



Constitutional Court of the Republic of Guatemala  
Guatemala City, May 15, 2024.  
Regarding the Request for an Advisory Opinion, Case No. 2094-2024

To the Honorable Justices of the Constitutional Court of the Republic of Guatemala:

We, the undersigned, are honored to share this Amicus Curiae brief with the Constitutional Court of the Republic of Guatemala. This brief is submitted on behalf of Stephen McFarland, a retired career U.S. diplomat, and U.S. Ambassador to Guatemala from 2008-2011, by the Rule of Law Impact Lab at Stanford Law School. It is submitted with the intention of respectfully sharing international legal standards regarding the accountability of prosecutors and reasons why the current legal framework in Guatemala with respect to the Attorney General's accountability does not comply with these standards.

We, the undersigned, as individuals and entities committed to the preservation of the Rule of Law, are honored to lend our support and contribution to the laudable work of the Constitutional Court of the Republic of Guatemala in the present case.

Respectfully,

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Stephen McFarland  
former U.S. Ambassador to Guatemala (retired)

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Amrit Singh  
Executive Director, Stanford Law  
School's Rule of Law Impact Lab

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Before the  
Constitutional Court of the Republic of Guatemala

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In the  
April 4, 2024, Request by the President of the Republic of Guatemala  
For an Advisory Opinion  
Case No. 2094-2024

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Amicus Curiae Brief

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On behalf of Stephen McFarland, a career U.S. diplomat and U.S. Ambassador to Guatemala from 2008 to 2011, submitted by the Rule of Law Impact Lab at Stanford Law School.

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# AMICUS CURIAE TO BE PRESENTED WITH RESPECT TO THE REQUEST OF THE PRESIDENT OF THE REPUBLIC OF GUATEMALA FOR AN ADVISORY OPINION

## Magistrates of the Constitutional Court

1. This amicus curiae brief is filed with respect to the Request of the President of the Republic of Guatemala for an Advisory Opinion, submitted to this Court on April 4, 2024. It is submitted with the intention of respectfully sharing international legal standards regarding the accountability of prosecutors and reasons why the current legal framework in Guatemala with respect to the Attorney General's accountability does not comply with those standards.
2. The amicus curiae, Stephen McFarland, is a recognized and respected retired career U.S. diplomat who served as U.S. Ambassador to Guatemala from 2008 to 2011. His professional qualifications, which include more than thirty years of diplomatic service in Latin America, make him uniquely qualified to assess the evolution of the rule of law in Guatemala from a national, regional, and international perspective.

## I. DECLARATION OF INTEREST

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3. Ambassador McFarland is a retired U.S. diplomat with extensive experience in Guatemala, Central America, and Latin America. He served as U.S. Ambassador to Guatemala from 2008 to 2011, appointed by President George W. Bush as his personal representative, and ratified by President Barack Obama. As ambassador, he strengthened cooperation between the United States and Guatemala in areas of mutual interest, such as the rule of law and the fight against corruption and transnational crime, economic growth, and respect for democracy and human rights. He also expanded the embassy's communication with all sectors of Guatemala, from the right to the left, with people of all ethnicities and all classes, within a framework of mutual respect, dignity, and shared interests. He led U.S. cooperation with the Executive, the Judiciary, Congress, and the Public Prosecutor, among other state institutions, and with the private sector, civil society, and the ancestral authorities of the Indigenous peoples.
4. Ambassador McFarland took careful note of the historical events of 1954, when one of his predecessors, Ambassador John Peurifoy, was a protagonist in the coup d'état against the democratically elected government of President Jacobo Arbenz. This coup prompted decades of violence and authoritarianism in Guatemala, and convinced thousands of people in other Latin American countries to use violence and armed struggle, rather than democratic mechanisms, to seek change. The dire aftermath of that coup was felt not only in Guatemala, but in Central America, the rest of Latin America, and the United States.
5. Ambassador McFarland worked in several Latin American countries that experienced subsequent struggles between democracy and the rule of law, and the authoritarian

temptations of the right and left, and corruption, including El Salvador, Peru, Guatemala, Venezuela, Bolivia, Paraguay, Honduras, and Colombia. McFarland was the desk officer for Nicaragua from 1983 to 1985, when the Sandinista regime, taking advantage of the democratic vacuum and the weakness of democratic actors resulting from the Somoza dictatorship, entrenched an authoritarian state that would eventually lose popular support. Then, between 1988 and 1990, he was the political counsel of the U.S. Embassy in El Salvador during the last years of the internal conflict. In 1989, when Alfredo Cristiani, of the ARENA party won the elections, about which there were doubts about his party's commitment to the rule of law, McFarland supported the U.S. policy of respecting the results of these democratic elections. He witnessed some clashes and bombings; several of his professional contacts, both from the right and the left, were killed, including Héctor Oquelí Colindres who was assassinated in Guatemala in 1990, while demonstrating the regional character of the conflict.

6. McFarland was the Minister Counselor at the U.S. Embassy in Guatemala from 2000 to 2003. He supported Ambassador Bushnell and Ambassador Hamilton in strengthening bilateral cooperation in the economic field, in cooperation against drug trafficking, and in the reconciliation process. Later as Chargé d'Affaires, he was also the first diplomat to publicly criticize the growing corruption in Guatemala and he convinced the State Department to include this issue in the bilateral relationship. He then served as Minister Counselor at the U.S. Embassy in Venezuela between 2003 and 2005, in the years when President Chavez consolidated his control over the entire state, including the judiciary and congress, as well as the private sector and the press. The end of democracy initiated a great social crisis suffered not only by Venezuela, but by all countries that have had to receive the seven million Venezuelan migrants, including half a million who migrated to the United States. After retiring from the foreign service, McFarland led a U.S. Agency for International Development project to support access to justice in Colombia's conflict zones, 2015 to 2017. He was a consultant on anti-corruption and rule of law issues for Millicom in Guatemala from 2018 to 2021. He currently follows and opines on democracy and rule of law in various media outlets.
7. The Rule of Law Impact Lab at Stanford Law School is a non-profit, non-partisan project that aims to study and put law at the service of democracy around the world.<sup>1</sup>

## II. FACTS AND PROCEDURAL HISTORY

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The President's April 4, 2024, Request for An Advisory Opinion

8. On April 4, 2024, the President of the Republic of Guatemala submitted to this Court a request for an Advisory Opinion.

