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CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)

CCPE Opinion No. 16 (2021):

Implications of the decisions of international courts and treaty bodies

as regards the practical independence of prosecutors

I. Introduction: purpose and scope of the Opinion

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared the present Opinion on the implications of the decisions of international courts and treaty bodies as regards the practical independence and effective autonomy of prosecutors and related aspects.
2. This topic was selected by the CCPE with a view to highlighting the impact of decisions of international courts and treaty bodies on the independence of prosecutors. Although many of such decisions focus rather on the independence of the judiciary, this independence is closely linked to the independence of prosecutors since the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary¹. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability². Consequently, appropriate provisions should be adopted in member States, in parallel

¹ See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.

² See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section V.

to the independence of judges, to strengthen likewise the independence, accountability and ethics of prosecutors³.

3. Systems of criminal justice vary throughout Europe. The different systems are rooted in different legal cultures and there is consequently no uniform model for all states. There are, for example, important differences between systems which, in the framework of criminal procedure, are adversarial in nature and those which are inquisitorial⁴. Nevertheless, over the centuries, European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems. This borrowing across systems has led to a degree of convergence⁵.
4. The most important convergence factor, and one that really brings all these systems together, is the requirement of the independence of the prosecution services as a prerequisite for the rule of law and the independence of the judiciary, as mentioned in para 2 of the present Opinion. Because of the serious consequences for the individual of a criminal investigation and trial, since it may lead to conviction and punishment, the prosecutor must act cautiously and fairly in deciding whether to prosecute, and for what charges. In this regard, a prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may therefore be subject to certain professional restrictions aiming to safeguard his or her own impartiality and integrity⁶.
5. The independence of prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised. Thus, akin to the independence secured to judges, the independence of prosecutors is not a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned⁷.
6. In countries, where the public prosecution is part of, or subordinate to, the government, the state must ensure that the nature and the scope of its powers with respect to the public prosecution is clearly established by law, and that the government exercises its powers in a transparent way and in accordance with international treaties and standards, national legislation and general principles of law⁸.
7. The independence and autonomy of prosecutors and prosecution services should therefore be encouraged⁹ and guaranteed by law, at the highest possible level, in a

³ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section i.

⁴ See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 7.

⁵ See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 9.

⁶ See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), paras 16-17.

⁷ See the CCPE Opinion No. 4 (2009) on relations between judges and prosecutors in a democratic society, para 27.

⁸ See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 33.

⁹ See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.

manner similar to that of judges. In countries, where the public prosecution is independent of the government, the state must consequently take effective measures to guarantee that the nature and the scope of this independence are established by law¹⁰ and not just by administrative regulations. A fully independent prosecution system remains a guarantee of unconditional impartiality of prosecutors.

8. The case-law of international courts and decisions of treaty bodies may also play an important role. The present Opinion aims at examining the impact for the independence of the prosecution services and of individual prosecutors of such case-law and decisions.
9. This Opinion has been prepared on the basis of the European Convention on Human Rights (hereafter ECHR) and the relevant case-law of the European Court of Human Rights (hereafter ECtHR), as well as of the case-law of the Court of Justice of the European Union (hereafter CJEU) and relevant United Nations treaty body decisions.
10. This Opinion is also based on the previous CCPE Opinions, in particular the Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the Rome Charter, and the Opinion No. 13 (2018) on independence, accountability and ethics of prosecutors, as well as on the Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system (hereafter Recommendation Rec(2000)19) and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system (hereafter Recommendation Rec(2012)11).
11. The CCPE has also gained an insight into the UN Guidelines on the Role of Prosecutors adopted in 1990¹¹, as well as into the Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted in 1999 by the International Association of Prosecutors (IAP)¹².
12. In the course of the preparation of the present Opinion, the CCPE has based itself on the significant contributions provided by Mr João Manuel da Silva Miguel (Portugal), Mr José Manuel Santos Pais (Portugal), Ms Jana Zezulova (Czech Republic) and Ms Ioana Bara-Bușilă (Romania), and thanks them for their valuable expert contribution to this work.

II. Decisions of international courts as regards the practical independence of the judiciary in general and prosecutors and prosecution services in particular

A. Principles developed by the CCPE as regards independence of prosecutors and prosecution services

13. According to the CCPE, the concept of independence means that prosecutors are free from unlawful interference in the exercise of their duties so as to ensure full respect for

¹⁰ See Rec(2000)19, para 14. See also CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, para 33.

¹¹ By the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹² These Standards serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. They establish that the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent, consistent with lawful authority, and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

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. Independence applies not only to the prosecution service as a whole, but also to its particular bodies and to individual prosecutors¹³.

14. In practical terms, the above definition results in several important principles in order to make such independence a reality:
- first of all, measures for such independence should be established through a corresponding legal framework, like those for the independence of judges¹⁴;
 - consequently, the status, independence, recruitment and career of prosecutors should, similarly to judges, be clearly established by law and governed by transparent and objective criteria¹⁵;
 - a status for prosecutors should ensure both their external and internal independence, preferably by provisions at the highest legal level and guaranteeing their application by an independent body such as a Prosecutorial Council, in particular for appointments, careers and discipline¹⁶. It is necessary in particular to secure proper tenure and appropriate arrangements for the promotion, discipline and dismissal of prosecutors¹⁷;
 - in the course of their career, including for recruitment and promotion, prosecutors should be selected on the basis of their skills, knowledge and ethical values, and receive adequate training to carry out their functions independently and impartially, and with full respect for ethical standards¹⁸;
 - instructions by the executive power concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with the Recommendation Rec(2000)19¹⁹;
 - general instructions on priorities of prosecutorial activities as they result from the law, the development of international co-operation or requirements relating to the organisation of the service should always be given in accordance with the law, in

¹³ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, paras 15-16.

