

# Assessment Report

## Superior Council of Prosecutors

### Republic of Moldova

February 2011



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**List of Abbreviations**

**List of Recommendations and Observations**

**Annex A – Methodology**

## **Executive Summary**

On 17 March 2009 a new law came into effect in the Republic of Moldova clarifying the organizational structure of the Public Prosecution Service (PPS) and establishing a new autonomous body called the Superior Council of Prosecutors (SCP).<sup>1</sup> In October 2010, upon request of the Prosecutor General (PG) of the Republic of Moldova, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) embarked on a two-month project to:

1. Assess the institutional placement of the SCP in the Office of the Prosecutor General;
2. Provide immediate technical assistance to the SCP where appropriate and requested;
3. Assess the needs of the SCP; and
4. Prepare a report to ODIHR on the findings of the project team,<sup>2</sup> including concrete recommendations on how to effectively address identified shortcomings.

The “new law” is a significant improvement over the “old law”<sup>3</sup> because it establishes the SCP and its attached Qualification and Disciplinary Boards. Decision making in relation to the appointment, promotion, merit recognition, training and disciplining of prosecutors no longer rests exclusively in the hands of the PG. As a result, the PPS is a more democratic organization.

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1 The new law was adopted by Parliament on 25 December 2008. The SCP held its first meeting on 14 January 2009 and elected its President.

2 The members of the project team were John Pearson B.A., J.D., LL.M., Mihaela Vidaicu, and Olimpia Iovi.

3 **Law of Public Prosecutor’s Service**, Law No. 118-XV, 14 March 2003, Official Monitor No. 73-75, 14 April 2003.

***Summary of the Major Findings related to the institutional placement of the SCP in the Office of the PG***

1. The current PG is supportive of the SCP. The current President and Secretary of the SCP have a vision of what the SCP could do if properly resourced and are committed to working hard to make this vision a reality.

2. The close institutional relationship between the SCP and the Office of the PG is not conducive to a perception that the SCP is truly a “guarantor of the independence, objectivity and impartiality of prosecutors” as required by the organic law creating it.<sup>4</sup>

***Summary of Major Findings related to the Needs of the SCP***

1. Although the SCP was modelled on the Superior Council of Magistracy (SCM), it possesses none of the infrastructure that has contributed to the success of the SCM. Unlike the SCM, the SCP does not have its own budget, detached members, support staff or premises. Without these tools it is unable to effectively perform the tasks assigned to it by the new law.

2. The process for recruiting new prosecutors would be improved by ensuring that every candidate has completed a course of study at the National Institute of Justice (NIJ) and adoption by the PPS of selection criteria that test a broader range of skills and knowledge.

3. The SCP has recognized the need for a revised PPS code of ethics and preparation of a new code should be made a priority.

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<sup>4</sup> Art. 80(2), **Law of Public Prosecutor’s Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009.

4. The regulations of the SCP and its attached Boards require revision.
5. The performance management plan of the PPS can be substantially improved.

### ***Summary of Major Recommendations on how to address Identified Shortcomings***

#### Short-term Measures

1. To become a stronger body capable of more effectively performing its mandate and exerting greater influence in the PPS, the SCP needs a modest operating budget and a detached President. The Boards attached to the SCP also require detached chairpersons. In addition, there is a need for legal specialist support and office space for the SCP and the two attached Boards.
2. Financial, human resource and other forms of management training should be made available to interested members of the SCP and its attached Boards.
3. The SCP should make it clear to all prosecutors that it will take an active role in addressing concerns about improper interference from any source or actions on the part of superiors that may be signs of corruption and other professional misconduct.
4. The regulations of the SCP and its attached Boards should be redrafted to a) provide day-to-day guidance to Council and Board members, b) ensure consistency of approach, and c) eliminate the perception of arbitrary and non-transparent decision making.
5. The SCP should develop a performance management plan for the PPS that includes specific evaluation criteria.

6. The SCP should develop a strategy to publicly present the PPS as an indispensable and independent social institution worthy of independence, autonomy and public support.

#### Other Observations

1. The PG and other appropriate officials (e.g. the Minister of Justice) should consider ways to focus the PPS on its criminal justice functions and transfer its non-criminal responsibility to other agencies. To make this happen, the PPS and other appropriate agencies should develop joint change management programmes.

2. Consideration should be given to amending the law of the PPS to streamline the processes of the SCP.

3. If it is provided with adequate resources, the SCP should consider and discuss with the PG assuming a policy development role. Priority in this regard should be given to issuing a directive on the factors that should and should not be taken into considerations when deciding whether or not to institute or continue a prosecution.

4. The operation and effectiveness of dual chamber councils for judges and prosecutors in other jurisdictions should be carefully reviewed before any steps are taken in Moldova to establish the SCP as a separate chamber of the SCM.

5. If it is decided to establish the SCP as a second chamber of the SCM, careful study should be undertaken before conferring the title of magistrate on prosecutors.



## 1. Introduction

The Republic of Moldova is a country in transition. It aspires to join the European Union<sup>5</sup> and continued reform of its legal system will play an important role in furthering the country's European integration. Moldova experienced an explosion in crime and the growth of a shadow economy in the late 1990s and early 2000s.<sup>6</sup> An effective and efficient legal system is the key to combating criminality, fighting corruption, protecting human rights and attracting investment.<sup>7</sup> This report starts from the internationally accepted premise<sup>8</sup> that a necessary component of an effective and efficient legal system is a functional, independent, autonomous, and transparent public prosecution service. Guarantees of independence and autonomy are not conferred on prosecutors in their own interests; **they are provided in the interests of the rule of law and those seeking and expecting justice.**<sup>9</sup>

For the most part this report recommends measures that can be implemented under Moldova's current Constitution and organic law.<sup>10</sup> During these troubling economic

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5 Moldova has implemented the first three-year Action Plan within the framework of the European Neighbourhood Policy (ENP) (<http://www.mfa.md/european-integration/relations-RM-EU/>; europa.eu foreign relations Moldova-EU). See also: 2009-2013, Government Activity Program "Freedom, Democracy, Welfare" of the Republic of Moldova.

6 Soros Foundation, Criminal Justice Performance from a Human Rights Perspective, Moldova, November 2009 at p. 5.

7 See Autheman V., Elena S. and Henderson K. (ed), Global Best Practices: Judicial Councils, IFES Rule of Law White Paper, April 2004.

8 The 1990 **U.N. Guidelines of the Role of the Prosecutor** and the 2000 Council of Europe **Recommendation On the Role of the Public Prosecution in the Criminal Justice System** are important documents containing safeguards to guarantee the independence of prosecutors in their profession. They both contain provisions aimed at the state to secure independence for the prosecutor. **What is of primary importance is a prosecutor's freedom from improper interference or influence upon his or her work.**

9 **European Guidelines on Ethics and Conduct For Public Prosecutors** "The Budapest Guidelines", Adopted by the Conference of Prosecutors General of Europe on 31 May 2005.

10 In the concluding section of the report some suggestions are made for changes to the law that would strengthen and transform the SCP and the PPS.

times it is difficult for all states, and particularly economically poor states like Moldova,<sup>11</sup> to embark on costly capacity building programmes. Public institutions cannot expect to receive more money. They must learn to work more effectively and efficiently (i.e. “work smarter”) within existing or dwindling budgets. Often this involves subjecting the existing system to close scrutiny to determine where it can be streamlined. This report identifies some areas where officials in Moldova may find opportunities for streamlining.<sup>12</sup>

## **2. Context**

### 2.1 The Public Prosecutor

[Public prosecutors are] public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.<sup>13</sup>

A crucial mission of a modern democratic state is to set up and ensure the functioning of an effective criminal justice system. Every state has a public prosecutor entrusted with mobilizing the coercive powers of the state to prosecute alleged offenders for violations of the criminal law. Jurisdictions that trace their legal roots to England typically place the public prosecutor in the executive branch of government (e.g. Canada, the United States of America and the Republic of Ireland), while jurisdictions employing the continental model introduced by Louis XIV of France usually view the public prosecutor

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11 In 2009 Moldova’s (nominal) gross domestic product (\$5,403 billion) fell by 7.8%. In 2010 Moldova ranked 86th of 110 participant states in the Legatum Prosperity Index.

12 The project team wishes to acknowledge the assistance it received in the preparation of this report from Prosecutor General Valeriu Zubko, Iurie Garaba, President of the Superior Council of Prosecutors, and the members of the Public Prosecution Service who shared their insights with us. The opinions expressed and the conclusions reached in the report are exclusively those of the project team unless indicated otherwise.

13 Opinion No. 12 (2009) of the Consultative Council of European Judges and Opinion No. 4 (2009) of the Consultative council of European Prosecutors on the **Relations between Judges and Prosecutors in a Democratic Society** “The “Bordeaux Declaration”, (Strasbourg, 8 December 2009).

as a judicial authority (e.g. France, Italy and Romania).<sup>14</sup> The Soviet Union adopted a third model, entrusting the Procurator-General with the state's highest supervisory responsibilities over all spheres of public and social life.<sup>15</sup> This made the Procuracy the most powerful institution in the Soviet system of justice.<sup>16</sup>

## 2.2 Prosecutorial Independence

Whatever model of prosecutorial arrangements a country embraces, it is generally recognized that the chief public prosecutor and his or her agents play a key role, in theory if not always in practice, in ensuring that the criminal justice system functions in an independent and impartial way.<sup>17</sup> To effectively play this role, prosecutors must be protected from improper interference or influence, including interference or influence from the executive and legislative branches of government. It is for this reason that the continental model identifies public prosecutors as judicial authorities, entitled to the protections afforded by judicial independence.

In jurisdictions where the public prosecutor is part of the executive branch of government, strong traditions have developed prohibiting other members of the executive from becoming involved in individual prosecutions. Some jurisdictions have supplemented these traditions with legislated Director of Public Prosecution (DPP) models (e.g. the Republic of Ireland and Canada at the federal level and in the

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14 This was the model employed in Moldova prior to the Soviet era and it still influences aspects of the Moldovan justice system. Moldova has embraced an adversarial trial model (Art. 13, **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009) but judges still review the court dossier prior to trial, a practice inconsistent with adversarial trial procedure as practiced elsewhere.

15 Cherif Bassiouni and V.M. Savitski (eds), *The Criminal Justice System Of The U.S.S.R.*, (Springfield, U.S.A., 1979).

16 Soros Foundation, *Criminal Justice Performance from a Human Rights Perspective*, Moldova, November 2009 at p. 38.

17 **Guidelines on the Role of Prosecutors**, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF. 144/28/Rev. at 189 (1990). Procurators in the Soviet Union theoretically answered to the Supreme Soviet but they derived their authority from the Procurator General and thus acted independently of any regional or local government body.

provinces of Nova Scotia and Quebec) that permit the DPP to disregard the orders of the executive branch unless they are in writing and published in an official record.

