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Addendum to the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors: Compilation of comments received from Member States

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In 2008, the commission on Crime Prevention and Criminal Justice, in its resolution 17/2 entitled ”Strengthening the rule of law through improved integrity and capacity of prosecution services” requested the United Nations Office on Drugs and Crime (UNODC) to prepare a structured, verbatim compilation of the comments received from Member States on the Standards of Professional Responsibilities and Statement of Essential Duties and Rights of Prosecutors (the standards), annexed to that resolution, as an addendum to them.

In response to a note verbale sent by the secretariat on 27 June 2008, 31 Member States provided the secretariat with their comments to the standards. This document presents a compilation of the comments and in accordance with the resolution 17/2 is an addendum to the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors.

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I. Introduction

The Commission on Crime Prevention and Criminal Justice adopted resolution 17/2, entitled "Strengthening the Rule of Law through improved integrity and capacity of prosecution services", at its seventeenth session held on 14-18 April 2008, in which it requested United Nations Office on Drugs and Crime (UNODC) to circulate the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (the standards), annexed to the Resolution, to Member States for their consideration and comments. It also requested UNODC to prepare, by the third quarter of 2008, a structured, verbatim compilation of the comments received from the Member States, as an addendum to the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

The Commission also requested Member States, consistent with their domestic legal systems, to encourage their prosecution services to take into consideration the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors and the above-mentioned addendum when reviewing or developing rules with respect to the professional and ethical conduct of members of prosecution services.

It further requested UNODC to continue to provide, upon request by Member States, technical assistance, including, as appropriate, material and tools, such as the Standards Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors and the above-mentioned addendum, to allow Member States to strengthen the integrity and capacity of their prosecution services. It also invites Member States and other donors to provide extrabudgetary contributions for the above-mentioned purposed, in accordance with the rules and procedures of the United Nations.

On 27 June 2008 UNODC sent a note verbale to Member States circulating the standards and inviting comments on them.

This addendum includes the comments received by 19 March 2009.

The following 31 Member States provided comments to the standards: Algeria, Austria, Belarus, Benin, Burkina Faso, Canada, Costa Rica, Denmark, El Salvador, Estonia, Germany, Grenada, Hungary, Japan, Kenya, Latvia, Libyan Arab Jamahiriya, Mexico, Monaco, Norway, Panama, Peru, Philippines, Qatar, Saudi Arabia, Senegal, Serbia, Sweden, Thailand, Ukraine and Venezuela.

II. General comments by Member States

Algeria stated that the consideration of the Professionals Standards did not call for any particular comment, since the rules, rights and duties of prosecutors were covered in great detail by legislation and regulations in force in Algeria, as well as by the deliberation of the Supreme Council for the Judicial Service establishing the Code of Ethics for Judicial Officers. The Code was a means of prevention and a mechanism for peer assessment of any conduct prejudicial to the impartiality, loyalty and integrity of judges and prosecutors in the exercise of their judicial functions. Thus, there was complete agreement between the standards and the description of the situation in Algeria, with the exception of the framework of the prevention and detection of the corruption of judges and prosecutors. Therefore Algeria suggested that a provision imposing the obligation of declaration of assets, which prosecutors must make upon taking office, should be introduced. In Algeria such declaration of assets by judges and prosecutors was a legal obligation,[1] the non-observance of which automatically entails sanctions up to the removal from office as the most serious disciplinary sanction.

Austria had no objections to the standards.

Belarus reported that its relevant authorities had examined the standards and no comments had been made.

Benin stated that generally the Standards were fully in line with the basic principles of Beninese law, which had already made significant progress, notably through the improvement brought by the recent amendment to the legislation on the judicial service, the strengthening of mechanisms of cooperation within the judicial system and the introduction in the rules

[1] The declaration of assets covers the inventory of property and other assets, located within and/or outside the territory, owned or co-owned by the prosecutor himself, as well as those belonging to his underage children (art. 5 of the Law 06-01 of 20/02/2006 on the Prevention and Suppression of Corruption).

of provisions to promote the full exercise of the rights of the defence. However, it was noted that the Standards did not address the question of incompatibilities or conflicts of interest, which were likely to have adverse impact on the independence and impartiality of the public prosecutor.

Burkina Faso stated that the promotion of fair, effective, impartial and efficient prosecution of criminal offences and the promotion of high standards and principles in the administration of justice were essential in that, if followed, they permitted a sound administration of justice and made it possible to gain the confidence of the public in the integrity of the justice system. Burkina Faso was of the opinion that the standards served to strengthen the United Nations Guidelines on the Role of Prosecutors. In addition, it was observed that prosecutors played a crucial role in the administration of the criminal justice as it was the prosecutor who launched the public response when a crime was committed, monitored the judicial process, conducted appeals and ensured that sentences were carried out. The prosecutor also exercised prosecutorial discretion, which was a grave and serious responsibility and had to be done in a transparent manner and with respect for victims' rights. Burkina Faso also stressed that prosecution of criminal offences by prosecutors had to be carried out with full respect for the rights and freedoms of all persons in accordance with the rule of law, and that building a peaceful society depended in part on the confidence of litigants in the judicial system.

