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(VENICE COMMISSION)

REPORT

ON

THE RELATIONSHIP BETWEEN POLITICAL AND CRIMINAL MINISTERIAL RESPONSIBILITY

Adopted by the Venice Commission
at its 94th Plenary Session
(Venice, 8-9 March 2013)

on the basis of comments by

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I. Introduction

1. As part of its process for preparing a report on "Keeping political and criminal responsibility separate", the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (PACE) has asked the Venice Commission for an opinion on this topic from a comparative constitutional law perspective, by letter of its chairman dated 28 June 2012.

2. According to the request, the purpose of the report is "the elaboration of objective criteria for distinguishing cases in which elected officials should only be held politically responsible for their actions from those cases in which criminal responsibility would be in order".

3. The present report was prepared on the basis of comments by Mr Hamilton, Ms Palma, Mr Sejersted and Mr Tuori.

4. Although the request is confined to the task of elaborating criteria for distinguishing between political and criminal responsibility for elected officials, this concerns the wider issue of *the relationship between political and legal responsibility*, which is a complex one, both in general constitutional theory and under national law. This is the perspective from which the Venice Commission will approach the request.

5. There are three main categories of elected officials that may in principle be held politically (as well as legally) responsible: (i) heads of state, (ii) government ministers (including prime ministers and all members of government), and (iii) members of parliament (MPs). The rules and procedures on responsibility, both legal and political, are in most constitutional systems different for each of these three categories. Both heads of state and MPs often (though for different reasons) enjoy a higher degree of immunity from legal responsibility than what government ministers usually do. Most cases in which there has been controversy over the relationship between legal and political responsibility have concerned ministers, and the Venice Commission understand this to be also at the core of the PACE request. The present report will therefore confine itself to the issue of *ministerial* legal and political responsibility.

6. The relationship between legal and political ministerial responsibility is a fundamental question in constitutional law, which is complex and often sensitive. There is great diversity in how this is regulated under national constitutional law in the member states of the Council of Europe. There is no single best model, and so far no common European standards in terms of hard law, except for those that can be derived from the European Convention on Human Rights (ECHR). In order to get a comprehensive comparative understanding it would furthermore be necessary to compare not only the legal rules and procedures on ministerial responsibility in the Council of Europe member states, but also the way in which they are interpreted and applied in practice. This is a task that it has not been possible for the Venice Commission to fully undertake within the available timeframe and resources.

7. In addition to the contributions of the rapporteurs the report has taken into consideration the replies by national correspondents to the Rapporteur's ECPRD[1] request, which are summarised in document CDL-REF(2012)041, as well as a comparative table of constitutional (legislative) provisions on responsibility of the executive and legislative branches of government (CDL-REF(2012)040) that has been compiled by the secretariat of the Venice Commission. Though these documents give an overview of important features there is still relevant information that is not covered, and they should not be seen as comprehensive.

[1] European Centre for Parliamentary Research and Documentation.

8. The report will first seek to define the key concepts of "political", "legal" and "criminal" ministerial responsibility, and the basic relationship between them (II). It will then present an overview of the rules on such responsibility to be found in European constitutional systems (III), based upon a distinction between (i) procedural rules, (ii) substantive rules, and (iii) actual application. This is followed by an assessment of basic challenges and concerns (IV), in particular related to the fact that rules and procedures for holding government ministers legally responsible are often to a greater or lesser extent "political", and also that some of the substantive criminal provisions applicable to ministers (such as "abuse of office" are of a very wide and vague character. In conclusion (V) the Venice Commission will present some normative reflections on the issue.

9. The present Report was adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

II. On "political", "legal" and "criminal" ministerial responsibility

10. Political and legal responsibility of members of government can be seen as two circles, of which the political one is by far the widest, covering in principle everything a government minister does. Legal responsibility is a much more limited concept, covering only cases in which a minister breaks the law, and where there are potential legal consequences, which may be criminal or other forms of legal sanctions. Ministerial criminal responsibility is thus a sub-category of legal responsibility, which involves other types of sanctions, such as civil ones.

11. The Venice Commission will use the term "political" ministerial responsibility in the wide sense, covering all ways in which a government minister may be "held responsible" for political actions, ranging from mere criticism in parliament or in the media, to failure at elections, to the results of more formalised procedures of parliamentary scrutiny and oversight, including question time, committee hearings, special committees of inquiry etcetera. In parliamentary systems the ultimate form of political responsibility for ministers is the vote of no-confidence, which obliges the minister (and sometimes the whole cabinet) to resign.

12. It is in practice in the nature of politics that political responsibility may cover everything a government minister does or does not do, whether there are "objective" grounds for criticism or not.[2] The opposition does not have to "prove" that the minister has done something wrong in order to hold him or her politically responsible. Political responsibility may be realised in informal ways, such as mere criticism, or through formalised parliamentary and other procedures, which are governed by legal rules, but which are nevertheless "political". A vote of no-confidence should, in this terminology, therefore be considered a "political" sanction, even if the procedure is legally regulated and the decision creates a formal obligation to resign.[3] Ministers may be held politically responsible not only by the opposition, but also by the media, by the general public, or indeed by their own prime minister.

13. In any political system governed by the principles of rule of law, government ministers are also bound by the law, and may be held legally responsible if they break it. Most countries have special rules on legal immunity for heads of state (kings and presidents) and for members of

[2] Sometimes a distinction is made between ministerial "accountability" and "responsibility", under which the latter is reserved for cases in which there is an element of personal blame. A minister may be held politically accountable for everything that happens in the ministry, even if he or she is not personally responsible. However the political repercussions will usually be harder if there is personal blame than if the minister is merely "accountable". In cases of parliamentary oversight the opposition therefore often seeks for a blame element, in order to legitimise political sanctions.

[3] However, if the minister does not respect the vote of no-confidence, and remains in government, then this will in many countries constitute a breach of constitutional law, which may in principle lead to legal responsibility, including impeachment and criminal sanctions.

parliament, but rules on immunity for government ministers are less common, and to the extent that there are such rules, they are often less far-reaching.

14. The Venice Commission will use the term "legal responsibility of members of government" to cover all instances in which a government minister may be held legally responsible for breaking the law while being a minister, whether the sanctions are applied while the minister is in office or afterwards. Such sanctions may be "criminal" (mainly fines or prison), but they may also take the form of disciplinary measures, obligation to pay compensation, dismissal from office, ineligibility to stand for future election and other non-penal reactions.

15. The term "*criminal* ministerial responsibility" will be used to cover those instances in which a minister may be subject to legal sanctions that are considered "criminal" (penal) by the European Court of Human Rights in its case law on Article 6 of the ECHR. This covers all forms of prison sentences, whether suspended or not, as well as most forms of fines and some other severe sanctions, including in some cases ineligibility or dismissal from office. When trying to determine, according to the request from the Parliamentary Assembly, when "criminal responsibility would be in order" (as opposed to just political responsibility) all the three criteria established by the ECtHR with regard to Article 6 are useful, in particular that of the "nature of the offence." The Court uses three alternative criteria to determine whether a sanction is criminal or not – "the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty".[4] This means that legal sanctions against ministers may be classified as "criminal" under the ECHR, and therefore subject to the requirements of Articles 6 and 7, even if they are not considered to be so under national constitutional and penal law. Classifying an offence as "disciplinary" in domestic law does not for example automatically exclude it from the scope of Article 6 ECHR.