### 2.3 Institutional Safeguards

The institutional safeguards that guarantee the independence and autonomy of prosecutors are mainly defined by recruitment mechanisms (e.g. ensuring that candidates have the relevant professional qualifications), continued training, promotion and financial remuneration.<sup>18</sup> These safeguards seek to ensure that every decision relating to a prosecutor's appointment and career is based on objective criteria applied by an independent authority or subject to guarantees providing that the decision is not taken other than on the basis of the merit principle.

### 2.4 Prosecutorial Accountability

While public prosecutors should be able to perform their professional duties without unjustified interference and states should protect them from such interference, public prosecution services should account periodically and publicly for their activities and priorities.<sup>19</sup> Prosecutorial independence and accountability are sometimes seen as competing values. Properly understood, however, they are complementary. Prosecutorial independence exists in the public interest, as does prosecutorial accountability. **Prosecutors must remain accountable to society to ensure that they use the substantial powers conferred on them in the public interest.**

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18 Art. 5, Recommendation Rec (2000) 19 of the Committee of Minister to Member States on the **Role of Public Prosecution in the Justice System**, Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies.

19 Art. 11, Recommendation Rec (2000) 19 of the Committee of Minister to Member States on the **Role of Public Prosecution in the Criminal Justice System** (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies).

## 2.5 Public Prosecutors in Moldova

Public prosecutors in Eastern European states have traditionally played a major role in the justice system.<sup>20</sup> The broad mandate currently conferred on Moldovan prosecutors is a legacy of the supervisory role of the Soviet Procurator General. In addition to their criminal law responsibilities, public prosecutors in Moldova represent the public interest and protect the legality of civil and/or administrative proceedings.<sup>21</sup> They also represent the State, Ministries and other government bodies and the interests of vulnerable people (e.g. minors) in civil proceedings.

Despite the hard work and commitment displayed by many Moldovan prosecutors, the PPS has an “image problem”. In 2008 the American Bar Association’s Rule of Law Initiative reported: “there is little public confidence that [the PPS] is politically capable of investigating and prosecuting human rights abuses and crimes by public officials.”<sup>22</sup> Interviews conducted by the Soros Foundation in 2009 revealed that less than half of Moldovans interviewed were prepared to agree with the proposition that the prosecution service as an institution brings just and correct prosecutions. Only 45% were willing to agree with the statement that prosecutors as individuals bring just prosecutions. Those interviewed were also asked the question: how well do prosecutors do their jobs? The average rating was 3.10 out of 5, slightly higher than the rating for criminal investigators.<sup>23</sup>

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20 The highest number of public prosecutors (per 100.000 inhabitants) can be found in Central and Eastern European states (Bulgaria, Hungary, Latvia, Lithuania, Moldova, Slovakia, Russian Federation). See European Judicial Systems, Edition 2010 (2008 data): Efficiency and quality of justice: European Commission for the Efficiency of Justice (CEPEJ), Council of Europe at p. 183).

21 Articles 1 and 5, **Law of Public Prosecutor’s Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009.

22 American Bar Association, Rule of Law Initiative, Prosecutorial Reform Index, Moldova, June 2008 at p. 44.

23 Soros Foundation, Criminal Justice Performance from a Human Rights Perspective, Moldova, November 2009 at pp. 40 - 41.

## 2.6 The Reform Process to Date

This report focuses on the needs of the SCP and PPS. There are many needs and meeting them will require strong leadership and hard work. The reform efforts taken to date should, however, be acknowledged. The new law of the PPS is a significant improvement over the 1993 law it replaced.<sup>24</sup> It requires a prosecutor's council to play a role in the appointment, promotion, merit recognition, training and disciplining of prosecutors. These decisions no longer rest solely in the hands of the PG. While this report will suggest that further delegation should take place; the significance of increased input into the decision making of the PG should not be disregarded.

Another improvement is that Article 21(2) of the old law allowed a person who worked at least five years as a Member of Parliament to be a candidate for the position of prosecutor without attending the NIJ. The new law does not include Members of Parliament in the group of people who are able to be a candidate for the position of prosecutor without attending the NIJ. It is difficult to see how a quick and smooth transition from a career in politics to a career in the PPS is in the public interest. The roles played by politicians and prosecutors are fundamentally different.

The PPS inherited uniforms and a rigid military hierarchy from the Soviet era. It appears this has shaped the approach of the PPS to the community and has also played a role in the response of the community to the PPS. However, it seems that elements of the PPS have embraced new attitudes. The PPS recently launched an initiative to provide the community with more information about the role played by prosecutors.<sup>25</sup> When prosecutors are promoted they are now introduced to leading members of the civil

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24 This opinion is not universally shared. The Soros Foundation is of the view that "many of the changes [in the new law] are superficial in nature." The Foundation is concerned that under the new law the PPS retains many of its extra-criminal justice related competencies (see Soros Foundation, *Criminal Justice Performance from a Human Rights Perspective*, Moldova, November 2009 at p. 41).

25 In 2008 the American Bar Association's Prosecutorial Reform Index described (at p. 48) PPS interactions with the media, civil society and the public as "infrequent".

society and the mass media. These outreach measures will increase communication and understanding between the PPS and the community it serves.

## 2.7 Corruption

Corruption remains a major challenge in Moldova. The most recent Transparency International Corruption Perception Index ranks Moldova 108<sup>th</sup> of 178 countries.<sup>26</sup> In the 2009 report, Moldova was listed 92<sup>nd</sup>. This was an improvement of 16 points over the 2008 report. The chief executive of Transparency International Moldova has suggested that **the prevalence of corruption in Moldova's criminal justice system** is a reason for the failure to combat corruption more generally. The investigation and prosecution of corruption offences in Moldova is split between the PPS and the Centre for Combating Economic Crimes and Corruption (CCECC). The CCECC investigates public corruption cases and refers them to the PPS for prosecution.

The American Bar Association's Rule of Law Initiative noted in 2008 that there is a perception in Moldova that the PPS's high-profile corruption prosecutions are politically motivated.<sup>27</sup> Senior management of the PPS disputes the accuracy of ranking based on perception. They also note that those who criticize the level of corruption in Moldova seldom offer realistic suggestions about how it can be addressed.

### **3. The Council and Boards Created by the New Prosecutor's Law**

#### 3.1 The Superior Council of Prosecutors

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<sup>26</sup> The higher the number the worse the perception of corruption.

<sup>27</sup> American Bar Association, Rule of Law Initiative, Prosecutorial Reform Index, Moldova, June 2008 at p. 44.

(2) The Superior Council of Prosecutors **shall act as guarantor of independence, objectivity and impartiality of prosecutors.**<sup>28</sup>

Multiple and interrelated rationales have been advanced in support of the creation of judges' councils, prosecutors' councils and mixed councils of judges and prosecutors. All of them reflect attempts at strengthening institutional independence. Most often this is done by insulating career processes from external interferences<sup>29</sup> through the so-called "Southern European Model". All the responsibilities and competencies of a council created pursuant to this model are related to career decisions (e.g. advice or power to select and promote, discipline and train, etc.). In some countries these councils exist as guarantees of judicial independence only. However, prosecutors as well as judges are members of magistrates' councils in ten European jurisdictions, including Hungary, Slovakia, Romania and Ukraine.<sup>30</sup>

Some jurisdictions have created separate prosecutors' councils (e.g. Portugal and Serbia). This is the model adopted by Moldova. Article 81 of the new law provides that the Superior Council of Prosecutors consists of 12 members:

- Five elected by the General Assembly of Prosecutors (through secret and direct vote<sup>31</sup>) with two members from the PG's office and three from territorial offices and specialized prosecution offices);
- Four law professors selected by the Parliament from among tenured law professors; and

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28 Article 80, **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009.

29 Autheman V., Elena S. and Henderson K. (ed), *Global Best Practices: Judicial Councils*, IFES Rule of Law White Paper, April 2004, at p. 1.

30 Autheman V., Elena S. and Henderson K. (ed), *Global Best Practices: Judicial Councils*, IFES Rule of Law White Paper, April 2004 at p. 25.

31 At least one knowledgeable Moldovan observer is of the view that because of the strong hierarchical tradition in the PPS, the General Assembly of Prosecutors knows who is "expected" to be successful and votes accordingly. \_\_



- three *ex officio* members who are members by virtue of holding another office (the PG, the Minister of Justice, and the Chairperson of the SCM).

### The Role and Responsibilities of the SCP

The establishment of the SCP was heralded as the first concrete step in the process of re-organisation of the PPS. It was a major recommendation of the Council of Europe experts that assisted in the drafting of the new law. Minister of Justice Alexandru Tanase predicted: "The Council will help to gradually free the Prosecutor's Office from the influence of the political sector."<sup>32</sup> PG Valeriu Zubco expressed the view that the creation of the Council "was a step in the right direction that will contribute to the better functioning of the Prosecutor's Office. The entire society will feel the effects of the Council's work."<sup>33</sup>

The SCP was created to ensure that the career progression of prosecutors proceeds on the basis of objective considerations. This increases the likelihood that prosecutors will be independent decision makers. But the SCP has a second important role: the professional development of prosecutors. The long term success of the PPS depends on its ability to attract and **retain**<sup>34</sup> employees who have the skills required to do the job and a commitment to the role of public prosecutor. To ensure that the PPS succeeds and gains greater public confidence, hard working and honest prosecutors have to be encouraged and promoted. The performance of prosecutors who are incompetent or lack motivation has to be addressed and corrected and corrupt prosecutors have to be dismissed and prosecuted.

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<sup>32</sup> *Info-Prim Neo*, 14 January 2010.

<sup>33</sup> *Info-Prim Neo*, 14 January 2010.

<sup>34</sup> The PPS is currently experiencing a serious retention problem.

## The Regulations and Internal Work Processes of the SCP

The SCP performs the following major functions pursuant to its mandate:

- approves regulations on its activity and on the activities of the Qualification and Disciplinary Boards;
- makes proposals to the PG with regard to the appointment of candidates to the position of prosecutor, chief-prosecutor, territorial prosecutor, specialist prosecutor and of deputy prosecutor;
- makes proposals to the PG with regard to the appointment, promotion, encouragement, delegation, transfer secondment, suspension or dismissal of prosecutors;
- approves the strategy on initial and continuous training of prosecutors and produces an opinion on the Action Plan for the implementation thereof;
- examines appeals against the decisions of the Qualification Board and of the Disciplinary Board;
- decides on the validation of decisions made by the Qualification Board and by the Disciplinary Board;
- examines citizens' complaints on issues concerning prosecutors' ethics; and
- examines the complaints of a prosecutor who believes that his or her independence, impartiality, professional reputation have been affected in any way.

This is a formidable volume of work. It requires that the individuals on the SCP have superior organizational and administrative skills. However, the members of the PPS selected by their fellow prosecutors to be on the SCP are not necessarily selected on the basis of their skill in these areas. Similarly, Parliament does not necessarily appoint law professors to the SCP because of their organizational and administrative skills.

