Conference of Prosecutors General of Europe

3rd Session

organised by
the Council of Europe
in co-operation with the
Prosecutor General of Slovenia

Ljubljana, 12 – 14 May 2002

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Letter of Welcome from the President of the Republic of Slovenia, Mr. Milan KUČAN
to participants of the third Conference of prosecutors general of Europe

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It is a matter of great satisfaction that I have this opportunity to extend greetings to participants in the Third Conference Of Prosecutors General of Europe, which will take place here in Ljubljana, the capital of the Republic of Slovenia. I very much hope that you will enjoy your stay in our country and that your work will prove useful. Today's third conference of European Prosecutors General continues the necessary and praiseworthy efforts to improve international cooperation in the field of criminal prosecution and to increase our effectiveness in protecting basic civilised values and, still more importantly, human rights.

In Slovenia we are well aware of how important a role the judiciary and the public prosecution service play within the system of the separation of powers. The work of an independent judiciary, bound only by the law and respect for fundamental ethical principles, is vital to enforcing the rule of law. For some time now it has been impossible to effectively prosecute criminal acts and protect human rights solely within the framework of a single national judicial system. Following the ratification of its founding charter, a new International Criminal Court has been established – an important step in shaping the institutions of global democracy within a system marked by the rule of law. Prosecuting criminals that do not recognise borders and, even more importantly, the perpetrators of international organised crime will require closer, more organised and in all likelihood more institutionalised forms of cooperation between national public prosecution services and the police under their supervision. In the future we will need new forms of cooperation and international organisation in the economic and political spheres, in the fight against terrorism, security in general and especially in the field of criminal prosecution.

I believe that your conference will be a great encouragement to the work of Slovenia's public prosecution service, as well as an encouragement to Slovenia's executive and judiciary. It will be a contribution to the proper regulation of organisational and status related issues within the public prosecution service. I believe that once more at this third conference participants from the Republic of Slovenia will make their contribution to the joint efforts of your organisation under the auspices of the Council of Europe.

Once again I wish you every success in your work and a pleasant stay in our country.

Address by
Mr Candido CUNHA, member of the Secretariat of the Council of Europe at the opening session

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It is a great honour for me today, on behalf of the CoE, to address this high assembly of prosecutors general and other high level prosecutors of Europe.

I am the only (with you …) not to be a prosecutor and therefore beg your indulgence in listening to my address.

My quality here – as I mentioned – is that of representing the CoE, i.e. the organisation that has taken the initiative of bringing you together in the present shape. And – I hope – the organisation that will take upon itself in the future the mission of assisting you in the accomplishment of your own designs.

And I hope so because in fact your designs entirely match those of the CoE. How and why?

- because in each of your respective countries, you are one of the pillars of the rule of law, as much as you are the protectors of human rights; and your position rests in the very heart of democracy.
- At the same time, the rule of law, human rights and democracy are equally the three values for the protection and promotion of which the CoE was founded 53 years ago.

I must add that the pursuit of peace based upon justice and international co-operation is also a statutory aim of the CoE. And again in this respect the CoE's aim matches yours. Because indeed in this evermore "globalised" world your action may no longer be confined within the limits of your own constituencies. Whether you like it or not, reality imposes on you to pursue justice and other fundamental values beyond the borders of your respective countries.

We all know how crime has become more and more international and more and more organised. You will not be able effectively to deal with crime without engaging yourself in international relations.

However, we also know how much the internationalisation of the reactions against crime may bring down the level of guarantees afforded to the individuals. Many across Europe - and beyond Europe - have sworn to engage in fights and combats, even wars, against the evils known as organised crime to some, corruption to others, terrorism to the remaining. It is again upon your shoulders that falls the burden of ensuring that all such fights and combats and wars, do not entail any violation of human rights. In that frantic war against sin, wickedness,

evil and other recurrent myths and realities, you must see to it that our liberties are not jeopardised.

In the globalisation of the response to crime, you are – using Alessandro Baricco's language in his marvellous little book NEXT - at the same time the "testimonials" and the "rebels", i.e. you are amongst those who remind the world that today is global and tomorrow will be even more global; and you are amongst those that raise their voices against the misuse of global response to crime. You are indeed one of the most reliable shields that Europeans have against all kinds of extremes.

So, on both counts of prosecuting crime and safeguarding rights and liberties, your action is doomed to be more and more international.

Most instruments to that effect remain undisclosed. It very much belongs to you to invent ways and means to pursue your designs in that direction. Only together can you do that. And your Conference is the right framework to do it at European level. And I submit to you that in this respect the European level is the most workable level: on the one hand, a world-wide level is not really practical; on the other hand, action at a the level of part only of the European area would not take into account the geography of crime.

Justice, as much as the rule of law, human rights and democracy require that public prosecutors across Europe join their forces, assert their common values, harmonise their views in order to pursue in common what there is for them to pursue in common. It all lies on your hands. ….

You share with the CoE a key role in safeguarding and realising the ideals and principles which are the common heritage of our European countries.

May the wisdom of all contribute to seal a pact between you and the CoE: a pact that will allow both, together, to play the role that they share.

The session that is now starting constitutes an opportunity to give a step forward in that direction.

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Co-ordinating Bureau activity report
by Marc ROBERT, Prosecutor General of Auvergne (France)
Chair of the Bureau

A year ago, on 16 May 2001, the second Pan-European Conference of Prosecutors General of Europe held in BUCHAREST asked the Council of Europe's Committee of Ministers to officially establish, within the Council, a "*Conference of Prosecutors General of Europe*", with its own "*co-ordinating bureau*".

On 5 September 2001, the Committee of Ministers expressed an interest in these proposals, instructed the Directorate of Legal Affairs to present it with a formal draft and, in the meantime, authorised the release of funds for Conference and Co-ordinating Bureau meetings.

In accordance with the resolution adopted in Bucharest, this Bureau

- which began operating in October 2001 – comprises six representatives of prosecution services:
- one member of the prosecution service of the country that hosted the last Conference, in this case Mr JOITA, Prosecutor General of Romania;
- one member of the prosecution service that is to host the next Conference, in this case Ms CERAR, Prosecutor General of SLOVENIA;
- two others were elected by the Conference, namely Mr MONETTI, Deputy Prosecutor General at the Italian Court of Cassation, and Mr VAN ERVE, Chief Public Prosecutor in the National Prosecutor's Office of the Netherlands;
- and finally, two were directly appointed by the Council of Europe Secretariat, namely Mr RANGE, Prosecutor General of Lower Saxony (Germany), and myself, Prosecutor General of Auvergne (France), whom the other members of the Bureau have kindly appointed as Chair.

I would like to express my particular appreciation to Mr CUNHA, head of the criminal law and criminal justice division of the Council of Europe's Directorate of Legal Affairs, for acting as secretary.

This is the first activity report which I have been asked to present on behalf of the Co-ordinating Bureau.

Allow me first of all to say thank you on behalf of the entire Conference to the Prosecutor General of SLOVENIA for welcoming us here today in Ljubljana. I know how much effort and skill goes into organising a conference of this kind. Its success, and I have no doubt that it will be a success, will be a direct reflection of your efforts, Madam, and the efforts of your office, for which I am most grateful.

Allow me also, before going on to describe the Bureau's activities, to take a quick look back.

A few years ago, many of us would not have believed that such a conference, based on shared values, was even possible, so formidable were the barriers surrounding our national prosecution services, whether because of different legal systems, political rifts or other residues of the past.

Then, in 1996, the Council of Europe set up a committee of experts which, for the first time, allowed representatives of 25 of our prosecution services to discuss their role in the institutions and the criminal justice system, their members' rights and also their duties to the public, and to establish, on all these points, a framework for harmonisation, free from corporatism and dogma.

Four years later, on 6 October 2000, the Council of Europe's Committee of Ministers adopted the experts' findings in the form of Recommendation (2000)19 on *the Role of Public Prosecution in the Criminal Justice System*, which, for the first time at international level, committed 44 public prosecution services, and their states, to a set of shared values, and common guidelines, firmly rooted in the Convention for the Protection of Human Rights. For us, as representatives of Europe's prosecution services, this is our "constitution" as it were.

In order for this international instrument to really succeed, however, and not become just another good intention that was never followed through, more needed to be done.

With the help of the Council of Europe and in particular the Directorate of Legal Affairs, some of us thus set about creating a co-ordinating body for the prosecution services of the CoE member states, of which there were then 43: thanks to all of you, following the Strasbourg meeting in May 2000, and later the Bucharest meeting in May 2001, the project became a reality, with the launch of the Conference of Prosecutors of Europe, whose third plenary session we are currently attending.

Today we possess not only common guiding principles, but also an organisational structure for putting them into effect. Our mission now, and it is not the easiest one, is to take that which unites us and translate it into practical measures.

This brings me, quite naturally, to the various tasks which the Bucharest Conference saw fit to assign its future Co-ordinating Bureau and which we have endeavoured to accomplish, despite the budgetary constraints that have prevented us from meeting as often as we would have liked.

The Co-ordinating Bureau, as you know, has both permanent terms of reference – including the task of representing the Conference between sessions and providing follow-up to Recommendation (2000)19 – and specific terms of reference defined by the Conference.
Allow me, then, to report to you on the progress made under each of these terms.

General term of reference no. 1:
to promote INFORMATION and TRANSPARENCY

At its meetings in Strasbourg, the Bureau sought firstly to define its collective operating procedures; top priority was assigned to information and transparency, in order to ensue that the Recommendation and work of the Conference were widely disseminated, and in order to keep you informed, in your capacity as prosecution service officials, of the Bureau's activities.

To this end, an exhaustive list of official representatives of member states' prosecution services was drawn up. Also included in the list were officials from the governing bodies of the judiciary and prosecution services, professional organisations for prosecution staff and, finally, colleges and training centres, as these have a particular role to play in disseminating the Recommendation and ensuring that it is taken on board.

This list was used to send out various circulars asking you to reply to certain questions, for it is important that our activities be based on a sound knowledge of the problems currently facing Europe's prosecution services.

At the same time, a special section on the Conference of Prosecutors General was inserted in the Council of Europe's web site: as explained in a memo from the Secretariat, which you will receive in due course, this section contains the main reference texts as well as documents pertaining to the current session.

In the near future, we hope to introduce an on-line discussion list accessible to all the prosecutors general, which will enable the Bureau to publish a regular newsletter as well as summaries based on replies to the various questionnaires sent out. It should also facilitate discussion, despite the language barrier.

General term of reference no. 2:
to REPRESENT the CONFERENCE

Convinced of the need both to raise the profile of the Conference and to promote a harmonious, co-ordinated approach to issues that have a bearing on the judiciary, the Bureau contacted *the Consultative Council of European Judges*, whose President, the Right Honourable Lord

Justice MANCE, I am pleased to welcome here today, in order that the two organisations might exchange information on their activities and hold joint discussions on matters of general interest.

The Bureau also contacted *the European Committee on Crime Problems* and *the European Committee on Legal Co-operation*, in order that the Conference might be kept informed of any work in progress or liable to be of interest to prosecution services and thus issue opinions (either ex officio or on request) or express preferences about matters that concern it under Recommendation (2000) 19. It has thus taken an interest in Recommendation (2001) on the European Code of Police Ethics, and the work of the Reflection Group on international co-operation in criminal matters.

The Bureau also represented the Council of Europe at the fourth conference of Prosecutors General of the European Union, which took place on 29 and 30 November 2001 in Brussels, and made a special point of inviting the Prosecutor General of Sweden to join us here today in his capacity as organiser of the next EUROJUSTICE conference, to be held in October.

General term of reference no. 3:
Follow-up to Recommendation (2000)19

Turning this Recommendation into a reality is one of the key aims of this Conference, and the main reason why it was established in the first place.

Our primary task is help those prosecution services which so wish to implement the Recommendation, which means that the Bureau must be ready to respond to any requests for mutual assistance which it receives, and to represent the Conference at any international colloquies or meetings which have a bearing on the prosecution service.

In keeping with the principle laid down in Bucharest, however, mutual assistance must be accompanied by evaluation. To this end, the Bureau recently contacted each prosecution service, asking it to describe, in detail, how the Recommendation was applied. The Prosecutor General of Slovenia has compiled a summary of the replies, which you will find in the handouts: much has been accomplished, but there is still a great deal of work to be done in some states.

Each plenary session of the Conference also provides an opportunity to focus on a specific aspect of the Recommendation: in Bucharest, it was relations between the prosecution service and the police, and the role of the prosecution service in dealing with victims of crime; this time it was decided, on a proposal from the Prosecutor's Office of Slovenia, to examine relations between public prosecution and the judiciary.

Mr LATHOUD, Prosecutor General of Douai (France), will speak on this subject this afternoon.

As well as mutual assistance and evaluation, there is also a need to expand on the Recommendation, in order to give substance to certain aspects of this founding instrument.

This year we propose to deal with the ethics and liability of prosecution staff, a subject that will be covered tomorrow morning in the report by Professor MYJER, Chief Advocate-General at the Amsterdam Court of Appeals.

There was nothing accidental about the decision to focus on status and ethics, the Bureau having consulted each of the prosecution services beforehand in order to identify their main concerns. Of all the issues mentioned, the most common were the institutional role of the prosecution service in relation to the executive; the status and role of the prosecution service in relation to the judiciary; the relations and respective powers of the prosecution service and the police; and finally, ethics and international co-operation.

The issues that we will be discussing, beginning this afternoon, will thus strike a chord with many of you.

Still on the subject of follow-up to the Recommendation, the Bureau has had to deal with the tricky question of how to respond in the event that certain provisions of the Recommendation should appear to have been infringed or jeopardised and, with them, the prosecution service concerned.

The Bureau unanimously agreed that, in such an event, the Conference would be justified in taking a stance, by reminding the representative judicial bodies concerned of the basic principles in question or by referring the matter to the Committee of Ministers, for example.

The Bureau also felt, however, that it could not embark on such a course without the prior approval of the Conference meeting in plenary session. It will thus be asking you in future for permission to take the appropriate action, should the need arise.

General term of reference no. 4:
preparations for the LJUBLJANA Conference

In view of the information already provided, I have nothing further to add here, except to point out that the Bureau has devoted a significant portion of its meetings to these preparations, particularly as regards the topics for discussion and organising the working groups.

Specific term of reference no. 1:
development of a DATABASE on public prosecution

At your second session, the Conference asked the Bureau to look into the feasibility of developing a European database on public prosecution, to store documents already kept at the Council of Europe and also the main national instruments of each of the member states, and which could be accessed remotely.

