

**INTERVENTION AS AMICUS CURIAE BY
THE OPEN SOCIETY JUSTICE INITIATIVE
BEFORE THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS**

**IN THE CASE ANA MATILDE GÓMEZ RUILOBA v. PANAMA
PETITION 178-11**

I. INTRODUCTION

1. This intervention before the Inter-American Commission of Human Rights is presented by Open Society Justice Initiative (*Iniciativa pro-Justicia de la Sociedad Abierta* en adelante “Justice Initiative”).
2. Justice Initiative provides an analysis of the importance recognized by international law on the independence of prosecutors as a key complement or corollary to the independence of the judiciary and foundation for the rule of law (Section III). Section IV details the guarantees that, according to International standards and standards from the Council of Europe and European Union, States must organize to secure the independence of prosecutors, and in particular chief prosecutors, and protect them from reprisals or intimidation for decisions they make. These standards require transparent and accountable appointment and dismissal processes of chief prosecutors (A) and specific guarantees surrounding the decisions to remove a chief prosecutor (B). Finally, in Section V, this intervention will detail the decision issued by the European Court of Human Rights on 5 May 2020, where the Court affirmed the application of the right to a fair trial on removal processes of chief prosecutors as a way to protect their independence and the independence of the judiciary.

II. DECLARATION OF INTEREST

3. Justice Initiative utiliza la ley para proteger y empoderar a las personas de todo el mundo. A través del litigio, incidencia, investigación y asistencia técnica, Justice Initiative promueve los derechos humanos y desarrolla capacidades legales para lograr sociedades abiertas. Nuestro personal tiene su sede en Abuja, Bruselas, Berlín, La Haya, Londres, Ciudad de México, Nueva York, París y Washington, D.C. Justice Initiative promueve la responsabilidad por crímenes internacionales, combate la discriminación racial y la apatridia, apoya la reforma de la justicia penal, combate los abusos sobre cuestiones relacionadas con la seguridad nacional y medidas contra el terrorismo, promueve la libertad de información y expresión, combate la corrupción relacionada con la explotación de los recursos naturales, entre otras cosas.
4. Justice Initiative ha presentado escritos en calidad de *amicus curiae* y representado a víctimas en casos ante ambos órganos que componen el Sistema Interamericano de Derechos Humanos. Entre ellos: *Yean and Bosico v. República Dominicana*, *Gomes Lund v. Brasil*, *Claude Reyes v. Chile*, *Herrera Ulloa v. Costa Rica*, *Gudiel Álvarez et al. (Diario Militar) v. Guatemala*, *Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana*, y *Vereda La Esperanza v. Colombia*.
5. Justice Initiative tiene amplia experiencia en temas de independencia judicial y procesal, incluyendo en el campo de designación de fiscales y magistrados. Justice Initiative ha presentado

amicus curiae ante el Tribunal Europeo de Derechos Humanos (Kovesi v. Romania, 5 mayo 2020, remoción del fiscal anti-corrupción), en el Tribunal de Distrito en Materia Administrativa en la Ciudad de México (Derechos humanos y A.C. v. Titular de la Fiscalía General de la República y otros, caso pendiente, designación del fiscal federal anti-corrupción) y en el Consejo de Estado de Colombia (Alejandro Jimenez Ospina y otros v. Presidencia de la Republica y otros, 27 febrero 2020, nulidad del Decreto 1163 de 2019, tramite para la integración de la terna de candidatos a Fiscal General de la Nación). Justice Initiative también coordinó un estudio comparado de nueve países, analizando los modelos de independencia, rendición de cuentas y eficacia de los fiscales, titulado “*Promoting Prosecutorial Accountability, Independence and Effectiveness. Comparative research*” (Promoviendo la rendición de cuentas, la independencia y la eficacia de las fiscalías. Estudio comparado)¹; OSJI publicó junto a la Comisión Internacional de Juristas un informe titulado “*Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners*” (Fortalecimiento desde dentro: Derecho y práctica en la selección de jueces y comisionados de derechos humanos). Este informe examina los procesos de selección de magistrados y comisionados regionales, incluyendo aquellos de la Corte Interamericana de Derechos Humanos, identifica buenas prácticas y formula recomendaciones.²

III. THE INDEPENDENCE OF PROSECUTION SERVICES: A KEY ELEMENT OF THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY

A. Role of prosecutors

6. 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.
7. The structure, organization and role of prosecution services vary from one state to another. They can be part of the executive power, of the judiciary or be completely independent from both branches. Functions of prosecutors may also vary. For example, some operate under a system of discretionary prosecution (the “opportunity principle”) while others operate under a system of mandatory prosecution (the “legality principle”).

