

Programme on Strengthening the Rule of Law in Some Arab States

“Project on Modernization of Public Prosecution Offices”

“Legal Organization of Public Prosecution”

Session I

The legal foundation of the concept and role of public prosecution in criminal procedures

Speech by His Excellency, Judge Wolfgang Schomburg, Judge at the Appeals Chamber of the International Tribunal for the former Yugoslavia and Rwanda

Preliminary Remarks:

A) On tolerance:

The role of criminal proceedings against a country’s cultural background.

Criminal proceedings are the fundamental safeguards for the implementation of substantial law. Substantial criminal law has always to be seen as ultima ratio, the last resort. It shall only cover such conducts a concrete society cannot tolerate or address by less intrusive measures based on and seen against each society’s cultural backdrop. Thus, also criminal proceedings have to be individualized from State to State against this cultural background. The limitation however, are to be found in our common values as enshrined in particular in the ICCPR and regional¹ unalienable principles.

B) On the goal of all criminal proceedings:

.. For a practitioner it is to live up to the famous triangle of (internal and external) **peace, justice and truth**. It is for the judiciary to bring peace to people and you cannot have justice without truth. Therefore this fundamental sentence, “There is no peace without justice and, there is no justice without truth” is not only often quoted by our former Secretary General Kofi Annan, it is quoted by representatives of nearly all religions and you find it in a number of fundamental books on religion:

- **Prophet Mohammed, Hadith:** “If you see a wrong you must right it; with your hand if you can, or, with your words, or, with your stare, or in your heart, and that is the weakest of faith.”
- **Pope Paul VI:** “If you want peace, work for justice.”
- **Rabban Simeon Ben Gamaliel:** “The world rests on three pillars: on truth, on justice, and on peace.”
- **A Talmudic commentary adds to this:** “The three are really one. If justice is realized, truth is vindicated and peace results.”

C) The **two topics** before us:

1) The role of public prosecution in criminal procedures in German criminal justice system (excerpts of the German Code of Criminal Procedure (*Strafprozessordnung- StPO*) attached, fundamental principles highlighted in bold).

¹ As for Germany, see similar supra Art.5,6 of the ECHR.

The principles in short:

The Prosecutor **must** start investigations when there is an initial suspicion (See Section 152 (2), 170 (1) StPO)

During Investigation Prosecution (and assisting forces like police, tax authorities) plays the **leading role** in proceedings. Only in relation to particularly intrusive measures Prosecution needs authorization or if time is of essence endorsement of an “investigating judge” (See Section 162 StPO).

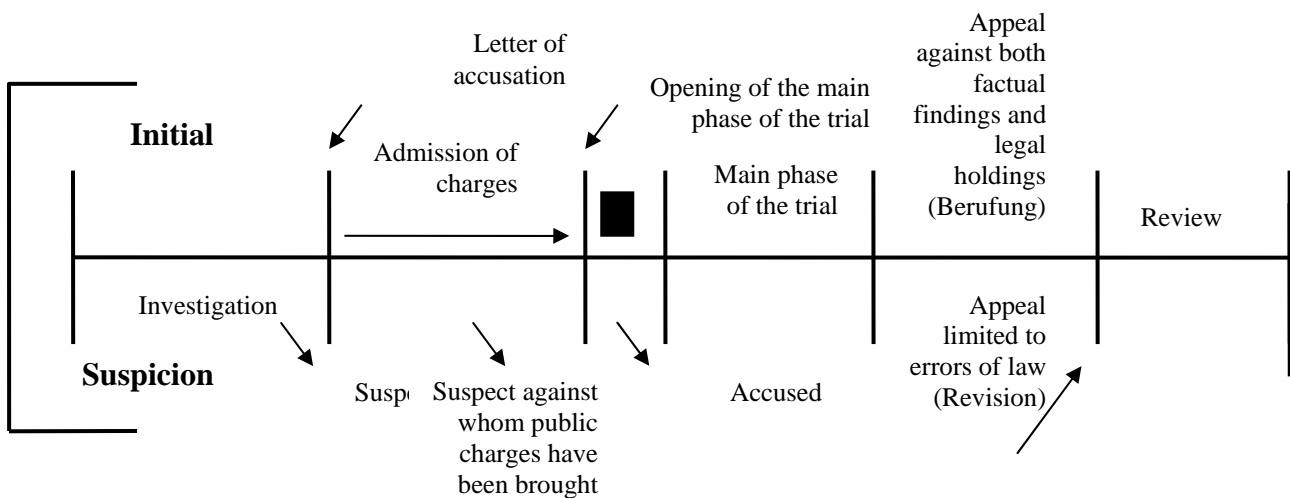
Investigations end with the submission of a detailed **letter of accusation** (See Section 170 and 200 StPO) (Anklageschrift), in minor cases an **order for summary punishment** or the **formal discontinuation of investigations** (See Section 153 (1) StPO).

