



**General Assembly**

Distr.  
GENERAL

A/HRC/8/4  
13 May 2008

ENGLISH  
Original: SPANISH

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HUMAN RIGHTS COUNCIL  
Eighth session  
Agenda item 3

**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS,  
CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL  
RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT**

**Report of the Special Rapporteur on the independence of  
judges and lawyers, Leandro Despouy\***

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\* This document is submitted late to reflect the most recent information.

## Summary

The report describes the Special Rapporteur's activities in 2007 and then looks at three main issues: the impact of states of emergency on the right to a fair trial, access to justice, and recent developments in international justice.

In line with the recommendations of the expert seminar held in Geneva in late 2007, the report contains a proposal for a study to systematize the norms and principles for the protection of human rights during states of emergency, with a view to drafting an instrument or *corpus juris* to guide States in ensuring the continued effective exercise of fundamental human rights in states of emergency.

The report sets out to analyse the two most important aspects of access to justice: access to justice as a fundamental right, and the conditions required for its effective implementation. Although strictly speaking access to justice means the right to effective judicial protection, the term is used with a broader meaning in this report, in order to permit analysis of the justice administration system and the factors that affect access to, and the operation of, justice. The report looks at the content and scope of the right of access to justice, and then in detail at the different economic, social, cultural and operational barriers to the exercise of this right. It examines how access to justice is affected by the type and characteristics of the various courts involved in dispensing justice and the conditions in which judicial actors carry out their work; it also looks at the impact of corruption and judicial delay. It focuses on interesting developments in the enforceability of economic, social and cultural rights and goes on to analyse the way in which certain vulnerable groups' right of access to justice is impaired. The report ends by indicating the main consequences of shortcomings in access to justice and recommends, in particular, that a database of best practice should be developed in order to help States bridge this serious gap.

Lastly, the report indicates the main recent developments in the area of international justice, highlighting the importance of the start of the first trial in the International Criminal Court since its establishment in 2002. It warns of the serious consequences, for the relatives of Sergio Vieira de Mello and 20 other staff members who lost their lives in the 19 August 2003 attack on the United Nations office in Baghdad, of the execution of a witness who could have helped to shed light on the incident. For the Special Rapporteur this is a blatant violation of the right to the truth, one that considerably undermines the Organization's authority and to which the Human Rights Council should pay particular attention.

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## **Introduction**

1. Since taking up his duties in August 2003, the Special Rapporteur has addressed one or more main topics in each annual report. This report, the fifth by the current Special Rapporteur and the fourteenth since the mandate was established in 1994, looks at the issue of due process in situations of de jure or de facto states of emergency, and also at the complex issue of access to justice.
2. In analysing the issue of access, the Special Rapporteur considers his own reports and country visits and the material produced by other special procedures. It takes as a reference the International Bill of Human Rights and the precedents set by supervisory bodies, in particular the Human Rights Committee. He also takes account of the texts and precedents established by regional bodies; the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors; and other specific standards set in regional systems.
3. Given the United Nations word-count requirements, many examples and numerous legal references could not be included. Only the footnotes, grouped together in annex I, are retained.

## **I. ACTIVITIES IN 2007**

### **A. International meetings**

4. From 11 to 20 June 2007, in Geneva, the Special Rapporteur took part in the fourteenth annual meeting of the special procedures of the Human Rights Council and the fifth session of the Council, where he presented his annual report, a report on exchanges with Governments concerning specific complaints, a report on his mission to the Maldives and a preliminary note on his mission to the Democratic Republic of the Congo. In October he attended the sixty-second session of the General Assembly in New York, where he presented his report (A/62/207).
5. On 28 and 29 June 2007, the Special Rapporteur attended a meeting of the Supreme Courts of Justice of the Andean region organized by the Supreme Court of Ecuador, the body whose establishment and appointment he had pressed for in 2005 in the United Nations and the Organization of American States (OAS), after the Ecuadorian Supreme Court judges had been dismissed in breach of the Constitution, triggering a serious institutional crisis.
6. From 16 to 27 October he attended a training course in Washington D.C., on inter-American and universal systems for human rights protection, organized by the Inter-American Commission on Human Rights and the Washington College of Law.
7. In November the Special Rapporteur spoke at the third meeting of the Ibero-American Legal Assistance Network, in Punta del Este, Uruguay, giving a presentation on his mandate and on international cooperation in the field of justice.
8. In December he chaired the expert seminar referred to in section B below.

## **B. Country visits**

9. At the invitation of the Government of the Republic of Maldives, the Special Rapporteur visited that country from 25 February to 1 March. His report (A/HRC/4/25/Add.2) was presented to the Human Rights Council at its fifth session. Again at the invitation of the Government, he visited the Democratic Republic of the Congo from 15 to 21 April, and his report (A/HRC/4/25/Add.3) will be presented to the Council at its eighth session. He wishes to thank both Governments for having allowed him to make these visits.

10. The Special Rapporteur is planning a mission to the Russian Federation in May 2008 and thanks the Government for its kind invitation. He also hopes to visit Angola, Cambodia, Fiji, Guatemala, the Islamic Republic of Iran, Kenya, Nigeria and the Philippines. He looks forward to receiving replies from those countries that have not yet authorized a visit; he is grateful to those Governments that have already confirmed their invitation and hopes that a suitable time for these visits will be arranged shortly.

11. In Fiji, the 2006 coup d'état caused a severe political and institutional crisis. Worrying allegations of human rights violations affecting the independence of the judiciary prompted the Special Rapporteur to ask to visit the country as soon as possible, first by letter on 18 June, followed by reminders on 14 November 2007 and 7 February 2008, then in the General Assembly and lastly in an approach to the country's diplomatic representatives. He has not yet received a positive reply. It is also regrettable that leading jurists' organizations, such as the International Bar Association (IBA) have not been allowed to visit the country. This mandate is a Human Rights Council special procedure, tasked with defending the independence of the judiciary; the Special Rapporteur's visit will not affect any ongoing judicial proceedings, as the Government claims, and he therefore hopes to receive a positive reply. During visits to countries in similar situations, interviews were carried out with the highest national authorities, all sectors working in the area of justice and NGOs, and had a verifiable positive impact. In some cases, such as that of the Supreme Court of Ecuador, interviews of this kind have been adopted by the United Nations as "best practice".

## **C. Routine activities**

12. These included consideration of a large number of communications concerning situations relevant to the mandate. This involved ongoing contact not only with the Secretariat and other special rapporteurs but also with many Governments, and the preparation of numerous urgent appeals, letters of allegation and press releases. This work is described in annex I of this report.

## **II. STATES OF EMERGENCY AND THE RIGHT TO A FAIR TRIAL**

13. A seminar on "The protection of human rights under states of emergency, particularly the right to a fair trial" was held on 3 and 4 December 2007 in Geneva. Convened at the initiative of the Special Rapporteur, who was also in the chair, the seminar was organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the International Commission of Jurists and brought together some 15 international and regional specialists.

14. Some of the most significant findings and recommendations of the meeting - details of which will be included in the next report to the General Assembly - show that the use of states of emergency is growing, spanning all continents, and continues to be a source of serious human rights violations. Of particular concern are situations where the independence of the judiciary is affected, and where emergency powers are granted to military or special courts or commissions to try civilians, thus violating the guarantees of the right to a fair trial. In addition, some States, which have not declared a state of emergency, have tightened national security or anti-terrorist laws and provisions, placing similar - or even more severe - restrictions on human rights than those authorized during a declared emergency. These abuses occur despite the safeguards provided for by international law and the abundant case law in this area; hence the importance of bringing together in one instrument all the norms and principles governing the protection of human rights under states of emergency, with the aim of setting international standards applicable to all States. This should be preceded by a study, to be conducted by OHCHR, compiling important developments over the last 10 years in legislation, case law and doctrine. In addition the Council is requested to pay particular attention to this issue.

### III. ACCESS TO JUSTICE

#### A. Introduction

15. States have an obligation to guarantee the exercise of the rights required under domestic law and in international treaties to which they are parties. This means that they must unreservedly respect the rights established therein and set up institutional mechanisms to prevent or remedy acts that violate those rights. All States governed by the rule of law have a positive obligation to eliminate obstacles that impair or restrict access to justice.