16. When trying to determine, according to the request from the Parliamentary Assembly, when "criminal responsibility would be in order" (as opposed to just political responsibility) all the three criteria established by the ECtHR with regard to Article 6 are useful, in particular that of the "nature of the offence".

17. One example is that a fine which can be automatically converted into a prison sentence if not paid is considered as criminal by its nature and severity.[5] More generally, a fine has to be considered as a criminal sanction when it aims at punishing offenders and at deterring them from reoffending. According to the Court, "a punitive character is the customary distinguishing feature of a criminal penalty".[6] While "criminal" sanctions usually apply to everyone, a sanction might more easily be regarded as being only of a disciplinary nature if it addresses a particular group of individuals – *e.g.* lawyers appearing in court, contrary to every person who may appear before a judge.[7] The Court has also drawn a distinction between the (disciplinary) nature of sanctions decided by Parliament against members of the House and the criminal nature of those decided against other individuals.[8]

18. Political responsibility is a concept that is primarily used for government ministers that are still in office, and which may be held accountable for example by parliament. After they have left office, the possibility of holding former ministers politically responsible is usually far less,

[4] See for example Alenka Pečnik v. Slovenia, 27 September 2012, § 30; cf. ECtHR Engel and Others v. the Netherlands, 8 June 1976, § 82; Weber v. Switzerland, 22 May 1990, §§ 31-34; Ravnsborg v. Sweden, 23 March 1994, § 30; Putz v. Austria, 22 February 1996 §§ 31 ff; T. v. Austria, 14 November 2000, § 61; Ezeh and Connors v. United Kingdom, 9 October 2003, § 82.

[5] ECHtR Pečnik, cited above, §§ 32 ff.; T. v. Austria, cited above, §§ 63 ff.

[6] ECHtR Balsyte-Lideikiene v. Latvia, 4 November 2008, §§ 57 ff; cf. ECHtR Öztürk v. Germany, 21 February 1984, § 50.

[7] ECHtR Putz, cited above, § 34; Weber v. Switzerland, 22 May 1990, §§ 32-33; Kyprianou v. Cyprus, 15 December 2005, § 64 (Grand Chamber), confirming the judgment of the second section of 24 January 2004, § 31.

[8] ECHtR Demicoli v. Malta, 27 August 1991, § 33.

although they may still be subject to criticism for past deeds. Criminal responsibility, on the other hand, may be invoked both against present and former ministers, for actions committed while they were office. The political context, however, may be very different. For a minister in office, the threat of criminal charges is most likely to come from the opposition or from external actors (the media, the public prosecutor). For a former minister, there is the different threat – that charges may be brought also by the new government, as the result of a shift in policy or even as revenge for past disagreements.

19. Government ministers may in principle be liable to criminal responsibility under three sets of rules:

1. Ordinary rules on criminal responsibility that applies to everyone, including government ministers;
2. Criminal provisions applicable to all public officials, both administrative and political;
3. Special rules on criminal responsibility that apply only to ministers.

20. In countries that have *special rules* on criminal liability that apply *only* to ministers these may fall in two categories:

1. Special *procedural* rules for holding ministers criminally responsible;
2. Special *substantive* rules on ministerial criminal responsibility.

21. Of these two the first category is the most widespread. A number of European countries have special procedures under the constitution for holding government ministers legally responsible. These are often referred to as "*impeachment*" proceedings, and may cover all aspects of the procedure, from the first inquiries and investigations, the decision to initiate proceedings, the rules on prosecution, the composition of the court, and the rules on the procedure itself, including the procedural rights of the defendants. Typically the rules are more "politicical" than ordinary criminal procedure, with one or more of the stages involving political institutions and actors, most often parliament.

22. The political element may make it easier to initiate proceedings against ministers than under ordinary criminal procedure, and this may pose challenges under the rule of law. But more often the special procedures make it more difficult to initiate cases, creating a political threshold, which may in effect function as a kind of procedural immunity, which is also a challenge under the rule of law.

23. As for special substantive rules on ministerial criminal liability these usually come in addition to the ordinary criminal code, and cover special offences that only ministers may commit, such as the breach of constitutional or other legal obligations related to the position as minister. Such rules usually make the potential legal responsibility of ministers wider than for ordinary people, at least in principle.

24. Both procedural and substantive rules on ministerial criminal responsibility may thus typically be more *political* than ordinary criminal law, or they may be applied in a more political manner. In this report the term "political" will be used in a wide sense. The political approach may be institutional, as for example when it is for a majority of parliament to decide whether or not to start impeachment proceedings, or when all or some of the judges on the court of impeachment are appointed by a political process. But the political approach may also be substantive, as for example when the rules on ministerial criminal responsibility open up for assessments that are of a more "political" nature, as opposed to ordinary criminal law assessments, as for example when the issue at stake is whether a minister has broken a constitutional obligation towards parliament.

25. The Venice Commission is of the opinion that it may to some extent be considered natural and legitimate that rules on ministerial criminal responsibility are more political than ordinary criminal law. But it may also raise serious questions of legal certainty for the persons concerned. The core question implied in the request from the Committee is where the line goes between what are legitimate political elements in rules on criminal ministerial responsibility and what are illegitimate political elements in what are basically legal (penal) rules and procedures.

III. Comparative overview of rules on criminal ministerial responsibility

A. Procedural rules for making government ministers criminally responsible

26. There is great variation in how the procedures for holding government ministers legally responsible are regulated in different European constitutional systems.

27. On the one hand, there are some countries in which there are no special procedures for ministerial criminal responsibility and where this is governed by ordinary criminal procedure – under which it is for the ordinary public prosecutor to initiate cases and for the ordinary criminal courts to judge them, according to ordinary rules of criminal procedure. Examples of this are the UK, Ireland, Germany and Portugal (where Parliament must however authorise the continuation of the procedure after accusation, which is compulsory for the most serious offences).[9]

28. On the other hand there are countries in which ministers primarily may be held criminally responsible under procedures that are different from ordinary criminal procedure both with regard to the initiation of cases, the investigation, the composition of the court and other procedural rules. These are usually referred to as "impeachment" proceedings, and the courts sometimes as "courts of impeachment". Examples of this are France, Poland, Denmark, Norway, Finland and Iceland.

