

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**  
**Application No. 39092/21– *Fabienne VIDBERG***  
***v. France***

**WRITTEN COMMENTS OF THE  
OPEN SOCIETY JUSTICE INITIATIVE**

**I. OVERVIEW**

1. This case raises important questions about the guarantees that must guide prosecutors' decisions not to initiate criminal proceedings in order to secure access to justice to victims of serious crimes, in particular international crimes an corruption, and prevent impunity and undue political interference. To assist the Court in considering the application, the Open Society Justice Initiative provides: (II) an analysis of the importance of prosecutorial accountability to guarantee the rule of law, (III) the problems arising from the absence of an independent judicial review of prosecutors' decisions not to initiate criminal proceedings and the international standards calling for such review and (IV) how these decisions implicate articles 6 and 13. We especially emphasize the importance of independent review of decisions of prosecutors not to prosecute international crimes and corruption, and why such review is important to comply with Article 6 and 13.

**II. INDEPENDENCE AND ACCOUNTABILITY OF PROSECUTORS ARE KEY COMPONENTS OF THE ADMINISTRATION OF JUSTICE AND RULE OF LAW**

**A. The role of prosecutors**

2. 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”.<sup>1</sup> They determine whether to initiate prosecutions, which crimes to charge and whom to charge and prosecute.
3. The structure and organization of prosecution services vary from one state to another. They can be part of the executive power or the judiciary or they can be completely independent. Functions of prosecutors may also vary. Some operate a system of discretionary prosecution (the “opportunity principle”) while others operate a system of mandatory prosecution (the “legality principle”).<sup>2</sup>
4. Notwithstanding the variety of institutional and legal arrangements, common features and values characterize the professional status and ethical standards governing the conduct of prosecutors. Both the United Nations Office on Drugs and Crime and the Venice Commission have underscored the necessity for prosecutors to carry out their functions fairly and impartially.<sup>3</sup> The Consultative Council of European Prosecutors underlined that prosecutors are expected to “exercise their functions within the framework of

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<sup>1</sup> 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, Adopted by the Committee of Ministers on 6 October 2000, para. 1. See also Council of Europe, European guidelines on ethics and conduct of public prosecutors. “The Budapest guidelines”, Conference of Prosecutors General of Europe, 6<sup>th</sup> session, 31 May 2005.

<sup>2</sup> 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. 7.

<sup>3</sup> United Nations Office on Drugs and Crime, The status and role of prosecutors, 2014, p. 8. 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, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, para. 12 and 13.

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”.<sup>4</sup> Prosecutors must thus be independent and accountable.

## **B. Prosecutors must be independent**

5. International and regional bodies have reached a broad consensus about the need to guarantee the independence of prosecutors as a fundamental component of the administration of justice.<sup>5</sup> Prosecutors must be sufficiently independent to take their decisions objectively, regardless of any political pressure or unlawful influence of any kind,<sup>6</sup> in order to strengthen the rule of law.<sup>7</sup> Where pressures or interference are brought, “the prosecutor will not be able to protect the interests of justice, will not be able to respect the rule of law and will be powerless to deal effectively with cases of corruption or abuse of State power”.<sup>8</sup>
6. In a judgment of 5 May 2020, this Court recognized that the principle of the independence of prosecutors is “a key element for the maintenance of judicial independence”.<sup>9</sup> Several months later, the Inter-American Court of Human Rights ruled that the authorities in charge of an investigation must enjoy *de jure* and *de facto* independence and that, to secure the independence and objectivity of prosecutors, they must be protected by guarantees of an adequate appointment process, irremovability, and protection against external pressure.<sup>10</sup>

## **C. Prosecutors must be accountable**

7. As emphasized by the United Nations Special Rapporteur on the independence of judges and lawyers, “autonomy [of prosecutors] should not exist to the detriment of accountability”<sup>11</sup>: there is a need to “ensure effective oversight of all prosecution services, [and] increase their transparency”.<sup>12</sup> The Consultative Councils of European Judges and Prosecutors has warned that “an over-powerful prosecution service without accountability can endanger judicial independence and the protection of human rights”.<sup>13</sup>

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<sup>4</sup> Consultative Council of European prosecutors, Opinion No 13(2018): “Independence, accountability and ethics of prosecutors”, 23 November 2018, para. 6.

<sup>5</sup> United Nations Office on Drugs and Crime, The status and role of prosecutors, above, p. 8. See also United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HCR/20/19, 7 June 2012, para. 24 & 25. 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, 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”, 8 December 2009, para. 6.