Canada was of the view that the standards was a statement intended to serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. The Public Prosecution Service of Canada (formerly the Federal Prosecution Service) was committed to the Standards and the Standards had garnered a broad consensus among all governmental jurisdictions in Canada. Canada also noted that the Standards stated in declaratory fashion the protections that were necessary to ensure that prosecutors were able to perform their duties and exercise their discretion in an independent manner, free from improper influence of pressure. The Standards also enumerated the duties and obligations of prosecutors. It further noted that prosecutorial independence and accountability were essential elements and hallmarks of the rule of law. Further Canada noted that the Standards had been reviewed by the IAP in 2007 and founded to be still fit for the purpose, and, in Canada's view, there was no need to further review of update the Standards.

Denmark considered that the standards were in line with internationally recognized principles.

El Salvador observed that the standards aimed at regulating the standards of ethical, professional and organizational behaviour to be observed by prosecutors so that they could carry out their duties with due impartiality, independence and transparency.

Estonia saw that in unison with the United Nations Guidelines on the Role of Prosecutors the standards sent out a strong message, and finded it important and natural to comply with the Standards.

Germany was of the view that the position of prosecutors in Germany already complied with the standards.

Grenada stated that the provisions set out in the standards were comprehensive and adequate.

Hungary noted that the ethical part of the standards were incorporated in the Hungarian legislation partly in the Constitution and in other acts and partly in the instructions of the Prosecutor General. It further noted that it was generally recognized that prosecutors had to meet higher standards because of the unique function they performed in representing the public interest, and in exercising the sovereign power of the state. Hungary also reiterated the independence of the prosecutor from both the executive and from the legislature and referred to a decision of the Constitutional Curt of Hungary. It also referred to national legislation related to disciplinary responsibility, proceedings and penalties and noted that prosecutors might be held accountable for professional misconduct or a breach of ethical principles in the proceedings before a disciplinary authority. It further noted that the international documents and guidelines concerning ethical issues and domestic prosecution associations helped to designate the precise limits of the duties and rights of prosecutors and fine-tune the interpretation of statutory provisions. This flexible internal regulation within the prosecution organization allowed to prevent prosecutors from getting to delicate situations which were not necessarily legally forbidden yet which could easily undermine the public trust in the impartiality of criminal justice and the rule of law. It pointed out that the standards were silent on the consequences, if necessary, of the interference with ethical rules, including ethical penalties, and suggested that it might be useful for the Standards to give instructions about the way of enforcing ethical rules, about necessity of ethical penalties, the connection between the ethical and disciplinary rules, and the potential impact of the rules on prosecutors' legal status. In Hungary the Standards might have served as a reference in case of disciplinary offences. Hungary also suggested that the Standards should

have put more emphasis on the restriction of public prosecutors' business activities as s/he, in addition to political independence, also had to preserve economic independence. With a reference to the "Budapest Guidelines",[2] Hungary suggested that the Standards should have expressly stressed that it was not allowed that public prosecutors' personal or financial interests or the public prosecutor's family, social or other relationships improperly influenced the public prosecutor's conduct as a public prosecutor. In particular, they should not have acted as public prosecutors in cases in which they, their family or business associates had a personal, private of financial interests or association.

Japan was of the view that the Standards would have served as an relevant but non-binding reference material to promote and strengthen the rule of law through improved integrity and capacity of prosecution services. It also noted that the Standards were those of a private non-governmental organization and would not become United Nations standards even if UNODC had chosen to refer to the Standards upon its delivery of technical assistance as mentioned in the 4th operative paragraph of the resolution 17/2.

Kenya reported that its Department of Public Prosecutions was a member of the International Association of Prosecutor and as such committed to the standards. The Department had in 2007 developed and launched a Code of Conduct and Ethics for Public Prosecutors which set the minimum standards of professional and ethical conduct and a National Prosecution Policy which provided guidelines that would facilitate legal, fair and informed decision-making in the conduct of Public Prosecutions.

Latvia referred to the national legislation governing the prosecutors' tasks, functions, powers and basic principles of performance, such as the Prosecution Office Law, and considered the situation in Latvia to be basically in the line with legal and moral guidelines determined for Prosecutors by the standards. However, along with the development of the legal provisions in the European Union, the legal provisions governing the performance of the Prosecution Office were under revision and improvement in Latvia as well.

The Libyan Arab Jamahiriya had adopted Standards of professional responsibility for the members of the Public Prosecution Service, as well as their essential rights and duties. It referred to the resolution No. 3/2008

[2] The European Guidelines on Ethics and Conduct for Public Prosecutors, adopted by the Conference of Prosecutors General of Europe on 31 May 2005.

of the High Council of Judicial Commissions in Libya on the adoption of a code of ethics and conduct of the members of the judicial commissions.