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<sup>1</sup> The Rule of Law Impact Lab gratefully acknowledges the research conducted by Stanford Law School students Boyce Buchanan and Max Han, as well as the contribution of Adriana Garcia Garcia, expert advisor for the Lab, for this brief.

9. The request presented the following questions to the Court:
- i. The Political Constitution of the Republic of Guatemala establishes in Article 251, as a requirement to hold the position of the Attorney General and Head of the Public Prosecutor's Office, that the person must be of recognized honorability. Must the requirement of recognized honorability be met only at the time of applying for the public office or must it remain in force during the exercise of the public function referred to?
  - ii. Can the loss of the constitutional requirement of recognized honorability required by Article 251 of the Political Constitution of the Republic of Guatemala constitute a duly established justified cause for the revocation of the appointment of the Attorney General of the Republic and Head of the Public Prosecutor's Office?
  - iii. In accordance with the principles of objectivity, equality, legality, and independence that govern his actions, if a complaint or accusation is filed against the Attorney General and Chief Public Prosecutor, according to Article 251 of the Political Constitution of the Republic of Guatemala, must the Attorney General and Chief Public Prosecutor himself exercise the public criminal action, direct his subordinates in charge of the investigation against him or may he be suspended from the exercise of his office?
  - iv. When a complaint or accusation is filed against the Attorney General and Head of the Public Prosecutor's Office, in accordance with the functional autonomy established in Article 251 of the Political Constitution of the Republic of Guatemala, what measures must the Attorney General and Head of the Public Prosecutor's Office take to guarantee the independence, objectivity and autonomy of the public criminal action carried out by the personnel in charge of the criminal investigation of the Public Prosecutor's Office promoted against him/her?
  - v. Pursuant to Articles 60 and 65 Ter of the Organic Law of the Public Prosecutor's Office and Article 154 of the Law on Probity and Responsibilities of Public Officials and Employees, can the Attorney General and Head of the Public Prosecutor's Office be investigated for administrative misconduct?

### **III. GUATEMALA'S DOMESTIC LEGAL FRAMEWORK FOR PROSECUTORIAL ACCOUNTABILITY**

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#### **a. Qualifications for the Position of Attorney General - "Honorability"**

10. According to Article 251 of the Constitution of the Republic of Guatemala, the Attorney General must "be a lawyer and have the same qualities as the magistrates of the Supreme Court of Justice."<sup>2</sup> Article 216 of the Constitution states that in order to be a magistrate of the Supreme Court of Justice (CSJ), the requirements of Article 207 of the Constitution must

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<sup>2</sup> Constitution of the Republic of Guatemala, art. 251.

be met, which are: to be Guatemalan by origin, of recognized honorability, to be in the enjoyment of their rights as citizens and to be a member of the bar.<sup>3</sup>

11. In this regard, the Constitutional Court (CC) has indicated that: "To apply for the public position of Attorney General of the Republic and Head of the Public Prosecutor's Office, . . . it is necessary that the applicant not only has an excellent academic background, but also sufficient professional experience and that, in general, it is observed that his professional and personal conduct have been attached to the highest ethical values, together with other aspects that denote a correct human projection."<sup>4</sup>
12. Regarding the requirement of recognized honorability, the CC has indicated that "[...] it is a requirement that must be considered, in order to hold a public office in general."<sup>5</sup>
13. The purpose of this requirement is to ensure that those who hold public office are "persons who, in accordance with their personal and professional behavior, [have] a conduct that seeks and procures the correct interpretation of social and legal norms or laws and, thereby, evidences their inclination to the due application of justice or fairness. When it is said that honorability must be "recognized," it refers to the fact that the qualities of a person are known to the whole of society or to a segment of it, which shows him for what he is in terms of his merits, talents, skills, abilities, criteria and human qualities."<sup>6</sup> It seeks to "exclude those persons who, attracted by a false appearance of justice (or of the good), their actions distort or alter things to obtain a result contrary to or prohibited by laws or rules."<sup>7</sup>
14. Qualifying the elements to determine whether an official is honorable or not requires "special rigor, since a person is either honorable or not, and therefore logically there are no categories in terms of honorability."<sup>8</sup> To prove recognized honorability, the consistent jurisprudence of the CC has listed the following elements:<sup>9</sup>
  - i. Accreditations: "the presentation of documents or certifications";
  - ii. Social criteria: "good professional conduct, union esteem, recognition by the public forum, professional decorum";<sup>10</sup>

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<sup>3</sup> Constitution of the Republic of Guatemala, arts. 207, 216.

<sup>4</sup> Appeal of Amparo Case File 2215-2018, Judgment of 22 October 2019.

<sup>5</sup> Amparo in Sole Instance Case 5414-2018, Ruling of March 11, 2021.

<sup>6</sup> Partial General Unconstitutionality 942-2010, Ruling of August 24, 2010 (Criteria sustained in Case 3635-2009). (Emphasis added).

<sup>7</sup> Appeal of Amparo Judgment Case 3422-2019, Judgment of May 14, 2020.

<sup>8</sup> Amparo in Sole Instance 1169-2020, Ruling of May 6, 2020.

<sup>9</sup> Amparo in Sole Instance 3635-2009, Ruling of February 11, 2010. In the same sense: Judgment dated March 25, 2010 in Case 3634-2009. See Joined Cases 4639, 4645, 4646, 4647-2014. See also: 942-2010. Docket 1158-2016 (January 10, 2017).

<sup>10</sup> In file 4051-2015 (and with criteria sustained in file 3986-2015) the CC recognized that the fact that a citizen was determined guilty in the United States for having committed crimes while holding a public office in Guatemala was sufficient to determine the absence of honorability.