With the help of a Council of Europe expert, the Bureau examined the technical aspects, and also considered what the goals of the project should be. You will be asked to comment on the proposals, as outlined in a memo that will be given to you shortly. In the meantime, I would merely point out that if the new database is to be a success, each prosecution service must undertake to forward the information requested and ensure that it is updated, which means appointing a special correspondent.

The next step will be to negotiate Council of Europe funding for the setting-up and running of the database, which will naturally require staff.

Specific term of reference no. 2:
INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS between prosecution services

The Bureau has tried to adopt a pragmatic, practical approach in this area, while taking care not to step on the toes of the authorities specifically responsible for such matters.

As we see it, there are three key issues where prosecution services are concerned:

- first of all, the Conference of Prosecutors General should state its position on the proposals already made by the competent authorities for improving international co-operation in criminal matters. In view of the central role played by the prosecution service in this co-operation, it is important that its representatives make their views on these plans officially known, before any final decision is taken.
  Such will be the task of the working group that is to meet tomorrow morning.

- The Conference, however, should not merely state opinions: it should also put forward suggestions so that rapid progress can be made in this area. To this end, and bearing in mind the existing European Union procedures, your Bureau asks you to approve the establishment of a network of "contact points", in each of the 43 prosecution services, with

information and training to be provided by the Council of Europe via regular meetings.
The working group meeting tomorrow morning will provide the Bureau with an opportunity to explain its proposals in this area, and to begin discussing them with EUROJUST officials.

- on the basis of examples, the Conference might wish to recommend ways of organising prosecution services internally so as to achieve more effective co-operation in criminal matters within each prosecution service. For there is no point in improving international co-operation instruments unless every effort is made, within each prosecution service, to be as swift and efficient as possible.
Such was the object of the request for information sent out last March. The replies will be incorporated into a summary, which you will receive in due course.

The Bureau felt that there was no point in the Conference setting up a document base on international co-operation, as the Council of Europe has already compiled a list of contacts and useful notes, which will soon be available on the Internet. The Bureau has therefore merely added to this list, indicating the names and addresses of the prosecution service officials in charge of co-operation.

Specific term of reference no. 3:
International co-operation between prosecution services in the field of ORGANISED CRIME and ECONOMIC and FINANCIAL CRIME

In view of the complex nature of these issues, the Bureau has decided to use this conference to bring together – and this is purpose of one of the working groups meeting this afternoon – officials from various prosecutor's offices specialising in this field, so that they can exchange information about how they operate and the problems facing them. This will also give us a chance to express our support for these prosecutors in the difficult job which they are called upon to perform.

The Conference should then be in a position to clarify its position on two points:

- the setting-up of specialised prosecution services, and the conditions for their efficient operation
- the possible establishment of a network of existing databases. This would mean reviewing the data already available through INTERPOL and EUROPOL, and considering whether users should have access to information on cases which have already been tried. It would also require us to examine the issue of confidentiality in the light of the legal instruments on data protection.

At the same time, the Bureau has asked the Council of Europe to send any documentation already available on the existence of police units, specialised prosecution services or courts, such as police or court databases, to the officials concerned.

Allow me, if you will, to conclude this progress report on a more personal note. The future of our work, and the future harmonisation of our prosecution services depends, to some extent, on the willingness of the Council of Europe's Committee of Ministers to officially recognise our conference as a fully fledged consultative body, with its own status and budget: obviously, the Conference conclusions must reiterate this point.

The future, however, also depends on the ability of each of our prosecution services to look beyond our specific needs and history, and any internal problems we might have, and to embrace the European approach that is mapped out in Recommendation (2000)19.

Political, economic and police co-operation, however essential, will be futile unless it is accompanied by co-operation in the legal and judicial sphere, in the interest of harmonisation around common principles. We senior officials of Europe's prosecution services have already accepted these principles. Our task now is to put them into practice in a spirit of openness, and in the general interest of the European public.

Opening speech by
Mrs Zdenka CERAR, Prosecutor General of the Republic of Slovenia

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Exactly one year has passed since we adopted the conclusions and programme for our future work in Bucharest at the Second Pan-European Conference of Prosecutors General and said "till we meet again in Ljubljana". Today we are here and in the introduction to my paper as noted in the agenda, I would first like to remind you of the basic objectives we set in Bucharest:

- to contribute to harmonising the principles that guide a prosecutor's functions and status, particularly by ensuring follow-up action to Recommendation 19 (2000);

- to improve international cooperation in criminal matters, in terms of efficiency and respect for human rights and other standards;

- to organise cooperation between public prosecutors at the European level, in order to achieve the above objectives, and also to ensure horizontal exchanges between European prosecutors general.

A Coordinating Bureau was established to execute specific tasks adopted within these objectives and to prepare the contents of today's conference.

As a member I can report that the Coordinating Bureau took the instructions of the previous conclusions into very careful consideration, a fact reflected in the organisation of the conference's working methods that consist not only of plenary sessions, but also of working groups. This careful organisation is also demonstrated in the range of delegates, which includes not only prosecutors general and high-ranking prosecutors from individual countries, but also prosecutor specialists who represent the horizontal exchange implicit in cooperation between prosecutors general at the European level on one hand and execution of the specialised task – the constant battle against organised crime and corruption.

Esteemed guests, welcome to this conference as members of the Assembly of the Council of Europe, the Consultative Council of European Judges, Eurojust, the European Commission, the Secretariat of the Council of Europe, the International Association of Prosecutors and other institutions whose presence here today is proof that the Coordinating Bureau has established contacts recommended for international legal cooperation in criminal matters. We are establishing a conceptual connection between these institutions to make such cooperation more effective. This means the planned database on

comparative law and operative data and information on procedures in the individual countries will finally come into being.

Crime does not recognise national borders! I am strongly convinced that we also must do away with the borders and obstacles to cooperation on criminal matters among Council of Europe members and also those who are not yet members or are from other parts of the world. This very idea is being implemented today, at this conference with your participation, that is the participation of the highest prosecution authorities from your countries. With us today we even have several colleagues from the Far East – prosecutors from China, who were recently also the guests of myself and Slovenian prosecutors.

Esteemed colleagues, we have an ideal opportunity to establish personal contacts that will ease our future work; to learn about paths already in use within international cooperation; to offer ideas for new types of cooperation at the highest level and within operations where speed and efficiency are essential to success.

The Committee of Ministers of the Council of Europe was invited to found a "conference of prosecutors general of Europe" that would work towards implementing these ideas. The conference was also intended to organise the implementation and execution of the act, which, in the light of its contents, justifiably earned the title of a European constitution for prosecutors – Recommendation 19 (2000). That is the reason we are gathered here today.

R 19 places the prosecutor in a role that can be implemented in every country of the European Union or in the world. Allow me to illustrate its significance in the words of the Deputy Secretary General of the Council of Europe Mr Hans Christian Krüger: "Justice, human rights, democracy and the rule of law are the day-to-day business of public prosecutors. In most of our countries, public prosecution is an institution which is expected to reach the right balance between the antagonisms that are bound to arise from the simultaneous implementation of the values to individuals, society and the state.

It is within the province of the public prosecutor:

- that human rights face up to the requirements of an effective action against crime;

- that the human rights of the accused are confronted with those of the victims;

- that the principle of separation of powers makes headway, often slowly and arduously, keeping government outside the courts, the courts outside government, law-making system distinct from law enforcement and justice separate from administration;

- that respect for the courts and compliance with their decisions are safeguarded;

- that international cooperation in criminal matters becomes a judicial matter rather than a purely factual one;

- that the public's right to be informed is circumscribed by the requirement that justice should not be subject to mob rule;

- that the rule of law plays its role in fulfilling society's expectations as regards the security and certainty of the law;

- and that the rule of law plays its role by ensuring that the law applies equally to all authorities and individuals and that everyone is answerable before the court on an equal footing, for any unlawful act.

So, the role of the public prosecution service is so closely linked to the aims of the Council of Europe that it necessarily is in the centre of its concerns."

This interpretation of the public prosecution service also derives from Recommendation 19, which instructs countries how to independently establish a public prosecution service so that it is capable of executing its tasks. Demands are also placed on public prosecutors as individuals – they must perform their work fairly, objectively and without bias, by monitoring police work in particular. They must ensure fluent operation of criminal justice, be fair, consistent and expeditious in their work, be answerable for their own decisions and able to take the necessary initiative required to perform their own work.

At this point the act approaches a vital part of the prosecution function – ethics! It also touches on the sensitive relationship between the public prosecution service and the judiciary.

I realise with great pleasure that both these subjects are included in the programme of our Conference. Both law and ethics form the approach of the public prosecution to this function and in life in general. A comparison of the position and work of public prosecutors and judges will be included in the discussion on status of these two offices.

For the criminal judicial system to operate successfully both the judge and the public prosecutor must perform their tasks, which are equally important for success, though differing in substance.

A public prosecutor leads and guides the police as early as at the discovery of a criminal offence in the pre-trial review and ensures that sufficient evidence for the criminal proceeding is gathered in a correct manner. He formulates the charges that must be substantiated and submitted to the court. The public prosecutor frames the work of the

judge who can only try the perpetrator and the act stated in the indictment.

During the trial the public prosecutor is not only a party and representative of the indictment, but also the representative of the victim's rights. She must take into account the positions and interests of the victims and ensure that the victims are aware of their rights and familiar with court proceedings. The final judgement is in the hands of the judge after she resolves practically the same substantive and legal issues as the public prosecutor did before her.

It is clear from the above that the roles of the public prosecutor and the judge are different and mutually independent. They call on the same type of knowledge, commitment and education, and therefore they must be equally valued in terms of status and related benefits. Not because the two offices are identical in their substance, but because they are equal in their degree of difficulty and the importance of their work. There can be no judge without a prosecutor. In many Council of Europe countries and elsewhere this equality is not found. The differences in salaries and other benefits cause the migration of quality personnel to the better-paid office, which reduces the overall quality of criminal offence trials.

One argument in favour of this assessment is the public prosecutor’s new role as an arbitrator in petty cases, assigned to him by Recommendation 19. Within his own jurisdiction the public prosecutor can resolve a criminal matter dispute between the accused and the injured party without court intervention by settlement or a deferred prosecution. These alternative methods represent a great responsibility for the public prosecutor, relieves some burden from the courts and are a faster and much cheaper remedy for unlawful situations – always with consent of both the accused and the injured party.

Today's conference will pay special attention to the status of the public prosecutor in relation to the judge and to the judiciary within the demand to harmonise the legal systems of individual Council of Europe members, in which, judging from the poll, this issue is not harmonised with the demands of Recommendation 19.

Let me now concentrate on my second task, i.e. the summary of reports on the implementation of Recommendation 19 (2000) in the period between the two conferences.

The answers by countries to two questionnaires sent out by the Coordinating Bureau provide an interesting impression. In some countries Recommendation 19 has been translated and delivered to all prosecutors and other governmental and scientific institutions. They were published in various legal publications as a summary or as a whole, and were presented at conferences or in other forms of legal work.

In Austria the principles set forth in the recommendation are being incorporated in the country's legislation by reforming the preliminary criminal proceedings, i.e. granting investigative powers to the prosecutor and broadening court monitoring in preliminary criminal proceedings. A similar amendment to the Criminal Proceedings Act was adopted by the Czech Republic, which has altered preliminary criminal proceedings by replacing examining justices with police officials. France is also studying the tasks of public prosecutors and examining justices and the power of the public prosecution service over the police and responsibility of public prosecutors. Italy meanwhile is debating the reform of the criminal code to ensure a greater level of separation between judges and prosecutors, which represents a deviation from the current similarity of the two offices, both of which are presently occupied by magistrates.

Luxembourg is also debating prosecutor independence, while a special task group is being formed in Norway to propose a prosecutors' ethics code in accordance with Recommendation 19 (2000). Poland is amending its Public Prosecution Act in line with recommendations on the status and organisation of the public prosecution service. In Slovakia debates are underway on the relationship between the public prosecution service and police, as well as the participation of EU candidates in European institutions such as the Eurojust.

In Spain there are debates on the relationship between the public prosecution service and other branches of power, and between the public prosecution service and the police with an emphasis on crime detection and investigation. In Sweden discussion is focused on cooperation between the police and the public prosecution service during investigations, and on the role of courts due to call to resolve petty crimes more quickly to avoid the current substantial court delays. In Switzerland the debate now concerns the draft of a new Federal Criminal Proceedings Act that is to substitute the 29 proceedings now in place. The draft does not have unanimous support, especially not the proposal to merge the office of the examining justice with the office of the public prosecutor. Criminal investigation would be headed by the public prosecutor who would also conduct investigative tasks before the courts. In Turkey, Recommendation 19 was submitted to commissions established to prepare a draft proposal for the criminal code and the criminal proceedings act, obviously with the intention for its contents to be considered. In Great Britain the Recommendation was sent to the heads of police departments of the Crown Prosecution Service, as well as to other legal representatives. However, no changes in legislation to this effect are being prepared. A debate is underway on court delays and the inefficiency of the criminal legal system, which has its own specific requirements and characteristics that differ from the continental European system entirely. Scotland and Ireland are also working on subjects related to Recommendation 19 instructions on the independence and responsibility of the public prosecutor and the status

of victims of criminal offences. And lastly, Slovenia translated the Recommendation 19 (2000) into Slovene in 1999 and distributed it to all public prosecutors, assistants and to the Ministry of Justice and the Ministry of the Interior.

Here in Slovenia these recommendations have not just stayed on paper, but have been put into practice. Alternative methods of prosecuting petty crime are being carried out by public prosecutors and in the prosecution of organised crime and corruption they are cooperating with the police from the very discovery of the crime as heads and guides of the procedure. At this stage they are in charge of human rights protection in police work. After a full year of negotiation the two services adopted a mutual act in December 2001, entitled the Professional Instructions on Cooperation Between the Police and the Public Prosecution Service in the Discovery and Prosecution of Criminal Offence Perpetrators. These instructions regulate cooperation between the police and the public prosecution service, especially the informing of public prosecutors and police officers and the guiding of police work. This cooperation had been put into the framework of law and was established in order to ensure the highest possible degree of efficacy in discovery and further prosecution of criminal offence perpetrators. This type of work has already rendered excellent results by resulting in the discovery of criminal associations in the area of organised crime. The public prosecutor's responsibility to select the correct path and to secure the end results has lead to a larger number of indictments and to harsher punitive policies in the case of the most serious offences. Each case demands an individual approach; the public prosecutor must not perceive a dossier as simply a pile of paper, but rather as the fate of the person he is deciding on. This calls for careful consideration and the application of all the criteria offered by the Criminal Code and by one's experience and education.

