Kosovo Judicial Institute
Instituti Gjyqësor i Kosovës
Kosovski Institut za Pravosudje

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KJI NEWSLETTER
January 2004

This newsletter is published to fully inform the magistrates of Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo. KJI will invite this year magistrates to contribute to this Newsletter and to publish their own articles or reports. The January Newsletter also includes the following special message.

Farewell to Nesrin Lushta

With beginning of the New Year she will have left us and will be serving as judge in the District Court in Mitrovica, as she did before. There is talk of Nesrin Lushta, National Co-Director of the Kosovo Judicial Institute (KJI). Her name is deeply linked with this establishment, for which she was responsible for nearly 3 years. She has left her own mark on the KJI. It is due to her dominant merit that our institute has reached a stabile and recognised position in the Judiciary of Kosovo. She has achieved to steer "the boat" through the storms of initial institution building, the short time of consolidation and the decisive steps of transition to a national ruled "Magistrate School".

Storm and ocean are standing for adversity and challenges with the huge bureaucracy, to courting the sponsors, to seek recognition for the foundation, to overcome despite of deficits in personnel and support, lacking understanding and fear for the future. Nesrin Lushta never abused her "captain's position" as an instrument of power towards others, especially her colleagues and all staff. She never intrigued, in contrary played with her cards on the table. She convinced by arguments and based her decisions on consultation of her personnel. She remained modest and decent. She led gently but fairly. She is characterized by high competence as a judge and experience of life, working hard with a sense of duty in an exemplary manner. Her intelligence, her general knowledge including linguistic abilities, her empathy and open-mindedness and tolerance made her to an ideal mediator of cultures, which meet in the institute. It will be impossible to replace her.

Thanks and good wishes for her future may be expressed by all she worked with and for. We will stay in contact.

Dr. Horst Proetel, International Judicial Trainer, KJI, on behalf of all KJI staff.

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The amendments of the provisions on justifications in the new criminal code

Like the Yugoslavian Criminal Code of 1976, which so far has been an applicable law in Kosovo, the new Criminal Code of Kosovo (PCCK) foresees two justifications as defenses to crime. They are the classical justifications: Necessary Defense under Article 8 CC and Necessity (called "Extreme Necessity") under Article 9 CC. In general, these provisions are special permissive rules by which certain harmful acts, otherwise unlawful, are not only declared non-criminal, but – unlike insignificant acts under Article 7 CC – are also deemed legal for their social usefulness (repelling an unlawful attack, or removing an imminent danger which can't be avoided in a harmless way).

There are some amendments of both Art. 8 and Art. 9 CC. The amendments are theoretically interesting, have practical importance and therefore are worth discussion.

I. THE PROVISIONS ON NECESSARY DEFENSE (ARTICLE 8 CC)

1. Pursuant to Art. 8, § 2 and 3 CC, "(2) An act is committed in necessary defense when a person commits the act to avert an unlawful, real and imminent attack from himself, herself or another person and the nature of the act is proportionate to the degree of danger posed by the attack. (3) An act which is disproportionate to the degree of danger posed by the attack exceeds the limits of necessary defense". If this text is compared to the text of the preceding Art. 9 (2) of the Yugoslavian Criminal Code[1], it can be seen that the new text covers not only the state of necessary defense (explaining when it is allowed to act at all, damaging the assailant) but also includes the limits of necessary defense (explaining in addition – and unlike the Yugoslavian Code - how it is allowed to act too). Therefore, Art. 8 (2) CC has a second defining part (missing in Art. 9 of the Yugoslavian Code) which expressly sets forth the limits of necessary defense. No doubt, this second defining part of Art. 8 (2) CC is a step forward.

But being placed after the beginning words (which describe the defined phenomenon - "An act is committed in necessary defense when"), the second defining part of Art. 8 (2) CC leaves the impression that it foresees a requirement for the defined necessary defense as a whole and not for its limits only. It seems that the act is committed in necessary defense, only if it has complied with the limits of necessary defense too. Otherwise, if the act has exceeded them, there is no necessary defense at all, and it shall never be taken into account that the act has served to repel an unlawful attack. Actually, on the contrary: there is

[1] "(2) Necessary defense is an act of defense which is absolutely necessary for the actor to avert an immediate and unlawful attack from himself or from another."

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necessary defense too (though illegal) even when the act has exceeded its limits, and it is taken into account that the act has repelled an unlawful attack. That is why, under Art. 8 (4) CC, "when the perpetrator exceeds the limits of necessary defense, the punishment may be reduced…".