- iii. Repercussions of his actions: "not only his professional practice, but also his personal, commercial or any other activities that are incompatible with the exercise of his public function";
  - iv. Respect for privacy: "Otherwise, there would be the danger of entering into aspects of personal privacy or the sphere of the right to one's own image outside of everything that nurtures recognized honorability";
  - v. Criteria of international bodies: independence implies the recognition and adequate guarantees that: "Judges shall decide the matters before them impartially, on the basis of the facts and in accordance with the law, without any restriction and without undue influence, inducement, pressure, threats or interference, whether direct or indirect, from any quarter or for any reason whatsoever";
  - vi. Ordinary legislation: the fact of having business or exercising trades that are incompatible with the decorum of their profession;
  - vii. Complementary criteria: the above exegesis establishes criteria for what in various fields is called "Guide of good practices" in favor of transparency.
15. In support of the reasoning that honorability must be maintained throughout the entire term of office and not only at the time of taking office, the CC has indicated that "If it is established that an official [...] while in office, incurs in unlawful acts of unworthiness, he can and should be prosecuted in order to remove him from a function that he unlawfully performs."<sup>11</sup> In the event of a situation denoting the absence of honorability of the official, "he must be removed from office, in order to protect the public function he performs and the office he holds, for the sake of the legal value, the common good. Removal from office constitutes a guarantee for society that his behavior and conduct will not affect the function he performs."<sup>12</sup>

b. The "Just Cause" for Removal of the Attorney General

16. Article 251 of the Constitution establishes that "The Attorney General shall serve for four years in the exercise of his functions and shall have the same preeminence and immunities as the magistrates of the Supreme Court of Justice. The President of the Republic may remove him/her for duly established justified cause."<sup>13</sup>
17. Prior to a 2016 reform, the Organic Law of the Public Prosecutor's Office established that just cause could be understood as "the commission of an intentional crime during the exercise of its function, for which it has been convicted in trial and the poor performance of the duties of the office established by this law."<sup>14</sup>

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<sup>11</sup> Amparo in sole instance 3690-2009, Ruling of September 2, 2010.

<sup>12</sup> Partial general unconstitutionality 889-2005, Ruling of July 27, 2006.

<sup>13</sup> Constitution of the Republic of Guatemala, art. 251.

<sup>14</sup> Organic Law of the Prosecutor's Office, art. 14 (2015).

18. Subsequent to said reform, the current law establishes that "Justifiable cause shall be understood as the commission of an intentional crime during the performance of his duties, provided that there is a duly executed conviction."<sup>15</sup>
19. In practical terms, this reform makes it virtually impossible to remove the Attorney General. First of all, the Public Prosecutor's Office is the entity in charge of criminal prosecution,<sup>16</sup> so any criminal investigation against the Prosecutor General would have to be initiated by the institution which he/she heads and either by personnel who are all hierarchically inferior to him/her, or an external lawyer appointed by him/her.<sup>17</sup>
20. Secondly, the Attorney General has the right to pre-trial proceedings or *antejuicio*, which, according to the law on the matter, must be heard and resolved by the Congress of the Republic.<sup>18</sup> However, constitutional jurisprudence has recognized that the Supreme Court of Justice has the power to determine "[...] whether the proceedings that contain the impeachment that has been submitted 'to its knowledge' have been promoted for 'spurious, political or illegitimate reasons,' understanding that this entitles it, if such situations concur, to agree to the liminal rejection of the accusation."<sup>19</sup>
21. Accordingly, the procedure for removing the Attorney General involves the following sequence of events:
  - i. The Public Prosecutor's Office decides to criminally prosecute its hierarchical superior for the commission of an intentional crime.
  - ii. The Supreme Court of Justice decides to admit the pre-trial proceedings or *antejuicio*.
  - iii. The Congress of the Republic decides to waive immunity.
  - iv. The corresponding criminal judge decides to convict for the commission of an intentional crime.
  - v. The Court of Appeals, the Supreme Court of Justice and even the Constitutional Court reject all appeals and actions brought against the conviction.
22. A criminal proceeding can take up to eight years to reach a final conviction<sup>20</sup>, so that the production of just cause for the Attorney General's removal could occur after the conclusion of her first or even second term. This leaves ability to remove him/her without practical effect.
23. At the internal level of the Public Prosecutor's Office, there is a Code of Ethics, which is, in principle, applicable to the Prosecutor General. This Code sets forth relevant obligations for

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<sup>15</sup> Organic Law of the Prosecutor's Office, art. 14.

<sup>16</sup> Constitution of the Republic of Guatemala, art. 251.

<sup>17</sup> Organic Law of the Prosecutor's Office, art. 11.

<sup>18</sup> Constitution of the Republic of Guatemala, arts. 206, 251.

<sup>19</sup> Case 2041-2003, Judgment of March 4, 2004; Case 634-2005, Judgment of March 25, 2004; Case 2040-2003, Judgment of August 8, 2005.

<sup>20</sup> Guatemala Congressional Session Records, Feb. 16, 2016.

prosecutors, such as “ensuring the absence of conflicts of interest in the exercise of public functions,”<sup>21</sup> and notes that an Ethics Commission is in charge of ensuring the correct application of the Code.<sup>22</sup> However, this Commission is appointed by the Attorney General and is hierarchically subordinated to him/her.<sup>23</sup> In any event, failure to comply with the Code of Ethics is not a cause for dismissal. Furthermore, because the Code is an agreement of the Public Prosecutor's Office, it may be repealed or modified at the discretion of the Prosecutor General.

c. The Absence of an Independent and Impartial Mechanism to Hold the Attorney General Accountable

24. The aforementioned process for holding the Attorney General accountable makes it virtually impossible for a criminal investigation to be initiated against him/her. As indicated above, such a proceeding would have to be initiated by a superior officer of the Public Prosecutor's Office, which is headed by the Attorney General, or an external lawyer appointed by her.<sup>24</sup> The Organic Law of the Prosecutor's Office does not provide any recourse or mechanism to protect personnel from retaliation for initiating such a proceeding.
25. To date, no case initiated by the Public Prosecutor's Office has reached the public stage of pre-trial proceedings before the Supreme Court.
26. There is also no provision for an independent body that can investigate independently of the Attorney General. The General Supervision is in charge of investigating administrative misconduct within the Public Prosecutor's Office, but it reports hierarchically to the Prosecutor General.<sup>25</sup> Furthermore, it is not explicitly specified that the Prosecutor General is subject to the disciplinary regime applied by the General Supervisor.
27. The figure of the "Special Prosecutor" through which someone external to the Public Prosecutor's Office could be appointed to carry out a criminal investigation against the Attorney General has two important limitations that call into question the possibility of independence and impartiality: such special prosecutor is appointed and can be removed by the Attorney General.<sup>26</sup>
28. In addition, the Organic Law of the Prosecutor's Office does not contemplate the possibility of suspension of the Attorney General in case an investigation is being carried out against him/her. The only suspension that could be granted is after the removal of immunity, in

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<sup>21</sup> Code of Ethics of the Public Prosecutor's Office, Section III.C.

<sup>22</sup> Code of Ethics of the Public Prosecutor's Office, art. 6.

