

# LEGAL COMMENTARY TO THE ICJ GENEVA DECLARATION

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UPHOLDING THE RULE OF LAW AND THE ROLE OF  
JUDGES AND LAWYERS IN TIMES OF CRISIS



HUMAN RIGHTS AND RULE OF LAW SERIES: No. 3



INTERNATIONAL  
COMMISSION  
OF JURISTS

The Rule of Law and the protection of human rights are vulnerable to erosion when countries pass through periods of crisis. Armed conflict, terrorist campaigns, insurgencies, states of emergency, food crises, severe political instability, natural disasters, all may place enormous strain on the democratic institutions necessary for ensuring the enjoyment of human rights and the fair administration of justice.

The ICJ *Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* is an instrument for addressing these threats to human rights protection. Adopted by the World Congress of the International Commission of Jurists, the Geneva Declaration sets forth 13 core principles indicating key elements of particular responsibility for judges and the legal profession and for the conduct of States in situations of crisis. Among the areas covered are the bedrock principles of separation of powers and judicial review; effective administration of justice through the guarantee of remedy and reparation; the right to fair trial by an independent and impartial tribunal; the essential terms and conditions for tenure of judges; the judicial responsibility in states of emergency; protection of judges and legal professionals from threats and persecution; and accountability of judges and lawyers for unethical or criminal conduct.

This Commentary to the Geneva Declaration aims to assist judges, legal professionals and human rights advocates in making effective use of the principles by spelling out the basis in law for each of the Declaration's 13 principles.



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The International Commission of Jurists (ICJ) is a non-governmental organisation devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has many national sections and affiliated organisations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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# Legal Commentary to the ICJ Geneva Declaration

Upholding the Rule of Law and the Role of  
Judges and Lawyers in Times of Crisis

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# Legal Commentary to the ICJ Geneva Declaration

Upholding the Rule of Law and the Role of  
Judges and Lawyers in Times of Crisis



INTERNATIONAL  
COMMISSION  
OF JURISTS

The Legal Commentary to the ICJ Geneva *Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* was researched and written by Federico Andreu Guzmán, Maria Pia Bianchetti, Sanjay Patil, Ian Seiderman, Erin Shaw, Samantha Stark, and Ilaria Vena. Federico Andreu Guzmán and Ian Seiderman provided legal review. Maria Pia Bianchetti, Dennis Clagett, and Priyamvada Yarnell assisted in the editing and production.

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## Foreword

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The Rule of Law and the protection of human rights, which demand ever vigilant safeguarding even in the best of times, become particularly vulnerable to erosion when countries pass through periods of crisis and strife. Armed conflict, terrorism, political instability, insurgency and states of emergency, food crises, and natural disasters, all can place great strain on the democratic institutions necessary for ensuring the enjoyment of human rights and the fair administration of justice.

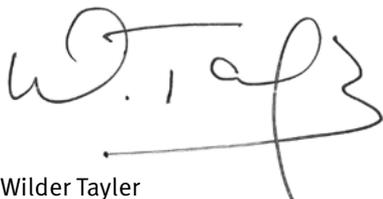
Judges and legal practitioners frequently absorb a large brunt of stress during such times of crisis. At the same time, they play a special role as the last line of defence against the exercise of arbitrary power by political, military and other actors.

The ICJ from its inception has understood this solemn responsibility and has sought to mobilise jurists in support of the Rule of Law to advance human rights. In its first general pronouncement in 1955, the Act of Athens, the ICJ declared that “[j]udges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.” In addition, “[l]awyers of the world should preserve the independence of their profession [and] assert the rights of the individual under the Rule of Law.” At its next Conference in New Delhi in 1959, the ICJ, in its influential Declaration of Delhi, set forth a defining vision for the Rule of Law, “recogniz[ing] that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed [...] to safeguard and advance [human] rights”. In subsequent declarations and resolutions over the last five decades, the ICJ built on these seminal principles, each time committing itself to press for the engagement of the legal profession at the heart of the development and advancement of universal human rights in all of their dimensions.

At its World Congress in Geneva in December 2008, the ICJ Commissioners, Honorary Members, National Sections, Affiliated Organisations and Secretariat came together to explore ways to address the serious challenges confronted by the legal community in crisis situations and to affirm our responsibility to meet those challenges. At that meeting, the Congress adopted its *Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (The Geneva Declaration). This Declaration sets out a number of key principles to which all judges and legal practitioners should adhere. These principles concern such areas as the separation of powers; the function of judicial review; effective administration of justice, including through the provision of remedy and reparation; the right to a fair trial by an independent and impartial tribunal; the terms and conditions of tenure of judges; judicial responsibility in states of emergency; protection of judges and legal professionals from threats and persecution; and the accountability of judges and lawyers for unethical or criminal conduct.

The Geneva Declaration is more than simply an expression of ICJ organisational policy. The principles it contains are universal, undergirded by international law, standards and jurisprudence which reflect the evolution of the international human rights architecture since the ICJ elaborated its seminal statements on the topic of the 1950s and 1960s. In order to equip the Declaration with optimal force and to aid legal professionals and human rights advocates in making effective use of the principles, the ICJ has undertaken to prepare this legal commentary, which spells out the basis in law for each of the Declaration's 13 principles. The analysis prepared in respect of each principle begins with a brief summary of problems that typically arise in times of crisis constituting unlawful national practices, with some concrete country-specific examples. This summary is followed by a legal analysis in respect of the component element of the principles. Finally, there is an exposition of how the ICJ has addressed the question in past global conferences and meetings, a compilation of certain more critical legal standards.

It is my hope that the Declaration and this commentary will serve as a valuable source of information and inspiration for the many judges, prosecutors, lawyers and other members of the legal profession and human rights advocates in taking on their heavy but essential responsibilities in a troubled world.

A handwritten signature in black ink, appearing to read 'W. Tayler', with a stylized flourish extending from the end.

Wilder Tayler  
ICJ Secretary General

# **THE GENEVA DECLARATION**



## The Geneva Declaration

### ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis

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*Reaffirming* its primary mission to uphold the principles of the Rule of Law, the independence of the judiciary and the legal profession and human rights;

*Recalling* that the principles of the separation of powers and the independence of the judiciary are bedrock components of the Rule of Law and must remain invulnerable in times of crisis;

*Emphasising* the universality, indivisibility and interdependence of all human rights and the need in times of crisis to protect civil, cultural, economic, political and social rights;

*Recognising* that in times of crisis, the capacity of judges and lawyers, including prosecutors and government counsel and advisers, to fulfil their essential role as protectors and guarantors of human rights may come under enormous strain;

*Aware* that such crises may consist in or arise out of, among other situations, a declared or undeclared public emergency, armed conflict, internal political instability, period of transitional justice, civil unrest, generalised situation of violence, terrorism, social, economic or financial upheaval, or natural disaster;

*Recalling* the critical role of the legal community in opposing impunity for violations of human rights and international humanitarian law;

*Reaffirming* that the victims of violations of economic, social and cultural rights must be protected, including by means of access to effective judicial remedy;

*Recalling* its commitment to take effective steps to promote the abolition of the death penalty, and urging retentionist states to abolish the death penalty and in the interim to observe a moratorium on the practice;

*Recalling* its Declarations, resolutions and conclusions adopted at previous Conferences, in particular, the Act of Athens on *the Rule of Law* (1955), the Declaration of Delhi on the *Rule of Law in a Free Society* (1959), the *Law of Lagos* (1961), the Resolution of Rio de Janeiro on *Executive Action and the Rule of Law* (1962), Declaration of Bangkok (1965), the Conclusions of Vienna on *Human Rights in an Undemocratic World* (1977), the *Caracas Plan of Action on The Independence of Judges and Lawyers* (1989) and the Berlin Declaration on *Upholding Human Rights and the Rule of Law in Combating Terrorism* (2004) and the principles and standards to which the ICJ is committed;

*Recalling* principles and standards of international law, including the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors;

The International Commission of Jurists proclaims the following principles and plan of action:

### **Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis**

1. The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law. In times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of Law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case.

2. In times of crisis, the executive, legislative and judicial branches must preserve and guarantee, in law and practice, the independence and effective functioning of the judiciary in carrying out the fair administration of justice and the protection of human rights. They must ensure effective remedies and full reparation for violations. They must not take any decision or action the effect of which would be to nullify, invalidate or otherwise revise or undermine the integrity of judicial decisions, without prejudice to mitigation or commutation of sanctions by competent authorities consistent with international law.

3. The executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to restrict the competence or capacity of the judiciary to carry out its essential functions, to transfer those functions to non-judicial bodies or to circumvent judicial proceedings, control or review. They must not:

- a) remove from the jurisdiction or supervision of ordinary tribunals the capacity to adjudicate complaints concerning human rights violations or to provide fundamental judicial remedies; or
- b) place the administration of justice under military authority; or
- c) confer on the military any power or authority to carry out criminal investigations in matters within the jurisdiction of ordinary justice.

4. To safeguard the Rule of Law and the indivisibility of all human rights, all measures adopted to address the crisis, including those taken pursuant to a declared state of emergency or to prevent social dissent in times of economic crisis, must

be subject to judicial oversight and review. Affected persons must have the right to fair and effective judicial proceedings to challenge the legality of these measures and/or their conformity with national or international law.

5. In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions. The right of judges and lawyers to freedom of association, including the right to establish and join professional associations, must at all times be respected.

6. The establishment of temporary or interim judges during times of crisis should be avoided. In respect of exceptional circumstances where it may become necessary to augment the capacity of the judiciary by expanding the number of active judges or through the creation of special chambers or units, the fundamental principles regarding the appointment and security of tenure must be strictly respected. Considerations of merit must remain essential criteria for appointments. Appropriate terms of tenure, protection and remuneration of judges must be ensured and the judiciary must have adequate resources to discharge its functions.

7. Since the protection of human rights may be precarious in times of crisis, lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and the defence of human rights. All branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights. In particular, lawyers must not be identified with their clients or clients' causes as a result of discharging their functions. The authorities must desist from and protect against all such adverse actions. Lawyers must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients.

8. In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients, including to those deprived of their liberty, and to relevant documentation and evidence, at all stages of proceedings. All branches of government must take necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including substantial and timely access to all relevant case files.

9. In times of crisis, anyone who is deprived of liberty or any person with a legitimate interest has the right to challenge the lawfulness of detention (*habeas corpus*, *amparo*) before an ordinary tribunal or court and to be released if the detention is arbitrary or otherwise unlawful. Deprivation of liberty must at all times be under judicial control or supervision. Judges, prosecutors, lawyers and other competent authorities must do all in their power to ensure that detainees enjoy the right to prompt access to lawyers, contact with family members, and when necessary, access to adequate and prompt medical attention.

10. In times of crisis, only courts and tribunals should dispense justice and only a court of law or tribunal should try and convict a person for a criminal offence. Every person has the right to a fair trial by an independent and impartial tribunal or court established by law. In times of crisis, civilians must only be tried by ordinary courts or tribunals, except when special rules of international law allow military tribunals to try civilians. All such proceedings must respect the inherent minimum guarantees of a fair trial. In particular, governments must not, even in times of emergency, derogate from or suspend the presumption of innocence, the right to be informed of the charge, the right of defence, the right against self-incrimination, the principle of equality of arms, the right to test evidence, the prohibition against the use of information obtained under torture or other serious human rights violations, the non retroactivity of criminal liability and the right to judicial appeal.