In 2001, Slovenia was more successful in using alternative methods to prosecute petty crime than ever before and in the prosecution of organised and serious crime the highest possible sentences – 30 years imprisonment – were passed in two cases for the first time in history.

I would now like to address final part of my task, the implementation of Recommendation 19 (2000) in the countries of south-eastern Europe. I will limit the report to the countries from the former Yugoslavia. Slovenia shares a common legal history with these countries and the procedural and the substantive criminal code united us for many years.

This is the reason we decided to offer these countries our experience and knowledge on implementing the Council of Europe recommendations and the use of our slightly adapted legislation.

In response to the invitation of Mr. Božidar Vukčević, Prosecutor General in Montenegro we personally presented the contents of the Recommendation and our experiences to our colleagues there.

Numerous delegations of judges, prosecutors and lawyers of other institutions from the countries of former Yugoslavia have participated in consultations on these issues either on their own initiative or on our invitation and an agreement on further cooperation in this direction has been made. The exchange of experience and direct international cooperation based on personal contacts are vital to creating successful prosecution services and the Council of Europe has, with the role it assigned to the public prosecutor in the 21st century in its Recommendations, created every opportunity for the legislation of different countries to be harmonised and for the positive, humane objectives of the organisation to be achieved.

Today is a time and the opportunity for us at the conference to promote a sense of loyalty to our office, to adopt decisions that will result in higher standards in the coordination of our work, in international cooperation at state and international forums and on the level of operations. Let us draw an image of a public prosecutor that as close as possible to the ideal set forth in the Recommendation of the Council of Europe, whose imperatives are responsibility and ethics. Let us secure a position and status for ourselves that corresponds to the responsibilities and difficulties of our work. Let us seek out the areas we can improve.

Please allow me to present, with the help of my colleague Silvij Šinkovec from the supreme public prosecution service, our practical approaches and experiences in implementing Recommendation 19.

Report by
Mr Jean-Amédée LATHOUD, Principal Public Prosecutor, Douai Court of Appeal (France)

Relations between the public prosecution service and the judiciary are the very cornerstone of the criminal justice system. Public prosecutors, who are responsible for conducting prosecutions and may appeal against court decisions, are one of judges' natural counterparts in trial proceedings and also in the broader context of management of the system of criminal law.

In the functioning of the courts, members of the public prosecution service and of the judiciary share the same responsibilities for promoting the rule of law, safeguarding freedoms and democracy and upholding the principles laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The case-law of the European Court of Human Rights and Recommendations R (94) 12, on the independence, efficiency and role of judges, and Rec (2000) 19, on the role of public prosecution in the criminal justice system, issued by the Committee of Ministers of the Council of Europe lay down principles governing the way we perform our judicial activities and our respective roles in the criminal justice system.

At the same time, member states of the Council of Europe have answered two questionnaires on the status and role of public prosecutors and their relations with the judiciary, which the European Committee on Crime Problems and the bureau of the Conference of Prosecutors General of Europe sent out in 2000 and 2002.

The above sources provide insight into the relationship between members of the public prosecution service and of the judiciary at a time when the courts are playing an increasing role in society and the public demands and expects more efficient criminal justice.

- The fact that judges and public prosecutors have the same standards of reference and pursue the same objectives means that the two professions are subject to similar requirements and should enjoy similar guarantees.

- However, the roles of the judiciary and of the public prosecution service are not indistinguishable. There must be no confusing their respective places within the criminal justice system. This means coming to terms with their differences, respecting each profession's independence and clarifying the precise duties of the different persons involved in dispensing justice.

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1/ Public prosecutors and judges: common objectives and guarantees

a) The recommendations issued by the Council of Europe give members of the judiciary and of the public prosecution service the same points of reference for the performance of their activities:

- Safeguarding the rule of law and respecting and protecting human rights and fundamental freedoms;

- Ensuring the efficiency of the criminal justice system (Recommendation 2000 (19), paragraphs 1, 24 and 36; Recommendation 94 (12), preamble and principles V2 and VI1).

b) Their shared objective of doing justice gives both public prosecutors and judges reason to take account of the position of the victim (Recommendation (85) 11) and of the need for simplification of criminal justice (Recommendation (87) 18), consistency in sentencing (Recommendation (92) 17), improved management of criminal justice (Recommendation (95) 12) and protection of witnesses and respect for the rights of the defence (Recommendation (97) 13).

These mutual aims go hand in hand with common ethical standards.

Both judges and public prosecutors are required to perform their activities objectively and impartially (Rec (2000)19, paragraphs 20 and 24, and R (94) 12 , principle V3).

Both have a duty to deal with cases fairly and speedily (Rec (2000)19, paragraphs 20 and 24, and R (94) 12, principle V2).

The two must work in an open manner: clarity concerning the assignment of cases in the public prosecution service (Rec (2000)19, paragraphs 9 and 36 c) and the judiciary (R (94)12, principle I e), the requirement that judges give reasons for their decisions (R (94) 12, V f), and that the public prosecution service account for its activities (Rec

(2000) 19, 11), guarantees of transparency concerning any instructions given to prosecutors on the handling of specific cases (Rec (2000)19, paragraph 13 d and f).

Respect for parties to proceedings is incumbent on both public prosecutors (Rec (2000)19, paragraphs 26 and 28) and judges (R(94)12 - V 3 b, d, e).

c) Given their mutual dedication to the rule of law and justice and their identical codes of ethics, judges and public prosecutors must enjoy the same statutory guarantees.

- These guarantees must be established by national law (Rec (2000)19, 17 and R(94)12 - I 2 a). They enable members of these two professions to discharge their duties and responsibilities with real independence, as regards the decision-making powers they exercise for the public good and in the interests of freedom.

- Judges and public prosecutors must be provided with adequate material, budgetary and human resources (Rec (2000)19, paragraphs 4 and 5 d; R(94)12, principle III 1).

Some countries (Slovenia, the Czech Republic) have mentioned their concern that judges and public prosecutors should be awarded sufficient remuneration, of a similar level, and the same social protection.

- Recruitment and training of suitably qualified judges and public prosecutors is of prime importance (R(94)12, I 2 c, and Rec (2000) 19, 5). Advantages are to be derived from running joint training schemes for the two professions. There is also a general consensus in the member states that training to improve the handling of complex financial cases must be stepped up.

A number of reforms of judges' and prosecutors' training are in progress (in the Czech Republic and Portugal, for instance).

- Career management (promotions, transfers, appraisal) must take account of experience and merit and be based on fair, impartial, clear procedures (Rec (2000)19 - 5 a and b, and R(94)12, I 2 c).

- Both judges and public prosecutors are entitled to freedom of expression, association and assembly (Rec 2000 19, paragraph 6, and R (94)12, principle IV). Their right to belong to political parties remains a subject of debate in a number of countries.

- Proceedings against judges and public prosecutors who fail to carry out their duties in the proper manner or commit disciplinary offences must be impartial and objective (R (94) 12, principle VI, and Rec (2000)19, paragraph 5 e).

In many member states (France, Italy, Scotland, etc.) the question of the personal responsibility of members of the judiciary and the public prosecution service is on the agenda. In some cases, concerns have been voiced about the ensuing risks of intimidation or of bringing things to a standstill.

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It is on the strength of these common standards of reference, rules of ethics and guarantees that both judges and prosecutors qualify as officers of the court.

The legal framework within which officers of the court - judges and prosecutors - perform their duties and their independence from outside influences when taking decisions (an independence denied to members of ordinary, non-judicial public authorities) constitute a guarantee against arbitrary treatment for persons coming before the courts. In the case of prosecutors, this state of affairs was endorsed by the European Court of Human Rights in its Schiesser v. Switzerland judgment of 4 December 1979. Prosecutors therefore rightly set great store by their quality as officers of the court.

However, members of the public prosecution service perform specific duties, in the interests of the community, which distinguish them from judges.

2/ Public prosecutors: Specific responsibilities, fulfilled for the public good

a) Under European criminal justice systems the main task of members of the public prosecution service is to conduct prosecutions on behalf of society and in the public interest (Recommendation (2000)19, paragraph 1).

This is the prosecutors' own responsibility, which society entrusts to them. In conducting a prosecution they must adhere to a number of basic principles: upholding the rule of law, combating crime and safeguarding individual rights and fundamental freedoms.

- This responsibility for conducting prosecutions is what distinguishes the prosecutor's role from that of judge, and also from that of counsel. Since they act on society's behalf and in the public interest, prosecutors are not a legal representative like any other. The principles set out in Committee of

Ministers Recommendation (2000) 21 on the freedom of exercise of the profession of lawyer cannot apply to members of the public prosecution service. In seeking to defend their clients' rights and legitimate interests, lawyers do not practise their profession under the same conditions as public prosecutors. The guarantees of efficiency of criminal justice, objectiveness and impartiality required of public prosecutors do not necessarily apply to lawyers, whose prime concern is to defend their clients' interests.

- In addition to this essential task of conducting prosecutions, in a number of European countries public prosecutors may decide on and monitor the implementation of measures constituting alternatives to prosecution, as recommended by the Committee of Ministers in Recommendation (87) 18, 1, concerning simplification of criminal justice and the principle of discretionary prosecution. The public prosecution service may also carry out a number of tasks relating to the implementation of national and/or regional crime policy. In some countries it may direct or supervise police investigations. Lastly, the public prosecution service has an important role in international co-operation.

b) This range of responsibilities in connection with crime policy requires fairness, consistency and efficiency. It is acknowledged that members of the public prosecution service must be autonomous in their decision-making, but that decisions must nonetheless be taken within a hierarchical framework. The aim of this hierarchical organisation is to guard against arbitrary decision-making and departures from general guidelines, laid down in the public interest, when dealing with individual cases (cf Recommendation (2000)19, paragraph 36).

The purpose of the hierarchical organisation of the public prosecution service is to safeguard public interests, the interests of society. That organisation should not reflect specific political, government or economic interests. It is a specific feature of the public prosecution service, which contrasts with judges' independence, personally and as members of the courts, since they base their judgments on the individual circumstances of a case.

This hierarchical organisation, which should not result in increased bureaucracy and paralysis and with which there should be no unwarranted tinkering by executive authorities, is first and foremost a guarantee for parties to proceedings. It is also a means of safeguarding public prosecutors against undue outside interference. It is necessary to the efficiency of efforts to combat complex - that is to say multi-facetted or organised - crime.

The European Court of Human Rights dealt with this hierarchical organisation in its Piersack v. Belgium judgment (1.10.1982), which

recognises public prosecutors' hierarchical position vis-à-vis their deputies in the conduct of proceedings, since prosecutors are empowered to revise their deputies' written submissions to the courts, to discuss with them the approach to be adopted in a specific case and to advise them on points of law ...

This hierarchical structure within which members of the public prosecution service operate is what distinguishes their situation from the independence enjoyed by members of the judiciary. Nonetheless, this hierarchy must go hand in hand with a number of guarantees (recognition of prosecutors' discretion, of their right to freedom of speech at court hearings, of their own specific powers, and provision of institutional safeguards concerning relations between the different tiers of the hierarchy).

The stricter disciplinary supervision and greater mobility formerly imposed on public prosecutors in certain countries by virtue of this hierarchical organisation can be seen to be diminishing, and the status of members of the public prosecution service increasingly resembles that of judges.

However, this issue of prosecutors' "independence" is still a subject of widespread debate in many member states (the Czech Republic, Estonia, France, Luxembourg), and bills on the public prosecution service are before parliament in Poland and in Scotland.

c) There must be no ambiguity in the relationship between public prosecutors and judges. There should be no confusion in the minds of those who come before the courts as to these professions' specific roles (conducting prosecutions and giving judgment). It is important to clarify the respective duties of judges and public prosecutors. The public should be in no doubt about the independence and impartiality of judges (Recommendation (2000) 19, paragraph 17 and explanatory memorandum), although operational contacts between the two professions are constant, necessary and in need of further reinforcement.

It would seem that there is room for further clarification of the respective roles of prosecutors and judges. Questionable situations can be noted in a number of countries: approval or implementation by the judiciary of measures constituting alternatives to prosecution (in France); judges' faculty of challenging decisions to prosecute (in Austria, the Netherlands and the United Kingdom); judges' capacity to decide to bring a prosecution (in Italy).

Although, in principle, judges of the criminal courts cannot give instructions to members of the public prosecution service, exceptions to this rule can be noted in a number of countries (the Netherlands, Poland, Slovakia, Italy).

In France and Switzerland, as in certain other countries, the role of investigating judges, which raises questions linked to these issues, is currently under discussion. Criminal court judges are involved in police investigations everywhere, so as to guarantee protection of freedoms, but in some countries (Belgium, Spain, Portugal and Austria) they also have a role in uncovering evidence.

Clear procedural rules on the respective roles of each profession should enhance the efficiency of the criminal justice system and satisfy our fellow citizens' demand for impartiality, the impartiality necessary to guarantee respect for individual freedoms and the suppression of crime. Pursuit of efforts to clarify the situation moreover offers the assurance of improved international co-operation in the judicial sphere in future.

This debate is of importance at a time when the Statute of the International Criminal Court (signed in Rome on 17 July 1998) seems to follow a different logic concerning the principles governing the relationship between judge and prosecutor in the Pre-Trial Chamber with regard to decisions to prosecute (articles 15, paragraph 3, 53 and 61 of the Statute of the ICC).

A code of conduct for the Public Prosecutor
The Dutch experience

Report by
Mr Egbert MYJER, Chief Advocate-General at the Amsterdam Court of Appeals, Professor of Human Rights, Amsterdam Free University (Netherlands)

Introduction
Anyone wishing for popularity in the field of law is well advised against becoming a public prosecutor. At least, that's the situation in the Netherlands and I have a strong sense that it also applies to other countries. Public prosecutors don't come off heroically in legal thrillers, police or detective series and other stories where crime is the key theme. The role of hero is reserved for the wayward, brave policeman (preferably obstructed by his superiors or the public prosecutor), whose marriage is in tatters or the dedicated lawyer who, although secretly infatuated with the female suspect, is nevertheless sharp-witted. And, in rare instances, it is the judge who proves to be the just figure from the very beginning.

