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PRELIMINARY DRAFT REPORT

ON

THE RELATIONSHIP BETWEEN POLITICAL AND LEGAL MINISTERIAL RESPONSIBILITY

on the basis of comments by

Mr Dominique CHAGNOLLAUD (Member, Monaco)
Mr James HAMILTON (Substitute Member, Ireland)
Ms Maria Fernanda PALMA (Member, Portugal)
Mr Fredrik SEJERSTED (Substitute Member, Norway)
Mr Kaarlo TUORI (Member, Finland)

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Table of Contents

I. INTRODUCTION 3
II. ON “POLITICAL”, “LEGAL” AND “CRIMINAL” MINISTERIAL RESPONSIBILITY 4
III. COMPARATIVE OVERVIEW OF RULES ON CRIMINAL MINISTERIAL RESPONSIBILITY 7
IV. ASSESSMENT OF THE RELATIONSHIP BETWEEN POLITICAL AND CRIMINAL MINISTERIAL RESPONSIBILITY 14
V. CONCLUSIONS 18

Note: a first version of the report was prepared by the secretariat on the basis of the rapporteurs' comments. Mr Sejersted then proposed a revised version of chapters I-III and made general comments to chapters IV-V, which can be found below.

Mr Sejersted's comments: I propose to change the title of the report, since the earlier title, based on the request from the PACE Committee is in my view not the best for dealing with the issue at hand. This I think is within what the Venice Commission should feel free to do when we get a request for an opinion on a general subject.

I. INTRODUCTION

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

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

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

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

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

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

7. The following should therefore be seen as some preliminary findings and reflections. In addition to the contributions of the rapporteurs the report has taken into consideration the

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

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

II. ON "POLITICAL", "LEGAL" AND "CRIMINAL" MINISTERIAL RESPONSIBILITY

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

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

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

12. In any political system governed by the principles of rule of law, government ministers are also bound by the law, and may be held legally responsible if they break it. Most countries have

[1] European Centre for Parliamentary Research and Documentation.

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

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

special rules on legal immunity for heads of state (kings and presidents) and for members of parliament, but rules on immunity for government ministers are less common, and to the extent that there are such rules, they are usually less far-reaching.

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

14. The term “*criminal* ministerial responsibility” will be used to cover those instances in which a minister may be subject to legal sanctions that are considered “criminal” (penal) by the European Court of Human Rights in its case law on Article 6 of the ECHR. This covers all forms of prison sentences, whether suspended or not, as well as most forms of fines and some other severe sanctions. The Court uses three alternative criteria to determine whether a sanction is criminal or not – “the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty”.

15. Actually, according to the European Court of Human Rights, “the question whether the criminal head of Article 6 [ECHR] applies has to be assessed in the light of three alternative criteria laid down in the Court’s case-law, namely the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty”.[4] The definition of the Court will be used for defining what criminal responsibility is for the purpose of the present report.

16. More precisely, even if the criterion of the classification of the offence in domestic law may appear as the most straightforward one, it is of lesser use for this study than the two other ones. The “nature and severity of the penalty” appear more accurate, whereas the “nature of the offence” could even help determining when “criminal responsibility would be in order”, according to the words used by the Parliamentary Assembly.

17. For example, a fine which can be automatically converted into a prison sentence if not paid is considered as criminal by its nature and severity.[5] It seems that, more generally, a fine has to be considered as a criminal sanction when it aims at punishing offenders and at deterring them from reoffending.[6]

18. An offence would rather be of a criminal nature if it may concern everybody, whereas it would rather be of a disciplinary nature if it addresses a particular group of individuals – *e.g.* lawyers appearing in court, contrary to every person who may appear before a judge.[7] Moreover, the Court makes an express distinction between the (disciplinary) nature of sanctions decided by Parliament against members of the House and the criminal nature of those decided against other individuals.[8] On this basis, a sanction which is especially intended for members of government, or, more broadly, politicians in office (contrary to every voter or

[4] See for example Alenka Pečnik v. Slovenia, 27 September 2012, § 30; cf. ECtHR Engel and Others v. the Netherlands, 8 June 1976, § 82; Weber v. Switzerland, 22 May 1990, §§ 31-34; Ravnsborg v. Sweden, 23 March 1994, § 30; Putz v. Austria, 22 February 1996 §§ 31 ff; T. v. Austria, 14 November 2000, § 61; Ezeh and Connors v. United Kingdom, 9 October 2003, § 82.
[5] ECHtR Pečnik, cited above, §§ 32 ff.; T. v. Austria, cited above, §§ 63 ff.
[6] ECHtR Balsyte-Lideikiene v. Latvia, 4 November 2008, §§ 57 ff; cf. ECHtR Öztürk v. Germany, 21 February 1984, § 50.
[7] ECHtR Putz, cited above, § 34; Weber v. Switzerland, 22 May 1990, §§ 32-33; Kyprianou v. Cyprus, 15 December 2005, § 64 (Grand Chamber), confirming the judgment of the second section of 24 January 2004, § 31.
[8] ECHtR Demicoli v. Malta, 27 August 1991, § 33.

candidate to elections) should not be considered as of a criminal nature, unless defined as such or severe.

19. According to the European Court of Human Rights' case-law, the three conditions quoted above are of an alternative nature. This allows avoiding that, for example, classifying an offence as disciplinary excludes it from the scope of Article 6 ECHR.

Mr Sejersted's comments: There is an extensive case law on the subject, to which reference is made, and which for the purposes of the present report it is not necessary for the Venice Commission to elaborate on. So it is suggested to delete the four paragraphs above and to simply refer to the Court's case-law in a footnote.