¹⁴ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section i.

¹⁵ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iii.

¹⁶ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iii.

¹⁷ See Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 18; see also CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, para 53.

¹⁸ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section ii.

¹⁹ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iv.

a fully transparent and written manner²⁰. If instructions are given to prosecutors by their superiors in the prosecution service, these should be presented in writing, given transparently and always with the objective of applying the law, seeking the truth and ensuring the proper administration of justice, while respecting human rights and fundamental freedoms²¹;

- status, remuneration and treatment of prosecutors as well as the provision of financial, human and other resources allocated to prosecution services should correspond, in a way comparable to those of judges, to the eminent nature of the mission and the particular duties of prosecutors²²;
 - member States should protect prosecutors and, as appropriate, members of their families and livelihood, when carrying out their functions²³;
 - in their systems of administrative and hierarchical organisation, member States, if they wish to confer or maintain the status of judicial authority for prosecutors within the meaning of the European Convention on Human Rights, should ensure that they have all the guarantees, in particular those required for independence, attached to this status²⁴;
 - general public and interested individuals should upon request receive appropriate information on the prosecution service and prosecutorial activities. In parallel, prosecutors should play a key role in disseminating such information through appropriate channels and in accordance with the law, ensuring at the same time respect for prosecutorial independence, presumption of innocence, needs of the investigation, protection of personal data and other relevant aspects²⁵.
15. As regards in particular the term of office of prosecutors, it is important to recall the position endorsed by the Venice Commission that prosecutors should benefit from a career until retirement. Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her²⁶.

B. Case-law of the European Court of Human Rights (ECtHR)

16. Article 6 of the European Convention states that everyone has the right to an independent and impartial tribunal established by law. There is a vast jurisprudence on what an independent tribunal should be. The relevance of the concept derives from the

²⁰ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, paras 34-35.

²¹ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, para 40, Recommendations, Section vi.

²² See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section xi.

²³ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section ix.

²⁴ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section xii.

²⁵ See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section vii.

²⁶ See Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 50.

fact that it is an element of the judicial system vital to the strengthening and functioning of the rule of law. An independent and impartial tribunal guarantees the respect for human rights and fundamental freedoms and is vital to ensure the public trust in the justice system in a democratic society.

17. Independence and autonomy of prosecutors have been examined so far by the ECtHR only to a limited extent, unlike the case-law on judges which is much more comprehensive. These concepts in relation to prosecutors were touched upon only in some judgments. However, since the independence and autonomy of the prosecution services constitute, in the opinion of the CCPE, an indispensable corollary to the independence of the judiciary²⁷ (also see paras 2 and 4 of the present Opinion), the guidance provided by the judgments referring to the judiciary may also be applicable to some extent, *mutatis mutandis*, to the prosecution services.
18. The concept of an independent tribunal requires independence not only from the executive and the parties to the proceedings but also from the legislator²⁸. Moreover, in order to determine whether a tribunal can be considered to be independent as required by Article 6 of the ECHR, appearance of independence may also be of importance²⁹.
19. The ECtHR cast further light on the importance of appearance of independence and pointed out that what is at stake here is the confidence which courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused³⁰.
20. Compliance with the requirement of an independent tribunal is assessed on the basis of statutory criteria, such as the manner of appointment of its members and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures³¹.
21. In particular, the irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence and thus included in the guarantees of Article 6 of the ECHR³².
22. Even though the ECtHR established that Article 6 of the ECHR requires the courts to be independent not only of the executive and the parties, but also of the legislature, the

²⁷ See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.

²⁸ *Ninn-Hansen v. Denmark* (dec.), no. 28972/95, 18 May 1999, para 93.

²⁹ *Sramek v. Austria*, no. 8790/79, 22 October 1984, §42. See, *mutatis mutandis*, *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 78; and *Piersack v. Belgium*, no. 8692/79, 1 October 1982, Series A no. 53, pp. 14-15, para. 30.

³⁰ *Şahiner v. Turkey*, no. 29279/95, 25 September 2001, § 44. For civil limb, see *Sacilor Lormines v. France*, no. 65411/01, 9 November 2006, § 63; *Grace Gatt v. Malta*, no. 46466/16, 8 October 2019, § 85.

³¹ *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015, § 221; *Findlay v. the United Kingdom*, no. 22107/93, 25 February 1997, § 73; *Bryan v. the United Kingdom*, no. 19178/91, 22 November 1995, Series A no. 335-A, p. 15, para 37. Regarding civil limb, see *Langborger v. Sweden*, no. 11179/84, 22 June 1989, § 32; *Kleyn and Others v. the Netherlands* [GC], (nos. 39343/98, 39651/98, 43147/98 et 46664/99), 6 May 2003, § 190.

³² *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 80.

mere appointment of judges by Parliament cannot be construed as casting doubt on their independence or impartiality³³.

23. The appointment of judges by the executive may be permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role³⁴.
24. The requirement of impartiality has two aspects: first, the tribunal must be subjectively free of personal prejudice or bias, and secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality³⁵.
25. As regards the duration of the term of office of judges, no particular tenure has been specified as a necessary minimum. Even though the irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence³⁶, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that the irremovability is recognised in fact and other necessary guarantees are present³⁷.
26. Judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court³⁸.
27. In particular, doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in a criminal case, carried out for unascertainable reasons and not circumscribed by procedural safeguards³⁹.
28. In this regard, where members of a tribunal include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt as to those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society⁴⁰.

³³ *Filippini v. San Marino* (dec.), no. 10526/02, 26 August 2003, § 8; *Ninn-Hansen v. Denmark* (dec.), no. 28972/95), 18 May 1999, §§ 89, 93.

³⁴ *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010, § 49; *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, § 79; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], no. 2312/08 and 34179/08, 18 July 2013, § 49.

