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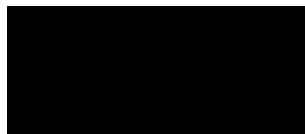
30 May 2019

**Re: Third party submission in *Laura Codruța Kövesi v. Romania*
(Application no. 3594/19)**

Dear Mrs. Tsirli,

Pursuant to leave granted by the Court on 10 May 2019, please find enclosed the submission of written comments of the Open Society Justice Initiative in the ***Laura Codruța Kövesi v. Romania* (Application no. 3594/19)**.

Yours sincerely,



James A. Goldston
Executive Director
Open Society Justice Initiative

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application No. 3594/19 – Laura Codruța KÖVESI
v. Romania

WRITTEN COMMENTS OF THE
OPEN SOCIETY JUSTICE INITIATIVE

I. OVERVIEW

1. In these written comments, the Open Society Justice Initiative provides an analysis of the importance of the independence of prosecution services and independent chief prosecutors to guarantee the rule of law.¹ The analysis also examines how the dismissal of a chief prosecutor falls under the application of Article 6 § 1 of the Convention and the protections that, according to both international standards and Article 6 § 1, must surround such dismissal. Finally, these comments address the guarantees provided under Article 13 of the Convention.
2. A Convention-compliant dismissal process for chief prosecutors is a key component ensuring the independence of prosecution services and the safeguards of the rule of law. The nature of that process falls under the application of Article 6 § 1 of the Convention and must be surrounded by guarantees provided under this provision, as well as under Article 13 of the Convention, which both reflect the standards developed by numerous international and regional bodies.
3. The following analysis is most directly responsive to the Court’s first question to the parties (*Is Article 6 § 1 of the Convention under its civil head applicable in the present case?*). However, where appropriate, we provide information that is responsive to the third question (*Did the applicant have access to a court for the determination of her civil rights and obligations in relation to her dismissal from the position of chief prosecutor of the National Anticorruption Prosecutor Department (DNA), in accordance with Article 6 § 1 of the Convention?*) and the fourth question (*Did the applicant have at her disposal an effective domestic remedy for her Convention complaints, as required by Article 13 of the Convention?*).
4. These comments draw upon the jurisprudence of this Court, comparative regional and international law and standards, and authoritative statements on the importance of the rights at issue, noting that this Court takes into account “evolving norms of national and international law in its interpretation of Convention provisions.”²
5. In sum, the following comments aim to assist the Court in considering the close link that exists between independence of prosecution services, dismissal processes of heads of such services, and Articles 6 § 1 and 13 of the Convention.

¹ Written comments provided pursuant to the Court’s grant of permission under Rule 44(3) of the Rules of Court, dated 10 May 2019.

² *Demir and Baykara v. Turkey* (Grand Chamber), 12 November 2008, Application no. 34503/97, para. 68.

II. THE IMPORTANCE OF INDEPENDENT PROSECUTION SERVICES AND INDEPENDENT HEADS OF PROSECUTION SERVICES FOR THE RULE OF LAW

6. Prosecutors are key actors of the criminal justice system. Respect for the rule of law requires them to be independent - that is to say - free from any undue external influence. Additionally, fair and transparent appointment and dismissal processes are a key component of independence. We elaborate these principles below.

A. Role of prosecution services

7. Public prosecutors play a key role in the criminal justice system. They are the “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”.³ Prosecutors are among the most powerful officials in the criminal justice system: they determine whether to divert a case, which crimes to charge, whom to charge and prosecute, whether to ask for pretrial detention, and whether to negotiate and offer concessions to obtain a conviction without a contested trial.
8. The structure, organization and role of prosecution services vary from one state to another. They can be part of the executive power, or of the judiciary or be completely independent from both branches. Functions of prosecutors may also vary. For example, some operate a system of discretionary prosecution (the “opportunity principle”) while others operate a system of mandatory prosecution (the “legality principle”).
9. Notwithstanding this variety of institutional and legal arrangements, common features and values characterize the professional status and the ethical standards governing the conduct of prosecutors. As recalled by the Venice Commission, prosecutors are expected to carry out their functions fairly and impartially, regardless of their position in the criminal justice system.⁴ The Consultative Council of European Prosecutors, a consultative body to the Committee of Ministers of the Council of Europe, also underlined in its latest opinion that prosecutors are expected to “exercise their functions within the framework of the rule of law, which requires respect for a certain number of fundamental values, such as impartiality, transparency, honesty, prudence, fairness and contribution to the quality of justice”.⁵