¹ Open Society Institute Sofia y Open Society Justice Initiative, “Promoting Prosecutorial Accountability, Independence and Effectiveness. Comparative research” (Promoviendo la rendición de cuentas, la independencia y la eficacia de las fiscalías. Estudio comparado) (2009), disponible en <https://www.justiceinitiative.org/publications/promoting-prosecutorial-accountability-independence-and-effectiveness>

² Open Society Justice Initiative y International Commission of Jurists, *Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners* (Fortalecimiento desde dentro: Derecho y práctica en la selección de jueces y comisionados de derechos humanos) (2017), disponible en <https://www.justiceinitiative.org/publications/strengthening-within-law-and-practice-selection-human-rights-judges-and-commissioners>

³ 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. 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.

8. 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. Both the United Nations Office on Drugs and Crime and the Venice Commission (the Council of Europe independent consultative body on issues of constitutional law) have underscored the necessity for prosecutors 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 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. Prosecutors must be independent

9. United Nations and the Council of Europe have reached a broad consensus about the need to guarantee the independence of prosecutors as a fundamental component of the administration of justice.⁶ 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.⁷ Prosecutors must indeed be sufficiently independent to take their decisions objectively and regardless of any undue interference or pressure. Where such 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.”⁸
10. The United Nations Special Rapporteur on the independence of judges and lawyers has underscored that “it is essential that prosecutors are able to play their roles independently, impartially, objectively and in a transparent manner in the discharge of their functions”,⁹ an opinion shared by

⁴ 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, paras. 12 and 13.

⁵ Consultative Council of European prosecutors, *Opinion No 13(2018): “Independence, accountability and ethics of prosecutors”*, 23 November 2018, para. 6.

⁶ United Nations Office on Drugs and Crime, *The status and role of prosecutors*, supra n.4, 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. 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*, supra n.4, 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.

⁷ 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 subgroup 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.

⁸ Speech of the President of the International Association of Prosecutors, James Hamilton, at the opening ceremony of the 18th Annual Conference of the International Association of Prosecutors, on the theme “The prosecutor and the rule of law”, held in Moscow from 8 to 12 September 2013, in United Nations Office on Drugs and Crime, *The status and role of prosecutors*, supra n.4, p. 7.

⁹ United Nations Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, supra n.6, para. 24.

the United Nations Office on Drugs and Crimes (UNODC).¹⁰ 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”.¹¹ The Council also emphasized that any influence that may affect the independence of prosecution is likely to affect the entire trial.¹²

11. In a groundbreaking decision issued on 5 May 2020 - that we will further detail in Section V - the European Court of Human Rights enshrined the principle of the independence of prosecutors “which is, according to Council of Europe and other international instruments, a key element for the maintenance of judicial independence.”¹³ The Court referred to the numerous instruments of the Council of Europe and the United Nations that affirmed this principle of the independence.¹⁴
12. As highlighted by the Venice Commission, prosecutorial independence 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”.¹⁵ The Venice Commission also recalled that “political interference in prosecution is probably as old as society itself”.¹⁶ 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, creating impunity.¹⁷ These non-autonomous decisions jeopardize the fairness and the credibility of the administration of justice and consequently undermine the rule of law.
13. Prosecutorial independence strengthens efforts to combat corruption, especially political or grand corruption.¹⁸ As underscored by the anti-corruption body of the Council of Europe, Greco, “the entire discussion about the independence of the criminal justice system should start with the capability of the prosecution systems to act autonomously from the other branches of government and to take decisions based solely on the merits of the cases”.¹⁹ 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

¹⁰ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 8.

¹¹ Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, 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.

¹² Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, para. 32.

¹³ *Kövesi v. Romania*, ECtHR, 5 May 2020, Application no. 3594/19, para. 208.

¹⁴ *Ibidem*, para 80-93.

¹⁵ 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, supra n.4, para. 18.

¹⁶ 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, supra n.4, para. 20.

¹⁷ *Ibidem*, para. 21.

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, 2017, p. 4.

¹⁹ GRECO, Group of States against Corruption. Anti-corruption Body of the Council of Europe, 4th Evaluation Round, supra n.18, p. 25.

officials.²⁰ It concluded that the more independent prosecutors are in practice, the lower the expected level of corruption in the countries under study.