Mexico recognized that the standards constituted a useful contribution to strengthening the rule of law in our societies, in particular for the values and institutions on which the prosecution service was based, which in turn were fundamental components of the Mexican system for the administration and enforcement of justice. It also considered that the consultation process for the elaboration of the document and its subsequent presentation was suitable, having established the foundation for later initiatives relating to the text in addition to those set out in resolution 17/2 of the Commission on Crime Prevention and Criminal Justice. Mexico was of the view that an efficient, effective and reliable prosecution service, made up of ethical, professional and committed civil servants, which employed a holistic focus, enjoyed the force of law and remained attuned to society would contribute to the full enjoyment of personal liberty and to the country's development. In Mexico the Office of the Public Prosecutor of the Republic had issued the Code of Conduct for this body, establishing that public services should be conducted in conformity with the principles of legality, objectivity and impartiality, professionalism, efficiency, honesty, loyalty, transparency, respect for human dignity, institutional solidarity and reliability. Article 20 of the Constitution provided that criminal proceedings should be accusatorial, oral, public, adversarial, continuous and held in the presence of a judge, principles which in Mexico's view were consistent with the standards. Mexico also suggested that given the many systems for prosecution and the administration of justice worldwide the definition of "prosecutors" in the text of the Standards should have been broadened. In the specific case of Mexico, the functions described for the prosecution were carried out by "officials of the prosecution service". It also suggested that the scope of the words "non-prosecutorial authorities" should have been clarified to ensure that the Standards did not give the impression of going beyond the competence of the prosecutorial role. Mexico also made some remarks to the Spanish translation of the standards.

Monaco welcomed the Standards and stated that the text would enhance a unified approach to the laws governing the various prosecution services and provide guiding principles for the discharge of their work. For the most part the Standards, which by nature were non-binding, embraced well-known concepts endorsed by many legal experts, and they were particularly useful in that they indicated the approach to follow in ensuring their implementation and observance. In fact, stated Monaco, they constituted genuine guidelines for the professionals concerned.

Norway states that the Standards are well balanced and provide good instructions for the work of the prosecuting authorities, independent of national legal systems and local challenges. Norway finds it important that the Commission on Crime Prevention and Criminal Justice emphasizes these important standards during their meetings and through the adoption of resolutions. Also the Director of Public Prosecutions in Norway has confirmed that the prosecuting authorities will adopt and follow the Standards.

Panama reminded that at the at the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Havana, in 1990, attention had been drawn to the important role of prosecutors within the justice system, with had marked differences in their degree of involvement from one jurisdiction to another, and as depositories of the trust of the population, and noted that the standards should have been seen as a vital pillar of the institution and as a decisive factor of general interest, since they constituted the ideal standards of behaviour on which the prosecutorial culture rested, as an integrated mode of life reflecting what the profession was, wished to be and ought to be, represented by values which formed part of its collective identity.

Peru stressed that the standards had to be applied with full respect for the constitutional and legal order in each country and without affecting the autonomy and independence of the prosecution services or of prosecutors in the performance of their functions.

Qatar referred to the Law No. 10 of 2002 and its amendments, stating that they contained the standards of professional responsibility of prosecutors referred to in the resolution 17/2.

Saudi Arabia presented a report of the Saudi Commission for Investigation and Prosecution and its efforts in strengthening the rule of law.

Senegal was of the opinion that the establishment of guiding principles and rules relating to the role of prosecutors could contribute effectively to the strengthening of the integrity of criminal justice and to a positive perception among the general public of the justice system. It would also help to strengthen the rule of law by ensuring, through an independent and impartial criminal justice system, that the rights and freedoms accorded to all citizens were respected. It noted, however, that the ultimate objectives to which those principles were directed, risked remaining no more than a formal reality unless the necessary changes were made to the current

organization and operation of the legal systems of developing countries. The success of the measures undertaken would largely depend upon the capacity to push through the necessary reforms.

Serbia, referring to the Conference of Consultative Committee of Public Prosecutors on Europe in Sankt Petersburg on 2-3 July 2008, noted that the process of institutionalization of international cooperation and harmonization in application of standards for proceedings of Public Prosecutor's Offices was globally continued and transferred to the highest levels worldwide. The standards practically confirmed and summed up conclusions from conferences and meetings of international organizations and bodies dealing with the issues of judiciary functioning.

Sweden supported the standards and was of the opinion that they were entirely taken into consideration by the Swedish Prosecution Authority and in the application of law in Sweden.

Thailand was of the view that the standards were appropriate, clearly stated and in accordance with the practice of Public Prosecutors in Thailand.

III. Comments on the specific articles of the standards

1. Professional Conduct

Subparagraphs (a)-(h)

Serbia proposed that paragraph 1 should state that prosecutors should protect honour and dignity of their profession in compliance with the law and ethic principles from the code of professional ethics. In Serbia's view indicating of the code of professional ethics as guidelines for acting and conduct of public prosecutors would increase significance of adoption and implementation of such documents in prosecutorial practice.