Popularity is of course not a public prosecutor's main goal. He stands for the law, which may not suit everyone. He also needs the courage to take up standpoints that may not be directly in line with the (political) trends of the day. It will be very rare that, once a trial is over, all those involved – suspect, victims, witnesses – will be equally enthusiastic about how the public prosecutor dealt with it. He will always need to weigh up and reconcile conflicting interests if he can. Job satisfaction would be greatly improved if the public prosecutor received even the slightest public appreciation. And this calls for confidence and authority.

What does it take for a public prosecutor to acquire authority?
Authority minimally demands that a public prosecutor upholds the national law and the previous court decisions rendered under the law. I also take this to mean that he acts within the boundaries of stipulations laid down by international conventions on human rights, to which his country is signatory, and the judgements rendered by the ECHR. A public prosecutor would seem highly implausible if it transpired that, as a professional upholder of the law, he didn't comply with it himself. And if a public prosecutor breaches the law, it reverberates throughout the State as a whole in as much as the State lets such behaviour go unpunished.

But a public prosecutor need to more than simply uphold the law. Both the organisation of which he is a part, and he as an individual, will need to exude integrity. This boils down to:

- a realisation of values and norms
- respect and awareness of the interests of others
- being unimpeachable
- acting consistently and transparently in word and deed: doing what he says and saying what he does. This renders actions controllable, not only for the independent court but society as a whole.

Moreover, he must do what he says he is going to, well and decently.

International norms: convention texts and soft international law

Just how much value is placed internationally on a public prosecutor's correctly, proper behaviour is clear from the texts written over the last twenty years, world-wide, specifically on the behaviour of public prosecutors. According to the enforceable minimum norms laid down in international conventions relating to human rights, texts have also been drafted that on the one hand detail the minimum norms and international standard jurisprudence rendered, or that focus on the specific professional body, and state norms to which the profession should adhere in practice. Such formulations can be found in declarations, recommendations and guidelines. In as much as they contain more norms than those already laid down in international conventions, these are not legally binding upon states in practice. Rather, they encompass those principles, policies and expressions of intent that may well govern the conduct of states in certain situations, albeit that no legal obligation exists. Nevertheless, 'soft' law principles do reflect the intention of states in a given matter. They can be regarded as obligations of cooperation and good faith. These concepts are 'soft' because they lack the imperative quality of the law, although they may acquire that status through their transformation by the formal sources of law.

a. United Nations

In addition to general texts - such as the United Nations Charter (1945), the Universal Declaration of Human Rights (1948) and the general conventions based on these documents (International Covenant on Civil and Political Rights, that entered into force in 1976) and special conventions (including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – that entered into force in 1987), that are of immediate relevance to the work of a public prosecutor - a specific 'soft' text has been adopted at UN level formulating further general principles and behavioural rules tailored to the work of a public prosecutor. I refer here to the 'Guidelines on the role of prosecutors', adopted during the eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 1990).

b. Council of Europe

A development parallel to that taking place within the United Nations can also be seen at the Council of Europe. Besides general texts such

as the Charter of the Council of Europe (1949), general convention texts (European Convention on Human Rights, that entered into force in 1954 and related protocols) and special conventions (including the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, that entered into force in 1989), a Recommendation 'On the Role of Public Prosecution in the Criminal Justice System' (Rec. (2000) 19) has recently been adopted by the Committee of Ministers at the Council of Europe. This is another instance of 'soft international law'.

International Association of Prosecutors
Furthermore, the professional body of public prosecutors has itself since formulated general standards such as the 'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors' adopted in 1999. Where the latter was realised without governmental intervention, it is clear that the standards in question are not enforceable simply by an appeal to the Standards.

The desirability of a national code of conduct
In the Council of Europe Recommendation 'On the Role of Public Prosecution in the Criminal Justice System' (hereafter referred to as the Recommendation), the following is stated, among other things:

"*(..) 35. States should ensure that in carrying out their duties, public prosecutors are bound by 'codes of conduct'. Breaches of such codes may lead to appropriate sanctions in accordance with paragraph 5 above. The performance of public prosecutors should be subject to regular internal review."*

The following is also observed in the Explanatory Memorandum:

"Public Prosecutors should in particular demonstrate high standards of decision-making and professional conduct. As public prosecutors become increasingly independent or autonomous, and thus of necessity assume a greater burden of responsibility, existing statutory and procedural regulations may require further elaboration if there are to serve as an ethical and behavioural guide for the profession. However, those who drafted it do not envisage the proposed *"code of conduct"* as a formal code, but rather as a flexible set of prescriptions concerning the approach to be adopted by public prosecutors, clearly aimed at delineating what is and is not acceptable professional conduct. Regular monitoring is an appropriate way to ensure that such rules are observed."

Various members of the Council of Europe had, or now have, introduced national codes of conduct.

A national code of conduct: the Dutch experience
Below, I would like to make a number of comments on experiences in the Netherlands with drawing up a national code of conduct. I will also touch on the implementation process.

The compilers
At the end of 1997, the Board of Procurators General set up a working group to complete the task of :

- formulating a number of general starting points to which the actions of the Public Prosecution Service and its members should adhere from a professional, ethical and state of law perspective
- translating these starting points into instructions to be followed by the (general) policy of the Public Prosecution Service, and into a code of conduct governing the behaviour of individual members of the Department.

The working group was multi-disciplinary in nature. In addition to four members of the Public Prosecution Service, it included a Professor of Constitutional Law (also a member of the European Commission of Human Rights), a Professor of Ethics, a lawyer (specialised in codes of conduct for the legal profession from an academic perspective) and a top official of the Ministry of Justice, charged with designing new legislation on the Public Prosecution Service. I chaired the working group.

Inventory
The working group began by making an inventory of the requirements to be met by a member of the Public Prosecution Service (according to currently valid international and national benchmarks) when performing their duties involved in upholding legal order in the context of criminal law. The 'soft' rules laid down in the UN guidelines and the IAP standards were also included. The working group also drew upon the draft text of the abovementioned Council of Europe Recommendation.

Formulating starting points
The working groups then began formulating a number of starting points.

- *First starting point: one code of conduct for all members of the Public Prosecution Service*

As things progressed, the working group realised that the task did not involve formulating a code of conduct that applied only to public prosecutors, the advocates general and the members of the Board of Procurators General. It needed to apply to an organisation where work is often carried out by teams, powers are sometimes mandated and in which many staff members maintain contacts with third parties; the starting points could not be restricted solely to a relatively small group

of members of the judiciary. The code of conduct – a guideline and reference point for each individual's behaviour – had to apply to all personnel. This does not alter the fact that some rules refer to activities or powers that can only be exercised by a public prosecutor or advocate general.

- *Second starting point: alignment with the oath sworn by the public prosecutor*

It was also clear to the working group that the acceptance of, and subsequent adherence to, a code of conduct would be enhanced when it could be made clear that (the majority of) the rules contained were mandatory in one way or another. With this in mind, each rule could be followed by a reference to a convention text, legal stipulation or judgement of relevance to that particular rule. In the end, the working group did not elect to follow the detailed approach.

Gradually, it transpired that the rules largely flesh out the content of every oath sworn by a functionary of the Ministry of Justice as laid down (at the time) in article 5 of the Dutch Judicial Organisation Act. All aspects of the oath are given a contemporary elaboration and interpretation in the code of conduct, where the vague norms of '*honesty, accuracy and impartiality, regardless of individuals'* and *'behaving as befits a decent and honest servant of the law'* are written mindful of topical insights that should be understood in the context of the Public Prosecution Service. The oath, which originated in 1827 ('modernised' in certain places as of 1 January 2002), reads:

"*All the members of the judiciary referred to in this act will swear the oath (pledge) prior to the date on which they are installed in office, each in the manner befitting their religious, political or philosophical convictions,*

'that they will be loyal to the King, will uphold and comply with the Constitution; that, in order to obtain the appointment they have neither given nor promised anything, nor shall give or promise anything, directly or indirectly, under any name or pretext, to any person whatsoever;

that they shall never give gifts nor accept gifts from any person they know or have reason to suspect is or will become embroiled in a legal case in which they could be involved in a professional capacity;

that they will furthermore perform their duties with honesty, accuracy and impartiality, regardless of individuals and in so doing behave as befits a decent and honest servant of the law."

Other members of the Public Prosecution Service swear a different oath/pledge when being installed. This is in part more limited, thus offers fewer points of contact for elaboration in a code of conduct.

- *Third starting point: general rules, rules relating to members of staff working to together, specific rules regarding the environment and other aspects*

The working group expressly chose not to make a compilation of all manner of open norms. This would be of little benefit to the intended clarity of existing state of law criteria pertaining to the Public Prosecution Service. With this, the Public Prosecution Service code of conduct differs from a number of other codes of conduct that have been realised within (and outside) the government in recent years.

The approach chosen includes:

- *general rules*. These are laid down in ten commandments, three of which also relate to behaviour outside the context of work. The rules in this paragraph are relatively vague although this does nothing to hamper clarity. Basically, members of staff should not breach confidentiality outside of work. In addition, they should be aware that any odd behaviour in their personal life might damage the Public Prosecution Service as a whole. They will need to be alert to the fact that some subsidiary activities may be inadmissible.
- *Rules with regard to staff collaboration*
- *Specific rules with regard to the environment*. These are geared to the 'client and suppliers' groups. These rules in particular contain a sometimes highly detailed reflection or elaboration of rules laid down in national and international jurisprudence and thus form an easily accessible guideline.
- *Other aspects of the code of conduct, including management and compliance*

- *Fourth starting point: internal manual*

The code of conduct is deliberately presented as an internal manual. As stated under the heading 'compliance', "(..) *attempts to justify the intended character of the code of conduct: a living tool that promotes the further formation of ethical awareness within the Public Prosecution Service.*" This renders it a document that primarily has an *internal effect*. At first sight this could seem a little disappointing. If the Public Prosecution Service really claims to support these roles, then they should also apply externally. And then one shouldn't want to hide behind the solely internal effect, would be the logical conclusion. This similarly ignores the fact that a large number of the rules contained also apply externally even though because they reflect international or national (jurisprudence) norms. This is also expressly postulated where the code of conduct says, with regard to 'compliance': '*The form of the code of conduct (manual) restricts invocation by third parties on compliance with the code of conduct. This extends no further than the external effect that already arises from existing legislation in which obligations relating to the Public Prosecution Service or its individual staff*

members, are set down." Moreover, they comprise, as outlined above, a modern result specifically tailored to the Public Prosecution Service of the oath that is also sworn by members of the Public Prosecution Service. No manual could alter this status. The other, more specific (interrelated) conduct and decency norms initially work to make Public Prosecution Service staff extra alert to the norms to be considered from an official perspective, and thus primarily serve as a reference point for identifying and resolving dilemmas that may arise in the execution of their duties.

Conferences to test out the code of conduct, and consultations
When the working group had prepared the first draft texts, two conferences were organised to put the code to the test. Each public prosecutor's office was allowed two representatives. For the conferences, an organisation with considerable experience with implementing codes of conduct at government and commercial level, was called in to provide professional support. The conferences concentrated on dilemmas that could occur in the working day of a member of the Public Prosecution Service, ways of optimally resolving the dilemmas and whether the solutions could be included in the formulations of the code of conduct. It was striking that the formulations arrived at like this almost always entirely corresponded with the first draft texts of the code of conduct presented at the time. In both conferences it emerged that the participants were very pleased to be able to talk about these kinds of dilemmas at last.

A number of consultation rounds were also held. Heads of public prosecutor's offices, co-determination committees and 'outsiders' like the Dutch Bar gave comments. The conferences and consultation rounds resulted in adjusting the draft texts on a number of (subsidiary) points. This was followed by presenting the new text to the Board of Procurators General, where it was also discussed. The definitive text (see appendix) was adopted on 11 July 2000.

The importance of good implementation and periodical evaluation
In the first instance, the text of the code of conduct was only presented on paper to the staff of the Public Prosecution Service. Looking back, this wasn't the best decision. If a document of this sort is to be accepted by the organisation as a whole as a general benchmark against which the Public Prosecution Service can be measured, it is crucial for the code of conduct to become fully absorbed into the consciousness of the Public Prosecution Service's staff. For which an announcement on paper is utterly inadequate. Conferences to test the code and consultation rounds may have been held, but only a small group had taken part. Behavioural scientists have an iron law in such instances:– professional ethics won't flourish if imposed top-down. They have to be experienced by the professional body and mirror aspects that they also perceive as relating to their professional integrity.

A number of measures have since been taken to assure this acceptance:

- incumbent staff

Implementation meetings have currently been held at a large number of public prosecutor's offices. Please see the appendix for details. The first meetings were similar to the conferences to test out the code. The staff was generally enthusiastic that a structural space had finally been created for stimulating awareness of dilemmas occurring in their working practice, and for discussing them. Here again, the most common ethical questions can be categorised under three points: confidentiality, setting an example (in their personal lives as well), and relationships with colleagues. If staff have doubts, it is imperative that they consult their superior rather than believing that they can resolve the problem alone. This method seems to work well: participants come up with dilemmas they have experienced themselves in their professional lives, and the solution they came up with, followed by discussing whether a general rule can be formulated based on this experience. This rule almost always seems to correspond to something already formulated in the code of conduct.

- new staff

For new public prosecutors and legal staff, there is a new module on ethical issues in the central basic training course, corresponding to situations that could be encountered in everyday working life. There is considerable attention here for the code of conduct. However there is at present no comparable programme for other new (administrative) staff. In general, when the head of the public prosecutor's office swears in new members of staff, the code of conduct is referred to, and a copy is presented to the individual concerned.

Never ending story
Overall, it should be realised that ensuring the integrity of the Public Prosecution Service will be a 'never ending story'. The existence of a code of conduct doesn't automatically mean that staff will comply with it. Constant efforts will need to be made to make sure that members of staff not merely skimmed over and forgot the norms laid down in the code of conduct, but actually digested them. In which regard, the example set by the person with first-line responsibility is of inestimable significance. In addition, it is important, from time to time – and within the bounds of the fundamental rights it contains – to test the code against new insights, and for practicability and efficacy. The code of conduct itself states: *"The code of conduct will be subject to periodical reviews in this regard"*.

Final words
The first remarks on the code of conduct were in the tenor of – *very 'open door'* and *'what at first sight seems a primarily politically-correct document'*. If various dilemmas are dealt with during the implementation meetings, practice proves to be more unruly than

theory. In the end, the biggest sceptics agree that such a reference point is very useful. Talking about dilemmas makes matters that seem self-evident suddenly less so. A breath of fresh air, even when doors may be open. Although, as someone working for the Public Prosecution Service, this too will not make you very popular either.