To avoid the obvious mistake, considering that there is no necessary defense at all, if solely its limits are exceeded, Art. 8 (2) CC must have been confined to its first defining part, which reads: "An act is committed in necessary defense when a person commits the act to avert an unlawful, real and imminent attack from himself, herself or another person". Only after the completion of this text there shall be another one, a separate text on the limits of necessary defense. Generally, that is the approach of most other Criminal Codes. In them the whole legal text on necessary defense is structured traditionally in three consecutive provisions:

- a provision on the state of necessary defense only - such as the above proposed version of Art. 8 (2) CC,
- a provision on the limits of necessary defense, implying that if they are not exceeded, the act is completely justified and there shall be no criminal responsibility for it – such as Art. 8 (3) CC, and
- a provision, prescribing the possible sanctions (or exemption of them) when the limits of necessary defense have been exceeded – such as Art. 8 (4) CC.

2. To conclude with the state of necessary defense, it shall be pointed out that the new CC no longer determines necessary defense as an act "which is absolutely necessary for the actor to avert an immediate and unlawful attack". There has been no reception of the words "absolutely necessary", used in Art. 9 (2) of the Yugoslavian Criminal Code.

Here one can find an expected negation of **the first possible understanding (sense)** of the word "necessary", namely the understanding of the **subsidiarity** (or unavoidability) of necessary defense. Such a requirement for necessary defense is no longer valid. Thus, the impossibility to avoid the attack, running away from the assailant, is not a required for the defense any longer. It means that necessary defense is not "unavoidable defense" any more. The assailant might be harmed even when the defender or the third person attacked has the opportunity to run away and avoid the conflict with the assailant. In this regard, it has been a good legislative decision not to reproduce the words "absolutely necessary" in Art. 8 CC to define necessary defense[2]. Therefore, taking

[2] The only remaining problem is whether the same rule of *the true man doctrine* applies if the assailant is a minor or an insane person. On the Balkan Peninsula and Eastern Europe the answer generally is "YES", the same rule applies, and the defender has no legal duty to retreat but only a moral obligation to do so if the assailant is a minor or an insane person. In Germany, on the contrary, they say "NO", *the retreat doctrine* shall be taken into account in such cases: if the assailant is a minor or an insane person the defender has the legal duty to retreat. The defender has the duty to step aside if he can thus evade the attack without losing face and he never loses face retreating from a minor or an insane person. This serious problem though is traditionally solved (one way or the other) in judicial practice and not by legislators. That is why it shall not be considered a disadvantage of Article 8 CC its omission to expressly offer a solution to the problem.

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into account the development of theory and law on necessary defense, the first understanding of its necessity – as a subsidiary (or an unavoidable) defense, has been overcome.

3. Regretfully, the development of theory and law on necessary defense was not taken into account with regard to ***the second possible understanding (sense)*** of its necessity, which relates to its limits under Art. 8 (2) CC. It means that defense is justified and lawful whenever it is "required" to successfully avert the attack and thus defend the interest endangered. And vice versa, the defense shall not be justified and considered lawful when it has not been "required" to successfully avert the attack; when it was enough for that purpose to use less force, and therefore, the force used had been superfluous. Hence, the word "necessary" means **for the purpose of being successful**. In terms of its limits the act of necessary defense may be committed in a way, which ensures its success.

The limits of necessary defense have now been expressly regulated by the Art. 8 (2) CC, providing that "the nature of the act is proportionate to the degree of danger posed by the attack". But, as stated, the text quoted does not follow the development of the idea underlying the limits of necessary defense as a whole and the idea of its necessity in particular.

First of all, even if the development of these ideas is not known at all, it is quite clear that the quoted text makes an impossible comparison between the defensive act and the attack in order to determine when the former is proportionate to the letter. It is obvious that the comparison between any two things might be possible only if it is based on same criterion or criteria. (No one can compare two persons, saying that one of them is old while the other is tall.) So if one compares the defense to the attack in other to find whether the defense has been proportionate to the attack or not, s/he must use same criteria.

The danger of the defensive act (whose danger and degree of danger[3] in particular, is determined by the possibility to successfully harm the assailant's interest and stop him/her) must be compared to the danger of the attack repelled (whose danger and degree of danger in particular, is determined by the possibility to successfully harm the assailed interest). After that the nature of the defensive act (whose nature is determined by the

[3] One must distinguish between the degree of (social) danger with regard to the individualization of possible punishment for the attack and the degree of danger with regard to the repulsion of the attack by means of necessary defense. Actually (and in contrast to the terminology of CC), it is not the degree of danger of the attack which counts in case of necessary defense as a first criterion for its proportionality to the attack, but the possibility of the realization of this danger only (its intensity) regardless of the value of the endangered interest (object). While for individualization of punishment it is just the contrary: its main consideration is the true degree of danger whose first criterion is the value of the endangered interest. The value of the endangered interest is taken into account for necessary defense too, but separately and after the danger of the attack, as a second criterion for proportionality. Thus, the danger (of the attack and of the defense) serves only as a second base of comparison between the two opposing acts.

