Strasbourg, Warsaw, 7 July 2015

CDL-PI(2015)014
Eng. only

Venice Commission opinion no. 811/2015
ODIHR opinion no. CRIM-GEO/272/2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS
(CCPE)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

PRELIMINARY JOINT OPINION ON THE DRAFT AMENDMENTS TO THE LAW ON THE PROSECUTOR'S OFFICE OF GEORGIA

on the basis of comments by

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I. INTRODUCTION

1. On 21 May 2015, the First Deputy Minister of Justice of Georgia, Mr Alexander Baramidze, requested an opinion of the Venice Commission, of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), and of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on draft amendments to the Law on the Prosecutor's Office of Georgia (CDL-REF(2015)008), hereinafter "the Draft Law"). Mr Baramidze informed the Venice Commission that the Georgian Parliament would examine the Draft Law before the summer recess. In view of the urgency of the matter, the Venice Commission, at its 103rd Plenary Session, authorised the rapporteurs to transmit the Preliminary Joint Opinion to the Georgian authorities in early July 2015, prior to the next Plenary Session in October 2015.

2. Mr Richard Barrett, Mr Nicolae Esanu, and Mr Sergiy Kivalov (members of the Venice Commission) acted as rapporteurs on behalf of the Venice Commission. Mr Oleksandr Banchuk contributed to this opinion on behalf of the OSCE/ODIHR and Mr Cedric Visart de Bocarmé, Mr Han Moraal, Mr Jose Santos Pais, and Mr Peter Polt, on behalf of the Consultative Council of European Prosecutors (the CCPE), representing the DGI.

3. On 20 June 2015, the rapporteurs from the Venice Commission, the CCPE members and an OSCE/ODIHR representative met in Venice with representatives of the Georgian authorities, several NGOs and other stakeholders, and discussed the Draft Law. The Venice Commission, the CCPE/DGI and OSCE/ODIHR are thankful to the Georgian interlocutors for their participation in this discussion.

4. *The present Joint Opinion was transmitted to the Georgian authorities as a preliminary opinion and made public on 7 July 2015. It was subsequently endorsed by the Venice Commission at its […] Plenary Session (Venice, …).*

II. SCOPE OF THE JOINT OPINION

5. The scope of this Joint Opinion covers only the Draft Law, submitted for review, and those elements of the existing Law on the Prosecutor's Office which the Draft Law seeks to amend. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the prosecution system of Georgia.

6. In the interest of brevity, the Joint Opinion focuses more on problematic areas rather than on the positive aspects of the Draft Law. The ensuing recommendations are based on relevant international human rights and rule of law standards, and best practices existing in other states in the Council of Europe and OSCE regions. Where appropriate, they also refer to the relevant recommendations made in previous OSCE/ODIHR-Venice Commission opinions and reports.

7. The present Joint Opinion is based on official English translations of the relevant legislation provided by the Georgian authorities. Errors may nevertheless result.

8. This Joint Opinion is without prejudice to any recommendation or comments on the legislation under examination or any related acts that the Venice Commission, OSCE/ODIHR or the CCPE/DGI may make in the future.

III. EXECUTIVE SUMMARY

9. Overall, the Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that the reform of the Prosecutor's Office goes into the right direction. The Georgian authorities are encouraged to pursue it further, while bearing in mind the recommendations contained in this opinion. However, it is noted that the proposed reform does not yet fully achieve the stated goal of depoliticising the office of the Chief Prosecutor. To ensure this, the Venice Commission, OSCE/ODIHR and the CCPE/DGI make the following key recommendations:

A. nominations to the position of the Chief Prosecutor should be based on clear qualification/experience criteria set out in the Draft Law; it would be preferable if the Minister of Justice, following formal consultations with independent external actors, would propose several candidates to the Prosecutorial Council for approval;

B. members of the Council elected by the Parliament should be selected in a more transparent manner. One option is for certain office holders to gain membership of the Council automatically, *ex officio*. Another is to give the nominating power to one or several bodies outside of the Ministry of Justice or the Prosecutorial Council. The members elected by the Parliament should include either members elected by a qualified majority of the Parliament, or members appointed by the opposition (quota system). It is advisable to have the Chairperson of the Prosecutorial Council elected by the Council itself, instead of having the Minister of Justice automatically hold this position;

C. the power to nominate candidates for the prosecutorial component of the Prosecutorial Council should not belong exclusively to top officials of the prosecutorial system; instead, it is advisable to ensure that nominations are done either through an open selection procedure, or via some form of peer-to-peer nominations by prosecutors of all levels;

D. the Draft Law must include the necessary guarantees for the independence of the Prosecutorial Council; for example, it is recommended to provide the Prosecutorial Council with the power to decide on the early removal of its prosecutorial members;

E. the Draft Law should clearly define the status and any coercive powers that the Special Prosecutor has, and how the "investigation" conducted by him/her relates to any possible criminal proceedings which may be opened against the Chief Prosecutor under the Criminal Procedure Code; the appointment of the Special Prosecutor and the approval of his/her report should require a simple majority of votes of the Council, and the consent by the Government should not be needed to submit that report to the Parliament.

IV. ANALYSIS

A. Background information

10. In the current Law on the Prosecutor's Office, the Prime Minister appoints and dismisses the Chief Prosecutor, based on the nomination of the Minister of Justice (see the second sentence of Article 9 par 1 of the Law on the Prosecutor's Office). Thus, Georgia belongs to a relatively small group of States in the Council of Europe and OSCE region where the

prosecutor's office forms part of the executive authority and is subordinated to the Ministry of Justice (as in, e.g. Austria, Denmark, Germany, and the Netherlands).[1]

11. One of the main purposes of the proposed reform is to create a special body – the Prosecutorial Council – which would then play an important role in the process of appointing and dismissing the Chief Prosecutor. Around half of the members of this Prosecutorial Council would be elected from the ranks of prosecutors by their peers. To elect these prosecutors as members another body is created – the Conference of Prosecutors which represents all prosecutors of Georgia. Finally, the Draft Law establishes the new position of a "special (*ad hoc*) prosecutor" (hereinafter "the Special Prosecutor") whose only function would be to conduct an "investigation" which could eventually lead to the dismissal of the Chief Prosecutor in cases where the latter is suspected of having committed a crime.