20. An important observations that legal sanctions against ministers may be classified as "criminal" under the ECHR, and therefore subject to the requirements of Articles 6 and 7, even if they are not considered to be so under national constitutional and penal law.

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

1. Ordinary rules on criminal responsibility that applies to everyone, including government ministers
2. Special rules on criminal responsibility that apply only to ministers

22. Government ministers can in principle usually be held criminally responsible if they commit ordinary criminal offenses, under the ordinary criminal code and ordinary criminal procedures, unless covered by special rules on immunity. In some European countries this is the only basis for criminal responsibility for ministers. But in many countries there are also *special rules* on criminal liability that apply only to ministers. Such rules may fall in two categories:

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

23. Of these two the first category is the most widespread. A number of European countries have special procedures under the constitution for holding government ministers legally responsible. These are usually referred to as "impeachment" proceedings, and may cover all aspects of the procedure, from the first inquiries and investigations, the decision to initiate proceedings, the rules on prosecution, the composition of the court, and the rules on the procedure itself, including the procedural rights of the defendants. Typically the rules are more "politicized" than ordinary criminal procedure, with one or more of the stages involving political institutions and actors, most often parliament. The political element may make it easier to initiate proceedings against ministers than under ordinary criminal procedure, and this may pose challenges under the rule of law. But more often the special procedures make it more difficult to initiate cases, creating a political threshold, which may in effect function as a kind of procedural immunity.

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

25. Both procedural and substantive rules on ministerial criminal responsibility may typically be more *politicized* than ordinary criminal law, or they be applied in a more politicized manner. To some extent this is natural and legitimate. But it may also raise serious questions of legal certainty for the persons concerned. The core question implied in the request from the

Committee is where the line goes between what are legitimate political elements in rules on criminal ministerial responsibility and what are illegitimate political elements in what are basically legal (penal) rules and procedures.

III. COMPARATIVE OVERVIEW OF RULES ON CRIMINAL MINISTERIAL RESPONSIBILITY

Mr Sejersted's comments: *I suggest we have an overall chapter (3) on "comparative overview", divided into three parts – (3.1) procedural rules, (3.2) substantive rules, including on "abuse of office", and (3.3) application.*

The comparative material that we have at hand is a bit fragmentary, and if it is possible to supplement it, that would be good. But if not, we will have to do with what we got. The present version should be completed.

3.1 Procedural rules for making government ministers criminally responsible

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

27. On the one hand, there are some countries in which there are no special procedures for ministerial criminal responsibility, and where this is governed by ordinary criminal procedure – under which it is for the ordinary public prosecutor to initiate cases and for the ordinary criminal courts to judge them, according to ordinary rules on criminal procedure. *(Do we have clear examples of this? The UK? Germany?)*

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

29. There are also countries in which government ministers may be held responsible for breaches of ordinary criminal law, committed in their private capacity, by the ordinary criminal courts, but for offenses committed *in their capacity as ministers* only by special (more politicized) impeachment procedures.

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

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

32. Countries in which it is for the parliament to decide whether or not to *initiate* criminal proceedings against a government minister include ..

33. For example, a criminal action against members of government is allowed only with the consent of the unicameral Parliament in Estonia (on a proposal by the Legal Chancellor), Greece, Liechtenstein, the Netherlands, Slovakia, Slovenia, Turkey, with the consent of the

lower Chamber of Parliament in Austria, Poland; with the consent of any of both Chambers in Italy. The consent of the Constitutional Law Committee of Parliament is necessary in Finland[9] and Sweden.[10] In Spain, a charge of treason or of any offence against the security of the state brought against ministers needs the initiative of one quarter of the members of Congress and the approval of the absolute majority thereof. A constitutional court could also be invited to give a binding opinion.

34. In Lithuania, the consent of Parliament may be replaced by that of the President of the Republic when Parliament is not in session; in Romania, either Chamber or the President of the Republic will have the right to ask for criminal proceedings against members of government.

35. [In a related field, in Azerbaijan, only the President of the Republic has the power to lift the members of government's immunities. In Serbia, it belongs to the government itself.

36. It has finally to be noted that, in Portugal, immunity does not apply when a member of government is charged with a wilful crime punishable by imprisonment for more than three years.]

Mr Sejersted's comments: Do we have a full list of this, or can we make it on the basis of the available material?

37. In some countries it is for parliament to decide whether to initiate criminal proceedings against ministers, but if they do so, then the process is left to the ordinary criminal courts (Italy).

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

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

Mr Sejersted's comments: I think that the list is probably not exhaustive?

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

40. In France, for example, cases of criminal liability for ministers are referred to the Court of Justice of the Republic, which was established in its present form in 1993, and which consists of fifteen members: twelve Members of Parliament, elected in equal number from among their ranks by the National Assembly and the Senate, and three judges of the *Cour de cassation*, one of whom shall preside over the Court of Justice of the Republic. In Norway, the Court of Impeachment (*Riksretten*) shall after a constitutional revision in 2007 be composed of the five most senior judges of the Supreme Court and six representatives appointed by Parliament. Similar systems are in use in Denmark, Finland and Iceland. In Poland, the Tribunal of State shall be composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm for the current term of office of the Sejm from amongst those who are not Deputies or Senators.

41. In countries that do not have special courts of impeachment, but instead refer cases of criminal responsibility for ministers directly to a supreme jurisdiction, this may typically either be

[9] Article 114-2 of the Constitution.
[10] Article 12-3 of the Constitution.

to the constitutional court, to the supreme court, or to another high court. Countries that refer such cases to the constitutional court include, inter alia, Austria, Liechtenstein and Slovenia. In Albania cases are referred directly to the High Court, in Andorra to the *Tribunal Superior* (at the request of *Tribunal de Corts*), in Belgium to the *Cour d'appel*, and in the Netherlands, Spain and Sweden to the Supreme Court. In Greece they are referred to a Special Court composed of high professional judges.