B. Prosecution services must be independent

1. Independence from external influence

10. Prosecutors have to be free from any undue external influence and must remain unaffected by individual or sectional interests and public and media pressures. This is of highest importance as prosecutors may have to take “unpopular decisions, which may be the subject of criticism in the media or become the subject of political controversy”.⁶

³ Council of Europe, 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. Council of Europe, European guidelines on ethics and conduct of public prosecutors. “The Budapest guidelines”, Conference of Prosecutors General of Europe, 6th session, 31 May 2005.

⁴ European Commission for Democracy Through Law (Venice Commission), Report on European standards as regards the independence of the judicial system. Part II – The prosecution service, 2010, para. 15. United Nations, Guidelines on the Role of Prosecutors, 1990, para. 12 and 13.

⁵ Consultative Council of European prosecutors, Opinion No 13(2018) on “Independence, accountability and ethics of prosecutors”, para. 6.

⁶ European Commission for Democracy Through Law (Venice Commission), above, para. 18.

11. As highlighted by the Venice Commission, “political interference in prosecution is probably as old as society itself”.⁷ Such undue interference may be aimed at prompting prosecutors to make incorrect decisions. Under undue influence, a prosecutor may decide to prosecute a case where there is insufficient evidence or on the basis of improperly obtained evidence. Undue influence may also lead a prosecutor to decide not to prosecute a case which ought to be prosecuted.⁸ These non-autonomous decisions jeopardize the fairness and the credibility of the administration of justice and consequently undermine the rule of law.
12. Independence of prosecutors is therefore of critical importance. According to the Consultative Council of European Prosecutors, “independence means that prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind”.⁹
13. Numerous international and regional bodies have recently underlined the need to guarantee the independence of prosecution services, considered as a “fundamental component of the administration of justice”.¹⁰ Independent prosecutors, willing to investigate and prosecute, regardless of the status suspects may have in society, play a key role in strengthening the rule of law.¹¹ Whatever the place of the prosecution office within the constitutional framework, the act of prosecution should be independent, and any influence that may affect the independence of prosecution is likely to affect the entire trial.¹²

2. Link between prosecutorial and judicial independence

14. The independence of prosecutors is largely seen today as the corollary of the independence of judges¹³ even though the scope and elements of their respective independence are not identical. No instructions should be given to judges, who have to take their decisions exclusively on the basis of the law.¹⁴ By contrast, lawful instructions may be given to prosecutors within the terms of their hierarchy¹⁵ or general instructions in relation to “an aspect of policy (...) decided by parliament or government”¹⁶.

⁷ *Ibid.*, para. 20.

⁸ *Ibid.*, para. 21.

⁹ Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 15. See also Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, CM(2016)36 final, Action 3.2.

¹⁰ United Nations Office on Drugs and Crime, The status and role of prosecutors, 2014, p. 8. See also United Nations. Human rights council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HRCR/20/19, 7 June 2012, para. 25. European Commission for Democracy Through Law (Venice Commission), above, para. 22. Opinion no. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion no.4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe on the relations between judges and prosecutors in a democratic society, called “Declaration de Bordeaux”, para. 6. Inter-American Commission on Human Rights, Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas, 5 December 2013, para. 37.