³⁵ *Findlay v. the United Kingdom*, 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 281, § 73.

³⁶ *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 80.

³⁷ *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, § 80.

³⁸ *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009, § 86; *Daktaras v. Lithuania*, no. 42095/98, 10 October 2000, § 36; *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, § 184, *Sacilor Lormines v. France*, no. 65411/01, 9 November 2006, § 59.

³⁹ *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, § 184.

⁴⁰ *Şahiner v. Turkey*, no. 29279/95, 25 September 2001, § 45.

29. The principles applicable when determining whether a tribunal can be considered independent and impartial within the meaning of the ECHR apply not only to professional judges, but to lay judges and jurors as well⁴¹.
30. In a democratic society, both the courts and the investigative authorities must remain free from political pressure. It is thus in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State⁴².
31. Moreover, for an investigation to be effective, persons responsible for carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence⁴³.
32. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts⁴⁴.
33. The general procedural safeguards applicable in member States include provisions guaranteeing the institutional or functional independence of public prosecutors, whether they are members of the judiciary or civil servants⁴⁵. Furthermore, in some member States, prosecutors are protected from undue pressure through additional safeguards such as the obligation to prosecute all offences except petty offences⁴⁶ (based on the need to respect the principle of legality). In some other member States, which recognise the principle of discretionary prosecutions, importance is attached to the transparency of official guidelines⁴⁷.
34. The prosecution systems in some member States are structured hierarchically with higher-ranking prosecutors having the power to give orders and instructions to the lower-ranking prosecutors. Despite this structure, a number of safeguards are in place in the legal systems of member States to ensure the effectiveness and independence of the organs in charge of criminal investigations in respect of high-ranking prosecutors. These safeguards include:
 - transfer of the case to another entity within or outside the prosecution system;
 - special investigation procedures in cases involving suspicion against high-ranking prosecutors;
 - suspension of the prosecutor under suspicion from his/her duties (in the case of the highest-ranking prosecutor this decision would be made by the political bodies in charge of his/her appointment); and

⁴¹ *Holm v. Sweden*, no. 14191/88, 25 November 1993, § 30.

⁴² *Guja v. Moldova* no. 14277/04, 12 February 2008, § 86 and 90.

⁴³ *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009, §193; *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15 May 2007, §§ 321-332; *Khaindrava and Dzamashvili v. Georgia*, no. 18183/05, 8 June 2010, §§ 59-61; *Tahsin Acar v. Turkey* [GC], no. 26307/95, 8 April 2004, §§ 222-225; *Güleç v. Turkey*, no. 21593/93, 27 July 1998, § 82; *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, 7 February 2006, §§ 78 and 80-86; and *Ergi v. Turkey*, no. 23818/94, 28 July 1998, §§ 83-84.

⁴⁴ *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002 IV, § 140.

⁴⁵ *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 148-149; *Vasilescu v. Romania*, no. 27053/95, 22 May 1998, §§ 40-41; *Pantea v. Romania*, no. 33343/96, 3 June 2003, § 238; *Moulin v. France*, no. 37104/06, 23 November 2011, §§ 57.

⁴⁶ *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 149.

⁴⁷ *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 149.

- general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service⁴⁸.
35. In 2020, the ECtHR expressly referred to the independence of prosecutors, stating that the removal from office of a chief prosecutor and the reasons justifying it in that particular case can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which – according to the Council of Europe and relevant international instruments – is a key element for the maintenance of judicial independence. Against this background, it appeared that the premature removal of the applicant from her position as chief prosecutor defeated the very purpose of maintaining the independence of the judiciary⁴⁹.
 36. The ECtHR set out that the executive branch of the government cannot remove chief prosecutors without independent judicial review⁵⁰ and also noted that the premature termination of the applicant's mandate was a particularly severe sanction, which undoubtedly had a "chilling effect" in that it must have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary⁵¹. In this way, the ECtHR reaffirmed, inter alia, the freedom of expression for prosecutors with respect to legislative reforms which may have an impact on the judiciary and its independence.

C. Case-law of the Court of Justice of the European Union (CJEU)

37. The CJEU stated that Article 19 of the Treaty of the European Union contains an obligation to ensure judicial independence, and it underlined that the guarantee of independence, which is inherent to the task of adjudication, is required not only at the EU level, but also at the level of member States as regards national courts. The concept of judicial independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions⁵².
38. The CJEU also stressed that the guarantees of independence and impartiality require rules, particularly as regards the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions⁵³.

⁴⁸ *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009, § 142.

⁴⁹ *Kövesi v. Romania* no. 3594/19, 5 May 2020, § 208.

⁵⁰ *Kövesi v. Romania*, no. 3594/19, 5 May 2020, §§ 154, 201, 205 and 208-209. See also *Baka v. Hungary*, no. 20261/12, 23 June 2016, §§ 156-157 and 164-167.

⁵¹ *Kövesi v. Romania*, no. 3594/19, 5 May 2020, §§ 209.

⁵² Case C-64/16, (*Associação Sindical dos Juízes Portugueses*), 28 February 2018, §§ 42 and 44.

⁵³ Case C-64/16, (*Associação Sindical dos Juízes Portugueses*), 28 February 2018, and case C-216/18 (*Minister for Justice and Equality*), 25 July 2018, §§ 63 and 66.