42. Another important question is to what extent the ordinary principles of criminal procedure are applicable to impeachment procedures – such as rights of representation, prohibition against self-incrimination, rules on evidence, presumption of innocence and etcetera. It appears that in principle they usually apply, at least as a starting point, but that one may find a number of modifications and derogations in practice. The requirements of Article 6 ECHR have at any rate to be followed as soon as the case has to be considered as criminal. The principle of two instances often does not apply to ministerial impeachment proceedings, which are typically a one-instance procedure.

3.2 Substantive rules on criminal responsibility for government ministers

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

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

44. In most European countries the ordinary criminal code will also apply to ministers, ranging from trivial offences, such as speed driving, to the most serious ones, such as murder. If a minister should happen to commit such ordinary criminal offenses, this will usually be in his or hers private capacity, as a citizen. But breaches of the ordinary criminal code may also appear in the exercise of public office, if for example the minister is caught speed driving while on the job, or if caught stealing or embezzling public funds.

45. In most European countries there are certain offenses under the ordinary criminal code that by their nature only apply to public officials, but which in principle both cover administrative officials (civil servants) and politically elected officials (including ministers). An important example is corruption. Another important example is the category of provisions that prohibit official "abuse of powers" or "abuse of office" or similar formulations. The inherent problem with such provisions is that in order to cover all situations that may potentially be serious enough to warrant penal sanctions they either have to be very detailed or very wide and vague, and therefore potentially harmful to legal certainty, as well as open to misuse for political reasons.

46. This is why the ECPRD request made by the rapporteur to national correspondents include a question on which countries have rules on "abuse of powers" that are applicable to government ministers.[11]

47. Out of the thirty-one countries that replied to the request,[12] five have no provision at all on abuse of office or similar offences in their criminal legislation.[13] The provisions in force in Belgium[14] and Greece[15] do not apply to government ministers.

[11] Cf. the ECPRD request on the issue of "Keeping political and criminal responsibility separate" (abuse of office), summarised in document CDL-REF(2012)041.

[12] Andorra, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Montenegro, Netherlands, Norway, Poland, Portugal, Romania,

48. But all the rest have provisions that in effect criminalize "abuse of office" in one form or another, and which are applicable in principle (though rarely in practice) to government ministers. The wording of such provisions differs. In France[16] and Germany,[17] for example, the offences are defined as illegal taking of interests, *i.e.* interference of a private interest in an administrative process. In Romania, three offences are provided for: malfeasance and nonfeasance against a person's interest; malfeasance and nonfeasance by restriction of certain rights; malfeasance and nonfeasance against public interests.[18] In the United Kingdom, misconduct in public office is a *common law* offence committed by a public officer acting as such who willfully neglects to perform his/her duty and/or willfully misconducts him/herself to such a degree as to amount to an abuse of the public's trust in the office holder.

49. It appears that most criminal codes intend to punish only intentional misuses of office. Neglect of duty by a public official may however be also punishable, as it is in Slovakia.[19] In Sweden, gross negligence is necessary when members of government are involved.[20] On the contrary, some countries only sanction behaviours that are not only 10ilful, but imply that the author has knowingly gone against his or her duties (Andorra, Austria).

50. Most of the countries which criminalise abuse of office consider benefit – personal or of other persons – or damage as a necessary condition. It may be inferred from the very limited number of cases brought to court that, in general, damage is considered as punishable only when it is intentional, that is if the author intends to harm. In Germany for example, benefit is a constituent element of the offence of illegal taking of interests.[21] Some countries simultaneously provide for offences implying benefit and damage and others for which damage is the main condition (Russia, Ukraine). In a number of states, benefit is an alternative condition to damage.[22] Damage may also be a necessary condition (Austria, Poland). In Romania, the conditions are harm to the legal interests of a person[23] or restriction of his rights/discrimination[24] or significant disturbance in the proper operation of a body or institution of the state.[25] On its turn, damage may be material or immaterial, including violation of rights or legal interests of a person. The victim may also be the state or another public body, as expressly stated in the legislations of Lithuania and Poland. Finally, a number of countries consider benefit (Denmark, Lithuania) or damage (Sweden) as an aggravating circumstance.

51. Generally speaking, the material at the disposal of the Venice Commission gives very few examples of application of provisions on abuse of office to members of government. Most of them appear as cases where the courts found an element of corruption or pecuniary gain.

52. In addition to criminal provisions on abuse of public powers, there are some European countries that have other special criminal provisions that are applicable only to government ministers. The reason for this is, inter alia, may be that there are certain obligations that only ministers have, and which should be subject to legal sanctions if broken. This may typically

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Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Ukraine and United Kingdom.

[13] Canada, Cyprus, Ireland, Estonia, Ireland, Netherlands.

[14] Articles 254 and 258 of the criminal code.

[15] Articles 239 and 259 of the criminal code.

[16] Article 432-12 of the criminal code.

[17] Article 331 of the criminal code.

[18] Article 246-248 of the criminal code.

[19] Article 327 of the criminal code.

[20] Article 13-3 of the Instrument of government.

[21] Article 331 of the criminal code.

[22] Croatia, Czech Republic, Finland, Italy, Montenegro, Portugal, Serbia, Slovakia, Switzerland. "the former Yugoslav Republic of Macedonia".

[23] Article 246 of the criminal code.

[24] Article 247 of the criminal code.