Rules of procedure or operating procedures can provide organizational and administrative assistance by focusing the work of the Council and maximizing the time it spends on its most important tasks. However, writing clear and effective rules of procedure is an acquired skill. There is no reason why prosecutors or law professors should have a natural facility for drafting internal regulations. In large part, the regulation

prepared by the SCP to guide its own processes<sup>35</sup> replicates the wording of the law creating the SCP. This is not the purpose of internal regulations. Institutional rules of procedure should provide guidance on how specific functions are to be performed. By establishing detailed rules of procedure, internal regulations promote uniform treatment. They give rise to shared expectation, reduce the possibility of arbitrary decisions and establish standards by which decisions can be evaluated.

The **Regulation on the Superior Council of Prosecutors**<sup>36</sup> states that the SCP is to approve “the measures to supplement the number of vacancies in prosecution.” But the SCP’s regulation provides no guidance on how this function is to be performed. What criteria does the SCP apply in deciding whether to approve measures to supplement the number of vacancies (e.g. demographic increases, upward trends in the crime rate, caseload inventory backlog, etc.)? Does the SCP conduct an independent inquiry to determine whether underutilized prosecutors in one area can be moved to the area experiencing a staff shortage or whether the need to supplement vacancies is temporary or permanent? Or is the function of the SCP merely to “rubber stamp” the conclusion reached by the human resources branch of the Office of the PG?

The SCP’s regulation also provides that the SCP “reviews appeals from decisions of qualification and disciplinary Boards.” But how is the appeal to be conducted? Does the SCP restrict itself to a procedural review of the decisions of the qualification and disciplinary Boards or does it hold a rehearing at which the SCP is entitled to review the decision on its merits and decide whether it would have reached the same result? To avoid confusion and re-argument, the regulation should answer these questions.

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35 **Regulation on the Superior Council of Prosecutors**, adopted by the Decision of Superior Council of Prosecutors No..2-2d-1/10 from 16.02.2010.

36 Adopted by SCP Decision No. 2-2d-1/10, 16 February 2010.

## SCP Meetings

The focal point of SCP activities are its meetings, which must take place at least once a month. The SCP's internal regulation sets out a basic regulation relating to SCP meetings, but it provides no guidance on meeting format or procedure. The ability to chair an effective meeting is a skill that does not come naturally to most people. Rules of procedure that provide guidance on the types of issues best addressed by a meeting and those best addressed by another form of communication (e.g. letter or telephone call) and how to 1) plan an effective meeting, 2) chair a meeting, 3) engage everyone at the meeting, 4) forge a consensus, and 5) follow up on the meeting would assist the President of the SCP in making the best use of his or her time.

The minutes of and decisions made at SCP meetings are posted on the website of the Office of the PG.<sup>37</sup> They provide insight into the various matters that occupy the time of the SCP when it meets. The areas of focus at SCP meetings since January 2010 can be summarized as follows.

Areas of Focus	Number of Decisions related to this area of Focus
Validation of Disciplinary Board decisions	59
Delegation and extension of delegation of authority	55
Designation of the successful candidate in a competition for filling the position of prosecutor	44
Announcement of the competition for available positions (vacancies)	38
Transfers	38
Processing resignations/ dismissal/ end of mandates	29
Considering appeals from decisions of the Disciplinary Board	12
Approval of SCP Regulations	7
Providing commentaries on draft laws	1
Creation of a working group for drafting a new code of ethics for prosecutors	1

<sup>37</sup> <http://www.procuratura.md/en/pdpagg/>

Professional/business meetings break down into several basic types of meeting. In a decision-making meeting, the group selects a decision to implement. In a problem-solving meeting, participants first define a problem and then craft solutions for solving it. Other types of meetings are held for the purposes of communicating, reporting and feedback. The great majority of SCP meetings are decision making. More accurately, most often the SCP validates a decision made by one of its attached Boards and agrees to recommend it to the PG. Once validated by the SCP, the recommendation goes to the PG for a final decision.

The lack of problem-solving SCP meetings is unfortunate. The members of the SCP are eminently qualified to consider policy issues. They enjoy the confidence of the Assembly of Prosecutors and of Parliament. There are numerous policy issues relating to the independence and autonomy of prosecutors that they could usefully address. This is not a role directly assigned to the SCP by the new law but it is a role the SCP should consider and discuss with the PG when it is properly resourced.

During the time period summarized in the above chart, the SCP was not called upon to “examine the complaints of a prosecutor who believed that his or her independence, impartiality and professional reputation had been affected in any way.” The regulations of the SCP clearly state that this is a competency of the SCP but it appears prosecutors do not actively use the SCP to protect their independence. This is unfortunate. Attempts to exert outside influence on a prosecutor, undue interference by a superior, the absence of objective criteria for assigning files, and the reassignment of files can all be tell-tale signs of improper conduct or corruption. Prosecutors should feel confident about bringing these matters to the attention of the SCP.

## Comparing Judicial Independence and Prosecutorial Independence

An examination of the laws establishing the SCM<sup>38</sup> and the SCP makes it clear that the SCP was modelled after the SCM. However, the SCP is a pale imitation of the SCM. The President (the Head of the General Investigations Division of the GP's Office), Secretary of the SCP (required by the new law to be a prosecutor) and other PPS members on the SCP have to find time to fit in SCP work with their other responsibilities. They are given no dedicated time off from their regular jobs to work on SCP activities. This is in marked contrast to the members of the SCM, who are able to work full-time on their SCM responsibilities. Moreover, the SCP is expected to perform essentially the same role for approximately 750 prosecutors as the SCM performs for approximately 430 judges. Inevitably, the members of the SCP and the President and Secretary in particular have to do their SCP work in the evenings or on the weekends.

The SCM has staff to provide it with administrative and secretarial support. The SCP has no detached administrative or secretarial support staff. Prior to a SCP meeting the President and Secretary of the SCP have no alternative but to spend their time putting together the agenda and supporting material. This is not an efficient use of their valuable time.

Because the SCP has no support staff, it has to work through the office of the PG. The SCP and Qualification Board rely heavily on the Human Resources Branch of the Office of the PG. The Internal Security Unit of the Office of the PG performs background checks for the Qualification Board and conducts investigations for the Disciplinary Board. Since the Human Resources and Internal Security Unit report to the PG, it is natural that their first loyalty rests with the PG. As a result, their priorities are not always aligned with the priorities of the SCP.

An important structural difference between the SCP and the SCM is that the members of the SCM have the benefit of judicial independence. They are not subordinate to

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<sup>38</sup> Law on the Superior Council of Magistracy, Law No. 947-XIII, 19 July 1996, Official Monitor No. 64/641, 3 October 1996.

anyone on the Council. The members of the PPS on the SCP, however, are subordinate to the PG. Art. 125 of Moldova's Constitution places the PG at the head of the PPS. All other prosecutors, including the President of the SCP, are subordinate to him. The PG organizes and coordinates the activities of the PPS and manages its budget.<sup>39</sup> This gives rise to the question: how can the SCP be independent and autonomous from the PG when the members of the PPS on the SCP are subordinate to the PG? Even if the PG avoids interfering with the independence of the SCP, the lack of legislative prohibition against interference and hierarchical subordination taints the appearance of independence.

Another important distinction between the SCM and the SCP is that the SCM has true decision making authority. In most of its areas of operation, the SCP only has authority to provide advice. It is not a decision making body. Thanks to the new law, appointment, promotion and discipline decisions no longer rest exclusively in the hands of the PG; the SCP and its attached Boards now provide broader input. However, the final decision still rests with the PG. As long as the SCP has an advisory rather than decision making capacity, it cannot effectively act as "the **guarantor of independence, objectivity and impartiality of prosecutors**" as contemplated by Article 80 of the new law.<sup>40</sup>

The final decision making authority over the appointment and careers of prosecutors conferred on the PG by the new law requires brief consideration of the guarantees of independence and autonomy possessed by the PG. The Constitution declares that the PG is imbued with the "principle of independence" excluding "the possibility of subordination ... to the authority of the legislative and executive powers." However, it appears to be conceded in Moldova that the PG is not free from "the influence of the political sector."<sup>41</sup> Moreover, for the PG to **be seen as independent**, he or she must be

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39 For a detailed listing of the PG's authority over the PPS, see Article 27, **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009,.

40 Article 80, **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009.

41 *Info-Prim Neo*, 14 January 2010.

appointed through an impartial and transparent selection process, have legally established conditions of employment and be safeguarded against removal from office for improper reasons. Otherwise, there will be concern that the PG, and members of the PPS the PG is unable to “protect”, will be subject to unwritten “telephone” orders from politicians and other influential individuals.<sup>42</sup>

The PG is appointed by Parliament. This method of appointment raises the spectre that partisan political considerations can play a role in the selection of the PG. In turn, a “politicised” PG could lead to concerns about the political neutrality of the SCP because the PG is an *ex officio* member of the SCP. Moreover, a member of the PPS subordinated to the PG can (and has) become President of the SCP. Other jurisdictions use a non-partisan committee (e.g. the Republic of Ireland involves a committee including representatives of civil society and all major political parties) or a committee including judicial representation (e.g. the Canadian province of Nova Scotia) to select or recommend their chief public prosecutor.

The PG is appointed for a term of five years. However, he or she can be dismissed by Parliament. This provision is open to a perception that the removal of the PG for partisan political reasons is possible. Adding to this perception is the frequency with which PGs in Moldova “resign”<sup>43</sup> when there is a change in government.<sup>44</sup> Many jurisdictions provide security of tenure during good behaviour to their chief public prosecutor to counter suggestions that he or she could be vulnerable to political manipulation.<sup>45</sup> Moldova’s authorities may wish to consider civil society involvement,

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42 American Bar Association, Rule of Law Initiative, Prosecutorial Reform Index, Moldova, June 2008 at p. 24.

43 None of the last **five** PGs served more than **three** years of their **five** year term. Former PG Valeriu Catana stated in *Ilascu and Others v. Moldova and Russia*, ECtHR, 8 July 2004 at para. 210 that he was forced to “resign” for political reasons because he insisted on taking his decisions on the basis of the law and not according to the way the political wind was blowing.

44 Frequent turnover at the head of an organization and the changes that often accompany it create a climate of instability that is not healthy for the organization. Societal reform efforts also fail to take root without stability and sustainability.

45 A “good behaviour” appointment provides that the appointee cannot be removed from office unless he or she engages in misconduct. For example, the Republic of Ireland provides that the DPP may only be removed from office following an investigation



judicial representation, or more transparent parliamentary input in the appointment and dismissal of the PG.