39. The CJEU stated, as regards prosecutors, and interpreting the concept of an ‘issuing judicial authority’ of a European judicial warrant⁵⁴, that Article 64 of the French Constitution guarantees the independence of the judicial authorities, which comprises judges and public prosecutors, and that the Public Prosecutor’s Office carries out its duties objectively, free from any instruction in a specific case from the executive, since the Minister for Justice may issue only general instructions concerning criminal justice policy to public prosecutors in order to ensure that that policy is consistently applied throughout the territory. According to that government, under no circumstances can those general instructions have the effect of preventing a public prosecutor from exercising his/her discretion as to the proportionality of issuing a European arrest warrant. Moreover, the Public Prosecutor’s Office conducts prosecutions and ensures that the law is applied in accordance with the principle of impartiality⁵⁵.
40. Thus, the CJEU underlines several criteria to assess if a particular prosecutor is to be considered as an issuing judicial authority of a European arrest warrant:
- participating in the administration of justice;
 - acting objectively;
 - being independent;
 - being subject to judicial scrutiny⁵⁶.
41. Regarding the third criterion, it requires statutory rules and institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive⁵⁷.
42. Consequently, prosecutors of member States who are responsible for conducting prosecutions and who act under the direction and supervision of their hierarchical superiors are covered by the term ‘issuing judicial authority’, within the meaning of that provision, provided that their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of a European arrest warrant⁵⁸. In addition to the autonomy and independence of prosecutors, their decisions on issuing European arrest warrants must be subject to judicial review⁵⁹.

D. Case-law of the Inter-American Court of Human Rights

43. Independence of judges is guaranteed in Article 8 of the American Convention on Human Rights. The jurisprudence of the Inter-American Court of Human Rights follows also the criteria of the ECtHR regarding independence of judges as the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures⁶⁰.

⁵⁴ Within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

⁵⁵ See case 566/19 (joined cases C-566/19 and C-626/19), 12 December 2019, §54. See the same date judgements in cases 625/19 and 627/19. See also case C-489/19, 9 October 2019; and cases C-508/18 (joined cases C-508/18 and C-82/19) and C-509/18, 27 May 2019.

⁵⁶ See cases C-648/20, C-206/20, C-414/20.

⁵⁷ Case 566/19, §52. See also cases, C 508/18 and C 82/19 PPU, §§51 and 74.

⁵⁸ Case 566/19, §58.

⁵⁹ Case 566/19, §74.

⁶⁰ Case *Tribunal Constitucional v. Perú*, judgment of 31 January 2001, §75.

44. Closely in line with the jurisprudence of the ECtHR, the Inter-American Court stated that one of the principal purposes of the separation of public powers is to guarantee the independence of judges⁶¹.
45. The Inter-American Court held that the requirements related to access to a court, together with criteria of independence and impartiality, also extended to the non-judicial bodies responsible for the investigation prior to the judicial proceedings, showing that investigations into violations of human rights must not only be carried out in a reasonable time but they must also be independent and impartial⁶².
46. The Court also held that it is particularly important that the competent authorities adopt all reasonable measures to guarantee the necessary probative material in order to carry out the investigation and that they be independent, both de jure and de facto, from the officials involved in the facts of the case. The foregoing requires not only hierarchical or institutional independence, but also real independence⁶³.
47. Independence de jure and de facto covers a double dimension: the first is institutional or systemic, while the second is functional, referring to justice operators' individual independence in performing their functions⁶⁴.
48. The Inter-American Court also held that reinforced guarantees of independence applying to judges, due to the necessary independence of the judicial power which is essential for the exercise of the judicial functions, should also be applied to prosecutors based on the nature of the duties performed by them⁶⁵.
49. Referring to the specific duties of prosecutors, the Court underlined the duty of the State to conduct an independent and objective investigation as regards violations of human rights and crimes in general, emphasising that the authorities in charge of the investigation be independent, de jure and de facto, which requires not only hierarchical or institutional independence, but also actual independence⁶⁶.
50. The Court added that the independence of prosecutors guarantees that they will not be the object of political pressures or improper hindrance in their actions, nor will they suffer retaliation for the decisions objectively made by them. This demands a guarantee of stability and a fixed term in their positions. Therefore, the specific guarantees for prosecutors, in an equivalent application of the mechanisms of protection acknowledged for judges, result in the following: (i) that separation from office must obey exclusively to the causes permitted, either through a proceeding that complies with the right to a fair trial or because the mandate for which they have been appointed has expired; (ii) that prosecutors may only be removed for grave disciplinary offenses or incapacity, and (iii) all proceedings against prosecutors must be according to fair procedures that guarantee

⁶¹ Case of the *Constitutional Court v. Peru*, 31 January 2001. § 73.

⁶² Case of *Cantoral Huamaní and García Santa Cruz v. Peru*, 10 July 2007, §§ 132-133,

⁶³ Case of *Zambrano Vélez et al. v. Ecuador*, 4 July 2007, §122.,

⁶⁴ Report on "Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas", approved by the Inter-American Commission on Human Rights on 5 December 2013, § 25.

⁶⁵ Case of *Martínez Esquivia v. Colombia*, 6 October 2020, §§84, 86.

⁶⁶ Case of *Martínez Esquivia v. Colombia*, §§ 86-88. In the same sense the IACHR, Report No. 109/18, Case 12.840. Merits. *Yenina Esther Martínez Esquivia v. Colombia*, 5 October 2018, approved by the Commission at its session No. 126 held on 5 October 2018, 169 Period of Sessions, available at: <https://www.oas.org/en/iachr/decisions/court/2019/12870FondoEn.pdf>

objectivity and impartiality under the Constitution or the law, given that free dismissal of prosecutors promotes an objective doubt regarding the actual possibility for them to perform their duties without fear of retaliation⁶⁷.