<sup>23</sup> Code of Ethics of the Public Prosecutor's Office, art. 6.

<sup>24</sup> Organic Law of the Prosecutor's Office, art. 11.

<sup>25</sup> Organic Law of the Prosecutor's Office, art. 65.

<sup>26</sup> Organic Law of the Prosecutor's Office, art. 11.

case a preventive detention order is issued,<sup>27</sup> but this is insufficient to protect the independence and impartiality of the criminal process initiated against the Prosecutor, since during the entire investigative phase, she would continue to exercise her function as the hierarchical superior of those who are investigating her.

d. Contrast with Accountability of other Appointed Autonomous Body Officials

29. For all appointed autonomous body public officials, except for the Attorney General, there is a legal mechanism to remove them from office in the event that there are reasons that justify it, beyond a criminal conviction for an intentional crime, including the loss of the qualities necessary for the exercise of the office.
30. Such is the case with respect to the Human Rights Ombudsman,<sup>28</sup> the President, the Vice President, the elected members of the Monetary Board,<sup>29</sup> the Comptroller General of Accounts,<sup>30</sup> among others. This corresponds to the importance of such positions and the need to ensure accountability and removal from office of those officials who fail to comply with the necessary requirements for the exercise of their functions.
31. In contrast, the Attorney General can only be removed on the basis of a criminal conviction in the manner described above.

#### **IV. INTERNATIONAL LEGAL STANDARDS FOR PROSECUTORIAL ACCOUNTABILITY**

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a. Binding Nature of International Norms in Guatemala

32. Article 46 of the Guatemalan Constitution establishes that human rights treaties take precedence over domestic law<sup>31</sup>. The Constitutional Court of Guatemala has confirmed that human rights treaties take precedence over the Constitution.<sup>32</sup> Guatemala has signed and ratified the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the United Nations Convention Against Corruption.

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<sup>27</sup> Preliminary Trial Law, art. 7.

<sup>28</sup> Law of the Human Rights Commission of the Congress of the Republic of Guatemala and of the Human Rights Ombudsman, art.12. Decree 54-86.

<sup>29</sup> Organic Law of the Bank of Guatemala, art. 20. Decree 16-2002

<sup>30</sup> Constitution of the Republic of Guatemala, art. 233.

<sup>31</sup> Political Constitution of the Republic of Guatemala (Reformed by Legislative Agreement No. 18-93 of November 17, 1993) - Article 46.- *Preeminence of International Law. The general principle is established that in matters of human rights, treaties and conventions accepted and ratified by Guatemala, have preeminence over domestic law.*

<sup>32</sup> Judgment of the Constitutional Court of the Republic of Guatemala, July 17, 2012, file 1822-2011 <http://200.6.233.69/Sentencias/820216.1822-2011.pdf>.

b. Guatemala's Obligation to Ensure that Prosecutors, as Essential Agents of the Administration of Justice, Shall at all Times Maintain the Honor and Dignity of Their Profession, and Act Fairly, Objectively, and Impartially.

33. Both Article 8 of the American Convention on Human Rights<sup>33</sup> and Article 14 of the International Covenant on Civil and Political Rights<sup>34</sup> establish the right to an independent and impartial justice system. Prosecutors—including the Attorney General—are “essential agents of the administration of justice.”<sup>35</sup>
34. The Inter-American Court of Human Rights (IACtHR) has established that “the principle of legality of the public function, which governs the actions of officials of the Public Prosecutor's Office, requires that their work in the exercise of their duties be carried out on normative bases defined in the Constitution and the laws. Thus, prosecutors must ensure the correct application of the law and the search for the truth of the facts that occurred, acting with professionalism, good faith and procedural loyalty.”<sup>36</sup>
35. The United Nations Guidelines on the Role of Prosecutors (Guidelines on the Role of Prosecutors), recognized as relevant authority by the Inter-American human rights system,<sup>37</sup> “have been formulated to assist Member States in their role of ensuring and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings,” and “should be respected and taken into account by governments within the framework of their national legislation and practices.”<sup>38</sup> These Guidelines state that “Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.”<sup>39</sup>
36. Similarly, the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors (IAP

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<sup>33</sup> American Convention on Human Rights, 1969. General Secretariat of the Organization of American States. Article 8. Judicial Guarantees (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any criminal accusation made against him, or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”) at <https://www.corteidh.or.cr/tablas/17229a.pdf>

<sup>34</sup> International Covenant on Civil and Political Rights (1966). Office of the United Nations High Commissioner for Human Rights. Article 14. (“All persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him or of his rights and obligations in a suit at law.”) at <https://www.ohchr.org/es/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

<sup>35</sup> Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 3, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>.

<sup>36</sup> I/A Court H.R., *Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009, para. 165, at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_193\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_193_esp.pdf)

<sup>37</sup> Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 3.

<sup>38</sup> *Ibid.*, Preamble.

<sup>39</sup> *Ibid.*, para. 3.

Standards), provide that “[p]rosecutors shall at all times maintain the honour and dignity of their profession.”<sup>40</sup> The United Nations Commission on Crime Prevention and Criminal Justice has endorsed these standards as complementary to the Guidelines on the Role of Prosecutors and invited Member States to consider them in developing of their own national standards relating to the role of prosecutors.<sup>41</sup>

37. Both the Guidelines on the Role of Prosecutors and the IAP Standards also require prosecutors to perform their functions fairly, objectively, and impartially.<sup>42</sup>

### c. Guatemala’s Obligation to Hold Prosecutors Accountable By Means of a Fair, Independent and Impartial Procedure Established by Law

38. The Inter-American Court of Human Rights (IACtHR) has clarified that pursuant to Article 8 of the American Convention on Human Rights, legal standards applicable to judges also apply to prosecutors.<sup>43</sup> In addition, United Nations Convention against Corruption (“UNCAC”) requires state parties like Guatemala which have independent prosecution services<sup>44</sup> “to take measures to strengthen integrity and to prevent opportunities for corruption” in the prosecution service analogous to measures taken with respect to members of the judiciary.<sup>45</sup>
39. The IACtHR has further held under Article 8 of the American Convention that the “specific guarantee [of tenure] for prosecutors, applied in the same way as the protection mechanisms recognized for judges results in the following: (i) that removal from office is exclusively due to the permitted causes, either by a proceeding that complies with judicial guarantees or because the mandate has ended; (ii) that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence, and (iii) that any process against prosecutors must be settled using fair, objective and impartial proceedings, pursuant to the Constitution or the law, because the discretionary removal of prosecutors gives rise to the objective doubt about their real possibility of exercising their functions without fear of reprisals.”<sup>46</sup>

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<sup>40</sup> *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the International Association of Prosecutors, April 23, 1999 (*IAP Standards*), para. 1, at [https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx).

