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COMMENTS
ON THE AMENDED LAW OF UKRAINE ON THE PUBLIC PROSECUTOR'S OFFICECONCERNING REINSTATEMENT OF THE MILITARY PROSECUTION OFFICES

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Introduction

1. These comments are concerned with the amendments to the Law of Ukraine on the Public Prosecutor's Office ('the Law') on reinstatement of military prosecutors' offices, which has been adopted on 14 August 2014. They are prepared by the CoE consultant Mr. Erik Svanidze.[1]The comments have been produced under the auspices of the Council of Europe's Project "Support to criminal justice reform in Ukraine", financed by the Danish Government. They are based on an English translation of the Law provided by the Project.

2. The comments first suggest some general remarks addressing the issues relevant to maintaining military justice and prosecution systems, their models. There is then an Article by Article analysis of the provisions in the Law.

General remarks

3. The Law is not furnished with an explanatory note (not presented for the review).Nevertheless, from the context of the developments in Ukraine it is to be assumed that the reinstatement of military prosecutors' offices has been prompted by a need to adjust the judicial treatment of armed forces to the circumstances of anti-terrorist (wide-scale military) operations taking place in the Eastern and South-Eastern parts of the country. It is evident that an introduction of a distinct military prosecution system aims at bringing in the specific military expertise, institutional and other arrangements deemed necessary for that.
4. Since the amendments do not explicitly refer to armed conflicts as understood by the corresponding offshoot of international law, it is to be concluded that the Law follows the pattern of non-war-time jurisdiction and relevant administration of justice in military sphere, which occasionally involves armed operations, use of armed forces in emergency and some other related exigencies of military life. It is understood that the Ukrainian authorities intend to address the situation without introducing martial law or derogating from peacetime legal framework, applicable rule of law and human rights standards, including the derogable provisions of the European Convention on Human Rights (ECHR).
5. The Law, therefore, is to be compatible withand assessed from the point of view of the ECHR, European Court of Human Rights (ECtHR) military prosecution-related and other relevant case law, as well as general standards concerning prosecution systems reflected in the 2013 and earlier opinions of the Venice Commission concerning the prosecution system legislation in Ukraine, as well asthe general standards on military justice and judicial treatment of armed forces.[2] It is to be

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[2] See: Council of Europe Parliamentary Assembly's Recommendation 1742 (2006) on "Human rights of members of the armed forces", its Committee of Minister's Recommendation CM/Rec (2010) 4 on "Human Rights of Members of the Armed Forces" and explanatory memorandum to it, other relevant international instruments and texts, including "Handbook on human rights and fundamental freedoms of armed forces personnel", published by OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Centre for the Democratic Control of Armed Forces (DCAF) in 2008; the 2006 Report "Issue of the administration of

mentioned in this regard, that the international standards accept singling out and maintaining separate military justice systems or some of their components, including prosecution structures, in order to ensure the efficiency of the armed forces and the appropriate performance of their military and related functions. At the same time, in doing so the states are to balance these arrangements with appropriate safeguards and take considerable additional legislative, organisational, institutional, administrative and, as a result, financial measures in order to ensure compatibility of such systems with human rights, rule of law and other relevant standards. In other words, this approach requires special arrangements, additional guarantees and efforts for ensuring its compliance with these considerations. It presupposes significant endeavours in overcoming certain caution that is inevitably bred by the distinct rules, military appearances and related implications of such models.