E. Impact of decisions of international courts on practical independence of prosecutors

51. The above-mentioned judgments of international courts provide useful elements as regards the independence of the judiciary in general and the independence of prosecutors in particular. As explained above, the safeguards provided for the judiciary may also be applicable to some extent for prosecution services and prosecutors.
52. Thus, the various elements of independence stressed in these judgments may be used for reinforcing the institutional independence of prosecution services, as well as the functional independence of individual prosecutors, as regards in particular the legislative framework for organisational autonomy of the prosecution services, process of appointment, evaluation and dismissal of prosecutors, their term of office, non-interference into the prosecutors' work and other important aspects.
53. The main added value of the case-law of the ECtHR is its binding force. The ECtHR judgments, in which breaches of the ECHR are found, impose on the respondent State a legal obligation not just to pay those concerned the sums awarded as a just satisfaction, but also to identify, subject to supervision by the Committee of Ministers of the Council of Europe, general measures to be adopted in its domestic legal order to put an end to the violations found by the Court and to redress as far as possible their effects⁶⁸.
54. Thus, the requirement to undertake general measures to put an end to violations is obligatory and is supervised by the Committee of Ministers. Such general measures may include new or amended legislation, new institutions, mechanisms, procedures, new criteria for appointment, relocation, promotion, evaluation, dismissal of prosecutors, new safeguards in the course of disciplinary proceedings against prosecutors, developing ethical standards and other measures.
55. That's why the CCPE considered it essential to prepare the present Opinion which expressly shows the elements of independence of prosecutors developed in the ECtHR case-law which can be translated into practice within the framework of obligatory general measures.
56. At the same time, there are important advisory instruments developed by the Council of Europe and providing an in-depth guidance as regards the independence of prosecutors in all above-mentioned aspects. These instruments include in particular the previous Opinions of the CCPE and the Reports of the Venice Commission relevant for the prosecution. The recommendations contained in these instruments are actively advocated by the Committee of Ministers for implementation in member States and they are often translated into practice at national level. They serve as a basis for judicial and prosecutorial reforms in member States, and the Council of Europe co-operation activities, both bilateral and multilateral, take into close account these advisory instruments, along with the case-law of the ECtHR.

⁶⁷ Case of *Martínez Esquivia v. Colombia*, §§95-96.

⁶⁸ See Article 46 of the ECHR on binding force and execution of judgments of the European Court of Human Rights.

57. The CCPE notes that some judgments of the ECtHR, for example, the judgment where the Court referred expressly to the independence of prosecutors⁶⁹, included references to the CCPE Opinions⁷⁰. The CCPE also welcomes the fact that its advisory instruments have been used, among other sources, by the ECtHR when preparing judgments in particular cases.

F. Decisions of national courts reinforcing the practical independence of prosecutors

58. As the CCPE underlined, member States of the Council of Europe have different legal systems including diverse prosecution services. However, irrespective of the national prosecution system⁷¹, national decisions of the Supreme Courts, Courts of Cassation, Supreme Administrative Courts and Constitutional Courts in member States have dealt with the issue of independence of prosecutors and the prosecutor's offices in various contexts.

59. Over the years, such decisions were adopted as a response to various situations faced by member States in respect of the status of prosecutors and different aspects of the prosecutorial professions, and they were largely guided by the case-law of the ECtHR, as well as by the recommendations of the Committee of Ministers of the Council of Europe and opinions of the CCPE, CCJE, Venice Commission, GRECO and other key bodies of the Council of Europe.

60. In their responses to the questionnaire for the preparation of the present Opinion, member States indicated in particular in what context these highest judicial bodies at national level took decisions reinforcing the prosecutorial independence and impartiality. The most relevant topics and aspects analysed were as follows, showing the wide range of the topics discussed:

- Constitutional status and independence of the Public Prosecutor's Office, position of the Public Prosecutor's Office, independence of the Public Prosecutor's Office and prosecutors, autonomy, admissibility and limits of hierarchy within the prosecution service⁷²;
- Appointment and dismissal of prosecutors and Prosecutor General, the transfer of chief prosecutors⁷³;
- Instructions, interference into the activity of public prosecution and the relation to the executive and legislative power⁷⁴;

⁶⁹ *Kovesi v. Romania*, no. 3594/19, § 208.

⁷⁰ In its judgment in the case of *Kovesi v. Romania*, no. 3594/19, CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including Rome Charter, was cited, para 91 of the judgment.

⁷¹ With regard to the different status of the prosecution service within the system of state powers in each member State, the Public Prosecutor's Office is most often classified as an executive or judicial power. However, it can be assumed that the Public Prosecutor's Office can be described rather as a *sui generis* body, standing outside of the classical triad of the three state powers.

⁷² Armenia, Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Italy, Latvia, Lithuania, Poland, Portugal.

⁷³ Czech Republic, Italy, Lithuania.

⁷⁴ Cyprus, Hungary, Lithuania, Luxembourg.

- Salaries of prosecutors, salary restrictions due to the COVID - 19 pandemic, recalculation of pensions⁷⁵;
 - Control of the constitutionality of some provisions of the Law on the Public Prosecution Office (i.e. new procedure of election, appointment, dismissal of Prosecutor General and composition of Superior Council of Prosecutors, pension regulation) and other legal regulations⁷⁶;
 - Reporting on the activities of the Public Prosecutor's Office by the Prosecutor General to the President and Parliament or Government, and to the Supreme Judicial Council; nature of the reports; providing information on pending cases⁷⁷ and dismissal of the Prosecutor General for non-approval of the annual report by the Parliament⁷⁸;
 - Establishment of Parliament's Committee for investigation and establishing the political responsibility of public officials, including prosecutors and judges, involved in prosecution and trial in several cases of a politician for corruption offenses⁷⁹;
 - The position of the prosecutors in criminal proceedings (exercising oversight over the lawfulness of pre-trial investigation, relationships between the investigative body and the prosecutor; mandatory criminal action)⁸⁰;
 - The position of prosecutor outside the field of criminal law⁸¹.
61. Decisions of national courts reinforcing the practical independence of prosecutors are one of the examples of the positive progressive impact of the case-law of international courts, and in particular of the ECtHR, on the practical independence of prosecutors in member States. As demonstrated above, such decisions concern a wide spectrum of the aspects of the prosecutorial status and profession, and they are particularly needed where reforms of the judiciary and prosecution do not provide sufficiently positive results.
62. The national judicial authorities are closely assisted by the Council of Europe and rely, in addition to the case-law of the ECtHR, on the advisory standards developed by the Council of Europe bodies, and in particular on the CCPE findings which provide a voice and perspective of serving prosecutors throughout Europe and aim to ensure that prosecutors can work in an independent, impartial and effective way when fulfilling their important responsibilities within their national legal systems.
63. Such combination of useful effects both from the case-law of the ECtHR and advisory findings of the Council of Europe bodies provides the national judicial authorities a relevant contextual framework for reinforcing the practical independence of prosecutors at national level. It considerably helps them to work impartially and implement more efficiently the provisions of the ECHR, which in turn allows them to resolve more disputes at national level thus preventing the increasing flow of cases, including repetitive ones, to the ECtHR.