Some political leaders in Moldova appear insensitive to the need for the PG to be seen to be free from any suggestion of political influence. On 28 October 2010 a news agency reported that a member of the party in power responded to accusations from a political opponent by stating that he would convene a meeting of the PG, the Security Intelligence Service and the Ministry of Interior Affairs and ask for explanations about the accusations. Statements like this give rise to public skepticism about the independence and autonomy of the PG, whether or not improper pressure is in fact brought to bear on the PG.

### Relationship with the NIJ

Prosecutors around the world need to remain current with respect to developments in the law in order to effectively discharge their responsibilities. Continuing professional education is also recognized as an institutional safeguard of the independence and autonomy of prosecutors. The NIJ “represents a substantial undertaking by Moldova to ensure its prosecutors are adequately educated and trained”.<sup>46</sup> It expands on the theoretical legal education provided by Moldovan law schools through initial and continuous training of prosecutors. The SCP approves the training strategy and provides an opinion on implementation of the NIJ’s training Action Plan. The training focuses on the legislative process, national legislation and European and international acts to which Moldova is a party, and national and European case-law. The addition of advocacy skills training would enrich this curriculum and be of particular assistance to new prosecutors.

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by a committee consisting of the Chief Justice and a Judge of the High Court into the 1) physical or mental health of the DPP, or 2) misconduct of the DPP.

46 American Bar Association, Rule of Law Initiative, Prosecutorial Reform Index, Moldova, June 2008, at p. 12.

The SCP recently assumed a more active role in ensuring that prosecutors get assigned their preferred courses at the NIJ. These efforts should continue so that prosecutors are able to obtain maximum benefit from their legally guaranteed educational opportunities.<sup>47</sup> The development of even closer ties between the SCP and the NIJ would be mutually beneficial.<sup>48</sup>

Administering the careers of 780 prosecutors is an onerous task. Some members of the SCP feel they do not have the expertise or training required to perform some of the tasks assigned to them. This is not surprising; their professional training was as lawyers and prosecutors. Human resource management requires a different set of skills. It is common practice in other prosecution services to provide management training to prosecutors who assume management positions.

### 3.2 The Qualification Board<sup>49</sup>

#### The Process for Recruiting New Prosecutors

The Qualification Board is attached to the SCP and is responsible for the recruitment of new prosecutors, the competency assessment of experienced prosecutors and the promotion of prosecutors. There are nine prosecutors on the Board elected by the General Assembly of Prosecutors and two law professors appointed by the SCP. The predominance of prosecutors on the Board might not be conducive to bringing about cultural change in the PPS.

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47 In Moldova, as elsewhere, workload pressures often stand in the way of prosecutors attending educational programmes. Despite the legislative requirement that every prosecutor attend the NIJ each year, approximately 60% of Moldovan prosecutors are actually able to do so.

48 Greater SCP input and interest in curriculum development and presentation (e.g. an increased focus on skills training) and NJI participation at the ceremony where new prosecutors take their oath are but two examples of measures that could be adopted to strengthen the ties between the PPS and the NIJ.

49 Art. 27, **Regulation of the Qualification Board**, adopted by Decision of the SCP No. 2-3d-29 from 23.02.2010, precludes members of the SCP or the Disciplinary Board from membership on the Qualification Board.

There is also a danger that the prosecutors on the Qualification Board could overshadow the law professors. The new law provides that a quorum of the Board is present if 2/3 of the members attend a meeting. It also states that a decision of the Board is adopted if it is approved by a majority vote. Having regard to these provisions, the rights of the individual members of the Board, especially the law professors, should be carefully respected, including the right of individual members to:

Read the materials presented for examination, participate in the examination, take steps to set out the arguments and present additional materials, propose examination problems, vote for the decisions and express, if necessary, separate opinions or take other actions in accordance with the law.<sup>50</sup>

It appears that initial and continued employment in the PPS rests largely on successful completion of the capacity examination.<sup>51</sup> This examination focuses on the candidate's theoretical and practical knowledge by means of written and oral tests. Knowledge based testing does not always identify the candidates best suited to be prosecutors. While prosecutors undoubtedly need a solid foundation of academic knowledge, good judgment and a strong sense of fairness are also important qualities in a prosecutor. In choosing the methods to use to rate candidates, the selection criteria (i.e. criteria related to the work to be performed and necessary for effective and efficient performance) have to be carefully considered.

Appropriate methods to test for skills not based on academic knowledge include practical demonstrations of ability to perform job-related tasks such as trial and appellate advocacy, to answer problem-solving questions and address hypothetical situations. The best indicator of future performance is past performance and verification

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50 Art. 2.7, **Regulation on the Qualification Board** adopted by Decision of the SCP No. 2-3d-29 from 23.02.2010.

51 Art. 4.12, **Regulation on the Qualification Board**, adopted by Decision of the SCP No. 2-3d-29 from 23.02.2010. The application for the capacity examination is submitted to the SCP who, by regulation, determines the organization of the capacity examination.

of past on-the-job performance can be obtained through targeted and specific reference checks.<sup>52</sup>

NIJ graduates are entitled by law to seek employment with the PPS. A candidate who has previously worked as a prosecutor, or for at least five years as a judge or in another legal capacity, can also seek the position of prosecutor. The number of vacancies offered to these candidates cannot exceed 20 per cent of the total number of vacancies offered in a year. Candidates who are not graduates of the NIJ are required to write a capacity examination. But candidates who have been prosecutors, defence attorneys, investigators and/or judges for at least ten years can also be appointed without taking a capacity examination. Candidates with experience as prosecutors should not necessarily be required to attend the NIJ, but candidates with no prior prosecutorial experience would benefit from attendance at a NIJ course, even if it were an abbreviated course in recognition of the candidate's experience in another legal capacity.

### Appraisal and Promotion of Prosecutors

The new law calls for the Qualification Board to appraise the professional competence and performance of a prosecutor two years after the prosecutor's appointment and thereafter every five years.<sup>53</sup> Art. 42 (7) of the new law provides that by "regulations at the institutional level" there can be established "other ways of intermediary evaluation of the results of the prosecutors' activity" but the Qualification Board's regulation does not provide for intermediary evaluations. Consequently, a long period of time passes between performance reviews. This is unfortunate because regular performance

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52 The promotion process outlined in the regulation adopted by the Decision of the SCP No. 103 from 13.04.2010, recognizes the need to test a candidate's practical skills as well as academic knowledge. It involves two practical assignments which include solving a case and planning concrete tasks (e.g. organizing an operations meeting or preparing a draft decision).

53 Art. 42, **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009. The prosecutor may appeal against the results of the Qualification Board's appraisal to the SCP.

evaluations play a key role in identifying performance problems and are particularly important during the early years of a prosecutor's career.

The attestation procedure provided by the **Regulation of the Qualification Board** requires the prosecutor's superior or, where appropriate, a member of the SCP, to "fill in the attestation record, analysing [the prosecutor's] professional and moral qualities." The regulation provides no objective criteria on which to make the evaluation. Consequently, the attestation rests on the subjective opinion of the prosecutor's superior. This procedure is not transparent. It lacks credibility because of the possibility of favouritism.

Promotion competitions are based on a combination of academic and practical knowledge. The written test contains 50 multiple-choice questions in numerous areas, including European Court of Human Rights practice. These questions are designed to test the knowledge and skills necessary for fulfilling the tasks and duties for the vacant position.

The second part of the competition involves two practical assignments. These assignments could include solving a case or planning concrete tasks.

Basing promotion decisions on test results has the virtue of objectivity. But are test results the best way to determine suitability for promotion? An effective performance management programme records the career progress of a prosecutor at regular intervals. When the prosecutor applies for a promotion, it provides decision makers who may not have personal knowledge of the work performance of the prosecutor with important assessment information. High test scores demonstrate that the candidate is skilled at writing tests. Strong and sustained past performance is the most reliable indicator of future performance.

### 3.3 The Disciplinary Board

The Disciplinary Board is attached to the SCP and is comprised of nine members elected by the General Assembly of Prosecutors. Having prosecutors judged by fellow prosecutors may not be conducive to public confidence in the integrity of the process. Moreover, members of the public do not have direct access to the disciplinary process but have to make their complaint through senior management of the PPS or the SCP.

Consideration should be given to a publicly advertised process that allows members of the public to complain directly to the Disciplinary Board. Senior management of the PPS is not in favour of this suggestion. They feel the current process is adequate and the suggested one would generate unwarranted complaints and result in prosecutors spending too much time replying to unfair and unfounded complaints.

The investigation of complaints is the responsibility of the Internal Security Unit of the GP's office, which has authority to demand written explanations from the prosecutor under investigation. The decision of the Disciplinary Board and the rationale for the application of a disciplinary sanction are submitted to the SCP for validation. The affected prosecutor is entitled to appeal a decision of the Disciplinary Board to the SCP and of the SCP to the courts.

#### Comparing the New System with the Old

The creation of the Disciplinary Board has had a significant impact on the number and outcome of disciplinary proceedings. In 2008, when discipline was exclusively in the hands of the PG, 133 disciplinary proceedings were initiated. They all resulted in a finding against the prosecutor. There were 119 findings of "professional inadequacy"<sup>54</sup>

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<sup>54</sup> "Professional Inadequacy" (also translated as "inappropriate fulfilment of service duties") is an extremely vague term. The hearing of a disciplinary charge against a public prosecutor will likely involve a determination of the civil rights of the prosecutor. This will certainly be so if any question of the demotion or dismissal of the prosecutor is concerned. It follows that the prosecutor is entitled to a fair and public hearing by an independent and impartial tribunal established by law. The precise complaint against the prosecutor should be stated very clearly so that he or she knows exactly what complaint has to be answered. It is crucial that prosecutors not be disciplined for honestly reaching a different legal opinion than a superior. Penalizing a prosecutor for reaching a

and 14 findings of ethical breaches.<sup>55</sup> 93 sanctions were pronounced: 39 reprimands, three demotions, three dismissals and 48 other sanctions.<sup>56</sup>

During a nine month period in 2010 the new Disciplinary Board held 14 sessions during which it examined 75 allegations of disciplinary misconduct and reached 85 decisions. In 19 cases the Board ceased the proceedings because of the expiration of the limitation period<sup>57</sup>; in 14 cases it ceased the proceedings on the ground of non-opportunity to apply the disciplinary sanction; in twelve cases it decided to dismiss the proposal to apply a disciplinary sanction and to cease the disciplinary proceedings; and in one case the proceedings were discontinued because the Board found the conduct complained about was not capable of constituting a disciplinary violation.

The 2010 Board proceedings led to one dismissal from the PPS, three demotions, one downgrade, six sharp reprimands, six reprimands, and one warning. 71 of the 85 decisions of the Disciplinary Board were validated by the SCP. Twelve decisions were appealed and in four cases the decision was maintained. Eight decisions were modified by the SCP.