29. In countries that have special (more political) impeachment proceedings for government ministers, it is usually the rule that these only apply to offences committed *in their capacity as ministers,* while breaches of ordinary criminal law, committed in private capacity, is left to ordinary criminal procedures. In French terminology this is the distinction between *actes détachables (*unconnected with the exercise of ministerial functions) and *actes rattachables (*criminal acts conducted in a public capacity). The last category would include for example illegally giving or withholding permissions, taking bribes, corruption in general, and offences related to failure to disclose political contributions, the diversion of public funds to private purposes, but may also include the carrying out of burglary, theft or violence directed at political opponents.[10]

30. A study made by the French Senate in ten Western European states showed that only one of them (Belgium) applied a special procedure involving Parliament for offences unconnected with the exercise of functions, whereas this is the rule for offences committed in the exercise of official functions.[11] The Constitutional Court of Poland has for example made it clear that the

[9] Article 196 of the Constitution.

[10] For example, in France, the *Cour de cassation*, in a judgment of 27 June 1995, defined "les actes commis par un ministre dans l'exercice de ses fonctions [comme étant] ceux qui ont un rapport direct avec la conduite des affaires de l'Etat […], à l'exclusion des comportements concernant la vie privée ou les mandats électifs locaux" (acts committed by a Minister in the exercise of official functions as those having a direct link with the conduct of State affairs, excluding behaviours concerning private life or local elective mandates).

[11] Service des affaires européennes – Division des Etudes de législation comparée, 10 septembre 2001. The study covered Austria, Belgium, Denmark, Germany, Greece, Italy, Netherlands, Portugal, Spain, United Kingdom.

Tribunal of State may only examine offences committed by members of the council of ministers in connection with their position.[12]

31. Special rules on impeachment proceedings may cover all aspects, ranging from the first inquiries and investigations, the decision to initiate proceedings, the rules on prosecution, the composition of the court, and the rules on the procedure itself, including the procedural rights of the defendants.

32. In countries with special impeachment procedures it is often for parliament (with ordinary or qualified majority) to take the decision whether to *initiate* proceedings against a minister. This may also mean that it is for parliamentary organs to do the investigations, through standing committees on parliamentary oversight and scrutiny, special commissions of inquiry or other procedures.

33. Countries in which it is for the parliament to decide whether or not to *initiate* criminal proceedings against a government minister include Austria, Denmark, Estonia, Finland, Greece, Iceland, Italy, Liechtenstein, Lithuania, the Netherlands, Norway, Poland, Portugal (where Parliament must however authorise the continuation of the procedure after accusation, which is compulsory for the most serious offences - when the penalty is at least three years), Romania, Slovakia, Slovenia, Sweden and Turkey. Some of these countries have unicameral parliaments. Others have bicameral parliaments, and here the decision may either be given to one of the chambers (usually the lower one) or to both (Italy). In Sweden the competence to make the decision is given to a parliamentary committee; in Finland, the Constitutional Law Committee merely gives its opinion on the legal aspects.

34. In Spain, a charge of treason or of any offence against the security of the state brought against ministers needs the initiative of one quarter of the members of Congress and the approval of the absolute majority thereof. The constitutional court can also be invited to give a binding opinion. In Lithuania, the consent of Parliament may be replaced by that of the President of the Republic when Parliament is not in session. In Romania, either Chamber or the President of the Republic will have the right to ask for criminal proceedings against members of government. In some countries it is for parliament to decide whether to initiate criminal proceedings against ministers, but if they do so, then the process is left to the ordinary criminal courts (Italy).

35. In many European countries, there are special rules on the competent jurisdiction to adjudicate cases of criminal ministerial responsibility. The two main categories are:

1. Countries with special courts of impeachment for government ministers;
2. Countries in which cases of criminal ministerial responsibility are brought directly before a superior (ordinary) court.

36. Special courts of impeachment for government ministers may be found, *inter alia*, in Denmark, Finland, France, Iceland, Norway and Poland. The typical feature is that these special courts are more political than ordinary courts, in the sense that they are usually composed partly or wholly by members of parliament or persons appointed by parliament.

37. In France, for example, cases of criminal liability for ministers are referred to the Court of Justice of the Republic, which was established in its present form in 1993, and which consists of fifteen members: twelve Members of Parliament, elected in equal number from among their ranks by the National Assembly and the Senate, and three judges of the *Cour de cassation*, one of whom shall preside over the Court of Justice of the Republic. In Poland, the Tribunal of

[12] CODICES (http://www.codices.coe.int), POL-2001-2-010, decision of the Constitutional Tribunal of 21-02-2001, case P 12/2000.

State shall be composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm for the current term of office of the Sejm from amongst those who are not Deputies or Senators. In Norway, the Court of Impeachment (*Riksretten*) shall after a constitutional revision in 2007 be composed of the five most senior judges of the Supreme Court and six representatives appointed by Parliament. Similar systems are to be found in Denmark – where the numbers of professional judges and parliamentary appointees are equal -, Finland and Iceland – with eight judges appointed by parliament as against seven professionals.

38. In countries that do not have special courts of impeachment, but instead refer cases of criminal responsibility for ministers directly to a supreme jurisdiction, this may typically either be to the constitutional court, to the supreme court, or to another high court. Countries that refer such cases to the constitutional court include, inter alia, Austria, Liechtenstein and Slovenia. In Albania cases are referred directly to the High Court, in Andorra to the *Tribunal Superior* (at the request of *Tribunal de Corts*), in Belgium to the *Cour d'appel*, and in the Netherlands, Spain and Sweden directly to the Supreme Court. In Greece they are referred to a Special Court composed of high professional judges.

39. Another important question is to what extent the ordinary principles of criminal procedure are applicable to impeachment procedures – such as rights of representation, prohibition against self-incrimination, rules on evidence, presumption of innocence etcetera. It appears that in principle they usually apply, at least as a starting point, but that one may find a number of modifications and derogations in practice. The principle of two instances often does not apply to ministerial impeachment proceedings, where a one-instance procedure typically appears to be preferred due to the composition or the high level of the court.

B. Substantive rules on criminal responsibility for government ministers

40. The *scope* of ministerial criminal responsibility in a given country is determined by the substantive rules governing this. Here again there is great variation in the member states of the Council of Europe, but, as already said, three main categories may be identified:

1. Ordinary criminal law, applicable to everyone (including ministers);
2. Criminal provisions applicable in particular to public officials, both administrative and political (including ministers);
3. Special criminal provisions applicable only to ministers.

41. Government ministers can in principle usually be held criminally responsible if they commit ordinary criminal offences, under the ordinary criminal code and ordinary criminal procedures, unless covered by special rules on immunity. In such cases, in most European countries the ordinary criminal code will also apply to ministers, ranging from trivial offences, such as speed driving, to the most serious ones, such as murder. If a minister should happen to commit such ordinary criminal offences, this will usually be in his or her private capacity, as a citizen.

42. Furthermore, ministers are often covered by special criminal provisions that apply to all public officials (both administrative and political) against particular crimes that only such officials may conduct – such as bribery, corruption, or more general prohibitions against "misuse of powers", "abuse of office", "maladministration" and the like.