In first and second alternatives the case and its file (!) will be **handed over to the Judge/Chamber**. From this point in time onwards **the Judges** are solely controlling and leading proceedings leading the proceedings throughout trial/appeal/review.

Prosecution takes over again (in principle) when it comes to the **enforcement of sentences** (control over correctional institutions, provisional release, early release) (See Section 451 StPO)

Overview:

German Criminal Procedure Code



2) The source of public prosecution's powers in the German criminal justice systems.

History of German criminal proceedings.

- The exercise of power solely by the State (Machtmonopol) instead of a victim acting as one's own judge
- The lessons learnt from the Nazi Regime and now enshrined in **Germany's Constitution (Grundgesetz):**

Article 101 [Ban on extraordinary courts]

- (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.
- (2) Courts for particular fields of law may be established only by a law.

Article 102 [Abolition of capital punishment]

Capital punishment is abolished.

Article 103 [Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment]

- (1) In the courts every person shall be entitled to a hearing in accordance with law.
- (2) An act may be punished only if it was defined by a law as a criminal offense before the act was committed.
- (3) No person may be punished for the same act more than once under the general criminal laws.

Article 104 [Legal guarantees in the event of detention]

- (1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.
- (2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.
- (3) Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefore or order his release.
- (4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom.

Article 16 [Citizenship; extradition]

- (1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result.
- (2) No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed.

- Influenced by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950, directly both influencing jurisprudence and legislation:

Article 5 [Right to liberty and security]

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 [Right to a fair trial]

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- (3) Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 [No punishment without law]

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.

Article 3 [Prohibition of torture]

No one shall be subjected to torture or to inhuman or degrading treatment or punishment

- Framework decisions of the European Union (e.g. European Arrest Warrant)
- Parliamentary Control
- General control by Minister of Justice based on hierarchy vis a vis prosecution
- Control by victims: Proceeding to compel the Prosecutor to prefer Public Charges (See: Section 172 att.)
- Control by independent judges: scope of charges, legal requalification.
- Review of a case

For detailed applicable norms in this context: see attachment: Excerpts from Germany's Code of Criminal Procedure.

ATTACHMENT

German Code of Criminal Procedure of 15 May 1871
as amended by law of 16 July, 20
(Courtesy translation provided by the German Federal Ministry of Justice)
Emphasis added in bold by the author.

Section 151. [Principle of Indictment]

The opening of a judicial investigation **shall** be conditional upon preferment of charges.

Section 152. [Indicting Authority; Principle of Mandatory Prosecution]

- (1) The public prosecution office **shall** have the authority to prefer public charges.
- (2) Except as otherwise provided by law, the public prosecution office **shall be obliged** to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications.

Section 153. [Non-Prosecution of Petty Offenses]

- (1) If a **less serious criminal offense** is the subject of the proceedings, the public prosecution office **may dispense** with prosecution **with the approval of the court** competent for the opening of the main proceedings if the perpetrator's culpability is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall be not required in the case of a less serious criminal offense which is not subject to an increased minimum penalty and where the consequences ensuing from the offense are minimal.

Section 154. [Insignificant Secondary Penalties]

- (1) The public prosecution office **may dispense** with prosecuting an offense:
 1. if the penalty or the measure of reform and prevention in which the prosecution might result is not particularly significant in addition to a penalty or measure of reform and prevention which was imposed with binding effect upon the accused for another offense, or which he has to expect for another offense, or
 2. beyond that, if a judgment is not to be expected for such offense within reasonable time, and if a penalty or measure of reform and prevention which was imposed with binding effect upon the accused, or which he has to expect for another

offense, appears sufficient to have an influence on the perpetrator and to defend the legal order.