C. Link between prosecutorial and judicial independence

14. The independence of prosecutors is largely seen today as the corollary of the independence of judges, even though the scope and elements of their respective independence are not identical.²¹
15. The European Court of Human Rights has underscored the importance for investigative authorities to be independent, ruling that “the persons responsible for carrying out investigation must be independent and impartial, in law and in practice”²². The Court ruled also that “in a democratic society both the courts and the investigation authorities must remain free from political pressure”.²³
16. In its plan of action on “Strengthening judicial independence and impartiality” adopted in 2016, the Committee of Ministers of the Council of Europe made it clear that the reinforcement of the independence and impartiality of the judiciaries requires to strengthen both the independence of judges and of prosecutors.²⁴ In a jointly adopted opinion, the Consultative Council of European Judges and the Consultative Council of European Prosecutors stated that the independence of the administration of justice requires from both judges and prosecutors not to come under any kind of undue influence in individual cases.²⁵ They added that “the independence of prosecutors is a further safeguard in maintaining the independence of judges, it is crucial in a democratic society and an essential condition for the independence of the entire justice system”.²⁶
17. Members of the European Network of Councils for the Judiciary (an organization that unites national bodies in support of the Judiciary from European Union countries) acknowledged that the independence of judges and the independence of prosecutors are both equally crucial in fostering and enhancing the rule of law.²⁷

IV. GUARANTEES TO SECURE INDEPENDENCE OF CHIEF PROSECUTORS AND FREEDOM FROM REPRISALS OR INTIMIDATION FOR DECISION MAKING

18. The independence of prosecution services is secured through various complementary rules that protect them from undue interference in their activities. These rules cover at the very least: the process of appointment, transfer, promotion and discipline of members of the office; the allocation of sufficient resources for executing the tasks; the guarantees of non-interference in the work of prosecutors other than their hierarchy in the office; a functional immunity for actions carried out in

²⁰ 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.

²¹ *Ibidem*, para. 3. “Déclaration de Bordeaux”, supra n.6, para. 3.

²² *Kolevi v. Bulgaria*, ECtHR, 5 November 2009, Application no. 1108/02, para. 193

²³ *Guja v. Moldova*, ECtHR (Grand Chamber), 12 February 2008, Application no. 14277/04, para. 86.

²⁴ Council of Europe, Committee of Ministers, Plan of action on “Strengthening judicial independence and impartiality”, supra n.11.

²⁵ “Déclaration de Bordeaux”, supra n.6, paras. 5 and 8.

²⁶ 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 for the attention of the Secretary General of the Council of Europe, SG/Inf(2016)3rev, 24 March 2016, para. 35.

²⁷ European Network of Councils for the Judiciary, Independence and accountability of the judiciary and of the prosecution. Performance Indicators 2015, supra n.7, p. 72.

good faith in pursuance of their duties; and transparent and accountable appointment and dismissal processes of chief prosecutors.²⁸

19. As recalled by the Committee of Ministers of the Council of Europe, States have indeed the responsibility to “take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference”.²⁹ It also underscored that “public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law.”³⁰
20. This submission will more specifically focus on two categories of safeguards that protect prosecutorial independence: the requirement of transparent and accountable appointment and dismissal process of chief prosecutors, and the detailed guarantees that must surround decisions of removal of chief prosecutors.

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

21. International and regional bodies unanimously agree that the appointment and dismissal process of chief prosecutors should be robust in order to secure their independence and the independence of the prosecution services as a whole. 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”.³¹ 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 chief prosecutors can therefore be a key vulnerability for prosecutorial independence.³²
22. This is the reason why the independence of prosecution services has been closely linked with existence of merit-based, transparent and accountable appointment and dismissal process of their heads, by all international and regional bodies (the Venice Commission,³³ the Anti-corruption Body of the Council of Europe (Greco),³⁴ the United Nations Office on Drugs and Crime,³⁵ the United

²⁸ 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, supra n.4, para. 32. Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, paras. 24-45.

²⁹ 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, supra n.3, para. 11.

³⁰ *Ibidem*, para. 16.

³¹ European Commission for Democracy Through Law (Venice Commission), supra n.4, para. 34.

³² European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, supra n.18, p. 4.

³³ European Commission for Democracy Through Law (Venice Commission), supra n.4, para. 34-40.