¹¹ European Network of Councils for the Judiciary (ENCJ), Independence and accountability of the judiciary and of the prosecution. Performance Indicators 2015. ENCJ Report 2014-2015, p. 73. This report was prepared by a sub-group of representatives of five members of the ENCJ (Belgium, Bulgaria, France, Romania and Italy) and does not reflect the views and recommendations of the entire ENCJ.

¹² Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 32.

¹³ *Ibid.*, para. 3. “Declaration de Bordeaux”, above, para. 3.

¹⁴ European Commission for Democracy Through Law (Venice Commission), Report on European standards as regards the independence of the judicial system. Part I – The independence of judges, 2010, para. 56.

¹⁵ “Declaration de Bordeaux”, above, para. 9.

¹⁶ European Commission for Democracy Through Law (Venice Commission), above, para. 30.

Nevertheless, independence of prosecution services requires them not to come under any kind of influence in individual cases from any source outside of the prosecution service itself.¹⁷

15. Prosecutorial independence strengthens efforts to combat corruption, especially political or “grand” corruption.¹⁸ For example, an empirical evaluation across 78 countries clearly highlighted the links between the independence of prosecution agencies and their willingness to prosecute crimes committed by government members.¹⁹ The study concluded that the more independent prosecutors factually are, the lower the expected level of corruption in the countries under study.
16. This Court has also highlighted the importance for independent investigative authorities, stating that “the persons responsible for carrying out investigation must be independent and impartial, in law and in practice”²⁰ and that “in a democratic society both the courts and the investigation authorities must remain free from political pressure”.²¹
17. In sum, there is a general consensus that independent prosecution services help ensure that governments and public administrations are held to account for their actions and, as is the case with independence of judges, independence of prosecutors is equally crucial in fostering and enhancing the rule of law.²²

C. Transparent and accountable appointment and dismissal process of chief prosecutors are essential to secure independent prosecution services

18. The independence of prosecution services is secured through various complementary rules and means such as the process of appointment, transfer, promotion and discipline of members of the office; allocation of sufficient resources for executing the tasks; guarantees of non-interference in the work of prosecutors other than their hierarchy in the office; and transparent and accountable appointment and dismissal processes of chief prosecutors.²³
19. Given the diversity of organizational models of prosecution services around the world, no single principle can be formulated as to whom and through which process chief prosecutors should be appointed or dismissed.
20. However, international and regional bodies unanimously agree that the appointment and dismissal process of chief prosecutors should be robust in order to secure their independence. The applicable process should avoid political nominations or dismissal process that exposes them to political pressure or influence.

¹⁷ “Declaration de Bordeaux”, above, para. 8.

¹⁸ GRECO, Group of States against Corruption. Anti-corruption Body of the Council of Europe, 4th Evaluation Round, Corruption prevention. Members of Parliament, Judges and Prosecutors. Conclusions and trends, p. 25. European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2013) 47 final, p. 4.

¹⁹ Anne Van Aaken, Lars P. Feld and Stefan Voigt. (March 2010). ‘Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries.’ *American Law and Economics Review*, 12(1), 204-244.

²⁰ *Kolevi v. Bulgaria*, November 2009, Application no. 1108/02, para.193

²¹ *Guja v. Moldova* (Grand Chamber), 12 February 2008, Application no. 14277/04, para. 86.

²² Inter-American Commission on Human Rights, above, para. 44. European Network of Councils for the Judiciary (ENCJ), above, p. 72.

²³ European Commission for Democracy Through Law (Venice Commission), above, para.32. Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 24-45.