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value of the assailant's interest harmed by this act) is to be compared the nature of the attack (whose nature is determined by the value of the interest aimed at by the attack and saved by the defense). It is not logically possible to compare the defensive act, taking into account its nature only, and the attack repelled, taking into account its danger only, as it is foreseen in Art. 8 (2) CC.

4. It could have been much easier to find the right solution for the text of this Article, if the genuine historical development of the theory and law on necessary defense and on its limits in particular were taken into account. To understand the real problem with the limits of necessary defense, the development of the idea of its necessity shall be followed and explained.

a. The idea of necessity has governed the limits of necessary defense for a very long time in the past. Such a view that the defense might be necessary, otherwise it cannot be successful, was based on the medieval understanding of John Lock that necessary defense is a sort of defensive war where the danger of the defense shall be proportionate to the danger of the assault[4]. This means that the possibility of defender to succeed shall be proportionate to the possibility of attacker to succeed.

According to that theory the bigger the number of assailants, their force and the effectiveness of their weapons, the bigger in turn might be the number of defenders, their force and the effectiveness of their weapons. The values of the defended interest and of the harmed assailant's interest shall not be taken into account. Hence the likely harm of the defense may not be proportionate to its likely benefit. That is why, if the attack is on an insignificant item (e. g. a bottle of syrup) but the assailant is very much dogged to break it or take it away and the only way to successfully repel his attack is to kill him, then lethal defense against him is justified and lawful too.

This warlike understanding of necessary defense is based on the idea that the assailant is outlawing himself by his illegal act and thus takes the risk of any damage inflicted on him. Consequently, there is no need to measure and compare values of the defended interest and of the harmed assailant's interest. It is sufficient that necessary defense is successful.

There is an additional argument in support of that conclusion. Although necessary defense was for a very long time seen primarily as an individualistic right to hold one's own against assault, nowadays the social function of necessary defense is given similar and even more weight: besides protecting the individual interest of the attacked person, necessary defense is regarded as the actualization of the legal interest in promotion of general peace. That is why, in the name of social preservation of legal order, the concept of necessary defense allows it whenever its danger is proportionate to the danger of the assault. It is not required that necessary defense is reasonable too with regard to values of the defended interest and of the assailant's interest; that is to say, it

[4] See also **Fletcher, G.**: Rethinking Criminal Law, Boston – Toronto, 1968, p. 861.

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is nor required that the nature of necessary defense (determined by the value of the infringed assailant's interest) shall be proportionate to the nature of the assault (determined by the value of the defended interest). This understanding is reflected in the so-called German conception that "*Das Recht brauch dem Unrecht nicht yu weichen*"(Right need never yield to wrong)[5].

b. Situations where the dogged assailant might be killed for the successful defense of a trifle have generated the most difficult single problem in the German theory of Necessary defense. In 1920, the German Supreme Court ruled that success of the defense and protection of legal order would justify killing of an apple thief if that is the only way to stop him. This problem of reasonableness has haunted German theory ever since. Despite the consensus that killing apple thieves is inhumane, German legislators failed to write into Section 32 of their CC[6] any limitation of proportionality with regard to the values of the defended interest and of the harmed assailant's interest. They did not prescribe that the likely benefit of the defense shall not be disproportionate to the likely harm of the assault. The explanation was that under German CC necessary defense is determined as "required" (or necessary), which covers not only its successfulness but its reasonableness too. It was argued in particular that necessary defense is nor "required" if the likely harm of the defense is disproportionate to its likely benefit. That argument might be in some accordance with the Philosophy of Hegel on necessity (to be reasonable), but it has, obviously, nothing to do with criminal law and its very practical approaches.

Unlike Germany, other countries have found that the comparison between opposing forces does not include and imply comparison between values of opposing interests.That is why their legislation has explicitly foreseen the latter comparison, prescribing that defense shall be proportionate to assault in nature too. Anyhow, today it is everywhere out of the question that the interest of the assailant which is damaged by the necessary defense, shall not be strikingly out of proportion, strikingly more valuable in comparison to the attacked and defended interest. Therefore, the necessity of the necessary defense is not absolute; it is allowed only within the bounds of Reasonableness. The defense may be necessary so far as not to strikingly get out of proportion to the unlawful attack with respect of the values of the two aforementioned interests.