<sup>6</sup> 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, April 2016, Action 3.2., p. 26.

<sup>7</sup> 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.

<sup>8</sup> Speech of the President of the International Association of Prosecutors, James Hamilton, 18th Annual Conference of the International Association of Prosecutors, “The prosecutor and the rule of law”, Moscow, 8 September 2013, in UNODC, The status and role of prosecutors, above, p. 7. See also 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, above, para. 18. Consultative Council of European prosecutors, Opinion No 13(2018), above, para. 32.

<sup>9</sup> *Kövesi v. Romania*, ECtHR, 5 May 2020, Application no. 3594/19, para. 208.

<sup>10</sup> *Yenina Esther Martínez Esquivia v. Colombia*, IACtHR, Judgment of 6 October 2020, Serie C No. 412, para. 95.

<sup>11</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HCR/20/19, 7 June 2012, para. 82.

<sup>12</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. Addendum. Mission to Mexico, A/HRC/17/30/Add.3, 18 April 2011, para. 18.

<sup>13</sup> Challenges for judicial independence and impartiality in the member states of the Council of Europe, Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE, SG/Inf(2016)3rev, 24 March 2016, para. 35.

8. The Committee of Ministers of the Council of Europe has also stressed the close links between the independence and the accountability of prosecutors.<sup>14</sup> The Committee recommends that States “take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability” and that “the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out”.<sup>15</sup> The Group of States against Corruption (GRECO) emphasized as well that “proper checks and balances should also exist to ensure that this functional independence [of prosecutors] is not abused or diverted from its initial purpose”.<sup>16</sup>
9. Prosecutorial accountability can be secured through various complementary rules. Some aim to organize the accountability of the prosecution service as an institution,<sup>17</sup> while others aim to secure accountability for decisions in individual cases. These latter tools are crucial to guarantee that decisions are in accordance with the law, reflect compliance with States’ responsibility to conduct thorough and effective investigations, and are not improperly made or unduly influenced. Prosecutors’ decisions to initiate criminal proceedings are subject to scrutiny by courts, which provides a form of accountability.<sup>18</sup> But decisions to dismiss, or to decline to initiate, criminal cases must also be subject to appropriate scrutiny, as described below.

### **III. PROSECUTORIAL ACCOUNTABILITY REQUIRES AN INDEPENDENT REVIEW OF DECISIONS NOT TO INITIATE PROCEEDINGS**

10. When they are not reviewable, decisions of prosecutors not to initiate proceedings, which often end with no consequences for the alleged offender, are particularly sensitive. Where such decisions are not clearly supported by the evidence, they carry substantial risks of abuse, corruption, impunity or unequal treatment of victims and accused.<sup>19</sup> As the Venice Commission has observed, “the biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability”.<sup>20</sup> The risks are especially pronounced in respect of two categories of political sensitive crime: international crimes which, by definition, are of universal concern because of their gravity; and crimes of corruption.
11. After (A.) describing the most salient problems caused by the absence of appropriate safeguards guiding the exercise of prosecutorial powers, this submission (B.) details the international and regional standards calling for an independent review of prosecutors’ decisions not to initiate criminal proceedings.

<sup>14</sup> Council of Europe, Recommendation Rec(2000)19 of the Committee of Ministers, above, para. 11; Council of Europe, Committee of Ministers, Plan of action on strengthening judicial independence and impartiality, CM(2016)36 final, April 2016, Action 3.2., p. 26.

<sup>15</sup> *Ibid.*

<sup>16</sup> GRECO, Group of States against Corruption, 4th Evaluation Round, Corruption prevention. Members of Parliament, Judges and Prosecutors. Conclusions and trends, p. 28.

<sup>17</sup> Council of Europe, Recommendation Rec(2000)19 of the Committee of Ministers, above, p. 23 and para. 35; 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, above, para. 44; United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HCR/20/19, 7 June 2012, para. 84; GRECO, 4th Evaluation Round, above, p. 28.

<sup>18</sup> 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, above, para. 45.

<sup>19</sup> Organisation for Economic Co-operation and Development (OECD), The Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific, 2020, p. 104; <sup>19</sup> Council of Europe, Recommendation R(87)18 of the Committee of Ministers to Members States concerning the simplification of the administration of justice, Adopted on 17 September 1987 at the 410th meeting of the Ministers’ Deputies, p. 2; 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), Explanatory note, above, para. 53.

<sup>20</sup> 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, above, para. 45.