21. In this regard, international and regional bodies, such as the Venice Commission,²⁴ the Anti-corruption Body of the Council of Europe (Greco),²⁵ the United Nations Office on Drugs and Crime,²⁶ the United Nations Special Rapporteur on the independence of judges and lawyers,²⁷ the Inter-American Commission on Human Rights,²⁸ and the European Commission²⁹ have linked the independence of prosecution services with existence of merit-based, transparent and accountable appointment and dismissal process of their heads.
22. Moreover, as stressed by the Venice Commission, “the manner in which the Prosecutor General is appointed and recalled plays a significant role in the system guaranteeing the correct functioning of the prosecutor’s office”.³⁰ For good reason: heads of prosecution services typically determine national- or state-level prosecution policy and priorities, and in hierarchically organized prosecution services they influence which cases are prosecuted and which are not. The appointment and dismissal processes of heads of prosecution services can therefore be a key vulnerability for prosecutorial independence.³¹

1. Appointment process

23. The Venice Commission has strongly recommended the need to find a balance between the requirement of democratic legitimacy of appointments of heads of prosecution services, and the requirement of depoliticisation.³² Clear criteria for recruitment should be established,³³ preferably by law³⁴. The European Commission has stressed that the assessment of the professional qualifications of candidates should ensure appropriate safeguards in terms of independence and checks and balances.³⁵ As stressed by the Venice Commission and the UNODC, this could imply the “creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government”³⁶, or seeking the advice from qualified persons, having suitable expertise (such as representatives of the legal community or civil society).³⁷

2. Dismissal/Removal process

24. The removal process of chief prosecutors is as critical as their appointment process. If left to the discretion of another branch of power, it would undermine any prospect of

²⁴ European Commission for Democracy Through Law (Venice Commission), above, para. 34-40.

²⁵ GRECO, Group of States against Corruption. Anti-corruption Body of the Council of Europe, 4th Evaluation Round, Above, p. 26.

²⁶ United Nations Office on Drugs and Crime, The status and role of prosecutors, above, pp. 11-12.

²⁷ United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, above, para. 63-65.

²⁸ Inter-American Commission on Human Rights, above, para. 103.

²⁹ European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM (2014)37 final, p. 4.

³⁰ European Commission for Democracy Through Law (Venice Commission), above, para. 34.

³¹ European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM (2014)37 final, p. 4.

³² European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 18.

³³ UNODC, The status and role of prosecutors, above, p. 11.

³⁴ Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 24.

³⁵ European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2018)851 final, p. 9.

³⁶ European Commission for Democracy Through Law (Venice Commission), above, para. 34

³⁷ *Ibid.*, para. 35. UNODC, The status and role of prosecutors, above, p. 11. United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, above, para. 63. Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 24.

independence of prosecution services: a chief prosecutor could be removed for whatever reason, including failure to conform to the “expectations” of a government.

25. Therefore, as underlined by the UNODC, there is a need for an “established, transparent and accountable regime for the removal of the head of the prosecution service” that will “serve to protect independence” of the service.³⁸ According to the Venice Commission, grounds for such a dismissal should be prescribed by law,³⁹ and as we will detail later, safeguards should surround a dismissal process such as a fair hearing and a possibility to challenge the decision.

III. DISMISSAL OF CHIEF PROSECUTOR IMPLICATES ARTICLE 6 § 1 OF THE CONVENTION

26. The dismissal of chief prosecutor falls under the scope of Article 6 § 1 of the Convention and must be surrounded by the guarantees provided by the provision. This is a direct consequence of the necessity to safeguard their independence as a component of the rule of law.

A. To complete a mandate as head of a prosecution service is a civil right under Article 6 § 1 of the Convention

27. Two questions must be examined to determine whether Article 6 §1 under its civil head is applicable. There must be a dispute over a right, and the right must be of civil nature.⁴⁰

1. Dispute over a right under national law

28. As recalled by the Court in the *Baka v. Hungary* decision,⁴¹ “for Article 6 § 1 in its ‘civil’ limb to be applicable, there must be a dispute over a ‘right’ (‘*contestation*’ in the French text), which can be said, at least on arguable grounds, to be recognized under domestic law, irrespective of whether that right is protected under the Convention”.

29. Where a chief prosecutor is appointed for a fixed-term, the legal implication is that she/he serves for the entirety of the fixed term unless there are specific objective grounds for their dismissal anchored in the law and in compliance with due process. Failure to interpret appointments for a fixed term in this manner means that a chief prosecutor serves at the discretion of government which would be an outright assault to the concept of prosecutorial independence.