12. As stated by the First Deputy Minister of Justice in his request for an opinion, "the key objective of the draft [amendments to the law] is to ensure the complete de-politicization of the Chief Prosecutor's Office in Georgia". The objective of "depoliticisation" of the Chief Prosecutor's Office is also listed as one of the main priorities in current discussions on the issue of visa liberalization between the European Commission and the Georgian authorities. Paragraph 2.3.1.3 of the Third Progress Report on Georgia's implementation of the action plan on visa liberalisation ("Preventing and fighting corruption") recommends as follows: "The appointment and dismissal of the Chief Prosecutor needs to be taken in an open, merit-based, objective and transparent way, free of undue political influence." In analysing the proposed reform, the Venice Commission, OSCE/ODIHR and the CCPE/DGI have borne in mind this main purpose of the Draft Law. In addition, the Venice Commission, OSCE/ODIHR and the CCPE/DGI have also taken into consideration the particular circumstances prevailing in Georgia, as described, for example, in the 2013 Report "Georgia in Transition" prepared by the EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, Thomas Hammarberg.[2]

13. At the meeting with the Georgian authorities, the Venice Commission, OSCE/ODIHR and the CCPE/DGI were assured that the Draft Law under examination represents only the first phase of a comprehensive reform of the prosecutorial system, and that the second phase is underway. The Venice Commission, OSCE/ODIHR and the CCPE/DGI have only very limited information about the details of this second phase; however, they strongly encourage the Georgian authorities to continue such reforms.

B. Existing standards

14. The Venice Commission, in its report on the prosecution service of 2010[3] noted the great diversity of models of the prosecution service existing in Europe and in the world.[4] There are several international documents on prosecutors, such as the 1990 UN Guidelines on the Role of Prosecutors, and the 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of

[1] Article 81-4 of the Georgian Constitution reads as follows: "Bodies of the Prosecutor's Office are under the system of the Ministry of Justice and the Minister of Justice shall provide general management of their operations. The powers and activities of the Prosecutor's Office shall be defined by law"

[2] Available at http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf

[3] CDL-AD(2010)040, Report on European Standards as regards the Independence of the judicial system: Part II – The prosecution service (3 January 2011), http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf

[4] See also Recommendation Rec(2000)19, Explanatory Memorandum, p.11

Prosecutors.[5] Likewise, key OSCE commitments include relevant principles related to the powers and mandate of the prosecution service, such as the 1990 OSCE Copenhagen Document.[6] However, the institutional design of the prosecution service, its internal structure and how it relates to other State bodies are rarely specified. Moreover, the existing institutional principles are often formulated in deliberately vague terms in order to leave the States a wide margin of appreciation in implementing them.

15. Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from "unjustified interference" with their professional activities.[7] The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system.[8] In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. The Venice Commission's report on the prosecution service makes a similar affirmation: "There is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive".[9] The Venice Commission further notes that in many countries "subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases". That being said, a general tendency of giving more independence to the prosecution service has not yet transformed itself into a binding rule that is uniformly applied across Europe.[10]

16. The Venice Commission has in the past welcomed systems where the process of appointing prosecutors "avoids unilateral political nominations", and where several State authorities and bodies participate in the appointment process and seek consensus on candidates. While the right to nominate candidates should be clearly defined, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.[11] At the same time, relationships within the prosecution system between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations (Principle XIV of the Rome Charter). The recruitment, career and dismissal of prosecutors should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination (including discrimination based on gender) and allowing for the possibility of impartial review (see Principle XII of the Rome Charter, and point 5 (a), (b), (e) and (f) of the Committee of Ministers Recommendation, cited above).

C. Appointment of the Chief Prosecutor

17. Under Article 1 the Draft Law, which introduces a new Article 9^1 to the current law, the election of the Chief Prosecutor now follows a somewhat more complex procedure: a

[5] For a list of European norms see Appendix to Opinion No.9 (2014) of the CCPE on European norms and principles concerning prosecutors, https://wcd.coe.int/ViewDoc.jsp?Ref=CCPE%282014%294&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

[6] Which provides, *inter alia*, that "the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution"; see OSCE Copenhagen Document (1990), par 5.14

[7] CM Recommendation Rec(2000)19, point 11

[8] See Explanatory Note to the Rome Charter, p. 47

[9] Cited above, par 26

[10] See the Explanatory Note to the Rome Charter, p. 47; see also the Report on the prosecutors, cited above, CDL-AD(2010)040, par 24

[11] CDL-AD(2010)040, Report on the prosecutors, cited above, par 32

candidate is nominated by the Minister of Justice (Article 9^1 par 1), and then needs to be approved by a 2/3 majority of the Prosecutorial Council (Article 9^1 par 2). After this, the consent of the Government needs to be obtained (Article 9^1 par 3) and, finally, once all of these stages have been completed successfully, the respective candidate is elected by the Parliament (Article 9^1 par 5), by a simple majority.

18. The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of *democratic legitimacy* of such appointments, on the one hand, and the requirement of *depoliticisation*, on the other.[12] Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.

19. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. Thus, the new scheme of appointment of the Chief Prosecutor, as proposed by the Draft Law, is definitely a step forward compared to the existing situation. Furthermore, the non-renewable, six-year term of appointment for the Chief Prosecutor proposed in the Draft Law's amendment to Article 9^1 is to be welcomed, as it will help ensure his/her autonomy and impartiality. Nevertheless, it is noted that the new procedure for appointing the Chief Prosecutor is still not fully balanced and that the "political element" in the appointment process still remains predominant.

20. Political bodies participate in the process of appointing the Chief Prosecutor at several levels. First, they are represented in the Prosecutorial Council: the Minister of Justice, who is part of the Government representing the parliamentary majority, is an *ex officio* member that also chairs the Council, while four other members (out of the total number of nine) are elected by Parliament by simple majority. Second, the Government and the Parliament, again by a simple majority, approve the decision of the Prosecutorial Council on the appointment of the candidate proposed by the Minister of Justice. Finally, the Minister of Justice, has the initial power to nominate the candidate.

21. In sum, the Government and the parliamentary majority play a very important role at all stages of the process of appointing the Chief Prosecutor. In the opinion of the Venice Commission, OSCE/ODIHR and the CCPE/DGI, if the purpose of the reform, as stated in the letter of the First Deputy Minister of Justice of Georgia, is to achieve "*complete* (emphasis added) de-politicization of the Chief Prosecutor's Office", then the procedure whereby the Chief Prosecutor is appointed should be reconsidered, and the influence of the Government/parliamentary majority reduced. There are several ways of achieving this.

22. One way would be to envisage the election of the Chief Prosecutor by a *qualified majority* of votes in Parliament. This solution would secure the broadest political support for the person appointed as the Chief Prosecutor. At the same time, the rapporteurs take note of the fact that in other areas of law, the requirement of a 2/3 majority has in the past led to political stalemates in the Georgian context. Thus, an election by qualified majority would only work in practice if an effective anti-deadlock mechanism is in place to create incentives

[12] Thus, as early as in 1995, the Venice Commission wrote: "It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process." CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, pp. 6 – 7

for both the majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise). In this context, one possible solution would be, in case of such a deadlock, to involve different institutional actors, such as the president of the constitutional court, or another neutral figure or body, who would then have the final say.