## A. Barriers to access to justice and risks of impunity

12. In practice, where prosecutors enjoy exclusive and unreviewable decision power whether to open investigations or bring charges, barriers in access to justice may lead to impunity. The problem is exacerbated when the independence of the prosecution office is not fully guaranteed and the crimes appear politically sensitive, such as international crimes or corruption.
1. Obstacles to access justice and impunity for victims of international crimes
13. For years, European and international legal authorities have made clear the need for States to provide for some form of review of prosecutorial decisions not to initiate criminal proceedings. Yet, in various countries of the Council of Europe, the prosecutor has the discretion whether to open investigations or prosecutions on allegations of serious international crimes committed outside of the state's territory, with no possibility for victims to ask for judicial review of these decisions, or to file a petition to an investigative judge as a civil party. These restrictive procedural rules have been identified as real barriers in access to justice for victims.<sup>21</sup> Some concrete examples:
14. France. The prosecutor has discretionary power to open prosecutions for genocide, crimes against humanity and war crimes committed abroad by a suspect who usually resides in France.<sup>22</sup> The plaintiff can challenge the decision not to prosecute before the prosecutor general, whose decision will be final.<sup>23</sup> This appeal has been described as ineffective in practice, since the prosecutor general always seems to uphold the first instance prosecutor's decisions and never orders a prosecution.<sup>24</sup> There is no review by an independent court. These rules raise even more salient problems considering that prosecutors in France cannot be considered as independent *vis-à-vis* the executive, as this Court ruled in *Medvedev*,<sup>25</sup> in light of the fact that they are placed under the authority of and report to the Minister of Justice.<sup>26</sup> In addition, prosecutors have to inform the Minister of Justice of cases filed and pending, either on their own initiative or at the Minister's request,<sup>27</sup> under modalities and criteria defined only by the Minister of Justice.<sup>28</sup> This mandatory reporting often raises suspicions of possible interference by the executive.<sup>29</sup>
15. Sweden. Public prosecutors have the duty to investigate once a criminal complaint has been filed, including for international crimes.<sup>30</sup> However, in practice, there is room for considerable prosecutorial discretion since a prosecutor may decide not to open an investigation if they consider that no investigation can be conducted.<sup>31</sup> Once an investigation is completed, prosecutors have the obligation to prosecute where there is a sufficient evidentiary basis,<sup>32</sup> but must first have the Government's approval to prosecute crimes

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<sup>21</sup> FIDH, ECCHR AND REDRESS, Breaking down barriers. Access to Justice in Europe for victims of international crimes, September 2020, 138 pages.

<sup>22</sup> Article 689-11 of the French Criminal Procedural Code.

<sup>23</sup> *Ibid.*

<sup>24</sup> FIDH, ECCHR AND REDRESS, Breaking down barriers, Above, p. 52.

<sup>25</sup> ECtHR (GC), *Medvedev and others v. France*, Judgment of 29 March 2010, Application nr 3394/03, para. 110; ECtHR, *Moulin v. France*, Judgment of 23 November 2010, Application nr. 37104/06, para. 56-60.

<sup>26</sup> ECtHR, *Moulin v. France*, Judgment of 23 November 2010, above, para. 56. No reforms have been adopted.

<sup>27</sup> Articles 35 and 39-1 of the Criminal procedural code.

<sup>28</sup> Circulaire du 31 janvier 2014 de présentation et d'application de la loi n°2013-669 du 25 juillet 2013 relative aux attributions du garde des sceaux et des magistrats du ministère public en matière de politique pénale et de mise en œuvre de l'action publique, Journal officiel, 14 février 2014. In 2021, the French Constitutional Council stated that this practice does not violate the principle of separation of powers, without however taking into account the clear jurisprudence of this Court about the lack of independence of French prosecutors. Conseil Constitutionnel, Décision n° 2021-927 QPC du 14 septembre 2021, para. 18.

<sup>29</sup> See for example Mediapart, Les remontées d'informations au garde des Sceaux devant le Conseil constitutionnel, 7 Septembre 2021.

<sup>30</sup> Open Society Justice Initiative and Trial International, Universal jurisdiction. Law and practice in Sweden, Briefing paper, April 2020, p. 13.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* See also FIDH, ECCHR AND REDRESS, Breaking down barriers, above, p. 92.

committed outside Sweden.<sup>33</sup> Victims can ask for a review by a superior of the prosecutor of decisions not to open an investigation or not to prosecute,<sup>34</sup> according to a procedure exclusively regulated by guidelines of the prosecutor general.<sup>35</sup> There is no review by an independent Court.