Without conducting a detailed comparison of the 2008 and 2010 discipline files, it is not possible to determine whether the discipline process of the PPS has become more lenient. It may be that the Disciplinary Board and the SCP have greater experience and insight when it comes to prosecutorial conduct than the members of the Internal Security Unit of the Office of the PG. It is also possible that they are more forgiving of their fellow prosecutors.

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“wrong” legal conclusion is unfair and inhibits other prosecutors from freely expressing legal opinions and making discretionary decisions.

55 **European Judicial Systems**, Edition 2010 (2008 data): Efficiency and quality of justice: European Commission for the Efficiency of Justice (CEPEJ), Council of Europe, at p. 229.

56 **European Judicial Systems**, Edition 2010 (2008 data): Efficiency and quality of justice: European Commission for the Efficiency of Justice (CEPEJ), Council of Europe, at p. 232.

<sup>57</sup> A particularly troubling way to conclude a citizen’s complaint and one likely to give rise to serious concerns about the integrity of the process);

## The Disciplinary Board Regulation

Discipline Board hearings are important. They are the principal means by which prosecutors are held accountable for non-criminal misconduct in the performance of their duties. The PPS must demonstrate to the public that it treats allegations against prosecutors seriously. On the other hand, the discipline process must be fair. The prosecutor's career may hang in the balance. Having Disciplinary Board complaints initiated by a member of the Disciplinary Board and then adjudicated by the Board, albeit in the absence of the member of the Board that initiated the complaint, is problematic. In effect, the Disciplinary Board is judging a complaint brought by one of its colleagues. This is capable of giving rise to an appearance of conflict of interest.

The existing Disciplinary Board regulation provides that the participants in discipline proceedings only receive notice three days in advance of the hearing. This may not be adequate. The investigators from the Internal Security Agency assigned to look into the complaint against the prosecutor provide the prosecutor with the following information:

- the allegations;
- the time, date and place of the hearing;
- the names of any witnesses to be called at the hearing;
- the name of the person that investigated the allegation;
- the composition of the Disciplinary Board;
- the right of the prosecutor who is the subject of the hearing to be represented or accompanied by another person;
- a copy of the investigative report; and
- any statements to be relied on by the Board.

Having this information provided to the prosecutor before the hearing by the agency investigating the prosecutor rather than the Board could create the impression that the Internal Security Agency is on "the same side" as the Disciplinary Board. This may



cause the prosecutor to be concerned that the Disciplinary Board will not be neutral when it comes to adjudicating on the merits of the investigative report.

The existing regulation indicates that the hearing begins with the President reading “the report.” Presumably this is the report prepared by an investigator from the Internal Security Unit. Since the Chairperson has a copy of the report before the hearing commences, he or she does not come to the hearing as a “clean slate”. This could affect or be perceived as capable of affecting his or her ability to perform a strictly adjudicative role.

The regulation also does not provide detailed guidance on how the hearing should be conducted. Rules of procedure governing disciplinary hearings often provide for the following.

- The chairperson introduces those present at the hearing, including the board representative and the members of the adjudicative board.
- The chairperson of the adjudicative board explains to the participants the procedure to be followed.
- The chairperson of the adjudicative board confirms that the prosecutor is aware of his or her rights.
- The management representative calls witnesses, including the investigator who presents his or her findings.
- The prosecutor who is the subject of the allegation and/or his or her representative is given an opportunity to question the investigator or any witness who gives evidence.
- The prosecutor who is the subject of the allegation and/or his or her representative is given an opportunity to present his/her case.
- The prosecutor who is the subject of the allegation and/or his or her representative is given an opportunity to call witnesses.
- The management representative questions the prosecutor who is the subject of the allegation or any witnesses the prosecutor calls.

- The management representative and the prosecutor who is the subject of the allegation make their final arguments.
- The board conducts its deliberations.
- The board announces its final decision.

#### **4. Addressing the Needs of the Superior Council of Prosecutors**

Adequate organisational, financial, material and human resources should be put at the disposal of justice.

- Art. 4 of the “Bordeaux Declaration”<sup>58</sup>

##### 4.1 Short-Term Measures

The SCP was born out of a desire to guarantee the “independence, objectivity and impartiality of prosecutors”<sup>59</sup> from external influence, including influence from the executive and legislative branches of government. This desire is understandable. In the past, Moldovan prosecutors were used as instruments of repression. They must never be put to such use again. However, as noble as the words creating the SCP may be, they are just words. The SCP has been given a mission but not the tools to accomplish it. The SCP has no operating budget, no full time members, no office, no support staff and little in the way of equipment.

##### A Separate Budget

The SCP requires an annual budget. At a minimum, it should be adequate to allow the SCP to:

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58 Opinion No. 12 (2009) of the Consultative Council of European Judges and Opinion No. 4 (2009) of the Consultative council of European Prosecutors on the **Relations between Judges and Prosecutors in a Democratic Society**, (Strasbourg, 8 December 2009).

59 Art. 80, **Law on the Public Prosecution Service** (LPPS), 17 March 2009.

- have three members detached from the PPS;
- employ three legal specialists (one for the SCP and one for each of its attached Boards) to provide legal advice and perform executive administrative functions at a total cost of 90 000 MDL;
- purchase and maintain four computers;
- purchase adequate office supplies;
- create and maintain a web page separate from that of the Office of the PG; and
- meet the daily operating expenses of the SCP.

### **Recommendation 1**

The SCP should be provided with support staff, office premises and an adequate annual operating budget.

### **Detached President and Chairpersons**

The President of the SCP, the Chairperson of the Qualification Board and the Chairperson of the Disciplinary Board should be detached from the PPS while in office. This would permit them to focus on their Council and Board responsibilities. The President of the SCP and the Chairperson of the Qualification Board would not need to rely so heavily on the human resources staff of the office of the PG. Detaching the President and Chairpersons from the hierarchy of the PPS while in office would provide them with both the reality and appearance of greater independence and autonomy from the PG.

### **Recommendation 2**

The President of the SCP, the Chairperson of the Qualification Board and the Chairperson of the Disciplinary Board should be detached from the PPS while in office.

### Management Training

Members of the SCP and its attached Boards may come to their positions with little or no background in financial, human resource and other management functions. Management training in these areas will benefit interested members of the SCP and its attached Boards and equip them to better perform their important functions. In the short term, human resource and financial specialists in the Office of the PG may be able to provide this training. In the long term, the SCP and the NIJ should work together to design management training based on the needs of the SCP.

### **Recommendation 3**

Financial, human resource and other forms of management training should be made available to interested members of the SCP and its attached Boards.

### Collective Decision-Making

Members of the SCP and its attached Boards may have no prior experience working on councils, boards or committees. Prosecutors are used to individually making professional decisions and they often have to learn how to be part of a collective decision making process. The SCP and Qualification Board also bring together prosecutors and law professors. To work collaboratively, they must respect and listen to each other. Team building exercises facilitated by a mediator can contribute to the development of a collegial atmosphere that assists in improving group performance.

### **Recommendation 4**

The SCP and its attached Boards should regularly review their performance to ensure that they are working together effectively as collaborative bodies. If not, they should consider seeking the assistance of a mediator to facilitate team building exercises.

## Revised Regulations

The existing regulations of the SCP and its attached Boards require revision. For example, the **Regulation of the Qualification Board** provides no objective criteria on which to make an appraisal of a prosecutor's work and the Disciplinary Board regulation provides inadequate guidance to the Board on how it should go about its work. The regulations of the SCP and its attached Boards should be revised to a) provide day-to-day guidance to Council and Board members, b) ensure consistency of approach, and c) eliminate the perception of arbitrary and non-transparent decision making.

## Recommendation 5

The regulations of the SCP and its attached Boards should be reviewed and revised.

## Performance Management

The performance management programme of the PPS can be substantially improved. Not assessing the performance of a prosecutor until he or she has been on the job for two years and only every five years thereafter is a marked departure from the practice of prosecution services that place **a priority** on establishing an **annual** performance planning cycle.<sup>60</sup> The cycle commences with a meeting between the manager and prosecutor where key commitments and performance measures are set. The next phase involves preparing a learning and development plan for the prosecutor to ensure the support (e.g. a particular NIJ course) the prosecutor needs to meet identified objectives. Ongoing performance discussion is the third phase in the process and involves monitoring progress, adjusting the plan and, where necessary, a midterm review. The final phase of the cycle involves appraisal. It is here that the prosecutor's work is reviewed and the performance and learning plans evaluated.

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<sup>60</sup> For example, the Ontario prosecution service, the Canadian Federal Prosecution Service and the prosecution service for the Republic of Ireland (see James Hamilton and Sousa Mendes, Draft Opinion (473/2008) on the Draft Law on the Public Prosecutors' Service of Moldova, Venice Commission at para. 46).

## Evaluation Criteria

**It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before [the court] what the [prosecution] considers to be credible evidence relevant to what is alleged to be a crime. [Prosecutors] have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.**

- Rand J. of the Supreme Court of Canada<sup>61</sup>

The regulations of the PPS do not establish effective criteria and standards to be used in evaluating the performance of prosecutors. Determining the performance characteristics and decision making qualities it wants to see reflected in its prosecutors is a crucial exercise for a prosecution service. Translating these characteristics and qualities into clear performance criteria and standards is the first step in establishing an effective performance management plan. The second step is ensuring prosecutors are aware of the criteria and standards by which they will be evaluated. The third step is applying the criteria and standards consistently and fairly so they are credible. Over time a prosecution service will embody the characteristics and qualities it has built into its performance management plan.

Credible performance criteria blend quantitative and qualitative elements. Objective criteria alone can be improper and/or misleading. The purpose of a public prosecution is not to obtain a conviction and rewarding prosecutors for the number of convictions they obtain or penalizing them for the number of their cases that result in acquittal perverts their role. Evaluating a prosecutor's performance solely on the number of cases that he or she has opened or completed or the number of indictments filed ignores the reality that a criminal case may initially appear simple but turn out to be complicated. The same types of decisions may require significantly different time commitments or expertise. While the number of files handled by a prosecutor does provide some

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61 *R. v. Boucher* [1955] S.C.R. 16

indication of the ability and dedication of a prosecutor, it should not be given too much emphasis.

Prosecutorial competence is demonstrated by and can be measured on the basis of a prosecutor's characteristics and qualities, including the following:

- capability in the application of expert knowledge and professional skill;
- analytical thinking;
- capacity to form opinions and make decisions;
- quality of explanation and skill in expression;
- oral and written communication skills;
- work ethic and reliability; and
- capability for team work.

Integrity and fairness are also important traits for a prosecutor. They can be evaluated on the basis of a prosecutor's conduct, including the following:

- adherence to ethical standards;
- level of civility;
- reputation in the legal community;
- honesty and conscientiousness;
- awareness of social responsibility; and
- interaction with colleagues and other justice system participants.

These are basic criteria on which to evaluate the performance of prosecutors. If prosecutors are performing specialized or management function, additional criteria will be appropriate. When discussing performance issues with prosecutors, it is important that managers provide concrete examples to support their evaluation.