[25] Article 248 of the criminal code.

cover special constitutional obligations of ministers – as towards parliament, the cabinet, the prime minister, the civil service or the public. The duty of a minister to provide parliament with information according to established constitutional procedures may for example in some countries be regarded as a legal (and not only political) obligation, which it should be possible to legally sanction in cases of grave breach. The obligation to resign after a vote of no-confidence is another example – if broken this may in principle constitute a coup d'état, which may legitimately be subject to criminal responsibility.

Mr Sejersted's comments: I am not quite sure in how many countries we find such special substantive criminal provisions that apply only to government ministers. We certainly find it in some of the Nordic countries – including Norway –Ii propose a paragraph on the Norwegian example, which is copied below, but which of course may be taken out. It appears we have no full comparative overview of this. For that reason we might want to keep this short. On the other hand, such provisions go to the very core of the request made by the PACE. Of the pending cases, the Icelandic case as far as I know hinge on exactly such a provision, namely an infringement of the constitutional duty of the prime minister to put cases of importance before the cabinet in formal session.

53. The Norwegian example can illustrate this. The basic rules are laid down in Article 86 of the Constitution of 1814, which states that government ministers (as well as MPs and Supreme Court judges) can be tried before a special court of impeachment (*Riksretten*) for legal offences that constitute a breach of their "constitutional duties". This is supplemented by two statutes (from 1932), one on the procedure of the impeachment process, the other on the substantive rules of legal responsibility. The substantive act starts by stating that the provisions of the ordinary criminal law are applicable before the court of impeachment in as far as the offences are linked to the breach of a constitutional duty. This is supplemented by eight articles with special penal provisions for ministers, MPs and judges. Some of these are potentially very wide. Under article 8 a minister may be sentenced to 2 years in prison for not carrying out a decision made by parliament, under article 10 to 2 years in prison for any kind of negligence in the administration of public property, and under article 12 to 5 years in prison for not giving parliament necessary information. Under article 11 any act by a minister that is "in breach of the Constitution or the laws of the realm" are punishable by up to 10 years in prison. This is however all in theory. The last time the court of impeachment was convened was in 1926. If a case is brought in the future, the criminal provisions will probably be interpreted narrowly, with a high threshold. Still there is a widespread opinion that such broad rules on legal ministerial responsibility are justified and necessary. In 2007 the rules on impeachment were reformed, inter alia by way of constitutional amendment, and though there were proposals for abolishing the special system, parliament voted unanimously for maintaining both special procedures on impeachment and the very wide substantive rules.

3.3 Application of rules on criminal ministerial responsibility in practice

Mr Sejersted's comments: In my view it is important for us to have a separate section on "application" – because the difference between the law on paper and the law in practice is so great when it comes to ministerial legal responsibility. I propose below a text providing some examples, but these are just examples, and they should as far as possible be supplemented by other examples. The examples are for the most part from the Nordic countries, and if we do not get others, then they should be taken out – in order not to have too much of a Nordic bias. The replies from the national correspondents to the ECPRD request give some more information – and in addition assistance may be sought from Venice Commission members.

54. The degree to which special substantive and procedural rules on ministerial criminal responsibility are actually invoked in practice differs a great deal – from never to quite often, with most countries somewhere in the (lower) middle.

55. In most European countries criminal proceedings against government ministers is an extraordinary event, which only takes place very rarely, but which may come about unexpectedly from time to time. Assessing to what degree a given system actually manages to keep "political" and "legal" responsibility separate relies more on how the national impeachment rules are applied in practice than on the wording of the provisions. Many national constitutions have quite politicized rules on ministerial penal responsibility on paper, but these are not applied in practice, and if they were to be invoked then one would interpret into them a high threshold.

56. The term "impeachment" comes originally from the UK, and dates back to the 17th century. However, it appears that there has not been any impeachment case for more than two hundred years, and some scholars argue that the whole institution has fallen formally out of use (desuetudo). It appears that the legal responsibility of British government ministers are in practice subject the ordinary rules of criminal law, both as regards procedure and substance. (*This should be checked*).

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

58. The Danish constitution of 1953 has a system for impeachment of ministers (*Rigsret*) in articles 59 and 60 which dates back to the 1849 constitution. Cases can be brought by the King or the Parliament (ordinary majority), and the court is composed half by judges of the Supreme Court and half by persons appointed by Parliament. The rules of responsibility are quite wide. Until modern times the court of impeachment had only been convened four times (1844, twice in 1877, and in 1910), and many thought it had gone out of use. However, in 1993-95 the court was called to judge in a case against a former minister of justice, Mr Erik Ninn-Hansen, who had deliberately and unlawfully neglected to decide on a number of applications for family reunion from Sri Lanka under immigration law. Mr Ninn-Hansen was sentenced to four months suspended prison. He tried to bring the case before the European Court of Human Rights, arguing inter alia that the court of Impeachment was not an independent and impartial tribunal and that his rights of fair trial had been breached, but the application was found inadmissible in 1999.[26]

59. The Norwegian constitution of 1814 has special rules on impeachment of ministers (*Riksrett*) in articles 86 and 87, which are supplemented by two statutes, one on procedure and one on the substantive rules for responsibility. Cases can be brought by the Parliament (ordinary majority). The court was convened 7 times in the 19th century, but only once in the 20th century and that was in 1926. Since then there have been several proposals for impeachment proceedings, but none that have succeeded. Until recently many observers argued that the whole system was outdated, and in 2003 a commission appointed by parliament proposed to abolish it altogether, and leave ministerial legal responsibility to the ordinary courts. This, however, was too radical for parliament, who instead passed a constitutional amendment in 2007 slightly reforming the system, but keeping the main characteristics, including special procedures, special composition of the court, and very wide rules of responsibility.