³⁴ GRECO, Group of States against Corruption. Anti-corruption Body of the Council of Europe, 4th Evaluation Round, supra n.18, p. 26.

³⁵ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, pp. 11-12.

Nations Special Rapporteur on the independence of judges and lawyers,³⁶ the Inter-American Commission on Human Rights,³⁷ and the European Commission³⁸).

23. 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. However, it is generally accepted that the applicable process should avoid political nominations or dismissal processes that expose them to political pressure or influence.
24. Regarding the appointment of chief prosecutors, the Venice Commission has strongly recommended the need to find a balance between the requirement of democratic legitimacy of such appointments and the requirement of depoliticization.³⁹ Clear criteria for recruitment should be established,⁴⁰ preferably by law⁴¹. 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.⁴² 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”⁴³, or seeking the advice from qualified persons, having suitable expertise (such as representatives of the legal community or civil society).⁴⁴
25. 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 independence of prosecution services. Removals could indeed be used abusively to intimidate, threaten or punish a chief prosecutor for the way they carry out their professional activities or for failure to conform to the “expectations” of a government. Therefore, as underlined by the UNODC and the Venice Commission, there is a need for an “established, transparent and accountable regime for the removal of the head of the prosecution service”⁴⁵ that will serve to “protect independence of the service”.⁴⁶ We will now detail in the next section the specific safeguards that should surround the dismissal process of chief prosecutors in order to guarantee their independence.

B. Decisions of removal of chief prosecutors must be surrounded by appropriate safeguards

26. According to International and European standards, the removal process of a chief prosecutor should respect three fundamental safeguards in order to preserve their independence: the decision

³⁶ United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6, para. 63-65.

³⁷ 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. 103.

³⁸ European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, supra n.18, p. 4.

³⁹ European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 18.

⁴⁰ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 11.

⁴¹ Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, para. 24.

⁴² European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, supra n.18, p. 9.

⁴³ European Commission for Democracy Through Law (Venice Commission), supra n.4, para. 34

⁴⁴ *Ibid.*, para. 35. United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 11. United Nations, Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6, para. 63. Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, para. 24.

⁴⁵ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 12. European Commission for Democracy Through Law (Venice Commission), supra n.4, para. 39 and 40.

⁴⁶ *Ibidem.*

should be based on objective criteria anchored in the law; the liability of chief prosecutor should respect the principle of functional immunity; and due process rights should be respected.

1. Criteria for removal must be objective and anchored in the law

27. The UN Special Rapporteur on the independence of judges and lawyers stated that the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities.⁴⁷ The Committee of Ministers of the Council of Europe, the Consultative Council of European Judges and the Consultative Council of European Prosecutors unanimously consider that the careers of public prosecutors, including mobility, disciplinary proceedings and removals should never be the result of arbitrary decisions: they should be governed by law, which should define objective criteria for them.⁴⁸

28. As underlined by UNODC and the Venice Commission, these rules apply to chief prosecutors.⁴⁹ Where a chief prosecutor is appointed for a fixed-term, the legal implication is indeed that they serve for the entirety of the fixed term unless there are specific objective grounds for their dismissal anchored in the law. 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. Prosecutors should benefit from functional immunity

29. Prosecutors, including chief prosecutors, must be able to perform their functions independently without unjustified exposure to civil, penal or other liability that could lead to their removal.⁵⁰ They should therefore benefit from functional immunity for actions carried out in good faith in pursuance of their duties.⁵¹ In other words, prosecutors, similar to judges, should not be held personally responsible for their choices of public action which are based on a personal intellectual and legal analysis.⁵² Liability should be limited to situations where prosecutors acted in bad faith, committed a disciplinary offence or clearly failed to do their work properly.⁵³ Finally, criminal liability should be limited to acts considered as criminal offences by the national law at the moment they were

⁴⁷ United Nations, Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6, para. 70.

⁴⁸ 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, supra n.3, para. 5(b) and 5(e). “Declaration de Bordeaux”, supra n.6, para. 8. See also United Nations, Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6, para. 69.

⁴⁹ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 12. European Commission for Democracy Through Law (Venice Commission), supra n.4, para. 39 and 40.

⁵⁰ Consultative Council of European Prosecutors, Opinion no. 9(2014): “European norms and principles concerning prosecutors”, 17 December 2014, para 36. United Nations, Guidelines on the Role of Prosecutors, supra n.4, para.4. 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, supra n.3, para. 11.