43. But breaches of the ordinary criminal code may also appear in the exercise of public office, if for example the minister is caught speed driving while on the job, or if caught stealing or embezzling public funds.

44. In most European countries there are certain offences under the ordinary criminal code that by their nature only apply to public officials, but which in principle both cover administrative officials (civil servants) and politically elected officials (including ministers). An important

example is corruption. Another important example is the category of provisions that prohibit official “misuse of powers” or “abuse of office” or similar formulations.

45. The inherent problem with such provisions is that in order to cover all situations that may potentially be serious enough to warrant penal sanctions they either have to be very detailed or very wide and vague, and therefore potentially harmful to legal certainty, as well as open to misuse for political reasons. This is why the ECPRD request made by the rapporteur to national parliamentary correspondents[13] includes a question on which countries have rules on “abuse of powers” that are applicable to government ministers.[14]

46. Out of the thirty countries that replied to the request,[15] five have no provision at all on abuse of office or similar offences in their criminal legislation.[16] The provisions in force in Belgium[17] and Greece[18] do not apply to government ministers.

47. But all the rest have provisions that in effect criminalise “abuse of office” in one form or another, and which are applicable in principle (though rarely in practice) to government ministers. The wording of such provisions differs. In France[19] and Germany,[20] for example, the offences are defined as illegal taking of interests, *i.e.* interference of a private interest in an administrative process. In Romania, three offences are provided for: malfeasance and nonfeasance against a person’s interest; malfeasance and nonfeasance by restriction of certain rights; malfeasance and nonfeasance against public interests.[21] In the United Kingdom, misconduct in public office is a *common law* offence committed by a public officer acting as such who wilfully neglects to perform his/her duty and/or wilfully misconducts him/herself to such a degree as to amount to an abuse of the public’s trust in the office holder.

48. It appears that most criminal codes intend to punish only intentional misuses of office. Neglect of duty by a public official may however be also punishable, as it is in Slovakia.[22] In Sweden, gross negligence is necessary when members of government are involved.[23] On the other hand, some countries only sanction behaviour that is not only wilful, but implies that the author has knowingly gone against his or her duties (Andorra, Austria).

49. Most of the countries which criminalise abuse of office consider as a necessary condition *benefit* – personal or of other persons – or *damage* – or the intention to obtain them. It may be inferred from the very limited number of cases brought to court that, in general, damage is considered as punishable only when it is intentional, that is if the author intends to harm. In Germany for example, benefit is a constituent element of the offence of illegal taking of interests.[24] Some countries simultaneously provide for offences implying benefit and damage and others for which damage is the main condition (Russia, Ukraine). In a number of states, benefit is an alternative condition to damage.[25] Damage may also be a necessary condition

[13] See par. 7 above.
[14] Cf. the ECPRD request on the issue of "Keeping political and criminal responsibility separate" (abuse of office), summarised in document CDL-REF(2012)041.
[15] Andorra, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, and United Kingdom.
[16] Canada, Cyprus, Estonia, Ireland, Netherlands.
[17] Articles 254 and 258 of the criminal code.
[18] Articles 239 and 259 of the criminal code.
[19] Article 432-12 of the criminal code.
[20] Article 331 of the criminal code.
[21] Article 246-248 of the criminal code.
[22] Article 327 of the criminal code.
[23] Article 13-3 of the Instrument of government.
[24] Article 331 of the criminal code.
[25] Croatia, Czech Republic, Finland, Italy, Montenegro, Portugal, Serbia, Slovakia, Switzerland. “the former Yugoslav Republic of Macedonia”.

(Austria, Poland). In Romania, the conditions are harm to the legal interests of a person[26] or restriction of his rights/discrimination[27] or significant disturbance in the proper operation of a body or institution of the state.[28] On its turn, damage may be material or immaterial, including violation of rights or legal interests of a person. The victim may also be the state or another public body, as expressly stated in the legislations of Lithuania and Poland. Finally, a number of countries consider benefit (Denmark, Lithuania), damage (Sweden) or both (Iceland) as an aggravating circumstance.

50. In Estonia the legislator repealed in 2007 as too general and vague a provision on misuse of office which punished "intentional misuse by an official of his or her official position with the intention to cause significant damage or if thereby significant damage is caused to the legally protected rights of interests of another person or to public interests". This provision was repealed due to its too general and vague wording, which made it difficult to foresee what kind of acts had to be considered criminal or not. This could have made it problematic under Article 7 of the ECHR, and it was not considered necessary, as the other rules of criminal law were considered sufficient to cover also punishable acts committed by public officials. The provision had been applied in 2001 against a mayor and a vice-mayor, and in 2007 against the vice-chairman of a town council, which had been acquitted. In the explanatory memorandum prepared by the Ministry of Justice, "reference was … made to the interpretation of Article 7 par. 1 of the European Convention on Human Rights, according to which the necessary elements of a criminal offence had to be clearly defined in law".[29]

51. The European Court of Human Rights had to address a case concerning the previous version of the provision repealed in 2007. It noted that this penal law provision and its interpretation were inherited from the former Soviet legal system, and it was a difficult task of applying them in the completely new context of a market economy. The interpretation given to this provision, including potential damage as well as moral damage to the state, "involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects".[30]

52. Generally speaking, the material at the disposal of the Venice Commission gives very few examples of application of provisions on "abuse of office", "misuse of powers" etc. to members of government.

53. In addition to criminal provisions on abuse of public powers, there are some European countries that have other special criminal provisions that are applicable *only* to government ministers. The reason for this presumably is, inter alia, that there are certain obligations that only ministers have, and which should be subject to legal sanctions if broken. This may typically cover special constitutional obligations of ministers – as towards parliament, the cabinet, the prime minister, the civil service or the public. The duty of a minister to provide parliament with information according to established constitutional procedures may for example in some countries be regarded as a legal (and not only political) obligation, which it should be possible to legally sanction in cases of grave breach. The constitutional obligation to resign after a parliamentary vote of no-confidence is another example – if broken this may in principle be considered a coup d'état, which may legitimately be subject to criminal responsibility.

[26] Article 246 of the criminal code.
[27] Article 247 of the criminal code.
[28] Article 248 of the criminal code.
[29] See ECtHR Liivik v. Estonia, 25 June 2009, par. 84.
[30] ECtHR Liivik v. Estonia, par. 101.

C. Application of rules on criminal ministerial responsibility in practice

54. The degree to which special substantive and procedural rules on ministerial criminal responsibility are actually invoked in practice in the member states of the Council of Europe differs a great deal. In some countries, such as France, there are cases from time to time. In other countries there have not been any cases for a very long time. In most European countries criminal proceedings against government ministers is an extraordinary event, which only takes place very rarely, but which may come about unexpectedly in singular cases.