16. Finland. International crimes committed outside the territory can only be investigated and prosecuted by the prosecutor general,<sup>36</sup> considering whether the offence is punishable according to the law, the statute of limitation and the existence of “probable grounds” supporting the guilt of the suspect.<sup>37</sup> Decisions not to open an investigation or not to prosecute cannot be challenged by the victims.<sup>38</sup>
17. Norway. Prosecutors have broad discretion to investigate and prosecute universal jurisdiction cases: they will consider whether prosecuting the case is in the public interest.<sup>39</sup> Decisions are made by the Director of Public prosecutions and cannot be challenged by victims.<sup>40</sup>

## 2. Increased risk of impunity of corruption-related crimes

18. Prosecutors play a key role in fighting corruption and financial crimes.<sup>41</sup> Yet, in many Council of Europe member states, they face a series of challenges, especially with regard to high-level corruption,<sup>42</sup> since politicians or cronies may seek to exert illegal influence.<sup>43</sup> As a consequence, in numerous cases where evidence of corruption would seem to warrant prosecution, prosecutors decline to act and don’t bring prosecution which ought to be brought.<sup>44</sup>
19. The World Bank has underlined that “lack of prosecutorial integrity and corruption are still serious problems in many parts of the world. In numerous countries, there are few prosecutorial agencies that can honestly claim that none of their prosecutors and other staff could be tempted to engage in corrupt practices”.<sup>45</sup> The problem is particularly acute when prosecutors are not properly independent: an empirical evaluation across 78 countries highlighted the links between the independence of prosecution agencies and their willingness to prosecute crimes committed by government members and concluded that the more independent prosecutors factually are, the lower the expected level of corruption.<sup>46</sup>
20. Accountability mechanisms for individual decisions in the context of corruption-related investigations are therefore crucial<sup>47</sup>: prosecutors’ monopoly on decisions to prosecute “provides incentives for politicians who are at risk of being prosecuted to influence the procuracy by, for example, intervening in their

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<sup>33</sup> *Ibid.*

<sup>34</sup> Open Society Justice Initiative and Trial International, Universal jurisdiction. Law and practice in Sweden, above, pp. 16-17; FIDH, ECCHR AND REDRESS, Breaking down barriers, above, p. 96.

<sup>35</sup> *Ibid.*

<sup>36</sup> Open Society Justice Initiative and Trial International, Universal jurisdiction. Law and practice in Finland, Briefing paper, February 2020, p. 13.

<sup>37</sup> *Ibid.*, p. 17.

<sup>38</sup> *Ibid.*, pp. 13 and 17.

<sup>39</sup> Open Society Justice Initiative and Trial International, Universal jurisdiction. Law and practice in Norway, Briefing paper, January 2019, pp. 23, 24 and 28.

<sup>40</sup> *Ibid.*

<sup>41</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/44/47, 23 March 2020, paras. 15, 24 and 27.

<sup>42</sup> Consultative Council of European prosecutors, Opinion No 14(2019), The role of prosecutors in fighting corruption and related economic and financial crime, CCPE(2019)2, 22 November 2019, para. 16.

<sup>43</sup> 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, above, para. 20.

<sup>44</sup> *Ibid.*, para. 21.

<sup>45</sup> The World Bank, Preventing corruption in prosecution offices: understanding and managing for integrity, 2011, p.11.

<sup>46</sup> A. Van Aaken, L. P. Feld and S. Voigt, Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries., American Law and Economics Review, 12(1), March 2010, pp. 204-244.

<sup>47</sup> Consultative Council of European prosecutors, Opinion No 14 (2019), above, para. 21.

appointment process or offering bribes. If other actors can also initiate a trial, it will be more difficult to prevent being prosecuted through such means”.<sup>48</sup>