60. The new Finnish constitution of 1999 has special provisions on the court of impeachment (*Riksrätten*) in article 101 cf. articles 113-116.

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

<u>Mr Sejersted's comments:</u> *I do not know if these rules (or their predecessors) have ever been used – Kaarlo Tuori can tell us that.*

61. The Swedish constitution of 1974 (*Regeringsformen*) has a provision on impeachment in article 12-3. There is no special court of impeachment, but the procedure is special. Cases against government ministers can be brought by the standing Constitutional Committee (ordinary majority) of the parliament and are to be tried directly before the Supreme Court. *As far as I know this procedure has not been used in modern times, but this we could check out.*

62. Under article 14 of the Icelandic constitution of 1944 government ministers may be brought before a court of impeachment by parliament (ordinary majority). The court of impeachment (Landsdómur) has 15 members – five supreme court judges, a district court judge, a professor of constitutional law and eight persons chosen by parliament. This procedure had not been used until 2011, when the court was convened for the first time, in the case of the former prime minister, Mr Geir Haarde for alleges misconduct in the events leading up to the 2008 Icelandic financial crisis. In its judgment of 23 April 2012 the court of impeachment acquitted Mr Haarde of most of the charges against him, but found him guilty on one minor charge, which was that of not placing the imminent banking crisis on the agenda of a formal cabinet meeting. Mr Haarde was not sanctioned, and had his legal costs reimbursed.

<u>Mr Sejersted's comments:</u> *In the documents from the PACE there is an information memorandum on the Icelandic case, which is very informative, but which is also quite critical of the judgment in the Haarde case. In my view this is debatable, and anyway I do not think it would be proper for the Venice Commission to go into any kind of assessment of the case, which I think has now been brought before the ECtHR. The fact of the case was that in ended in a kind of compromise. Given the nature of the 2008 Icelandic financial crisis it was in itself not illegitimate that attempts were made to place legal (and not only political) responsibility on the government, and in the end Mr. Haarde was not sanctioned. A constitutional obligation to put cases of vital national interest on the formal agenda of the government can probably be found in many jurisdictions, and it is not in my view for the Venice Commission to overrule the national court of impeachment on whether this obligation was breached in the case at hand.*

Of particular interest to our study are the recent cases of impeachment in Eastern Europe, including in Ukraine and Romania (others?). I am not familiar with the legal details of these cases, but I have the impression that the main problem may not be so much (or at least not primarily) with the legal framework for impeachment as with the way it has been interpreted and applied. It would seem that in some of the new democracies they are lacking the political (non-legal) norms and traditions that exist in most mature democratic systems and which serve to limit the use of impeachment and reserve it to cases where there is a clear legal basis.

In addition to European examples we might also consider having a paragraph or two on the well-known US rules and practice of impeachment of presidents, which were last invoked in the case against President Clinton.

The main point to make under "application" is that although a number of European countries on paper have rather wide and "politicized" rules on ministerial responsibility, these are in practice very rarely invoked, and if so, with quite a high threshold – which in my view we should present as a sign of a mature and well-functioning democratic system.

Furthermore, I think we should stress that the problem (challenge) is not only that government ministers may in some cases be subject to "politicized" criminal proceedings, but also the <u>opposite</u> – that because of the political procedures for bringing such cases the threshold may sometimes be too high – with the effect that ministerial offenses that should in principle be legally (and not only politically) sanctioned may go unpunished. For example, I gather that the

reason why France reformed its system for ministerial legal responsibility in the early 1992 was that the previous system functioned too much as a form of ministerial immunity.

IV. ASSESSMENT OF THE RELATIONSHIP BETWEEN POLITICAL AND CRIMINAL MINISTERIAL RESPONSIBILITY

Criminal responsibility as ultima ratio and based on the principle of legality

63. Since the time of the natural law stream, and in particular authors like Pufendorf and Grotius[27] and up to modern doctrine which is largely based on utilitarianism and focuses on the preventive aspect of sanctions,[28] the basis of criminal responsibility was found in the protection of goods and rights essential for democratic life. Implementing penalties which restrict fundamental rights is legitimate in a democratic system only when it becomes necessary to protect these essential goods and rights. Another traditional distinction between liberal and democratic systems on the one side and arbitrary if not tyrannical ones is proportionality of punishments already defined by Beccaria in the XVIIIth century.[29]

64. The first essential rule to be inferred from these principles is subsidiarity of penal sanctions, to be considered as *ultima ratio* of the state's repressive arsenal. This rule was already recognised by the Venice Commission in previous documents[30] and implies that penal repression should be confined to cases of impairment of essential rights or goods.

65. The second rule to be inferred from the democratic and liberal principles is the strict respect of the principle of legality in penal law: *nullum crimen, nulla poena sine lege praevia, certa, stricta*. In international law, this rule is expressed in particular in Article 7 ECHR, according to which "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". In particular, Article 7 ECHR embodies qualitative requirements, including those of accessibility and foreseeability.[31] It is important for criminal law not to be extensively construed to the detriment of an accused, for instance by analogy.[32] When assessing foreseeability, absolute certainty cannot however be required, and judicial interpretation is inevitable.[33] Formulas like "infringement of the rule of law" or "infringement of democracy" would for example go against the principle of legality.

Comment by the secretariat: Should more examples be given?