### **Recommendation 6**

The SCP should develop a performance management programme for the PPS based on effective evaluation criteria and standards.

### **Code of Ethics**

The existing Code of Ethics of the PPS is outdated,<sup>62</sup> extremely detailed and complex. It is in need of revision and modernization. The SCP has recognized this need and formed a working group to draft a new code of ethics. Priority should be given to completing this important task. For a code of ethics to change the behaviour of members of an organization, it must be incorporated into the culture of the organization. This is best done through educational programmes that focus on the identification and resolution of practical issues that regularly arise.

### **Recommendation 7**

Priority should be given to completing a new code of ethics and implementing it through educational programmes focusing on practical ethical issues.

### **Combating Improper Conduct**

The regulations of the SCP state that one of its competencies is to “examine the complaints of a prosecutor who believes that **his or her independence**, impartiality and professional reputation had been affected in any way.” This regulation supports the mandate of the SCP to be the guarantor of independence and impartiality for prosecutors. It should be made clear to prosecutors that the SCP sees this as one of its most important roles. Consequently, a clear message should be conveyed to prosecutors that the SCP is to be informed when efforts are made to influence the prosecutor or when the prosecutor’s superior unduly interferes in a file. The SCP should also provide education to prosecutors on other tell tale signs of impropriety or corruption

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<sup>62</sup> Adopted by the Order of the PG No. 192/22 from October 2004.



(e.g. the absence of objective criteria for assigning files or the reassignment of a file if the prosecutor is not receptive to the wishes of a superior).

### **Recommendation 8**

The SCP should make it clear to all prosecutors that it is interested in and receptive to concerns about actions on the part of their superiors or others that may be signs of attempts to interfere with the independence and impartiality of the prosecutor.

### **Engaging Civil Society**

There presently appears to be a deep disconnect between the PPS and the public it serves. This may be a vestige of the Soviet era, when the PPS served the party and not the people, but almost 20 years after Moldovan independence, the lack of confidence in and level of distrust between the PPS and the people of Moldova still appears to be large. Creating effective channels for civil society and public engagement and involvement in PPS management, policy design, and monitoring should be explored. No public institution can survive in the long run unless it enjoys the support of the people who pay for it. The SCP should strive to improve the public image of the PPS and develop a strategy for public campaigns and informative mechanisms to present the PPS as an indispensable and independent public institution worthy of independence, autonomy and public support.

### **Recommendation 9**

The SCP should develop a strategy to publicly present the PPS as an indispensable and independent social institution worthy of independence, autonomy and public support.

## 4.2 Other Observations

Implementing the short-term measures outlined above will make the SCP a stronger institution within the PPS. But the effect of their implementation on Moldovan society will

be minimal. The SCP will only have an impact on the wider criminal justice system in Moldova if it becomes an agent for transformative change. Additional resources are only a part, albeit an important part, of what is required to turn the SCP into an agent of transformative change. In order to commence the process of changing the PPS from a reactive and rigidly hierarchical organization to a proactive, modern prosecution service, the SCP will have to work with a truly independent PG to champion the development of a new organizational culture within the PPS. To earn the confidence and respect of the community it serves, the new PPS must be open and transparent, focused on the public interest and immune to improper internal and external influences.

### Focusing the PPS on its Core Functions

There are differing views in Moldova on whether or not it is appropriate for the PPS to have the broad range of duties and responsibilities currently required of it. The leadership of the PPS, perhaps because of their familiarity with the supervisory role they performed during the Soviet era, consider the broad mandate of the PPS as evidence of public confidence in and respect for the PPS. Many junior prosecutors privately expressed concern about having responsibilities relating to what they see as private disputes and the monitoring of the legality of non-criminal public activities in addition to their substantial prosecutorial duties.<sup>63</sup>

The old law included within the competencies of the PPS responding to citizens' petitions and complaints. This competency does not appear in the new law. However, many citizens still send petitions and complaints to the PPS because there is no alternative. It appears this does not trouble the senior leadership of the PPS. Younger prosecutors have a different view. They see time spent reviewing, answering or forwarding petitions as time not spent on the prosecutor's core function; prosecuting criminal offences.

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<sup>63</sup> Soros Foundation, Criminal Justice Performance from a Human Rights Perspective, Moldova, November 2009 at p. 41. Some prosecutors told Soros interviewers that non-criminal justice related work takes up to 50% of their working time.

Independent experts from the Council of Europe are of the view that Moldovan prosecutors should focus on criminal justice activities.

It is essential ... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending the public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function.<sup>64</sup>

Transitioning the PPS from its current broad mandate to a more streamlined criminal justice role will require effective change management. The PG and the SCP will need to develop “double vision.” This means looking out for the current state of operations while also focusing on where they would like the PPS to be in the future. To do this effectively, the PG and SCP will need to arrive at a consensus about the optimum future for the PPS. As many members of the PPS as possible should have input into this process so the consensus reflects the views of future leaders of the PPS as well as the current leadership.

A planning technique known as “gap analysis” can be used to arrive at a clear understanding of current conditions and desired outcomes. By determining what is critical to the success of the service in each of its core functions and by detailing the desired future states, the organization can identify the areas in which to focus. Experience suggests that paying close attention to desired outcomes that are measurable and aligned with organizational goals is an effective way to approach the planning and analysis process. The focus should be on values and guiding principles rather than details.

### **Observation**

The PG and other appropriate officials (e.g. the Minister of Justice) should consider ways to focus the PPS on its core criminal justice activities and transfer its non-criminal

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<sup>64</sup> Hamilton, J. and Range, H. Comments on the draft law of amendments to the Prosecutors' Office Act (No. 118 – XV of 14 March 2003), Directorate of Legal Affairs, Council of Europe, 11 January 2007.

law responsibilities to other agencies. To make this happen, the PG and the appropriate agencies should develop a joint change management programme.

### Streamlining SCP Processes

The SCP spends a considerable amount of time validating the decisions of the Boards subordinated to it. This is required because of the way the law is currently worded. Consideration should be given to legislatively streamlining some of these processes. For example, when the Qualification Board has selected a candidate for a vacant position, it is questionable whether much is gained by having the SCP validate the recommendation before it is passed on to the PG. There appears to be no reason why the recommendation of the Qualification Board should not go directly to the PG. This would allow the SCP to spend more of its time concentrating on policy issues (e.g. the drafting of a new code of ethics for prosecutors).

Another option would be to legislatively vest the SCP with final decision making authority with respect to recommendations of the Qualification and Disciplinary Boards. The PG would continue to play a role in the decision making process in his capacity as an *ex officio* member of the SCP. This model would more effectively establish the SCP as “guarantor of independence, objectivity and impartiality of prosecutors”.<sup>65</sup> It would also reduce some of the workload of the PG.

Changing the Disciplinary Board from an adjudicative body into an investigative body is another streamlining possibility. Instead of the Internal Security Unit of the Office of the PG conducting discipline investigations, the Disciplinary Board would investigate and provide a report to the SCP for decision. Rather than merely validating the decision of a

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<sup>65</sup> Article 80, **Law of Public Prosecutor’s Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009. A caveat is that care must be taken to avoid excessive concentration of power in one body and the perception of corporatism that can arise when too many aspects of administration are controlled by a single authority. See the Kyiv Recommendations (ODHIR, 23 – 25 June 2010) .

subordinated board, the SCP could be vested with decision making authority with a further appeal to the courts.

### **Observation**

Consideration should be given to amending the law of the PPS to streamline the processes of the SCP.

### **A Policy Role for the SCP**

Many prosecution services (e.g. the Crown Prosecution Service for England and Wales, the Canadian Federal Prosecution Service, and all of Canada's provincial prosecution services) have developed policy directives and guidelines outlining the principles and factors that prosecutors should and should not consider when exercising their discretion. If the SCP receives adequate resources, it will be able to develop and recommend to the PG policy statements and directives. These documents can play an important role in the management of a prosecution service because they promote consistency and principled decision making. Publication of the directives and guidelines also informs defence attorneys and the public of the principles which guide decisions made by the prosecution service.

One of the most important decisions a prosecutor makes is whether to institute or proceed with a prosecution. Not only does this decision affect those directly involved but it is also one of many such decisions that determine how the resources of the criminal justice system are used. In 1987 the Council of Europe<sup>66</sup> recognized an increase in the number of cases being referred to the courts, particularly those carrying minor penalties, and the problems caused by the length of criminal proceedings. The result of these developments was court delay that brought the administration of justice into disrepute.

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<sup>66</sup> Recommendation No. R. (87) 18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice (Adopted by the Committee of Ministers on 17 September 1987 at the 410<sup>th</sup> meeting of the Ministers' Deputies, Council of Europe).

The Council encouraged its member states to resort to the principle of discretionary prosecution to address the situation.

The principle of discretionary prosecution allows a prosecutor to exercise discretion and waive or discontinue prosecution, even when there is adequate evidence of guilt to proceed with a prosecution, if the prosecutor concludes that prosecution is not in the public interest. Some countries do not follow the principle of discretionary prosecution. In Italy, for example, the legality principle is followed and interpreted to require mandatory prosecution. It is felt that the principle of equal treatment of all citizens before the criminal law can only be safeguarded by requiring mandatory prosecution wherever there is evidence available to the prosecution on every element of an alleged crime. Mandatory prosecution is also considered a protection against improper influence or interference in the prosecution process.<sup>67</sup>

Art. 2 of Moldova's new prosecution law provides that the PPS shall conduct its activities on the basis of the legality principle. This suggests to some that a Moldovan prosecutor cannot refrain from prosecuting a case as long as there is evidence available on every essential element of a crime. Moreover, the current Code of Ethics of the PPS states that the good reputation of the PPS

shall be built on the basis of the following principles: the principle of legality, according to which prosecutors, during the exercise of their duties, shall be obliged to accurately observe the law.

However, Art. 10 of the new law permits the application of "alternative measures" whereby a prosecutor "can take a decision to exempt from criminal liability the person who has committed an action that includes elements essential to the offence." Art. 56(1)(d) of the new law also states: "the prosecutor's autonomy shall **be guaranteed by discretion in decision-making** granted by the law to the prosecutor exercising his/her functions."

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<sup>67</sup> Caterina Scaccianoce, The principle of mandatory criminal prosecution and the independence of public prosecutors in the Italian criminal justice system, ReAIDP, 2010.

Senior members of the PPS agree that the legality principle as understood in Moldova does not prohibit prosecutors from exercising discretion. But they acknowledge that some prosecutors, especially junior prosecutors, are reluctant to do so. This reluctance may be the result of a lack of clarity about the extent to which the legality principle permits prosecutors to exercise discretion. There are also a number of practical reasons why prosecutors may be reluctant to discontinue cases even though they believe that proceeding with them will not be in the public interest. Prosecutors may not be willing to displease criminal investigators, who are evaluated on the basis of the number of their files opened by prosecutors. A prosecutor who has opened a file for prosecution may also be reluctant to withdraw the file out of fear that he or she will be criticized for opening the file in the first place. In some cases, prosecutors prefer to take the “easy way out” and simply let the court dismiss the case. The insidious nature of corruption also shows its face when prosecutors prefer to proceed to trial rather than give rise to suspicion that they have taken a bribe.