Burkina Faso stated that the purpose of the obligations regarding the professional conduct of judicial officers in general and of prosecutors in particular was to preserve the interests of the profession. Consequently, those concerned should conduct themselves with full respect for the duties of their profession. Specifically as to the subparagraph *(a)* it stated that

any failure in maintaining the honour and dignity of the profession should be subject to disciplinary penalties. The provisions of article 50 of Organic Law No. 036-2001/AN of 13 December 2001 Regulating the Judicial Service in Burkina Faso was clear on this point. It was therefore to be welcomed that the statement in the annex mentioned this obligation concerning professional conduct.

Peru stated that in subparagraph *(b)* a reference to the Political Constitution should be added before the reference to "the law [...]", since the Office of the Prosecutor General was a body with constitutional status whose competence and functions were established by that same supreme instrument.

In relation to subparagraph *(c)*, Burkina Faso also stated that the persons selected as prosecutors were to be persons of integrity and ability. The integrity of this category of judicial officers had to be strongly affirmed in view of the duties assigned to them in the administration of justice. Prosecutors had to defend the general interests of society while respecting individual freedoms. Seen from this angle, any lack of this fundamental value, which in most cases manifested itself in the corruption of the persons concerned, seriously impaired the trust of litigants in the judicial system. Black sheep should therefore be subject to exemplary penalties, as a result of the strict application of the rules of professional conduct.

Burkina Faso also saw that keeping abreast of relevant legal developments, as required in subparagraph *(d)*, was an ethical obligation. Prosecutors had to be competent in order to ensure the effective administration of justice and keep abreast of relevant legal developments in order to have the necessary legal capacity to fulfil their responsibilities. A lack of competence impaired the quality of the justice system; such a prosecutor was no longer useful to the judicial system and was a danger to it.

As to the subparagraph *(e)* Burkina Faso noted that the duty to be independent and the duty to be impartial, in addition to being professional duties, were principles set down in the Constitution and in the legislation regulating the judicial service. It was fitting that they should have been recalled in the annex to resolution 17/2. In carrying out their duties and at all other times, prosecutors had to abstain from any conduct that will affect the confidence placed in their independence and impartiality (article 34, paragraph 1, of the Law of Burkina Faso Regulating the Judicial Service).

It also reminded that the right of each person to a fair trial, as stated in subparagraph *(f)* of the Standards, could only be ensured if the accused had the right to information. This right to information represented for the prosecutor an obligation to ensure that all the evidence was disclosed, in accordance with the law, and to present to the court the evidence which was relevant to the crime so that justice might be done on the basis of a fair trial. To ignore this right was to deny the accused the right to justice. That was a right recognized by the Universal Declaration of Human Rights and enshrined in constitutions around the world.

El Salvador suggested that subparagraph *(f)* should read as follows: "*Safeguard the legality of trials with a view to ensuring that an accused person enjoys the right to a constitutionally structured trial in accordance with the Constitution and legislation regulating the prosecution service's powers in each country*".

Panama noted that in the same way as mention in subparagraph *(f)* was made of the need to "protect an accused person's right to a fair trial … and … ensure that evidence favourable to the accused is disclosed", the right of victims to real access to justice and not to be re-victimized should also have been included, in the interests of ensuring the success of the proceedings.

Also Hungary suggested that the duty to protect and respect the victims' and witnesses rights should have been incorporated in paragraph 1 of the standards to emphasize the importance of that element.

Peru considered that the standard in subparagraph *(f)* was inappropriately placed in the paragraph entitled "Professional conduct"; instead, it should have been incorporated into subparagraph 4.3 *(c)* of the paragraph entitled "Role in criminal proceedings", which reads: "safeguard the rights of the accused in cooperation with the court and other relevant agencies;"

As to subparagraph *(g)*, Burkina Faso noted that the prosecutor always had to promote the interests of society and protecting those interests was sacrosanct. Paragraph 13 *(b)* of the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the prevention of Crime and the Treatment of Offenders, held in Havana, 27 August-7 September 1990, stipulated that prosecutors must protect the public interest.

El Salvador suggested that subparagraph *(g)* should read as follows: "*Defend, serve and protect the State and society whenever the public interest is threatened*."

2. Independence

Subparagraph 2.1

In relation to Paragraph 2.1 of the Standards, Mexico was concerned that the reference to the prosecutorial discretion of the public prosecution service, when permitted in certain cases, might have given rise to incorrect interpretations. Accordingly, it suggested the following wording in order to delimit the duties of prosecutors, regardless of the fact that the elements presented presupposed a legal framework: *"The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently, free from political interference and in the interest of justice"*.

Subparagraph 2.2

Peru stated that standards 2.2 and 2.3 were not consistent with the Peruvian legal system, which guaranteed the Office of the Prosecutor General and prosecutors autonomy and independence in exercising their functions, as provided for in article 158 of the Political Constitution of 1993, article 5 of Legislative Decree No. 152 and the Organization Act of the Office of the Prosecutor General. Peru complied fully with those provisions; had it not been to do so, the position that non-prosecutorial authorities should have been permitted to instruct prosecutors in the exercise of their functions might have been interpreted as valid. This, in turn, might have been used as the basis for constitutional and legislative amendments to the extent that such a position had been accepted by the United Nations, without consideration of its implications and possible interpretations. Such changes would have harmed the institutional framework for and functioning of the rule of law in Peru.