21. There is no public comprehensive analysis of the reviewability of prosecutorial discretion in corruption matters across Council of Europe jurisdictions. However, several reports suggest that the absence of checks and balances on prosecutors’ decisions not to initiate criminal proceedings in corruption cases is a salient problem in the Council of Europe region. For example, after its fourth evaluation round, GRECO recommended that Member States provide for the possibility to appeal prosecutorial decisions taken in the pre-investigative phase in corruption-related cases,<sup>49</sup> from which it can be inferred that this review does not exist in a number of States. Another study – not limited to Europe – underlined that many countries impose “doctrines of non-reviewability”<sup>50</sup> with no possibility for victims to challenge prosecutors’ decisions not to initiate criminal proceedings. Some concrete examples:
22. In Switzerland, prosecutors have a monopoly on criminal enforcement actions. Therefore, when a victim files a criminal complaint, the prosecutor has no obligation to pursue the case and the victim has no right to appeal the decision.<sup>51</sup> In Norway,<sup>52</sup> Sweden,<sup>53</sup> Finland,<sup>54</sup> and Denmark,<sup>55</sup> prosecutors’ decisions not to investigate or prosecute can only be challenged before the immediate superior prosecuting authority, and not before an independent Court. In Germany, victims must first submit a complaint to the attorney general, followed by a second complaint to the higher regional court. This latter appears ineffective in practice, characterized by extensive formalities making it “hardly possible to even file an admissible application”.<sup>56</sup> In France, it is only after a long legal battle that nongovernmental organizations devoted to fighting corruption gained standing to act as civil party before an investigative judge after the prosecutor had dropped charges.<sup>57</sup> NGO’s acting as civil party has been the only way to secure prosecutorial accountability in corruption related cases.

### **B. International and regional consensus on the need for an independent review of prosecutors’ decisions**

23. Today there is a broad international and regional consensus that victims should have the possibility to ask for an independent review of prosecutors’ decisions not to investigate or prosecute, in order to strengthen the rule of law. Many European and international authorities have underscored the need for judicial review by an independent and impartial Court.
24. United Nations. According to the United Nations Office on Drugs and Crime, “decisions to discontinue investigations should be subject to independent scrutiny”<sup>58</sup> and “examples of accountability include the undertaking of a review of a prosecutor’s decision not to prosecute a particular individual”.<sup>59</sup> The United Nations independent expert to update the Set of principles to combat impunity came to the same

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<sup>48</sup> A. van Aaken, L. P. Feld, and S. Voigt, Power Over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator, CESifo Working Paper Series No. 2245, March 2008, p. 9.

<sup>49</sup> GRECO, 4th Evaluation Round, above, p. 27

<sup>50</sup> M. C. Stephenson, Standing doctrine and anti-corruption litigation : a survey, Legal remedies for grand corruption : the role of civil society, Open Society Foundations, 2019, p. 49.

<sup>51</sup> *Ibid.*, p. 48

<sup>52</sup> Open Society Justice Initiative and Trial International, Universal jurisdiction. Law and practice in Norway, above, p. 24.

<sup>53</sup> Franet, Victim Support Services in the EU: An overview and assessment of victims’ rights in practice. Sweden, 2014, p. 21.

<sup>54</sup> Franet, Victim Support Services in the EU: An overview and assessment of victims’ rights in practice. Finland, 2014, p. 21.

<sup>55</sup> Franet, Victim Support Services in the EU: An overview and assessment of victims’ rights in practice. Denmark, 2014, p. 21.

<sup>56</sup> European Agency for Fundamental Rights, Proceedings that do justice. Justice for victims of violent crime, Part II, 2019, p. 79.

<sup>57</sup> M. Perdriel-Vaissière, France’s Biens Mal Acquis Affair: Lessons from a Decade of Legal Struggle, above, p. 17.

<sup>58</sup> United Nations Office on Drugs and Crime, United Nations Handbook on Practical Anti-Corruption, Measures for Prosecutors and Investigators, 2004, p. 32.

<sup>59</sup> United Nations Office on Drugs and Crime, The status and role of prosecutors, 2014, p. 19.

conclusion : “Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures”.<sup>60</sup> The UN Special Rapporteur on the independence of judges and lawyers underlined that “there should always be an effective oversight mechanism to ensure increased transparency and accountability”, including for decisions not to prosecute.<sup>61</sup> The Rapporteur underscored that “a number of regional standards recommend the possibility of interested parties challenging the decision of prosecutors not to prosecute”.<sup>62</sup>