2. “Civil” nature of the right

30. The Court has developed an extensive case-law on the criteria for applicability of Article 6 § 1 of the Convention to employment disputes concerning civil servants. Members of the judiciary (“*magistrats*” in the French text), that is to say judges and prosecutors, are “considered part of typical public service” and may benefit from the protection of Article 6. Employment disputes may be of all types, including those relating to termination of service or dismissal.

31. For States to exclude the applicability of Article 6 to civil servants, two conditions must be fulfilled. First, the “national law must have expressly excluded access to a court for

³⁸ UNODC, The status and role of prosecutors, above, p. 12.

³⁹ European Commission for Democracy Through Law (Venice Commission), above, para. 39 and 40.

⁴⁰ *Baka v. Hungary* (Grand Chamber), 23 June 2016, Application no 20261/12, para. 100-102.

⁴¹ *Ibid.*, para. 100.

the post or category of staff in question”.⁴² Secondly, “the exclusion must be justified on objective grounds in the State’s interest” and “it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists (...) a ‘special bond of trust and loyalty’ between the civil servant and the State, as employer”.⁴³

32. The application of these criteria to the dismissal of a chief prosecutor requires an inquiry on two issues. First, the consistency between an exclusion of access to a court and the international standards developed on the need for fair and accountable dismissal process. In our view, and as argued later, the correct approach is what numerous international bodies insist on – that is – to provide the opportunity to challenge a decision for removal.
33. Secondly on “objective grounds in the State’s interest”, the critical issue is whether there can be objective reasons to exclude a chief prosecutor who has been dismissed from access to court. To secure the independence of prosecution services, it is important to subject any dismissal decision of a chief prosecutor to judicial challenge, in order to provide a safeguard against potential abuses. The absence of a judicial challenge would undermine the independence of prosecutors and the rule of law. This absence could therefore not be justified by the protection of a State’s interest.
34. In sum, dismissal of a head prosecutor is a dispute over a civil right and hence subject to the guarantees laid out in Article 6 § 1 of the Convention.

B. Guarantees under Article 6 § 1: access to a court and a fair hearing

1. ECtHR

35. Article 6 § 1 provides the right of access to a court - that is – for everyone to have any claim relating to his “civil rights and obligations” brought before a tribunal and what this Court has referred to as the “right to a court”.⁴⁴ The right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect of this.⁴⁵
36. A judicial body needs to fulfill a set of criteria in order to qualify as a “tribunal” under the Convention. In *Belilos v. Switzerland*, this Court set out that “a ‘tribunal’ is characterized in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.”⁴⁶
37. In the case *Bentham v. the Netherlands*, this Court found that “a power of decision is inherent in the very notion of a ‘tribunal’ within the meaning of the Convention”.⁴⁷ A tribunal which can only issue advisory opinions without binding force, even if those opinions are followed in majority of cases, does not meet the requirements of a tribunal under the Convention.⁴⁸
38. Article 6 § 1 creates the right to a fair hearing before a tribunal that meets the requirements specified above, including granting parties to the proceedings the right to present the observations which they regard as relevant to their case. This Court has held that the right

⁴² *Ibid.*, para. 103.

⁴³ *Ibid.*

⁴⁴ *Golder v. the United Kingdom*, 21 February 1975, Application no. 4451/70, para. 36; *Naït-Liman v. Switzerland* (Grand Chamber), 15 March 2018, Application no. 51357/07, para. 113.

⁴⁵ *Ibid.*

⁴⁶ *Belilos v. Switzerland*, 29 April 1988, Application no. 10328/83, para. 64.

⁴⁷ *Bentham v. the Netherlands*, 23 October 1985, Application no. 8848/80, para. 40.