⁷⁵ Czech Republic, Latvia, Slovenia, Ukraine.

⁷⁶ Republic of Moldova, Slovak Republic, Ukraine.

⁷⁷ Bulgaria.

⁷⁸ Hungary, Lithuania.

⁷⁹ Hungary, Slovenia.

⁸⁰ Armenia, Czech Republic, Estonia, Italy, North Macedonia.

⁸¹ Bulgaria, Czech Republic, Hungary, Russian Federation.

III. Decisions of treaty bodies as regards the practical independence of the judiciary in general and prosecutors in particular

64. The Human Rights Committee (hereafter the HRC) which is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties, issued a number of relevant recommendations as regards the judicial and prosecutorial independence.
65. All States parties to the ICCPR are obliged to submit regular reports to the HRC on how the rights under the Covenant are being implemented. In response, the HRC issues concluding observations in respect of the State concerned. Many of the HRC concerns as regards prosecutors and their work have been expressed in concluding observations issued after the review of reports presented by State parties.
66. These concerns are related to the reform of the justice system and the full observance of due process guarantees, implying the need to strengthen the independence of both the judiciary and the prosecution service⁸².
67. In this regard, due care should be given to ensure judicial independence, including the independence of prosecuting authorities, from the executive power⁸³, the President⁸⁴ or the legislative power⁸⁵.
68. An independent body should be responsible for judicial discipline and sufficient safeguards should be in place to prevent disciplinary actions being taken against judges and prosecutors for minor infractions or for a controversial interpretation of the law⁸⁶. Such an independent body, for instance a High Prosecutorial Council, should comprise prosecutors elected by professional self-governing bodies⁸⁷.
69. In this regard, decisions related to the selection, disciplining, evaluation and permanent appointment of judges⁸⁸ and prosecutors⁸⁹, as well as dismissals, therefore ensuring their security of tenure⁹⁰, should be based on objective criteria explicitly provided for by law⁹¹.

⁸² Concluding observations in respect of Angola, 2019.

⁸³ Concluding observations in respect of Azerbaijan, 2016; Central African Republic, 2020; Czech Republic, 2019; Equatorial Guinea, 2019; Lao People's Democratic Republic, 2018; Niger, 2019; Paraguay, 2019; Romania, 2017; Swaziland, 2017; Tajikistan, 2019.

⁸⁴ Concluding observations in respect of Belarus, 2018.

⁸⁵ Concluding observations in respect of the Czech Republic, 2019; Guatemala, 2018; Lao People's Democratic Republic, 2018; Paraguay, 2019; Serbia, 2017; Tajikistan, 2019; Viet Nam, 2019; Angola, 2019.

⁸⁶ Concluding observations in respect of Azerbaijan, 2016; Belarus, 2018; Bulgaria, 2018.

⁸⁷ Concluding observations in respect of the Czech Republic, 2019.

⁸⁸ Concluding observations in respect of Azerbaijan, 2016.

⁸⁹ Concluding observations in respect of Belarus, 2018; Viet Nam, 2019.

⁹⁰ Concluding observations in respect of the Central African Republic, 2020; Czech Republic, 2019; Equatorial Guinea, 2019; Guatemala, 2018; Mongolia, 2017; Niger, 2019.

⁹¹ Concluding observations in respect of Equatorial Guinea, 2019; Guatemala, 2018; Lao People's Democratic Republic, 2018; Mongolia, 2017; Tajikistan, 2019.

70. Concerns have also been raised regarding the need to fight corruption effectively⁹² and to avoid corruption in the judiciary, both by judges and prosecutors⁹³.
71. As regards some countries, concerns have also been expressed concerning possible broad powers of the Prosecutor General when this may lead to weak accountability or interference with the activity of courts⁹⁴.
72. In addition to reviewing State parties reports and issuing concluding observations, the First Optional Protocol to the Covenant gives the HRC competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol, similarly to the activity deployed by the ECtHR under the ECHR.⁹⁵
73. According to the HRC's established case-law, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognise. By adhering to the Optional Protocol, a State party to the Covenant recognises the competence of the HRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant (Optional Protocol, Preamble and Article 1). Implicit in the adherence of a State to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the State party and to the individual concerned (Articles 5 (1) and (4)). It is incompatible with its obligations under Article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of communications and in the expression of its Views⁹⁶.
74. The HRC has an extensive set of decisions and Views concerning the rights set forth in the Covenant, particularly on judicial independence, which is similar in many aspects to the case-law of the ECtHR⁹⁷.

⁹² Concluding observations in respect of Azerbaijan, 2016; Guatemala, 2018.

⁹³ Concluding observations in respect of Angola, 2019; Central African Republic, 2020; Equatorial Guinea, 2019; Mongolia, 2017; Paraguay, 2019.