Subparagraph 2.3

Referring to Paragraph 2.3 of the Standards, Burkina Faso stated that the independence of judicial officers was asserted in constitutions throughout the world and in laws regulating the judicial service (article 129 of the Constitution of Burkina Faso and article 4, paragraph 1 of the Law of Burkina Faso Regulating the Judicial Service). This applied also to international and regional legal instruments. However, a question was raised regarding the actual independence of prosecutors due to their position in the hierarchy relative to the executive, and in particular to the Ministry of Justice. While it was true that, in view of their position in the hierarchy,

they were subordinate to the executive and to the Ministry of Justice, their position was protected in law and also strengthened by the behaviour of some prosecutors who did not follow instructions to the letter. It was true that prosecutors received written instructions, but they were independent for the remainder (90 per cent) of cases.

In particular, continued Burkina Faso, they freely developed oral comments which they considered to be appropriate for the administration of justice (article 32 of the Code of Criminal Procedure of Burkina Faso and article 7, paragraph 2, of the Law Regulating the Judicial Service). In keeping with the principle that writing was subject to control but speech was free, prosecutors had a degree of independence, although it had to be broadened further, and it was up to them to assert it. Accordingly, the affirmation of the independence of prosecutors in this declaration was to be welcomed. Moreover, the public authorities had to ensure that when they took action, they did so with due regard for legality and did not undermine the independence of the prosecution. That was a requirement of the rule of law.

Costa Rica suggested to add words "*substantiated and public*" in subparagraph 2.2, after the word "transparent", and after subparagraph 2.3 add a new subparagraph 2.4 which would have stated as follows: "*Prosecutors shall oppose and reject any interference from other bodies, agencies or institutions that might affect the independence of prosecution service*".

El Salvador suggested that subparagraph 2.3 should read as follows: "*The right to institute or to stop criminal proceedings brought by the statutory authorities should be strictly in accordance with each country's Constitution and criminal procedure legislation*".

3. Impartiality

Subparagraphs (a)-(f)

In relation to subparagraph *(a)*, Burkina Faso noted that impartiality was a principle embodied in constitutions and in international and regional legal texts, and to ensure respect for human rights, it was essential for a person's cause to be heard by an impartial court (article 4 of the Constitution of Burkina Faso). Impartiality also reflected the right of everyone to equal protection of the law. Referring to subparagraph *(b)*, it further noted that impartiality required that precedence was given to the rule of law and to

the principles of equity and that neither personal interests nor those of one of the parties or other considerations distracted judicial officers from their duty to be impartial. They had to serve only the public interest.

Burkina Faso also noted, in relation to subparagraph *(d)* that investigations had to be conducted for the sole purpose of ascertaining the truth, and thus not only incriminating but also exonerating evidence had to be sought. Prosecutors had to act with complete objectivity, taking duly into consideration the position of the suspect and all relevant circumstances, regardless of whether they were favourable or unfavourable for the suspect.

Costa Rica suggested to add in the end of subparagraph *(b)* the words "*in accordance with the Law*".

Peru suggested that the text of this sub-item *(b)* should have been amended as follows: "remain unaffected by individual or sectional interests, the interests **of other State agencies** and public or media pressures and shall have regard only to the public interest, **as provided for by law**;" In Peru's opinion it was considered necessary to include the wording highlighted in bold and underlined above in order to provide a framework for the impartiality of the work of prosecutors, as in article 159, paragraph 1 of the Political Constitution of Peru. This reflected the fact that while other public interests might exist, it was inappropriate for the prosecutor to consider such interests in the exercise of his or her functions since, as a member of the Office of the Prosecutor General, his or her role was to defend the law.

El Salvador suggested that subparagraph *(c)* should read as follows: "*Act with objectivity and transparency, where action is taken by an official in the course of his duties and functions*".

Panama reminded with regard to subparagraph *(f)* that note should have been taken in respecting the right of the victim to alternative outcomes, even where this did not correspond to the community's sense of "justice".

In view of the many judicial systems in the world and the terms used to refer to suspects, Mexico proposed the following alternative wording to the subparagraph *(e)*:"*in accordance with local law and the requirements of a fair trial"*. It also suggested that the concept of "the accused" should have been included in addition to "the suspect".

4. Role in Criminal Proceedings

Subparagraph 4.1

Referring to subparagraph 4.1, Burkina Faso noted that to establish the truth, it was important for criminal cases to be processed expeditiously. This was only possible if the reasons for delays were overcome. Delays were due for example to the shortage of human resources at all levels and, to a certain extent, to the idleness or negligence of prosecutors. Burkina Faso further reminded that prosecutors also ensured the enforcement of decisions rendered by the courts on criminal matters. Their role excluded any notion of victory or defeat: they performed a public service.