25. Council of Europe. Numerous Council of Europe bodies have affirmed the importance of independent judicial review of prosecutors’ decisions not to investigate or not to prosecute. As far back as 1985, the Committee of Ministers recommended that Member States make sure that “victims have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings”.<sup>63</sup> The Committee reiterated in 2000 that victims “should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorizing parties to engage private prosecution”.<sup>64</sup>
26. The Consultative Councils of European Judges and European Prosecutors agreed as well that “A decision of the prosecutor not to prosecute should be open to judicial review”,<sup>65</sup> stressing that “(...) as soon as prosecutors have the right not to present particular cases in court, it is necessary to avoid arbitrary actions, discrimination or possible unlawful pressures from the political power and to protect the rights of victims. It is also necessary to enable any person affected, in particular the victims, to seek a review of the prosecutor’s decision not to prosecute”.<sup>66</sup> GRECO also recommends “that a possibility to appeal decisions of prosecutors taken in the pre-investigative phase be introduced”<sup>67</sup> to avoid any abuse of prosecutorial independence to the detriment of the fight against corruption.
27. The Venice Commission has advised that the absence of any legal remedy to challenge prosecutors’ decisions not to prosecute would amount to a critical problem of accountability.<sup>68</sup> Addressing the outstanding problem of lack of accountability of the prosecutor general in Bulgaria,<sup>69</sup> the Venice Commission recommended the creation of a judicial avenue in serious cases where the investigation has not been opened.<sup>70</sup>
28. Organisation for Economic Co-operation and Development (OECD). The OECD stressed that “the independence of prosecutors is a crucial issue in the fight against corruption”<sup>71</sup> and that “accountability and

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<sup>60</sup> United Nations. Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19.

<sup>61</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HCR/20/19, 7 June 2012, para. 85.

<sup>62</sup> *Ibid.*, para. 86.

<sup>63</sup> Council of Europe, Committee of Ministers, Recommendation No. R(85)11 on the Position of the victim in the Framework of Criminal Law and Procedure, Adopted on 28 June 1985 at the 387th meeting of the Ministers' Deputies, para. 7.

<sup>64</sup> Council of Europe, Recommendation Rec(2000)19 of the Committee of Ministers, above, para. 34.

<sup>65</sup> 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), above, para. 1.

<sup>66</sup> *Ibid.*, Explanatory note, para. 53.

<sup>67</sup> GRECO, 4th Evaluation Round, above, p. 28.

<sup>68</sup> 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, above, para. 45.

<sup>69</sup> See ECtHR, *Kolevi v. Bulgaria*, Judgment of 5 November 2009, Application n° 1108/02, paras. 208-213.

<sup>70</sup> European Commission for Democracy Through Law (Venice Commission), Bulgaria. Urgent Interim Opinion on the Draft New Constitution, Opinion No. 1002 / 2020, 20 November 2020, para. 71.

<sup>71</sup> Organisation for Economic Co-operation and Development (OECD), *The Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific*, 2020, p. 3.

safeguards against abuse should be considered”.<sup>72</sup> Acknowledging that decisions to not prosecute bear the highest risks of abuse and corruption,<sup>73</sup> the OECD recommended to organize mechanisms of review of such decisions. They underscored that in practice, a review by a superior prosecutor “could prove to be insufficient and may lack credibility among the larger public, who may perceive it as a non-transparent system”.<sup>74</sup> The OECD called therefore for allowing “a complaint to the judge, either directly or through the Ombudsman or other independent body”.<sup>75</sup>

29. The European Union. Article 11 of EU Directive 2012/29/EU of 25 October 2012 on “minimum standards on the rights, support and protection of victims of crime”<sup>76</sup> states that victims must “have the right to a review of a decision not to prosecute”, under procedural rules to be determined by national law. Recital nr 43 indicates that “Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority”.
30. Article 11 of the Directive must be read in conjunction with article 47 of the Charter of fundamental rights of the European Union that guarantees the right to an effective remedy and the right of access to an impartial tribunal. Since the entry into force of the Lisbon Treaty on December 1, 2009, the Charter is part of European primary law<sup>77</sup> and Member States can no longer act within the framework of Union law without respecting the Charter.<sup>78</sup> The Court of Justice of the European Union has repeatedly confirmed that article 47 of the Charter constitutes a directly invocable right and does not need to be specified by provisions of Union law or national law.<sup>79</sup> Article 47 of the Charter provides the same guarantees as Article 6 of the ECHR, but differs in two respects: it guarantees a right to an effective remedy before a Court and it is applicable to any case, not only criminal charges or disputes relating to civil rights and obligations.<sup>80</sup> As a consequence, “victims” within the meaning of article 2 of the Directive must have the right to an effective remedy before a Court when their rights and freedoms guaranteed by the Directive are violated: they should be able to ask for a review of prosecutors’ decisions not to prosecute in compliance with article 47 of the Charter, this is before an independent and impartial tribunal and with the guarantees of a fair trial.<sup>81</sup>
31. The Inter-American Human Rights System. The Inter-American Court of Human Rights has stated that a failure to investigate or an ineffective investigation may constitute violations of the right to judicial protection under Article 25 and to a fair trial under Article 8 of the Inter-American Convention.<sup>82</sup> It has also recognized the right to justice as a fundamental right of victims that includes the right to a judicial

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<sup>72</sup> *Ibid.*, p. 104.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the European Union, 14 November 2012. It applies in relation to criminal offences committed in the Union and to criminal proceedings that take place in the Union.