CODE OF CONDUCT
PUBLIC PROSECUTIONS SERVICE (The Netherlands)

As set down by the Board of Procurators General on July 11, 2000

CODE OF CONDUCT

1 GENERAL RULES

An employee of the Public Prosecutions Service carries out his/her duties:

1 within the limits of the law;
2 with special attention to the fundamental human rights;
3 with respect for the inherent human dignity, irrespective of person or status, and without discriminating as to religion, sex, sexuality, national origin, ethnicity, color, age or on any other ground;
4 Fairly, impartially, objectively and without fear;
5 in a way that can be monitored, also in retrospect, and so that an accounting can always be given of the choices made in the process of carrying out duties;
6 with due observance of the rules of proportionality and subsidiary;
7 in a way that is both conscientious and dynamic.

Whether on or off duty, he/she conducts himself/herself:

8 with due observance of the instructions in relation to the provision of information to third parties and observance of secrecy in respect of confidential information;
9 in accordance with the public character of the responsibility of the Public Prosecutions Service, where the work involves enforcing standards, which may mean that the employee's acts and omissions become the subject of public debate and thus can affect the prestige of the Public Prosecutions Service as a whole;
10 with the necessary integrity, which in any case shall be construed to mean that an employee does not perform any acts or hold any secondary jobs or carry out other activities that might influence his/her professional attitude of open-mindedness, or that might arouse such an impression.

2 RULES IN RELATION TO COLLABORATION

1 Colleagues

A Employees of the Public Prosecutions Service treat one another with respect.

B Employees of the Public Prosecutions Service are result-oriented in the way they work together, and they communicate in openness.

C Employees of the Public Prosecutions Service have mutual and reciprocal consideration for each other's duties and responsibilities, and do not ask one another to perform services that would complicate these duties and responsibilities.

2 Employees

A Employees of the Public Prosecutions Service account for their work and the way in which they have done it to their superior.

B Employees inform their superior in a timely fashion, without necessarily being asked to do so, in respect of matters which, in reasonableness, are important for their superior to know.

3 Superiors

A A superior adopts an attitude of openness and receptiveness in respect of his/her employees.

B A superior deals fairly with his/her employees and sets a good example.

C A superior informs the employees in respect of matters which are necessary for them to know if they are to perform their duties properly and well.

4 The public prosecutor's office

The various public prosecutor's offices work together in a manner that is result-oriented and they communicate in openness.

5 Consultation with the head of a public prosecutor's office

In case of doubt as to whether a proposed action is justifiable, an employee of the Public Prosecutions Service shall consult with his/her superiors and/or with the head of the public prosecutor's office in question.

3 SPECIFIC RULES IN RESPECT OF THE WORKING ENVIRONMENT

1 The court

A An employee of the Public Prosecutions Service gives a full accounting to the court of all cases that have been put before it.

B With the exception of that which takes place at the court hearing, an employee of the Public Prosecutions Service shall not furnish to the court any information about matters in which this court must judge, or may have to judge in the future, unless

it is immediately substantiated by a written document which constitutes part of the case file.

C For purposes of development of law, with the consent of the head of the public prosecutor's office, a public prosecutor may put before the court a standpoint that purposely deviates from existing case law or legal views. He/she shall do so explicitly, stating reasons.

D In his/her dealings with the court, a public prosecutor shall refrain from conduct that might call the impartiality of the court into question.

2 The suspect and his/her counsel

A Except in special circumstances, a public prosecutor shall not decide to prosecute in a criminal case if he/she is not convinced in all conscience that there is sufficient legal evidence available to allow the court to declare that the charges have been proved.

B If evidence has been obtained in a manner that constitutes a gross violation of the fundamental rights of the suspect, a public prosecutor will not make use of that evidence, except to initiate legal proceedings against the persons responsible for this violation.

C In his/her investigation, a public prosecutor addresses his/her actions at finding the objective truth. He/She is open-minded and honest, and includes in his/her considerations all circumstances, both those that are incriminating and those that are disculpatory.

D If a public prosecutor should have factual information that disculpates a suspect or that is to the advantage of the suspect in the case, or that is essential for the court to arrive at its decision, then he/she shall provide this information at his/her own initiative.

E A public prosecutor shall ensure that the defense can take cognizance of the case documents in a timely fashion.

3 The victim

An employee of the Public Prosecutions Service must show special concern in respect of victims of offences and their next-of-kin. He/she shall make efforts to ensure their interests properly. He/she shall actively furnish information about their rights, about the outcome of the case.

4 Witnesses

An employee of the Public Prosecution Service shall make every effort to ensure that witnesses are not burdened by the giving of evidence any more than is necessary in the interests of a good administration of justice. If necessary, he/she shall take measures to protect the physical

and mental integrity of witnesses, as well as their property and that of their next-of-kin.

5 The Minister of Justice

A An employee of the Public Prosecutions Service shall act in accordance with instructions given. At the court session, a public prosecutor will loyally defend any instructions he/she has been given. He/she is free, however, to call attention to considerations in respect of the law that the court, from a point of view of objectivity, ought to include in its opinion on the case at hand.

B An employee of the Public Prosecutions Service shall have an eye for the consequences that his/her actions or omissions may have for the political responsibility of the Minister of Justice

6 Public administration

A In his/her dealings with the public administration, an employee of the Public Prosecutions Service always aims to work in purposeful collaboration. In doing so, he/she furthers and promotes maintenance of law and order with a particular view to a well-considered and fair use of the possibilities offered by criminal law.

B As a representative of the Public Prosecutions Service, an employee of the Public Prosecutions Service shows himself/herself to be a reliable discussion partner.

C With a view to the incorruptible operation of public administration, a public prosecutor shall particularly ensure for a due and proper prosecution of offences committed by public servants and other offences which might be disparaging for the integrity of the public administration.

7 The police force[*]

A A public prosecutor shall adopt an attitude of openness and receptiveness vis-à-vis the police force, shall take unambiguous decisions and shall take his/her responsibility.

B A public prosecutor shall see to it that the police act lawfully and properly.

C A public prosecutor shall ensure that the police submit reports that are truthful and complete.

D A public prosecutor shall ensure that he/she is informed of investigative actions undertaken by the police in a criminal investigation and that he/she can justify these actions to the court during the hearing session.

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[*] The police force is deemed to include all special investigating officers.

8 Society

In the exercise of his/her job, an employee of the Public Prosecutions Service shall conduct himself/herself courteously and conscientiously toward all those with whom he/she comes in contact.

9 The media

In individual criminal cases, a public prosecutor only expresses himself about that case in public in the courtroom, during the public hearing. This does not detract from the fact that an employee of the Public Prosecutions Service who is in charge of maintaining contacts with the press shall give to the press as much objective information as is justified at that time -- taking into consideration all circumstances which are at issue.

10 Other countries

In handling requests for mutual legal assistance, an employee of the Public Prosecutions Service shall provide the required help and in doing so, shall exercise the same care and caution as he/she would in his/her own cases.

4 OTHER ASPECTS

1 Compliance

The code of conduct in this guide will have to come alive in everyday practice. The code of conduct aims to promote that a climate is achieved within the constituent parts of the organization in which problems (whether moral or otherwise) are recognized and are open to discussion. The code of conduct does not give independent disciplinary or public service rules other than those that arise from existing legislation and regulations. Nor was it decided to introduce a specific complaints procedure: internal corrective procedures and incentives are already in place. In this way, it is hoped to do justice to the intended nature of the document: a living instrument that serves as an incentive in further shaping ethical awareness within the Public Prosecutions Service.

The form of the code of conduct (that of a guideline) limits the invocation by third parties of compliance with the code of conduct. Its external influence goes no further than the consequences that arise from existing legislation and regulations comprising obligations of the Public Prosecutions Service or its individual employees.

2 Evaluation and amendment

Because rules in the code of conduct may lose their validity, or other rules may develop that are deserving of a place in the code of conduct,

it is in the interests of the organization that the code of conduct remains up to date. The code of conduct will therefore be evaluated periodically for this purpose.

BACKGROUND

As the Public Prosecutions Service, we are responsible for maintaining law and order. Together with public administrative bodies, the police force, the courts and other organizations, we promote compliance with the law and we take action against people who violate those rules. We feel that society may therefore expect us as a law enforcement agency to act fairly and respectably in doing our work. This guide, as a derivative of that vision, sets down in writing for all employees of the Public Prosecutions Service the standards of conduct that they observe in carrying out their responsibilities. The great majority of these standards have been brought together from international treaties, statute law, case law and other sources that have long served as an inspiration to the Public Prosecutions Service and that are simply taken for granted by many. Some of the behavioral standards will need to be given a more concrete definition in terms of daily practice so that they can also start to function as genuine guidelines in our professional practice.

This guide is expected to grow and expand over the years into a document in which the people in the organization recognize themselves, and about which they will say that it definitely offers grip as they carry out their responsibilities in their daily jobs.

This code of conduct is not so much intended as a legally conclusive system of rules, but more as a set of general principles that are leading for the conduct of employees of the Public Prosecutions Service: the code of conduct serves as a reference point for our own actions, but also as a guideline. It goes without saying that responsibilities arising from other regulations and, ultimately, a person's own responsibility, continue to remain in full force.

The code of conduct applies for all employees of the Public Prosecutions Service, and not merely for public prosecutors and advocates-general. In fact that speaks for itself in an organization in which much of the work is teamwork, in which powers are sometimes given in the form of mandates and in which many members of the team maintain contacts with third parties. This does not detract from the fact that some rules of conduct primarily revolve around powers that are exercised by public prosecutors and advocates-general. Wherever that is the case, for the sake of conciseness, these rules are addressed to public prosecutors. When it is a matter of mandated powers as referred to in article 126 of the Judiciary (Organization) Act, then the rule also applies to the employees of the public prosecutions office who make use of the mandated power.

Most rules, including all general rules in the code of conduct, apply to every single employee of the Public Prosecution Service.

In formulating the code of conduct, it has been attempted to relate it to the oath (article 5 of the Judiciary (Organization) Act) which is taken by all judicial officials upon their acceptance of office. The oath which is taken by members of the judiciary dates from 1827 and reads as follows:

"All the members of the judiciary named in this present act, each of them in the manner of his religious affinity or philosophy of life, before taking office, shall take the oath (make the promise) that they will be loyal to the King, and will maintain and comply with the Constitution; that they have not given or promised anything, nor will they give or promise anything, in order to obtain their appointment, either directly or indirectly, under any designation or pretence, to any person whomsoever; that they will never accept or receive any gifts or donations whatsoever from any person of whom they know or suspect that he is involved in legal proceedings or in a lawsuit, or will become thus involved, in which they might be required to act in an official capacity; that they, furthermore, will fulfil their posts with honesty, accuracy and impartiality, without discrimination of persons, and will conduct themselves in the exercise of their duties as behaves brave and honest judicial officials."

The object was to focus on specific qualities or aspects of the Public Prosecutions Service and on a contemporary interpretation of the more than 170-year-old oath. Other employees of the Public Prosecutions Service take a different oath or make a different promise upon accepting office: because it is briefer, it offers fewer points of departure for elaboration into a code of conduct. For this reason, the judiciary oath with its broader scope was taken as a basis.

Transitional law
This guide applies as from the date of its entry into force.

Implementation of the Public Prosecution Service Code of Conduct

General comments

Why implementation is required
It is vital to understand that a Code of Conduct is only effective if it is absorbed into the 'consciousness' of the office personnel. There is little point in circulating the text of the Code of Conduct without an implementation programme.

Management sets an example
It goes without saying that the director and senior staff of a public prosecutor's office should set an example in following the Code of Conduct. Promoting compliance with the Code of Conduct is implausible if the management itself fails to live up to it.

New employees
New employees should be familiarised with the Code of Conduct in some form of introductory programme. These days, it is an integral part of public prosecutors' training although doesn't yet seem to be a standard part of administrative workers' induction. Personally, when swearing in new staff, I always refer to the Code of Conduct, presenting the new staff member with a copy.

Implementation programme for existing staff
For existing staff to whom the Code of Conduct is new, it is a good idea to organise a special introductory meeting to discuss the code. Based on experiences exchanged during the meeting, you can then decide how often such meetings should be held.

Implementation programme for existing staff

No set parameters
You are of course free to decide the form your introductory meetings should take. Experiences gained at different public prosecutor's offices have taught me the value of organising a group of a maximum of twenty persons, drawn from all levels of the public prosecutor's office. This gives the best chance of the actual participation of as many people as possible.

If you decide to focus only on public prosecutors, you can adapt examples to reflect typical dilemmas that occur in public prosecutors' everyday working life.

Leading the meeting
For an open atmosphere, I recommend that someone who is not part of the management should lead the meeting. However, it can be useful if a chief or senior public prosecutor attends the meeting, even if only to demonstrate the management's support of meetings of this kind. This need not mean that a behavioural expert should be hired to lead the meeting. Someone who works in the organisation could prove extremely skilled. When selecting a member of staff, I strongly advise choosing an individual who is trusted within the organisation, with excellent social skills, creativity, imagination and a sense of humour.

The leader doesn't only ensure that as many people as possible actually participate in the discussions, but also creates an atmosphere of openness and trust and can temper the situation if responses become too heated. He or she should also try to keep the meeting from becoming too 'heavy'.

Before the meeting, the leader should discuss any specific issues relating to conduct that may have surfaced in the workplace, in order to subtly steer the meeting to addressing these situations.

What can be discussed during the meeting?
Much depends on the history of the public particular prosecutor's office, the way in which people are accustomed to treating each other and so on. But experience shows that (in the first instance) staff highly appreciate discussing daily problems that can arise at work. Once these difficulties can be brought out into the open, the typical professional dilemmas can be dealt with.

Solutions to the dilemmas put forward by staff can then be compared to the answers listed in the Code of Conduct. If the two seem to correspond, the first step towards recognition and consequently dealing with the situation has been taken.

The top three 'standard' dilemmas within the Dutch Public Prosecution Service seem to involve questions relating to:

1. confidentiality
2. how the personal lives of the Public Prosecution Service are affected by their job at the Public Prosecution Service, and
3. relationships with colleagues

It is very important to make people recognise the fact that certain issues encountered during their everyday working lives are in fact dilemmas. Next, one of the fundamental rules regarding dilemmas is that employees shouldn't be too ready to find solutions themselves. If in doubt, employees should consult their colleagues and their immediate superior. Another key point to be aware of is that, in some cases, there is not just one "right" answer.