Costa Rica suggested to add in the end of subparagraph 4.1 the words: "*with loyalty to the court and the parties*".

Subparagraph 4.2

As to the subparagraph 4.2 *(a)* Peru noted that neither the conditional "where authorized" nor the reference to participation in the investigation of a crime or the exercise of authority over the police applied to Peru, since, in the Peruvian legal system, it was the Political Constitution itself that established clearly and inarguably the direct and exclusive competence of the Office of the Prosecutor General as the body responsible for conducting the investigation of a crime from the outset of that investigation and the obligation of the National Police to comply with the instructions of the Office of the Prosecutor General within its area of competence (article 159, paragraph 4). Therefore, it suggested, the wording of standard 4.2 could have been interpreted and possibly used as an argument for reversal of the State's criminal policy, which was currently based on the modern accusatorial system and thus on the autonomy and independence of the Office of the Prosecutor General as the body responsible for investigation and prosecution, having departed from the previously prevailing inquisitorial system.

Burkina Faso noted, as to the subparagraph 4.2 *(b)* that prosecutors enjoyed the prerogatives recognized by law for conducting investigations in cases of violations of criminal law. In such instances, they had to ensure respect for the rules of procedure.

As to subparagraph 4.2 *(c)* Peru also stated that it did not apply to Peru since, according to the Peruvian legal system, the giving of advice

did not fall within the competence of prosecutors. However, prosecutors might issue a reasoned opinion on any bill relating to the Office of the Prosecutor General or the administration of justice and might also take part in commissions established to draft amendments to national law, in national or international congresses or in professional development courses, as provided for in articles 4 and 21 of the Organization Act of the Office of the Prosecutor General, approved by Legislative Decree No. 52.

Ukraine proposed to supplement the paragraph 4.2, subparagraph *(c)*, after the words "when giving advice" with the words "*and composing accusation*" and subparagraph *(d)*, after the words "and will not continue with a prosecution" with the words "*or discontinue criminal proceedings*".

In relation to subparagraph 4.2 *(d)* Burkina Faso stated that prosecutors may decide, on the basis of the offence committed, whether or not to institute proceedings. This was a manifestation of the principle of discretionary prosecution, which prosecutors enjoyed by law. Article 39 of the Code of Criminal Procedure of Burkina Faso provided that prosecutors should receive complaints and allegations and should decide how to deal with them. In the exercise of this power, prosecutors might close a case if they concluded that trial is inappropriate (absence of or insufficient evidence). As could be seen, the rule only applied during the initial stage of prosecution.

Venezuela noted that the wording of paragraph 4.2, subparagraph *(d)* might be ambiguous or imprecise, because, for example, when it spoke of the institution of "criminal proceedings", it introduced problems relating to what was meant by "proceedings" and the determination of the moment at which it might be assumed that criminal proceedings had been instituted or have commenced. The provision also stated that prosecutors "*will not continue with a prosecution in the absence of such evidence*", concerning which it should have been pointed out that it was not clear whether this meant that an indictment would not be issued unless it was supported by the relevant evidence, or whether it meant that, once the indictment had been issued, new circumstances might arise indicating that the evidence upon which the indictment was based had been nullified.

Venezuela proposed that the provision should be made more precise, and, with regard to the indictment, it was preferable, for the sake of clarity, simply to state that "*in the institution of criminal proceedings, they will issue an indictment only when a case is well-founded …*".

As to the institution of the investigation, Venezuela stated that such institution or the institution of criminal proceedings would only proceed

automatically in cases authorized by law, when the prosecution – by means that all legal systems provided – learned of allegedly illegal acts that would have been necessary to investigate and register as such, with all the circumstances which might have influenced the characterization of the offence and the responsibility of the perpetrators and other participants, as well as the determination of the facts directly or indirectly relating to the commission of the offence.

Venezuela also noted that in conformity with Venezuelan legislation on criminal procedure, the term "evidence" referred specifically to the evidentiary basis obtained in the public hearing or, exceptionally, prior to the trial, and should therefore haven been the subject of an adversarial procedure between the parties. Consequently, with regard to the preparatory stage of the proceedings, more general terms should have been used in the subparagraph *(d)*, for example "exhibits" or "evidentiary items", so that the provision could cover all the legal systems of the States parties.

As to the subparagraph 4.2 *(e)*, Burkina Faso noted that the law required that prosecution had to be firm and complete and at the same time fair. Prosecutors might not take account of evidence that had not been filed in the case and which had been the subject of inter partes hearings. Further as to subparagraph *(f)* it continued that prosecutors also ensured the enforcement of decisions rendered by the courts on criminal matters. Their role excluded any notion of victory or defeat: they performed a public service.

Subparagraph 4.3

Burkina Faso commented as to the paragraph 4.3 *(a)* that professional confidentiality was protected by law, and prosecutors had to respect it.