<sup>77</sup> P. GILLIAUX, La force obligatoire de la Charte des droits fondamentaux de l’Union européenne, *Rev.trim. dr. h.*, 2020, pp. 70 et 77.

<sup>78</sup> *Ibid.*, p. 79.

<sup>79</sup> C.J.E.U., Judgment Egenberger, 17 April 2018, aff. C-414/16, para. 78; Judgment Torubarov, 29 July 2019, aff. C-556/17, para. 56; A. K. e.a., 19 November 2019, aff. jtes no C-585/18, no C-624/18 et no C-625/18, para. 162.

<sup>80</sup> Explanations relating to the Charter of Fundamental rights (2007/C 303/02), Official Journal of the European Union, 14 December 2007, p. C 303/29 – C 303/30.

<sup>81</sup> European Agency for Fundamental Rights, Proceedings that do justice. Justice for victims of violent crime, Part II, 2019, p. 77.

<sup>82</sup> I/A Court H.R., Case of Blake v. Guatemala, Judgement of 24 January 1998, Merits, Series C No. 36, para. 97; I/ACtHR, Case of Bámaca Velásquez v Guatemala, Judgment of 25 November 2000, Series C No. 70, para. 197; I/ACtHR, Case of Las Palmeras v Colombia, Judgment of 6 December 2001, Series C No. 90, para. 65.



recourse according to article 25 and that victims must therefore be “entitled to a judicial recourse to ensure the decision to not prosecute does not unreasonably infringe on their right to justice”.<sup>83</sup>

#### **IV. PROSECUTORS’ DECISIONS NOT TO INITIATE CRIMINAL PROCEEDINGS IMPLICATE ARTICLE 6 AND ARTICLE 13**

##### **A. Article 6**

32. This Court has traditionally ruled that the Convention does not confer any right to have third parties prosecuted or sentenced for a criminal offence. To fall within the scope of Article 6, such a right must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right.<sup>84</sup> The Court has however held that Article 6 applies to proceedings involving civil-party complaints from the moment the complainant is joined as a civil party, including during the preliminary investigation stage taken on its own.<sup>85</sup>
33. We respectfully submit that this Court should consider that prosecutors’ decisions not to investigate or prosecute may implicate article 6 of the Convention under its civil limb. First, the right to reparation under civil rights includes not only compensation but also the right to truth. A violation of an international obligation which results in harm creates indeed a duty to make adequate reparation, and “the right to the truth is another form of reparation in cases of human rights violations”.<sup>86</sup> The “knowledge of the circumstances of manner, time and place, motives and the identification of the perpetrators are fundamental to making full reparations to victims of human rights violations”.<sup>87</sup> The Inter-American Court of Human Rights has also found that “the obligation to investigate [is] a form of reparation, given the need to remedy the violation of the right to know the truth in a specific case”.<sup>88</sup>
34. Secondly, the Inter-American Court of Human Rights has recognized for more than two decades that the right to a fair trial, as guaranteed by the article 8 of the Inter-American Convention on Human Rights, “includes the rights of the victim's relatives to judicial guarantees ... [and] recognizes the right ... to have [the crimes] effectively investigated, . . . those responsible prosecuted for committing said unlawful acts; [and] to have the relevant punishment, where appropriate, meted out”.<sup>89</sup> In other words, “the right to access to justice should assure, in a reasonable period of time, the right of the alleged victims or their next of kin that all the necessary is done in order to know the truth of what occurred, and where applicable, the punishment of those responsible”.<sup>90</sup> States must not only adequately investigate the circumstances

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<sup>83</sup> M. Gaitan, Prosecutorial Discretion In The Investigation And Prosecution Of Massive Human Rights Violations: Lessons From The Argentine Experience, American University International Law Review, 2015, Volume 32, p. 564.

<sup>84</sup> ECtHR (GC), Nicolae Virgiliu Tănase v. Roumania, Judgment of 25 June 2019, Application nr. 41720/13, para. 194.

<sup>85</sup> *Ibid.*, para. 207. See also ECtHR (GC), Perez v. France, Judgment of 12 February 2004, Application nr. 47287/99, paras. 67-68.