Here again, if only points of this sort are mentioned by the participants, participants may not fully digest them. Staff will first need to experience issues as dilemmas, and finding solutions, before really being able to grasp them.

Atmosphere of openness and trust
During the meeting, it is crucial to create an atmosphere of openness and trust. People should be able to express their views without fear, and not be held to account for their responses afterwards. The only way to encourage an open exchange of thoughts is by ensuring that meetings are open and free from value judgements. This is the only way of securing an open exchange of ideas. These basic rules of the game must be made clear beforehand. However, this doesn't mean that congenial responses to each other's remarks should be discouraged. The leader plays an important role here; the management of the public prosecutor's office can make a considerable contribution here by, in the beginning, presenting a suitable dilemma for which there are no straightforward answers.

Structure of the meeting
There are no blueprints for structuring the meeting. I usually start with a short general introduction about how the Code of Conduct came about, and the importance of the implementation meeting, before showing my own vulnerability by referring to a simple dilemma I encountered and for which – too stubborn to ask anyone's advice – I eventually found a not particularly adequate solution. Then, I open the floor to the group.

A good method is to give every participant three minutes to come up with a dilemma they faced (preferably at work). Then wait and see whether someone responds to the issue or choose a member of the group – preferably someone able to take a few knocks – to do so. A person's own response to a dilemma can lead to an initial group discussion. Here it is important to frame the questions to reflect the experiences of (other members of) the group ('do you recognise this and how did you deal with such situations?) This technique helps prevent group members from giving socially desired answers. If there's no other option, the group can also be asked something along the lines of 'would you have taken similar action in that situation?' If people agree, it can be useful to see whether the chosen option is also contained in the Code of Conduct.

If the dilemma is a complex one, the leader can simplify it by placing less emphasis on certain facts; if the reverse is true, complicating factors can be added. Even if the discussion becomes too theoretical rather than being based on personal experience, this won't be too bad in the context of the discussion. The stage of giving socially desirable answers – which is a danger when introducing an example oneself, is minimised. Depending on the type of examples tabled, it may be useful if the leader varies the cases by introducing a slight variant each time ('would it have made a difference to you if…'). Again, the best way of dealing with a situation is to adapt your behaviour to each one rather than always taking the same line. It is also constructive to relate the dilemmas and solutions found to other sections of the Public Prosecution Service ('your dilemma ranks among the top three').

If the meeting leader decides not to have participants present dilemmas themselves, he or she can opt to ask an open question about one of the top three dilemmas: ('Which of you experienced…?) Use a recognisable example such as (dealing with colleagues: a colleague has a bad odour,.. another tells sexist jokes;… one colleague seemed to look at a female colleague's blouse for a split second too long) followed by the questions – what did you do in that situation?

The confidentiality examples are particularly useful for such questions as ('Did you ever come across the name of a friend or acquaintance in a criminal case file? Did you tell anyone? Your colleagues, your wife, the people you know?).

Then there are the examples encountered at home ('Have you ever noticed that if the plumber, decorator, mechanic etc,. doesn't give you a bill, you get a huge discount? How did you respond)? In every instance, choose easily recognisable situations.

Finally, the leader can also present complete examples. I've listed a couple below.

At the end of the meeting, you can return to the Code of Conduct. If the group is enthusiastic, then say that similar meetings can be arranged in the future. Experience has shown that it's always a good idea to let the group discuss the issues that have been raised, in a relaxed setting. So I recommend closing the meeting with drinks and light refreshments.

Examples of cases
N.B.: the following examples regularly contain questions such as 'what can I do?' The leader of the meeting should draw a distinction between 'how did you react/ how would you react' and the question of whether this was the correct way to respond.

- I'm a secretary, and now and then organise a dinner or business lunch for the chief public prosecutor. There's a good restaurant round the corner, and the public prosecutor always enjoys eating there. My boyfriend and I decided to eat out at that restaurant and when the bill arrives, see that they have charged hardly anything 'Because you're such loyal customers'. What should I do?
- I work at the Public Prosecution Service. After an inauguration when he'd drunk several beers, I happened to see my team leader get into his car, drive off, and collide with a stationary car. He didn't know I'd seen him. He got out to make a quick assessment of the damage, looked around to see if anyone had witnessed the accident, and quickly drove off. The problem is – next week, I'm up for a promotion. What should I do?
- I work as an administrator at the Public Prosecution Service. One of the public prosecutors I work closely with regularly makes fairly major mistakes. I know from experience that he can't deal with criticism. No one else seems aware of his uneven performance and he's on the verge of making another error. What should I do?
- As a trainee public prosecutor, I sat in on a victim interview between my trainer and a rape victim. He had to tell her that the case won't be brought to court, but the way he did so was pretty crude. He was clearly having a bad day. The victim was very upset and filed a complaint several days later. The chief public prosecutor has asked me to draft an official report of what happened. What should I do?
- As public prosecutor after a prolonged sitting, I return to my office at 6pm to find a message to the effect that, that same afternoon, a suspect has filed a notice of appeal. This happened

to be the last day on which, according to the law, appeal could be lodged. Although the case was also viewed by the Public Prosecution Service as suitable for a notice of appeal, I had indicated I wanted to check on what the suspect would do. If he instigated an appeal, I would follow. The criminal court registry closed at 5pm. When I walk past the criminal court registry, I see a member of staff with whom I have a good relationship, still working. I wonder to ask her to draft my notice of appeal anyway. What should I do?

- From experience, I know that the reputation of a quoted company I am investigating in the context of a preliminary investigation into insider dealing will suffer a huge blow when the case collapses. This is sure to affect share prices. My neighbour and good friend is considering investing a 70,000 Euro inheritance. He tells me that the bank has advised him to invest some of the inheritance in the company in question. What should I do?
- I've just returned from an emergency meeting of the Board of Procurators General with the heads of the public prosecutors' offices. During the discussion, it was agreed that the content of the meeting would not be made public. A journalist working for a reputable evening paper phones me. He seems to be well informed of the points we discussed, but wrongly interprets one of the matters agreed upon. When this gets into the papers, it could mean considerable personal injury for one of the chief public prosecutors. What should I do?
- I'm a public prosecutor and I'm on holiday overseas. I see high quality fake products being sold on the street there at extremely low prices. Apparently, this is not punishable in that country although it is in mine. I've even prosecuted cases of this kind myself. Is it permissible for me to purchase these goods anyway?
- I work for the Public Prosecution Service and am a member of the staff football team's managing board. A large sports retailer has offered our members a sizeable discount on sports goods. No other sales outlet can match the discount. What should I do? Does the fact that the sports outlet has never dealt with the judiciary make a difference to my response?
- I work for the Public Prosecution Service. I was shocked to see that the father of one of my daughter's friends is suspected of incest. Should I tell my wife and stop my daughter from playing with the child? Should I tell my sister, whose kids play with the man's children as well? Should I tell the neighbours?
- As public prosecutor, I've been given the use of a company car. My wife tells me that our own car needs to go in for a service. She asks whether she can borrow the company car. What should I do?
- I'm a public prosecutor. My daughter was recently assaulted by a group of immigrant youths. I've just been presented with a similar case, which makes my blood boil. What should I do?

- I'm a public prosecutor. My son has told me that his class is doing a roaring trade in illegal CD copies of chart music. This is how my son has got hold of all his favourite music at a price far below that in the shops. He spent all his pocket money on it. I have the possibility of looking into the criminal records. What should I do?
- I'm a public prosecutor and on very friendly terms with a judge. One day, he tells me that he's worried about his son, who is studying in another town. He even wonders whether his son has had a run-in with the law. What should I do?
- As a public prosecutor I met the relatives of a murdered man, explaining the course of the criminal process. Afterwards, they sent me a huge bunch of flowers for my trouble. What should I do? Is a bouquet the same as a crate of wine or accepting a dinner invitation to an expensive restaurant?
- I work for the Public Prosecution Service and have just moved to a new area. The houses are ready, but the gardens haven't been laid yet. While getting to know my new neighbours, I hear that they've found a company to prepare the soil of the entire row of houses for laying gardens. The price offered is very low because it'll be paid in cash, without an invoice. The offer is all or nothing. If one of the neighbours doesn't go along with it, the offer will be invalid. What should I do?
- I'm a public prosecutor and love football. One of my friends in a service club gives me tickets for the skybox during Europe Cup Match. When I go, I realise that a number of other guests in the skybox are businessmen, some of whom are currently the subject of a criminal investigation. What should I do? Does it make any difference that the men have since been sentenced and served their criminal term?
- I work for the Public Prosecution Service and spend much of my free time in activities on behalf of a political party. One of the party members I know is now a member of parliament and phones me to ask whether the Minister of Justice gave an honest report on a criminal case now being discussed in parliament. He promises me total anonymity. Because of my professional involvement, I know what really happened. What should I do? Does the fact that I know that the Minister only told half-truths make any difference?
- I'm a public prosecutor and am prosecuting a burglar who has committed twenty break-ins. In accordance with internal guidelines, I subpoena a burglar for no more than five instances, adding the rest for information. In my legal system, the victims of a case declared to have been proven are more easily awarded damages. One of the victims transpires to be an old acquaintance fallen on bad times. What should I do?
- I'm a public prosecutor. In a major drugs case I received information that an extremely dangerous criminal was behind a liquidation. I have promised my source absolute anonymity. Additional information seems impossible to get hold of. If I

successfully want to prosecute the criminal I have to withdraw my pledge of anonymity. My informer doesn't want to testify because it would endanger his life. I know I'd be able to place him in a witness protection programme, but that this would mean huge consequences for his personal life. What should I do?

- I'm a public prosecutor. I'm currently prosecuting a large-scale drug dealer who was arrested when the police made an official report during a routine traffic check, when cocaine and a firearm were discovered in his car. I happen to discover that the police set up the find. But the man had been under observation for some time, and an informant had told the police that the man would be delivering cocaine that day. The vehicle check was set up and the real course of events was left out of the official report. If the truth comes to light, the suspect will almost definitely go free and the police will be reprimanded. What should I do?
- I'm a public prosecutor and presently involved in a case against a company suspected of committing environmental offences. A key politician phones me with an informal request to give the case low-key treatment otherwise the company would probably transfer its activities to another country, which would have considerable impact on jobs in my area. What should I do?
- I'm a public prosecutor. A man suspected of a number of paedophile crimes tells me that his confession was extracted by police beatings. However, there is no trace of physical injury. When asked, the police say they conducted a stringent but fair interview and that it's sometimes better if I don't know the full story. What should I do?

International co-operation in criminal matters:
Establishment of a network of CONTACTS between Prosecution Services

Technical memorandum by the *Bureau of the Conference* (2 May 2002)

Recommandation (2000) 19 provides, in Article 38 c., for the establishment of contacts between Prosecution Services in different countries. At its meetings in STRASBOURG and BUCHAREST, the Conférence instructed its Bureau to look into the related question of establishing appropriate relations with EUROJUST. This memorandum sets out the Bureau's proposals on this point.

I.- Prosecution services and international co-operation in criminal matters

Generally speaking, the *Bureau* considers it appropriate that the *Conference* should

 state its position, at its LUJBLJANA meeting, on ways of improving international co-operation in criminal matters and express an official view, on behalf of Europe's Prosecution Services, on all the desirable reforms, based on proposals made by the PC-S-NS group, in the framework of OCTOPUS or at the Conference's first meeting in STRASBOURG.

 look at ways of organising Prosecution Services internally with regard to international co-operation, in order to be able to recommend those which appear to be most relevant and most efficient. The *Bureau* is gathering the necessary information for this purpose.

II.- Establishment of NATIONAL CONTACT POINTS

While the member states of the European Union and the applicant states have numerous judicial co-operation tools – such as the contact points of the European judicial network and EUROJUST -, the other Council of Europe countries at present seem bereft of any comparable machinery.

The absence of any appropriate pan-European machinery, especially in the criminal justice field, is an obstacle to international exchange and co-operation at a time when crime is becoming increasingly internationalised.

Accordingly, the *Bureau* proposes **establishing a network of national contact points** which, to begin with, would concern all the

states not included in the above-mentioned European judicial network, then, at a second stage, after negotiation with the European Union, all 43 member states of the Council of Europe.

Each national contact point, designated within the Prosecution Service concerned, would serve to facilitate international exchange and co-operation, in particular:

- by helping to determine the authorities enjoying territorial jurisdiction, both internally on behalf of requesting Prosecution Services, and externally for the benefit of its own authorities;

- by facilitating contact between foreign Prosecution Services and requesting or requested internal authorities;

- by advising foreign Prosecution Services on procedure;

- and by passing on requests for mutual assistance to the Prosecution Service concerned and monitoring their execution within the required time-limits.

Training for these contact points should be provided by the Council of Europe at regular meetings also intended to foster mutual acquaintance and exchange on questions of common interest.

The *Conference of Proecutors-General of Europe* is invited to discuss the principle of establishing such contact points at its meeting in Ljubljana.

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The future EUROPEAN DATABASE on PUBLIC PROSECUTION

Technical memorandum from the *Conference Bureau* (2 May 2002)

At its meeting in Bucharest (16 May 2001), the Conference of European Prosecutors General instructed its Bureau to study the arrangements for a future database on Public Prosecution.
This memorandum sets out the Bureau's proposals, on which the Conference is invited to give an opinion at its meeting in LJUBLJANA.

In accordance with the instructions given to it, and in liaison with Council of Europe specialists in this field, the *Bureau* has defined the content and arrangements for a future ***"database on public prosecution"***.

I.- OBJECTIVES

There are several objectives, including :

- to adopt a comparative approach at a time when both public prosecution services and procedural law are undergoing wide-ranging reform.

Each public prosecution service must therefore have access to legal texts governing the organisation, status and procedural law applied in all other European public prosecution systems.

- to promote the harmonisation of public prosecution services on the basis of common principles set out not only in Recommendation (2000) 19 but also in other official Council of Europe texts concerning public prosecution services.

The main aim is to simplify access to all of the documents concerned, while stressing their importance for public prosecution.

- to facilitate relations, exchanges, co-operation and mutual assistance between the various public prosecution services; this also requires wide knowledge of the specific features of each service.

- to identify the problems currently facing each prosecution service to help the *Conference* decide what needs to be done in future.

