Kosovo Judicial Institute
Instituti Gjyqësor i Kosovës
Kosovski Institut za Pravosudje

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KJI NEWSLETTER
December 2003

This newsletter is published to more fully inform the magistrates of Kosovo of the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter now features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

OPENING OF THE CRIMINAL CASE /INSTITUTION OF CRIMINAL PROCEEDINGS/

1. Unlike other countries (e.g. Germany) where the initiation of criminal proceedings and the preliminary investigation, in particular, is considered to have taken place when the first investigative action is undertaken, this initiation in Kosovo needs a formal act namely, ruling of the public prosecutor (Art. 221. 1 CPC) to open an investigation and thus, make the collection of valid evidence possible.

In contrast to former Yugoslavia where the public prosecutor requested only, but the investigating judge or court finally decided on the initiation of preliminary investigation, now it is the public prosecutor who takes this decision. The public prosecutor issues a ruling to institute criminal proceedings and preliminary investigation, in particular, once s/he is in possession of information substantiating "a reasonable suspicion that" a "person has committed a criminal offence which is prosecuted ex officio" (Art. 220. 1 CPC). Therefore, this information has to be sufficient for a reasonable suspicion not only about the probable offence but also about the probable offender. Thus, currently, it not allowed to formally have pending preliminary proceedings against an unknown offender and if there are such proceedings, the evidence gathered in them shall be considered invalid. But if the prosecutor's ruling specifies both the offence and the offender, then (regardless of whether the information for/against them has been sufficient or not) the evidence gathered in that framework shall always be considered valid. The evidence collected in the preliminary investigation shall be considered invalid, only if it goes beyond that formal framework. To avoid this, the public prosecutor must issue an additional ruling for expansion of the proceedings with respect to the new probable offence or/and the new probable offender (see Art. 222 CPC).

2. There might be two types of information sources for the public prosecutor to render his/her ruling: (i) local – a criminal report, or (ii) international – a request (direct of after rejected extradition) from another country to institute criminal proceedings against a resident of Kosovo for an offence committed in its territory or against its national. The practical

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difference between the two types of sources is that the former usually does not necessitate, while the latter makes it necessary for the public prosecutor to additionally establish the applicability of the Criminal Code of Kosovo to the alleged offence. Thus, the Criminal Code is likely to have no application to the offence if the offender only lives in Kosovo but is not its resident ("national") or has become such a resident but in the meantime.

Most often, the information source is a police criminal report of criminal offence. Often such reports (and all other reports as well) do not contain information which is sufficient to substantiate a reasonable suspicion that there are both a probable offence and a probable offender. In such a case, pursuant to Article 209 (1) CPC "the public prosecutor, if he or she is unable to do so on his own, shall request that the judicial police gather the necessary information". The idea is, on the one hand, not to overload the public prosecutors and judicial police with unsubstantiated official investigations, but on the other hand, not to require a full clarification of the case through such verifying actions which are only to be repeated as investigative actions afterwards. It is very important that the right balance is found.

Also it must be explained that the quoted legal text of Article 209 (1) CPC does not reflect the true technology of the discussed preliminary verifications. Usually, neither the role of the police in them is subsidiary, nor it is only the judicial police, which makes them (when "the public prosecutor … is unable to do so on his own"). No doubt, the public prosecutor is the central figure in the pre-trial phase now but this does not necessarily mean that s/he must do the bulk of the work. On the contrary, being the central procedural figure (as a magistrate), the public prosecutor has to concentrate on judicial assessments only and to avoid doing in person as much other work as it is possible. That is why not him/her but the police are generally in charge of the gathering of the necessary additional information. The public prosecutor has to gather such information on his/her own in exceptional cases only (e. g. of perjury), when the job is obviously not for police.

Besides, the first signal of a committed criminal offence usually does not come from the judicial police but from an ordinary policeman/woman (of the community police of the road police, etc.). S/he is there in touch with the scene of the criminal offence and with the persons that have seen and or heard of it. And this is the best policeman/woman, who can gather both initial and additional information about the offence and the offender, inter alia, by taking care to keep the traces and items that may be later collected and serve as material evidence. Otherwise, if s/he is not prepared and encouraged in doing this but on the contrary, is eliminated by entrusting later somebody else to gather the necessary information (regardless of whether it is a public prosecutor or a judicial police officer), then the information obtained will be both of smaller quantity and of lower quality with regard to its reliability. Therefore, it is always wise to utilize more and to eliminate less the policemen/women who have been first in touch with the probable offence and

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eventually the probable offender. Hence, in particular, when additional information is needed, the best person to gather is the policemen/woman in question. The judicial police which has to further investigate if criminal proceedings are instituted, may also be involved at that earliest stage but (following the positive foreign practice) the best way to do this is to assign them with giving a written opinion of whether to open an official case or to do something else. The final conclusion is not to follow the provision of Article 209 (1) CPC in the part, which stipulates that (i) the necessary additional information shall be collected first of all by the public prosecutor and (ii) if s/he is unable to do so on his/her own, the information shall be collected by the judicial police. Furthermore, both of the two rules are of instructive nature and the recommendable non-compliance with any of them cannot produce any negative procedural effect. It can't entail invalidity of collected evidence.

3. It must be remembered that the public prosecutor's ruling to institute preliminary investigation is always a formal act, which is not only necessary but also completely sufficient to open the way for collection of any valid evidence. Therefore, it is procedurally recommendable, in general (to avoid the overloading of judiciary), but not procedurally obligatory that this act of the public prosecutor is supported by sufficient information about the probable offence and the probable offender. On the contrary, even if this information is not sufficient for reasonable suspicion but for their identification only, the ruling in question shall be rendered and preliminary investigation shall be instituted, when something possible in pending proceedings only has to be urgently undertaken: either in the territory of Kosovo (certain investigative actions) or abroad (to send a rogatory letter or to circulate a petition for international search and provisional arrest of the defendant for the purpose of his/her future extradition). That is why the issue of urgency shall always be subject to a separate and careful consideration regardless of whether the information about the probable offence and the probable offender is sufficient or not.