<sup>41</sup> Resolution 17/2 on *Strengthening the rule of law through enhancing the integrity and capacity of prosecution services* of the United Nations Commission on Crime Prevention and Criminal Justice, (17th Session, Vienna, 14-18 April 2008) at [https://www.iap-association.org/getattachment/Spanish/Resources-Documentation/IAP-Standards/UN-Resolution/RESOLUCION\\_ONU\\_2008.pdf.aspx](https://www.iap-association.org/getattachment/Spanish/Resources-Documentation/IAP-Standards/UN-Resolution/RESOLUCION_ONU_2008.pdf.aspx)

<sup>42</sup> *Guidelines on the Role of Prosecutors*, paras. 12 and 13; *IAP Standards*, paras. 1.e, 3.a, 4.1, 4.2.

<sup>43</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, paras. 69-72.

<sup>44</sup> Constitution of the Republic of Guatemala, art. 251.

<sup>45</sup> United Nation Convention against Corruption, art. 11, [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

<sup>46</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, para. 80.

40. The IACtHR has also “stressed the need for States to ensure an independent and objective investigation into human rights violations and into crimes in general, and has emphasized that the authorities responsible for the investigation must enjoy de jure and de facto independence which requires ‘not only hierarchical or institutional independence, but also real independence.’”<sup>47</sup>
41. The former UN Special Rapporteur on the Independence of Judges and Lawyers has stated that “[t]he fair, independent and impartial administration of justice also requires prosecutors to be held to account should they not fulfil their functions in accordance with their professional duties. In this vein, the Special Rapporteur emphasizes that autonomy should not exist to the detriment of accountability.”<sup>48</sup> She has noted, moreover, that “[t]he issue of accountability of prosecution services is especially important where the office of the prosecutor is fully independent and there is no scrutiny of prosecutorial actions from the executive or the legislative [branch].”<sup>49</sup>
42. The Guidelines on the Role of Prosecutors, recognized as relevant authority by the IACtHR,<sup>50</sup> similarly provide: “Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.”<sup>51</sup>
43. The Guidelines further provide: “Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.”<sup>52</sup>
44. The IACtHR has recognized the European Court of Human Rights (ECtHR), as relevant authority<sup>53</sup>. In *Kolevi v. Bulgaria*, the European Court of Human Rights found that Bulgaria had violated its obligation to conduct an effective investigation into the Chief Public

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<sup>47</sup> *Ibid.*, para. 70.

<sup>48</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/HRC/20/19, June 7, 2012, para. 82, at <https://documents.un.org/doc/undoc/gen/g12/138/14/pdf/g1213814.pdf?token=C9w42E5fEqplWiX0hF&fe=true>.

<sup>49</sup> *Ibid.*, para. 84.

<sup>50</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, para. 73.

<sup>51</sup> *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 21.

<sup>52</sup> *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 22.

<sup>53</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, para. 76.

<https://www.oas.org/es/cidh/defensores/docs/pdf/justice-operators-2013.pdf>.

Prosecutor's alleged crimes because Bulgaria's public prosecution service was organized in a manner that made it impossible for there to be independent investigation of the Prosecutor General.<sup>54</sup> The Court observed that "it was legally impossible in Bulgaria to bring criminal charges against the Chief Public Prosecutor without his consent. As a result, he could not be removed from office against his will even if he happened to commit the most serious crime, as his conviction was a prerequisite for the termination of his term of office under the Constitution . . . . Moreover, the Chief Public Prosecutor could not be temporarily suspended from duty, as that could only be done if charges had been brought against him . . . . In these circumstances . . . it was legally impossible to investigate any suspected [wrongdoing] . . . of the Chief Public Prosecutor."<sup>55</sup>

45. The ECtHR observed in this case that "as a result of the hierarchical structure of the prosecution system and, apparently, its internal working methods, no prosecutor would issue a decision bringing charges against the Chief Public Prosecutor."<sup>56</sup> The Court found the fact that "the Bulgarian government had not been able to show that any allegation against the Chief Public Prosecutor had ever been investigated" confirmed that "Bulgarian law lacked sufficient guarantees for an independent investigation into offences of which the Chief Public Prosecutor or other high-ranking officials close to him may be suspected."<sup>57</sup> The Court accepted that, "given the centralised structure of the Bulgarian prosecution system, based on subordination, its exclusive power to bring charges and the procedural and institutional rules allowing full control by the Chief Public Prosecutor over every investigation in the country," meant that "it was practically impossible to conduct an independent investigation into circumstances implicating him, even after [a] . . . constitutional amendment allowing in theory the bringing of charges against him."<sup>58</sup>
46. In 2017, the Venice Commission similarly concluded that "the . . . weak structure for accountability of the [Prosecutor General] . . . who [was] essentially immune from criminal prosecution and . . . virtually irremovable by means of impeachment for other misconduct" was "problematic."<sup>59</sup> In 2018, the Human Rights Committee also expressed "concern" over the Bulgarian Prosecutor General, on account of his being "essentially immune from criminal prosecution and irremovable by means of impeachment for other misconduct."<sup>60</sup>

e. International Legal Standards and Comparative Experience Allow for the Use of Lawful Administrative Disciplinary Proceedings for Holding Prosecutors Accountable.

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<sup>54</sup> *Kolevi v. Bulgaria*, ECtHR, (Application no. 1108/02), Judgement of 5 Nov. 2009, para. 204-209.

<sup>55</sup> *Ibid.*, para. 204.

<sup>56</sup> *Ibid.*, para. 205.

<sup>57</sup> *Ibid.*, para. 206.

<sup>58</sup> *Ibid.*, para. 209.

<sup>59</sup> European Commission for Democracy Through Law, Bulgaria, Opinion on the Judicial System Act, CDL-AD(2017)018, § 37, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e)

<sup>60</sup> Concluding observations on the fourth periodic report of Bulgaria, CCPR/C/BGR/CO/4, 15 Nov. 2018, para. 43.