55. Assessing to what degree a given system actually manages to keep "political" and "legal" responsibility separate relies more on how the national impeachment rules are applied in practice than on the wording of the provisions. Many national constitutions or legislations have quite wide and political rules on ministerial penal responsibility on paper, but these are not applied in practice, and if they were to be invoked then one would interpret into them a high threshold.

56. The term "impeachment" originally became entrenched in the United Kingdom, and dates back to the 17th century. However, it appears that there has not been any impeachment case in the UK for more than two hundred years, and some scholars argue that the whole institution has fallen formally out of use (desuetudo). For a long time now the legal responsibility of British government ministers have in practice been subject to the ordinary rules of criminal law, both as regards procedure and substance.

57. France has experienced a number of different procedures for impeachment since 1789. The present system has two special courts and procedures for this – La Haute Cour (HC) for the president[31] and La Cour de Justice de la République (CJR) for government ministers. Both have been reformed recently – the HC in 2007 and the CJR in 1993, following the "infected blood" scandal. The elaborate and rather complex CJR system seems in a comparative perspective to be used relatively often. Since 1993 there appears to have been a number of investigations under the CJR system, including two pending ones, and at least two instances in which ministers have been given suspended prison sentences.

58. Germany is an example of a country that has no special rules and procedures for ministerial criminal responsibility. Offences committed by federal ministers are dealt with the ordinary criminal prosecutors and courts, since there is no provision in the (federal) Fundamental law permitting a special procedure to hold a federal minister responsible before a court (for instance the Federal Constitutional Court). In practice no such case can be found However, in accordance with some former German constitutions, a few states still know the "Ministeranklage" at a request of the state parliament (usually by a 2/3 majority), decided by the state Constitutional Court. "Ministeranklage" is rather a political instrument than one under criminal law, which largely resembles the "Präsidentenanklage" under Art. 61 Basic Law. Its own field of application lies in violations of any law or the constitution, which are not penalised under criminal law. However, in these cases the resignation from office is the consequence most likely to happen. The ordinary proceeding before a criminal court can be initiated in parallel to or after this proceeding. In practice the instrument ("Ministeranklage") is not used and it was only rarely used in the German history.

59. The Danish constitution of 1953 has a system for impeachment of ministers (*Rigsret*) in articles 59 and 60 which dates back to the 1849 constitution. Cases can be brought by the King or the Parliament (ordinary majority), and the court is composed half by judges of the Supreme Court and half by persons appointed by Parliament. The rules of responsibility are quite wide. Until modern times the court of impeachment had only been convened four times (1844, twice

[31] The Haute Cour cannot however pronounce a criminal sanction, but only the destitution of the President of the Republic.

in 1877, and in 1910), and many thought it had gone out of use. However, in 1993-95 the court was called to judge in a case against a former minister of justice, Mr Erik Ninn-Hansen, who had deliberately and unlawfully neglected to decide on a number of applications for family reunion from Sri Lanka under immigration law. Mr. Ninn-Hansen was sentenced to four months suspended prison. He tried to bring the case before the European Court of Human Rights, arguing inter alia that the Court of Impeachment was not an independent and impartial tribunal and that his rights of fair trial had been breached, but the application was found inadmissible in 1999.[32]

60. Norway, Finland and Sweden are examples of countries that have special (and recently revised) impeachment procedures for government ministers that have *not* been applied in practice for a very long time. The new Finnish constitution of 1999 has special provisions on the court of impeachment (*Riksrätten*) in Article 101 and Articles 113-116, but these have so far not been invoked in practice. The Swedish constitution of 1974 (*Regeringsformen*) has a provision on impeachment in article 13-3. There is no special court of impeachment, but the procedure is special. Cases against government ministers can be brought by the standing Constitutional Committee (ordinary majority) of the parliament and are to be tried directly before the Supreme Court. Again this has not been used in modern times.

61. The Norwegian constitution of 1814 has special rules on impeachment of ministers (*Riksrett*) in articles 86 and 87, which are supplemented by two statutes, one on procedure and one on the (very wide) substantive rules for responsibility. Cases can be brought by the Parliament (ordinary majority). The court was convened seven times in the 19th century, but only once in the 20th century, and that was in 1926. Since then there have been several proposals for impeachment proceedings, but none that have succeeded. Until recently many observers argued that the whole system was outdated, and in 2003 a commission appointed by parliament proposed to abolish it altogether, and leave ministerial legal responsibility to the ordinary courts. This, however, was too radical for parliament, who instead passed a constitutional amendment in 2007 slightly reforming the system, but keeping the main characteristics, including special procedures, special composition of the court, and very wide rules of responsibility.

62. Under Article 14 of the Icelandic constitution of 1944, government ministers may be brought before a court of impeachment by the parliament. This is supplemented by two statutes, the Act on Ministerial Accountability and the Act on the court (the *Landsdómur*). The scope of the former Act is wide and includes penal responsibility for action which places the fortunes of the State in foreseeable danger and neglect of action conducive to averting such danger, as well as acts or omissions contravening stipulations of the Constitution. The procedure had never been resorted to when in 2010 the Althingi resolved to indict the former Prime Minister Mr Geir H. Haarde for alleged misconduct or neglect of duty in relation to the events leading up to the financial crisis experienced in the autumn of 2008, involving a collapse of the three major Icelandic commercial banks. The Court was then convened for the first time. The indictment by parliament had two main parts, the first including five charges of neglect of action conducive to averting or reducing the risk of an imminent banking crisis affecting the fortunes of the State, and the second alleging a failure to comply with provisions of the Constitution regarding ministerial meetings. In October 2011 the Court of Impeachment dismissed two of the charges as being too general in content. In its judgment of April 2012, the Court noted that the legal responsibility provided for in the Constitution "… comes in addition to the parliamentary or political responsibility borne by a government minister towards the Althingi … From a comparison of such responsibility of two kinds, it must be concluded that it is only by virtue of serious misconduct in office that a minister may be held liable to punishment." In the result, the Court acquitted Mr. Haarde of the substantive charges, but found him guilty (by 9 to 6 judges) on the more formal charge of breaking the constitution by not placing the risk of a

[32] Cf. Application no. 28972/95 by Erik Ninn-Hansen against Denmark – Decision 18 May 1999.

banking crisis on the agenda of formal cabinet meetings. Mr Haarde was not sanctioned, and had his legal costs reimbursed. In 2012 he brought the case before the ECtHR, where it is presently pending.

63. In 2011 Ms Yulia Timoshenko, former Prime Minister of Ukraine was charged under Article 365 (exceeding/misuse of official powers) of the Criminal Code of Ukraine for having, inter alia, illegally authorised the signing of the agreement between Naftogas and Gazprom on the sale of Russian gas to Ukraine which ended the energy crisis between these two countries in 2009. She was sentenced in 2011 to seven years in prison for "misuse of powers" concerning the gas deal by an ordinary criminal court. The issue is now pending before the European Court of Human Rights (application 49872/11).