4. When the public prosecutor, having already sufficient information of what has happened, decides whether to open an official criminal case, s/he must consider, first of all, whether the committed act or omission is actually a criminal offence and not of an insignificant nature whose investigation shall be diverted. Unlike West-European countries, this possible diversion is done not under the principle of opportunity but still under the principle of legality. Article 7 of the Criminal Code makes it not a matter of grace (good will) only but a matter of law (obligation) to drop such a case.

At the same time it shall be born in mind that even in Kosovo the opening of an official criminal case is not always a matter governed by the legality principle only. There is always some flexibility needed, especially when the probable offender is foreign national in Kosovo. If his/her offence is a petty one and there is no injured party in Kosovo (e. g. such related to a document), then under the theory of lesser evil it is advisable, but not mandatory though, to

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expel this offender out of Kosovo and to send a request to the country of his/her nationality to institute criminal proceedings against him/her. Such a decision, which excludes the opening of an official criminal case, is fully governed by the opportunity principle.

If there is no reason to send the materials abroad, the public prosecutor has the further assignment to look for grounds, which exclude initially or terminate later the criminal responsibility. If s/he finds any such grounds, there is no sense to open a case. Special consideration shall be given to possible immunity. If the offender has immunity, its nature must be clarified. When his/her immunity is substantive, then it cannot be waived (lifted). Thus, all the members of the Assembly are immune from all criminal proceedings with regard to words spoken or other acts performed in their capacity as members of the Assembly and they are never criminally responsible for such acts. That is why opening of criminal cases against these persons for any of the acts in question is not allowed. But if the immunity of the offender is procedural only and may be waived (e. g. that of foreign diplomatic agents, UN servants, enjoining full procedural immunity, or of co-operative witnesses, and extraditees, enjoining partial procedural immunity), steps in this regard shall be considered. And if this immunity is successfully waived, the criminal case shall be opened.

5. The ruling of the public prosecutor to open the case shall have the requisites set forth in the second sentence of Article 221 (1) CPC. Under the next sentence “A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge”. Obviously, this provision, reproducing the ex-Yugoslavian mindset, is not consistent with the idea that the public prosecutor is dominus litis (master) in the pre-trial phase. Anyhow, the provision is entirely instructive. On the one hand, its violation shall entail no negative procedural consequences: the pre-trial judge, having received the whole file of the investigation so far, can’t refuse to render a decision on an issue of his/her competence for the only reason that a copy of the public prosecutor’s ruling had not been forwarded to him/her on time. On the other hand, such possible delays and even non-compliance with the discussed provision shall mean that the file, which counts in this phase, is that with the prosecution office and not that with the court.

Actually, it is much more important if the defendant is a foreigner, that the public prosecutor checks whether there is a Consular Convention in force (left from former Yugoslavia) applicable for the relations between Kosovo and the foreigner’s country. If this is the case and the Convention provides for the obligation to inform the Consul of the defendant about the opening of the criminal case, then the public prosecutor shall be sent without delay a copy of his/her ruling or information of its contents to the official representation of the foreigner’s country to Kosovo.

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Project Activities December 2003

- Training on Punishments and Alternative sentencing according to the Provisional Criminal Code of Kosovo
- Training on Code of Ethics and professional behavior for judges and public prosecutors
- Training on Civil Law: Property Issues
- Training on the new Provisional Criminal Procedure Code of Kosovo

Training on Punishments and Alternative Sentencing

2 December, 2003

The KJI is planing a training session on 2 December on punishments and alternative sentencing according to the provisions of the provisional criminal code that will come into force on 6 April 2004. The program will address the content of articles 36 to 41 of PCPC, as well as the work and competencies of the Probation service. The agenda will include the practical approach to the alternative punishments through brief presentations and case studies. Criminal law judges and public prosecutors from all over Kosovo are invited, since they have new mandate in accordance with the new Code.

Training on Code of Ethics and Professional Behavior

9 and 10 December, 2003

This will be a two-day training seminar offered first on 9 December and repeated on 10 December with another group of participants. This training is the fourth one in the regularly offered course. The aim is to train all the judges and prosecutors on the Code of Ethics and Professional Behavior, the mandate and the work of the Kosovo Judicial and Prosecutorial Council as well as the Judicial Inspection Unit.

Seminar on Civil Law: Property issues

12 December, 2003

For this training event, judges working in civil matters are invited. The topics will be focused on the respective competencies of Regular Courts, Housing and Property Directorate and Housing and Property Claims Commission.

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Seminar on the new Criminal Procedure Code

16 December, 2003

This training is planned for the judges working in criminal cases and for prosecutors. Presentations will be held on: the pre trial judge and its functions and competencies, relationship between the pre-trial judge and prosecutor, the role of the prosecutor on the investigative procedure, procedure on cross-examination of defendant, summoning minutes on cross-examination of the defendant and the prosecutor's decision on conducting the investigations. This seminar aims at providing a clearer understanding and an easier practical approach of the provisional Criminal Procedure Code.

OTHER – FUTURE EVENTS

KJI training calendar for 2004

KJI concluded their consultation visits to all courts and prosecutors offices throughout Kosovo, and therefore received their suggestions on topics in criminal and civil law matters they would like to see developed during the coming year. Another meeting with contact persons from the regions, representative from OSCE sections and other institutions allowed KJI to take other inputs into consideration. KJI is now preparing the yearly program for 2004. The new training agenda will be finalized by the end of December.