23. However, such solution involving the election of the Chief Prosecutor by a qualified majority of members of Parliament may not be needed if the Prosecutorial Council has the necessary independence to avoid too much political interference, and if several other guarantees are in place. Such mechanisms could then counterbalance the election of the Chief Prosecutor by a simple majority.

24. The question of how the Prosecutorial Council is composed will be discussed further below (see Chapter D). Other guarantees, which may create the right balance between political and non-political elements in the appointment process, are as follows:

25. First, under the Draft Law the right of the Minister of Justice to nominate a candidate is discretional, as the Minister is not bound by any rules of selection and has no obligation to explain his/her choice. This process would need to be replaced with a more open, transparent procedure. Indeed, the Venice Commission, OSCE/ODIHR and the CCPE/DGI note that under Article 81^4 of the Georgian Constitution, the prosecution system is defined as being a part of the Ministry of Justice and that this may arguably be interpreted as implying that the Minister of Justice should play a certain role in the process of appointing of the Chief Prosecutor. However, Article 81^4 does not give any specific guidance as to the type and level of influence of the Minister within this process. In the opinion of the Venice Commission, OSCE/ODIHR and the CCPE/DGI, the powers of the Minister of Justice with respect to the nomination of candidates for the position of Chief Prosecutor are too strong and should therefore be reconsidered.

26. Instead, the nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position; the powers of the Chief Prosecutor require special competencies and experience.[13] In designing these qualification requirements, the Georgian authorities should give consideration to the possibility of opening the position of Chief Prosecutor up for highly qualified and experienced legal professionals from outside the prosecutorial community as well.[14]

27. Similar remarks may be made in respect of the qualification requirements for the selection of a Special Prosecutor, which are set forth in a new Article 8^3 par 5 (introduced by Article 1 of the Draft Law). Under this provision, the candidate shall be a former judge, former prosecutor or former investigator with higher education and at least five years' experience of work as a judge, prosecutor or investigator. It is questionable, however, whether an investigator, who is often a starting-level employee of the system, should be eligible to become a Special Prosecutor, given the importance of that position. Instead, consideration should be given to somehow matching the qualifications of the Special Prosecutor to those of the Chief Prosecutor so that there is no serious imbalance between them at the professional level. Moreover, this position of the Special Prosecutor should also

[13] The Georgian authorities informed the rapporteurs that the pool of potential candidates to this position in Georgia is not very large. This is understandable; however, it does not exclude certain qualification criteria from being set out in the law, which must be higher than those for ordinary prosecutors.

[14] For more information on the qualification requirements see CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, par 118; see also CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, pars 34 and 36

be open to legal professionals who do not necessarily belong to law enforcement or the judiciary.

28. In order to make the nomination process more transparent and open, the Venice Commission, OSCE/ODIHR and the CCPE/DGI would recommend that the Minister of Justice proposes not one but *several candidates* to the position of Chief Prosecutor, and that the Prosecutorial Council then selects one of them. The Draft Law should specify that candidates proposed to the Prosecutorial Council have to be selected by the Minister following formal consultations with external independent actors, such as the Bar Association, Judicial Council, civil society and the like.[15] The list of candidates nominated by the Minister should also take due account of the need for gender balance.

29. If the above conditions are met, the Minister will still play a very important role in the nomination process, and, at the same time, the transparency of the appointment procedure would demonstrate to the general public that the candidates for such an important position are selected on the basis of their competencies and experience and not because of their political affiliation.

30. Additionally, the Venice Commission, OSCE/ODIHR and the CCPE/DGI believe that the procedure for appointing the Chief Prosecutor as set out in the Draft Law involves too many decision-making bodies. In particular, it is unclear why the Government, which the Minister of Justice is part of, would need to accept a candidate who has already been nominated by the Minister and approved by the Prosecutorial Council. It is the opinion of the Venice Commission, OSCE/ODIHR and the CCPE/DGI that the executive branch already exercises its influence sufficiently at the nomination stage through the Minister; the additional "consent" of the Government, as provided by the new Article 9^1 par 3 and par 4 would thus appear to be an unnecessary further requirement in this process.

31. An alternative solution would be to transfer the power to nominate candidates for the office of Chief Prosecutor to the members of the Prosecutorial Council, possibly through an open competition. In this scenario, the Prosecutorial Council could send a list of proposals to the Minister, who would then recommend the best candidates to the Parliament.

D. Powers and composition of the Prosecutorial Council

32. The main novelty of Article 1 of the Draft Law is the establishment of the Prosecutorial Council, via the new Article 8^1, which is a very welcome step towards depoliticisation of the Prosecutor's Office. In addition, it is very important that the Prosecutorial Council is conceived as a *pluralistic body*, which includes MPs, prosecutors, members of civil society and a Government official. However, the proposed institutional arrangements would need to be modified in order to ensure the neutrality of this body.

33. First of all, the independence of the Prosecutorial Council and its members should be clearly stipulated in the Draft Law. Article 8^1 par 1 proclaims that the Prosecutorial Council "shall be established at the Ministry of Justice"; however, the meaning of this provision is not entirely clear. Does this mean that the Prosecutorial Council is a part of the structure of the

[15] Additionally, there is a need for a well-reasoned nomination decision of the Minister of Justice, based on the qualification and experience of the candidates proposed to the Prosecutorial Council. This well-reasoned motivation should follow the whole procedure, including in Government and Parliament. Finally, sufficient time should be allocated to the Minister to prepare the list of candidates, and to civil society and other relevant actors to propose possible alternate candidates. To ensure continuity, it is recommended to specify a reasonable period after the unexpected removal, resignation, death or other incapacity of the Chief Prosecutor within which the procedure to nominate a new Chief Prosecutor should be initiated. In cases where the Chief Prosecutor leaves his/her office due to the end of his/her mandate, the Draft Law could specify that the procedure for nominating a new Chief Prosecutor should commence even before the end of the incumbent's mandate.

Ministry of Justice? If this is so, then it would be difficult to accept, since the goal of establishing the Prosecutorial Council is to ensure the depoliticisation and autonomy of the prosecution service from the executive (including the Ministry of Justice) and legislative branches. It would be impossible to achieve this goal if the Prosecutorial Council is defined as being an integral part of the executive.

34. The next question concerns the composition of the Prosecutorial Council. If the Chief Prosecutor is elected and removed by a simple majority of votes in Parliament (see Article 9^1 par 4 and Article 9^2 par 12), it becomes all the more important for the Prosecutorial Council to have a *sufficient non-political component*, to prevent the parliamentary majority from imposing its will upon this body.