⁹⁴ Concluding observations in respect of Bulgaria, 2018; Tajikistan, 2019.

⁹⁵ At the end of the 132nd session, in July 2021, the Committee concluded that there had been a violation of the Covenant in 1,278 (83.4 per cent) of the 1,532 Views that it had adopted since 1979.

⁹⁶ See General comment No. 33 (2008), paras. 8 and 10; and, inter alia, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010), para. 8.2; and *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 6.2, *Piandiong v. Philippines* (CCPR/C/70/D/869/1999 and Corr.1), para. 5.1; *Maksudov v. Kyrgyzstan* (CCPR/C/93/D/1461, 1462, 1476 and 1477/2006), paras. 10.1–10.3; and *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), para. 6.2. As indicated in paragraph 19 of the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol. The HRC is therefore of the view that, by failing to respect the request for interim measures transmitted to a State party, this State party fails in its obligations under article 1 of the Optional Protocol.

⁹⁷ According to the HRC, as expressed in General Comment 33 (2008) on the obligations of States Parties under the Optional Protocol to the Covenant (see para 11), while the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

75. The HRC underlined⁹⁸ that a tribunal is, under the Covenant, a body established by law, which is independent of the executive and legislature or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. The right of everyone facing criminal charges to access to such body cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision⁹⁹.
76. The HRC added that the requirement of competence, independence and impartiality of a tribunal under the Covenant is an absolute right that is not subject to any exception.¹⁰⁰ The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature¹⁰¹.
77. According to the HRC, States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.¹⁰² A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.¹⁰³ It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law¹⁰⁴.
78. As regards the dismissal of judges, the HRC pointed out¹⁰⁵ that they may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.¹⁰⁶ The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.¹⁰⁷

⁹⁸ In its interpretation of Article 14 of the Covenant concerning access to courts and related principles.

⁹⁹ HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 18.

¹⁰⁰ Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

¹⁰¹ HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 19.

¹⁰² Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.

¹⁰³ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

¹⁰⁴ HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 19.

¹⁰⁵ HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 20.

¹⁰⁶ Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

¹⁰⁷ Communication No. 933/2000, *Mundy Busyo et al v. Democratic Republic of Congo*, para. 5.2.

79. As regards the concept of impartiality, the HRC determined two aspects¹⁰⁸: 1) judges must not allow their judgement to be influenced by personal bias or prejudice, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other¹⁰⁹; 2) the tribunal must also appear to a reasonable observer to be impartial. A trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.¹¹⁰
80. The HRC also required, as regards liberty and security of persons, that a prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by Covenant¹¹¹.
81. Furthermore, as regards the right of the arrested or detained person to be brought promptly before a judge or other officer authorised by law to exercise judicial power, this right is intended to bring the detention in a criminal investigation or prosecution under judicial control¹¹².
82. The HRC also addressed the issue of the protection of prosecutors in the context of their freedom of expression, that defamation laws must be crafted with care to ensure that they comply with the Covenant and that they do not serve, in practice, to stifle freedom of expression. At the same time, the HRC acknowledged that public prosecutors are not on the same footing as public figures, and, like judicial officers, require a measure of public confidence for the effective performance of their functions¹¹³.
83. The HRC added that the principle of judicial independence, an essential guarantee for the independent exercise of judicial functions, requires that judges and prosecutors be able to interpret and apply the law and assess facts and evidence freely, without being subjected to intimidation, obstruction or interference in the exercise of their functions. Judges should not be subject to criminal or disciplinary sanctions for the content of their decisions, except in cases involving serious crimes, corruption, misconduct or incompetence that render them unfit for office; in such cases, this should be done in accordance with procedures that respect fair trial guarantees. Judicial errors should be corrected by review of the decision by a higher court¹¹⁴.

IV. Conclusions

A. Principles developed by the CCPE as regards independence of prosecutors and prosecution services

1. The CCPE has developed in its previous opinions the following key elements of independence of prosecutors and prosecution services:

¹⁰⁸ HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 21.

¹⁰⁹ Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

¹¹⁰ *Idem*.

¹¹¹ HRC General Comment 35 (2014) dealing with the rights to liberty and security, para 15.

¹¹² HRC General Comment 35 (2014) dealing with the rights to liberty and security, para 32.

¹¹³ HRC General Comment No. 34, para 32; HRC Communication No. 2716/2016, *Eglé Kusaitė v. Lithuania*, para 8.7.

¹¹⁴ HRC General Comment No. 34, para 5.5; HRC Communication No. 2844/2016, *Baltasar Garzón v. Spain*, para 5.4.

- prosecutors must be free from unlawful interference in the exercise of their duties and political pressure or unlawful influence of any kind, including when acting outside the criminal law field, to ensure full respect for and application of the law and the principle of the rule of law;
- a corresponding legal framework, like that for the judiciary, regulating the status, independence, recruitment, tenure of office and career of prosecutors on the basis of transparent and objective criteria must be established;
- prosecutors should benefit from a career until retirement because appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutors will make biased decisions depending on the priorities of the appointing authorities;
- the external and internal independence of prosecutors and prosecution services should be ensured by an independent body such as a Prosecutorial Council;
- instructions given to prosecutors and to the prosecution services, both external and internal should be based on guidelines containing specific safeguards such as legality and transparency of such instructions, which should always pursue the objective of applying the law while respecting human rights and fundamental freedoms;
- the status, remuneration and treatment of prosecutors as well as the allocation of financial, human and other resources allocated to the prosecution services should be regulated in line with the importance of their mission and work, and in a way comparable to those of judges;
- prosecutors and, where appropriate, members of their families and livelihood, must be protected when carrying out their functions.