<sup>86</sup> Inter-American Commission for Human Rights, The Right to Truth in the Americas, OEA/Ser.L/V/II.152, 2014, para. 124. This Court has emphasized the importance of the right of victims “to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation”. See: ECtHR, Alexandrescu and Others v. Romania, Judgment of 24 November 2015, Applications nr. 56842/08 and 7 others, para. 22.

<sup>87</sup> *Ibid.*

<sup>88</sup> I/A Court H.R., Case of Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Series C No. 4, para. 181; Case of Kawas Fernández v. Honduras, Merits, Reparations and Costs, Judgment of 3 April 2009 Series C No. 196, para. 190; Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, Series C No. 202, para. 118

<sup>89</sup> I/A Court H.R., Case of Blake v. Guatemala, Judgement of 24 January 1998, Merits, Series C No. 36, paras. 96-97.

<sup>90</sup> I/A Court H.R., Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment of 24 November 2010, Series C No. 219, para. 219; Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of 23 September 2009, Series C No. 203, para. 133; Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012. Series C No. 250, para. 191; and the Case of Gudiel Álvarez (“Diario Militar”) v. Guatemala. Merits, Reparations and Costs. Judgment of November 20, 2012. Series C No. 253, para. 229.

surrounding a gross violation but must undertake prosecutions and disciplinary actions warranted by the investigation.<sup>91</sup>

35. In view of this growing body of jurisprudence, concordant international and regional standards calling for an independent review of prosecutors' decisions not to initiate criminal proceedings should be understood to require access for victims, including of international crimes and corruption, to an independent and impartial Court according to article 6 in order to challenge prosecutors' decisions.

## **B. Article 13**

36. Pursuant to article 13 of the Convention, everyone whose Convention rights and freedoms have been violated must have access to an effective remedy before a national authority. Convention rights and freedoms include States' procedural obligations to conduct effective investigations of alleged violations of law. To be sure, this Court has reasoned that article 13 does not guarantee an applicant a right to secure the prosecution and conviction of a third party.<sup>92</sup> However, the Court has held that, where a right of such fundamental importance as the right to life or the prohibition of torture is at stake, article 13 requires a "thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure."<sup>93</sup>
37. A remedy under Article 13 needs to be "effective in practice as well as in law".<sup>94</sup> It must be accessible, capable of providing redress in respect of the applicant's complaint and offer "reasonable prospects of success".<sup>95</sup> While the authority referred to in Article 13 may not necessarily be a judicial authority, this Court has insisted that "the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective" and has held that "judicial remedies furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13".<sup>96</sup> And "in the evaluation of the effectiveness of a remedy for the purposes of Article 13 of the Convention, the requirements of Article 6 may be relevant. As a rule, the fundamental criterion of fairness, including the equality of arms, is a constituent element of an effective remedy".<sup>97</sup>
38. In the light of international and regional standards around prosecutorial accountability recalled in this submission, victims must have access to an independent judicial review of prosecutors' decisions not to investigate or prosecute. The practice in various jurisdictions has demonstrated that a review by a superior prosecutor is ineffective in an overwhelming number of cases, and in any event does not offer the guarantees of a fair trial. Such appeal can therefore not be considered as an effective remedy under article 13. Finally, in the absence of investigations conducted by a prosecutor, a request for reparation to civil courts is often not an effective remedy since serious or complex crimes, such as corruption or international crimes, require acts of investigation that very often cannot be conducted by a civil judge or by the parties themselves.

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<sup>91</sup> D. Groome, *The Right to Truth in the Fight against Impunity*, Berkeley Journal of International Law, 2011, Vol. 29, p. 184.

<sup>92</sup> ECtHR (GC), *Öneryıldız v. Turkey*, Judgment of 30 November 2004, Application nr. 48939/99, para. 147.

<sup>93</sup> ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Judgement of 17 November 2014, Application nr. 47848/08, para. 149.

<sup>94</sup> ECtHR (GC), *Kudła v. Poland*, Judgment of 26 October 2000, Application nr. 30210/96, para. 157; ECtHR (GC), *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Application nr. 30696/09, para. 288.

<sup>95</sup> ECtHR (GC), *Vučković and Others v. Serbia*, Judgment of 25 March 2014, Application nr. 17153/11, paras. 71 and 74.

<sup>96</sup> ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, op. cit., para. 149.

<sup>97</sup> ECtHR, *Csüllög v. Hungary*, Judgment of 7 June 2011, Application nr. 30042/08, para. 46.