16. In successive reports, the Special Rapporteur has noted the adverse effects of some structural factors on the effective enjoyment of human rights, and in particular factors directly or indirectly preventing, hindering or impeding access to justice. In the present report, he proposes to consider this issue by looking at its two most important aspects: (a) as a fundamental human right, and (b) the conditions required for its effective realization. The first concerns the complex fabric of rights related to access to justice. The second concerns the institutional and material conditions in which the justice administration system operates, and the factors affecting that operation and access to justice, and follows the direction taken in European case law<sup>1</sup> and the modern tendency to broaden the definition of access to justice to mean “the effective availability of institutional channels for the protection of rights and the resolution of various types of conflict in a timely manner and in accordance with the legal order”.<sup>2</sup> By referring to both institutional

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<sup>1</sup> Para el Tribunal Europeo de Derechos Humanos el acceso a los tribunales comprende diversos derechos en favor de las partes y que se relacionan tanto con la organización y composición de las instituciones judiciales, como con la substanciación de los procesos. ECHR, *Case Brualla de la Torre, v. Spain*, 19/12/1997, 155/1996/774/975.

<sup>2</sup> J.M. Casal *et al.*, *Derechos humanos y acceso a la justicia*, Caracas: Instituto Latinoamericano de Investigaciones Sociales, 2005, p.11.

and judicial channels, this definition also covers alternative dispute resolution mechanisms, which are increasingly important in certain contexts, and in regard to certain rights and specific social groups.

## **B. Content and scope of the right of access to justice**

17. The legal complexity and richness of the concept of access to justice lies in the fact that it is both a right in itself and the means of restoring the exercise of rights that have been disregarded or violated. As an indispensable component of specific rights such as the right to liberty and to personal safety, it is closely linked to the right to effective judicial protection (fair trial or due process), the right to an effective remedy<sup>3</sup> and the right to equality.<sup>4</sup>

### **1. Right to a fair trial**

18. This right is recognized in article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights and treaties of the various regional systems for human rights protection,<sup>5</sup> and implies access to a predetermined, independent and impartial court, the decisions of which are based on law, following proceedings that observe procedural guarantees. As the Human Rights Committee states in its general comment No. 32, article 14 is of a particularly complex nature, combining various guarantees with different scopes of application: (a) equality before the courts; (b) right to a fair and public hearing by a competent, independent and impartial tribunal established by law; (c) procedural guarantees; (d) right to compensation in cases of miscarriage of justice in criminal cases; and (e) right not to be tried or punished again for an offence that has already been tried (*ne bis in idem*). In the context of access to justice the first three guarantees are of particular relevance.

### **2. Right to an effective remedy**

19. This right strengthens the conditions of access to justice insofar as it includes effective procedural guarantees such as amparo or habeas corpus in the demands and requirements of a fair trial or the right to protection of the courts. Judicial protection applies in disputes in respect of any rights, whereas effective remedy protects certain specific rights acknowledged as fundamental and identified as such in the Constitution, the law or international treaties. For example, article 2, paragraph 3, of the International Covenant on Civil and Political Rights

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<sup>3</sup> Artículo 2.3 del PIDCP.

<sup>4</sup> “En la medida en que la legitimidad del Estado de Derecho se apoya en una implementación efectiva del principio de igualdad ante la ley, las desigualdades para acceder a la justicia comprometen esa legitimidad que el Estado democrático tiene la necesidad de preservar y nutrir constantemente. La falta de igualdad de posibilidades de los ciudadanos en la defensa de sus derechos socava la legitimidad del Estado y las instituciones democráticas”: A.M. Garro, “El acceso a la justicia y el ‘derecho de interés público’”, *Justicia y Sociedad*, vol. 2, 1999, p. 52.

<sup>5</sup> Artículo 8 de la Convención Americana sobre Derechos Humanos y el artículo 6 de la Convención Europea de Derechos Humanos.

recognizes the right to an effective remedy, but only with respect to the rights enshrined in the Covenant. Article 25 of the American Convention on Human Rights provides for the “right to simple and prompt recourse” in the event of violation of rights “recognized by the constitution or laws of the state concerned or by this Convention”. Thus there is always a reference to explicit recognition. However, case law has in practice interpreted the two rights as complementary, establishing that the proceedings in an effective remedy must observe the general guarantees of due process and that the available remedy must be simple and prompt. The monitoring bodies, when considering the admissibility of communications and deciding whether domestic remedies have been exhausted or not, have determined that a remedy must be real, not merely theoretical; be available to the person concerned; be capable of restoring the enjoyment of the impaired right; and ensure the effectiveness of the judgement. In the inter-American system there is considerable case law relating to the protection of procedural guarantees in respect of non-derogable rights during states of emergency. Similarly, the Human Rights Committee has extended non-derogability to cover the guarantees of due process set out in article 14 of the Covenant. Thus the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.

### **3. Right to equality before the courts**

20. This right is enshrined in generic terms in article 14, paragraph 1, of the Covenant. Access should be guaranteed to all individuals, regardless of nationality or administrative status, in order to ensure their right to claim justice. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds, thus excluding any restriction on the grounds of race, sex, language, religion, opinion, national or social origin, economic situation, birth or other condition, such as civil status.<sup>6</sup> Access to justice should be unrestricted and effective. The first of these criteria refers to the prohibition of discrimination and coercion, and to conditions that favour admissibility of the action. Being effective means that the procedural channels should be such that the necessary legal assistance is provided and the remedies available are genuinely capable of meeting the desired objective. It is not just a matter of guaranteeing entry to the judicial process: equality of access must determine the entire conduct of that process. The Human Rights Committee has established that a situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.<sup>7</sup>

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<sup>6</sup> CDH, Comunicación N° 202/1986, *Alto del Avellanal c. el Perú*, párr. 10.2 (otorgando al marido el derecho a representar el patrimonio conyugal ante los tribunales, excluyendo así a la mujer casada del derecho de legitimación activa). *Vid.* también CDH, *Observación general n° 18. No discriminación*, párr. 7.

<sup>7</sup> Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.



#### 4. Equality of arms<sup>8</sup>

21. Equality also extends to the procedural rights and instruments available to parties throughout the proceedings, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.<sup>9</sup> This right is abundantly confirmed in international case law. In the Committee's view, there is no equality of arms if only the prosecutor, but not the defendant, is allowed to appeal a certain decision.<sup>10</sup>

#### 5. Legal assistance

22. This is a fundamental component of access to justice. In the Committee's view<sup>11</sup> legal assistance must meet a number of requirements: among other things, it must be prompt; it should be obtained privately; it should be confidential; and it should be free of charge when the person does not have sufficient means to pay for it. Other financial aspects have been repeatedly raised by the Committee,<sup>12</sup> such as the imposition of litigation costs and how this can impair the effective exercise of this right.<sup>13</sup>

#### 6. Positive obligations of the State

23. The State should refrain from any action that hinders access to justice or makes it impossible for those working in the judicial system - judges, lawyers and prosecutors - to carry

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<sup>8</sup> *Ibid.*, párr. 8.

<sup>9</sup> CDH, Comunicación N° 1347/2005, *Dudko c. Australia*, párr. 7.4; CDH, Comunicación N° 846/1999, *Jansen-Gielen c. los Países Bajos*, párr. 8.2; CHD, Comunicación N° 779/1997, *Äärelä y Näkkäläjärvi c. Finlandia*, párr. 7.4.

<sup>10</sup> CDH, Comunicación N° 1086/2002, *Weiss c. Austria*, párr. 9.6. También Comunicación N° 223/1987, *Robinson c. Jamaica*, párr. 10.4 (suspensión de audiencia).

<sup>11</sup> CDH, Comunicaciones N° 646/1995, *Lindon c. Australia*, párr. 6.5; N° 341/1988, *Z.P. c. el Canadá*, párr. 5.4; 985/2001, *Aliboeva c. Tayikistán*, párr. 6.4; 964/2001, *Saidova c. Tayikistán*, párr. 6.8; 781/1997, *Aliev c. Ucrania*, párr. 7.3; 554/1993, *LaVende c. Trinidad y Tabago*, párr. 58; N° 383/1989, *H.C. c. Jamaica*, párr. 6.3; N° 253/1987, *Kelly c. Jamaica*, párr. 9.5; Nos. 705/1996, *Taylor c. Jamaica*, párr. 6.2 ; 913/2000, *Chan c. Guyana*, párr. 6.2; 980/2001, *Hussain c. Mauricio*, párr. 6.3; N° 917/2000, *Arutyunyan c. Uzbekistán*, párr. 6.3.

<sup>12</sup> Comunicaciones Nos. 377/1989, *Currie c. Jamaica*, párr. 13.4; 704/1996, *Shaw c. Jamaica*, párr. 7.6; 707/1996, *Taylor c. Jamaica*, párr. 8.2; 752/1997, *Henry c. Trinidad y Tabago*, párr. 7.6; 845/1998, *Kennedy c. Trinidad y Tabago*, párr. 7.10.