47. The Inter-American Court of Human Rights has pointed out that "[t]he norms aimed at disciplining judges must seek to protect the judicial function when evaluating the performance of judges in the exercise of their functions."<sup>61</sup> The Court has further observed that "disciplinary control aims to assess the conduct, suitability, and performance of the judge as a public official. Thus, the disciplinary regulations for judges should be aimed at protecting the judicial function in such a way as to evaluate the performance of the judge in the exercise of their functions."<sup>62</sup> In *Chocrón Chocrón v. Venezuela*, the IACtHR held that a judge could be removed "in the context of a disciplinary procedure or by a duly-founded administrative decision."<sup>63</sup> As noted above, this jurisprudence applies equally to prosecutors.<sup>64</sup> In *Casa Nina v. Peru*, the IACtHR held "that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence . . ."<sup>65</sup>
48. The UN Special Rapporteur on the Independence of Judges and Lawyers has stated that "[h]uman rights principles and standards relating to . . . prosecutors recognize that they have to be accountable in the discharge of their functions and that disciplinary proceeding[s] can be initiated against them."<sup>66</sup> The UN Special Rapporteur has further stressed that "disciplinary measures must be proportional to the gravity of the infraction, and . . . that the law should give guidance on infractions by judges and the disciplinary measures that they trigger . . . which should also be applied to prosecutors."<sup>67</sup>
49. Comparative practice reflects the availability of administrative proceedings for holding prosecutors accountable. The Attorney General in Peru can be dismissed by a disciplinary proceeding conducted by the Justice National Commission.<sup>68</sup> In Mexico, according to Article 102 of the Mexican Constitution, the Attorney General (Fiscal General de la República) can be removed by the President of Mexico for serious reasons as defined by law, such as Bribery, embezzlement, diversion of public resources, improper use of information, abuse of functions, acting under conflict of interest, improper contracting, hidden enrichment or concealment of conflict of interest, simulation of legal acts, influence peddling,

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<sup>61</sup> Corte IDH. Caso Cordero Bernal vs. Perú. Excepción Preliminar y Fondo. Sentencia de 16 de febrero de 2021. Serie C No. 421. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_421\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_421_esp.pdf), para. 78.

<sup>62</sup> Corte IDH. Caso López Lone y otros vs. Honduras. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 5 de octubre de 2015. Serie C No. 302. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_302\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_302_esp.pdf), para. 273.

<sup>63</sup> *Chocrón Chocrón v. Venezuela*, Inter-American Court of Human Rights, 1 July 2011, para. 117-118.

<sup>64</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, paras. 69-72.

<sup>65</sup> *Ibid.* para. 80.

<sup>66</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/65/274, para. 60, <https://documents.un.org/doc/undoc/gen/n10/480/55/pdf/n1048055.pdf?token=kW5esSb15dN4TOxVld&fe=true>

<sup>67</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/65/274, para. 60.

<sup>68</sup> Article 154 of the Constitution of Peru and the Regulations of disciplinary proceedings by the Justice National Commission: <https://www.jnj.gob.pe/wp-content/uploads/2020/01/REGLAMENTO-DE-PROCEDIMIENTOS-DISCIPLINARIOS.pdf>

concealment, contempt, nepotism.<sup>69</sup> However, this removal can be objected to by the Senate. If the Senate objects, the Attorney General is reinstated in their position; otherwise, if no objection is made, the removal is considered valid, and the Attorney General is officially removed from office. According to Article 24 of the Attorney General Law, the attorney general can be dismissed through criminal or disciplinary proceedings.<sup>70</sup>

50. Based on the facts and international norms set forth above, the legal arguments asserted before the Constitutional Court are set forth below.

## V. LEGAL ARGUMENTS

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a. Guatemala's Failure to Ensure an Independent and Impartial Mechanism for Holding the Attorney General Accountable Makes It Virtually Impossible to Remove Him/Her and Violates International Legal Standards

51. The former UN Special Rapporteur on the Independence of Judges and Lawyers has stated that "[t]he fair, independent and impartial administration of justice also requires prosecutors to be held to account should they not fulfil their functions in accordance with their professional duties. In this vein, the Special Rapporteur emphasizes that autonomy should not exist to the detriment of accountability."<sup>71</sup> She has noted, moreover, that "[t]he issue of accountability of prosecution services is especially important where the office of the prosecutor is fully independent and there is no scrutiny of prosecutorial actions from the executive or the legislative [branch]."<sup>72</sup>
52. The IACtHR has "stressed the need for States to ensure an independent and objective investigation into human rights violations and into crimes in general and has emphasized that the authorities responsible for the investigation must enjoy de jure and de facto independence which requires 'not only hierarchical or institutional independence, but also real independence.'"<sup>73</sup>
53. Furthermore, the IACtHR has recognized the European Court of Human Rights (ECtHR), as relevant authority<sup>74</sup>. In *Kolevi v. Bulgaria*, a case concerning an investigation into alleged wrongdoing by the Chief Public Prosecutor of Bulgaria, the ECtHR has held that "(f)or an investigation to be effective, the persons responsible for and carrying out the investigation

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<sup>69</sup> Article 24 of the Attorney General Office Law (Ley de la Fiscalía General de la República) in relation to articles 51 to 63 BIS of the General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas)

<sup>70</sup> DECRETO por el que se expide la Ley de la Fiscalía General de la República, se abroga la Ley Orgánica de la Fiscalía General de la República y se reforman, adicionan y derogan diversas disposiciones de distintos ordenamientos legales.

<sup>71</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/HRC/20/19, June 7, 2012, para. 82, at <https://documents.un.org/doc/undoc/gen/g12/138/14/pdf/g1213814.pdf?token=C9w42E5fEqpWiX0hF&fe=true>.

<sup>72</sup> *Ibid.*, para. 84.

<sup>73</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, para. 70.

<sup>74</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, (Nov. 24, 2020), Series C No. 419, para. 76.

<https://www.oas.org/es/cidh/defensores/docs/pdf/justice-operators-2013.pdf>.