Section 154a. [Limitation of Prosecution]

(1) If individual separable parts of an offense or some of several violations of law committed as a result of the same offense are not particularly significant

1. for the penalty or measure of reform and prevention to be expected, or
2. in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offense or which he has to expect for another offense,

prosecution may be limited to the other parts of the offense or the other violations of law.

Section 154 subsection 1, number 2, shall apply mutatis mutandis. The limitation shall be included in the records.

Section 134. [Bringing the Accused Before the Court]

(1) It may be ordered that the accused be brought before the court **immediately** if reasons exist which would justify the issuance of a warrant of arrest.

(2) The accused and the criminal offense with which he is charged shall be **exactly specified** in this order; the reason for his being brought before the court shall be indicated.

Section 135. [Immediate Examination]

An accused shall be brought before the judge without delay and be examined by him. He shall not be kept in custody by virtue of the order for longer than until the end of the day following the time when he was first brought before the court.

Section 120. [Revocation of the Warrant of Arrest]

(1) The warrant of arrest **shall** be revoked as soon as the conditions for remand detention no longer exist, or if the continued remand detention would be disproportionate to the importance of the case or to the anticipated penalty or measure of reform and prevention. In particular, it is to be

revoked if the accused is acquitted or if the opening of the main proceedings is refused, or if the proceedings are terminated other than provisionally.

(2) The release of the accused shall not be delayed by the fact that an appellate remedy is being sought.

(3) The warrant of arrest **shall** also be revoked if the public prosecution office makes the relevant application before the public charges have been preferred. Simultaneously with this application, the public prosecution office may order the release of the accused.

Section 155. [Scope of the Investigation]

(1) The investigation and decision shall extend only to the offense specified, and to the persons accused, in the charges.

Section 157. [Definition of the Terms “Indicted Accused” and “Defendant”]

Within the meaning of this statute,

the **indicted accused** shall be an accused person against whom public charges have been preferred,

the **defendant** shall be an accused person or indicted accused in respect of whom there has been a decision to open the main proceedings.

Section 158. [Criminal Informations; Applications for Prosecution]

(1) Information of a criminal offense or an application for criminal prosecution may be filed orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the Local Courts. An oral information shall be recorded in writing.

(2) In the case of criminal offenses which may be prosecuted only upon application, the application shall be made in writing or orally for the records to a court or to the public prosecution office; where the application is made to another authority, it shall be made in writing.

Section 160. [Investigation Proceedings]

(1) As soon as the public prosecution office obtains knowledge of a suspected criminal offense either through a criminal information or by other means it **shall** investigate the facts to decide whether public charges are to be preferred.

(2) The public prosecution office **shall ascertain not only incriminating but also exonerating circumstances**, and shall ensure that such evidence is taken the loss of which is to be feared.

(3) The investigations of the public prosecution office should extend also to the circumstances which are important for the determination of the legal consequences. For this purpose it may avail itself of the service of the court assistance agency.

Section 161. [Information and Investigations]

For the purpose indicated in the foregoing section the public prosecution office may request information from all public authorities and may make investigations of any kind, either itself or through the authorities and officials in the police force. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office.

Section 170. [Conclusion of the Investigation Proceedings]

(1) If the investigations offer **sufficient reason** for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment (Anklageschrift) to the competent court.

(2) In all other cases the public prosecution office **shall** terminate the proceedings. The accused shall be **notified** thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.

Section 171. [Notification of the Applicant]

If the public prosecution office does not grant an application for preferring public charges, or after conclusion of the investigation it orders the proceedings to be terminated, it shall notify the applicant, indicating the reasons. The decision shall inform the applicant, if he is at the same time the

aggrieved party, of the possibility of contesting the decision and of the time limit provided therefore (Section 172 subsection (1)).

Section 172. [Proceeding to Compel Public Charges]

(1) If the applicant is at the same time the aggrieved party, he shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification. On the filing of the complaint with the public prosecution office the time limit shall be deemed to have been observed. The time limit shall not run if no information has been given pursuant to Section 171, second sentence.

(2) The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the superior official of the public prosecution office. He shall be informed of this right and of the form provided for such application; the time limit shall not run if no information has been given. The application shall not be admissible when the subject of the proceedings is solely a criminal offense which may be prosecuted by the aggrieved party by way of a private prosecution, or if the public prosecution office dispensed with preferring public charges in accordance with Section 153 subsection (1), Section 153a subsection (1), first and sixth sentences, or Section 153b subsection (1); the same shall apply in cases under Sections 153 c to 154 subsection (1), as well as under Sections 154b and 154c.