35. It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine)[16], and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. Notably, in one of its previous opinions the Venice Commission noted that "the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers […] seems appropriate".[17] At the same time, the Venice Commission stressed that the prosecutorial council "cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament".[18] If the proposed proportion of prosecutors vs. non-prosecutors within the Council is maintained, more safeguards are needed to ensure that the Prosecutorial Council is politically neutral. In order to achieve such neutrality, three groups of measures are suggested.

1. Reducing the prominent role of the Minister of Justice

36. The position of the Minister of Justice within the Prosecutorial Council is very strong. In particular, he/she has the following powers:

- to chair the meetings of the Prosecutorial Council *ex officio* (Article 8^1 par 2 (a));
- to call extraordinary meetings of the Prosecutorial Council (Article 8^1 par 8);
- to nominate a candidate for the position of the Chief Prosecutor (Article 9^1 par 1) and vote, as a member of the Prosecutorial Council, for the approval of this person;
- to provide resources to the Special Prosecutor in order to enable him/her to conduct an investigation into the Chief Prosecutor's alleged misbehaviour (Article 8^3 par 4).

37. The Venice Commission, OSCE/ODIHR and the CCPE/DGI have already recommended the revision of the provisions defining the Minister's power to nominate candidates under Article 9^1 par 1 (see Chapter C above, pars 25 et seq.).

38. It would be advisable to also revisit other powers of the Minister within the Prosecutorial Council. Thus, participation of the Minister of Justice as a member *ex officio* may arguably be explained by Article 81^4 of the Georgian Constitution, which places the Prosecutor's Office within the system of the Ministry. However, in the opinion of the Venice Commission,

[16] Article 8^1 par 15 provides that the Chief Prosecutor may participate in the Council meetings without a right to vote, except in cases when his/her early removal from office or his/her disciplinary misconduct is examined. This paragraph presumably means that in such cases the Chief Prosecutor may not participate in Council meetings at all, but should be clarified, to avoid the impression that he/she may participate, but without the right to vote, when the Council examines the dismissal of the Chief Prosecutor. At the same time, it is positive that the Chief Prosecutor has the right to present his case to the Prosecutorial Council, as provided by Article 8^1 par 12 of the Draft Law.

[17] CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, par 38

[18] CDL-AD(2010)040, Report on the Prosecution Service, cited above, par 41

OSCE/ODIHR and the CCPE/DGI, no specific rule can be inferred from Article 81^4. Moreover, in one of its opinions the Venice Commission has held that "it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate".[19] This option should be considered.

39. Even if the Minister is a member of the Prosecutorial Council *ex officio*, having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee).[20] The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority. Should it fail to do so, the Minister of Justice may still be entitled to assume the Chairperson's position *ex officio*.

40. It should also be clear from the Draft Law that when members of the Prosecutorial Council wish to call an extraordinary meeting,[21] the Chairperson of the Council should not be able to veto such a decision (see in particular Article 8^1 par 5 (e) and Article 8^1 par 8).

2. Council members elected by the Parliament

41. The most important element of the Draft Law concerns the method of nomination and election of candidates to the Council by the Conference of Prosecutors on the one hand, and the Parliament on the other.

42. Under Article 8^1 par 2 (c) and (d), introduced through Article 1 of the Draft Law, the four members of the Council are elected by a simple majority of the nominal list of MPs, which means that only those persons are elected who have the support of those parties with the majority in Parliament. Given that the Minister of Justice is also an *ex officio* member of the Council, it is likely that the parliamentary majority (the ruling party or the coalition) will thereby secure the loyalty of *five out of nine* members of the Council, i.e. more than half. It is noted that a simple majority is not sufficient for certain important decisions – for example, six votes are needed to approve the candidacy of the Chief Prosecutor (Article 9^1 par 2). However, even for such important decisions the balance may very easily be tilted in favour of those members of the Council who are elected by the parliamentary majority. And, in any event, the "majority members" would definitely be able to block important decisions – such as, for example, the appointment of the Special Prosecutor, which also requires the support of six members of the Council (Article 9^2 par 1).

43. In its "Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service"[22] the Venice Commission stated that if members of the Prosecutorial Council are elected by Parliament, "preferably this should be done by qualified majority". In its Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia the Venice Commission held that "elections from the

[19] See CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, par 38

[20] See CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, par 62: "The election of the chairman of the Council by its members is welcomed (Article 85)" and CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, pars 31 and 32: "[…] [T]here are no common European standards on who should preside a prosecutorial council […]. However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC […]".

[21] In the opinion of the Venice Commission, OSCE/ODIHR and the CCPE/DGI, it should be possible for a smaller group of members to call extraordinary meetings; see further details on this below, in the part concerning the powers of the Special Prosecutor

[22] CDL-AD(2010)040, par 66

Parliamentary component [italics added] [to the High Council of Judges] should be by a two-thirds parliamentary majority, with a mechanism against possible deadlocks, or by some proportionate method which ensures that the opposition has an influence on the composition of the Council".[23]

44. The Venice Commission, OSCE/ODIHR and the CCPE/DGI observe that under the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 8^1 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of *nomination* and of *election* of candidates.

45. First of all, the nomination of members of civil society and academia (Article 8^1 par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become *ex officio* members of the Prosecutorial Council without being elected by Parliament.[24]

46. Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).[25]

47. An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.[26]

48. At the same time, if there are too many nominating bodies, and, as a result, too many candidates, it might be useful to establish a parliamentary committee composed of an equal

[23] CDL-AD(2013)007, par 52; at the same time, it is stressed that this was said in respect of the High Judicial Council, and not the Prosecutorial Council. Admittedly, the requirements of independence and depoliticisation are more stringent when it comes to the governance of the judicial system; thus, in its Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro (CDL-AD(2014)042, par 37) the Venice Commission said that "while it is tempting to apply the standards relating to [the Judicial Councils] to Prosecutorial Councils, there are some differences between the judiciary and the prosecution which are significant for the organisation of their respective councils".

[24] In this context the Venice Commission, OSCE/ODIHR and the CCPE/DGI are aware of the incompatibility rule laid down in Article 8-1 § 5 of the Draft Law; the justification for this rule is discussed in more detail below

[25] However, the appointment of judges to this body should not be to the detriment of the representatives of the civil society and prosecutors themselves; it is very important that independent legal professions (i.e. those not belonging to the legislative, executive or judicial branches) are well-represented in the Prosecutorial Council.

[26] When defining civil society groups and academic institutions which may nominate or delegate candidates to the Prosecutorial Council, rules to prevent possible conflicts of interest must apply.

number of representatives of all parties represented in Parliament. The role of such committee would be to pre-select a certain number of candidates and propose them to the Parliament for elections. It is important to ensure the plurality of candidates at this stage: the Parliament should have at least two or ideally three candidates for each vacant position to choose from.