⁴⁸ *Ibid.*

to a fair hearing can only be seen to be effective if the observations are actually “heard”, that is to say duly considered by the trial court.⁴⁹

39. Additionally, this Court notes that the right to adversarial proceedings constitute a key component of a fair hearing. This involves (1) the right to “have knowledge of, and comment on, all evidence adduced or observations filed”;⁵⁰ (2) the right to have sufficient time to familiarize oneself with the evidence before the court;⁵¹ and (3) the right to produce evidence.⁵²
40. The principle of equality of arms, which is closely linked to the right to adversarial proceedings, constitute another fundamental component of fair hearing. In essence, each party must be afforded a reasonable opportunity to present its case, including evidence, under conditions that do not place it at a “substantial disadvantage” vis-à-vis the other party.⁵³

2. International and regional standards

41. The guarantees of a fair trial as developed under this Court’s case law are widely recognized by international and regional bodies in regard to dismissal of chief prosecutors. The Venice Commission is the most explicit on the application of such guarantees to the dismissal of chief prosecutors. However, other bodies have also developed similar standards for dismissal of prosecutors in general, that a fortiori apply to chief prosecutors as well. The standards developed for disciplinary proceedings should equally apply to cases where dismissal proceedings are part of the application of disciplinary sanctions.
42. The Venice Commission held that a “Prosecutor General” should always benefit from a fair hearing in dismissal proceedings.⁵⁴ It notes that in disciplinary cases, including dismissal proceedings, the prosecutor concerned should have a right to be heard in an adversarial proceedings.⁵⁵
43. The Inter-American Commission on Human Rights warns of the risks posed by unfettered removal of justice operators including prosecutors.⁵⁶ Proceedings conducted to discipline prosecutors because of their conduct must observe the guarantees of due process, including the right to a prior hearing by a competent, independent and impartial judge.⁵⁷ It has insisted on the need for the disciplinary authority to have institutional independence, which means that “other branches or organs of government cannot interfere in the disciplinary proceedings, so that the disciplinary authority is able to act independently”.⁵⁸

⁴⁹ *Donadze v. Georgia*, 7 March 2006, Application no. 74644/01, para. 35.

⁵⁰ *Vermeulen v. Belgium* (Grand Chamber), 20 February 1996, Application no. 19075/91, para. 33.

⁵¹ *Krčmář and Others v. Czech Republic*, 3 March 2000, Application no. 35376/97, para. 42.

⁵² *Clinique des Acacias and Others v. France*, 13 October 2005, Application nos. 65399/01, 65406/01, 65405/01, and 65407/01, para. 37.

⁵³ *Regner v. the Czech Republic* (Grand Chamber), 19 September 2017, Application no. 35289/11, para. 146;

Dombo Beheer B.V. v. The Netherlands, 27 October 1993, Application no. 14448/88, para. 33.

⁵⁴ European Commission for Democracy Through Law (Venice Commission), Report on European standards as regards the independence of the judicial system. Part II – The prosecution service, 2010, para 40. European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 18.

⁵⁵ European Commission for Democracy Through Law (Venice Commission), Report on European standards as regards the independence of the judicial system. Part II – The prosecution service, 2010, para 52.

⁵⁶ Inter-American Commission on Human Rights, above, para. 15.

⁵⁷ *Ibid.*, para. 190 and 195.

⁵⁸ *Ibid.*, para. 197.

44. The UN Guidelines on the Role of Prosecutors also require right to a fair hearing in disciplinary proceedings, where prosecutors are alleged to have acted in a manner “clearly out of the range of professional standards”.⁵⁹ Equally UNODC notes that prosecutors subject to disciplinary hearings “should be made aware of the allegations of their misconduct, and this should be communicated to the prosecutors clearly and effectively”.⁶⁰
45. Finally, the International Association of Prosecutors’ standards confirm that prosecutors should be entitled to “expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards”. The disciplinary hearings should furthermore entail “objective evaluations and decisions”.⁶¹