6. The Law does not mention and it can be concluded that there is no intention to introduce a separate system of military courts in Ukraine and the move is limited to a reinstatement of a system of military prosecution offices. This arrangement, where matters handled by the military prosecution are subject to jurisdiction of ordinary courts, avoids particularly burdensome measures that are necessary to reconcile the military considerations and separate judicial systems with the majority of restrictions as to their jurisdiction over civilians,[3] specific judicial safeguards for meeting the requirements of the right to liberty and security, independence and impartiality of military judiciary in terms of securing fair trial requirements and other relevant international standards.
7. The very specific context of the reinstatement of the system of military prosecution offices in Ukraine suggests that they will be **abolished again** after the circumstances, which prompted this move, seize to exist. It is also to be expected in view of the temporary character of the investigative jurisdiction of prosecutors over the military offences established by the CPC (its transitional provisions).
8. Moreover, in the Ukrainian context an introduction of the system of military prosecution offices **is to be reviewed in the course of the forthcoming overall reform of the public prosecution in the country**. The Venice Commission opinions on the public prosecution in Ukraine demand that in order to overcome the Soviet procuratura heritage and its reminiscence, it is to comply with and be reformed under more rigid country-specific requirements.[4] The considerations that in 2012 made the Venice Commission to welcome the abolishment of a system of military prosecution offices in Ukraine were related to uniformity that is to be ensured by consistent principles of organisation and operation, uniform status of all public prosecutors, uniform procedure for organisational support for the prosecutors' work, the sole and exclusive funding of the PPO out of the state budget, and addressing the issues of the internal operation of the PPO by prosecutorial self-governance bodies.It regarded the abolishment as a necessary simplification of the system.[5]Prior to that, in its 2009 opinion the Venice Commission criticised the comprehensive structure of military prosecutor's offices that mirrored the structure of government as a whole and

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justice through military tribunals"prepared by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. E. Decaux, E/CN.4/2006/58.

[3]Based on the definition of military offences provided in Article 401 of the Criminal Code of Ukraine they extend to non-military personnel of the armed forces and some other militarized agencies, as well as civilian accomplices.

[4]See paras. 12-29 of the 2013 (Joint) Opinion of the Venice Commission.

[5]Paras. 26-27 of the Venice Commission Opinion on the draft Law on the Public Prosecutor's Office of Ukraine, CDL-AD(2012)019.

represented typical Soviet type approach where a prosecutors' office was primarily concerned with acting as a watchdog on the public administration.[6]

9. Apart of the country-specific reasons, an abolishment of a specialised system of military prosecutor's offices would be in line with the overall historical trend of splitting and further distancing of prosecution from the military chain of command up to attribution of this function to the ordinary (civilian) system. Although different forms of institutional affiliation of military prosecutors, including a status of serving officers, are regarded as useful for ensuring that "the prosecutors will be specialists in military law (specific regulations) and will thus be familiar with the military context", it has been suggested that 'bearing in mind that some legal systems grant prosecutors broad powers in terms of determining charges, when to discontinue prosecution, the examination of evidence, and the possible cross-examination of defendants and other witnesses, their independence from the chain of command is an important consideration."[7]
10. In the majority of European jurisdictions that have assigned the function in issue to ordinary prosecution systems, the interests of having relevant knowledge and experience is achieved by means of internal individual specialisation of prosecutors. Some countries have opted for more specific arrangements. Thus, in the Netherlands criminal prosecution of military offences is handled before relevant military chambers (judges) in one of territorial civilian courts (Arnhem) by the prosecutor's office of the same district that has become specialised in the respective category of cases.

Article by Article analysis

Article9. Participation in Meetings of Central Government Authorities

11. The amendment introduced to the Article envisages that military public prosecutors may participate in organizational activities conducted by authorities where the prosecutors supervise compliance with laws. This and some other provisions of the Law[8] clearly suggest that the functions of military prosecutors will not be limited to criminal justice field. The considerations against retention of these functions by prosecutors in Ukraine specified by the Venice Commission in its most recent opinion[9]are reinforced in this Law by the lack of further indications as to relevant substantial jurisdiction of military prosecutors. Its implicit delineation amounts to providing them with **unfettered discretion** in this regard**.** This might not only amplify the perils of performing by prosecutors the criticised general supervision and other functions from outside the criminal justice field, but also lead to **duplication of the military chain of command and undermine efficiency of the latter.** It would be advisable to specify the scope of functions in issue and further procedures for their execution accordingly**.** As to the format, it would not be correct (even as a temporary solution) to define it by a unilateral order of the Prosecutor General, as envisaged by Article 13 of the Law.

Article 13. System of Public Prosecutor's Offices

[6] 2009 Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor, CDL-AD(2009)048, para. 21.See also below the comments to the amendments to Article 9 of the Law on the PPO.

[7]"Handbook on human rights and fundamental freedoms of armed forces personnel", OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Centre for the Democratic Control of Armed Forces (DCAF), 2008, p. 228.

[8]Article 20 of the Law.

[9]See the 2013 (Joint) Opinion of the Venice Commission, paras. 16-29.