66. Concerning abuse of office, a thorough examination of the respect of the condition of foreseeability has to take place in particular when notions like violation of duties, misconduct, harming of somebody's interests or significant damage are at stake. It is interesting to know that Estonia repealed as too general and vague a provision on misuse of office which punished "unlawful misuse of office by an official with the intention to cause significant damage or implying significant damage to the rights or interests of another person protected by law or to

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[27] Grotius, Hugo, De iure belli ac pacis, III, 7.1, Paris, 1625; Pufendorf, Samuel, De juris naturae et gentium, VIII, 1688 – Traduction française de Barbeyrac, Le droit de la nature et des gens, Amsterdam, 1706, VIII, 3.
[28] Roxin, Claus, Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnunglehre, I, 4th Edition, München, 2006; Jakobs, Günther, Strafrecht Allgemeiner Teil, Berlin, 2nd Edition, 1991.
[29] Beccaria, Cesare, Dei delitti e delle pene, 1764.
[30] Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and insult to religious hatred, CDL-AD(2008)026, par. 55 ; Interim opinion on the draft law amending the civil code of Armenia, CDL-AD(2009)037, par. 10.
[31] ECtHR Huhtamäki v. Finland, 6 March 2012, § 44; Cantoni v. France, 15 November 1996, § 29; Coëme and Others v. Belgium, 22 June 2000, § 145; E.K. v. Turkey, no. 28496/95, 7 February 2002, § 51.
[32] See for example ECtHR Alimuçaj v. Albania, 7 February 2012, § 149; Jorgic v. Germany, 12 July 2007, § 100.
[33] See for example ECtHR Jorgic v. Germany, quoted above, § 101; S.W. v. United Kingdom, 22 November 1995.

public interests". This provision is not different from most rules of other countries in the field. It is also interesting to note that there is no discussion in Estonia about replacing this norm, since it is considered that the present set of offences of the criminal legislation is sufficient to apprehend possibly punishable behaviours. It has also to be noted that, even if the decision to repeal the provision was not decided by a judicial body, it was based on the requirements enshrined in Article 7 ECHR as well as in national constitutions. When such rather vague provisions are in force, case-law may however address the problem.[34]

67. Moreover, the situation of members of government is specific. Their role cannot be compared to the one of a mere civil servant, so the consequences of their indictment are also of a different nature for the state and the community in general: it has political consequences. If a judge has to be involved in assessing the behaviour of a politician, the principle of *separation of powers* is at stake[35]. Legal harassment for political motives has to be avoided to allow ministers the necessary conditions for concentrating on Government work. Legal prosecution should therefore take place only in case of qualified breach of trust; this will be developed below.

68. Peculiarities of the political game are also to be taken account of. Like in sport, criminal sanctions should be subsidiary to specific ones – that is *in casu* to political sanctions. Playing according to the rules of the political game may imply some drawbacks, but it should not be criminalised. On the contrary, a clear violation of the rules of the game could lead to a penal sanction. More concretely, political decisions may go against public or private interests, but should be criminalised only if these interests are completely ignored, and the difficulties of the political decision-making process should be taken account of.

Political responsibility as the sanction of simple breach of trust

69. Contrary to criminal responsibility, in a democratic state based on the rule of law, political responsibility goes far beyond the violation of social norms applicable to everybody. It is based on the mere violation by holders of political functions of the agreement established between them and the citizens they represent. This is in line with the liberal philosophy, as expressed *e.g.* by John Locke, who considered consent by citizens, together with respect of natural law, as a criterion for the legitimacy of obedience to authorities.[36] It may even be asserted that political responsibility is based on the institutional dependence of holders of political functions vis-à-vis the political bodies, which makes it rational and implies that it has no character of *ultima ratio*.[37] When not discretionary, political sanctions may apply to minor violations of the law and even assumptions of such violations which would lead to breaching to the trust between those who govern and the governed. This breach of trust has to be understood broadly, and includes bad political judgment, contrary to the qualified breach of trust which implies criminal responsibility. Political responsibility may occur even in the absence of any fault.

70. It may also be underlined that the submission of members of government to political responsibility – from mere non-re-election to dismissal by Parliament – gives the legislative body and even the voters a possibility to sanction in practice the holders of these high executive functions in a discretionary way that would not be applicable to civil servants, not talking about other private individuals. This should be considered when assessing the subsidiarity of the criminal punishment.

Consequences of the distinction

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[34] Cf. ECtHR Kokkinakis v. Greece, 25 May 1993, §§ 40-41, 52-53; Cantoni v. France, 15 November 1996, § 34.
[35] ECtHR A v. the United Kingdom, 17 December 2002, § 77.
[36] Locke, John, Two Treatises of Government (1680-1690), Cambridge, 1988. See also the doctrine of *contrat social* as expressed by Rousseau, Jean-Jacques, Du contrat social aux principes du droit politique (1672), Paris, 1966.
[37] On the issue, see in particular, Lomba, Pedro, Teoria da Responsabilidade Política, Coimbra, 2008, pp. 55 ff, 66.

71. Some countries have addressed this issue by providing that ministers cannot be the authors of the offence of abuse of office (Belgium; Greece up to a certain extent). This is however not the general rule.

72. National replies to the ECPRD request show however that, even when members of government may be accused of abuse of office, criminal procedures against them on this basis are very rare and convictions still more; it seems that they take place essentially in the presence of an element of corruption, that is of another criminal offence.

73. The factors explaining this situation were not available to the authors of the present report. One of them may however be immunity from criminal prosecution.

74. Another one – which is not unrelated – may be that the threshold for indictment of ministers is, if not in law, at least in practice, often higher than for ordinary citizens.

75. This reinforces the subsidiarity of penal sanctions when the behaviour of members of government is under discussion. This reinforced subsidiarity principle should however not apply to the judicial process but upstream, when deciding about immunities or indicting members of government.