To subparagraph 4.3 *(d)* Burkina Faso noted that it concerned the right to information of all persons who were the subject of criminal prosecution or who were involved in a judicial procedure, with a view to ensuring a fair trial. Panama reminded regarding that subparagraph to guarantee, in applicable cases, the protection of the rights of victims, witnesses and other participants in the proceedings.

In relation to subparagraph 4.3 *(f)* Burkina Faso clarified that evidence which had been obtained by threats, violence or deception must not be taken into account if allegations of such acts proved to be true.

It further noted, related to subparagraph 4.3 *(g)* that the indictments chamber, which monitored the activities of the police, was empowered to take appropriate measures against perpetrators of torture or cruel treatment inflicted on a person in order to obtain evidence (articles 224 to 230 of the Code of Criminal Procedure).

As to the subparagraph 4.3 *(h)* Burkina Faso noted that by law, prosecutors might only continue or discontinue proceedings on offences during the initial stage of prosecution. They might no longer do so once prosecution had commenced. They might only continue the proceedings and request the discharge of a suspect or the acquittal of an accused by submitting exonerating evidence to a court or to the criminal chamber of the Court of Appeal.

Referring to the same subparagraph, Peru stated that the Peruvian legal system did not allow the Office of the Prosecutor General to waive prosecution, since the conduct of criminal proceedings was established by the Constitution as an inalienable function of the Office of the Prosecutor General. However, the Office of the Prosecutor General had discretionary power and might refrain from initiating criminal proceedings by invoking the principle of prosecutorial discretion in the case of adults and ordering the transfer of proceedings in the case of juvenile offenders.[3] Therefore Peru suggested that the final part of the sub-item should have been amended to read: *"where such action is legally advisable and appropriate"*.

Serbia noted that it was necessary to grant independence in prosecution and not only to proclaim constitutional independence in organization and functioning of Public Prosecutor's office. Therefore Serbia proposed to include into Chapter 4 (Role in Criminal Proceedings) the principles contained in the Recommendation of the Council of Europe (CoE Recommendation) on the role of public prosecution in the criminal justice system,[4] especially the provision contained in Article 9 defining the limits of procedural independence of Public Prosecutor's Office.[5] Serbia noted that a detailed formulation was necessary because independence of Public Prosecutor's Office was often groundlessly

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[3] Article 2 of the Code of Criminal Procedure.

[4] Council of Europe, recommendation Rec (2000) 19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies.

[5] Art 9: With respect to the organization and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximize the proper operation of the criminal justice system, in particular the level of legal qualification and specialization devoted to each matter.

identified with independence of the courts and in national legislations there were difficulties when formulating legislative solutions for public prosecutor's offices.

Serbia also proposed including text on physical protection of prosecutors as stated in article 5 *(g)* in the CoE Recommendation[6] and on the possibility to carry out their duties and responsibilities without unnecessary interference as stated in the article 11 of the Recommendation.[7] Serbia also suggested to include text on prosecuting all kinds of perpetrators, including public officials,[8] and on the prosecutor's strict duty to respect independence and impartiality of judges[9] as stated in articles 16 and 19 of the CoE Recommendation, respectively.

Mexico noted that although the Standards recognized differences between countries with regard to the intervention of the prosecution at the investigation stage, some parts of the text did not distinguish clearly between the various functions of members of the prosecution both as investigators and in their participation in the criminal proceedings.

5. Cooperation

Mexico was of the view that cooperation or assistance discussed in paragraph 5 should have been expressly limited to the channels established by the applicable international legal instruments and to the domestic legislation of each country.

Peru noted that this sub-item was not in line with the Peruvian legal system. In Peru, it was the responsibility of the prosecutor to direct the investigation, while the police provided support or cooperation. However, the Office of the Prosecutor General might cooperate with other institutions for the purposes of providing a better service or performing its functions more effectively.

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[6] Art. 5 *(g)*: public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions.

[7] Art. 11: States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

[8] Art 16: Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

[9] Art. 19: Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.

Subparagraphs (a)-(b)

Hungary recommended naming positively the "Probation Service", the "Victim Aid Service" and the "Legal Aid Service" in this paragraph in the frame of "other government agencies" mentioned in subparagraph *(a)* based upon the fact that in many United Nations Member States these organizations had high importance related to the accused persons and to the victims.

Burkina Faso noted that cooperation with other investigation services, as mentioned in subparagraph *(b)* was obligatory at all times for a smooth administration of criminal justice.

Costa Rica suggested to add a new subparagraph *(c)*, which would read as follows: "*ensure that they have the proper legal tools under international instruments in order to stimulate the exchange of useful and accurate information for international penal co-operation*".

Panama suggested to add about promoting diversion to alternative dispute resolution of cases in which victims request this, following informed consent.

6. Empowerment

Subparagraphs (a)-(i)

The Libyan Arab Jamahiriya suggested adding in the end of subparagraph *(a)* the following words: "*enjoying judicial immunity for ensuring the performance of their professional duties without intimidation, hindrance or harassment*".