11. The executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to deprive victims of human rights violations and/or their relatives of their rights to effective access to justice, effective judicial remedies and full reparation. The adoption of measures to remove jurisdiction or the judicial remedies for human rights violations from the ordinary courts constitutes a serious attack against the independence of the judiciary and basic principles of the Rule of Law. State secrecy and similar restrictions must not impede the right to an effective remedy for human rights violations.

12. The integrity of the judicial system is central to the maintenance of a democratic society. Impartiality of the judiciary requires that cases be decided only on the basis of lawfully and fairly obtained evidence and on the application in good faith of the law, free from any extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

13. Members of the legal profession, including members of the judiciary and their legal staff, prosecutors, legal advisers to the executive and legislature, public defenders, members of the private bar, and lawyers' associations have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights and to ensure that in carrying out their professional functions they take no measures that would impair the enjoyment of human rights. Judges in times of crisis are under a special duty to resist actions which would undermine their independence and the Rule of Law. Judges are entitled to protection to enable them to discharge

their professional duties. A lawyer who knowingly gives advice which would foreseeably lead to a violation of human rights or international humanitarian law or to a crime under international law breaches his or her professional responsibility. When such advice leads to a crime under international law, the offending lawyer should incur civil and criminal responsibility.

### **Plan of Action**

The International Commission of Jurists, including its Commissioners, Honorary Members, National Sections and Affiliated Organisations, in pursuance of its primary mission to uphold the principles of the Rule of Law, the independence of the judiciary, the legal profession and human rights:

1. Reaffirms that the judiciary and legal profession have an enhanced responsibility during times of crisis to ensure the Rule of Law, the protection of human rights and the effectiveness of the administration of justice.
2. Calls on all members of the Judiciary, the legal profession and bar associations around the world to support the primacy of the Rule of Law in countries facing times of crisis and in particular to support judges and lawyers who may be under attack, persecution or harassment;
3. Decides as a global network to work collectively:
  - (a) To monitor situations where the institutional independence and effectiveness of the judiciary or the legal profession are threatened or under attack;
  - (b) To intervene, by appropriate means, to support and protect judges and lawyers who are harassed or persecuted as a result of carrying out their professional duties in times of crisis;
  - (c) To challenge, through advocacy and litigation, any legislation, measures or other actions contemplated, established or implemented in times of crisis at the national level, which place at risk or undermine the independence and effectiveness of the judiciary and the legal profession and their essential missions to protect human rights and the Rule of Law;
  - (d) To provide to the United Nations and regional organisations relevant information on the independence of the judiciary and the legal profession in times of crisis and to request from them action to protect judges and lawyers under attack.

4. Charges its Centre for the Independence of Judges and Lawyers (CIJL) with the responsibility:
  - (a) To act as a focal point in all matters concerning the independence and effectiveness of the judiciary and the legal profession in times of crisis;
  - (b) To initiate and implement the above Plan of Action;
  - (c) To work with the ICJ Network to assist efforts and initiatives to support and protect judges and lawyers in times of crisis; and,
  - (d) To disseminate this Declaration and the Plan of Action of the Conference to national, regional and international associations of judges and lawyers (including ICJ National Sections and Affiliated Organisations), to intergovernmental organisations and to governments.

# THE LEGAL COMMENTARY



## Principle 1

The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law. In times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of Law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case.

## Commentary

### 1. Unlawful national practices

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In resorting to declared or undeclared states of emergency or other states of exception, States have sometimes resorted to measures that have greatly impaired the independence of the judiciary and weakened the oversight function ordinarily exercised by the judiciary. States of emergency and exception have tended to create situations involving “hierarchy of powers” rather than conditions of separation of powers, which preserve the independent function of the judiciary.<sup>1</sup>

For example, during the regimes of Jean Claude “Baby Doc” Duvalier and François “Papa Doc” Duvalier in Haiti, on an annual basis the legislature would confer full powers to the executive and would suspend constitutional guarantees.<sup>2</sup> This practice led to the *de facto* and/or *de jure* exclusion of the judiciary from exercising judicial oversight in respect of the state of emergency itself and the measures taken pursuant to the emergency affecting the rights of individuals.<sup>3</sup>

In Sri Lanka, the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR) expressly exclude judicial scrutiny and discretion to overturn any order

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1 *Tenth annual report and list of States which, since 1 January 1985 have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 150.

2 *Ibid.*, para. 148.

3 *Ibid.*

made under those powers.<sup>4</sup> The Regulations provide that where the Secretary to the Ministry of Defence has ordered detention, the court “shall order” continued detention.<sup>5</sup> The Court’s role in reviewing the lawfulness of detention is therefore effectively extinguished, reduced to a rubber-stamping exercise.<sup>6</sup> A person “aggrieved” of an order made against him or her may only make objections to an “Advisory Committee”, consisting of persons appointed by the President<sup>7</sup> or the President himself.<sup>8</sup> After considering the objections, the Advisory Committee reports to the Secretary of the Ministry of Defence, who may revoke a Regulation 19(1) order, except where the person is a member of a proscribed organisation.<sup>9</sup>

In times of crisis, the use of state secrecy and national security doctrines are frequently expanded, which in practice has resulted in categorical procedural obstacles to gaining access to justice before the courts. In a case in Italy involving serious human rights violations related to the practice of “extraordinary rendition”, the judge determined that five Italian officials could not be prosecuted because the information was barred on grounds of state secrecy.<sup>10</sup> In the United States, cases involving abuses surrounding “extraordinary rendition” have also been dismissed on the basis of state secrecy.<sup>11</sup> In the Russian Federation, the amendments passed in first reading by the lower chamber of the Parliament in September

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- 4 Regulation 19 (10), EMPPR 2005: “An order under paragraph (1) of this regulation shall not be called in question in any court on any ground whatsoever”; and, Regulation 19 (1) (A), as amended Gazette Extraordinary 1561/11 of 5 August 2008: “the court shall order that such person continue to be detained”; and Regulation 19 (1) (B), as amended Gazette Extraordinary 1561/11 of 5 August 2008: “The production of any person in conformity with the provisions of paragraph 1 (A) shall not affect the detention of such person...”. However, such clauses in the past have not prevented the Supreme Court from exercising jurisdiction under the Constitution to protect fundamental rights when affected by emergency regulations. See e.g. *Perera v. AG* (1992) 1 SLR 199 *Wickramabandu v. Herath* [1990] 2 SLR 348 (holding that the judiciary has the authority to inquire into the reasonableness of restrictions on freedom imposed by Emergency Regulations); *Karunatileke v. Dissanayake*, [1999] 1 SLR 157, 177. See also in general, ICJ, *Sri Lanka: Briefing Paper – Emergency Laws and International Standards*, May 2009, available at <http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf> (accessed on 17 March 2011).
  - 5 Regulation 19 (1) (A) and (B), and Regulation 21, as amended Gazette Extraordinary 1561/11 of 5 August 2008.
  - 6 Until recently, somewhat confusingly, and contrary to what was implied by Regulation 19 (1), under Regulation 21(2) a person was to be produced before a court of competent jurisdiction within 90 days, or otherwise released. Even in this case, where the detainee was produced before such a court, Regulation 21 (3) provided that the court “shall order” their detention in prison. However, the previous Regulation 21 has now been revoked and replaced by a new Regulation 21; see Gazette Extraordinary 1561/11 of 5 August 2008.
  - 7 Regulations 19 (4) – (9), EMPPR 2005.
  - 8 Regulation 19 (5), EMPPR 2005.
  - 9 Regulation 19 (8) – (9), EMPPR 2005.
  - 10 Amnesty International, *Italy prevents trial of intelligence agents over Abu Omar rendition*, available at <http://www.amnesty.org/en/news-and-updates/italy-prevents-trial-intelligence-agents-rendition-abu-omar-2010-12-16>, 16 December 2010, (accessed on 22 February 2011).
  - 11 See Brief of Amici Curiae of international law scholars and human rights organisations (including the ICJ) to support the petition for writ of certiorari before the US Supreme Court, available at [http://icj.concepto.ch/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23667](http://icj.concepto.ch/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23667), (accessed on 22 February 2011).

2010 to the Law on state secrets, extending it to certain counter-terrorism cases, undermined the right to a jury trial for terrorism-related defendants, as jury trials are excluded when state secrets are involved.<sup>12</sup>

## 2. International legal framework

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### i) General considerations

As the ICJ affirmed in its seminal Declaration of Delhi, “the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed to safeguard and advance” human rights.<sup>13</sup> The International Bar Association has said: “The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.”<sup>14</sup> A number of principles, generally fundamental to the Rule of Law, take on heightened importance in times of crisis and declared states of emergency to prevent the political branches of government from abusing their power in the name of national security.<sup>15</sup> These fundamental principles of the Rule of Law include: an independent and impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; and equality of all before the law.<sup>16</sup>

These fundamental Rule of Law tenets are reflected in established principles of both international humanitarian law (IHL) and international human rights law.<sup>17</sup> Unlike IHL, international human rights law, including under the International Covenant on Civil and Political Rights, allows for States to derogate to a limited extent from the full scope of their obligations under exceptional circumstances.<sup>18</sup> As procedural and judicial guarantees are essential during an emergency, the judiciary must be fully independent and able to decide each case on its merits without any interference from the executive or the legislative.<sup>19</sup>

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12 ICJ *Bulletin on Counter-terrorism and Human Rights*, no. 46, September 2010, p. 11.

13 Preamble of ICJ’s *Declaration of Delhi*, 1959.

14 Paragraph 3 of the International Bar Association’s Rule of Law Resolution, 2005.

15 See *infra* Principle no. 10 and its Commentary.

16 Paragraph 2 of the International Bar Association’s Rule of Law Resolution, 2005.

17 See *infra* Principle no. 10 and its Commentary.

18 See *infra* Principle no. 4 and Principle no. 9 and their Commentaries.

19 See *infra* Principle no. 2 and Principle no. 12 and their Commentaries.

## **ii) The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency**

Members of the legal profession, including judges, lawyers, and prosecutors, have a duty to safeguard and uphold human rights and the Rule of Law.<sup>20</sup> This duty includes the legal and ethical responsibility to ensure that they engage in no conduct in the performance of their job that would impair another person's human rights.<sup>21</sup>

In times of crisis, States often curtail the rights and fundamental freedoms of individuals. In such circumstances, legal professionals have a duty to ensure that rights are respected and that the Rule of Law and the principle of legality are guaranteed.<sup>22</sup> In this respect, the legal profession plays a primary role in the protection of human rights by guarding against abuses and inhibiting conduct by the political branches which exceeds permissible bounds in emergencies and other crises.

Prosecutors must continue to investigate and bring criminal action for violations of rights in times of emergency, such as the right to life, and for crimes under international law, such as extrajudicial killings or enforced disappearances.<sup>23</sup> They must also uphold human rights and fundamental freedoms while discharging their professional duties in the course of investigation and prosecution.<sup>24</sup>

Lawyers must persist in this duty notwithstanding the hindrances and particular circumstances that the state of emergency may create.<sup>25</sup> They have a special responsibility to render assistance to victims of human rights violations through the pursuit of remedies and reparation for such violations.<sup>26</sup>

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20 Principle B.3(c) and Article 16.1 of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*; Principle 1(b) of the *Singhvi Declaration*; Principle 10(b) of the *Beijing Statement on the Independence of the Judiciary in the LAWASIA Region*; Principle 24(b) of the Council of Europe Recommendation No. R(2009)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system; Principle 4 of the *UN Basic Principles on the Role of Lawyers*; Chapter VII.59 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; Preamble of Council of Europe Recommendation No. R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer; Principle F(h) and Principle I(i) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

21 See *infra* Principle no. 13 and its Commentary.

22 Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p. 884.