<sup>13</sup> CDH, Comunicación N° 646/1995, *Lindon c. Australia*, párr. 6.4; CDH, Comunicación N° 779/1997, *Äärelä y Näkkäläjärvi c. Finlandia*, párr. 7.2.

out their task.<sup>14</sup> Access to justice requires the establishment of a judicial system that guarantees rights, and of parallel measures such as mechanisms and programmes to facilitate free legal assistance, in both criminal and civil cases.<sup>15</sup> This positive aspect of the State's obligations, likewise firmly established in both the European<sup>16</sup> and the inter-American systems,<sup>17</sup> must be considered in relation to socio-economic factors and others such as age, sexual orientation, and people's physical and psychological condition, which have a major bearing on effective access to justice.

### C. Barriers to access to justice

#### 1. Financial barriers

24. Financial factors usually have a huge impact on access to justice. In structural terms, they are reflected in scarcity of funds allocated to ministries of justice; lack of training for those working in the justice system; buildings in poor repair; delays in proceedings; outdated equipment for expert appraisals and technical analyses; inadequacy of funds to ensure free legal aid; and so forth. These are issues that directly or indirectly affect access to justice, and the Special Rapporteur makes a point of raising them in his country visits.

25. At the individual level, court proceedings can represent a heavy financial burden. Costs include initiating and pursuing the proceedings, and possible delays. In addition there are lawyers' fees and other costs such as travel and loss of working time as a result of a court case. Various studies show that costs can be as high as 30, 50 or even 60 per cent of the value of property disputes where the amounts claimed are low.<sup>18</sup> They have a proportionally greater effect on low-income social sectors, and the impossibility of paying for legal aid or meeting the costs associated with a case has come to be seen in case law and doctrine as constituting real

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<sup>14</sup> Esta dimensión negativa es la que aborda más específicamente la legislación británica. *Vid.*, M. Penfold Schoenborn, "The Access to justice Bill and Human Rights Act of 1998: Britain's legislative overhaul leaves the system scrambling to mend the safety net", *Buffalo Human Rights Law Review*, vol. 6, p. 201.

<sup>15</sup> *Vid.* TEDH, *Airey c/Irlanda*, Sentencia del 9 de octubre de 1979.

<sup>16</sup> Del razonamiento del Tribunal en ese asunto se deduce que el Estado no sólo tiene la obligación de abstenerse de interferir el ejercicio del derecho al acceso a la justicia, sino también la obligación de adoptar acciones positivas y remover los obstáculos materiales que impiden su ejercicio efectivo. TEDH, *Airey c/Irlanda*, Sentencia del 9 de octubre de 1979.

<sup>17</sup> Corte Interamericana de derecho Humanos, *Opinión Consultiva OC-11/90, del 10 de agosto de 1998. Excepciones al agotamiento de los recursos internos*; Corte Interamericana de derecho Humanos, *Caso Fairen Garben y Solis Corrales*, ST de 15 de marzo de 1989, Serie C, núm. 6, párr. 93.

<sup>18</sup> A.M. Garro, "Acceso a la justicia y el 'derecho de interés público'", *Revista Justicia y Sociedad*, vol. 2, 1999, p. 50.

discrimination,<sup>19</sup> if a person's financial situation places them in a position of inequality before the law. International instruments and case law reflect this reality and establish a number of requirements directly related to access to justice. Thus, in addition to free legal aid for criminal proceedings, the Basic Principles on the Role of Lawyers require Governments to ensure the provision of sufficient funding and other resources (for example legal services) to the poor and other disadvantaged persons.<sup>20</sup> Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights guarantees that anyone charged with a criminal offence shall be entitled to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment if they do not have sufficient means to pay for it. The Inter-American Court of Human Rights has found that proceedings must recognize and resolve factors of real inequality in respect of anyone brought before the courts. Furthermore, the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests.<sup>21</sup> In addition, the Court has found that any person whose economic status means that they cannot afford either the necessary legal counsel or the costs of the proceedings "is being discriminated against by reason of ... economic status and, hence, is not receiving equal protection before the law".<sup>22</sup>

### **Extreme poverty**

26. Financial factors take on even more importance when they compound other social, cultural or employment factors and lead to marginalization and social exclusion. At this point the issue of access to justice is global in nature, since it extends to the effective exercise of human rights as a whole. In reality, nothing mirrors the indivisibility and interdependence of human rights better than extreme poverty, since anyone living in extreme poverty is adversely affected in every aspect of life,<sup>23</sup> including appalling living conditions, unhealthy housing, homelessness, failure

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<sup>19</sup> H. Birgin, B. Kohen, "El acceso a la justicia como derecho", H. Birgin, B. Kohen, (Comp.), *Acceso a la justicia como garantía de igualdad*, Buenos Aires: Biblos, p. 17.

<sup>20</sup> Principios Básicos sobre la Función de los Abogados, Aprobados por el Octavo Congreso de las Naciones Unidas sobre Prevención del Delito y Tratamiento del Delincuente, La Habana, 27 de agosto a 7 de septiembre de 1990, Ppo. 3.

<sup>21</sup> Corte Interamericana de derechos Humanos, *Opinión Consultiva OC-16/99 de 1 de octubre de 1999, Derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*, párr. 119.

<sup>22</sup> Corte Interamericana de derecho Humanos, *Opinión Consultiva OC-11/90, del 10 de agosto de 1998, Excepciones al agotamiento de los recursos internos*, párr. 22.

<sup>23</sup> Despouy, Leandro, Relator Especial sobre la extrema pobreza, Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Informe final sobre los derechos humanos y la extrema pobreza, **E/CN.4/Sub. 2/1996/13**, 28 de junio de 1996: párrafos 3,4, 5, 7 y 8.-Aprobado por la Comisión de Derechos Humanos,  
URL:<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3b8458e534d255b58025669e0050ce6e?Opendocument>

to appear on civil registers, unemployment, ill-health, inadequate education and marginalization. Each one of these deprivations exacerbates the others to form a vicious circle of abject poverty, which is compounded by a strong tendency for poverty to perpetuate itself, thus forming an infernal mill that prevents people from exercising any of their human rights. The Special Rapporteur considered this issue in his former capacity as Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1996/13). The most serious obstacles barring access to justice for the very poor include: (a) their indigent condition; (b) illiteracy or lack of education and information; (c) the complexity of procedures; (d) mistrust, not to say fear, stemming from their experience of the justice system, either because they frequently find themselves in the position of accused, or because their own complaints are turned against them; (e) the slow pace of justice, despite the fact that their petitions often relate to very sensitive aspects of life (such as return of children) which need to be dealt with rapidly; and (f) in many countries, the fact that they are not allowed to be accompanied or represented by support organizations which could also bring criminal indemnification proceedings. It should be stressed that, while this issue and its implications for human rights have been addressed essentially in relation to guarantees protecting the right to a defence (designation of a court-appointed lawyer or officially appointed defence counsel, free legal advice and representation) and safeguarding the principle of equality before the law, they are in fact much more complex, as has been pointed out by the Committee on the Elimination of Racial Discrimination. We need only add to the long list of human rights affected by the total impunity with which they can be violated, as illustrated by the unpunished killings of street children and vagrants by death squads. When the authorities attempt to identify them, they say that many are not listed on official registers; in other words, legally, they do not exist.

### **3. Barriers relating to information**

27. Access to justice can also be hampered by clients' ignorance of their rights and all matters relating to their case. As a minimum, they need to know all the details of the charges and of the case: evidence, time periods and other parties involved. The right to be informed of the nature and cause of the charges made should be realized in a detailed, prompt and comprehensible manner. The Human Rights Committee has found that the right to be informed of the charge promptly requires that information be given as soon as the person is formally charged with a criminal offence under domestic law,<sup>24</sup> or the individual is publicly named as such. The principle of equality of arms requires that each party should have the information concerning the case and adequate facilities to participate in the proceedings, which means access to documents and other evidence, including materials<sup>25</sup> that the prosecution plans to offer in court against the accused or that are exculpatory.

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<sup>24</sup> CDH, Comunicaciones Nos. 1128/2002, *Márques de Morais c. Angola*, párr. 5.4 y 253/1987, *Kelly c. Jamaica*, párr. 5.8.

<sup>25</sup> *Vid.* observaciones finales del Comité de Derechos Humanos al informe de Canadá, CCPR/C/CAN/CO/5, párr. 13.