IV. GUARANTEES UNDER ARTICLE 13: RIGHT TO AN EFFECTIVE REMEDY

1. ECtHR

46. Article 13 grants any individual the right to claim an effective remedy before a national authority for arguable claims that one or more of their rights set out in the Convention have been violated. The provision has a broad application and is not restricted to national authorities that strictly fit as a judicial authority.⁶²
47. As a primary requirement, a remedy under Article 13 needs to be “effective in practice as well as in law”.⁶³ This Court has developed some principles to determine the effectiveness of a remedy. They include the remedy being accessible, capable of providing redress in respect of the applicant’s complaint, and offering “reasonable prospects of success”.⁶⁴ To determine the effectiveness of a remedy, one must take into account both the formal remedies available, and the “general legal and political context in which they operate as well as the personal circumstances of the applicant”.⁶⁵

2. International and regional standards

48. A number of international and regional bodies have recognized the right of prosecutors to an effective remedy in dismissal and disciplinary proceedings. As mentioned above, the standards developed for all prosecutors a fortiori apply to chief prosecutors as well.
49. According to these international standards, an effective remedy should be governed by law, and should enable the prosecutor subject to a disciplinary sanction to challenge it and to have it reviewed through a fair and independent process.
50. In its recommendation on the role of public prosecution in the criminal justice system, the Committee of Ministers of the Council of Europe emphasized that “disciplinary

⁵⁹ United Nations, Guidelines on the Role of Prosecutors, 1990, para. 21.

⁶⁰ United Nations Office on Drugs and Crime, The status and role of prosecutors, 2014, p. 34.

⁶¹ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, para. 6.

⁶² *Kudła v. Poland* (Grand Chamber), 26 October 2000, Application no. 30210/96, para. 157.

⁶³ *Ibid.*, para. 157; *M.S.S. v. Belgium and Greece* (Grand Chamber), 21 January 2011, Application no. 30696/09, para. 288.

⁶⁴ *Vučković and Others v. Serbia* (Grand Chamber), 25 March 2014, Application no. 17153/11 and 29 other cases, paras. 71 and 74.

⁶⁵ *Dorđević v. Croatia*, 24 July 2012, Application no. 41526/10, 24 July 2012, para. 101.

proceedings against public prosecutors should be governed by law and should guarantee a fair and objective evaluation” of the case and that any decision “should be subject to independent and impartial review”.⁶⁶

51. The UN Guidelines on the Role of Prosecutors set out that decisions made in the context of disciplinary hearings shall be subject to “independent review”.⁶⁷ In their report on the status and role of prosecutors, the UNODC cited and confirmed this standard set out in the Guidelines.⁶⁸
52. The UN Special Rapporteur on the independence of judges and lawyers stressed that “the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities”.⁶⁹ As a consequence, prosecutors “should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings”.⁷⁰
53. The Inter-American Commission on Human Rights held that, in order to dismiss a prosecutor, the phase for review of a disciplinary decision as part of the disciplinary process must be observed. The Commission further stated that there should be a possible review of the decision by a higher body, which will examine the facts of the case and the law, and ensure “a suitable and effective judicial recourse against possible violations of rights that happened during the disciplinary process”.⁷¹ The Commission also highlighted the importance of the right to a review in cases where dismissal “may be an implied sanction”, constituting a “misuse of power to punish a justice operator for some action or decision he or she took”.⁷²

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James A. Goldston, Executive Director
Open Society Justice Initiative

⁶⁶ Council of Europe, Recommendation Rec(2000)19 of the Committee of Ministers to Members States on the role of public prosecution in the criminal justice system, above, para. 5e.

⁶⁷ United Nations, Guidelines on the Role of Prosecutors, above, para. 21.

⁶⁸ United Nations Office on Drugs and Crime, The status and role of prosecutors, above, p. 34.

⁶⁹ Report of the Special Rapporteur on the independence of judges and lawyers, above, para. 70.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, para. 236 and 238.

⁷² *Ibid.*, para. 234.