23 *Ibid.*

24 See *infra* Principle no. 3 and its Commentary.

25 Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p. 884.

26 See also *infra* Principle no. 7 and its Commentary.

In this regard, the Human Rights Council has also recognised the special role played by the judiciary and the legal profession in the protection of human rights. In its resolution focussing on “Torture and other cruel and inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers”, it clearly stated that the Human Rights Council:

*“Emphasizes the essential role of judges, prosecutors and lawyers in safeguarding the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment and that in this regard States should ensure the effective administration of justice, particularly by:*

- (a) Enabling the judiciary to exercise its judicial functions independently, impartially and professionally;*
- (b) Taking effective measures to prevent and combat any unlawful interference of any kind, such as threats, harassment, intimidation and assaults on judges, prosecutors and lawyers, as well as ensuring that any such interference is promptly, effectively, independently and impartially investigated with a view to bringing those responsible to justice;*
- (c) Taking effective measures for combating corruption in the administration of justice, establishing proper legal aid programmes and having judges, prosecutors and lawyers adequately and in sufficient numbers selected, trained and remunerated;”*<sup>27</sup>

**iii) The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law**

The domestic judiciary is central to the protection of human rights and freedoms. It constitutes an essential check and balance on the other branches of government, ensuring that the laws of the legislative and the conduct of the executive comply with international human rights and the Rule of Law. In order for it to be able to exercise this function in practice, members of the public must have access to fair and effective proceedings to pursue justice.<sup>28</sup>

This principle is a necessary corollary of the Rule of Law, in particular of the principle of separation of powers. The latter principle is axiomatic in ensuring the

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<sup>27</sup> Human Rights Council, *Resolution 13/19 on Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, UN Doc. A/HRC/RES/13/19, 26 March 2010, para. 12. See also *infra* Principle no. 13 and its Commentary.

<sup>28</sup> See *infra* Principle no. 4 and its Commentary.

observance of human rights.<sup>29</sup> The principle of legality is intertwined with democratic institutions and the Rule of Law,<sup>30</sup> and is inherent in core instruments of international human rights law, such as the International Covenant on Civil and Political Rights.<sup>31</sup> The three separate and independent branches of the government have exclusive and specific responsibilities and none should intrude into the others' sphere.<sup>32</sup> An independent and impartial justice system is based on this principle of separation of powers.<sup>33</sup>

As the UN Special Rapporteur on states of emergency and human rights highlighted:

*“[S]tates of emergency are not tantamount to the rule of the arbitrary. They are an institution of the rule of law involving a series of measures designed to come into force only when a crisis situation arises and which remain in reserve during ordinary periods. Therefore, whatever the political dimension which may be attributed to a given state of emergency, its legal nature is such that the acts which constitute it (proclamation, ratification, etc.) and the measures which are adopted when it is in force (suspension or restriction of certain rights, etc.) must lie within the framework of the principles governing the rule of law and are thus subject to controls”.*<sup>34</sup>

Therefore, to ensure the observance of the Rule of Law and the protection of human rights, any declaration of a state of emergency and any emergency measure adopted under it, must be subject to judicial oversight.<sup>35</sup> In this regard, the function of courts in controlling declarations of states of emergency and ensuring respect for the limitations placed on such powers by the Constitution and international law is essential.<sup>36</sup>

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29 Inter-American Commission on Human Rights, *The Situation of Human Rights in Cuba: Seventh Report*, OAS Doc. OEA/Ser.L/V/II.61, doc. 29, rev. 1, 4 October 1983, p. 67, para. 2.

30 Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 19887, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), paras. 24 and 26.

31 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

32 See *Inter-American Democratic Charter*, adopted by the OAS General Assembly on 11 September 2001.

33 See *infra* Principle no. 2 and its Commentary.

34 *Sixth Annual Report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1993/23, 29 June 1993, para. 52.

35 See *infra* Principle no. 4 and its Commentary.

36 *Concluding Observations of the Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras. 23 and 38; Inter-American Commission on Human Rights, *Third report of the situation of human rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter II, “Human rights protection in the Colombian legal and political system”, para. 69.

#### **iv) In times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of Law**

As the UN Special Rapporteur on the Independence of Judges and Lawyers has affirmed, the competency and capacity of judges to review the executive's decision to declare an emergency is critical to preserving the Rule of Law:

*“In the light of the tendency to abuse the state of emergency and the related restriction of rights, the Special Rapporteur considers that the courts cannot be denied the authority to question a Government’s motives in declaring a state of emergency and suspending rights, or the authority to limit the measures imposed during states of emergency if such measures violate national and international legality[...]. The Special Rapporteur welcomes legislation that stipulates that a state of emergency proclaimed by a Government or parliament must be subsequently ratified by the highest judicial body. Judicial oversight of the duration of a state of emergency in relation to the circumstances that prompted its adoption and that justify its renewal and maintenance is also essential. Judges must be able to nullify extensions of states of emergency if they do not meet legal requirements or if the circumstances that justified the adoption of the state of emergency have changed.”<sup>37</sup>*

The institutions of a democratic State will become imbalanced where emergency measures have been imposed and its supervisory mechanisms weakened.<sup>38</sup> Emergency legislation must not restrict the capacity of the judiciary to supervise the compatibility of the declaration of emergency and its measures of implementation with international law and standards, domestic constitutions and human rights legislation.<sup>39</sup> Judicial oversight of the constitutionality or legality of the acts of the political branches is a requisite of the Rule of Law, inasmuch as restricting such power would imply “impairing the independence of justice”.<sup>40</sup> Such function is of greatest importance when, as a consequence of the implementation of states of emergency, an individual is deprived of his or her liberty.<sup>41</sup>

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37 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/63/271, 12 August 2008, paras. 16 and 18.

38 *Tenth annual report and list of States which, since 1 January 1985 have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 146.

39 *Ibid.*, para. 151.

40 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 29. See *infra* Principle no. 4 and its Commentary.

41 See *infra* Principle no. 9 and its Commentary.

**v) Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case**

The judiciary must be able to decide upon its own jurisdiction. The executive and legislative branches should not control or influence what matters can or cannot come before a court of law. This principle ensures the upholding and maintenance of the independence of judges in concrete conditions. If the legislative or executive were to determine the jurisdiction and competence of judges to decide upon a case, judicial independence would be a mere chimera.<sup>42</sup>

The judiciary has jurisdiction, either directly or by way of review, over all issues of a justiciable nature, including issues of its own jurisdiction and competence.<sup>43</sup> The judiciary has the exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law and on the basis of the Rule of Law.<sup>44</sup>

This principle identifying judicial autonomous determination of jurisdiction and competence is well established at both national and international levels.<sup>45</sup>

In times of crisis, the emerging misuse of state secrecy and national security doctrines has created a procedural bar to the exercise of jurisdiction of courts over allegations of human rights violations.<sup>46</sup> The *Draft Principles governing the administration of justice through military tribunals* affirm that military secrecy may not be invoked “to obstruct the initiation or conduct of inquiries, proceedings or trials, whether they are of a criminal or a disciplinary nature, or to ignore them”.<sup>47</sup> The use of these doctrines in ordinary courts in cases related to times of emer-

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42 Council of Europe, Committee of Ministers – European Committee on Legal Cooperation (CDCJ), *b. Draft Recommendation CM/Rec(2010)...of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities – Explanatory Memorandum*, CM(2010)147 add1, 21 October 2010, para. 17.

43 *Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region*, Principle 3(b); *Singhvi Declaration*, paragraph 5(a)

44 *UN Basic Principles on the Independence of the Judiciary*, Principles 3, 33 and 34; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guideline A: General Principles Applicable to all Legal Proceedings, Principle 4(a), (b) and (c); Chapter I.10 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities.

45 See, for example, Article 36(6) of the *Statute of the International Court of Justice* and Article 32(2) of the *European Convention on Human Rights*, Office of the High Commissioner of Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p. 122.

46 ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Report: Assessing Damage, Urging Action*, Geneva, 2009, p. 86.

47 Principle no. 10 of the *Draft Principles governing the administration of justice through military tribunals*, UN Doc. E/CN.4/2006/58, 13 January 2006.

agency has prevented courts from proceeding into the prosecution of human rights violations, thus resulting in the denial of judicial remedies and access to justice for individuals and rendering impossible the adjudication of a number of cases.

State secrecy and national security doctrines are not *per se* prohibited. However, the European Court of Human Rights has stressed that alternative methods must be explored and used when available “to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice.”<sup>48</sup>

This autonomy of judges derives directly from the principle of the independence of the judiciary and entails both the “institutional independence” and the “individual independence” of a judge. In this regard, neither the judiciary as a whole nor the single judge is subordinated to the other powers of the State or to the parties in the proceedings taking place before him or her.<sup>49</sup> This principle is reflected in the general and universally recognised right of individuals to be tried by an independent and impartial tribunal.<sup>50</sup>

Individual judges have the right, and simultaneously the duty, to decide the cases before them following the law, without any interference or pressure, in order to carry out their professional duties.<sup>51</sup> Within their role of protectors and guarantors of human rights and fundamental freedoms, as a corollary of the principle of the independence of the judiciary, they have the responsibility to state what the law provides. The judiciary should not seek from the political branches instruction on the interpretation of pieces of legislation, as this shifts the function of interpretation of the law to the legislative, which would set binding criteria and instructions upon the judiciary adjudicating individual cases.<sup>52</sup> In addition, making judges accountable to the legislature hinders their independence.<sup>53</sup>

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48 European Court of Human Rights, Judgment of 10 July 1998, *Tinnelly & Sons Ltd & Others and McElduff & Others v. United Kingdom*, Application N<sup>o</sup> 20390/92; 21322/92, para. 78.

49 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/ser.L/V/II.116, doc. 5 rev. 1 corr., 22 October 2002, para. 229. See also, in general, the Legal Commentary to the *ICJ Berlin Declaration*, Principle no. 2.

50 See *infra* Principle no. 10 and its Commentary.

51 Office of the High Commissioner of Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p. 123.

52 *Concluding Observations of the Human Rights Committee on Viet Nam*, UN Doc. CCPR/CO/75/VNM, 26 July 2002, para. 9.

53 *Concluding Observations of the Human Rights Committee on People's Republic of Korea*, UN Doc. CCPR/CO/72/PRK, 27 August 2001, para. 8.

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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The ICJ has since its inception recognised as paramount the need for judges to be guided by, and to serve as protectors of, the Rule of Law.

The *Act of Athens* (1955) stated that “Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges. [...] Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial”.<sup>54</sup> Subsequent Congresses described in more detail the need for the judiciary to safeguard the Rule of Law during times of crisis or emergency. At the *Congress of New Delhi* (1959), the importance of judicial review of the acts of the executive affecting the individual or his/her rights was stressed.<sup>55</sup>

The *African Conference on the Rule of Law* (Lagos, 1961) stressed “the responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society”.<sup>56</sup> In this regard, Committee I of the Conference of Lagos (1961) held that in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his or her rights should have access to the courts for determination whether the power has been lawfully exercised, and that the judiciary should be given the jurisdiction to determine whether the conditions for the exercise of emergency powers have been fulfilled.<sup>57</sup> The Conference further explored the roles of the judiciary and of the legal profession, recognising that “In a free society practising the Rule of Law, it is essential that the absolute independence of the Judiciary be guaranteed. Members of the legal profession in any country have, over and above their ordinary duties as citizens, a special duty to seek ways and means of securing in their own country the maximum degree of independence for the Judiciary”.<sup>58</sup>

Stressing the role of lawyers, Committee III of the *Congress of Rio* (1962) recognised “the duty of lawyers in every country, both in the conduct of their practice and in public life, [...] to be always vigilant in the protection of civil liberties and Human Rights”.<sup>59</sup>

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54 Articles 3 and 4 of the *Act of Athens*, 1955.