28. In addition, both the International Covenant on Civil and Political Rights and regional instruments provide that everyone has the right to a public hearing. This guarantee is related to access to justice, and contributes to transparency and to the independence and impartiality of tribunals. In this regard, the Committee has stated that courts must make information regarding the time and venue of the hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits considering, inter alia, the potential interest in the case. Access by the media and media accounts of the progress of the trial can help strengthen commitment to the proper conduct of proceedings and to protection of the rights of the participants.

#### **4. Cultural barriers**

29. Language difficulties can lead to a lack of understanding of what is at stake, the rights of participants, the institutional channels for claiming those rights, and the course of the proceedings. For this reason international instruments establish the right to have the free assistance of an interpreter if the accused cannot understand the language used in court.<sup>26</sup> This has to do with the principles of fairness and equality of arms in criminal proceedings.<sup>27</sup> Cases involving immigrants, asylum-seekers and ethnic minorities are revelatory, since cultural and language barriers compound the already precarious situation in which they find themselves in regard to the effective exercise of their rights before the courts. In addition, it usually transpires that the worse the situation, the more serious the consequences of lack of access to justice, as demonstrated by cases involving illegal workers, or foreign women who are sexually exploited.<sup>28</sup>

30. The administration of justice is not automatic, and may be influenced by the differences between the cultural and economic backgrounds of those involved. This is particularly relevant when a case involves ethnic and racial minorities, who may be at a disadvantage because they do not belong to the culture of the judicial official.<sup>29</sup>

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<sup>26</sup> Vid. CDH, Comunicación n° 451/1991, *Harward c. Noruega*, párr. 9.5; CDH, Comunicación n° 219/1986, *Guesdon c. Francia*, párr. 10.2; Corte Interamericana de derechos Humanos, *Opinión Consultiva OC-16/99 de 1 de octubre de 1999, Derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*, párr. 120.

<sup>27</sup> CDH, Comunicación N° 219/1986, *Guesdon c. Francia*, párr. 10.2.

<sup>28</sup> N. K. D. Lemon, "Access to justice: can domestic violence courts better address the needs of non-English speaking victims of domestic violence?", *Berkeley Journal of Gender, Law and Justice*, Vol. 21, 2006, p. 38.

<sup>29</sup> Cfr. C. Branson, "What is access to justice? Identifying the unmet legal needs of the poor", Symposium. Eleventh Annual Philip D. Reed Memorial Issue. Partnerships across borders: A Global Forum On Access to Justice, *Fordham International Law Journal*, vol. 24, 2000, p. 196.

## 5. Physical barriers

31. The physical distance between client and court restricts the effective exercise of access to justice. This problem is common in island or archipelago States and in very large countries, where the concentration of legal services in urban areas works against the rural or island population far from the city. Some initiatives are trying to solve this problem by means of mobile courts<sup>30</sup> as the Special Rapporteur found.<sup>31</sup> The problem does not only affect developing countries: the European Court of Human Rights has found that, if the strict application of a procedural rule deprives a party of the right of access to a court, in requiring them to travel at short notice to a city where they do not live in order to lodge an appeal within the prescribed time, such a requirement is unreasonable and violates the right of access to justice.<sup>32</sup>

32. The effective exercise of the right of access to justice can also be violated where the architectural layout of judicial buildings ignores the special needs of particular groups such as people with disabilities<sup>33</sup> and older people.<sup>34</sup> Some States have adopted measures to mitigate this problem, but restricted access to public buildings such as courts remains a serious problem worldwide.

### D. How the structure and functioning of the judicial system affect access to justice

33. Access to justice depends not only on the existence of a judicial structure but on how that structure operates and is organized.

#### 1. Courts - types and characteristics

34. **Ordinary courts.** The Human Rights Committee has described the criteria courts should meet in addition to their judicial functions, such as being established by law.<sup>35</sup> An essential

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<sup>30</sup> En Guatemala los Juzgados Comunitarios pretenden llegar a zonas donde no hay administración de justicia y donde la mayoría de la población es indígena, en idiomas indígenas. A. Ordóñez, *Investigación sobre acceso a la justicia en la República de Guatemala, Acceso a la Justicia y Equidad*, San José: Instituto Interamericano de Derechos Humanos, 2000, pp. 189-193.

<sup>31</sup> L. Despouy, Misión a Brasil, E/CN.4/2005/60/Add.3, Pár. 90.

<sup>32</sup> ECHR, *Case Pérez de Rada Cavanilles*, 18/10/1998, 116/1997/900/1112.

<sup>33</sup> Por ejemplo, en España se aprobó una ley sobre igualdad de oportunidades y accesibilidad de las personas con discapacidad (Ley 51/2003) y luego dos decretos (Real Decreto 366/2007 y Real Decreto 366/2007) que regulan tales previsiones en relación con, entre otras cuestiones, la administración de justicia.

<sup>34</sup> Vid., R. C. Morgan, "From the elder-friendly law office to the elder-friendly courtroom: providing the same access and justice for all", *National Academy of Elder Law Attorneys Journal*, vol. 2, 2006, p. 325.

<sup>35</sup> CDH, Comunicación N° 263/1987, *González del Río c. el Perú*, párr. 5.2.

condition for preserving their independence and impartiality is that they should not be subjected to external influence or pressure, and this calls for institutional machinery to ensure that both these requirements are met.<sup>36</sup> Recalling the provisions of the Basic Principles on the Independence of the Judiciary,<sup>37</sup> the Committee states that a situation where the functions and competences of the judiciary and the executive are not clearly differentiated, or where the executive is able to control or direct the judiciary, is incompatible with the notion of an independent tribunal.<sup>38</sup> The work of the Special Rapporteur since the mandate was established has shown that a perceived lack of independence and impartiality does indeed have a negative effect on the exercise of the right of access to justice. Apart from generating distrust, and even fear, it encourages people not to have recourse to justice. This situation can lead to structural obstacles, which are even greater in countries with high rates of corruption.

35. **Mediation or arbitration bodies** - Certain forms of alternative dispute resolution, administered by bodies other than conventional courts of law, can facilitate access to justice, saving those involved time and money. Mediation and arbitration, for example, are judicial channels that are more flexible as to the procedures and rules to apply, since officials do not have to limit themselves to the law. However, the use of alternative mechanisms should not lead to substandard justice or obstruct the right to obtain a court ruling. It is therefore necessary to regulate these new channels and define their powers, since they cannot always be a substitute for the administration of justice by a court and, in any case, the fundamental elements of due process must be observed and the independence and impartiality of those who dispense justice preserved.

36. **Special courts** - Special courts composed of anonymous judges have been established in various countries as part of efforts to combat terrorism. These courts curtail the right to a fair trial in fundamental ways. For example, the public nature of the trial is often very limited or non-existent, to the point where, in many cases, no one even knows that a trial is being held. Furthermore, such courts usually exclude from the courtroom the accused and their lawyer,<sup>39</sup> and indeed the court's own records, supposedly intended to clarify the case.<sup>40</sup> Information between

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<sup>36</sup> *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Vid., en particular ppos. 2, 3 y 5.

<sup>37</sup> *Basic Principles on the Independence of the Judiciary*, op. cit., en particular ppos. 1, 3 y 4.

<sup>38</sup> CDH, Comunicación N° 468/1991, *Oló Bahamonde c. la Guinea Ecuatorial*, párr. 9.4.

<sup>39</sup> CDH, Comunicación N° 1298/2004, *Becerra Barney c. Colombia*, párr. 7.2.

<sup>40</sup> CDH, Comunicaciones Nos. 577/1994, *Polay Campos c. el Perú*, párr. 8.8; 678/1996, *Gutiérrez Vivanco c. el Perú*, párr. 7.1; 1126/2002; *Carranza Alegre c. el Perú*, párr. 7.5.

the parties is also restricted, and accused persons are usually denied the right to communicate with their lawyers, especially when held incommunicado.<sup>41</sup> In addition, there are severe restrictions on the right to call and examine witnesses, or to have witnesses examined.<sup>42</sup>

37. **Administrative boards with the status of military or emergency courts** - Previous reports have condemned the grave violations of human rights - in particular of the right to a fair trial - that have taken place in recent years as a result of the establishment of such courts as part of efforts to combat terrorism or in application of national security legislation, or during states of emergency. An example of the first of these is contained in a report on the situation of detainees at Guantanamo Bay.<sup>43</sup> The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, of the International Covenant on Civil and Political Rights is an absolute right that is not subject to any exception, and any trial that fails to meet these requirements violates the right of access to justice.