12. Unlike for the scope of competence of military prosecutors outside the criminal justice field,[10]there is considerable certainty as to their investigative jurisdiction that is established in the CPC.[11] It is expected that it will be further distributed according to territorial or military-specific (chain of command / garrison or unit-linked) jurisdiction, which is implied in the structure and hierarchy of the military prosecution offices topped by a deputy Prosecutor General designated as the Chief Military Prosecutor and Prosecutor General accordingly.
13. At the same time, due to the considerations of meeting the specific standards of impartiality and independence,[12]there is a need to be particularly vigilant and make sure, when providing further details as to the competence of military prosecution system, that **their actual jurisdiction does not extend to investigation of cases that regardless of the classification according to an Article of the Criminal Code essentially concern any of serious human rights violations**. Relevant investigations are to be conducted by civilian investigative agencies.
14. This is to be also taken into account with respect to implementation of the exceptional provision envisaging a possibility for military public prosecutor's offices to substitute territorial (ordinary / civilian) ones in case of their failure to 'perform their functions because of force majeure circumstances' in certain administrative areas of Ukraine**.** It is to be noted that the Law refers to the function of 'supervising law compliance'. It should not be interpreted as automatically extending to their functions envisaged by the CPC. Thus, any of arrangements with regard to **taking over investigative or prosecutorial jurisdiction should be guided by the CPC norms (para. 5 of Article 36 and Article 37) that provide for a case-specific approach.**
15. The Law leaves the issue of staffing levels of the system and specific military prosecution offices open. Taking into account the specifics of the situation it provides the General Prosecutor with necessary flexibility (within the overall limit for the whole system) for adjusting it to the immediate exigencies.

Article 14. The Prosecutor General's Office

16. Institutional autonomy of the Chief Military Public Prosecutor's Office envisaged by the Article is in line with the overall rationale of the move.[13]
17. A possibility for attributing the Chief Military Public Prosecutor with additional powers in his capacity of Deputy Prosecutor General does not apply and should not be interpreted as applying to the system of military prosecution offices.

Article 17. Investigators of the public prosecutor's offices

18. By specifying that regional and descending chain of military public prosecutor's offices shall have corresponding posts of respectively investigators of special cases, senior investigators and so on down to (simple) investigators, the amendment mirrors the classification established for the ordinary prosecutors offices and does not raise any concerns.

Article 20. Powers of public prosecutors

19. The wording chosen for expanding the prerogative of free entrance to'headquarters of military bases irrespective of the order established there' makes it applicable to all prosecutors and not just military ones. Thus, it runs counter the rationale of the

[10] See the comments to Article 9 above.
[11]See para.7 above.
[12]See below the comments on Article 46-I of the Law.
[13] See also para. 13 above.

reinstatement of distinct system of military prosecution offices. However, it should be assumed that this wording has been chosen in order to keep the amendment as simple as possible and does not suggest that it is an exceptional power intentionally provided to civilian (ordinary) prosecutors.

Article 46-1. Personnel of Military Public Prosecutor's Offices

20. This completely novel article establishes a special requirement for prosecutors or investigators of military prosecution offices of being military officers on active duty or reservists. It seems to serve the purpose of ensuring their necessary proficiency in military matters. However, it would be preferable to ensure this by specifying that military prosecutors and investigators are required to have necessary proficiency in military matters.
21. As to the stipulation that in addition to the Law in issue 'they serve on active duty according to the Law of Ukraine on the Military Service Obligation and Military Service' and are to benefit from related advantages, it would be preferable just to recapitulate them in the Law and envisage that they are provided on the expenses of the prosecution and not armed forces. It is preferable to maintain the same approach towards disciplinary and service rules for the personnel of the military prosecution offices. It is to be envisaged by the framework of their system and not military chain of command in general.
22. In addition to other factors,[14]such an institutional affiliation with the armed forces, and, more importantly, implied subordination to the overall military hierarchy and chain of command is considerably undermining the appearances of independence and impartiality of individual military prosecutors and investigators and their system. It is unfortunate because it increases the risk of not meeting the requirements of the standards of investigation of serious human right violations.
23. The main challenges faced by military justice systems regarding the obligations in issue are similar to situations, where the relevant human rights of servicemen or other individuals affected by armed forces confront the responsibilities and interests of military authorities, their decisions, action or inaction. When restricting jurisdiction of military courts over civilians, the ECtHR suggests that a combination of even seemingly minor, nuances can justify a party's doubts as to independence of the military judiciary.This is exemplified by the *Miroshnik*v. *Ukraine*, where in spite of some institutional guarantees, the ECtHR paid attention that it was foreseen by the domestic law that the judges of the military courts were military servicemen, and in that capacity they constituted a part of the staff of the armed forces subordinated to the Ministry of Defence. The Court further observed that it was up to the Ministry of Defence to provide the judges of military courts with appropriate flats or houses if they needed to improve their living conditions. It noted that entities from the Ministry of Defence carried out the financing, logistics and maintenance of the military courts on a practical level. While it was not within the competence of the Ministry of Defence to decide on the annual scope of the financing and maintenance of the military courts, it did administer that financing and maintenance on a daily basis. The ECtHR concluded that these aspects of the status of the military courts and their judges, taken cumulatively, gave objective grounds for the applicant to doubt whether the military courts complied with the requirement of independence.[15]