55 Clause IV, Report of Committee II, “*The Executive and the Rule of Law*”, *Congress of New Delhi*, 1959.

56 Preamble, *Law of Lagos*, 1961.

57 Clause I. 3 and 7, Committee I, “*Human Rights and Government Security – the Legislative, Executive and Judiciary*”, *Conference of Lagos*, 1961.

58 Paragraph 1, Committee III, “*The Responsibility of the Judiciary and of the Bar for the Protection of the Individual in Society*”, *Conference of Lagos*, 1961.

59 Clause II, Report of Committee III, “*The Role of Lawyers in a Changing World*”, *Congress of Rio*, 1962.

The *Declaration of Dakar* (1967) followed similar lines, holding that “Jurists must [...] maintain constant vigilance to ensure an equitable balance between the requirements of the public well-being and the rights of the individual, and must ensure that measures adopted to deal with pressing problems of a temporary nature are not allowed to be used as permanent solutions”.<sup>60</sup>

The *European Conference of Jurists* (Strasbourg, 1968) reasserted the need for the judiciary to operate judicial control of states of emergency and to preserve the possibility “to grant effective remedies in cases of misuse or abuse of emergency powers”.<sup>61</sup>

The *Final Document of the Aspen Conference* on “Justice and the Individual: The Rule of Law under current pressure” (1971) recognised a “special responsibility” incumbent upon “all lawyers, whether judges, advocates, government lawyers, teachers of law or participants in the law making processes”, inasmuch as they are required to encourage the application of human rights obligations in national courts and “to make fuller and bolder use of international remedies for violations of those rights in their own and other countries”.<sup>62</sup>

The *ICJ’s Anniversary Meeting in Vienna* (1977) stressed that “the independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed”.<sup>63</sup>

The *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (Berlin, 2004) specifically recognised the role of the judiciary in reviewing State conduct while fighting terrorism.<sup>64</sup>

## 4. Selected excerpts from international standards

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### 2. (ii) The role of the judiciary and legal profession in safeguarding human rights and the Rule of law in times of crisis

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at

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60 *Declaration of Dakar*, 1967.

61 Part. IV.19, “Control over Assumption of Emergency Powers – Judicial Control”, Conclusions of the Conference, *Strasbourg Conference*, 1968.

62 Paragraph 2(c), *Final Document of the Aspen Conference*, 1971.

63 Paragraph 6, “*The Rule of Law in Emerging Forms of Society One Party States*”, *Anniversary Meeting of Vienna*, 1977.

64 Principle 2, “*Independence of the judiciary*”, *Berlin Declaration*, 2004.

law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

— *Article 14(1) of the International Covenant on Civil and Political Rights*

The institution of an independent and impartial judiciary is essential for ensuring the rule of law, particularly in times of emergency.

— *Article 16(1) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

The objectives and functions of the judiciary shall include: [...]

- (b) Promoting, within the proper limits of the judicial function, the observance and the attainment of human rights.

— *Principle 1(b) of the Singhvi Declaration*

The objectives and functions of the judiciary include the following: [...]

- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights.

— *Principle 10(b) of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

Judges should protect the rights and freedoms of all persons equally, respecting their dignity in the conduct of court proceedings.

— *Chapter VII.59 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*

In the performance of their duties, public prosecutors should in particular: [...]

- b. respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms.

— *Principle 24(b) of the COE Recommendation No. R(2009)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system*

Governments and professional associations shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms.

— *Principle 4 of the UN Basic Principles on the Role of Lawyers*

Underlying the fundamental roles that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms.

– *Preamble of COE Recommendation No. R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer*

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. [...] Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

– *Principles F(h) and I(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

**2. (iii) The judiciary as an essential check on the other branches of the State and on the compliance of laws and measures adopted to address the crisis with the Rule of Law, human rights and, where applicable, international humanitarian law**

The Assembly considers that the following safeguards – in addition to those stated in Article 15 of the European Convention on Human Rights – should always be provided in a state of emergency: [...] judicial scrutiny of the validity of a state of emergency and its implementation.

– *Paragraphs 12-12.2 of the PACE Resolution 1659 (2009) on Protection of Human Rights in emergency situations*

The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure

(legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

— *Principle B.5 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

## **2. (iv) The principle of judicial review in times of crisis as indispensable to the effective operation of the Rule of Law**

The ordinary courts should maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

— *Principle 60 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo*, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

— *Article 16(3) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

The objectives and functions of the judiciary include the following: a) To ensure that all persons are able to live securely under the rule of law; b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and c) To administer the law impartially among person and between persons and the State.

— *Principle 10 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

All remedies, including special ones, such as *habeas corpus* or *amparo*, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country.

— *Principle 21 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

**2. (v) Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case**

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

— *Principle 3 of the UN Basic Principles on the Independence of the Judiciary*

The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.

— *Principle 5(a) of the Singhvi Declaration*

The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature. [...] The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law[...]. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

— *Principles 3, 33 and 34 of the Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region*

Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;

c) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide with an issue submitted for a decision is within the competence of a judicial body as defined by law.

— *Principle A(4)(b) and (c) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Only judges themselves should decide on their own competence in individual cases as defined by law.

— *Chapter I.10 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities*



## Principle 2

In times of crisis, the executive, legislative and judicial branches must preserve and guarantee, in law and practice, the independence and effective functioning of the judiciary in carrying out the fair administration of justice and the protection of human rights. They must ensure remedies and full reparations for violations. They must not take any decision or action the effect of which would be to nullify, invalidate or otherwise revise or undermine the integrity of judicial decisions, without prejudice to mitigation or commutation of sanctions by competent authorities consistent with international law.

## Commentary

### 1. Unlawful national practices

In times of crisis, States have on occasion reacted to a real or perceived threat to national security by adopting measures from the executive and legislature which contravene the fair administration of justice or interfere with judicial independence. For example, such independence was compromised in Peru through the introduction of legislation in 1992, which established new anti-terrorism laws. Article 13 of Decree-Law 25.475, relating to judicial procedure, provided that a person seeking to appeal conviction of a terrorist offence would have to do so before the Special Anti-Terrorist Criminal Chamber of the Supreme Court of Justice. The President of the Supreme Court was responsible for choosing which members of the Court would serve in this Chamber. Problematically, however, the President and the majority of the members of the Supreme Court had been appointed by the executive branch, and therefore could not be seen as independent from the Executive.<sup>65</sup>

States have also resorted to the creation of specialised state security courts or military tribunals in periods of crisis. The presence of judges who are members of the military extinguishes the independence of these courts. Until 1999, legislation in Turkey provided that military officers would serve as judges in specialised courts. Such composition raised issues of independence and separation of powers, as military officers are under the power of the executive, operating under a command structure in relation to ranking and discipline.<sup>66</sup> The participation of

65 *Special Rapporteur for the Independence of Judges and Lawyers, Report on the Mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, para. 53.

66 United Nations Office on Drugs and Crime (UNODC), *Digest of Terrorist Cases*, January 2010, para. 173 available at [http://www.unodc.org/documents/terrorism/09-86635\\_Ebook\\_English.pdf](http://www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf) (accessed on

a military judge in interlocutory decisions means that persons coming before the court are denied the right to access to an independent court.<sup>67</sup>

The principle of separation of powers has likewise been undermined in the case of the Law of Ukraine no. 2453-VI on the Judiciary and the Status of Judges, adopted by the Verkhovna Rada on 7 July 2010. According to Article 48.1 of the legislation, judges are in possession of immunity and may not be arrested or detained prior to a guilty verdict by a court, except for those cases where the Verkhovna Rada of Ukraine has so consented. In such cases the scope of immunity that a judge possesses may be connected with a decision of the other branch of government, rather than an independent body.<sup>68</sup>

The political branches of government have also acted in times of crisis, or subsequent to a crisis, to pre-empt the judiciary from ensuring effective remedy for and full reparation to victims of human rights abuses. Amnesties, forms of which are typically granted at the end of hostilities or national emergencies, frequently entail a denial of effective remedy for victims of such abuses.<sup>69</sup> For example, pursuant to the Lomé Peace Accords in 1999 relating to the armed conflict in Sierra Leone, blanket amnesties were granted in an effort to assist national reconciliation in that country.<sup>70</sup> As a consequence, victims of serious violations of human rights and humanitarian law were effectively denied access to justice.

Judicial decisions must be respected regardless of whether there exists a formal state of emergency. This principle was breached in Tajikistan in 2005. The prosecutor in the country appeared to have powers superseding those of the judge and could countermand judicial decisions already enforced, at any time after the judgment was given. The prosecutor was also able to temporarily suspend the enforcement of a pronounced sentence, which might mean those acquitted would have to remain in detention.<sup>71</sup>

In respect of Kazakhstan, the prosecutor had the right automatically to appeal a case to a higher court even when the case was closed. The same right was not

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67 European Court of Human Rights, Judgment of 12 May 2005, *Öcalan v. Turkey*, Application N<sup>o</sup> 46221/99, paras. 112-118.

68 Council of Europe, Venice Commission, *Joint Opinion on the Law on the judicial system and the status of judges of Ukraine adopted by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe*, CDL-AD(2010)026, 18 October 2010, para. 38; Council of Europe, Venice Commission, *Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine adopted by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe*, CDL-AD(2010)003, 16 March 2010, para. 27.

69 See also *infra* Principle no. 11 and its Commentary.

70 *Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, Article IX.

71 *Special Rapporteur for the Independence of Judges and Lawyers, Report on the mission to Tajikistan*, UN Doc. E/CN.4/2006/52/Add.4, 30 December 2005, paras. 56 and 57.

granted to the defence lawyer, who had to first seek leave to appeal.<sup>72</sup> Moreover, the Prosecutor-General – and the chairperson of the Supreme Court - had a right to suspend the enforcement of a court’s decision, or a court’s judicial act or resolution, for up to two months in civil and criminal cases.<sup>73</sup>

## 2. International legal framework

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### i) Responsibility to guarantee independence and effective functioning of the judiciary and fair administration of justice

Protecting human rights, including by safeguarding the independence of the judiciary, is the obligation of all States, who must adopt necessary laws or other measures to give effect to these obligations.<sup>74</sup> The State discharges such obligations through all three branches of government, and a number of organs of State may be implicated toward this end. Accordingly, the responsibility of the State is engaged for any breach of these obligations, irrespective of which branch of government is responsible.<sup>75</sup>

While the conduct of all State agents from the executive, legislative and judicial branches engages the responsibility of States equally at the international level, it is critical that the three functions of government remain separate and independent from one another. The principle of separation of powers is a cornerstone of the Rule of Law. As emphasised by the UN Commission on Human Rights, “the essential elements of democracy include respect of human rights and fundamental freedoms [...] the separation of powers [and] the independence of the judiciary.”<sup>76</sup> The European Court of Human Rights has affirmed that respect for the principle of the separation of powers is indispensable for a functioning democracy.<sup>77</sup> According to the Inter-American Court of Human Rights, “one of the principal

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72 *Special Rapporteur for the Independence of Judges and Lawyers, Report on the Mission to Kazakhstan*, UN Doc. E/CN.4/2005/60/Add.2, 11 January 2005, paras. 45 and 47.

73 *Ibid.*, paras. 46-47.