On the other hand, the *Bureau* decided that it was there was no point including documents concerning international co-operation in the future database as useful notes has already been drawn up on the

Council of Europe's initiative and will soon be accessible on the Internet.

II.- ARRANGEMENTS

The purpose of the future database will be to make the following information available to all public prosecution services represented at the *Conference*:

- information on public prosecution services already gathered by the Council of Europe at its various meetings and the various relevant texts (conventions, resolutions, recommendations, etc)
- information gathered from each public prosecution service on previously determined issues.

The database will be housed on the Council of Europe website, in the part already reserved for the *Conference of European Prosecutors General.*

If this database is to be successful,

- each public prosecution service must undertake to forward the information requested in one of the Council of Europe's two official languages and in electronic form (via the web, for example)
- each public prosecution service must undertake to update the relevant information, at regular intervals still to be specified ; this will require the appointment of a specialist, who can be contacted by the database manager.
- the Council of Europe must earmark funds for the setting up and running this database (protecting data, defining research criteria, translating information into the other official language, updating information, etc).

III.- CONTENT of the INFORMATION to be forwarded by each Public Prosecution Service

The information to be forwarded and updated should, in the first place, concern :

- constitutional texts or Basic Laws specifically concerning the public prosecution service
- laws and other standard-setting texts concerning not only the powers and responsibilities of public prosecution services but also their organisation and the status of members
- codes or conduct and ethics for members of public prosecution services
- certain texts on criminal procedure directly concerning the role of the public prosecutor, insofar as it is related to the issues discussed in *Recommendation (2000) 19*

 particularly significant case-law decisions, on the same subject
 draft reforms and recent laws which are, for one reason or another, of relevance to the public prosecution service, as well as studies and research concerning public prosecution.

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The Ljubljana meeting should give the Conference of Prosecutors General the opportunity to give its opinion on this project and to give its Bureau instructions concerning its implementation .

The role of the public prosecutor's department at the Belgian Court of Cassation

Mr Jean DU JARDIN, Principal Public Prosecutor at the Court of Cassation, Belgium

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General comments on organisation of the Belgian judicial authorities

At each level of the courts the judicial authorities are divided into judges and public prosecutors:

- 1. Judges are required to decide cases in the courts of first instance, the courts of appeal and the Court of Cassation concerning disputes over civil rights.
- They must exhaust their jurisdiction in matters brought before them, without being able to refuse to deal with these on any ground, even where the law says nothing about such matters or is unclear or deficient.

- 2. The public prosecution service consists of a corpus of judicial officers, organised in a hierarchical system, who represent the law and public order within the court to which they are assigned. They participate in proceedings, in a completely independent, impartial manner, by bringing prosecutions, presenting the prosecution's arguments and giving opinions.

- In the field of criminal law the public prosecutor handles all aspects of a prosecution as regards determination of the charges, conduct of the case and sentencing.

- In other fields the public prosecutor issues opinions in cases laid down by law and whenever necessary for reasons of public policy. The prosecutor is not a party to the proceedings in respect of which the opinion is given, but rather fulfils the role of an *amicus curiae* (see below).

- At the Court of Cassation the public prosecutor's department does not, in principle, handle prosecutions as such but only issues opinions (see below).

The specific role of the Court of Cassation

Article 147 of the Constitution provides: "There shall be one Court of Cassation for the whole of Belgium." It serves as the country's supreme court. It does not judge cases on their merits, but only *judges judgments* against which a party has *appealed on points of law.*

Proceedings commence with lodging of an *appeal on points of law*. In principle, the court must strictly confine itself to weighing the appellant's arguments (or grounds of appeal) in order to assess the lawfulness of the decision being challenged, that is to say its conformity with the law or, under certain conditions, with international treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The procedure is primarily a written one. The appellant's grievances concerning the contested decision, which are based in law not in fact, must in principle be set out in written pleadings, known as the *applicant's memorial,* which must specify the legislative provision or general principle of law allegedly breached by the decision and any arguments which may constitute grounds for setting that decision aside([1]).

The opposing party, against whom the appeal is directed, may submit arguments in reply in a *respondent's memorial.*

The Court of Cassation's role is to serve as an instrument of social regulation through the law. It fulfils this task by means of the case-law it establishes in its judgments, "aiming for consistency, preciseness, certainty as to the law and foreseeability. Its reason for existing is to enforce the law in an equitable and just manner, to achieve some flexibility in trends in the law, while preserving its effectiveness and authority." (address given by Guy Canivet, First President of the French Court of Cassation, report of the Court of Cassation for the year 2000, p. 37).

The prosecutor, whose principal role is to issue an opinion (see below for the scope of this opinion), intervenes between the moment when the court takes cognisance of the tenor of the appeal and the memorials from a report submitted by a reporting judge, who is appointed by the President of the court to prepare the case for hearing, and that when the court deliberates and gives judgment.

The court either dismisses the appeal, with the result that the contested decision becomes finally binding, with no further possibility of appeal, or sets that decision aside and refers the case to a new court.

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1 An exception to this rule exists in criminal law. Where an appeal on points of law has been lodged in due form against a decision concerning a prosecution, the appellant is not required to advance any particular arguments. Once an appeal lodged under the proper procedure has been registered, the court and, before it, the public prosecutor automatically review the lawfulness of the challenged decision.

The specific role of the public prosecutor's department at the Court of Cassation

The Principal Public Prosecutor and his or her team of prosecutors constitute a department within the Court of Cassation, a corpus of judicial officers, who are impartial and independent of both the court and the parties to proceedings. Their main task is to provide the court and the parties with a reasoned opinion on the lawfulness of the proceedings at issue, the legal merits of the arguments relied on in challenging the contested decision and the recommendation(s) made by the reporting judge.

In fulfilling this task the public prosecutor can make *written* submissions, which are transmitted to the parties a fortnight before the hearing, or *oral* submissions. The parties may respond either orally or in writing to submissions made in either form.

Impartiality of the public prosecution service

Whereas the applicant and the respondent each quite rightly present their own case in strict compliance with the adversarial, or *inter partes*, principle - and it is for that very reason that they are designated parties, that is opponents in a dispute - the public prosecutor, who can in no way be regarded as a party, intervenes only as the law's advocate, speaking on its behalf.

The prosecutor's critical assessment, which concerns not only the parties' arguments but also the reporting judge's recommendations, must be seen within the specific context of his or her role, which is in fact more a *mission* assigned by law, in that the prosecutor's sole concerns are to ensure that the law is interpreted correctly and consistently and to preserve the case-law's unity.

What has been described as the "prosecutor's second opinion" ([2]), can immediately be seen to be far more wide-ranging in scope than the reporting judge's view of the case, since, in preparing the case for hearing, that judge takes account solely of the arguments relied on - nothing but the arguments but all of the arguments, as the saying goes - whereas the prosecutor adopts a more comprehensive approach to weighing the same arguments, referring, for example, to the intentions of the authors of a piece of legislation, which may have come to light during its passage through parliament, established precedents and even legal doctrine, and then goes on to give an opinion on the recommended solutions.

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2 Cf. the address given by Mr Burgelin, Principal Public Prosecutor at the French Court of Cassation, at that court's re-opening session on 11 January 2002.

In all these respects, the prosecutor has quite fittingly been compared to an *amicus curiae*.

If the prosecutor takes any side, it is solely that of uniform interpretation of the law and stability of the court's case-law - but without resisting changes in the law where the need exists - all of which comes within the ambit of the prosecutor's specific task of guaranteeing certainty as to the law. Have prosecutors not aptly been described as the "guarantors of both the lawfulness and the reasonableness of court decisions, which leads them to defend not only the law itself, but also that fundamental principle according to which it is applied, known as *reason*"? (L. Charbonnier, "Ministère public et Cour suprême", *La Semaine Juridique, 1991, 3532).*

It can be retorted, however, that this should also be the concern of judges of the court.

It is true that the public prosecutor works with the same material as the judges - in this case a judicial decision - and with the same instruments - legislation and case-law. But what distinguishes the prosecutor from the judge is the fact that the prosecutor's findings are in no way intended to decide the matter at issue, that they are not the outcome of deliberations, but the work of an independent, objective, impartial judicial officer, who puts the case being dealt with into perspective on the basis of the legislation and the case-law of which he or she is the guarantor. The prosecutor's sole - rather than primary - concern will therefore be to review the contested proceedings' lawfulness, as this is absolutely essential and it is this task with which the prosecutor is entrusted in the public interest. The prosecutor may also take account of any need for changes in the law, since the requirement of certainty as to the law cannot serve as an excuse for a fixed case-law, written in stone once and for all.

European case-law

In recent decades Belgium and other European countries have received some harsh criticism from the European Court of Human Rights concerning certain aspects of proceedings before their supreme courts. This criticism did not relate to the public prosecutor's role, nor even prosecutors' independence and impartiality, which were not called into doubt but, on the contrary, persistently and consistently acknowledged (see the references to this case-law set out in Appendix 1).

The criticisms mainly focussed on the lack of a right of reply to prosecutors' submissions and on their participation in the deliberations. These aspects of the procedure gave the *impression* of an unfair trial, and it was therefore first a matter of saving appearances: "*Justice must not only be done; it must also be seen to be done"* (see Appendix 2 for an explanation of the background to this saying).

The Belgian Court of Cassation, which was obliged to take account of the European court's decisions, immediately changed its practice to comply with that court's requirements, and this *de facto* adaptation was subsequently followed by a reform of the statute law (the Act of 14 November 2000 amending certain articles of the Judicial Code, constituting the general rules of procedure, and certain articles of the Code of Criminal Investigations, constituting the code of criminal procedure).

As a result of these changes in the legislation, the procedure before the Court of Cassation now allows parties the possibility of responding to the prosecutor's submissions and the practice of the prosecutor's participating in deliberations has been brought to an end.

The European court's tenacity

Far from letting things rest with the legal reforms adopted by states against which it had found violations, the European Court of Human Rights has continued to pursue this matter. It has taken the view that any document intended for a court's use in reaching its decision should, as a general rule, be made available to the parties in accordance with the adversarial principle. With specific regard to the procedure followed in the Court of Cassation, this would mean that the parties must have access to the draft judgment prepared by the reporting judge, which contains that judge's assessment of the arguments relied on and recommends one or more solutions, in the same way as they are informed of the public prosecutor's submissions, since both are intended to serve as a basis for a decision.

It is nonetheless inconceivable that the parties should be privy to information which is intended to be confined to the deliberations, unless the intention is that the parties should also be allowed to participate in the deliberations, a solution which - it cannot but be acknowledged - goes beyond the bounds of reason.

Pursuing the European court's line of reasoning, to guarantee *equality of arms* it would be necessary to ensure that the draft judgment was also kept secret from the public prosecutor.
The underlying idea is that, within the court, prosecutors are at an advantage over the parties, as regards their position and the information they receive. This assumes that the court itself equates prosecutors with the parties, regarding them as being for or against one or the other side depending on the tendency shown in their submissions.

Apart from the fact that this betrays an incorrect perception of the prosecutor's specific role, it is necessary to grasp the implications of a decision of this kind and to consider what would be lost to justice should such drastic limits be placed on the role of the public prosecutor at the Court of Cassation.

The consequences of what would amount to veritable exclusion would be felt at three levels: the court, the parties and the law in general.

1. At the court's level what value would the public prosecutor's opinion retain for the judges required to decide a case, if the prosecutor were confined to the role of theorising, to advancing what would, in the end, be merely dogmatic considerations, of which judges have no real need since they too are familiar with the law and concerned to ensure that it is interpreted in a consistent manner? To be of real use the public prosecutor's opinion must take into account not only the arguments relied on, but also the recommendations made by the reporting judge, both of which are weighed by the public prosecutor in the light of the legislation and the case-law.
   If the European court's preferred solution were adopted, the Court of Cassation would no longer have at its disposal the full legal assessment of the problems raised by an appeal on points of law, and of the possible solutions, with which it has been provided to date by judicial officers able to express themselves publicly - unlike the judges - and independent and impartial - unlike the parties, whose main concern is to defend their case and hence their own interests.

2. The loss would also doubtless be most severely felt at the level of parties to proceedings - members of the public coming before the court - who have been granted the right to reply to the public prosecutor's submissions. This is because they would be deprived of an opportunity to familiarise themselves with and better understand the legal context in which the court may take its decision, an opportunity they previously enjoyed through their knowledge of the opinion of an impartial judicial officer, functionally independent from both themselves and the judges. Their arguments in reply would then merely be based on an opinion divorced from the recommendations made by the reporting judge.

3. This alteration and, above all, debasement of the very substance of the public prosecutor's opinion would therefore already have very harmful consequences at the two above levels. However, there would also be negative repercussions on the law, in general, on its interpretation and on trends in the law, since judges tend to express themselves solely in authoritarian terms and their decisions are required to be elliptical in style, rather than going into details, whereas the voice of the *law's advocate* would no longer be heard, except in sententious theorising. The public prosecutor's submissions in fact derive their full meaning and importance from the way in which they place the possible solutions to the legal problems posed not only in their legal context, but also, where appropriate and necessary, in an economic, social or ethical context.

It should also be said that, unlike judges, public prosecutors at the Court of Cassation are not required to distance themselves from the legislative and executive authorities.
It is therefore possible for public prosecutors to propose legislative reforms, on the basis of the judgments handed down, so as to ensure that the law deals adequately with legal problems which the supreme court was unable to resolve in a satisfactory manner because of either deficiencies in the law or discrepancies in the case-law, resulting in legal uncertainty, both of which can be remedied by parliament alone.
Since the public prosecution service is involved in every case, it is ideally placed to realise that these deficiencies and discrepancies exist and to draw attention to them. This aspect of its role confers not inconsiderable importance on it.

Conclusions

The solution adopted in Belgian law - firstly, allowing the parties to reply to the prosecutor's submissions concerning the merits of an appeal and the possible solutions and, secondly, bringing an end to the prosecutor's participation in deliberations - was deemed satisfactory by the European Court of Human Rights, since the Act of 14 November 2000 offered additional guarantees to parties coming before the Court of Cassation, which went beyond the requirements of Article 6 § 1 of the Convention on Human Rights ([3]).

This solution has the advantage of preserving the principal aspects of the public prosecutor's role, for the greater benefit of the Court of Cassation and also parties to proceedings, since, far from being purely theoretical, as would be the case if the public prosecutor no longer had any knowledge of the reporting judge's preparatory work, the opinion can continue to take account of all the problems raised by an appeal on points of law.