⁵¹ European Commission for Democracy Through Law (Venice Commission), on “European Standards as Regards the Independence of the Judicial System: Part II—The Prosecution Service”, supra n.4, para. 61.

⁵² Consultative Council of European Prosecutors, Opinion No 13(2018), supra n.5, para 47.

⁵³ European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 40. United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p.34. Consultative Council of European prosecutors, Opinion No 13(2018), supra n.4, para. 48.

committed: the scope of existing offences can by no means be extended to acts which previously were not criminal offences.⁵⁴

3. Due process rights apply to decisions of removal of chief prosecutors

30. The guarantees of a right to a fair trial have been widely recognized by International and European bodies as applicable to decisions affecting the career of prosecutors, including chief prosecutors, in order to protect their independence (c). These guarantees include the right to access to court, the right to a fair hearing, the right to adversarial proceedings and equality of arms, and the right to an effective remedy (a). The right to access to courts requires that courts are independent and impartial (b).

a. *Guarantees of the right to a fair trial include access to a court, fair hearing, adversarial proceedings and equality of arms, and right to an effective remedy*

31. The right of access to court includes the right to institute proceedings before a court.⁵⁵ A court 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.⁵⁶ The court must have jurisdiction to examine all questions of fact and law relevant to the dispute before it.⁵⁷ Finally, a power of decision is inherent in the very notion of a court: an institution that 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.⁵⁸

32. The right to a fair hearing before a tribunal requires that parties to the proceedings be granted the right to present the observations which they regard as relevant to their case, and these observations must be duly considered by the court.⁵⁹

33. The right to adversarial proceedings constitutes another key component of a fair hearing. This involves (1) the right to “have knowledge of, and comment on, all evidence adduced or observations filed”;⁶⁰ (2) the right to have sufficient time to familiarize oneself with the evidence before the court;⁶¹ and (3) the right to produce evidence.⁶²

34. A fair trial requires also the respect of equality of arms, which means that 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.⁶³

35. Access to an effective remedy is critical: any individual should have a right to claim an effective

⁵⁴ *Del Rio Prada v. Spain*, ECtHR, 21 October 2013, Application no 42750/09, para. 114-117. *Kokkinakis v. Greece*, ECtHR, 25 May 1993, Application no 14307/88, para. 52.

⁵⁵ *Golder v. the United Kingdom*, ECtHR, 21 February 1975, Application no. 4451/70, para. 36; *Nait-Liman v. Switzerland*, ECtHR (Grand Chamber), 15 March 2018, Application no. 51357/07, para. 113.

⁵⁶ *Belilos v. Switzerland*, ECtHR, 29 April 1988, Application no. 10328/83, para. 64.

⁵⁷ *Ramos Nunes de Carvalho e Sá v. Portugal*, ECtHR (Grand Chamber), 6 November 2018, Application nos. 55391/13, 57728/13 and 74041/13, paras. 176-177.

⁵⁸ *Bentham v. the Netherlands*, ECtHR, 23 October 1985, Application no. 8848/80, para. 40.

⁵⁹ *Donadze v. Georgia*, ECtHR, 7 March 2006, Application no. 74644/01, para. 35.

⁶⁰ *Vermeulen v. Belgium*, ECtHR (Grand Chamber), 20 February 1996, Application no. 19075/91, para. 33.

⁶¹ *Krčmář and Others v. Czech Republic*, ECtHR, 3 March 2000, Application no. 35376/97, para. 42.

⁶² *Clinique des Acacias and Others v. France*, ECtHR, 13 October 2005, Application nos. 65399/01, 65406/01, 65405/01, and 65407/01, para. 37.

⁶³ *Regner v. the Czech Republic*, ECtHR (Grand Chamber), 19 September 2017, Application no. 35289/11, para. 146. *Dombo Beheer B.V. v. The Netherlands*, ECtHR, 27 October 1993, Application no. 14448/88, para. 33.

remedy before a national authority, for arguable claims that their rights have been violated, in order to have their claim decided and to obtain redress.⁶⁴ A remedy needs to be “effective in practice as well as in law”.⁶⁵ It should be accessible, fulfilling the obligation of promptness, capable of providing redress in respect of the applicant’s complaint, and offering “reasonable prospects of success”.⁶⁶ The merits of the complaint must be properly examined by the authority. The exercise of the remedy must not be unjustifiably hindered by acts or omissions of the authorities.⁶⁷ The effectiveness of the remedy requires also taking realistic account both of the existence of formal remedies and of the “general legal and political context in which they operate as well as the personal circumstances of the applicant”.⁶⁸