38. **Religious and customary courts** - In many countries, the culture and/or the religion have led to the formal justice system existing side by side with customary and/or religious courts. This makes for a broader range of judicial services and, in the case of customary courts, “neighbourhood” justice. Nonetheless, it should be pointed out that the Human Rights Committee has indicated that such courts cannot hand down binding judgements recognized by the State unless the proceedings are limited to minor matters, they meet the basic requirements of fair trial and other procedural guarantees, and their judgements are validated by State courts and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant; judgements that do not conform to international human rights standards are not acceptable. Nevertheless, complaints received by the Special Rapporteur show that such conditions are frequently not met, especially with regard to the existence of an independent system of legal defence and an appellate body to which convicted persons may apply.

## 2. Conditions of professional judicial practice

39. **Judges** - In terms of guaranteeing the complete independence of the judiciary, the Human Rights Committee refers to the procedure and qualifications for the appointment of judges, other guarantees relating to their security of tenure<sup>44</sup> and conditions governing promotion, transfer,

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<sup>41</sup> CDH, Comunicaciones Nos. 577/1994, *Polay Campos c. el Perú*, párr. 8.8; 1126/2002, *Carranza Alegre c. el Perú*, párr. 7.5.

<sup>42</sup> CDH, Comunicaciones Nos. 678/1996, *Gutiérrez Vivanco c. el Perú*, párr. 7.1; N°. 1126/2002, *Carranza Alegre c. el Perú*, párr. 7.5; 1125/2002, *Quispe Roque c. el Perú*, párr. 7.3; 1058/2002, *Vargas Mas c. el Perú*, párr. 6.4.

<sup>43</sup> E/CN.4/2006/120.

<sup>44</sup> Así, por ejemplo, ha mantenido que la destitución de jueces por el Poder ejecutivo, por ejemplo antes de la expiración del mandato para el que fueron nombrados, sin que se les dé ninguna razón concreta y sin que dispongan de una protección judicial efectiva para impugnar la destitución, es incompatible con la independencia del Poder judicial. CDH, Comunicación N° 814/1998, *Pastukhov c. Belarús*, párr. 7.3.



suspension and the cessation of their functions. Among the factors that may affect not only the judicial function but also the exercise of the right of access to justice are a shortage of judges or the inaccessibility of judges by reason of distance, as already mentioned, the material circumstances in which members of the judiciary work, the training received by judges and the mechanisms and laws instituted to preserve their independence and impartiality. By way of example, the Special Rapporteur draws attention to the report on his mission to Kazakhstan (E/CN.4/2005/60/Add.2).

40. **Lawyers** - Although not part of the judicial structure, lawyers play an essential role in the right to justice, in access to justice and, especially, in the right to a defence. In order to fulfil their role, they need a legal and institutional framework that allows them to exercise their profession freely and a judicial culture that allows them to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Yet the experience of this mandate shows how often lawyers are subjected to pressure, intimidation and constraints, leading up in many cases to arrest, assault and disappearance, for example. In many countries their work is hampered by complex regulatory regimes that govern the issuance and renewal of licences to practise law, and in extreme cases it may, for example, be the public prosecutor who takes the decision or advises the executive branch on the matter. Directly and indirectly, all these circumstances seriously affect access to justice. On the other hand, many means have been devised to provide legal assistance to those without the necessary financial resources.<sup>45</sup> In some cases, the State arranges with private lawyers or bar associations to provide services that are later reimbursed by the State.<sup>46</sup> In other cases, lawyers operate as if they were civil servants paid by the State to provide free legal assistance;<sup>47</sup> these are the court-appointed defence counsels. The public defender's office can be established as a State institution in several ways, either as part of the judiciary or the ministry of justice, or as a functionally and financially autonomous entity, an option that is spreading in Latin America. Provision is usually also made for the hiring of outside lawyers. In some countries, NGOs and universities have taken initiatives, setting up legal clinics, for example, and other means of providing this service. In some particularly sensitive cases or cases affecting a large number of people (environment, consumer protection, public health or anti-impunity cases), victims are represented by NGOs or by lawyers defending wider social interests. The aim is to overcome the barriers to access to justice encountered by certain groups, including lack of information, fear, high litigation costs or

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<sup>45</sup> *Vid.* Por ejemplo E: Blankenburg, "Comparing Legal Aid Schemes in Europe", *Civil Justice Quarterly*, vol. 11, 1992, pp. 106-114; H. Hirte, Access to courts for indigent persons: a comparative analysis of the legal framework in the United Kingdom, United States and Germany", *Civil Justice Quarterly*, vol. 11, 1992, pp. 92-123.

<sup>46</sup> Caso de Francia, *vid.*, F. Tietgen, "The Paris Bar: Access to justice and access to legal advise", *Fordham International Law Journal*, vol. 24, 1999-2000, p. 220.

<sup>47</sup> En el caso de Canadá se combinan ambos sistemas. *Vid.*  
<http://www.canlaw.com/legalaid/aidoffice.htm>

the fact that, taken individually, the violations are of minor importance. Group claims keep the length and cost of proceedings down and also facilitate the administration of justice. In addition, such actions may be seen as a healthy means of influencing the political and social agenda and redeeming the weaknesses of certain democratic institutions and regimes.

41. **Public Prosecutor's Office** - The proper functioning of this institution is a factor in the exercise of the right of access to justice. The Guidelines on the Role of Prosecutors provide guidance to Governments in ensuring it performs not only its primary function of exercising the right of public action but also the tasks of guaranteeing legality, protecting human rights and carrying out investigations, where such functions are also assigned to it. Despite this, the Special Rapporteur has been obliged to intervene on numerous occasions in which prosecutors' work was subjected to interference or their results led to a violation of their rights. Recent developments have led to prosecutors taking on more responsibilities and pushing back the bounds of their functional independence, with more scope for action to promote access to justice.

42. **Public defenders** - Until the State began to bear the costs of legal assistance for people without the means to pay for it, it was universities and bar associations that provided such assistance - the universities through community legal centres, and the bar associations using a roster or shift system - in the conviction that there was a moral obligation.<sup>48</sup> Now, however, States have accepted their international obligation to guarantee access to justice and the right to a defence, which requires them to adopt public policies and, where necessary, provide social services. Also as a result of recent developments, some countries have endowed public defenders with real judges' powers. In Latin America, the percentage of criminal cases in which defendants are represented by public defenders is generally more than 80 per cent of the total in the system. In Argentina, 60 per cent of those involved in oral proceedings are defended by officially appointed defence counsels.<sup>49</sup>

### **3. The impact of corruption and judicial delay**

43. Transparency and promptness are essential components of an efficient system of justice administration. The Special Rapporteur has had occasion to refer to these issues in depth in his previous reports and he therefore confines himself here to reiterating that the problems of corruption and judicial delay are two of the factors that have the greatest negative impact on the judicial system as a whole.

#### **E. Access to justice in relation to economic, social and cultural rights**

44. For various political and ideological reasons, economic, social and cultural rights have made considerably less progress since their establishment than civil and political rights in terms

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<sup>48</sup> F. Tietgen, "The Paris Bar: Access to justice and access to legal advice", *Fordham International Law Journal*, vol. 24, 1999-2000, p. 219.

<sup>49</sup> López Puleio, María Fernanda (2002) "Justicia penal y defensa pública" y Martínez, Stella Maris "Defensa pública, derecho del pueblo" en *Defensa Pública*, Revista Latinoamericana de Política Criminal No. 5, Buenos Aires, pp. 23-48 y 49-58.

of legislation and legal precedent. This disparity is essentially due to the limitations on their legal enforceability, which is why access to justice for this category of rights is of such crucial importance today. In this regard, the development that has taken place in doctrine and case law over the past 20 years is encouraging. The Committee on Economic, Social and Cultural Rights notes, for example, in its general comment No. 3 (1990) on the nature of States parties' obligations, that the rights recognized in the Covenant entail immediate obligations not subject to the availability of resources or to progressive realization.<sup>50</sup> In its general comment No. 9 (1998) on the domestic application of the Covenant it stresses that the means used by States to enforce those rights are ineffective if they are not reinforced or complemented by judicial remedies; and that, although the right to an effective remedy should not necessarily be interpreted as an absolute or exclusive requirement for a judicial remedy, it is appropriate to establish an ultimate right of judicial appeal before the courts.<sup>51</sup>

45. As to the matter of enforceability, the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights<sup>52</sup> constitutes a decisive step in that it will make it possible to submit to the Committee individual complaints alleging violations of economic, cultural and social rights.<sup>53</sup>

46. A key issue in relation to this category of rights is the low level of enforcement of court decisions, which affects access to justice, when the means to enforce decisions are lacking. It is at this juncture between access to justice and the right to an effective remedy that economic, social and cultural rights require enforceability.<sup>54</sup> The judiciary performs an important role in

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<sup>50</sup> Vid. CDESC, *Observación General núm. 3: La índole de las obligaciones de los Estados parte*, Doc. HRI/GEN/1/Rev.7, 12 de mayo de 2004.