So there are two specific limits to necessary defense. According to them the danger of necessary defense shall not obviously exceed the danger of the attack, and also the likely harm of the defense (inflicted on the interest

[5] See also **Eser, A.**: Justification and Excuse, in The American Journal of Comparative Law, Vol. 24, 1976, p. 631 – 632.

[6] "(1) Whoever commits an act, required as Necessary defense, does not act unlawfully.
(2) Necessary defense is the defense which is required to avert an imminent unlawful assault from oneself to another".

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damaged by it) shall not obviously exceed its likely benefit (the value of the interest saved). Those conclusions, based on the development of the theory and law on necessary defense, are not likely to be made out of the discussed Art. 8 (2) CC, under which "the nature of the act is proportionate to the degree of danger posed by the attack".

5. A whole new paragraph can be found in Art. 8 CC, if this Article is compared to the preceding Article 9 of the Yugoslavian Criminal Code. That is paragraph 3 of the said Article. It defines that necessary defense, which is illegal (unlawful) because it exceeds its limits. The paragraph in question reads: "An act which is disproportionate to the degree of danger posed by an attack exceeds the limits of necessary defense".

a. First of all, it is not clarified that the defined "act" has actually been committed in a state of necessary defense. This is not expressly written, nor the act is described as a one, which has already been dealt with in a previous provision (on necessary defense), with such words as: "If the act is disproportionate to the degree of danger posed by an attack exceeds the limits of necessary defense". Anyhow, that is a problem, which might be solved through interpretation.

b. The actual problem with the text of Art. 9 (3) CC is that according to it any defensive act, which is to any, even the smallest degree disproportionate to the attack, shall be considered exceeding the limits of necessary defense. No reception has been made from the Criminal Codes of Albania[7], Bulgaria[8], Denmark[9] or others, under which the act committed in a state of necessary defense exceeds its limits only when this act is obviously disproportionate to the attack. Probably, that is the only way to clearly distinguish the limits of necessary defense and the limits of necessity, which, though stricter, also bear in some way the idea of proportionality. Otherwise, common mistakes are likely to be made, such as to find that the act exceeds the limits of necessary defense, if the actor has not used the same ax as the assailant.

On the other hand, the standard of non-obvious disproportionality is not too loose or/and unclear as it might seem. This standard has been widely accepted bearing the following meanings:

- For the first necessary comparison, which is of the two opposing dangers (and of their degrees in particular), there is a general criterion. It is the non-superfluity of necessary defense: the latter shall not be superfluous. In that case danger of the defense does not obviously exceed the danger of the attack, and vice versa.
- While for the second necessary comparison, which is of the two opposing values, there is no general criterion so far: different solutions to the

[7] According to Art. 19 (2) of the Albanian Criminal Code "Obvious disproportion between them constitutes excessiveness over the limits of Necessary defense".

[8] According to Art. 12 (2) of the Bulgarian Criminal Code "The limits of Necessary defense shall be considered exceeded where the defense obviously does not correspond to the nature and danger of the attack".

[9] See Art. 13 (1) of the Danish Criminal Code.

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problem are to be found for different specific situations. Thus, in the USA a battered woman may kill the assailant resisting against her kidnapping[10]; in Russia a woman also may kill the assailant who tries to rape her[11]. The only possible generalization derives from the presumption of innocence of the actor. Until the contrary is proved, the value of the damaged interest is not obviously greater that the value of the defended interest and the necessary defense shall be considered legal and justified.

6. Setting forth the limits of necessary defense, the amendment of Art. 8 (2) CC has not solved the whole problem of how the defense shall be committed. The amendment offers only a partial solution to this important problem. It does not determine neither the objective direction of necessary defense, nor regulate the extremely contentious issue of the subjective (mental) state of mind of the actor[12], although these two questions come logically before the question of the limits. Usually, the former of the two questions is answered by legislators, while only the latter is left to judicial practice to decide.

Therefore, it might have been expected that Article 8 CC clarifies, at least, whether necessary defense shall be concentrated on the assailant only (excluding any belonging to a third person weapon of the attack, the damage of which might be justified as an act of necessity only) or necessary defense may be directed at the attack as a whole (including the belonging to a third person weapon of the attack too). Unlike the case with the act of necessity, for which it is sufficient that that its purpose and limits (costs) are determined, the act of necessary defense also has a specific direction, which shall be clearly defined too.