76. The scope of immunity of ministers is more limited than that of parliamentary immunity. While immunity of members of parliament is mainly a guarantee against arbitrary power of the executive - and only incidentally of the judiciary -, immunity of members of government is only directed against excessive interference of the judiciary.[38]

77. The immunity of members of the executive is however an expression of the principle of *separation of powers* as well as the immunity of parliamentarians. Moreover, in countries where members of government may sit at the same time in Parliament, they benefit from parliamentary immunity.

78. In order to avoid political reckoning, in particular against politicians who are not (any more) in the majority, it appears suitable that the lifting of immunities of the indictment by parliament is decided by a qualified majority, going beyond the political majority.

79. Immunities are not designed to protect the interests of individual politicians, but of those of Parliament, respectively of the government as a whole.[39] Authorities are not above the law: this would go not only against the principle of equality but also against the rule of law itself.[40]

80. A basic distinction is so to be made here between

(a) ordinary criminal acts that a minister may perform as a private citizen (ranging from speed driving to murder - *actes détachables*, unconnected with the exercise of functions and
(b) criminal acts conducted in a public capacity, while performing ministerial duties - *actes rattachables* -, committed in the exercise of official functions. This includes for example illegally giving or withholding permissions, taking bribes for giving public contracts, corruption in general, tax offences or offences related to failure to disclose political contributions, the diversion of public funds to private purposes, but may also include the carrying out of burglary, theft or violence directed at political opponents.[41]

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[38] Cf. CDL-INF(1996)007, par. 14.
[39] ECtHR A. v. the United Kingdom, quoted above, par. 85.
[40] On equality before the law as a basic element of the rule of law as "universal subjection" of all to the law, see the report on the rule of law, CDL-AD(2011)003rev, ch. IV(6).
[41] For example, in France, the *Cour de cassation*, in a judgment of 27 June 1995, defined "les actes commis par un ministre dans l'exercice de ses fonctions [comme étant] ceux qui ont un rapport direct avec la conduite des

81. A study made by the French Senate in ten Western European states[42] actually showed that only one of them (Belgium) applied a special procedure involving Parliament for offences unconnected with the exercise of functions, whereas this is the rule for offences committed in the exercise of official functions.[43]

82. While immunity is not always limited to offences committed in the exercise of official functions, it is more justified to apply it – at least under its aspect of non-liability defined above - in these cases, because they have a stronger link with the political function and the trust whose breach may lead to the lifting of immunity.

83. More generally, from a normative perspective, it would be advisable to apply special rules and procedures, with politicised elements, only to offences committed in the exercise of official functions, whereas offences unconnected with the exercise of functions would be left to ordinary criminal law. For example, the Constitutional Court of Poland made clear that the Tribunal of state may only examine offences committed by members of the council of ministers in connection with their position.[44]

<u>Mr Sejersted's comments:</u> *This is a section that I think we have to discuss in the group of rapporteurs, and for that matter perhaps also in the sub-commission, before drafting a final text.*

I agree with some of the points and assessments made above. But in general I think we should be somewhat more clear and transparent on which standards we use for these assessments. To some extent they are based on "hard law" – namely the ECHR, in particular Article 7, but it is not all that clear whether we are actually interpreting Article 7 or just referring to it more loosely. I also think that the text, especially in the first part, is too strict and goes too far in presenting criminal responsibility as secondary to political responsibility, and as ultima ratio. In my view it is easy to envisage examples in which government ministers commit legal offences that should not only be sanctioned politically but also under criminal law. The problem in practice is in general in many Council of Europe countries not that ministers are held legally responsible too often, but the opposite – that they are not held responsible often enough, and that the special procedures function as immunity.

In my view we might start this part with a general introduction on the standards that we use for assessing the relationship between political and criminal responsibility.

An important point here is that the aim of the ongoing PACE project is evidently to formulate new soft law standards in this field, based on what the assembly might find to be a proper relationship between political and criminal responsibility. This is therefore also the background for the report of the Venice Commission, and it means that we should in principle be able to formulate new normative standards, even if we do not have any existing legal sources to base these on. This we can do on the basis of "best practice", or simply on our own (qualified) assessments. However, my opinion is that we should be somewhat careful in our approach. The Venice Commission has first and foremost been asked to produce "a comparative report", and our main emphasis should be on that. We may then formulate more normative views and criteria for distinguishing between the political and criminal responsibility of government ministers, but in doing so we should as far as possible anchor this in existing sources of hard and soft law.

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affaires de l'Etat […], à l'exclusion des comportements concernant la vie privée ou les mandats électifs locaux" (acts committed by a Minister in the exercise of official functions as those having a direct link with the conduct of State affairs, excluding behaviours concerning private life or local elective mandates).

[42] Austria, Belgium, Denmark, Germany, Greece, Italy, Netherlands, Portugal, Spain, United Kingdom.

[43] Service des affaires européennes – Division des Etudes de législation comparée, 10 septembre 2001.

[44] CODICES (http://www.codices.coe.int), POL-2001-2-010.

As for "hard law" at the international level, the most important source is the ECHR, and in particular articles 6 and 7. The starting point is that these articles in principle apply also to national impeachment proceedings if these result in penal sanctions. However, I would suppose that impeachment proceedings are probably to be assessed as a special sub-category, with a wider national margin of appreciation than in other cases, both because of the special characters of such proceedings and because of the long-standing national constitutional traditions. Here we need an overview of relevant ECtHR case law. I am familiar with the Ninn-Hansen decision of 18 May 1999, where the Court declared the application inadmissible (29972/95). But have there been other cases before the ECtHR in which the Court has assessed national impeachment cases?

As for other "standards" I think it is perfectly legitimate for the Venice Commission to attempt to formulate this, based on "best practice" or other considerations – as long as we are open about it. Some of the assessments and tentative normative reflections in the draft text so far fall within this category.