[14]See comments to Articles 46-2, 47, 49, 52 and 53 below.
[15]*Miroshnik*v. *Ukraine* (2008) Application No. 75804/01, paras. 61-64.

24. The ECtHR case law suggests that, similarly to *Miroshnik*v. *Ukraine*, the same nuances and such formal signs as investigators, judges and prosecutors wearing uniforms or being serving officers of equal rank to those implicated, investigated or subjected to trials, do matter for handling cases of serious human rights violations.[16] These standards require that, even in the context of armed operations, investigations are effective and, first of all, carried out with advanced appearances of impartiality and independence from military authorities.[17]Thus, it is highly questionable that prosecution systems or any other investigative body with considerable institutional, functional, logistical, hierarchical or any other military service-related links with the armed forces and chain of command could comply with the advanced and demanding standards concerning independence and impartiality and overall effectiveness of investigations of serious human rights violations. This conclusion is also based on the derivative standards of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.[18]

Article 46-2. Grounds for Dismissing Officers of the Public Prosecutor's Offices

25. The article now envisages that servicemen in military public prosecutor's offices may be dismissed from service according to the laws regulating military service and, thus, reinforces the concerns as to appearances of their independence.[19]

Article 47. Class Ranks of the Public Prosecution Officers

26. The same considerations are relevant for the provision specifying that servicemen in military public prosecutor's offices shall be awarded military ranks.[20]

Article 49. Material and Social Support of Public Prosecution Officers

27. The housing and other benefits, in the circumstances, could be crucial for ensuring normal working conditions, compensating the difficulties and dangers inherent in performing functions of military prosecutors. However, as discussed, if provided by the military authorities, this arrangement makes them dependant on the chain of command and undermines their independence.[21] It is to be noted that some jurisdictions, including Russian Federation (for the military judges), have envisaged that this support covered from the budget of judicial authorities.

Article 52. Financial and Technical Support of the Public Prosecutor's Offices

28. The payment of salaries by the Prosecutor General's Office is an appropriate arrangement. Due to the same concerns,[22]this does not apply to provision of military uniform, transport and means of communication (including special ones), personal protection kits, firearms and other necessary property by the Ministry of Defence.

Article 53. Official Uniform of the Public Prosecutor's Office

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[16]*BarbuAnghelescu*v. *Romania* (2004) Application No. 46430/99, para. 67.
[17]See *Al-Skeini and Others* v. *the United Kingdom* (2011) Application No. 55721/07, paras. 161-177.
[18]Adopted by the Committee of Ministers of the Council of Europe on 30 March 2011at the 1110th meeting of the Ministers' Deputies.
[19]See comments to Article 46-1 above.
[20]*Ibid*.
[21]*Ibid*.
[22]*Ibid*.

29. As discussed, military class ranks could be one of factors undermining the appearance of independence of the military prosecutors from the armed forces and their hierarchy.[23]

Article 56. Interpretation of the definition "public prosecutor"

30. The inclusion of a reference to Article 46-1 extending the definition of 'public prosecutor' over the military ones does not raise any additional concerns.

Conclusion

31. Provided that the Law in question is applied with due regard being paid to the highlighted considerations (in bold) and it is temporary (to be reviewed upon the circumstances that prompted it seize to exist or diminish their significance), the restoration of the system of military prosecution in Ukraine does not otherwise contradict rule of law, human rights and other principal international standards.

[23] *Ibid*.