74 Article 2(2) of the *International Covenant on Civil and Political Rights*; Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*; Article 2 (c) and (d) of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2(a) of the *Convention on the Elimination of All Forms of Discrimination Against Women*; Article 4 of the *Convention on the Rights of the Child*; Article 2(1) of the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*; Article 1 of the *African Charter on Human and Peoples’ Rights*; Article 2 of the *American Convention on Human Rights*.

75 See Article 4 of the International Law Commission Articles on Responsibility of States for internationally wrongful acts: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”

76 UN Commission on Human Rights, *Commission on Human Rights Resolution 2003/36: Interdependence between democracy and human rights*, 23 April 2003, UN Doc. E/CN.4/RES/2003/36.

77 European Court of Human Rights, Judgment of 13 February 2003, *Chevron v. France*, Application N° 49636/99, para. 74.

purposes of the separation of public powers is to guarantee the independence of judges.”<sup>78</sup> A number of international instruments reaffirm the principle of the separation of powers, particularly with regard to the judiciary.<sup>79</sup>

The UN Human Rights Committee has affirmed that a “lack of clarity in the delimitation of the respective competencies of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy.”<sup>80</sup>

An independent and fully operative judiciary is indispensable to upholding the Rule of Law and protecting human rights.<sup>81</sup> The judicial function cannot be effectively fulfilled if the judiciary is not independent from the executive and the legislature, as well as from any private or supranational entities. Any interaction among the three branches of government must not compromise judicial independence.<sup>82</sup> The political branches must not only refrain from interfering with judicial independence, but they also must ensure that the independence of the judiciary is implemented in national law in order to guarantee and protect that independence.<sup>83</sup>

Within this framework, the independence and impartiality of the judiciary are cornerstone principles of democratic societies and may be considered among those general principles of law which constitute one of the sources of international law (art. 38(1)(c), Statute of the International Court of Justice).<sup>84</sup> The fundamental principle of the separation of powers is not a privilege of the judiciary, but an

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78 Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case v. Peru*, para. 73.

79 See, *inter alia*, Article 3 of the *Inter-American Democratic Charter*; Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, 17 November 2010; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

80 *Concluding Observations of the Human Rights Committee on Slovakia*, UN Doc. CCPR/C/79/Add.79, 4 August 1997, para. 3.

81 The UN Human Rights Council, in its *Resolution 15/3 on Independence and impartiality of the judiciary, jurors and assessors and independence of lawyers*, UN Doc. A/HRC/RES/15/3 29 September 2010, affirmed that “an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and that there is no discrimination in the administration of justice”.

82 *Commonwealth Principles on the Accountability of and the relationship between the Three Branches of Government*, Principle IV(d); *Latimer House Guidelines for the Commonwealth*, Guideline I) 5.

83 *UN Basic Principles on the Independence of the Judiciary*, Principle 1; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region*, Principle 4; *The Universal Charter of the Judge*, Article 2; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guidelines A: General Principles Applicable to all Legal Proceedings, Principle 4(a) and Guideline Q: Traditional Courts, Paragraph (c); Council of Europe *Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter 1.7.

84 *Report of the Special Rapporteur for the Independence of Judges and Lawyers*, UN Doc. E/CN.4/1995/39, 6 February 1995, para. 34.

instrument to guarantee to those seeking justice an efficient judiciary able to protect their rights and fundamental freedoms.<sup>85</sup> It is, therefore, a further means of protecting human rights. In this regard, the Human Rights Committee clearly recognised the independence, competence and impartiality of a tribunal as an “absolute right”, for which no exception is permitted.<sup>86</sup>

For their part, judicial officials must take care to interpret and apply the law in good faith, independently and with integrity, in conformity with international human rights law and international law.<sup>87</sup> An independent judiciary, in addition to upholding respect for the Rule of Law generally, must also guarantee the fair administration of justice and the right to a fair trial.<sup>88</sup> That right is provided for in all general universal regional human rights treaties,<sup>89</sup> as well as in a number of declaratory international human rights instruments.<sup>90</sup>

The UN Human Rights Committee, in interpreting Article 14 of the *International Covenant on Civil and Political Rights*, has affirmed that the “fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.”<sup>91</sup> This comment echoes the universal standard provided in the Basic Principles on the Independence of the Judiciary, which affirm that “[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”<sup>92</sup>

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85 Council of Europe, Venice Commission, *Report on the Independence of the Judicial System Part I: the Independence of Judges adopted by the Venice Commission*, CDL-AD(2010)004, 16 March 2010, para. 6; Council of Europe Recommendation CM/REC(2010)12E on Judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers, 17 November 2010, Preamble, para. 7, Chapter I. 3 and Chapter II.11.

86 Human Rights Committee, Views of 28 October 1992, *M. Gonzalez del Río v. Peru*, Communication N° 263/1987, para. 5.2, UN Doc.CCPR/C/46/D/263/1987, 28 October 1992; Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

87 *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*, Principle IV.

88 *Bangalore Principles of Judicial Conduct*, Value 1; *The Universal Charter of the Judge*, Article 1.

89 Article 14 of the *International Covenant on Civil and Political Rights*; Article 37(2) of the *Convention on the Rights of the Child*; Article 11(3) of the *International Convention for the Protection of all Persons from Enforced Disappearance*; Article 18(1) of the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*; Article 8(1) of the *American Convention on Human Rights*; Article 6 of the *European Convention on Human Rights*; Article 7 of the *African Charter on Human and Peoples’ Rights*; Article 13 of the *Arab Charter on Human Rights*.

90 Article 10 of the *Universal Declaration of Human Rights*; Article 47 of the *Charter of Fundamental Rights of the EU*; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guidelines A: General Principles Applicable to all Legal Proceedings, Principle 1.

91 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 25.

92 *UN Basic Principles on the Independence of the Judiciary*, Principle 4.

The right to a fair trial must be respected and protected, however serious the alleged crime and regardless of whether a State is at the time in a state of crisis, including when under the threat of terrorist attacks.<sup>93</sup> Even where a State is undertaking lawful measures in derogation of certain rights pursuant to a declared and notified state of emergency, these core fair trial principles must be scrupulously observed. As the Human Rights Committee has affirmed:

*“... the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.”<sup>94</sup>*

Where a judge is not independent, the court on which the judge sits cannot be considered to be a tribunal for purposes of a fair trial. Under Article 14(1) of the ICCPR, “the notion of a ‘tribunal’ [...] designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.”<sup>95</sup> Thus, any disposition of a case arising from a body not constituting a tribunal is incompatible with Article 14 of the ICCPR.<sup>96</sup>

All states must establish procedures in law to protect and promote the independence of the judiciary and all necessary measures should be taken toward that end.<sup>97</sup> Procedures for judicial appointments must be transparent and based on objective criteria,<sup>98</sup> in consultation with the legal profession,<sup>99</sup> and with appropriate safeguards against appointments made on the basis of inappropriate

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93 Council of Europe, *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002, Article IX.

94 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

95 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 18.

96 *Ibid.*; *Singhvi Declaration*, Principle 25.

97 *UN Basic Principles on the Independence of the Judiciary*, Principle 1; Article 26 of the *African Charter on Human and Peoples’ Rights*; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region*, Principle 4; *The Universal Charter of the Judge*, Article 2; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guidelines A: General Principles Applicable to all Legal Proceedings, Principle 4(a) and Guideline Q: Traditional Courts, para. (c); Council of Europe Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers, 17 November 2010, Chapter II.13.

98 *Universal Charter of the Judge*, Article 9.

99 *Singhvi Declaration*, Principle 11(c).

considerations<sup>100</sup> or improper motives.<sup>101</sup> Such safeguards are particularly important to ensure the propriety of any executive or legislative involvement in the appointments process.<sup>102</sup> The appointments process should aim to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary,<sup>103</sup> and as such, members of the judiciary and the legal profession should be consulted or otherwise involved in the process to ensure their effective participation.<sup>104</sup> States must also take measures to protect the integrity of the judiciary and to prevent opportunities for corruption among members of the judiciary.<sup>105</sup>

The executive and legislative branches must adequately secure by law the terms and conditions of tenure<sup>106</sup>, and the promotion of judges must be made on objective facts, including ability, integrity and experience.<sup>107</sup>

In order to ensure independence in practice, judges must be independent from the parties in the case before them.<sup>108</sup> Should a judge maintain any past links to a case or to any one of the parties, or any interest in the outcome of a case, the judge must not preside over that case.<sup>109</sup> Should there be any circumstances that infringe or appear to infringe on the judge's independence, such as contact with one of the parties, the judge should disclose these circumstances to the judicial authority as soon as he or she is aware of them.<sup>110</sup>

Judges must ensure that any activities in which they may be involved, apart from those directly associated with judicial office, do not interfere in any way with official activities and do not give rise to doubts as to their independence

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100 *The Burgh House Principles on the Independence of the International Judiciary*, Principle 2.3.

101 *UN Basic Principles on the Independence of the Judiciary*, Principle 10; *Singhvi Declaration*, Principles 11(b) and (c).

102 *Singhvi Declaration*, Principle 11(c); *COE Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter VI.

103 *Latimer House Guidelines for the Commonwealth*, Guideline II; *Council of Europe Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter VI.44-45.

104 *Singhvi Declaration*, Principle 11(c); *Council of Europe Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter VI.46-48.

105 Article 11 of the *UN Convention against Corruption*.

106 *UN Principles on the Independence of the judiciary*, Principle 11; See *infra* Principle no. 5 and its Commentary.

107 *UN Principles on the Independence of the Judiciary*, Principle 13; *Council of Europe Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter VI.44.

108 *The Burgh House Principles on the Independence of the International Judiciary*, Preambular paragraph 5.

109 *The Burgh House Principles on the Independence of the International Judiciary*, Principles 9-13; *Singhvi Declaration*, Principle 25.

110 *The Burgh House Principles on the Independence of the International Judiciary*, Principle 14.

or impartiality,<sup>111</sup> or are otherwise incompatible with the duties and status of a judge.<sup>112</sup> In particular, judges should not exercise any political function.<sup>113</sup> Judges must also refrain from any kind of conduct that would affect confidence in their impartiality and their independence.<sup>114</sup>

Judicial accountability is vital to maintaining confidence in and respect for the judiciary.<sup>115</sup> Judges are not, however, accountable to either the executive or legislature, as such a relation could result in their independence being compromised. Rather, they should be accountable only to the Constitution and to the law.<sup>116</sup> Standards of judicial conduct and accountability must be implemented by national judiciaries,<sup>117</sup> not by the political branches.

## ii) Governments must ensure effective remedies and full reparation for violations

The right to an effective remedy is enshrined in numerous international legal instruments.<sup>118</sup> The obligation to respect and ensure respect for international human rights law and international humanitarian law includes the duty to provide effective remedy and reparation to victims.<sup>119</sup> The right to reparation, which covers

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111 The *Burgh House Principles on the Independence of the International Judiciary*, Principle 8.1; *Singhvi Declaration*, Principle 22.

112 The *Universal Charter of the Judge*, Article 7; *European Convention on Human Rights*, Article 21; *European Charter on the Statute for Judges*, Article 4.2.

113 The *Burgh House Principles on the Independence of the International Judiciary*, Principle 8.2.

114 *European Charter on the Statute for Judges*, Article 4.3.

115 See *infra* Principle no. 13 and its Commentary.

116 *Commonwealth Principles on the Accountability of and the relationship between the Three Branches of Government*, Guideline Principle VII (b).

117 “Implementation”, *Bangalore Principles of Judicial Conduct*.