64. Criminal investigations were initiated against a number of other members of the government in charge before the 2010 presidential elections. In particular, Mr Lutsenko, former Minister of the Interior, was charged under Articles 191 (misappropriation of state property) and 365 (exceeding/misuse of official powers) of the Criminal Code of Ukraine. The grounds given for the charges were that Mr Lutsenko had illegally promoted his driver to the rank of police officer, allowed expenses for the annual Militia Day festivities in violation of a government decision and exceeded his powers as minister when ordering the police monitoring of a security service driver suspected of complicity in the alleged poisoning of former President Yushenko. On 27 February 2012, Mr Lutsenko was convicted to four years in prison for abuse of office and embezzlement. After his arrest, Mr Lutsenko had applied to the European Court of Human Rights, which stated that there had been several violations of Article 5 ECHR as well as a violation of Article 18[33] taken in conjunction with Article 5.[34]

65. The Venice Commission does not have any full empirical overview of the extent of criminal cases against government ministers in European countries in modern time. It does, however, appear that although a number of countries have rather wide and "political" rules on ministerial responsibility, these are in practice rarely invoked, and if so, normally with quite a high threshold.

66. On the one hand, this can be seen as a welcome indication that the distinction between political disagreement and criminal offences is understood and respected, which is a sign of a mature and well-functioning democratic system.

67. One the other hand, the very small number of cases in which government ministers have been held criminally responsible for their actions can also be interpreted as a sign that ministerial offences that should in principle be legally (and not only politically) sanctioned may go unpunished, and that the specialised rules and procedures on ministerial responsibility in effect function as a sort of immunity. One of the reasons why France reformed its system for ministerial legal responsibility in the early 1990s was that the previous system was perceived by many to function too much as a form of ministerial immunity.

IV. Assessment of the relationship between political and criminal ministerial responsibility

A. General remarks

68. The stated purpose of the request to the Venice Commission from the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (PACE) is to get background material for "the elaboration of objective criteria for distinguishing cases in which elected officials should

[33] "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".
[34] ECtHR Lutsenko v. Ukraine, Application no. 6492/11, 3 July 2012.

only be held politically responsible for their actions from those cases in which criminal responsibility would be in order".

69. Drafting such criteria is for the Committee, and the Assembly, to do – and the Venice Commission will only contribute some general reflections.

70. A first reflection is that this is quite a wide and complex issue. As the comparative overview illustrates, there is great variety in how the member states of the Council of Europe have regulated criminal responsibility for government ministers, both as regards procedure and substantive rules. There is furthermore great variety in how these rules and procedures are applied in practice. And even if one might reach agreement on some overarching principles for the division between political and criminal responsibility, the individual cases that come up are still bound to be disputed and controversial – with each case having to be assessed on its own merits.

71. Furthermore, there are so far few common European standards in this field. There are the minimum requirements that follow from the European Convention on Human Rights (ECHR), in particular Articles 6 and 7 and which are binding on all Council of Europe member states. But beyond that there is no common European "hard law" on the subject. One may, however, attempt to establish common standards as "soft law" guidelines, derived from common principles of democracy and the rule of law as well as comparative studies.

72. As a starting point, it is clear that criminal procedures against government ministers have to respect Article 6 of the ECHR on the right to a fair trial, including the minimum rights set out in Article 6 (3) for persons charged with a criminal offence. The same goes for the principle of "no punishment without law" in Article 7. These rules apply regardless of whether the person accused is an ordinary citizen or a government minister, and regardless of whether the minister is charged before the ordinary criminal courts or before a special court of impeachment.

73. Thus a government minister who has been convicted on a criminal charge may bring the case before the European Court of Human Rights (the ECtHR). So far, however, there have been very few such cases. One important example was the Ninn-Hansen case in 1999, mentioned earlier, in which the applicant complained of a number of violations of Article 6, including the fairness of the procedure and the independence and political impartiality of the Danish Court of Impeachment.[35] The Court did not find the appearance of any violations, and dismissed the application.

74. Recently two cases involving former prime ministers have been brought before the Court in Strasbourg. The first is the Ukrainian case against former prime minister Yulia Tymoshenko, she was sentenced for "excess of authority". The second is the case brought by former prime minister Geir Haarde of Iceland, who in 2012 was found guilty by the Court of Impeachment on a minor charge concerning a constitutional obligation, but not sanctioned. Both cases are still pending before the Court, and it is not for the Venice Commission to give an assessment of them in this general report, except to say that the many differences between the two pending cases illustrate the great variety of questions concerning the relationship between criminal and political responsibility that may arise in practice, and which makes it necessary to assess each case on its individual merits.

75. The European Court of Human Rights found several breaches of Article 5 and Article 18 in conjunction with Article 5 ECHR following the arrest of former Ukrainian Minister of Interior Jurij Lutsenko.[36]

[35] Cf. Application no. 28972/95 by Erik Ninn-Hansen against Denmark – Decision 18 May 1999.
[36] ECtHR Lutsenko v. Ukraine, Application no. 6492/11, 3 July 2012, see above footnote 34.

76. On a general level the Venice Commission considers that the basic standard should be that *criminal procedures should not be used to sanction political disagreement*. Government ministers are politically responsible for their political actions, and this is the democratically correct way to ensure accountability within the political system. Criminal procedures should be reserved for criminal acts.

77. Ministerial actions and decisions are often politically controversial, and may later turn out to have been very unwise and detrimental to national interests. But this is for the political system to sort out. Procedures of impeachment or other criminal charges should not be used against political opponents for political reasons, but should be invoked only in those few and extraordinary cases in which the minister is suspected of a clear breach of law.

78. The Venice Commission would furthermore point out the distinction, found in many legal systems, between administrative decisions (Verwaltungsakte), where the addressees are private persons or companies, and acts involving political discretion (Regierungsakte). It may be argued that for the first category the rules on ministerial criminal responsibility should be stricter and largely analogous to those applying to civil servants, while for the second category the clear emphasis should be on political responsibility. Criminal law should not be used to assess the appropriateness of a political decision.

79. When drawing the line between criminal and political responsibility, one should also take into account the special characteristics of the political decision-making procedures and the "political game". It is important for democracy that government ministers have room for maneuver to pursue the policies that they are elected to do, with a wide margin of error, without the threat of criminal sanctions hanging over them. In a well-functioning democracy, ministers are held responsible for their policies by political means, not be resorting to criminal law.

80. At the same time, the Venice Commission considers as equally important that *government ministers should not be above the law*. If a minister commits a criminal offence then he or she should be subject to criminal sanctions, the same as everyone else (although the procedures may differ). It may be legitimate and wise to have a certain threshold for initiating criminal proceedings against a government minister, in order to protect against political harassment, but this should not be so high as to protect a minister that has clearly broken the law. While there may be valid reasons for granting a certain degree of legal immunity to parliamentarians and heads of state, these reasons do not to the same extent cover government ministers. Special impeachment procedures should therefore not be construed in such a way as to provide wide procedural immunity for ministers that have clearly broken the law.