36. The European Court of Human Rights also ruled that when an applicant relies on the argument that an existing domestic remedy is ineffective, the Government must demonstrate the practical effectiveness of the remedy that they have suggested, in the particular circumstances of the case, providing relevant examples of case-law from national courts in a similar case.⁶⁹

b. Courts must be independent and impartial

37. The independence and the impartiality of a Court are critical components of the right to a fair trial. The independence is guaranteed in particular by the manner in which judges are appointed, the duration of their term of office, and by the existence of appropriate guarantees against outside pressures.⁷⁰ While no single model of appointment system for judges exists, international bodies unanimously agree that judges should be selected on the basis of objective criteria and merits, having regard to their qualifications, integrity, ability and efficiency.⁷¹ Moreover, the appointment process should not be entirely left to the executive or legislative powers: even when appointment are made by the head of the State, the Government or the Parliament, an independent judicial body should assess the qualifications of the candidates and provide with an opinion on their merits.⁷²

⁶⁴ *Klass and Others v. Germany*, ECtHR, Application no. 5029/71, 6 September 1978, para.64.; *Silver and Others v. the United Kingdom*, ECtHR, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983, para.113.

⁶⁵ *Ilhan v. Turkey*, ECtHR (Grand Chamber), Application no. 22277/93, 27 June 2000, para. 97, *Kudla v. Poland*, ECtHR (Grand Chamber), 26 October 2000, Application no. 30210/96, para. 157; *M.S.S. v. Belgium and Greece* ECtHR (Grand Chamber), 21 January 2011, Application no. 30696/09, para. 288.

⁶⁶ *Vučković and Others v. Serbia*, ECtHR (Grand Chamber), 25 March 2014, Application no. 17153/11 and 29 other cases, paras. 71 and 74. *Çelik and İmret v. Turkey*, ECtHR, Application no. 44093/98, 26 October 2004, para.59

⁶⁷ *Aksoy v. Turkey*, ECtHR, Application no. 21987/93, 18 December 1996, para. 95. *Aydın v. Turkey*, ECtHR, 25 September 1997, Application no. 57/1996/676/866, para.103.; *Paul and Audrey Edwards v. the United Kingdom*, ECtHR, 14 March 2002, Application no. 46477/99, para. 96.

⁶⁸ *Đorđević v. Croatia*, ECtHR, 24 July 2012, Application no. 41526/10, 24 July 2012, para. 101.

⁶⁹ *Efstathiou v. Greece*, ECtHR, 1996, para.49. *Kudla v. Poland*, ECtHR (Grand Chamber), 26 October 2000, Application no. 30210/96, para.159.

⁷⁰ *Langborger v. Sweden*, ECtHR, 22 June 1989, Application no 11179/84, para. 32.

⁷¹ Council of Europe, Recommendation Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 44. European Commission for Democracy Through Law (Venice Commission), Judicial appointments, Report adopted by the Venice Commission at its 70th Plenary Session, 16-17 March 2007, paras 3-4. UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August - 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para. 10.

⁷² Council of Europe, Recommendation Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 46-47. Council of Europe, European Charter on the Statute of for Judges, 8-10 July 1998, para. 1.3. European Commission for Democracy Through Law (Venice Commission), Judicial appointments, a above, paras. 4 and 14. Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), 17 November 2010, CCJE(2010)3 Final, para. 5.

38. Judicial independence demands that individual judges exercise their function “free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason”.⁷³ Judges should refrain from having inappropriate connections with the executive and legislative branches of government and being influenced by them.⁷⁴
39. Judges must also be impartial; this is without prejudice or bias. Impartiality has a subjective and an objective component. The subjective component relates to the personal conviction or behavior a given judge has in a particular case, such as, for example, the expression of hostility or the arrangement made by a judge to have a case assigned to them for personal reasons. The objective component of the impartiality requires to determine whether, apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In that perspective, appearances are also important: as underlined by the European Court of Human Rights, “justice must not only be done, it must also be seen to be done”.⁷⁵ Courts must indeed inspire confidence in the public.⁷⁶ The facts underlying a possible lack of objective impartiality most generally relate to hierarchical, professional, financial or personal links the judge has with the persons involved in the proceedings.⁷⁷ The nature and the degree of such relationship must be scrutinized in each individual case to determine if it indicates a lack of impartiality on the part of the tribunal. The appearance that a judge is not impartial can result not only from an apparent conflict of interest but also by the conduct of a judge outside the courtroom.⁷⁸
40. As a consequence, any judge who is unable to decide the matter impartially or in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw from the case.⁷⁹ If the judge does not withdraw on their own and a party asks their exclusion to the Court for lack of impartiality, the Court must address the arguments submitted by the party in support of their request.⁸⁰ The existence of national rules regulating the withdrawal of judges is also of importance to guarantee the respect of impartiality of judges and courts: such rules manifest the national legislature’s concern to remove all reasonable doubts as to the impartiality of the judge concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns.⁸¹