118 Article 8 of the *Universal Declaration of Human Rights*; Article 2(3) of the *International Covenant on Civil and Political Rights*; Articles 13 and 14 of the *Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*; Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 39 of the *Convention on the Rights of the Child*; Articles 25 and 63(1) of the *American Convention on Human Rights*; Article 7(1)(a) of the *African Charter on Human and Peoples’ Rights*; Articles 12 and 23 of the *Arab Charter on Human Rights*; Articles 5 (5), 13 and 41 of the *European Convention on Human Rights*; Article 47 of the *Charter of Fundamental Rights of the EU*; Article 27 of the *Vienna Declaration and Program of Action*.

119 *UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, Article 3. See also *UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity* (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 31: “Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”

all injuries suffered by victims,<sup>120</sup> includes the right to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>121</sup>

An essential component of the right to a remedy is the right to appeal against decisions<sup>122</sup> and the right to gain access to the courts and international processes in order to allow for an effective remedy to be granted.<sup>123</sup> States must ensure that all people have the right of access to courts by providing legal assistance to those who do not have sufficient means to pay for it themselves.<sup>124</sup>

One particular circumstance in which an effective remedy must be available is when a miscarriage of justice has occurred. Violations of a person's human rights can lead to a miscarriage of justice, particularly in circumstances where the independence of the judge presiding over a trial has not been respected, and as a result, the trial was not fair. In such circumstances, the victim should be fully compensated.<sup>125</sup>

### **iii) Governments must not take any decision or action the effect of which would be to nullify, invalidate or otherwise revise or undermine the integrity of judicial decisions**

The *UN Basic Principles on the Independence of the Judiciary* provide that “[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”<sup>126</sup> It is fundamental that the executive not maintain control over the judicial functions of the court in the administration of justice and that it engage in no conduct which would “[pre-empt] the judicial resolution of a dispute or

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120 *UN Impunity Principles*, Principle 34: “The right to reparation shall cover all injuries suffered by victims...”.

121 *UN Principles and Guidelines on Reparation*, Articles 18-23; *UN Impunity Principles*, Principle 34: “The right to reparation [...] shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.”

122 Article 7(1)(a) of the *African Charter on Human and Peoples' Rights*; Article 2 of Protocol 7 to the *European Convention on Human Rights*; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guideline A General Principles Applicable to All Legal Proceedings, Principle 2(j) and Guideline O, Paragraph (n)(vii).

123 Article 25 of the *American Convention on Human Rights*; Article XVIII of the *American Declaration of the Rights and Duties of Man*; Article 8 of the *Inter-American Democratic Charter*; *UN Principles and Guidelines on Reparation*, Article 14; *Latimer House Guidelines for the Commonwealth*, Guideline 6; Article 5.3 of the *European Charter of the Judge*; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guideline K: Access to Judicial Services.

124 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 10.

125 *Ibid.*, para. 52; Article 6 of the *International Covenant on Civil and Political Rights*; Article 10 of the *American Convention on Human Rights*; Article 3 of *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

126 *UN Basic Principles on the Independence of the Judiciary*, Principle 4.

frustrat[e] the proper execution of a court decision.”<sup>127</sup> The political branches may not retroactively revise decisions or interfere with the composition of the court in order to impact upon the decision-making processes and outcomes.<sup>128</sup> The effectiveness of an independent judiciary will be achieved only if its decisions are not subjected in any manner to interference by the executive or legislature or any administrative body. There must not be any inappropriate or unwarranted interference with judicial process or judicial decisions; the latter should only be subject to revision through appeals procedures or by way of mitigation or commutation of sentence by the competent authorities.<sup>129</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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Since its inception, the ICJ has underscored the principle of separation of powers as a cornerstone for safeguarding the Rule of Law. In a democratic society, the judiciary must maintain co-equal strength with the other pillars of government. Toward this end, the ICJ has long emphasised the compelling need to secure and preserve the core functions of the judiciary that are most vulnerable in times of crisis, including its role in guaranteeing fulfilment of the right to an effective remedy. The ICJ has also recognised the danger which arises when the political branches fail to respect and implement judicial decisions, as a consequence of which the Rule of Law will begin to fray.

In one of its seminal documents, the *Act of Athens*, which emerged from the *Congress of Athens* in June 1955, the ICJ affirmed “Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.”<sup>130</sup> This principle was reaffirmed in the *Declaration of Delhi on the Rule of Law in a Free Society*,<sup>131</sup> elaborated during the *Congress of New Delhi* in 1959. Annexed to the Declaration are the conclusions of the Committee on the Judiciary and the Legal Profession under the Rule of Law, stating that:

*“An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies a freedom from interference by the Executive or Legislative with the exercise of the Judicial function, but does not mean that the Judge is entitled to act in an arbitrary manner. His duty is*

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127 *Singhvi Declaration*, Principle 5 (j).

128 *Singhvi Declaration*, Principle 6.

129 Council of Europe, *Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers, 17 November 2010, Chapter II. 16-17; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Guideline A General Principles Applicable to All Legal Proceedings, Principle 4(f) and Guidelines Q(c)(ii).

130 Paragraph 3 of the *Act of Athens*, 1955.

131 Preambular paragraph 2 of the *Declaration of Delhi*, 1959.

*to interpret the law and the fundamental principles and assumptions that underlie it”.*<sup>132</sup>

In 1961 the *African Conference on the Rule of Law*, held in Lagos, Nigeria, produced the *Law of Lagos*, which elaborated the Rule of Law with particular reference to Africa.<sup>133</sup> Among the principles that should apply to any society, annexed to the resolution, the Committee on the Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society stated that:

*“In a free society practising the Rule of Law, it is essential that the absolute independence of the Judiciary be guaranteed. Members of the legal profession in any country have, over and above their ordinary duties as citizens, a special duty to seek ways and means of securing in their own country the maximum degree of independence of the Judiciary”.*<sup>134</sup>

The *Resolution of Rio de Janeiro on Executive Action and the Rule of Law*, adopted in 1962, affirmed that the independence of the judiciary is “the first indispensable condition of the existence of the Rule of Law in any country.”<sup>135</sup> The *Conference of French-speaking African Jurists in Dakar* in 1967, held under the auspices of the ICJ, concluded that “[s]ince complete independence of the courts is the best guarantee the individual can have against the arbitrary exercise of executive power, it is indispensable that the principle of the separation of powers should be scrupulously observed.”<sup>136</sup>

At the *ICJ Congress on Human Rights in an Undemocratic World*, which took place in Vienna in 1977, the ICJ highlighted the need to fully respect the independence of the judiciary<sup>137</sup> and that it was “essential to any society which has a respect for the Rule of Law. Members of the judiciary at all levels should be free to dispense impartial justice without fear in conformity with the Rule of Law.”<sup>138</sup>

The *Conclusions of Vienna* also address the right to an effective remedy and reparation for violations, stating that “Facilities for speedy legal redress of grievances against administrative action in both party and government should be

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132 Paragraph 1, Conclusions of the Committee on the Judiciary and the Legal Profession under the Rule of Law, *Congress of New Delhi*, 1959.

133 Preamble, Para. 3 of the *Law of Lagos*, 1961.

134 Paragraph 1, Conclusions of the Committee on the Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society, *Conference of Lagos*, 1961.

135 Final paragraph of the Resolution of Rio de Janeiro on Executive Action and the Rule of Law, *Congress of Rio*, 1962.

136 Article IV(4), ‘The Protection of Human Rights from the Arbitrary Exercise of Power: Conclusions adopted by the Conference on the proposal of Committee I’, *Conference of French-speaking African Jurists in Dakar*, 1967.

137 Paragraph 8(e), ‘The Rule of Law under Military Regimes’, *Conclusions of Vienna*, 1977.

138 Paragraph 5, ‘The Rule of Law in Emerging Forms of Society: One-Party States’, *Conclusions of Vienna*, 1977.

readily available to the individual”.<sup>139</sup> The right to a remedy had been previously addressed during the *Congress of New Delhi*, during which it was concluded that:

*“A citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy either in the form of a proceeding against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both”.*<sup>140</sup>

The *European Conference of Jurists on the Individual and the State*, in 1968, concluded that, “Remedies should be provided by law against infringements of the rights of the individual by State organs, public authorities or individuals.”<sup>141</sup>

The *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration as adopted in 2004 at the ICJ Congress)* Principle 2 stated:

*“In the development and implementation of counter-terrorism measures, States have an obligation to guarantee the independence of the judiciary and its role in reviewing State conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.”*<sup>142</sup>

#### 4. Selected excerpts from international standards

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##### **2. (i) Responsibility to guarantee independence and effective functioning of the judiciary and fair administration of justice**

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

— *Principle 1 of the UN Basic Principles on the Independence of the Judiciary*

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

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139 Paragraph 7, ‘The Rule of Law in Emerging Forms of Society: One-Party States’, *Conclusions of Vienna*, 1977.

140 Paragraph 6, Conclusions of the Committee on the Executive and the Rule of Law, *Congress of New Delhi*, 1959.

141 Paragraph 4, Part I, Conclusions of the *European Conference of Jurists on the Individual and the State*, 1968.

142 Principle no. 2 “Independent judiciary”, *Berlin Declaration*, 2004.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence. [...] Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

— *Articles 1 and 2 of the Universal Charter of the Judge*

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

— *Value 1 of the Bangalore Principles of Judicial Conduct*

The maintenance of the independence of the Judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

— *Principle 4 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body. [...] The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and impartial judicial body. [...] The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:

1. They shall be independent from the executive branch;
2. There shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.

— *Principles 1 and 4(a), Guideline A and Paragraph (c), Guideline Q of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Underlining that the independence of the judiciary secures for every person the right to a fair trial and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system[...]. The independence of the judge and of

the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level [...] the external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice[...]. All necessary measures should be taken to respect, protect and promote the independence and impartiality of judges.

— *Preambular Paragraph 7, Chapter I.7 and Chapter II.11 and 13 of the Council of Europe Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers*

A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

— *Article IX.1 of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism adopted by the Committee of Ministers on 11 July 2002*

... The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country[...]. Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

— *Principle IV and IV(d) of the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*

While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

— *Guideline I)5 of the Latimer House Guidelines for the Commonwealth*

## **2. (ii) Governments must ensure effective remedies and full reparation for violations**

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: [...]

- (d) provide effective remedies to victims, including reparation, as described below. [...] An adequate, effective and prompt remedy for gross violations

of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

— *Articles 3(d) and 14 of the UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*

People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

— *Guideline 1)6 of the Latimer House Guidelines for the Commonwealth*

Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

— *Article 5.3 of the European Charter on the Statute of the Judge*

**2. (iii) Governments must not take any decision or action the effect of which would be to nullify, invalidate or otherwise revise or undermine the integrity of judicial decisions**

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

— *Principle 4 of the UN Basic Principles on the Independence of the Judiciary*

The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court decision. [...] No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

— *Principles 5(j) and 6 of the Singhvi Declaration*

Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law. [...] With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.

— *Chapter II.16 and 17 of the Council of Europe Recommendation CM/Rec(2010)12E on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers*

There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.

— *Principles A(4)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

## Principle 3

The executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to restrict the competence or capacity of the judiciary to carry out its essential functions, to transfer those functions to non-judicial bodies or to circumvent judicial proceedings, control or review. They must not:

- a) remove from the jurisdiction or supervision of ordinary tribunals the capacity to adjudicate complaints concerning human rights violations or to provide fundamental judicial remedies; or
- b) place the administration of justice under military authority; or
- c) confer on the military any power or authority to carry out criminal investigations in matters within the jurisdiction of ordinary justice.