While Moldovan law appears to confer discretion on prosecutors to discontinue prosecutions, it provides no criteria or standards on which to base the decision. Prosecutors may be more willing to exercise their discretion if the SCP issues a directive or guideline stating 1) that the principled exercise of discretion is an essential part of the role of a prosecutor, and 2) a prosecutor may waive or discontinue a prosecution on the basis that it is not in the public interest. Before making this public interest determination, the prosecutor should consider:

- the seriousness, nature, circumstances and consequences of the offence;
- the background and criminal record of the alleged offender;
- the likely sentence in the event of a conviction;
- the effects of conviction on the alleged offender;
- the view of the victim; and
- the effect of the decision on public confidence in the justice system.

Factors the prosecutor must not consider include:

- any personal interest the prosecutor has in the case; and
- the social status;
- religion;
- sex;
- nationality;
- race;
- ethnic background; or
- sexual orientation of the alleged offender.

### **Observation**

If the SCP is provided with adequate resources, it should consider and discuss with the PG assuming a policy development role. Priority should be given to issuing a directive on the factors that should and should not be considered when deciding whether or not to institute or continue a prosecution.

### **Considering other Institutional Arrangements for the Superior Council of Prosecutors**

Discussion has taken place in Moldova about establishing the SCP as a second chamber of the SCM. Such an arrangement is in place in Romania. All indications are that the SCM is an efficient and effective institution. It already has an infrastructure and secure funding. Economies of scale may be achieved by a dual chambered SCM. Concern has been expressed, however, about having judges and prosecutors as part of the same council. The present participation of the PG on the SCM worries some observers. States have to take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality



of the court judges.<sup>68</sup> Would judicial independence be infringed by establishing the SCP as a second chamber of the SCM?

Prosecutors do not perform the same function as judges and do not require the same guarantees of independence as judges. For example, prosecutors cannot be impartial in the sense of passive, as is required of judges in adversarial criminal proceedings. They also may be subject to hierarchical instructions and act according to fixed criteria to ensure equal application of the law. But prosecutors do require conditions in which to exercise their function that guarantee the fair, effective and impartial prosecution of offences. Such conditions must be transparent and fixed by law. They must ensure that prosecutors act and appear to act on behalf of the public and not for individual or political interests. Finally, the conditions must be such that arbitrary decisions or undue influence from internal or external sources are ruled out.<sup>69</sup> Proponents of a dual chambered SCM for judges and prosecutors argue that operational independence for both can be secured by operating the two chambers as “water-tight compartments” sharing only infrastructure and administrative support.

### **Observation**

The operation and effectiveness of dual chambered councils for judges and prosecutors in other jurisdictions should be carefully reviewed before any steps are taken to establish the SCP as a separate chamber of the SCM in Moldova.

### **Magistrate Status for Prosecutors**

Establishing the SCP as a separate chamber of the SCM gives rise to another issue that has been considered in Moldova: should the title of magistrate be conferred on prosecutors? The European Association of Magistrates for Democracy and Human

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68 Recommendation Rec (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, Council of Europe).

69 Garcia-Maltras De Blas, Guarantees of Independence and Non-Interference of the Prosecution Service, Venice Commission, 14 October 2009 at p. 2.

Rights (MEDEL) states in the “Palermo Declaration” that public prosecutors should be equated with magistrates because they have an obligation to ensure the equality of citizens before the law. Moreover, they must be able to carry out their functions in “an autonomous fashion in relation to the political power” and be subject only to the law.<sup>70</sup> Article 1 of Moldova’s new prosecution law provides that the PPS is an autonomous institution within the system of **judicial authorities**. Independence is conferred on prosecutors in the public interest so they can approach their duties with an impartial state of mind. While there is unfortunate ambiguity in the language of the new law as to when a hierarchical superior can revoke, suspend or cancel acts issued by a more junior prosecutor, it appears such interference is only permitted when the acts of the junior prosecutor run counter to law.<sup>71</sup> Consequently, the prosecutor’s decision making independence is only constrained by the requirement that he or she acts within the law. When this independence is combined with the prosecutor’s obligations to act impartially and objectively and to defend the rule of law and human rights, the status of a Moldovan prosecutor assimilates to that of a magistrate.

Defining a prosecutor as a “magistrate” sends a clear signal to prosecutors and the community that the prosecutor’s primary function is not to secure a conviction but to see to it that justice is done. The sense of increased responsibility this will give to prosecutors should not be underestimated. People from whom more is expected frequently meet the challenge. A prosecutor who sees himself or herself as a magistrate may be less likely to countenance improper investigative conduct and more likely to demand that the human rights of suspects be respected.

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70 Medel, Elements of a European Statute of the Judiciary, “Palermo Declaration”, January 16, 1993, Section IX. At least one expert on the magistracy in Italy is of the view that Italian magistrates have too much independent and unchecked authority to commence investigations and institute prosecutions.

71 James Hamilton and Sousa Mendes, Draft Opinion (473/2008) on the Draft Law on the Public Prosecutor’s Service of Moldova, Venice Commission at para. 34.

Prosecutors may also be more willing to exercise their discretion and less willing to be subject to improper internal or external influence if they have the status of a magistrate. It is possible that this change in status will play a major role in breaking down the hierarchical, military culture that currently pervades the PPS. It will also call into question the appropriateness of prosecutors discharging their duties while dressed in a military uniform.

Constitutional change would be required in Moldova to confer the title of magistrate on prosecutors. Such change does not come easy and often depends on the existence of historical and cultural foundations. Because the concept works in countries like France and Italy does not mean that it will work in Moldova.

### **Observation**

If it is decided to establish the SCP as a second chamber of the SCM, careful study should be undertaken before conferring the title of magistrate on prosecutors.

## **5. Conclusion**

Moldova has some critical choices to make about its prosecution service. It can make no change to the *status quo* and allow the PPS to limp along as an outmoded vestige of the past; it can strengthen the SCP and the PPS through the addition of modest resources; or it can begin the long process of transforming the PPS into a modern European prosecution service. Choosing the first option will continue to subject Moldovans to a closed, hierarchical organization in which they have little confidence. Choosing the second option will constitute a limited improvement. Choosing the third option will be the beginning of a long journey leading to a modern prosecution service focused on protecting the safety and representing the interests of the public of Moldova.

### List of Abbreviations

CCECC = Centre for Combating Economic Crimes and Corruption  
NIJ = National Institute of Justice  
ODIHR = Office for Democratic Institutions and Human Rights  
OSCE = Organization for Security and Co-operation in Europe  
PG = Prosecutor General  
PPS = Public Prosecution Service  
SCM = Superior Council of Magistracy  
SCP = Superior Council of Prosecutors

### **List of Recommendations and Observations**

#### **Recommendation 1**

The SCP should be provided with support staff, office premises and an adequate annual operating budget.

#### **Recommendation 2**

The President of the SCP, the Chairperson of the Qualification Board and the Chairperson of the Disciplinary Board should be detached from the PPS while in office.

#### **Recommendation 3**

Financial, human resource and other forms of management training should be made available to interested members of the SCP and its attached Boards.

#### **Recommendation 4**

The SCP and its attached Boards should regularly review their performance to ensure that they are working effectively as collaborative bodies. If not, they should consider seeking the assistance of a mediator to facilitate team building exercises.

#### **Recommendation 5**

The regulations of the SCP and its attached Boards should be reviewed and revised.

#### **Recommendation 6**

The SCP should develop a performance management programme for the PPS based on effective evaluation criteria and standards.

#### **Recommendation 7**

Priority should be given to completing a new code of ethics and implementing it through educational programmes focusing on practical ethical issues.

### **Recommendation 8**

The SCP should make it clear to all prosecutors that it is interested in and receptive to concerns about actions on the part of their superiors or others that may be signs of attempts to interfere with the independence and impartiality of the prosecutor.

### **Recommendation 9**

The SCP should develop a strategy to publicly present the PPS as an indispensable and independent social institution worthy of independence, autonomy and public support.

### **Observation**

The PG and other appropriate officials (e.g. the Minister of Justice) should consider ways to focus the PPS on its core criminal justice activities and transfer its non-criminal law responsibilities to other agencies. To make this happen, the PG and the appropriate agencies should develop a joint change management programme.

### **Observation**

Consideration should be given to amending the law of the PPS to streamline the processes of the SCP.

### **Observation**

If the SCP is provided with adequate resources, it should consider and discuss with the PG assuming a policy development role. Priority should be given to issuing a directive on the factors that should and should not be considered when deciding whether or not to institute or continue a prosecution.

### **Observation**

The operation and effectiveness of dual chambered councils for judges and prosecutors in other jurisdictions should be carefully reviewed before any steps are taken to establish the SCP as a separate chamber of the SCM in Moldova.

### **Observation**

If it is decided to establish the SCP as a second chamber of the SCM, careful study should be undertaken before conferring the title of magistrate on prosecutors.

## **Further Recommendations**

### **Recommendation 10 (p. 26 of the Report)**

Civil society involvement, judicial representation, or more transparent parliamentary input in the appointment and dismissal of the PG should be considered.

### **Recommendation 11 (p. 27 of the Report)**

The NIJ should consider adding advocacy skills training to its curriculum.

### **Recommendation 12 (p. 38 of the Report)**

The SCP and the NIJ should work together to design management training based on the needs of the SCP.

### **Recommendation 13 (p. 31 of the Report)**

Consideration should be given to a publicly advertised process that allows members of the public to complain directly to the Disciplinary Board.

### **Recommendation 14 (p. 33 of the Report)**

Participants in Disciplinary Board proceedings should receive at least ten days notice because of the importance of the proceedings to the public and the prosecutor.

## **ANNEX A**

### **Methodology**

This report was written on the basis of information gathered from various sources in the following stages.