49. At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

50. The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by *qualified majority* (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council *ex officio*.

51. Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce *quotas for members appointed by opposition parties*. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors.

52. The last question which deserves attention is the incompatibility rule set out in Article 8^1 par 5, as introduced by Article 1 of the Draft Law. Under this provision, practicing defence lawyers cannot be members of the Prosecutorial Council elected by Parliament within the "civil society quota" (Article 8^1 par 2 (d)). The Venice Commission, OSCE/ODIHR and the CCPE/DGI are not sure whether the term "defence attorneys" covers only those lawyers who participate in criminal trials on behalf of criminal defendants, or whether it goes beyond this category. Be that as it may, given the limited powers of the Prosecutorial Council and the fact that under normal circumstances, it sits only twice a year and deals only with matters related to the appointment and removal of the Chief Prosecutor, it is not clear why a defence lawyer should not be able to serve on this body. The Georgian authorities explained this by referring to the adversarial character of criminal proceedings in Georgia. In the opinion of the Georgian authorities, a conflict of interests may occur if a defence lawyer participating in a criminal trial would at the same time be a member of the Prosecutorial Council; they also considered that allowing defence attorneys to sit on the Council would violate the principle of equality of arms, as prosecutors do not sit on relevant bodies of lawyers' associations, such as the Bar Association.

53. With regard to the conflict of interest argument, this risk may be reduced by more specific and narrowly formulated conflict of interest rules. In any event, in the proposed setup the Prosecutorial Council does not have any say in the appointment or dismissal of lower prosecutors who participate in criminal trials. The Venice Commission has in the past emphasized the importance of including, in the appointment process of prosecutorial

councils or similar bodies, legal professionals with non-political expertise, and has expressly mentioned members of the Bar among them.[27] It is of course for the Georgian authorities to decide whether it is justified to retain this prohibition in the Draft Law. However, the Venice Commission, OSCE/ODIHR and the CCPE/DGI note that it would be unwise to automatically exclude a whole class of independent legal professionals, who might have necessary expertise in matters debated in the Council, from being represented on the Prosecutorial Council; if some restrictions are necessary, they should be formulated as narrowly as possible.

3. Members elected by the Conference of Prosecutors of Georgia

54. In parallel to the creation of the Prosecutorial Council, Article 1 of the Draft Law introduces another new body - the Prosecutors' Conference (Article 8^2). The main purpose of this body appears to be to elect four representatives from the prosecution service to sit on the Prosecutorial Council. In this sense, it is a useful body which may contribute to the good governance of the prosecutorial system.

55. It is welcome that the Draft Law provides in Article 8^2 par 5 that the Conference of Prosecutors of Georgia shall adopt decisions by secret ballot. However, it is unclear who may stand as a candidate, and how many candidates could run for elections. The text of the Draft Law seems to imply that nominations under Article 8^2 par 6 are made by the respective heads of the various prosecutor's offices. This provision is problematic: in order to reduce any undue hierarchical influence, it is recommended to consider allowing other prosecutors to nominate candidates for the Prosecutorial Council, either through an open election procedure, or via some form of peer-to-peer nominations by prosecutors of all levels.

56. Moreover, the Draft Law should ensure representation from different hierarchical levels of the prosecution service in Georgia,[28] as well as an adequate geographic and gender representation. Currently, the Draft Law specifies that *candidates* to the Prosecutorial Council should represent different levels of the prosecution system; however, there is no safeguard in place to prevent a situation where, as a result of the elections, only the candidates from a certain level or a certain geographical area (for example, from Tbilisi) are elected. One may consider, as an option, elections by separate *electoral colleges*: for example, prosecutors working at the district offices could elect two candidates, while two other candidates could be elected by the prosecutors working at the regional or national levels.[29]

57. To ensure geographical diversity, the Draft Law may further provide that no more than one vacancy on the Prosecutorial Council should be filled by a representative of a particular region or the city of Tbilisi (including the Chief Prosecutor's Office and district Prosecutor's Offices of the city of Tbilisi). Regarding the need to achieve proper gender balance in the composition of the Prosecutorial Council, it is noted that in accordance with the 1995 UN

[27] CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, pp. 6 – 7; CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, par 66. See also e.g. the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Article 4 par 1, which provides for the election of two members of Bar Associations to the Council, and Article 5-1 on the Superior Council of the Magistracy of France (Organic Law no. 94-100 of 5 February 1994) which provides for the nomination of a defense attorney to the Superior Council of the Magistracy by the Bar Association.

[28] See CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, par 66.

[29] The Draft Law describes requirements for candidates; however, it does not say what happens if, during the mandate of a member of the Council he/she is promoted and becomes, for example, the head of the Tbilisi Prosecutor's Office. The Draft Law should specify whether in such cases this member should be replaced, or whether he/she may continue to perform his/her functions within the Council until the end of the mandate.

Beijing Platform of Action, States should establish the goal, if necessary through positive action, of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary.[30] It is recommended include a similar requirement of gender balanced representation in the Draft Law.

58. Article 8^2 par 7 provides that each prosecutor and investigator participating in the Conference of Prosecutors shall vote for one of the Council membership candidates nominated at the Conference. This mechanism does not necessarily ensure the election of those candidates supported by the majority of the prosecutors and investigators. One or two very popular candidates may attract the vote of an absolute majority of voters and a very small number of votes (in theory even one single vote will be enough) may secure the election of other candidates[31]. Furthermore, if two or more candidates receive the equal number of votes, these candidates shall be put to a repeat vote under par 8 of this provision. In this scenario, it is not clear who will have the right to participate in the new voting. If all participants of the Conference should take part, then this may lead to a situation where some participants will vote for more than one candidate. If, on the other hand, only some participants will have the right to vote in the repeat vote, it is not clear how it will be established who has the right to vote.[32] The system of voting at the Conference should be reconsidered in light of the above considerations.

E. Status of members of the Prosecutorial Council

59. The Draft Law should include provisions that describe the status of the members of the Prosecutorial Council; this is essential to guarantee both the independence and the stability of this body.

60. First, the Draft Law should specify that members of the Prosecutorial Council participate in the work of this body in their personal capacity, and may not receive instructions from individuals or bodies outside the Council in the exercise of their functions as members of the Prosecutorial Council.

61. Second, the Draft Law remains silent on the conditions of early termination of office of the members of the Prosecutorial Council (except for the provision contained in Article 8^1 par 3 which will be analysed below). It also does not specify which body may dismiss members of the Council. The Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that it should not be easy to remove a member of the Council from his/her position. While early removal should always be possible in cases of gross misconduct or incompatibility, such decisions should at all times be based on specific grounds enumerated in the Draft Law, and should be confirmed by the majority of the members of the Council itself.