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 independence.”<sup>75</sup>

54. Contrary to its international legal obligations, as demonstrated below, Guatemala’s domestic legal framework does not provide an independent and impartial mechanism for holding the Attorney General accountable.

i. Conflicts of interest in criminal investigations

55. There is no provision in Guatemalan law for an independent body to investigate the Attorney General.

56. As set forth above, the President of the Republic may remove the Attorney General for “duly established justified cause,”<sup>76</sup> which the Organic Law of the Prosecutor’s Office in turn defines narrowly as “the commission of an intentional crime during the performance of his duties, provided that there is a duly executed conviction.”<sup>77</sup>

57. The Organic Law of the Prosecutor’s Office governing the criminal investigation of the Attorney General, however, reflects an inherent conflict of interest because a criminal investigation into the Attorney General can only be initiated by a superior officer of the Public Prosecutor’s Office (which is headed by the Attorney General), or an external lawyer who is appointed by the Attorney General.<sup>78</sup> Moreover, the Organic Law of the Prosecutor’s Office does not provide any recourse or mechanism to protect personnel from retaliation for initiating such a proceeding.

58. Moreover, the “General Supervision” is in charge of investigating administrative misconduct within the Public Prosecutor’s Office, but it reports hierarchically to the Attorney General.<sup>79</sup> Furthermore, it is not explicitly specified that the Attorney General is subject to the disciplinary regime applied by the General Supervisor.

59. The figure of the “Special Prosecutor” through which someone external to the Public Prosecutor’s Office could be appointed to carry out a criminal investigation against the Attorney General has two important limitations that call into question the possibility of independence and impartiality: such special prosecutor is appointed and can be removed by the Attorney General.<sup>80</sup>

ii. No accountability for Code of Ethics violations

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<sup>75</sup> *Kolevi v. Bulgaria*, ECtHR, (Application no. 1108/02), Judgement of 5 Nov. 2009, para. 193.

<sup>76</sup> Constitution of the Republic of Guatemala, art. 251.

<sup>77</sup> Organic Law of the Prosecutor’s Office, art. 14.

<sup>78</sup> Organic Law of the Prosecutor’s Office, art. 11.

<sup>79</sup> Organic Law of the Prosecutor’s Office, art. 65.

<sup>80</sup> Organic Law of the Prosecutor’s Office, arts. 11, 44.

60. The domestic legal procedure for holding the Attorney General accountable arguably violates the Code of Ethics of the Public Prosecutor's Office, which is, in principle, applicable to the Attorney General. This Code sets forth relevant obligations for prosecutors, including "ensuring the absence of conflicts of interest in the exercise of public functions."<sup>81</sup>
61. The inherent conflict of interest in the Attorney General's appointment of a hierarchical inferior to conduct an investigation into himself/herself violates this Code. The UN Guidelines on the Role of Prosecutors and the UN Special Rapporteur on the Independence of Judges and Lawyers emphasize that prosecutors and other judicial operators should adhere to such ethical and professional standards.<sup>82</sup> Similarly, the Inter-American Convention Against Corruption, to which Guatemala is party, has endorsed the adoption of "[s]tandards of conduct for the correct, honorable, and proper fulfillment of public functions," intended, *inter alia*, "to prevent conflicts of interest."<sup>83</sup>
62. Moreover, the Code does not provide a means of holding the Attorney General accountable. While an Ethics Commission is in charge of ensuring the correct application of the Code,<sup>84</sup> that Commission too is appointed by the Attorney General and is hierarchically inferior to him/her.<sup>85</sup> In any event, failure to comply with the Code of Ethics is not a cause for dismissal. Furthermore, because the Code is an agreement of the Public Prosecutor's Office, it may be repealed or modified at the discretion of the Prosecutor General.

### iii. No provision for suspending Attorney General when investigation commences

63. In addition, the Organic Law of the Prosecutor's Office does not contemplate the possibility of suspension of the Attorney General in the event that an investigation is being carried out against him/her. The only suspension that could be granted is after the removal of immunity, in case a preventive detention order is issued.<sup>86</sup> This is insufficient to protect the independence and impartiality of the criminal process initiated against the Prosecutor, since during the entire investigative phase, he/she would continue to exercise his/her function as the hierarchical superior of those who are investigating him/her.
64. Significantly, in *Kolevi v. Bulgaria*, the ECtHR found the inability to temporarily suspend the Chief Public Prosecutor from duty without first bringing charges against him, was among

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<sup>81</sup> Code of Ethics of the Public Prosecutor's Office, Section III.C.

<sup>82</sup> *E.g.*, United Nations Guidelines on the Role of Prosecutors, para. 22 ("Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines."); Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/HRC/20/19, June 7, 2012, paras. 87, 123.

<sup>83</sup> Inter-American Convention against Corruption, art. III.

<sup>84</sup> Code of Ethics of the Public Prosecutor's Office, art. 6.

<sup>85</sup> Code of Ethics of the Public Prosecutor's Office, art. 6.

<sup>86</sup> Preliminary Trial Law, art. 7.

the factors that made it “legally impossible to investigate any suspected [wrongdoing] . . . of the Chief Public Prosecutor.”<sup>87</sup>

#### iv. Virtual Impossibility of holding Attorney General accountable

65. The virtual impossibility of holding the Attorney General accountable in Guatemala is analogous to the situation in Bulgaria that the ECtHR found in *Kolevi v. Bulgaria* to be in violation of the European Convention on Human Rights.<sup>88</sup>
66. The ECtHR observed in *Kolevi* that “as a result of the hierarchical structure of the prosecution system and, apparently, its internal working methods, no prosecutor would issue a decision bringing charges against the Chief Public Prosecutor.”<sup>89</sup> The Court accepted that, “given the centralised structure of the Bulgarian prosecution system, based on subordination, its exclusive power to bring charges and the procedural and institutional rules allowing full control by the Chief Public Prosecutor over every investigation in the country,” meant that “it was practically impossible to conduct an independent investigation into circumstances implicating him, even after [a] . . . constitutional amendment allowing in theory the bringing of charges against him.”<sup>90</sup>
67. The Court found the fact that “the Bulgarian government had not been able to show that any allegation against the Chief Public Prosecutor had ever been investigated” confirmed that “Bulgarian law lacked sufficient guarantees for an independent investigation into offences of which the Chief Public Prosecutor or other high-ranking officials close to him may be suspected.”<sup>91</sup> Similarly, to date, no case initiated by the Public Prosecutor’s Office has reached the public stage of pre-trial proceedings before the Supreme Court in Guatemala. This fact further confirms that Guatemalan legal framework relating to the Attorney General’s accountability is flawed.

#### b. The Absence of Administrative Disciplinary Proceedings to Assess the Conduct of the Attorney General Is Inconsistent With International Legal Standards

68. As noted above, the United Nations Guidelines on the Role of Prosecutors and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors require prosecutors, as essential agents of the administration of justice, to maintain “at all times” the “honour and dignity of their profession.”<sup>92</sup>

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<sup>87</sup> *Kolevi v. Bulgaria*, ECtHR, (Application no. 1108/02), Judgement of 5 Nov. 2009, para. 204.