c. Guarantees of a fair trial apply to decisions of removal of chief prosecutors

41. The guarantees of a fair trial are widely recognized by International and European standards as protecting the independence of prosecutors and therefore as being applicable to decisions affecting their career, including for chief prosecutors.⁸²

⁷³ The Bangalore Principles of Judicial Conduct, United Nations Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, 27 July 2006, para 1.1.

⁷⁴ *Ibidem*, para 1.3.

⁷⁵ *Micallef v. Malta*, ECtHR (Grand Chamber), 15 October 2009, Application no 17056/06, para. 98.

⁷⁶ *Ibidem*.

⁷⁷ *Pescador Valero v. Spain*, ECtHR, 17 June 2003, Application no. 62435/00, para. 27. *Tocono and Profesorii Prometeiști v. Moldova*, ECtHR, 26 June 2007, Application no. 32263/03, para.31. *Micallef v. Malta*, ECtHR, (Grand Chamber), 15 October 2009, Application no. 17056/06, para. 102.

⁷⁸ *Rustavi 2 Broadcasting Company LTD and others v. Georgia*, ECtHR, 18 July 2019, Application no 16812/17, para. 332.

⁷⁹ *Micallef v. Malta*, ECtHR (Grand Chamber), 15 October 2009, Application no 17056/06, para. 98. See also The Bangalore Principles of Judicial Conduct, supra n.73, para. 2.5.

⁸⁰ *Harabin v. Slovakia*, ECtHR, 20 December 2012, Application no 58688/11, para. 136.

⁸¹ *Micallef v. Malta*, ECtHR (Grand Chamber), 15 October 2009, Application no 17056/06, para. 99.

⁸² Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6,

42. The UN Special Rapporteur on the independence of judges and lawyers made it clear that the protection of prosecutorial independence requires that dismissals of prosecutors, disciplinary and other proceedings should be subject to a strict framework of rules and that prosecutors should in any case have the right to challenge, including in court, all decisions concerning their career.⁸³ The UN Guidelines on the Role of Prosecutors also provide that prosecutors should benefit from the right to a fair hearing in disciplinary proceedings and should be able to submit to an independent review the decisions made in this context.⁸⁴ The UNODC adds 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”.⁸⁵ The same principles should of course apply to criminal proceedings.
43. Equivalent standards have been endorsed by the Council of Europe. The Committee of Ministers of the Council of Europe urges State members to give prosecutors access to a satisfactory grievance procedure, including access to a tribunal, if their legal status is affected. They should benefit from the guarantee of a fair and objective evaluation in disciplinary proceedings with the possibility to submit any decision to an independent and impartial review.⁸⁶ The Venice Commission complemented saying that in cases of compulsory transfer, discipline and removal, the prosecutor concerned should have a right to be heard in adversarial proceedings and have the right to appeal the decision to a court.⁸⁷ The Venice Commission also specifically added that a Prosecutor General should always benefit from a fair hearing in dismissal proceedings.⁸⁸
44. The Consultative Council of European Prosecutors stated that in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), disciplinary proceedings must be organized with a number of guarantees. Proceedings should be based on a law for clear and determined reasons, they should be transparent, apply established criteria and be held before a body which is independent from the executive. Concerned prosecutors should be heard and allowed to defend themselves with the help of their advisers, be protected from any political influence, and have the possibility to exercise the right of appeal before a court. Finally, any sanction must be necessary, adequate and proportionate to the disciplinary offence.⁸⁹
45. As we will develop in the next section, the European Court of Human Rights has recently ruled that the right to a fair trial guaranteed by article 6.1 of the European Convention applies under its civil head to removal of a chief prosecutor in order to protect their independence.⁹⁰

supra n.6. 58 and 70. 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. *Kövesi v. Romania*, ECtHR, 5 May 2020, Application no. 3594/19.