62. There is only one provision which deals with the early termination of office of members of the Council: Article 8^1 par 3 appears to suggest that if a prosecutor elected to the Council is dismissed from service, his/her membership in the Prosecutorial Council shall also be terminated before the expiry of the usual four-year term. This may create a dangerous situation, as under the current law, the dismissal of an ordinary prosecutor is the prerogative of the Chief Prosecutor. It means that the Chief Prosecutor, using his disciplinary powers,

[30] See par 190, under Strategic Objective G., of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en.

[31] During consultations in Venice, the Georgian authorities explained to the Venice Commission, OSCE/ODIHR and the CCPE/DGI that this provision of the law should be read differently, and that each vacancy would be voted on separately; if this is the case, the law should specify this in more explicit terms.

[32] These difficulties would arise if Article 8^2 par 7 of the Draft Law is interpreted as introducing the strict principle "one prosecutor – one vote".

would be able to remove from the Council those prosecutors who voted for the opening of the investigation against him/her. Again, since the prosecutorial members of the Council sit there in their personal capacity, it should be for the Council itself to decide whether or not one of its members should leave the Council.

63. At the same time, the grounds for early removal may be different for those members of the Council who sit there in their personal capacity and those members who sit in the Council *ex officio*. If a member of the Prosecutorial Council have been elected in his/her personal capacity, he/she should not automatically be removed from the Council if his/her title or job changes during the term of service.

64. Finally, the Draft Law should specify whether the activities of Council members are remunerated, and enumerate financial incentives related to their participation in the activities of the Prosecutorial Council.

F. The Special Prosecutor and the nature of "investigations" under Article 92

65. The Draft Law introduces the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor and make recommendations to the Prosecutorial Council concerning the possible dismissal of the Chief Prosecutor.[33] The Georgian authorities explained that currently this issue remains unregulated, and that in theory every prosecutor may open a criminal investigation against the Chief Prosecutor, since the latter does not enjoy any special immunity (although in practice this has never happened and it is unlikely that it would happen in future).

66. The idea of creating a Special Prosecutor who obtains his/her temporary mandate from the Prosecutorial Council and may carry out investigations into the alleged misbehaviour of the Chief Prosecutor is laudable. However, the status of the Special Prosecutor, as well as his/her powers, is not entirely clear in the Draft Law, and the terminology used may be somewhat misleading.

67. First of all, as the Venice Commission, OSCE/ODIHR and the CCPE/DGI understood from the explanations given by the Georgian authorities, the "investigation" conducted by the Special Prosecutor may lead to the dismissal of the Chief Prosecutor and would be a precondition for opening a criminal case against the former (though this is not specified in the Draft Law). If this is the case, this means that during the period of his/her service the Chief Prosecutor enjoys a certain procedural immunity: he/she may not be held criminally liable in an ordinary way but only following a special impeachment procedure. If this is so, then the Draft Law should clarify this point, and also state which acts fall under this procedural immunity (ideally acts conducted in the exercise of his/her duties as Chief Prosecutor).

68. Next, it is difficult to say whether the Special Prosecutor should indeed be called a "prosecutor" and whether the process which may lead to the dismissal of the Chief Prosecutor should be called an "investigation". The function of a prosecutor is to collect evidence, and, if the evidence warrants it, to bring and argue a case before a court of law. However, as explained by the Georgian authorities, the role of the Special Prosecutor is to collect information, which would not have the status of "evidence" and, as such, could not be used in subsequent criminal proceedings. The purpose of collecting such information, and of the ensuing conclusions reached, is to persuade the Prosecutorial Council and the Parliament, where appropriate, that there are reasons to dismiss the Chief Prosecutor from

[33] Article 1 par 1 of the Draft Law creates the possibility of the appointment of a Special (*ad hoc*) prosecutor "in the case specified in Article 9^2 par 2". However, the latter provision specifies the procedure of verifying the information concerning a crime allegedly committed by the Chief Prosecutor. It would be more appropriate to refer to Article 9^2 par 1, which establishes the conditions for appointing an *ad hoc* prosecutor.

his/her office.[34] Thus, the powers of the Special Prosecutor are not identical to the powers of an ordinary prosecutor. Instead, the "investigation" procedure conducted by the Special Prosecutor more resembles a parliamentary inquiry which leads to impeachment rather than a criminal investigation *stricto sensu*.

69. The question of terminology is not idle, since it has a very specific practical dimension in this case: it is unclear to what extent the status and powers of the Special Prosecutor may be associated with those of an "ordinary" prosecutor. The Draft Law stipulates that the Special Prosecutor is authorised to request materials in criminal cases, which the respective bodies are also required to hand over to him/her (Article 9^2 par 5 and par 7); not much else is specified regarding his/her investigative powers. Article 8^3 par 2 states that he/she shall be guided by the Constitution, the Law on the Prosecutor's Office, and other legislation, but does not clarify whether such "other legislation" also includes the Criminal Procedure Code (and the powers that prosecutors habitually have under this Code).The Draft Law should thus make clear whether the Special Prosecutor is also to be considered as a public prosecutor within the meaning of the Law on Prosecutors and the Criminal Procedure Code.

70. The most important question is whether the Special Prosecutor should have any *coercive powers*. In this context, the Georgian authorities explained that the Special Prosecutor would not have "search and seizure" powers and other similar coercive powers which prosecutors usually have. This is not clear from the Draft Law and should be specified.

71. On this point, the Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that the Special Prosecutor should not be a part of the hierarchical system of the prosecutors' offices, and should be answerable to the Prosecutorial Council only; otherwise his/her independence would be compromised. At the same time, the Special Prosecutor should have certain powers which ordinary prosecutors do have, and enjoy similar privileges.

72. The question of coercive powers is of course left to the discretion of the Georgian authorities, but certain considerations should be borne in mind in this context. On the one hand, if such coercive powers involve interferences with the rights to privacy, liberty and other fundamental freedoms, this would probably require more elaborate procedures and the judicial review of such actions. Probably, given the specific nature of the "investigation" conducted by the Special Prosecutor, and in view of the very short time-limits set by the Draft Law for the "investigation", his/her powers should remain fairly limited. On the other hand, giving the Special Prosecutor the same coercive powers that any other "ordinary" prosecutor has might increase the efficacy of the "investigation" conducted by the Special Prosecutor. In this case, the Chief Prosecutor should enjoy similar fair trial rights as those enumerated in the Criminal Procedure Code.