<sup>88</sup> *Ibid.*, para. 209.

<sup>89</sup> *Ibid.*, para. 205.

<sup>90</sup> *Ibid.*, para. 209.

<sup>91</sup> *Ibid.*, para. 206.

<sup>92</sup> *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 3, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>; *Standards of*

69. International legal standards contemplate the use of disciplinary proceedings to ensure that prosecutors maintain the honor and dignity of their profession. The Inter-American Court of Human Rights has observed that "disciplinary control aims to assess the conduct, suitability, and performance of the judge as a public official. Thus, the disciplinary regulations for judges should be aimed at protecting the judicial function in such a way as to evaluate the performance of the judge in the exercise of their functions."<sup>93</sup> In *Chocrón Chocrón v. Venezuela*, the IACtHR held that a judge could be removed "in the context of a disciplinary procedure or by a duly-founded administrative decision."<sup>94</sup> This jurisprudence also applies to prosecutors.<sup>95</sup> In *Casa Nina v. Peru*, the IACtHR held "that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence . . ."<sup>96</sup>
70. Similarly, the UN Special Rapporteur on the Independence of Judges and Lawyers has stated that "[h]uman rights principles and standards relating to . . . prosecutors recognize that they have to be accountable in the discharge of their functions and that disciplinary proceeding[s] can be initiated against them."<sup>97</sup> The UN Special Rapporteur has further stressed that "disciplinary measures must be proportional to the gravity of the infraction."<sup>98</sup> In addition, the UN Special Rapporteur has observed that "[j]udges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, willful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics. In particular, justice operators must be duly held to account when engaged in corrupt practices."<sup>99</sup> The Human Rights Committee has also observed that judges may be dismissed "only on serious grounds of misconduct or incompetence."<sup>100</sup>
71. However, as noted above, Guatemala's legal framework does provide for disciplinary proceedings against the Attorney General. As set forth above, the President of the Republic

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*Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the International Association of Prosecutors, April 23, 1999 (*IAP Standards*), para. 1, at [https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx).

<sup>93</sup> Corte IDH. Caso López Lone y otros vs. Honduras. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 5 de octubre de 2015. Serie C No. 302. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_302\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_302_esp.pdf), para. 273.

<sup>94</sup> *Chocrón Chocrón v. Venezuela*, Inter-American Court of Human Rights, 1 July 2011, para. 117-118.

<sup>95</sup> *Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Nov. 24, 2020,, Series C No. 419, paras. 69-72.

<sup>96</sup> *Ibid.* para. 80.

<sup>97</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/65/274, para. 60, at <https://documents.un.org/doc/undoc/gen/n10/480/55/pdf/n1048055.pdf?token=kW5esSb15dN4TOxVLd&fe=true>

<sup>98</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Document A/65/274, para. 60.

<sup>99</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Document, A/HRC/26/32, para 84, at <https://documents.un.org/doc/undoc/gen/g14/139/18/pdf/g1413918.pdf?token=iBVzNBgDOMwgS2fszH&fe=true>.

<sup>100</sup> Human Rights Committee, General Comment 32 (2007), para 20.

may remove the Attorney General for “duly established justified cause,”<sup>101</sup> which the Organic Law of the Prosecutor’s Office in turn defines narrowly as “the commission of an intentional crime during the performance of his duties, provided that there is a duly executed conviction.”<sup>102</sup>

72. Notably, prior to a 2016 reform, the Organic Law of the Public Prosecutor's Office established that just cause could be understood as "the commission of an intentional crime during the exercise of its function, for which it has been convicted in trial and the poor performance of the duties of the office established by this law."<sup>103</sup>
73. Comparative practice reflects the availability of administrative proceedings for holding prosecutors accountable for misconduct not rising to the level of a criminal conviction. For example, in Peru, the Attorney General can be dismissed by a disciplinary proceeding conducted by the Justice National Commission.<sup>104</sup> In Mexico, according to Article 102 of the Mexican Constitution, the Attorney General (Fiscal General de la República) can be removed by the President of Mexico for serious reasons as defined by law, such as bribery, embezzlement, diversion of public resources, improper use of information, abuse of functions, acting under conflict of interest, improper contracting, hidden enrichment or concealment of conflict of interest, simulation of legal acts, influence peddling, concealment, contempt, nepotism.<sup>105</sup> However, the Senate can object to this removal. If the Senate objects, the Attorney General is reinstated in his/her position. In the absence of such an objection, the removal is considered valid, and the Attorney General is officially removed from office. According to Article 24 of the Attorney General Law, the Attorney General can be dismissed through criminal or disciplinary proceedings.<sup>106</sup>
74. Accordingly, the absence of disciplinary proceedings applicable to the Attorney General in Guatemala is inconsistent with international legal standards and comparative practice.

## VI. CONCLUSION

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75. From the foregoing considerations it is concluded that the current legal framework in Guatemala with respect to the Attorney General’s accountability does not comply with international legal standards.

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<sup>101</sup> Constitution of the Republic of Guatemala, art. 251.

<sup>102</sup> Organic Law of the Prosecutor’s Office, art. 14.

<sup>103</sup> Organic Law of the Prosecutor’s Office, art. 14 (2015).

<sup>104</sup> Article 154 of the Constitution of Peru and the Regulations of disciplinary proceedings by the Justice National Commission: <https://www.jnj.gob.pe/wp-content/uploads/2020/01/REGLAMENTO-DE-PROCEDIMIENTOS-DISCIPLINARIOS.pdf>.

<sup>105</sup> Article 24 of the Attorney General Office Law (Ley de la Fiscalía General de la República) in relation to articles 51 to 63 BIS of the General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas)

<sup>106</sup> DECRETO por el que se expide la Ley de la Fiscalía General de la República, se abroga la Ley Orgánica de la Fiscalía General de la República y se reforman, adicionan y derogan diversas disposiciones de distintos ordenamientos legales.

76. We submit to the consideration of this Constitutional Court the arguments set forth herein, in the hope that they will support its praiseworthy work in the present case.

May 15, 2024.

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Stephen McFarland  
former U.S. Ambassador to  
Guatemala

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Amrit Singh  
Executive Director, Rule of Law Impact  
Lab, Stanford Law School