Burkina Faso stated that the protection to which judicial officers, and prosecutors in particular, were entitled was a guarantee of their independence. It was up to the authorities to provide this protection. Judicial officers had to be able to perform their duties freely and independently without any fear. Both international and regional texts recognized the right of judicial officers to the protection of their person, their possessions and their families against violations of any kind. Such protection had to be ensured both during and outside the performance of their duties.

It further noted, in relation to subparagraph *(b)*, that to guarantee the complete independence to which the prosecutors were entitled, the

protection of judicial officers had to extend to the members of their family. Members of the family had to be physically protected by the authorities when their personal security was endangered on account of the performance of the duties of the officer with whom they were related. In Burkina Faso judicial officer's family members were entitled to such protection when threats and attacks occurred as a reaction to decisions taken by such officers in the performance of their duties or in the context thereof.[10]

Burkina Faso also noted that good living and working conditions, as mentioned in subparagraph *(c)*, were necessary to ensure quality functioning of the judicial system and to restore to the judiciary service the place assigned to it by the constitution in a State based on the rule of law. It was also important, that upon retirement judicial officers were able to retain their position in society and continue to have a decent standard of living.

Estonia noted that considering the responsibility of prosecutors and the need to guarantee their continuing impartiality it was important to set general standards to protect prosecutors against arbitrary action by governments.

Costa Rica suggested additional wording to the subparagraph *(c)* so that it would read as follows: "to reasonable conditions of service and adequate remuneration, commensurate with *the risk that they face and* the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished".

As to the subparagraph *(e)*, Burkina Faso stated that promotion of judicial officers had to be based on objective criteria in order to rule out undue or unjustified promotions.

Burkina Faso stated in relation to subparagraph *(f)* that a special procedure had to be applied to judicial officers when disciplinary steps were necessitated. If members of the executive and legislative powers were not subject to ordinary proceedings, the same should have been true for judicial officers, who also exercised constitutional power.

Burkina Faso further noted, in relation to subparagraph *(h)* that the legal texts in force in all countries and legislation regulating the judicial service ensured the right of association of judicial officers. The right to form and

[10] Law Regulating the Judicial Service (Organic Law No. 036-2001/AN of 13 December 2001), art. 33.

join professional associations and trade unions and to hold office in them was one of the civil rights granted to all citizens in the constitutions of all countries around the world and by international legal texts.

As to the subparagraph *(h)* Peru also noted that its broad wording would have entailed the violation of the provisions of article 153 of the Political Constitution, which prohibited judges and prosecutors from forming associations.

El Salvador suggested the following wording to subparagraph *(h)*: "*To form part of a professional association in accordance with the constitutional and legal restrictions in force in each country, with the aim of promoting training and academic exchange and improving professional qualifications at both the technical and personal level, which will enable them to increase their productivity at work and improve their salaries, without prejudice to the stability or institutional status that they should enjoy, whether or not they belong to an association.*"

In relation to subparagraph *(i)*, Burkina Faso stated that in political systems based on the rule of law, legal statutes provided for the right not to comply with a manifestly unlawful order. Obeying such an order incurred criminal sanctions. For example, In Burkina Faso article 70 of the Criminal Code provided that a manifestly unlawful order issued by the legitimate authority was not a ground for exemption from criminal responsibility.

Costa Rica suggested to add to the end of the subparagraph *(i)* the words: [and]"*is not substantiated or fails to conform with established procedure*."

Serbia proposed to add to chapter 6 (Empowerment) provisions obliging the public prosecutors when exercising powers outside the criminal law field, and referred to the Conclusions of the Conference of Prosecutors General of Europe,[11] held in Saint Petersburg, Russian Federation, 2-3 July 2008, specifically point 8 of the Conclusions. In addition, Serbia was of the view that points 9, 10, 11 and 12 of the Conclusions would have improved the standards to that extent that they should have been integral part of them. The text of the Conclusions reads as follows:

> "9. The Conference underlined the growing need in our societies to protect effectively the rights of vulnerable groups, notably of

[11] CPE (2008) 3.

children and young people, witnesses, victims, handicapped persons, as well as social and economic rights of the population in general. It expressed the opinion that prosecutors may have a crucial role to play in this respect.

10. The growing involvement of the State in the settling of current problems such as the protection of the environment, consumers' rights or public health, may lead to widening the scope for the role of prosecution services. Any extension of the role of the public prosecution outside the criminal law field must fully respect the ECHR, and in particular its article 6 on the right to a fair trial, notably the access to an independent and impartial tribunal, as well as the case-law of the European Court of Human Rights.

11. Considering Recommendation (2000)19 and in particular its section on "Duties of public prosecutors towards individuals", prosecutors in countries where they have such prerogatives should ensure the effective protection of human rights outside the criminal law field before, during and after the trial.

12. The Conference resulted in the exchange of a variety of practices and experiences concerning the role of the prosecution services in the protection of human rights and public interest outside the criminal law field. The best practices discussed during the Conference concerning the efficient protection by public prosecution services of individuals for questions outside the criminal field which come within their competences could be examined with a view to the possible application of this positive experience by the member States where the public prosecution services have such authority."

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