73. Finally, the Draft Law must explain clearly the nature of the decisions taken as a result of the "investigation". In particular, what happens if the report of the Special Prosecutor establishes the existence of a "probable cause" to believe that the Chief Prosecutor has committed a crime (Article 9^2 par 10), but the recommendation contained in the report is not followed by the Prosecution Council or by the Parliament and the Chief Prosecutor is thus not dismissed? Does this mean that the Chief Prosecutor may not be prosecuted anymore in relation to the facts which led to the opening of the "investigation"? If such decision means that the Chief Prosecutor would be "acquitted", this may imply that the "investigation" conducted by the Special Prosecutor is in essence a criminal investigation and must comply with all guarantees of fair trial enshrined in Article 6 of the European Convention of Human Rights. Furthermore, the Draft Law should specify that once the report is adopted by the

[34] Under Article 9^2 par 4, a Special Prosecutor shall prepare a report outlining whether or not there is a probable cause that the Chief Prosecutor has committed a crime. To that end, the Special Prosecutor is empowered to carry out an inquiry specified in Article 9^2 par 5 – 8.

Parliament, a criminal investigation may be initiated against the Chief Prosecutor; if this leads to the raising of criminal charges, this is to be dealt with by criminal courts and the Chief Prosecutor should then be treated as any other citizen. Another question is whether it is possible to prosecute the former Chief Prosecutor after the term of his/her mandate is over. If so, would a procedure involving a Special Prosecutor be needed? As follows from the explanations of the Georgian authorities, the "investigation" conducted by the Special Prosecutor is a procedure *sui generis* which is not identical to a "criminal prosecution". The findings of this "investigation" may lead to the dismissal of the Chief Prosecutor but they do not prejudge the findings of any criminal proceedings which may be opened once the Chief Prosecutor is removed from office or after his/her term of office expires.[35] It is recommended to clearly define the character of the "investigation" and the powers of the Special Prosecutor in the Draft Law.

74. In any event, whatever the nature of the "investigation", this procedure should be subjected to specific safeguards, including, amongst other things, the rights of the defence. The Chief Prosecutor should be entitled to appear before the body taking the decision, present his/her arguments and benefit from other procedural guarantees which are appropriate for this kind of procedure and commensurate with the gravity of the potential sanction. To a certain extent only, this concern is addressed by the provisions of Article 9-2 § 3, as introduced by Article 1 of the Draft Law. If, following his/her dismissal, the Chief Prosecutor is brought to trial, he/she should enjoy all guarantees of the right to a fair trial provided by Article 6 of the European Convention of Human Rights, and should benefit from the presumption of innocence.

G. Procedure of early removal of the Chief Prosecutor from office

75. The Draft Law puts a very high bar in place for the appointment of the Special Prosecutor, who is supposed to conduct an "investigation" into the allegedly criminal acts of the Chief Prosecutor, as well as for the approval of his/her report by the Prosecutorial Council, both of which need to be decided by a 2/3 majority. Moreover, the executive and the legislative branches need to agree to the dismissal of the Chief Prosecutor, following the proposal of the Prosecutorial Council. As a result, the early removal of the Chief Prosecutor from office for criminal misconduct becomes very difficult.

76. As set out in Article 9^2, introduced via Article 1 of the Draft Law, the procedure of removal has to go through several distinct phases. First, someone has to put the question on the agenda of the Prosecutorial Council and, if necessary, call an extraordinary meeting of the Prosecutorial Council. Second, the Prosecutorial Council should decide whether, as a matter of principle, there is a reason to start an investigation and appoint a Special Prosecutor. The third phase is the election by the Prosecutorial Council of the Special Prosecutor. The fourth phase is the "investigation" which results in a report prepared by the Special Prosecutor.[36] The fifth phase, after the Special Prosecutor completes his/her work, is the approval/disapproval of his/her report by the Prosecutorial Council, and the Council's proposal to the Government to dismiss the Chief Prosecutor. If the report is positive (i.e. if "probable cause" is established – see Article 9^2 par 10), the sixth phase is the confirmation of the report by the Government, and its recommendation to the Parliament to discuss and put to vote the removal of the Chief Prosecutor. Finally, the seventh phase is the majority decision of the Parliament, which may or may not decide to dismiss the Prosecutor on the basis of the report prepared by the Special Prosecutor.

[35] The law should specify that during the term of his/her mandate the Chief Prosecutor cannot be investigated in an ordinary manner, and that the initiation of a criminal investigation is possible only if the Chief Prosecutor is dismissed following the "investigation" conducted by the Special Prosecutor. Otherwise there is a risk of two parallel procedures with different conclusions.

[36] In theory Article 9^2 par 4 introduces an additional phase which requires a separate vote by the Council when the Special Prosecutor requests two more months to complete his/her "investigation".

77. The Draft Law, in its current form, does not distinguish clearly between these various phases, which creates confusion. Notably, the Draft Law does not always specify which majority is required at each stage in order for the process to continue. For example, when the initiative to appoint a Special Prosecutor comes from the members of the Council (see Article 8^1 par 8 and Article 9^2 par 1)[37], it is unclear how many votes are needed in order for this question to be put on the agenda.[38] It appears that a 2/3 majority of members of the Council is needed to elect the Special Prosecutor, but is the same majority required for just raising this issue before the Council and deciding that there is a case to answer? Furthermore, the Prosecutorial Council may terminate the mandate of the Special Prosecutor (see Article 8^3 par 6), and that, seemingly, requires only a simple majority (see Article 8^1 par 9), whereas the appointment of the Special Prosecutor requires a qualified majority. It is unclear whether the mandate of the Special Prosecutor may be terminated prematurely (i.e. before the conclusion of the "investigation") and, if so, under which conditions and by which majority of the Prosecutorial Council.

78. Most surprisingly, the Special Prosecutor may decide that there is no case to answer, and this conclusion then automatically closes the case (see Article 9^2 par 10), with no separate decision by the Prosecutorial Council being required. At the same time, in order to approve the "accusative" report of the Special Prosecutor, a 2/3 majority of the members of the Prosecutorial Council is needed (Article 9^2 par 10).

79. Based on the above, it is noted that if the goal of the Draft Law is to make the Chief Prosecutor more accountable, then this goal is achieved only in part. In the proposed scheme, it appears to be much easier to discontinue the proceedings against the Chief Prosecutor than to pursue the case, and the Government or the ruling majority will always be in a position to protect the Chief Prosecutor and interrupt proceedings, if they so wish. Therefore, an extensive revision of the relevant provisions of the Draft Law would be recommended.

80. First of all, it would not be reasonable to require that the procedure of appointment of the Special Prosecutor should be triggered by the majority of the members of the Council – a smaller number of members should suffice. Ideally, each member of Prosecutorial Council should be able to initiate a discussion within the Prosecutorial Council on the appointment of a Special Prosecutor.