Dr Anton Girginov,
International Judicial Trainer, KJI

(The second part of this article will be published in the next Newsletter)

[10] See **Fletcher, G.**: How would the Bush administration's claim of self-defense, used as justification for war against Iraq, fare under domestic rules of self-defense? (Sep. 10, 2002), Legal Commentary,p.2{http://writ.news.findlaw.com/commentary/20020910_fletcher.html}.

[11] See **Косак, В.**: Право граждан на необходимую оборону, Саратов, 1972, с. 93.

[12] The problem is whether his/her act shall be justified in case of a mistake which is opposite to putative necessary defense: if the actor does not know that actually, s/he acts in necessary defense, harming out of bad motives only a person who happens to carry out an unlawful attack at the same time. Since the 30-ties of the last century the prevailing view is that such a "blind" act constitutes necessary defense too. The principal argumentation is the following: in contrast to the fulfillment of an obligation for which the debtor is to have "animus solvendi" (knowledge and will to fulfill it), for the exercise of any right no "animus" (knowledge and will to use it) is necessary. And since necessary defense is a right, no knowledge and will for it is needed. Contrary to putative necessary defense, the "blind" but actual necessary defense, though committed without a "justificatory intent, virtually benefits society in the same way as normal necessary defense and like it has to be justified for the same considerations, accepting that bad motive has no pertinence because in such cases, which lack social danger (or harm) the actor's state of mind is not discussed at all. See also **Fletcher, G.**: Rethinking Criminal Law, Boston – Toronto, 1968, p. 768, and **Robinson, P.**: A theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, UCLA Law Review, Vol. 23, 1975, p. 286 – 287.

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Project activities January 2004

- Training on Civil Law : Mortgages and Pledges
- Induction course for newly appointed judges and prosecutors
- Training on the new Provisional Criminal Procedure Code of Kosovo

Seminar on Civil Law (Mortgages and pledges)

This seminar was already hosted on 9 September 2003 and given the interest of the civil law magistrates for this issue, will be repeated on 14 January 2004. The topics will cover the role of mortgages and pledges, general aspects of development and realization, procedure for securing the appointed request, previous and temporary measures, registration of real estate, registration and evaluation of goods, cases of establishment of mortgages and pledges in the executive procedure. A KJI trainer and three local judges will give the lectures. The practical questions on execution of verdicts concerning mortgage liability will be discussed. The issue of missing administrative regulations by the municipalities and not functioning of the registry of pledges and mortgages will also be dealt with.

Induction course for newly appointed judges and prosecutors of Kosovo

The KJI will hold an induction course for newly appointed judges and prosecutors in Kosovo during the week of 19-23 January 2004. Nineteen judges and seven prosecutors (who were sworn in on 4 December 2004) will be trained that week on the applicable law in Kosovo, including domestic law, UNMIK regulations (including the new codes of criminal law and procedure criminal law), International conventions, UNSC Resolution 1244 and the Provisional Constitutional Framework. Both international and local experts will present these topics. At the conclusion of the week, a celebratory ceremony will be offered for the new magistrates.

Training on the new Provisional Criminal Procedure Code of Kosovo

This training event was held on 16th December for criminal law judges and prosecutors and will be repeating on 27 January 2004. Presentations will be delivered on the pre-trial judge's functions and competencies, the relationship between the pre-trial judge and prosecutor, the role of the prosecutor during the investigation, the procedure of cross-examination of defendant, summoning minutes on cross-examination of the defendant and the prosecutor's decision on conducting the investigation. Two Supreme Court Judges, a prosecutor from the Kosovo Prosecutors Office and the Chief Prosecutor of Municipal Prosecutors Office in Pristinë/Priština will contribute to this seminar. The objective of this seminar is to provide the Judiciary with an overview of their new respective roles according to the provisions of the Provisional Criminal

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Procedure Code.

OTHER – FUTURE EVENTS

The KJI 2003 annual report and 2004 yearly programme are being distributed. The new training agenda for the first quarter of 2004 has been finalized. The seminars organized during this period will focus on the Provisional Criminal Code and Criminal Procedure codes of Kosovo, providing to the magistrates with an extensive theoretical and practical approach on the new laws. Experts from the Council of Europe and US Department of Justice will coordinate with KJI for supplementary training on new issues, such as probation, plea bargaining, cooperative witnesses, case management and police-prosecutor relationship during the new criminal proceedings, measures to ensure presence of the defendant.