The fact remains that if, when giving this "second opinion" (see above), the public prosecutor were obliged to take a blinkered view of things, that would significantly undermine his or her role and, at the same time, the quality and clarity of court decisions, above all from the point of view of the parties to proceedings who, up to now, have enjoyed a guarantee that two senior judicial officers, belonging to different bodies

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[3] European Court of Human Rights, admissibility decision in Wijnen v. Belgium of 18 September 2001, application No. 32576/96 (unofficial translation): "the judicial adaptations of the procedure followed in the Court of Cassation … appear to afford applicants guarantees which are at least as satisfactory as those assessed by the Court in its Reinhardt and Slimane-Kaïd v. France judgment of 31 March 1998 … The Act of 14 November 2000 apparently provided parties to proceedings in the Court of Cassation with additional guarantees, but this cannot lead to the conclusion that there was a violation of Article 6 §1 in the instant case, since those guarantees seem partly to exceed the requirements of that article."

- the judiciary and the public prosecution service - within the same supreme court, have thoroughly reviewed their case, in an unbiased, fully independent manner, and enriched the court's assessment of it through the diversity of their points of view.

There is no real explanation for the European court's reluctance to accept a practice which, first and foremost, was founded solely on the good administration of justice and, it must be stressed, had for over a century and a half met with no criticism nor negative reactions, whether in Belgium or in other countries applying the same procedure.

If this wary attitude towards public prosecutors were to subsist, there would be a considerable risk that the European court's readiness to place its own interpretation on situations, which is apparent from its case-law, might disrupt the traditional judicial systems, of Latin origin, under which public prosecutors at supreme courts have, in the public interest that it is their duty to uphold, retained an active role in both civil and criminal proceedings, whereas the solution should, in this case, be solely a *policy decision*.
This would consist in distinguishing the office of public prosecutor at the supreme court from that of public prosecutor in *accusatorial* proceedings in the ordinary courts.
The terminological ambiguity, resulting from the fact that both of these judicial officers bear the title prosecutor ("procureur" in French), probably does nothing to dispel the cautious attitude unjustly taken towards prosecutors.
This distinction would have the advantage of eliminating any ambiguity or unwarranted association of ideas concerning the specific role of *amicus curiae* which the prosecutor currently fulfils and must retain in future ([4]).

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4 However, there is still reason for hope since, in the Kress judgment (ECHR, 7 June 2001), seven judges - including the President of the court himself - disagreed with the majority of ten, stating that it would be desirable "that the Court should review the whole of its case-law on proceedings in supreme courts in Europe, case-law which places too much emphasis on appearances, to the detriment of respectable national traditions and, ultimately, of litigants' real interests." (partly dissenting opinion, § 13)

Appendix 1

I. Judgments of the European Court of Human Rights concerning the role of the public prosecutor at the Belgian Court of Cassation

The European Court of Human Rights has delivered four judgments finding violations against Belgium for failure to disclose the public prosecutor's submissions before the hearing, for denying parties the possibility of replying to these and on account of the prosecutor's presence at the court's deliberations. These are:

- the Delcourt v. Belgium judgment of 17 January 1970, a unanimous decision concerning criminal proceedings (Series A No. 11).
- the Borgers v. Belgium judgment of 30 October 1991, a decision taken by 18 votes to 4 concerning criminal proceedings (Series A No. 214-B).
- the Vermeulen v. Belgium judgment of 20 February 1996, a decision taken by 15 votes to 4 concerning civil proceedings (Reports 1996-I).
- the Van Orshoven v. Belgium judgment of 25 June 1997, a decision taken by 7 votes to 2 concerning disciplinary proceedings (Reports 1997-III).

II. Judgments of the European Court of Human Rights finding against other contracting states for identical or similar violations

1. Lobo Machado v. Portugal, 20 February 1996, a unanimous decision concerning proceedings in employment matters (Reports 1996-1).
2. K.D.B. v. the Netherlands, 27 March 1998, a unanimous decision concerning civil proceedings (Reports 1998-II).
3. J.J. v. the Netherlands, 27 March 1998, a unanimous decision concerning proceedings for tax offences (Reports 1998-II).
4. Reinhardt and Slimane-Kaïd v. France, 31 March 1998, a decision taken by 19 votes to 2 concerning criminal proceedings (Reports 1998-II).
5. Slimane-Kaïd v. France, 17 May 2000, a unanimous decision concerning interest in civil matters determined in the criminal courts (application No. 29.507).
6. Voisine v. France, 8 February 2001, a decision taken by 5 votes to 2 concerning criminal proceedings (application No. 27362/95).

7. Maftah v. France, 26 April 2001, a unanimous decision concerning criminal proceedings (application No. 3291/96).
8. Kress v. France, 7 June 2001, a decision taken by 10 votes to 7 concerning administrative proceedings in the French *Conseil d'Etat*.

Appendix 2

In full, this saying of Anglo-Saxon origin is: "*It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

It is said to have been pronounced for the first time in 1924 (!) by Lord Chief Justice Hewart, in the case of the King v. Sussex Justices, ex parte Mc Carthy, (1 K.B, 256). This information comes from a judgment of the Supreme Court of Canada, ruling on an appeal from a judgment of the Nova Scotia Court of Appeal (Supreme Court Reports, 1997, No. 25063, §110), where the saying is cited and described as a famous maxim.

The European Court of Human Rights first referred to this dictum - or a somewhat shortened and, hence, more elliptical version of it - in its Delcourt v. Belgium judgment of 17 January 1970, where it stated that although doubts might arise about the satisfactory nature of the Belgian system "looking behind appearances the Court does not find the realities of the situation to be in any way in conflict with this right [to a fair trial]" (§ 31). The European court accordingly held that the procedure entailed no violation of Article 6 of the Convention on Human Rights.

The concept of a fair trial was then to undergo "a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice" (Borgers judgment, §24, with references to many judgments delivered between 1982 and 1991), resulting in the various findings of violations cited in Appendix 1.

The Court, apparently basing itself on the Anglo-Saxon sense of the dictum, accordingly takes into consideration only the relational aspect of the procedure, in other words the impression that parties may be given of the way in which justice is done, without envisaging things from the standpoint of what the procedure may convey in itself, which would be another way of approaching the notion of appearances.

CONCLUSIONS

Under the aegis of the Council of Europe and following an invitation from the Prosecutor General of Slovenia, the Prosecutors General and other Prosecutors of Europe met at Ljubljana, from 12 to 14 May 2002.

At its opening, the Conference heard a message addressed to it by the President of the Republic of Slovenia.

The Programme of the Conference, as well as the list of participants, are available in separate documents. The Proceedings of the Conference will be published in due course.

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1. **The Conference strongly reaffirmed its determination in** promoting the approximation of prosecutors and prosecutors' offices of Europe, as well as their harmonisation around common values and guiding principles, respectful of human rights and mindful of the requirement of efficiency in criminal justice.

It recalled that Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe to its member States, on "the Role of Public Prosecution in the Criminal Justice System" is in that respect the text of reference. It belongs to the Conference and to each prosecutor's office to ensure that the Recommendation is largely distributed, to see to it that it is taken into account, in particular where reforms are undertaken, and to react to any violations thereto.

The Conference tasked its Bureau with studying ways and means of setting up a monitoring mechanism to survey the implementation of the Recommendation in the different member States of the Council of Europe and evaluate the results.

In this framework, the Conference tasked its Bureau with reminding the appropriate instances of the applicable guidelines, in the most appropriate way and in case of urgency where it appears that, in one or another State, the implementation of certain items of the Recommendation poses a problem. It should subsequently report to the Conference.

It expressed the wish that the principles of the Recommendation may also inspire the organisation and the operation of present and future international justice-related bodies, including Eurojust, and international courts. Such bodies and courts, because of their jurisdiction raise in an entirely new way questions concerning the independence and responsibility of the actors of the system of justice. In this respect, it greeted the imminent entry into force of the Statute of the International Criminal Court (ICC), for the new Court will - at the highest level - ensure

respect for the rule of law and the safeguard of human rights. Thus, it invited public prosecution offices in the different countries to bear in mind the existence of the ICC; it further underlined the need to introduce the matter in training programmes.

2. *The Conference reiterated the invitation that it had addressed, at its session in Bucharest in 2001, to the Committee of Ministers of the Council of Europe that the latter formally recognise the Conference as* ***a fully fledged body*** *at the same level as the Consultative Council of European Judges, and grant it with the resources required for its operation.*

3. As to the **relationship between public prosecution and judges**, the Conference reaffirmed that such relations are at the very heart of the criminal justice system: tasked with conducting prosecutions, enjoying the possibility of making appeals against decisions of justice, the Public Prosecution is the judge's natural correspondent in the proceedings, but also in a larger way, in the administration of criminal justice.

The Conference insisted on the fact that the proximity and complementarity of the missions of judges and prosecutors, as well as their common references create similar requirements, in particular in terms of qualification and ethics and, as they require, rules and professional safeguards of the same nature in terms of appointment, promotions and career, and also remuneration, retirement and pension rights.

Nevertheless, the Conference noted that there cannot be any confusion about the respective roles of judges and prosecutors. Such differences, as well as the respect for the independence of each and the procedural clarification of the functions of the different actors, must be recognised. The specificity of the missions of the prosecutors is the reason for them having a different regime than that of judges in terms of discipline and hierarchical organisation.

Lastly, the Conference expressed the wish that the Council of Europe organises a meeting for the members of the Public Prosecution at the Supreme Courts and the Courts of Cassation, because of the specific difficulties with which they are presently confronted.

4. Recalling that the autonomy of prosecutors - and for greater reason their eventual independence – should necessarily be accompanied by a system of responsibility founded on strict individual ethics, the Conference noted with interest that many prosecution offices already benefit from, or are in the process of adopting, a **code of ethics**. With the aim of encouraging that approach, the Conference was in favour of a generalisation of the use of such instruments and tasked its Bureau with preparing a draft model code of ethics for interested public prosecutors in Europe.

5. Underlining the importance that it attaches to **reinforced international co-operation** and the paramount role that public prosecution should play in that respect, in conformity with items 37 to 39 of the above-mentioned Recommendation as well as its own conclusions of Strasbourg and Bucharest, the Conference took note with great interest of the proposals for a "New Start" made by the Council of Europe's Reflection Group on developments in international co-operation in criminal matters.

It encouraged the Council of Europe to ensure a practical follow up to such proposals. It noted in particular that the objective of a European area of shared justice must be based on a commonly defined transnational justice in Europe, which will ensure unity of purpose and principle. It further noted that that area will take the form of legal provisions that introduce into the law the definition of the nature, the objectives, the guiding principles and the limits of transnational justice, as a first step to realising such a European area of shared justice.

The Conference declared its interest in taking part in such tasks.

Moreover, the Conference decided immediately to start a process to reinforce co-operation between public prosecution offices in Europe, by way of setting up a network of "national contact points" at the level of the member States of the Council of Europe. They should operate without prejudice to the role of national central authorities where they exist. Moreover, their coordination with the legal network of the European Union should be provided for.

To that effect, the Conference tasked its Bureau with submitting proposals to the Committee of Ministers, via the appropriate instances; it also tasked it with establishing contacts with Eurojust aimed at exploring the possibility of concluding a cooperation agreement, as it is provided for in Article 27.3 of Eurojust's constituent text.

6. Expressing once again its preoccupation with respect to transnational **organised crime**, corruption under all its forms as well as economic and financial criminality, that each seriously threatens democracy, the Conference voiced its support to prosecutors, "juges d'instruction", courts and police specialising in these matters.

It would wish States that do not have such specialised structures to envisage the possibility of creating such structures, endowing them with the means necessary to carry out their tasks and facilitating the exchange of information and, eventually the coordination of action.

Moreover, it expressed the wish that the competent national authorities be encouraged:

- fully to use the provisions concerning the communication and the exchange of information from judicial records, that are contained in the European Convention on Mutual Assistance in Criminal Matters and its Additional Protocol;
- fully to use the provisions concerning the spontaneous transmission of information, that are contained in particular in the 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

7. The Conference took note of the efforts of its Bureau designed to set up a **data base for public prosecution in Europe** and encouraged it to pursue them. The Conference also appealed to the Council of Europe to ensure the smooth operation of the data base and to the public prosecution offices to feed it regularly.

8. The Conference accepted with gratitude the invitation from the Prosecutor General of the Slovak Republic, to hold the next session in **Bratislava, from 1 to 3 June 2003.**

Programme

Sunday, 12 May 2002

- Tour
- Informal preparatory meetings for the Conference

Monday, 13 May 2002

Morning: Plenary session with the Prosecutor General of Slovenia on the chair

- Opening of the Conference [open to the media]
- Message from the President of the Republic of Slovenia read out
- Address by a representative of the Secretariat of the Council of Europe
- Report by the Chair of the Coordinating Bureau
- Report by the Prosecutor General of Slovenia on the impact of Recommendation (2000) 19

Afternoon: Two working parties met separately:

- WP1: relations between public prosecution and the judiciary
  Chair: Mr Harald Range, Prosecutor General at Celle (Germany)
  Rapporteur : Mr Jean-Amédée Lathoud, Prosecutor General at the Court of Appeal of Douai (France)
- WP2: Prosecutors specialising in anti-mafia cases and economic and financial criminality
  Chair: Mr Francesco Mandoi, Deputy National Anti-mafia Prosecutor (Italy)

Tuesday, 14 May 2002

Morning: Two working parties met separately:

- WP3: Ethics / liability of individual prosecutors
  Chair: Mr Marc Robert, Prosecutor General of Auvergne (France)
  Rapporteur: Mr B E P Myjer, Hoofdadvocaat-generaal, Ressortsparket Amsterdam, Professor of law at Amsterdam University
- WP4: international co-operation in criminal matters, including relations with Eurojust
  Chair: Mr Vito Monetti, Deputy Prosecutor General, Court of Cassation, Rome (Italy)

Rapporteur: Secretariat of the Council of Europe
Lecturer: Mr Olivier de Baynast, member of Eurojust

Late morning: Meeting of the Bureau with the rapporteurs with a view to preparing draft conclusions

Afternoon: Plenary session with the Prosecutor General of Slovenia on the chair:

- Reports from the different working parties
- Presentation of the draft conclusions
- General discussion
- Adoption of conclusions [open to the media]

Evening:

- Official close of the Conference
- Reception offered to participants by the Prosecutor General of Slovenia

List of participants

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