81. Second, as regards the second phase - the appointment of the Special Prosecutor – it should be possible to have this decision taken by a *simple majority* of the members of the Prosecutorial Council. One should bear in mind that members of the Prosecutorial Council are supposed to be eminent persons appointed specifically to oversee the actions of the Chief Prosecutor. If five of them consider that there is a need for an investigation and agree on the person who should be the Special Prosecutor, such an investigation should be opened. After all, the opening of an investigation does not amount to the definite dismissal of the Chief Prosecutor. Furthermore, the discontinuation of the investigation should not be decided by the Special Prosecutor alone; whatever his/her findings are, they should be presented to the Prosecutorial Council which should then decide whether or not these constitute sufficient grounds for dismissing the Chief Prosecutor.

82. Third, it would be important for the public to be able to scrutinise the process whereby the Prosecutorial Council and other bodies consider the report of the Special Prosecutor. It is

[37] Alternatively, 1/3 of the full membership of the Parliament may ask the Council to discuss the appropriateness of the appointment of the Special Prosecutor (Article 9^2 par 1)

[38] If Article 9^2 is read in conjunction with Article 8^1 par 6 (e), it appears that the question of appointment of a Special Prosecutor may be raised at an extraordinary meeting, and such meeting may be convened by a decision taken by the majority of the members of the Council.

therefore recommended to require the publication of the report of the Special Prosecutor upon its completion, with the proviso that some information which should remain confidential for a legitimate reason, such as whistle-blower protection, may be withheld or redacted by the Special Prosecutor.

83. Finally, the Government should not have the power to block this process: once the Prosecutorial Council, after having heard the report by the Special Prosecutor, decides that there is a "probable cause" to believe that the Chief Prosecutor has committed a crime, the file should go directly to the Parliament.

84. In addition to initiating proceedings concerning allegedly criminal acts of the Chief Prosecutor, the Prosecutorial Council also has the power to "conduct disciplinary proceedings against the Chief Prosecutor and his/her deputies" (Article 8^1 par 6). It is unclear, however, who may initiate such disciplinary proceedings and how such cases are examined by the Council afterwards. This should be clarified in the Draft Law.

H. Transitional provisions

85. While Article 1 of the Draft Law specifies new additions and wording to the Law on the Prosecutor's Office, Article 2 deals with the transition from the current system to the new system. However, this provision does not specify whether, once the new law is passed, the current Chief Prosecutor would be able to serve out his term. This may be presumed to be the case, but for the sake of clarity, it is recommended to state this more clearly in the transitional provisions[39].

86. Article 2 of the Draft Law further provides that the first Conference of Prosecutors will be organized within one month after the entry into force of the Draft Law, which may be somewhat short, considering the logistics involved in organizing such an event. It is recommended to consider extending this period.

I. Other issues

87. Besides issues which directly relate to the subject-matter of the Draft Law, the Venice Commission, OSCE/ODIHR and the CCPE/DGI invite the Georgian authorities to pay attention to certain other elements of the existing law.

88. Notably, the law should include statutory provisions concerning the nomination, promotion and dismissal of prosecutors, as well as disciplinary proceedings brought against them.[40] Currently, there is little reference to this, aside from some wording on the grounds for

[39] See in this respect CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, pars 58-61

[40] The current Law seems to treat all members of the staff of the Prosecutor's Office, be they prosecutors, investigators, advisors or other employees, the same. This may create awkward situations in relation to their recruitment, selection and functional duties, since these are not the same as regards all members of the prosecutor's staff. In fact, the modality, intensity and even mandatory nature of functional obligations relating to prosecutors are supposed to be different from other staff. This entails significant differences relating to forms of recruitment, productivity and quality rewards, and even restrictive duties concerning freedom of social and political manifestation. The Law under review should take these aspects into consideration.

dismissal of prosecutors under Article 34, which is somewhat vague.[41] The disciplinary regime of the prosecutors should be included in a distinct chapter of the law[42].

89. The internal functional autonomy of prosecutors should likewise be reinforced. Thus, it would be appropriate to make it clear in the law that decisions regarding the pursuance and treatment of criminal cases are carried out without undue interference from the Government. For example, Article 8 par 1 (b) of the current law could be read to imply that the Minister of Justice has the power to intervene in individual cases ("individual legal acts"), while Article 8 par 2 says that the Minister of Justice may not interfere in the actions performed and decisions made by the prosecutor in individual criminal cases. It should be clear from the law that Article 8 par 1 (b) applies to other individual legal acts, and that in all matters pertaining to prosecutors' work on individual criminal cases, the correct rule expressed in Article 8 par 2 should prevail.[43]

90. Article 9 par 3 (d) of the Law also states that the Chief Prosecutor leads the prosecution of high rank state officials. It could be noted that this procedure shall also include the Prime Minister. Moreover, Article 9 par 5 does not specify who may challenge orders or other acts issued by the Chief Prosecutor in a court (whether this is every defendant in court, or even every citizen), and that should be clarified. Finally, the law should define the protection of individual rights and freedoms as a major principle governing every prosecutor in the exercise of his/her mandate .

91. During the consultations in Venice, the Georgian authorities explained that the creation of an independent body dealing with disciplinary proceedings against prosecutors and investigators is being contemplated, which would replace the current system of an internal inspectorate. Such a development would be a welcome step, provided that this body is sufficiently independent and equipped with a strong mandate to effectively investigate complaints against all prosecutors and other officials working for the Prosecutor's Office. In the opinion of the Venice Commission, OSCE/ODIHR and the CCPE/DGI, if the Prosecutorial Council is transformed into a permanent body and organised along the lines suggested in the present opinion, it could also be an appropriate body to take up disciplinary functions in respect of lower-level prosecutors as well.

[41] In discussions with the Georgian authorities, it became clear that there is a special statute for an internal inspectorate conducting disciplinary proceedings, but while Article 8 of the law permits the Minister of Justice to issue normative acts, and to approve regulations on the bodies of the Prosecutor's Office, and their units, the current law does not include specific references to the inspectorate, its powers, or the manner in which disciplinary proceedings are conducted. This should be clarified in current amendments to the law, but also in future amendments, once the decision has been taken to establish an independent body for disciplinary matters.

[42] For more information on how to include this in legislation, see the UN Guidelines on the Role of Prosecutors, in particular pars 1, 2, 4, 6, 7, 21 and 22. See also the Venice Commission's Report on the Prosecution Service cited above, CDL-AD(2010)40, in particular sections F (a, b and d), pars 10-12, and IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, in particular par 6.

[43] In its Report on the prosecution service, cited above, CDL-AD(2010)40, the Venice Commission stressed that although instructions in individual cases are not completely ruled out, they should be accompanied by additional procedural guarantees, such as the requirement that such instruction is put in writing, is reasoned, that the prosecutor concerned should be consulted with, and that he/she should have the right to appeal against such instruction in the case of disagreement with the higher prosecutor - see pars 53 et seq.