#### *Documentation*

The project team analysed documents dealing directly or indirectly with the SCP, the PPS, and the criminal justice system in Moldova, including:

## A. NATIONAL LEGISLATION

1. **Constitution of the Republic of Moldova**, adopted 29 July 1994, Official Monitor No. 1, 12 August 1994.
2. **Code of Criminal Procedure**, adopted 14 March 2003, Official Monitor No. 104-110/447, 07 June 2003.
3. **Law of Public Prosecutor's Service**, Law No. 294-XVI, 25 December 2008, Official Monitor No. 55-56/155, 17 March 2009.
4. **Law of Public Prosecutor's Service**, Law No. 118-XV, 14 March 2003, Official Monitor No. 73-75, 14 April 2003.
5. **Criminal Code**, Law No. 985-XV, 18 April 2002, Official Monitor No. 128-129/1012, 13 September 2002.
6. **Code for Contraventions**, Law No. 218-XVI, 24 October 2008, Official Monitor No. 3-6/15, 16 January 2009.
7. **Law on the Superior Council of Magistracy**, Law No. 947-XIII, 19 July 1996, Official Monitor No. 64/641, 3 October 1996.
8. **Government Decision on Creating the Republican Center for Training and Perfecting the Staff of the Ministry of Justice**, Decision No. 96, 22 February 1996, Official Monitor No. 23-24/191, 18 April 1996 (In June 2006, the Parliament passed a law creating the National Institute of Justice (please see below at 12)).
9. **Law on the Centre for Combating Economic Crimes and Corruption**, No. 1104-XV, 06 June 2002, Official Monitor No. 91-94/668, 27 June 2002.
10. **Law on National Institute of Justice**, Law No. 152-XV, 08 June 2006, Official Monitor No. 102-105/484, 7 July 2006.

## B. REGULATIONS

1. **Regulation on Superior Council of Prosecutors**, adopted by SCP Decision No. 2-2d-1/10, 16 February 2010.
2. **Regulation on Disciplinary Board and Disciplinary Responsibility of Prosecutors**, adopted by SCP Decision No. 2-2d-30/10, 23 February 2010.

3. **Regulation on Qualification Board**, adopted by SCP Decision No. 2-2d-29/10, 23 February 2010.

4. **Regulation on Prosecutors' Promotion**, adopted by SCP Decision No.2-2d-103/10, 13 April 2010.

### C. INTERNATIONAL INSTRUMENTS

**Strengthening the Rule of Law through improved Integrity and Capacity of Prosecution Services, revised draft resolution**, The Commission on Crime Prevention and Criminal Justice, Seventeenth session, Vienna, 14-28 2008, agenda item 4, annexing the **Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors**, Adopted by the International Association of Prosecutors on the twenty third day of April 1999

**Guidelines of the Role of Prosecutors**, approved by the 8<sup>th</sup> congress of the United Nations for the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba (August 27-September 7, 1990).

**Basic Principles on the Independence of the Judiciary**, approved by resolutions 40/32 and 40/146 of the General Assembly of the United Nations on November 29 and December 13, 1985.

**Basic Principles of the Role of Lawyers**, approved by resolution 45/166 of the General Assembly of the United Nations, on December 18, 1990.

### D. EUROPEAN INSTRUMENTS, OPINIONS AND SURVEYS

Opinion No. 12 (2009) of the Consultative Council of European Judges and Opinion No. 4 (2009) of the Consultative council of European Prosecutors on the **Relations between Judges and Prosecutors in a Democratic Society**, (Strasbourg, 8 December 2009).

**European Guidelines on Ethics and Conduct For Public Prosecutors "The Budapest Guidelines"**, Adopted by the Conference of Prosecutors General of Europe on 31 May 2005.

Recommendation Rec (2000) 19 of the Committee of Minister to Member States on the **Role of Public Prosecution in the Criminal Justice System** (Adopted by the Committee of Ministers on 6 October 2000 at the 724<sup>th</sup> meeting of the Ministers' Deputies, Council of Europe).



Recommendation No. R. (87) 18 of the Committee of Ministers to Member States Concerning the **Simplification of Criminal Justice** (Adopted by the Committee of Ministers on 17 September 1987 at the 410 meeting of the Ministers' Deputies, Council of Europe).

Medel, **Elements of a European Statute of the Judiciary, "Palermo Declaration"**, January 16, 1993.

**Convention for the Protection of Human Rights and Fundamental Freedoms** as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950.

**European Judicial Systems**, Edition 2010 (2008 data): Efficiency and quality of justice: European Commission for the Efficiency of Justice (CEPEJ), Council of Europe.

Report, **Third World Summit of Prosecutors General, Attorneys General and Chief Prosecutors**, (Bucharest, Romania, 24-25 March, 2009)

#### E. REPORTS AND OPINIONS SPECIFIC TO MOLDOVA

2009-2013, Government Activity Program "European Integration: Freedom, Democracy, Welfare" of the Republic of Moldova.

Outlining Priorities for Future Reform in the Moldovan Legal System, Summary of the Roundtable, February 17, 2010.

Tom Russell, *Recommendations to the National Institute of Justice Regarding Curriculum Development and Training Delivery*, American Bar Association, Rule of Law Initiative, 2010.

Soros Foundation, Criminal Justice Performance from a Human Rights Perspective, Moldova, November 2009.

OSCE Mission in Moldova, Final Report, OSCE Trial Monitoring Report for the Republic of Moldova, (April 2006 – November 2008).

American Bar Association, Rule of Law Initiative, *Prosecutorial Reform Index*, Moldova, June 2008.

James Hamilton, The Importance and Functions of Codes of Ethics for Prosecutors, 23 September 2008.

James Hamilton and Sousa Mendes, Draft Opinion (473/2008) on the Draft Law on the Public Prosecutors' Service of Moldova, Venice Commission.

OSCE Mission in Moldova, Analytic Report, Observance of Fair Trial Report, Standards and Corresponding Rights of Participating Parties in Proceedings (April 2006 – May 3, 2007).

OSCE Mission in Moldova, 6-Month Analytic Report: “Preliminary Findings on the Experience of Going to Court in Moldova”, OSCE Trial Monitoring Programme for the Republic of Moldova, 30 November 2006.

## F. OTHER JURISDICTIONS

Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Judicial Administration, Selection and Accountability, ODIHR and MPIL, Kyiv, 23 – 25 June 2010.

Criminal Justice Systems in the OSCE Area, Reform Challenges and ODIHR Activities, May 2006.

Support for Improvement in Governance and Management, Romania, Elements of the Public Service Integrity System Assessment, March 2006.

Consolidated Summary, OSCE Human Dimension Seminar, Upholding The Rule of Law and Due Process in Criminal Justice Systems, Warsaw, 10 – 12 May 2006.

European Commission for Democracy through Law (Venice Commission), Draft Opinion on Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for Bearers of Public Prosecutor’s Function of Serbia, 2009.

Autheman V., Elena S. and Henderson K. (ed), *Global Best Practices: Judicial Councils*, IFES Rule of Law White Paper, April 2004.

Matti Jousten, The role of the prosecutor: the United Nations and European perspective, (LSE, 1988)

The Relation between the (Polish) Public Prosecutor and the Minister of Justice, [http://www.eurojustice.com/member\\_states/poland.country\\_report/2835](http://www.eurojustice.com/member_states/poland.country_report/2835).

Law n.º 60/98 of August 27 : Status of the [Portuguese] Public Prosecution Department

## G. LEGAL LITERATURE

Orindas, Victor; Sooy, Jennifer E; Sooy, Kathleen A, Moldova’s Criminal Justice System: Criminal Protections, Current Practices, and Proposed Reforms, *27 University of Dayton Law Review, Issue 1 (Fall 2001)* pp. 23 – 52.

Tak, Peter, *East Meets West: Aspects of Prosecution in Countries in Transition*, 7 *Eur. J. of Crime, Crim. L & Crim. Just* 413 (1999).

Egbert Myjer, Barry Hancock, Nicholas Cowdery (eds.) *Human Rights Manual for Prosecutors*, International Association of Prosecutors (The Hague, 2003)

James Hamilton, *Education in International Standards and Norms to Enhance Professional Ethics of Criminal Justice Officials*, paper presented at the Twelfth United Nations Crime Congress, Salvador Brazil, 14 April 2010.

Caterina Scaccianoce, *The principle of mandatory criminal prosecution and the independence of public prosecutors in the Italian criminal justice system*, ReAIDP, 2010.

Ivar Svendsgaard, *NORLAM's Comments Regarding the Independence of Judges – Appointment of Judges, Tenure, Inviolability, Disciplinary Sanctions etc.* (12 November 2009).

Garcia-Maltras De Blas, *Guarantees of Independence and Non-Interference of the Prosecution Service*, Venice Commission, 14 October 2009.

Oleksandr Medvedko, *Achieving Prosecution Success*, International Association of Prosecutors (IAP) Conference, 7 September 2009.

Joaquin Bayo-Delgado, *Judicial Independence in Europe*, a paper presented at “Models of Self-Government and Self-Responsibility” (Frankfort/Main Symposium) 7 - 8 November 2008.

Eric Alt, *Judicial Independence in Europe*, a paper presented at “Models of Self-Government and Self-responsibility” (Frankfort/Main Symposium) 7 – 8 November 2008).

Lord Justice Thomas, *Some perspectives on Councils for the Judiciary*, a paper presented at “Models of Self-Government and Self-Responsibility” (Frankfort/Main Symposium) 7 - 8 November 2008.

Nadejda Hriptievschi, *The Legal Profession in Moldova*, August 2008.

Cristi Danilet, *Independence and Impartiality of Justice*, 14 March 2008.

Arne Gunnar, *Adversarial Trial According to ECHR and European Standards*, 8 April 2008.

Nicholas Cowdery, *Independence of the Prosecution*, IAP Conference, 31 August 2007.

Eric Alt, *Discipline, ethics and the independence of the judiciary* (Belgrade, 2 June 2007).

Antonio Cluny, *Autonomy and Self Governance of the Portuguese Public Prosecutor's Office*, International Association of Prosecutors.

Cherif Bassiouni and V.M. Savitski (eds), *The Criminal Justice System Of The U.S.S.R.*, (Springfield, U.S.A., 1979).

### *Interviews*

As a second step, the report team had detailed interviews based on pre-determined questions with approximately 25 people knowledgeable about or interested in the SCP, the PPS and the Moldovan criminal justice system. To encourage frank discussion, the interviewees were assured that the meeting would be confidential and there would be no attribution of comments to interviewees in the project report. On 27 October 2010 the international expert on the project team had the opportunity to attend a conference on judicial independence organized by ODIHR and the OSCE Mission to Moldova. He was able to discuss issues relating to institutional independence and management with several Moldovan and international experts.

### *Observation and Study*

As a third step, from 10 October to 11 November 2010, the project team, working when possible at the Office of the Prosecutor General in Chisinau, studied the organization and functioning of the SCP. The minutes of the meetings and the decisions of the SCP are posted on the website of the Office of the PG. These documents were reviewed and translated into English. Having access to this material permitted the project team to analyze the work done by the SCP. On 19 October 2010 members of the project team attended a meeting of the SCP. On 5 November 2010 a member of the project team travelled to regional prosecution offices in Calarasi and Ungheni to meet with and gain the perspective of prosecutors from outside Chisinau.

On 16 December 2010, a roundtable organized by ODIHR and the OSCE Mission to Moldova, took place in Chisinau to discuss a draft of the report with national authorities. Comments and views of participants have been considered and integrated in this final report.