<sup>51</sup> Comité Derechos Económicos, Sociales y Culturales, *Observación General n° 9, La aplicación interna del Pacto*, E/C.12/1998/24, 3 de diciembre de 1998.

<sup>52</sup> Vid. Documentos de la Coalición para la adopción de un Protocolo Adicional al PIDESC, y <http://www.opicescr-coalition.org/> y documentos del Grupo de Trabajo de Naciones Unidas Para un Protocolo Adicional al PIDESC, <http://www.ohchr.org/english/issues/escr/intro>.

<sup>53</sup> Cabe insistir en el hecho de que este instrumento no crearía nuevas obligaciones ni extendería las obligaciones ya existentes que los Estados Partes aceptaron al ratificar el PIDESC. Únicamente se establecería un nuevo mecanismo de exigibilidad para que, en efecto, se cumplan las obligaciones ya existentes por los Estados. El artículo 2 del Pacto establece la obligación de tomar las medidas necesarias para que con el máximo de los recursos disponibles del Estado se logre progresivamente la efectividad de los derechos económicos, sociales y culturales. Los Estados, al adoptar el posible Protocolo estarían tomando una nueva medida para lograr la realización de dichos derechos en el plano internacional.

<sup>54</sup> Vid. Leandro Despouy, Informe A/HRC/4/25, 18 de diciembre de 2006, p. 8, párr. 21.

this context for judicial officials can not only through their judgements, stimulate public policies favouring the groups concerned but also provide the means to guarantee the implementation of those policies.<sup>55</sup>

47. The inter-American system<sup>56</sup> has established the following standards and principles that should guide the judicial protection of economic, social and cultural rights:

(a) States' obligations to remove economic and financial obstacles in order to guarantee access to the courts. The criteria for granting free legal aid include the resources available to those affected, the complexity of the case (for example, constitutional challenges) and the importance of the rights affected;

(b) The applicability of the rules of due process to administrative proceedings relating to these rights. Judicial remedies to review administrative decisions must be not only prompt and effective but also inexpensive or affordable. Components of due process in this area include the principle of equality of arms, in view of the glaring inequality usually found between the parties in this type of litigation (workers and employers; beneficiaries and providing State), as well as other guarantees in addition to those prescribed in international instruments, in order to correct or compensate for any real disadvantages with regard to a fair trial, the principle of equality before the law or the prohibition of discrimination;

(c) The right to a reasoned decision on the merits of the matter, within a reasonable time, and the criteria for determining what is reasonable, i.e., the complexity of the matter, the judicial activity of the interested party, the behaviour of the judicial authorities, the purpose of the proceeding and the nature of the rights at issue. Moreover, the time should be counted from the start of the administrative proceedings and not when the case reaches the judicial stage, and should include judgement enforcement proceedings;

(d) The components of the right to effective judicial protection for this category of rights, in both their individual and their collective dimension. Without prejudice to a more prolonged analysis of the merits of a case, provision should be made for procedural measures that allow for immediate - and even precautionary or preventive - protection of social rights. These measures should consist of remedies that are simple, urgent, informal, accessible, with low evidentiary requirements and which are processed by independent bodies as individual or collective actions (which implies a broad, active legitimacy);

(e) The right to effective judicial protection. This requires compliance with court decisions, whether precautionary or final, since execution of such decisions is an integral part of this right. This is particularly important given that it is generally State entities that are responsible for enforcing judgements, and they usually enjoy procedural privileges, such as

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<sup>55</sup> V. Abramovich, "Acceso a justicia y nuevas formas de participación en la esfera pública", *Acceso a la justicia como garantía de igualdad*, Buenos Aires: Ed. Biblos, 2006, p. 66.

<sup>56</sup> Estudio sobre el acceso a la justicia como garantía de los derechos económicos, sociales y culturales, OEA/Ser.L/II. 129, Doc. 4 de septiembre de 2007.

freedom from attachment of their assets, or they may simply invoke emergency regulations of a budgetary nature in order to avoid or defer compliance, particularly in the area of social security.

## **F. Difficulties experienced by specific groups**

48. Under the umbrella of the principle of equality, the law must try to treat all citizens as equal before the law while also taking account of the differences between them. In order to attend to this diversity, guaranteeing everyone the right to equal access to independent courts means making special provision for certain population groups and offering them differentiated protection.<sup>57</sup> The lack of public policies to eliminate obstacles to access to justice for all has a greater impact on groups in a vulnerable situation or living in extreme poverty,<sup>58</sup> or who are culturally, economically or socially disadvantaged.<sup>59</sup>

### **1. Indigenous peoples**

49. The areas where indigenous peoples are most vulnerable are labour and land, where there are no judicial mechanisms to ensure protection of their rights. In the course of some country visits, the Special Rapporteur observed not only a lack of adequate procedural mechanisms, but also that the judicial workers who devote themselves to these issues are subjected to threats and attacks.<sup>60</sup> These problems go hand in hand - notwithstanding certain interesting developments<sup>61</sup> - with the marginalization of indigenous peoples' customary approaches to

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<sup>57</sup> J.M. Casal, *et al.*, *Derechos humanos, equidad y acceso a la justicia*, Ed. Instituto latinoamericano de Investigaciones, Caracas, 2005, p.114; N. Gherardi, "Notas sobre acceso a la justicia y servicios jurídicos gratuitos en experiencias comparadas: ¿un espacio de asistencia posible para las mujeres?", *Acceso a la justicia como garantía de igualdad*, Buenos Aires: Biblos, 2006, p. 9.

<sup>58</sup> *Vid.* Informes sobre "Los derechos humanos y la extrema pobreza", E/CN.4/Sub.2/1994/19; E/CN.4/Sub.2/1995/15, E/CN.4/Sub.2/1996/13.

<sup>59</sup> J.H. Lam, "The rise on the NGO in Bangladesh: lesson on improving access to justice for women and religious per cent minorities", *George Washington Law Review*, núm 38, p. 121-122.

<sup>60</sup> L. Despouy, Misión a Brasil, E/CN.4/2005/60/Add.3, p. 2.

<sup>61</sup> En Perú, las decisiones de los Jueces de Paz son aprobadas por el sistema judicial formal, suponiendo un avance interesante, puesto que crea confianza en la población por la cercanía de los mismos. (F. Blandón, "Acceso a la justicia en el Perú", *Acceso a la justicia y equidad. Estudio de siete países de Latinoamérica*, San José: Instituto Interamericano de Derechos Humanos, 2000, pp. 270-273). En Nueva Zelanda el Tribunal de Waitangi permite a la población indígena presentar denuncias sobre cuestiones como la tierra y los recursos naturales, y ha tenido un importante impacto en la manera de entender las relaciones jurídicas con la población autóctona del país. ([www.waitangi-tribunal.govt.nz/reports](http://www.waitangi-tribunal.govt.nz/reports)) Otra posible acción es la de crear servicios de asesoría jurídica gratuita destinados particularmente a las poblaciones indígenas. En algunos casos, dichos servicios, pese a existir, afrontan graves problemas. N. Gillespie, "Is

conflict resolution and the administration of justice. In this regard, particular mention should be made of General Recommendation No. 31 of the Committee on the Elimination of Racial Discrimination, on the prevention of racial discrimination in the administration and functioning of the criminal justice system, which, in keeping with the Bangalore Principles of Judicial Conduct,<sup>62</sup> calls upon States to “guarantee the right of every person ... to an effective remedy against ... acts of racial discrimination” and “ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law”.

50. In one of his reports (E/CN.4/2004/80), the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people spoke about the relationship between discrimination against indigenous peoples and the justice system, noting the physical isolation and poor communications in indigenous areas, and the absence of an effective judiciary designed for the needs of indigenous communities. In addition, lack of access to justice may indicate that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect or reject indigenous cultures. Within the justice system, particularly in the area of criminal justice, women, young people and children are particularly disadvantaged.

## **2. Women**

51. In many countries, the integration of women into the bodies established for the administration of justice has been extremely limited. By way of example, the Special Rapporteur draws attention to the reports on his missions to the Republic of Maldives<sup>63</sup> and Kyrgyzstan.<sup>64</sup> At the international level, there is a positive requirement for equal representation of men and women among the members of the International Criminal Court.<sup>65</sup> A similar positive requirement at the national level is the establishment of ombudspersons for women - an institution now to be found in several countries, particularly in Latin America;<sup>66</sup> however, in many cases they may intervene only in response to violations of rights by the State or may only issue comments, or

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aboriginal legal aid being managed into extinction?”, *Law Society Journal*, vol. 45, No. 7, 2007, pp. 28-29.