B. Inventory of the relevant case-law of international courts and treaty bodies as regards the independence of the judiciary in general and prosecutors and prosecution services in particular

2. The right to an independent and impartial tribunal is a core value of the rule of law and is enshrined in the main international and regional legal instruments, guaranteeing the respect for human rights and fundamental freedoms and being vital for ensuring public trust in the justice system in a democratic society. This right has known a rich and well-established jurisprudence of international courts and treaty bodies.
3. In such jurisprudence, the independence of the judiciary has been thoroughly examined, and it also contains references to the independence and autonomy of the prosecution services. Since the independence and autonomy of the prosecution services constitute, in the opinion of the CCPE, an indispensable corollary to the independence of the judiciary, guidance provided by relevant international judgments and decisions relating to the judiciary may to some extent be applicable *mutatis mutandis* to the prosecution services.
4. Criminal justice systems, rooted in different legal cultures, vary throughout Europe. Despite the differences, an important convergence factor is emerging in recent years

grounded in the requirement of the independence of the prosecution services as a prerequisite for the rule of law and the independence of the judiciary.

5. The case-law of the European Court of Human Rights underlines that in a democratic society, both the courts and the investigative authorities must remain free from political pressure. It is thus in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State.
6. For an investigation to be effective, persons responsible for carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those investigated but also a practical independence.
7. The general procedural safeguards applicable in member States to the prosecution include provisions guaranteeing the institutional or functional independence of prosecutors, whether they are members of the judiciary or civil servants.
8. The prosecution systems in some member States are structured hierarchically with higher-ranking prosecutors having the power to give orders and instructions to the lower-ranking prosecutors. Despite this structure, a number of safeguards are in place in the legal systems of member States to ensure the effectiveness and independence of the organs in charge of criminal investigations in respect of high-ranking prosecutors.
9. The Court of Justice of the European Union, interpreting if a particular prosecutor is to be considered as an issuing judicial authority for a European arrest warrant, stated that this was the case when he/she meets the following three criteria: participates in the administration of justice, acts objectively, is independent and is not exposed to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive. However, a decision by a prosecutor issuing a European arrest warrant must be subject to judicial review.
10. The Inter-American Court of Human Rights, in line with the jurisprudence of the European Court of Human Rights, stated that one of the principal purposes of the separation of public powers is to guarantee the independence of judges. The Court also held that reinforced guarantees of independence applying to judges, due to the necessary independence of the judicial power which is essential for the exercise of the judicial functions, should also be applied to prosecutors based on the nature of the duties performed by them.
11. The Court elaborated further that authorities in charge of the investigation should be independent, *de jure* and *de facto*, which requires not only hierarchical or institutional independence, but also actual independence. Prosecutors should not be the object of political pressures or improper hindrance in their actions, nor should they suffer retaliation for the decisions made by them. This demands a guarantee of stability and a fixed term in their positions, as well as procedural guarantees as to their removal or disciplinary proceedings instituted against them.
12. The Human Rights Committee (HRC), a body of independent experts monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has also issued a number of relevant recommendations as regards the judicial and prosecutorial independence. Many of these recommendations have been expressed in concluding observations issued after the review of reports presented by State parties and relate to the reform of the justice system and the full observance of due process

guarantees, implying the need to strengthen the independence of both the judiciary and the prosecution service.

13. In this regard, decisions related to the selection, disciplining, evaluation and permanent appointment of prosecutors, as well as dismissals, ensuring therefore their security of tenure, should be based on objective criteria explicitly provided for by law.
14. In addition to reviewing State parties reports and issuing concluding observations, the First Optional Protocol to the ICCPR gives the HRC the competence to examine individual complaints with regard to the alleged violations of the ICCPR. This competence is recognised by all States parties by virtue of their accession to the Protocol. According to the case-law of the HRC, the principle of judicial independence, an essential guarantee for the independent exercise of judicial functions, requires that judges and prosecutors be able to interpret and apply the law and assess facts and evidence freely, without being subjected to intimidation, obstruction or interference in the exercise of their functions.

C. Impact of the relevant case-law of international courts and treaty bodies on the practical independence of prosecutors

15. The above inventory of the relevant case-law of international courts and treaty bodies, for many years concerned with judicial independence and in recent years, as well, with prosecutorial independence, provides useful elements which can have an important effect for the impartiality and independence, in law and in practice, of prosecutors.
16. The various elements of this case-law contribute for reinforcing the institutional independence of prosecution services, as well as the functional independence of individual prosecutors, both in the criminal justice system and, in countries where the public prosecution has responsibilities in other areas, outside the criminal justice system.
17. In particular, the legislative framework for organisational autonomy of the prosecution services, process of appointment, evaluation and dismissal of prosecutors, their term of office, non-interference into the prosecutors' work and other important aspects relating to their career, will surely benefit from such case-law.
18. The main added value of the case-law of the European Court of Human Rights (ECtHR) is its binding force and the requirement to undertake general measures in member States to put an end to violations identified by the ECtHR judgments. This process is obligatory and is supervised by the Committee of Ministers of the Council of Europe.
19. Such general measures may include new or amended legislation, new institutions, mechanisms, procedures, new criteria for appointment, relocation, promotion, evaluation, suspension and dismissal of prosecutors, new safeguards in the course of disciplinary proceedings brought against them, developing ethical standards and other measures.
20. There are also important advisory instruments developed by the Council of Europe bodies and institutions providing an in-depth guidance as regards the independence of prosecutors. These instruments serve as soft law standards and constitute a basis for judicial and prosecutorial reforms in member States in the framework of the Council of Europe co-operation activities.

21. These soft law instruments may, in turn, serve as a source of inspiration and be used as a reference, both universally and at a regional level, by international courts and treaty bodies in their increased search for a fairer and more effective judicial system in which the independence and impartiality of prosecutors and prosecution services are laid down in a proper legal framework, similar to the one applicable to judges.