## Commentary

### 1. National unlawful practices

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States have invoked situations of crisis, sometimes through declared or undeclared states of emergency or exception, to allow for the adoption of measures that have served to undermine an independent and impartial justice system. They have established courts of special or extraordinary jurisdiction to displace the natural jurisdiction of ordinary courts. In some cases, these special courts are under the exclusive control of the executive, with jurisdiction being removed from the ordinary tribunals. At times States have effectively militarised the administration of justice and have adopted measures aimed at limiting the power of the courts to examine and rule on the legality of states of emergency and exceptional legislation restricting the competency of the regular courts to exercise judicial oversight regarding the implementation of exceptional measures. States have also occasionally granted judicial police powers to the armed forces in respect of the investigation of matters normally within the jurisdiction of ordinary justice, thereby undermining the integrity of the justice system.

In 1993, the military government of Nigeria removed the jurisdiction of the ordinary courts through various decrees, in violation of the *African Charter on Human and Peoples' Rights*, the national Constitution and the basic principles of the independence of the judiciary.<sup>143</sup> Decree no. 107 of 1993 aimed both to suspend

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<sup>143</sup> African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria*, Communication

the Constitution and to exclude the jurisdiction of any court over the decrees promulgated after December 1983.<sup>144</sup> At the same time, Decree no. 114 of 1993 dissolved political parties, removed the jurisdiction of the courts and eliminated any application of the African Charter at the national level.<sup>145</sup>

During the 1990s, the militarisation of the courts in Turkey contravened the independence of the judiciary. State Security Courts adjudicating non-military offences were composed of panels of judges, one of whom was a military judge. The presence of a military officer on active service, subject to military hierarchy and linked to the executive, was recognised by the European Court of Human Rights as antithetical to judicial independence and impartiality.<sup>146</sup>

A further example from the 1990s occurred in Peru, where Article 12 of Decree Law N<sup>o</sup> 25475, provided the country's National Police with powers to investigate terrorist crimes through the DINCOTE, its National Anti-Terrorist Directorate. DINCOTE was also in charge of deciding whether sufficient evidence existed to bring certain cases to prosecution and, in the event of an affirmative decision, where to bring the case, whether before a military or a civilian court.<sup>147</sup> Through those provisions, a non-judicial body – lacking independence and impartiality – was tasked with exercising jurisdictional functions.<sup>148</sup>

## 2. International legal framework

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### i) General aspects

The judiciary plays a central role in the protection of human rights in times of crisis, acting as an essential check on the other branches of the State and ensuring that laws and administrative measures comply with international human rights law and the Rule of Law.<sup>149</sup>

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129/94, 9th Annual Activity Report 1995-1996.

144 Mumba Malila SC, *The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples' Rights*, (Judges' Symposium on Judicial Independence, Impartiality and Accountability organised by the International Commission of Jurists in conjunction with the Judiciary of Lesotho, Maseru, Lesotho, 28-30 July 2010), available at <http://www.icj.org/dwn/database/Malila-SC-JudicialIndependencethroughtheeyesoftheACHPR.pdf>, (accessed on 18 March 2011), para. 3.2.

145 *Ibid.*

146 European Court of Human Rights, see, *inter alia*: Judgment of 9 June 1998, *Incal v. Turkey*, Application N<sup>o</sup> 22678/93; Judgment of 28 October 1998, *Çiraklar v. Turkey*, Application N<sup>o</sup> 19601/92; Judgment of 8 July 1999, *Gergerv. Turkey*, Application N<sup>o</sup> 24919/94; Judgment of 8 July 1999, *Karatas v. Turkey*, Application N<sup>o</sup> 23168/94; Judgment of 8 July 1999, *Baskaya and Okçuoglu v. Turkey*, Application N<sup>o</sup> 23536/94; 24408/94; Judgment of 15 October 2002, *Karakoç and others v. Turkey*, Applications N<sup>o</sup> 27692/95; 28138/95; 28498/95; Judgment of 28 January 2003, *Demirel v. Turkey*, Application N<sup>o</sup> 39324/98.

147 Inter-American Commission on Human Rights, Report N<sup>o</sup> 49/00 of 13 April 2000, Case N<sup>o</sup> 11.182, *Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha and Carlos Florentino Molero Coca (Peru)*, para. 92.

148 *Ibid.*, para. 112.

149 See, among others, Articles 2 and 18 of the *International Covenant on Civil and Political Rights*; Article

The UN Human Rights Committee has stressed repeatedly that there is an obligation incumbent on all States parties to the *International Covenant on Civil and Political Rights* to ensure the existence of an independent and impartial judiciary and to adopt measures, including through legislation, to ensure a clear distinction in authority between the executive and judicial branches of government, so that the former cannot interfere in matters for which the judiciary has responsibility.<sup>150</sup> When the legislative power enacts laws removing certain cases from examination by the courts and the ongoing proceedings are suspended, there is a violation of the independence of the judiciary.<sup>151</sup>

The UN Commission on Human Rights addressed this question as early as 1962, when its Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile published its study examining national practice and the constitutions of a number of countries, concluding that “the judiciary is almost universally considered to be an independent State authority.”<sup>152</sup> The Committee set forth a number of essential elements of an independent judiciary, including: “the judiciary should enjoy independence in the exercise of its functions and be separated from the administration at every level; [...] the executive and legislative organs of the State should not exercise judicial functions or intervene in the work of the judiciary; [...] no type of extraordinary commission or special temporary court should be set up outside of the framework of the judiciary to try specific people or deal with specific matters; and [...] the decisions taken by the supreme court should be final and those taken by lower courts should only be altered by a higher competent court.”<sup>153</sup>

A corollary of the principle of the separation of powers is that only the judicial organs of the State are authorised to dispense justice. In this respect, the Human Rights Committee has stressed that even in time of war or in a state of emergency, “[o]nly a court of law may try and convict a person for a criminal offence”<sup>154</sup> and that during situations of emergency it is essential to ensure “the maintenance of

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18(1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Articles 8(1) and 25 of the *American Convention on Human Rights*; Article 7(1) of the *African Charter on Human and Peoples’ Rights*; Article 12 of the *Arab Charter on Human Rights*; Articles 6(1) and 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and Article 47 of the *Charter of Fundamental Rights of the European Union*. See also *supra* Principle no. 2 and its Commentary.

150 See *inter alia*, *Concluding Observations of the Human Rights Committee on Romania*, UN Doc. CCPR/C/79/Add.111, 28 July 1999, para. 10; *Peru*, UN Doc. CCPR/CO/70/PER, 15 November 2000, para. 10; *El Salvador*, UN Doc. CCPR/C/79/Add.34, 18 April 1994, para. 15; *Tunisia*, UN Doc. CCPR/C/79/Add.43, 10 November 1994, para. 14; and *Nepal*, UN Doc. CCPR/C/79/Add.42, 10 November 1994, para. 18.

151 European Court of Human Rights, Judgment of 22 October 1997, *Papageorgiou v. Greece*, Application No<sup>o</sup> 24628/94.

152 UN Commission on Human Rights, *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1, para. 68. [Spanish original, free translation.].

153 *Ibid.* [Spanish original, free translation.].

154 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

the principles of legality and rule of law at times when they are most needed.”<sup>155</sup> The UN Special Rapporteur on States of Emergency and Human Rights underlined that “[t]he rule of law, democracy and human rights form a single entity that the emergency cannot break, either exceptionally or temporarily.”<sup>156</sup>

Within this framework, the role of the judiciary in the oversight of both the states of emergency and the measures deriving from those states is essential in order to guarantee the Rule of Law and the protection of human rights.<sup>157</sup>

## ii) The jurisdiction or supervision of ordinary tribunals

The Rule of Law, human rights and the principle of legality require that any declaration of a state of emergency and any emergency measures adopted pursuant to the emergency be subject to judicial oversight.<sup>158</sup> The UN Special Rapporteur on the independence of judges and lawyers has recalled that “[t]he rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. [...] the rule of law presuppose[s] judicial monitoring (or its equivalent) of the constitutionality or legality of executive decisions and administrative acts and laws. [...] To restrict or even suspend this judicial power would be tantamount to impairing the independence of justice.”<sup>159</sup> In times of emergency the function of the judiciary is to control that both the declaration of and the dispositions deriving from the state of emergency are in compliance with the human rights system.<sup>160</sup> By exercising this function, the judiciary ensures that the government does not abuse its powers, especially when emergency legislation is ambiguous and unclear as to national security criminal offences.<sup>161</sup> This essential function of questioning the government and limiting measures of emergency cannot be eliminated when the State’s actions are contrary to national and international law.<sup>162</sup>

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155 *Ibid.*, para. 2.

156 *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 101. See also *infra* Principle no. 10 and its Commentary.

157 See also *infra* Principle no. 4 and its Commentary.

158 *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997.

159 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. E/CN.4/2004/60, 31 December 2003, paras. 28 and 29.

160 *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/63/271, 12 August 2008, para. 17

161 *Ibid.*, para. 16.

162 *Ibid.*

The Human Rights Committee considered that removing the power to review the proclamation of a state of emergency from a Constitutional Court undermined the effectiveness of international standards concerning states of emergency and non-derogable rights and concluded that “constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the courts.”<sup>163</sup> The control of the judiciary over the lawfulness of emergency measures is part of a system based on the Rule of Law.<sup>164</sup> As the Inter-American Court has indicated, “the dismissal of the justices and the omission by Congress to appoint substitutes violated *erga omnes* the possibility of exercising the control of constitutionality and the consequent examination of whether the State’s conduct was in harmony with the Constitution”,<sup>165</sup> entailing a breach of the general obligation in Article 1(1) of the American Convention on Human Rights.

The Inter-American Commission on Human Rights also shares the view that it is important for declarations of states of emergency to be subject to judicial review because it is “a crucial guarantee against the declaration of states of emergency other than on the grounds and pursuant to the limitations set forth in the [...] Constitution and international law”.<sup>166</sup> As the UN Special Rapporteur on states of emergency and human rights highlighted:

*“whatever the political dimension which may be attributed to a given state of emergency, its legal nature is such that the acts which constitute it (proclamation, ratification, etc.) and the measures which are adopted when it is in force (suspension or restriction of certain rights, etc.) must lie within the framework of the principles governing the rule of law and are thus subject to controls”.*<sup>167</sup>

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163 *Concluding Observations of the Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras. 23 and 38.

164 Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 40. In this sense, especially for what concerns the effect of the government action in states of emergency on the individual’s right to liberty, see also the case law of the European Court of Human Rights: Judgment of 25 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89; 14554/89, para. 48; Judgment of 29 November 1988, *Brogan and others v. United Kingdom*, Application N° 11209/84; 11234/84; 11266/84; 11386/85, para. 32; Judgment of 27 September 2001, *Günay and others v. Turkey*, Application N° 31850/96, para. 22; Judgment of 26 November 1997, *Sakik and others v. Turkey*, Application N° 23878/94; 23879/94; 23880/94; 23881/94; 23882/94; 23883/94, para. 44.

165 Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case v. Peru*, para. 112.

166 Inter-American Commission on Human Rights, *Third Report of the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter II, “Human rights protection in the Colombian legal and political system”, para. 69.

167 *Sixth revised annual report of justice and list of states which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy*, UN Doc. E/CN.4/Sub.2/1993/23/Rev.1, 17 November 1993, para. 52.