The core question implied in the PACE request is, as I interpret it: How "politicized" can rules on criminal ministerial responsibility be before they infringe basic principles of democracy, rule of law and legal certainty? This is a complex and to some extent sensitive issue, and to the extent that we attempt to answer it, we should take due consideration of the constitutional traditions of a number of Council of Europe member states.

The basic point that we might make: That rules on procedures on criminal ministerial responsibility should only be used in cases where there is actual criminal behaviour, and should not be misused for political purposes.

V. CONCLUSIONS

84. The overview of national legislation and practice in the field of responsibility of government ministers shows a great variety of solutions.

85. At the same time, in most member countries under consideration, the criminal offence of abuse of office is in principle also applicable to holders of high political office.

86. In most of these countries pecuniary benefit or – intentional - damage is a necessary condition for criminalising such behaviour.

87. Legal provisions on abuse of office by members of government are very rarely applied, and mainly in cases involving corruption or pecuniary gain.

88. In a state based on the rule of law, respect of the right to a fair trial in criminal proceedings, as defined in Article 6 ECHR, is essential. This includes in particular respect of the presumption of innocence as well as independence and impartiality of the judiciary.

89. In conformity with the principles of proportionality and subsidiarity, the criminalisation of any behaviour should be the *ultima ratio*. Penal repression should only address impairment of essential rights or goods. Moreover, concerning politicians, account should be taken of the specific rules of the political game, including its own (political) sanctions. This will often lead to making the threshold for indictment of ministers higher than for ordinary citizens.

90. The respect of the principle *nullum crimen sine lege praevia, stricta, certa* (accessibility and foreseeability), as enshrined in Article 7 ECHR, opposes the use of vague provisions like "infringement of the rule of law" or "infringement of democracy". When not so extreme, vagueness may however be remedied by precise and consistent case-law.

91. Immunities for members of government are not intended at protecting the interests of individual politicians, but are the expression of the principle of separation of powers and should be intended at preventing politically-motivated legal harassment. Submitting indictment to a parliamentary decision leads to the same result.

92. Non-liability should in principle only apply to acts committed in the exercise of official functions, whereas inviolability may also address acts unconnected with the exercise of functions.

93. The submission of criminal action against ministers to special jurisdictions like a court of impeachments, a constitutional court or the highest ordinary court is suitable, at least for acts committed in the exercise of official functions.

94. It is also preferable that the lifting of immunity or the indictment of a member of government, if taken by parliament, is decided by a qualified majority.

95. Submitting such procedure to a binding opinion by a constitutional court would be a supplementary guarantee against arbitrariness.

96. The aforesaid does not mean that ministers should be exempt for sanctions unless in very exceptional cases. Contrary to ordinary citizens, they are subject to political responsibility, which is essential in a democratic state based on the rule of law. Political responsibility is based on the mere violation by holders of political functions of the agreement established between them and the citizens they represent. It may follow (alleged) bad political judgment and does not imply any fault. Political sanctions seem sufficient unless the minister acted for personal pecuniary gain or - rather the less likely - deliberately with the intention to damage the interests of the State or of an individual.

Mr Sejersted's comments: Before attempting to draw up a list of normative reflections on the separation between "political" and "criminal" ministerial responsibility, I think we should talk ourselves through (i) whether we should attempt to do so at all (I am positive, but we must be aware of the pitfalls), and if so (ii) the specific proposals in the draft, one by one.

For my part, I agree with some of points made in the last section of the draft from the secretariat (paras 62-74), but not with others. I think that in general it goes to far in saying that criminal responsibility should always be just the last resort – in cases where a minster clearly breaks the law I think that legal sanctions are perfectly legitimate, even if the offense has also been sanctioned politically.

Furthermore I do not think it is preferable that a parliamentary decision to initiate legal proceedings against a minister should be subject to qualified majority (72), since this may easily raise the political threshold too high. And while I certainly agree that rules on ministerial responsibility should not be misused for "politically-motivated legal harassment" (69) I am not really comfortable with seeing this primarily as a question of "separation of powers". And while a requirement of personal gain or intentional damage might be appropriate for some forms of ministerial criminal responsibility (74) I can think of several examples where it is not – so I do not think we should propose that as a general criterion.

The final "normative reflections" in my earlier comments, which are preliminary, but which I would like to discuss, included some of the following:

The Venice Commission should point to the great variety to be found in national European constitutional law when it comes to rules on the political and criminal responsibility of government ministers. A large number of European countries have special rules and

procedures on such criminal responsibility that are more "political" than ordinary criminal law. This is a fairly widespread constitutional tradition, which is based on the particular characteristics of such cases, and which in itself should not be seen as illegitimate, even if it raises challenges under the principle of the rule of law. At the same time, the Venice Commission should stress that it is a sign of democratic and political maturity that special rules on criminal ministerial responsibility are not exercised except in extraordinary cases, and are not misused for political harassment.

The following conclusions could be made:

- Private offences committed by government ministers – not related to public duties – should preferably be subject to ordinary criminal law and procedure
- Special impeachment procedures should be reserved for offences carried out in the public capacity (as government minister)
- Special impeachment procedures must respect basic principles of fair trial
- Even if the decision to initiate impeachment proceedings is made by a political institution (such as the parliament), it must respect basic principles of fair trial and legal certainty
- The basic procedural rights of the defendant in an impeachment procedure must be respected, especially in so far as the procedure may end in penal sanctions

97. Widely formulated provisions on ministerial legal (penal) responsibility must in general be interpreted and applied in a strict and narrow manner, so as not to infringe ECHR Article 7 r jeopardize basic principles of legal certainty and the rule of law.