<sup>62</sup> Judicial Group on Strengthening Judicial Integrity, *The Bangalore Draft Code of Judicial Conduct* 2001, 25-26, 2002, adoptados por el ECOSOC en su Resolución 2006/23, de marzo de 2006.

<sup>63</sup> L. Despouy, Misión a Maldivas, Doc. A/HRC/4/25/Add.2 2 May 2007, párr. 31 y 80.

<sup>64</sup> L. Despouy, Misión a Kirguistán, 2 de diciembre 2005, Doc. E/CN.4/2006/52/Add.3, párr. 61.

<sup>65</sup> Artículo 36.8 (a) iii) del Estatuto de Roma por el que se establece la Corte Penal Internacional.

<sup>66</sup> En Ecuador se creó la defensa de los derechos de la mujer, niñez y adolescencia, en Guatemala la Defensoría de la Mujer Indígena.

else they are subject to political authority.<sup>67</sup> Moreover, women often have difficulty even gaining access to justice, whereas this is not the case for men. Similarly, impunity for certain kinds of crime, particularly sex-related crimes, is a source of obvious discrimination and an obstruction with regard to the exercise of the right of access to justice. Where the law itself does not grant men powers or rights that it denies women, in similar conditions, discrimination arises out of the events themselves, which are violations of the law. In certain countries, cultural factors and prejudices are at the root of the most serious, routine violations of the principle of equality before the law and the courts. Sometimes discriminatory treatment is institutionalized, for example where, women must have the backing of some male member of their family in order to access justice. Where gender inequality goes hand in hand with poverty, women's access to justice is doubly tenuous.<sup>68</sup> Yet legal services designed to meet the particular needs of women are still hard to find,<sup>69</sup> even more so for those living in poverty. In the area of free legal aid, for example, women are in competition with men for resource allocations, and those resources are in any case provided for a single type of service, regardless of the fact that needs may differ.<sup>70</sup> At best, when there is some kind of differentiated provision, such services are linked to the problems of domestic violence, abuse and family law.<sup>71</sup> The Inter-American Commission on Human Rights has identified a widespread pattern of human rights violations that are suffered by women in particular. This is compounded by cultural obstacles to women reporting such violations and authorities' failure to act on those complaints that are brought.<sup>72</sup> The Special Rapporteur on violence against women, its causes and consequences emphasized the need to provide domestic mechanisms of access to justice and to ensure women's access to international mechanisms for the protection of human rights.<sup>73</sup> However, in the course of his country visits, the

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<sup>67</sup> N. Gherardi, *op. cit.*, p. 25.

<sup>68</sup> Y. Ertürk, Integración de los derechos humanos de la mujer y la perspectiva de género: La violencia contra la mujer. Informe de la Relatora Especial sobre la violencia contra la mujer, sus causas y sus consecuencias, E/CN.4/2004/66, 26 diciembre de 2003, p. 13.

<sup>69</sup> En Australia, la Law Reform Commission documentó la discriminación que enfrentan las mujeres cuando buscan asistencia de los servicios jurídicos. Australian law Reform Commission, *Equality Before the laws: Justice for Women*, (ALRC 69), Part III, Access to Justice: Legal Aid.

<sup>70</sup> *Vid.* J. Méndez, "Acceso a la justicia, un enfoque desde los derechos humanos", *Acceso a la Justicia y Equidad*, Instituto Interamericano de Derechos Humanos, San José, 2000, p. 15-23.

<sup>71</sup> N. Gherdi, *op. cit.*, p. 14.

<sup>72</sup> Comisión Interamericana Derechos Humanos, *Informes sobre la situación de los derechos humanos: Haití*, 1995, cap IV, OEA/Ser.L/V/II.88 doc. 10 rev; *Ecuador*, 1997, cap. XI, OEA/Ser.L/V/II.96, doc.10, rev. 1; *Brasil*, 1998, cap. VIII.

<sup>73</sup> Y. Ertürk, *op. cit.*, p. 15.

Special Rapporteur on the independence of judges and lawyers found that judicial personnel received little or no training on issues such as violence against women<sup>74</sup> and that there was widespread ineffectiveness and lack of interest in pressing charges and prosecuting in cases of violence against women.<sup>75</sup>

### **3. Stateless persons, refugees, migrants and victims of racial discrimination**

52. It is commonplace for such persons to be deprived of access to the courts, owing to their administrative situation. This vulnerability is particularly distressing for asylum-seekers, for whom access to justice is crucial if they are to avoid irreversible prejudice such as a violation of the principle of non-refoulement. It is reasonable and mandatory to provide not only free legal aid, but also interpretation, and at times forensic psychological or medical, services. However, according to recent research, access to justice free of charge is made subject to conditions that make it unattainable in practice. Two reports by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have addressed this issue. In the Dominican Republic the Special Rapporteur noted the factors that led to an absence of judicial complaints of racism or racial discrimination: a lack of confidence that the judicial system will provide remedies or reparation in a context where high-level officials deny the existence of racism in that country; the refusal or reluctance of victims to file complaints for fear of retaliation or unlawful or discriminatory backlash; and the absence of any independent national human rights institution to complain to (A/HRC/7/19/Add.5). In the Russian Federation too, he referred to the small number of convictions for discrimination, for reasons including the refusal or reluctance of victims, in particular those from ethnic minorities, to file a complaint for fear of reprisals and discriminatory backlash by the police, and judges' failure - deliberate or through ignorance - to enforce the provisions of the Criminal Code. The Special Rapporteur on the human rights of migrants also raised this issue in the reports on his missions to the Republic of Korea and Indonesia (A/HRC/4/24/Add.2 and Add.3, respectively).

### **4. Minors**

53. Notwithstanding the array of international treaties, rules and directives that exist to protect minors' rights, States' treatment of children leaves a great deal to be desired as far as justice is concerned, in particular access to justice. There are, however, examples of good practices, mostly resulting from a conscientious application of international standards.<sup>76</sup> In respect of

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<sup>74</sup> Despouy, Misión a Kazajstán, E/CN.4/2005/60/Add.2, p. 20, pár. 74 y 78.

<sup>75</sup> L. Despouy, Misión a Brasil, E/CN.4/2005/60/Add.3, pár. 9.

<sup>76</sup> En numerosos casos se trata de iniciativas surgidas de la propia sociedad civil. En Perú, por ejemplo, las denominadas Defensorías Municipales del Niño y el Adolescente, impulsan un sistema nacional descentralizado para la protección y promoción del desarrollo integral de la niñez y adolescencia. Entre sus funciones está la denuncia ante las autoridades de las vulneraciones cometidas a los derechos de los niños y adolescentes, y la intervención en asuntos relativos a la violencia en la familia ([http://www.unicef.org/peru/spanish/protection\\_3234.htm](http://www.unicef.org/peru/spanish/protection_3234.htm)) En los Estados Unidos de América, el denominado SSI presta servicios legales gratuitos para garantizar que los niños discapacitados son escuchados de modo justo antes de determinar la



access it should be recalled that minors, while enjoying the same guarantees as adults, require special protection, as their best interests are paramount.<sup>77</sup> Also, it is advisable for access to justice to be provided through alternatives to court procedures, for example through mediation, family interviews, psychological guidance and support services, community services or education programmes.<sup>78</sup> The Special Rapporteur has repeatedly drawn attention to the situation of child and adolescent victims of sexual exploitation and the impunity of “death squads”.<sup>79</sup> He has underscored the need to set up special courts to deal with such crimes, and children’s units in public defenders’ offices.<sup>80</sup> During missions to central Asian countries, he has proposed creating special juvenile justice systems and developing national codes of children’s rights.<sup>81</sup> In some cases, even when there are specific guarantees for minors,<sup>82</sup> the fact that imprisonment is the sole penalty often means that children are incarcerated, in particular street children.<sup>83</sup> Elsewhere, while there may be a juvenile justice system, it is based on punishment and coercion, and provides no rehabilitation options or programmes.<sup>84</sup>

## 5. Brasilia Rules

54. Faced with the difficulties in ensuring access to justice in the region, at the fourteenth meeting of the Latin-American Judicial Summit,<sup>85</sup> the presidents of the supreme courts and councils of the judiciary of the Spanish-speaking countries of Latin America adopted the Brasilia Rules on access to justice for persons in vulnerable situations. The Rules list recommended measures for guaranteeing access to justice for persons who are more vulnerable for reasons of age, disability, membership of indigenous or minority communities, victimization, migration or internal displacement, poverty, gender or deprivation of liberty. The significance of these Rules

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retirada de subsidios públicos. (T.A. Smith, “Access to Justice for kids-the children’s SSI Project”, Illinois Bar Journal, 1997, p. 352).