⁸³ Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, supra n.6, para. 86.

⁸⁴ United Nations, Guidelines on the Role of Prosecutors, supra n.4, para. 21.

⁸⁵ United Nations Office on Drugs and Crime, The status and role of prosecutors, supra n.4, p. 34.

⁸⁶ 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, supra n.3, para. 5e.

⁸⁷ European Commission for Democracy Through Law (Venice Commission), supra n.4, para.52. See also European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 33.

⁸⁸ European Commission for Democracy Through Law (Venice Commission), supra n.4, para 40. European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, 2015, p. 18.

⁸⁹ Consultative Council of European prosecutors, Opinion No 13(2018), supra n.5, para. 47.

⁹⁰ *Kövesi v. Romania*, ECtHR, 5 May 2020, Application no. 3594/19, para. 124.

V. STANDARDS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE REMOVAL OF CHIEF PROSECUTORS

46. As aforementioned, on 5 May 2020, the European Court of Human Rights, set the important precedent of affirming the principle of the application of the right to a fair trial to removal processes of chief prosecutors as a way to protect their independence and the independence of the judiciary.⁹¹
47. The applicant, Laura-Codruța Kövesi, had been prematurely removed from her three-year mandate of anti-corruption chief prosecutor of Romania, by the Minister of Justice. She complained that she had been denied access to a court to challenge the premature termination of her mandate and that her position had been terminated as a result of the views she had expressed publicly, in her professional capacity, concerning legislative reforms affecting the judiciary.
48. Three lessons can be drawn from the decision of the European Court. First, the Court enshrined the principle of the independence of chief prosecutors as a fundamental element for the maintenance of judicial independence.⁹² Therefore, the Court ruled that when assessing the grounds of the removal of a chief prosecutor, particular consideration must be given to both the nature of their judicial function as an independent branch of State power, and to the principle of their independence.⁹³
49. Secondly, the Court ruled that the guarantees of a fair trial apply to removals and dismissals of chief prosecutors. The right to a fair trial is enshrined in the article 6.1 of the European Convention of Human Rights and applies to disputes about “civil rights and obligations” and to criminal proceedings. The terms of the Convention have an autonomous meaning and cannot be interpreted by the Court solely by reference to the State’s domestic law. The European Court had already stated in the past that employment disputes concerning public servants, including about their dismissal, constitute disputes about civil rights and obligations that fall in principle within the scope of article 6.1. of the Convention.⁹⁴ The Court added that civil servants can only be excluded from the beneficence of the protection of the right of a fair trial if the State demonstrates the fulfillment of two conditions. Firstly, the State must have expressly excluded by law the access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s interest. Applying this case-law to the situation of the removal of a chief prosecutor, the European Court said in its decision of 5 May 2020, that “the absence of any judicial control of the legality of (such) decision of removal cannot be in the interest of the State” since “senior members of the judiciary, including prosecutors, should enjoy, as other citizens, protection from arbitrariness from the executive power”.⁹⁵ According to the Court, only an oversight by an independent judicial body of the legality of a removal decision is able to render this protection effective.⁹⁶ The Court concluded therefore that a dispute about the removal of a chief prosecutor constitutes a dispute about a civil right according to article 6.1 of the Convention and that dismissed or removed prosecutors must benefit from the right to a fair trial.
50. Finally, the European Court clearly stated that the absence of a legal remedy to challenge the decision to remove a chief prosecutor is irreconcilable with the essence of the right to access a

⁹¹ *Ibidem*.

⁹² *Ibidem*, para. 208. See also paras 80-93 where the Court refers to the growing International and European standards promoting the independence of prosecutors.

⁹³ *Ibidem*.

⁹⁴ *Vilho Eskelinen and Others v. Finland*, ECtHR (Grand Chamber), 19 April 2007, Application no. 63235/00, para. 62.

⁹⁵ *Kövesi v. Romania*, ECtHR, 5 May 2020, Application no. 3594/19, para 124.

⁹⁶ *Ibidem*.

court.⁹⁷ To comply with the requirements of the right to a fair trial, such remedy must include the examination of the fulfilment of the legal conditions for its validity, the relevance of the alleged facts on which the removal is based on, and the appropriateness of the reasons underlying the removal.

⁹⁷ *Ibidem*, paras. 154 -156.