(3) The application for a court decision shall indicate the facts which are intended to substantiate preferment of public charges as well as the evidence. The application must be signed by an attorney-at-law; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent for the decision.

(4) The Higher Regional Court shall be competent to decide on the application. Section 120 of the Courts Constitution Act shall apply mutatis mutandis.

Section 199. [Decision to Open the Main Proceedings]

(1) The court which is competent for the main hearing shall decide whether main proceedings are to be opened or whether proceedings are to be provisionally terminated.

(2) The bill of indictment shall contain the application to open the main proceedings. The file shall be submitted to the court with the bill of indictment.

Section 417. [Application by the Public Prosecution Office]

In proceedings before the criminal court judge and the court with lay judges the public prosecution office shall file an application, in writing or orally, for a decision to be taken in an **accelerated procedure** if, given the simple factual situation or the clarity of the evidence, the case is appropriate for an immediate hearing.

Section 200. [Contents of the Bill of Indictment]

(1) The bill of indictment shall indicate the indicted accused, the criminal offense with which he is charged, the time and place of its commission, its statutory elements and the penal provisions which are to be applied (the charges). In addition, the evidence, the court before which the main hearing is to be held, and defense counsel shall be indicated. In cases under Section 68 subsection (1), second sentence, and subsection (2), first sentence, it shall be sufficient, as regards the designation of witnesses, to indicate an address at which documents can be served. Where a witness is mentioned whose identity is not to be revealed either wholly or in part, this fact shall be indicated; the same shall apply *mutatis mutandis* to the confidentiality of the witness's place of residence or whereabouts.

(2) The relevant result of the investigation shall also be presented in the bill of indictment. This may be dispensed with if the charges are preferred before the criminal court judge.

Section 201. [Communication of the Bill of Indictment]

(1) The presiding judge shall communicate the bill of indictment to the indicted accused and at the same time shall summon him to state, within a time limit to be set, whether he wants to apply for individual evidence to be taken before the decision on opening main proceedings, or whether he wants to raise objections to the opening of main proceedings.

(2) The court shall decide on the applications and objections. The decision shall be incontestable.

Appeal

Section 296. [Persons Entitled to Appellate Remedy]

(1) Both the public prosecution office and the accused shall be entitled to file the remedies admissible against court decisions.

- (2) The public prosecution office may also make use of them for the accused's benefit.

Section 301. [Public Prosecution Offices' Power of Appellate Remedy]

Any appellate remedy filed by the public prosecution office shall have the effect that the contested decision may be amended or revoked, also for the accused's benefit.

Section 333. [Admissibility]

An appeal on law may be filed against judgments of the penal chambers and of the penal divisions with lay judges and against judgments of the Higher Regional Courts pronounced at first instance.

Review

Section 359. [Reopening for the Convicted Person's Benefit]

Reopening of the proceedings concluded by a final judgment shall be admissible for the convicted person's benefit:

1. if a document produced as genuine, to his detriment, at the main hearing was false or forged;
2. if a witness or expert, when giving testimony or an opinion to the convicted person's detriment, was guilty of willful or negligent violation of the duty imposed by the oath, or of willfully making a false, unsworn statement;
3. if a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case, unless the violation was caused by the convicted person himself;
4. if a civil court judgment on which the criminal judgment is based is quashed by another judgment which has entered into force;
5. if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal, or, upon application of a less severe penal norm, a lower penalty or an essentially different decision on a measure of reform and prevention;
6. if the European Court of Human Rights has found that there was a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and if the judgment was based on that violation.

Enforcement of sentences

Section 451. [Executing Authorities]

(1) The sentence shall be executed by the public prosecution office as the executing authority on the basis of a certified copy of the operative provisions of the judgment containing an endorsement of enforceability, to be issued by the registry clerk.

(2) The prosecutors at the Local Courts shall be authorized to execute the sentence only insofar as such authority has been conferred on them by the Land department of justice.

(3) The public prosecution office which is the executing authority shall exercise the duties incumbent on the public prosecution office also vis-à-vis the penal chamber responsible for execution of sentences at another Regional Court. It may assign its duties to the public prosecution office competent at that court if this appears to be imperative in the interest of the convicted person and if that public prosecution office gives its consent.

schomburg@un.org