81. It may be that in some European countries the problem is not that government ministers are held legally responsible too easily, but the opposite – that they are not held responsible, and that the special impeachment procedures may function as a form of immunity that protects the minister against prosecution.

B. The procedures for holding ministers criminally responsible

82. There are two different basic models in European constitutional law for holding government ministers criminally responsible. One is to leave this to the ordinary criminal system. The other is to have special impeachment rules, which may be construed in a number of different ways, and may cover both the initiation of proceedings, the composition of the court and other procedural elements.

83. The Venice Commission is of the opinion that both alternatives should as such be considered legitimate, and that both form part of the European constitutional tradition. It is not for the Commission to advocate one before the other. While special impeachment procedures

may arguably by some be seen as a relic of the past, there are several countries in which the national constitutional legislator has recently revised and thereby reconfirmed such systems, as for example in France (1993), Finland (1999) and Norway (2007).

84. The Venice Commission considers that as long as the charges brought against a minister are of a "criminal" character, under Articles 6 and 7 of the ECHR, the same requirements of fair trial apply to both categories – including such basic elements as proper rights of defence, presumption of innocence, the independence and impartiality of the judiciary and etcetera.

85. In countries where criminal cases against government ministers are handled by the *ordinary* prosecuting authorities and the ordinary criminal courts, the Venice Commission considers that the basic challenge is to ensure that these institutions are not misused by the government (or other actors) against political opponents for political purposes. Furthermore, if a case arises, it is important that prosecutor and the judges understand and respect the distinction between political and criminal offences, and the special considerations that apply to ministerial exercise of public power.

86. In a democratic state founded on the rule of law and respecting fundamental rights, where the impartiality and independence of the public prosecutor and the courts are firmly established, this will serve as the main guarantee against political misuse of the ordinary criminal justice system.

87. The decision whether to initiate criminal proceedings against a (present or former) government minister will in itself often have grave consequences for the person concerned, whether or not he or she is eventually found guilty. In countries where this is handled by the ordinary public prosecutor, it is therefore important that this institution is able to exercise sound discretion, and not to pursue allegations that are not well-founded and that are brought primarily for political purposes. On the other hand, it is equally important that the prosecuting authorities are in a position not to be intimidated or instructed by the government (or other actors) against bringing charges in cases where there is substantial reason to believe that the minister has broken the law.

88. In countries with *special impeachment procedures* for ministers, these are typically more political than ordinary criminal proceedings, as illustrated earlier. There are reasons why this is so – one of them being that since a case against a government minister by its very nature is bound to have political repercussions, a certain element of political expertise and discretion is called for when handling the case.

89. The rules for impeachment of government ministers laid down in the 1953 Danish Constitution may serve as a typical example of such "political" procedures. An impeachment case may be brought either by the government or by parliament (ordinary majority), and the court is composed by an equal number of supreme court judges and lay judges appointed by parliament. There are special rules covering both the phase of inquiry and investigation, the responsibility of the minister, and the procedure before the court. The compliance of this model with Article 6 of the ECHR was assessed in the 1999 Ninn-Hansen case, in which the ECtHR found that it was not in breach of the Convention.

90. Similar impeachment procedures can be found in other European countries, and the Venice Commission cannot see that this in itself goes against the ECHR or the principles of democracy and the rule of law.

91. The Venice Commission does however hold that in systems with "political" impeachment procedures there is *an extra need for caution* in the way these are exercised, in other words, to ensure that the political elements do not breach the basic requirements of fair trial and legal certainty. Thus such systems may be more vulnerable to criticism, both with regard to Article 6

and 7 of the ECHR, and to common standards of democracy and rule of law, than systems in which criminal ministerial responsibility is left to the ordinary system.

92. The Venice Commission would also point out that although many European countries have chosen systems with special impeachment procedures for ministers, this does not appear to be "necessary" in order to ensure ministerial legal responsibility. In many of these countries the special procedures have not been used for a very long time. And many countries appear to function very well with leaving ministerial criminal responsibility to the ordinary criminal system.

93. In systems with special impeachment procedures, the Venice Commission considers that it is a good principle to distinguish (as many countries do) between ordinary crimes and crimes committed in the capacity as minister. The special "political" procedures should preferably be reserved for criminal acts committed in a public capacity, in the exercise of ministerial functions (*actes rattachables).* By contrast, ordinary criminal acts, committed in the minister's capacity as a private citizen (*actes détachables*) and unconnected with the exercise of public functions should preferably be a matter for the ordinary public prosecutor and criminal courts.

C. Provisions making "abuse of office", "misuse of powers and "excess of authority" a criminal offence

94. When assessing *substantive* national rules on ministerial criminal responsibility the basic point is that these must comply both with article 7 of the ECHR and other requirements derived from the principle of the rule of law, including legal certainty, predictability, clarity, proportionality, equal treatment etc.[37]

95. Article 7 of the ECHR lays down the principle of "no punishment without law" and states that no one may 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. Furthermore Article 7 has been interpreted as to embody also certain qualitative requirements, including those of accessibility and predictability.[38] Criminal law cannot be extensively construed to the detriment of the accused, for instance by way of analogy.[39] Article 7 does not require absolute predictability, and judicial interpretation is sometimes inevitable.[40] But a certain level of legal clarity is necessary and criminal provisions using such formulas as for example "infringement of the rule of law" or "infringement of democracy" may easily be found in breach of the ECHR.

96. To the extent that government ministers are charged under *ordinary rules of criminal law* this seldom raises any special problems. Here the basic principle should be that such rules are interpreted and applied against ministers in exactly the same way as against all other individuals.

97. An area of criminal law that may be of particular relevance for ministers is that of corruption, embezzlement and other forms of economic crime. It is of particular importance that such rules be strictly and effectively enforced against ministers and other publically appointed officials, since such offences are not only to be seen as criminal, but may also easily undermine public trust and the legitimacy and authority of the democratic system.

98. In some countries there are special rules on criminal responsibility for offences that only government ministers may commit, such as the breach of constitutional and other legal

[37] Cf. the report on the rule of law, CDL-AD(2011)003rev.
[38] ECtHR Huhtamäki v. Finland, 6 March 2012, § 44; Cantoni v. France, 15 November 1996, § 29; Coëme and Others v. Belgium, 22 June 2000, § 145; E.K. v. Turkey, 7 February 2002, § 51.
[39] See for example ECtHR Alimuçaj v. Albania, 7 February 2012, § 149; Jorgic v. Germany, 12 July 2007, § 100.
[40] See for example ECtHR Jorgic v. Germany, quoted above, § 101; S.W. v. United Kingdom, 22 November 1995.

obligations inherent in the office as minister. The Venice Commission considers that this in itself is not problematic. If a minister gravely breaches a clear constitutional obligation this may have serious consequences for the political system and the public interest, and may legitimately be categorised and treated as a criminal offence. However, to the extent that the constitutional obligation is of a more political nature, then this should first and foremost be sanctioned as an issue of political responsibility, and criminal charges should be considered only as the last resort (*ultima ratio*), to be used only for particularly grave [and clear offences against objective interests of the democratic state].