<sup>77</sup> En este contexto, la protección del interés superior del niño significa, por ejemplo, que los tradicionales objetivos de la justicia penal deben sustituirse por los de rehabilitación y la justicia reformativa.

<sup>78</sup> Ibid., pár. 44.

<sup>79</sup> Informe sobre la visita oficial a Brasil, *op. cit.*, par. 30.

<sup>80</sup> Ibid., pár.104.

<sup>81</sup> Informe visita a Kirguistán, *op. cit.*, pár. 73.

<sup>82</sup> Como la presencia obligatoria de un defensor en este tipo de causas y la presencia obligatoria de un pedagogo durante cualquier investigación.

<sup>83</sup> L. Despouy, Informe sobre la visita a Taijikistán, E/CN.4/2006/52/Add.4, pár. 82.

<sup>84</sup> Informe sobre la visita oficial a Maldivas, *op. cit.*, pár. 62.

<sup>85</sup> Realizada en Brasilia, 4 de marzo de 2008.

lies in the fact that they are aimed at all those working in the justice system or involved with it in one way or another. The justice system itself can thus make a substantial contribution to fighting inequality and fostering social cohesion.

#### **IV. MAJOR DEVELOPMENTS IN INTERNATIONAL JUSTICE**

##### **A. International Criminal Court**

55. **Democratic Republic of the Congo** - In a noteworthy and promising development, the trial of Thomas Lubanga Dyilo, the founder and leader of the *Union des patriotes congolais* (Union of Congolese Patriots) began on 31 March 2008. He is the first person to be tried by the International Criminal Court since its establishment in 2002. In February 2008, Mathieu Ngudjolo Chui, the former head of the *Front des nationalistes et intégrationnistes* (Nationalist and Integrationist Front - FNI) and the *Force de résistance patriotique d'Ituri* (Ituri Patriotic Resistance Force - FRPI), appeared for the first time before the Pre-Trial Chamber, while Germain Katanga, the former head of FRPI in the north-east of the Democratic Republic of the Congo, appeared in October 2007. For this case, the confirmation of charges hearing initially scheduled for 28 February 2008 has been rescheduled.

56. **Darfur** - In December 2007 the Chief Prosecutor of the International Criminal Court presented his sixth report to the United Nations Security Council pursuant to Security Council resolution 1593 (2005). He criticized the lack of cooperation on the part of the Government of the Sudan, requesting a unanimous message to be sent asking the Sudan to comply with resolution 1593 (2005) and proceed with the arrests. In April 2007 the Pre-Trial Chamber issued arrest warrants for Ahmad Harun and Ali Kushayb on 51 counts of war crimes and crimes against humanity. On 16 June and 17 October 2007 the Court requested the Government to execute the warrants, and the Registry of the Court requested an update as to "the activities undertaken by the Sudan in the execution of the warrants and as to any potential difficulty, which may have arisen in this process", by 15 November. The Special Rapporteur regrets that, at the time of writing, the Court has received no response, and urges the Government to follow up promptly on the Court's request.

##### **B. Supreme Criminal Tribunal of Iraq**

57. Despite repeated requests from the Special Rapporteur and from United Nations bodies, death sentences are still being handed down in Iraq following trials that are in breach of international principles and standards of human rights. For example, on 14 March 2007 Iraq's Supreme Criminal Tribunal confirmed the death sentence for Taha Yassin Ramadan. He was executed on 20 March, in violation of international human rights principles and standards, in particular the right to be judged by an independent and impartial court and the right to an effective defence. Awraz Abdel-Aziz Mahmoud Sa'id was likewise executed on 3 July 2007. He had confessed to involvement in the attack on the United Nations office in Baghdad on 19 August 2003, and was the only surviving alleged perpetrator of the attack, which took the lives of Sergio Vieira de Mello and 21 others (see document A/62/207). On 19 June the Special Rapporteur issued an urgent appeal to the Iraqi Government in a press release, with the aim of forestalling the imminent execution. By issuing the call in public, he also sought to mobilize the international community, in particular the Governments of the Western countries that considered themselves the institutional architects of the new Iraq, and including senior officials who had

expressed their esteem and admiration for Sergio Vieira de Mello. The terrorist's execution made it impossible to obtain any testimony that might shed light on the attack. The gravity of this act, its enormous significance for the victims' families, and for the credibility of the United Nations, and the flagrant violation of the right to the truth, merit the special attention of the Human Rights Council.

## **V. CONCLUSIONS**

58. As a fundamental human right, access to justice is the individual's gateway to the various institutional channels provided by States to resolve disputes. Thus, in addition to refraining from violating that right, States are also bound by a positive obligation to remove obstacles that block or limit the individual's access to justice. As a means of claiming the enjoyment or restoration of other rights (civil, political, economic, social and cultural), access to justice is not limited to ensuring admission to a court but applies to the entire process, which must be conducted in conformity with the principles of the rule of law (fair trial, procedural guarantees, etc.), right through to execution of the sentence. Thus the principle of equality and the conditions of accessibility and effectiveness that must characterize any mechanism established to deal with disputes must be observed not only at the start of settlement proceedings, but throughout. The absence of suitable means of access to justice ultimately deprives persons of the "right to a right" by denying them the actual means of exercising their rights in practice.

59. The report shows the enormous impact that access to justice has on people's living conditions, in particular those in vulnerable situations, and on all human rights. This underscores the continuing relevance of the subject, the vital importance of access to justice for the work of the Human Rights Council and the urgent need to implement the recommendations presented below.

## **VI. RECOMMENDATIONS**

60. The Special Rapporteur recommends that the United Nations should develop a database of best practice in access to justice, covering all civil, political, economic, social and cultural rights. It should assemble the most positive national experiences and those gathered by the special procedures and the various international institutions and specialized agencies carrying out cooperation activities in the field of justice. This reference material would be of great assistance to States, especially States in transition, and would be a very important resource for those working in the judicial system.

61. The Special Rapporteur strongly encourages the adoption of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. This instrument will represent a decisive step towards greater enforceability for this category of rights. The violation of these rights affects society's most disadvantaged groups in particular, but in the medium and long term affects society as a whole.

62. Those States that have not already done so should adopt legislation that will pave the way for justice systems that are accessible, transparent, expeditious and non-discriminatory.

63. In comparison with the executive and legislative branches and other public services such as education and health, investment in the justice system is routinely much lower. As a result, highly dedicated judges, prosecutors and lawyers are liable to find themselves working in very difficult conditions, both materially and in terms of personal safety. Facilitating access to justice requires giving budget priority to the administration of justice, and in such a way as to ensure full autonomy in the management of the resources allocated.

64. In light of the impact on access to justice of proper training for those working in the justice system, States should invest still more in training, concentrating particularly on international human rights law.

65. States should pay special attention to free legal aid programmes. This is generally the only legal assistance accessible to large portions of the population, and the absence or poor design of such programmes excludes the most disadvantaged groups from the judicial system. The experiences of certain Latin American countries with public defenders' offices deserve to be publicized with a view to possible replication elsewhere.

66. Regardless of the system adopted, it is also crucial to respect and support the work of NGOs and bar associations, and their initiatives to bring justice to traditionally neglected regions and social groups.

67. The Special Rapporteur recommends that the United Nations should publish the Brasilia Rules on access to justice for persons in vulnerable situations.

68. Because of its decisive impact on access to justice and on all human rights, the Special Rapporteur recommends that all United Nations bodies should step up efforts to eradicate poverty and extreme poverty.

69. The Special Rapporteur urges the Human Rights Council to ask the Iraqi authorities to stop applying the death penalty in trials that do not meet international standards. In addition, in the absence of firm information on the perpetrators and circumstances of the attack that took the life of Sergio Vieira de Mello and 21 others and the absolute impunity still surrounding this tragic event, it would be appropriate to create new channels of investigation to establish the facts. Given the very high value the United Nations places on combating impunity and defending the right to the truth, which has so far been consistently violated, and the legitimate interests of the Organization, whose authority has been undermined, it would be appropriate to set up a commission of eminent experts to begin, at last, to establish the facts.

70. The Special Rapporteur also proposes to look more closely at the impact of states of emergency on human rights, and asks the Council to give the subject the special attention it deserves.

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