99. The greatest challenge, both in principle and sometimes also in practice, is the fact that government ministers in many countries are subject to very wide and vague provisions on criminal sanctions for "*abuse of office*", "*misuse of powers*", "*excess of authority*" or similar expressions. Such provisions typically apply to all public officials, both civil servants and politically appointed ministers and junior ministers, and they may be problematic in relation to both categories. But as regards ministers, the special problem is that they may be particularly open to misuse by political opponents for political purposes.

100. Criminal provisions prohibiting "abuse of office", "misuse of powers", "excess of authority" or similar offences are to be found in a number of European legal systems, and the Venice Commission recognises that there may be a perceived need for such general clauses, which may cover the many various forms of grave offences that public officials may commit, and which it is not easy to regulate in detail in advance. At the same time, the Commission holds that such blanket criminal provisions are deeply problematic, both with regard to the qualitative requirements of Article 7 of the ECHR and other basic requirements under the rule of law, such as predictability and legal certainty, and that they are also particularly vulnerable to political misuse.[41]

101. It should be recalled that, in the case of *Liivik v. Estonia*, the European Court of Human Rights considered that the interpretation given to a former provision of the Estonian criminal code on abuse of office, excess of authority "involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects".[42]

102. On this basis the Venice Commission considers that national criminal provisions on "abuse of office", "excess of authority" and similar expressions should be interpreted narrowly and applied with a high threshold, so that they may only be invoked in cases where the offence is of a grave nature, such as for example serious offences against the national democratic processes, infringement of fundamental rights, violation of the impartiality of the public administration and so on. They should be related only to the exercise of public power, and to the extent possible it should be defined to what sorts of actions they refer, either in the statutes themselves, in the preparatory works or through relevant case law by the courts, ombudsmen and other institutions. Furthermore additional criteria should be required, such as for example a requirement of intention or gross negligence. For cases of "abuse of office" or "excess of authority" involving economic interests a requirement of intent of personal gain, either for the person concerned or for example a political party, may also be considered appropriate. Finally the minimum and maximum penalties of such "blanket" provisions should be moderate, and should be below the penalty ranges provided by more specific offenses, like for example corruption.

103. When interpreting and applying provisions on "abuse of office", "excess of authority" against government ministers (in contrast to non-elected officials) the special nature of politics should also be taken into account. Actions that may not be proper for an ordinary civil servant

[41] Cf. ECtHR Liivik v. Estonia, 25 June 2009.
[42] ECtHR Liivik v. Estonia, par. 101.

may sometimes be a legitimate part of ministerial political decision-making. Furthermore a government minister is subject to political responsibility, which ordinary officials are not. To the extent that criminal provisions on “abuse of office”, “excess of authority" is invoked against ministers for actions that are primarily of a political nature, then this should only, if at all, be done as the last resort (*ultima ratio*). Furthermore the level of sanctions should be proportional to the legal offence committed, and not influenced by political considerations and disagreements.

104. The Venice Commissions holds that the responsibility not to misuse provisions on “abuse of office” against incumbent or former ministers for political reasons falls upon both the political system and the national prosecutor and courts, and regardless of whether the minister is charged under special rules of impeachment or under ordinary criminal procedures.

V. Conclusions

105. The Venice Commission considers that the ability of a national constitutional system to separate and distinguish political and criminal responsibility for government ministers (past and present) is a sign of the level of democratic well-functioning and maturity as well as the respect for the rule of law.

106. Criminal proceedings should not be used to penalise political mistakes and disagreements. Political actions by ministers should be subject to procedures for political responsibility. Criminal procedures should be reserved for criminal acts.

107. At the same time, the Venice Commission considers that government ministers should not be exempt from legal punishment, unless covered by clearly defined and limited rules on immunity. A minister who commits a criminal offence should be subject to criminal sanctions. It may be that the problem in some countries is not the government ministers are held criminally responsible too often, but the opposite – that it is too difficult to hold them responsible in such a way.

108. The Venice Commission recognises that there are two basic models in European constitutional law for holding government ministers criminally responsible. One is to leave this to the ordinary criminal system. The other is to have special impeachment procedures, which may be construed in a number of different ways. The Venice Commission considers that both alternatives should as such be considered legitimate, and that both form part of the European constitutional tradition. It is not for the Commission to advocate one before the other.

109. The Venice Commission considers that as long as the charges brought against a minister are of a “criminal” nature, according to Article 6 of the ECHR, the same basic requirements apply both to ordinary criminal procedures and special impeachment procedures. These cover the rights to a fair trial under Article 6, including proper rights of defence, presumption of innocence, the independence and impartiality of the judiciary, as well as the principle of “no punishment without law” in Article 7, which includes such qualitative principles as legal certainty and predictability.

110. The Venice Commission considers that special procedural rules for impeachment of ministers are often more political than ordinary criminal procedures. While this in itself may not be in breach of basic principles of the rule of law, it still makes such systems particularly vulnerable to criticism and political misuse, which calls for extra caution and restraint in the way they are interpreted and applied.

111. The Venice Commission considers that in systems with special impeachment procedures, it is a sound principle to distinguish between ordinary crimes and crimes committed in the

capacity as minister. In conformity with the principle of equality, special procedures should preferably be reserved for criminal acts committed in the exercise of ministerial functions. Ordinary criminal acts, committed by the minister as a private citizen should preferably be a matter for the ordinary criminal system.

112. The Venice Commission considers that *substantive* national rules on ministerial criminal responsibility must comply both with article 7 of the ECHR and other requirements derived from the principle of the rule of law, including legal certainty, predictability, clarity, proportionality, equal treatment etc.

113. The Venice Commission considers that wide and vague national criminal provisions on "*abuse of office*" and "*misuse of powers*" constitute a particularly problematic category. While there may be a perceived need for such general clauses, they are still problematic, both with regard to Article 7 of the ECHR and other basic requirements under the rule of law, and they are also particularly vulnerable to political misuse.

114. The Venice Commission therefore holds that provisions on "abuse of office", "misuse of powers" and similar blanket provisions should be interpreted narrowly and applied with a high threshold. Additional criteria should be required, such as for example intention or gross negligence, and stricter definitions should be sought, either in the text of the law or through case law. For cases involving economic interests a requirement of intent of personal gain, either for the person concerned or for example a political party, may also be appropriate. The penalties for such blanket provisions should be moderate, and should be below the penalty ranges provided by more specific offenses, like for example corruption.

115. The Venice Commission also holds that when applying provisions on "abuse of office" against government ministers the special nature of politics should be taken into account. To the extent that such provisions are invoked against actions that are primarily of a political nature, then this should only, if at all, be done as the last resort (*ultima ratio*). The level of sanctions should be proportional to the legal offence, and not influenced by political considerations and disagreements.