### iii) Special, extraordinary and *ad hoc* tribunals or non-judicial bodies (commissions)

The practice of transferring the judicial functions of the judiciary to non-judicial bodies with adjudicative judicial powers, in order to circumvent the ordinary justice system, is a clear violation of the principle of the separation of powers, as both the Human Rights Committee<sup>168</sup> and the Inter-American Commission on Human Rights have made clear.<sup>169</sup> The right to be tried by an independent, impartial and competent tribunal must be also upheld in times of emergency.<sup>170</sup> This principle implies that civilians should be prosecuted in a trial by an independent and regularly constituted court, whose judges are trained and have appropriate tenure.<sup>171</sup> This framework therefore generally does not allow for civilians to be tried by commissions.<sup>172</sup>

This issue of special, emergency, *ad hoc* or extraordinary tribunals is inherently linked with the principle of “natural judge” (*juge naturel, juez natural, gesetzlicher Richter, giudice naturale*), also known as the principle of the “lawful judge” or the right to a “competent tribunal”.<sup>173</sup> The principle of the “natural judge” entails that no one should be tried except by an ordinary, pre-established, competent tribunal or judge. The principle of the “natural judge” also constitutes a fundamental guarantee of the right to a fair trial. As a corollary of this principle, emergency, *ad hoc*, “extraordinary”, *ex post facto* and special courts are forbidden.<sup>174</sup> The principle of the “natural judge” is also founded on the principle of equality before both the law and the courts and is enshrined in the constitutions and basic laws of many countries. The principle of the “natural judge”, or at least its corollary that forbids the setting up of *ad hoc*, special or *ex post facto* courts, is also contained in extradition law.<sup>175</sup> During the preparatory work on the *Draft Code of Offences against the Peace and Security of Mankind*, several members of the UN International Law Commission pointed out that at a national level special tribunals were primarily

168 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

169 Inter-American Commission on Human Rights, Report N° 49/00 of 13 April 2000, Case N° 11.182, *Rodolfo Gerbert Ascencio Lindo et al. (Peru)*, para. 86. See also *infra* Principle no. 10 and its Commentary.

170 Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261 (b).

171 *Ibid.*

172 *Ibid.*

173 See also *infra* Principle no. 10 and its Commentary.

174 ICJ's Practitioners' Guide, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, ICJ, 2004, p. 7 and ff..

175 See for example, Article 4 of the *Model Treaty on Extradition*, adopted by Resolution 45/116 of 14 December 1990 of the UN General Assembly; Article 3 of the *Convention on Extradition* (Montevideo, 1933); Article 20 of the *Treaty on International Penal Law* (Montevideo, 1940); Article 4 of the *Inter-American Convention on Extradition*, (Caracas, 1981); and Article 13 of the *Inter-American Convention to Prevent and Punish Torture*.

the tools of despotic regimes.<sup>176</sup> The International Criminal Tribunal for the Former Yugoslavia pointed out that the aim of the principle of the “natural judge”, a concept recognised in several constitutions throughout the world, was “to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial”.<sup>177</sup>

The principle of the “natural judge” is based on the dual principle of equality before the law and the courts, which means that laws should not be discriminatory or applied in a discriminatory way by judges. Not all differences of treatment are discriminatory according to the principles of equality before the law and of equal protection of the law.<sup>178</sup> However, the Human Rights Committee has repeatedly affirmed that a difference in treatment is only acceptable if it is founded on reasonable and objective criteria.<sup>179</sup> In the absence of such criteria, a difference is discriminatory.<sup>180</sup> Whereas certain considerations based on *de facto* inequalities, such as age or social status, may form the justification for a different treatment, such treatment will comply with the human rights system as long as it aims to achieve a legitimate purpose with a view of proportionality regarding the differences and the aims sought and does not contradict human dignity and justice.<sup>181</sup>

In accordance with these basic principles, human rights jurisprudence has usually rejected the practice, in times of crisis or states of emergency, of establishing special, *ad hoc*, emergency or extraordinary tribunals or expanding the scope of jurisdiction of military tribunals to circumvent the ordinary justice system.<sup>182</sup> The Human Rights Committee has repeatedly expressed its concern at the use of special courts<sup>183</sup> and has, on several occasions, recommended that such courts

176 “Report of the International Law Commission on the work of its forty-fifth session, 3 May to 23 July 1993”, in *General Assembly Official Records 48th session, Suppl. No. 10 (A/48/10)*, p. 34.

177 International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Decision of 2 October 1995, Case of *The Prosecutor v. Dusko Tadic, aka “Dule”*, N° IT-94-1, para. 62.

178 Human Rights Committee, Views of 9 April 1987, case of *S. W. M. Brooks v. Netherlands*, Communication N° 172/1984, para. 13, UN Doc. CCPR/C/29/D/172/1984, 9 April 1987. See also, among others: Views of 9 April 1987, *Zwaan-de-Vries v. Netherlands*, Communication N° 182/1984, UN Doc. CCPR/C/29/D/182/1984, 9 April 1987; Views of 3 April 1989, *Ibrahima Gueye and others v. France*, Communication N° 196/1985, UN Doc. CCPR/C/35/D/196/1985, 6 April 1989; and Views of 19 July 1995, *Alina Simunek v. The Czech Republic*, Communication N° 516/1992, UN Doc. CCPR/C/54/D/516/1992, 31 July 1995.

179 *Ibid.*

180 European Court of Human Rights, Judgment 23 July 1968, Case “*Relating to Certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium*, Application N° 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, p. 34;

181 Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, paras. 56-57.

182 See *infra* Principle no. 10 and its Commentary.

183 Human Rights Committee, Views of 20 July 1994, *Roberto Zelaya Blanco v. Nicaragua*, Communication N° 328/1988, UN Doc. CCPR/C/51/D/328/1988, 18 August 1994. See also the *Concluding Observations of the Human Rights Committee on Nigeria*, UN Doc. CCPR/C/79/Add.65, 24 July 1996 and CCPR/C/79/Add.64, 3 April 1996; *Morocco*, UN Doc. A/47/40, 23 October 1991, paras. 48-79 and CCPR/C/79/Add.113, 1 November 1999, para. 18; *France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997, para. 23; *Iraq*, UN Doc. CCPR/C/79/Add.84, 19 November 1997, para. 15; and *Egypt*, UN Doc. A/48/40, para. 706.

be abolished.<sup>184</sup> For example, the Human Rights Committee recommended that Nigeria should abrogate “all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts”.<sup>185</sup> In the case of Nicaragua, the Committee also found that “proceedings before the *Tribunales Especiales de Justicia* [special *ad hoc* tribunals] did not offer the guarantees of a fair trial provided for in article 14 of the Covenant”.<sup>186</sup> The Committee also saw the abolition of special courts as a positive contributing factor in achieving national implementation of the Covenant.<sup>187</sup> The Committee against Torture has also criticised the establishment of special courts.<sup>188</sup>

The creation of special tribunals to try certain offences that fall within the remit of ordinary courts undermines the independence of the judiciary.<sup>189</sup> The African Commission on Human and Peoples’ Rights has taken the view that the setting up of special tribunals, the composition of which is left to the discretion of the executive – thereby removing cases from the jurisdiction of the ordinary courts – violates the impartiality of the courts, irrespective of the qualifications that members of such special courts may be expected to have.<sup>190</sup>

Both the Inter-American Commission on Human Rights and the Inter-American Court have extensively addressed the principle of the “natural judge”, from the perspective of ensuring the existence of a competent pre-established court and from that of prohibiting “extraordinary” or special courts. The case law of both bodies has denounced the use of these special courts, which do not comply with the basic procedures of legal process, especially those that try civilians in times

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184 See, for example, *Concluding Observations of the Human Rights Committee on Gabon*, UN Doc. CCPR/CO/70/GAB, 10 November 2000, para. 11.

185 *Preliminary Concluding Observations of the Human Rights Committee on Nigeria*, UN Doc. CCPR/C/79/Add.64, 3 April 1996, para. 11.

186 Human Rights Committee, Views of 20 July 1994, *Roberto Zelaya Blanco v. Nicaragua*, Communication N° 328/1988, UN Doc. CCPR/C/51/D/328/1988, 18 August 1994, para. 4.

187 See, for example, the *Concluding Observations of the Human Rights Committee on Guinea*, UN Doc. CCPR/C/79/Add.20, 29 April 1993, para. 3; and *Senegal*, UN Doc. CCPR/C/79/Add.10, 28 December 1992, para. 3.

188 See for example *Concluding observations of the Committee against Torture on Jordan*, UN Doc. A/50/44, 26 July 1995, paras. 159 to 182, in which the CAT recommended that Jordan consider abolishing exceptional courts and state security courts, thus leaving the ordinary judiciary to exercise jurisdiction over the country.

189 African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria*, Communication 224/98, 28th Session, para. 63.

190 African Commission on Human and Peoples’ Rights, *Case of International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, Decision of 31 October 1998, para. 86. See also African Commission on Human and Peoples’ Rights, *Constitutional Rights Project v. Nigeria*, Communication 87/93.

of emergency, because of the lack of independence and of the basic guarantees of fair trial and due process.<sup>191</sup>

At the same time, the European Court of Human Rights has considered that, including in situations where there are objective and reasonable justifications for setting up special tribunals, these tribunals must comply with the requirements of independence and impartiality that characterise the judiciary function.<sup>192</sup>

#### iv) Judicial remedies

As pointed out by the UN Special Rapporteur on the independence of judges and lawyers:

*“In any democratic society, judges are the guardians of rights and fundamental freedoms, judges and courts undertake the judicial protection of human rights, ensure the right of appeal, combat impunity and ensure the right to reparation.”*<sup>193</sup>

Access to justice and determination of their rights by an independent and impartial tribunal are fundamental for the victims of human rights violations and their relatives, and such access has frequently been qualified as one of the most fundamental and essential elements for the effective protection of all other human rights.<sup>194</sup> The right to a remedy for victims of violations of human rights and international humanitarian law has been referred to not only as a basic principle of general international law but also as one of the basic pillars of the Rule of Law and a democratic society.<sup>195</sup>

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191 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 230.

192 See *inter alia*, European Court of Human Rights: Judgment of 9 June 1998, *Incal v. Turkey*, Application N<sup>o</sup> 22678/93; Judgment of 28 October 1998, *Çiraklar v. Turkey*, Application N<sup>o</sup> 19601/92; Judgment of 8 July 1999, *Gerger v. Turkey*, Application N<sup>o</sup> 24919/94; Judgment of 8 July 1999, *Karatas v. Turkey*, Application N<sup>o</sup> 23168/94; Judgment of 8 July 1999, *Baskaya y Okçuoglu v. Turkey*, Applications N<sup>o</sup> 23536/94, 24408/94; Judgment of 15 October 2002, *Karakoç and others v. Turkey*, Applications N<sup>o</sup> 27692/95, 28138/95, 28498/95; and Judgment of 28 January 2003, *Demirel v. Turkey*, Application N<sup>o</sup> 39324/98.

193 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. E/CN.4/2004/60 of 31 December 2003, para. 30.

194 *Report of the Special Representative on Human Rights Defenders*, UN Doc. A/56/341, 10 September 2001, para. 9; *Report of the Special Rapporteur on violence against women on cultural practices in the family that are violent towards women*, UN Doc. E/CN.4/2002/83, 31 January 2002, para. 116. See also *infra* Principles 9 and 11 and their Commentaries.

195 Council of Europe, Resolution 78(8) of the Committee of Ministers, cited by Meleander, G., “Article 8”, in Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press (1992), p. 143; Inter-American Court of Human Rights: Judgment of 22 January 1999, *Blake v. Guatemala*, para. 63; See also Judgment of 3 November 1997, *Castillo Paez v. Peru*, paras. 82, 83; Judgment of 12 November 1997, *Suárez Rosero v. Ecuador*, para. 65; Judgment of 27 November 1998, *Castillo Paez v. Peru*, para. 106.

In addition to the human rights treaties,<sup>196</sup> several international and regional human rights instruments reaffirm the right to an effective remedy and access to justice for the victims of human rights violations and their relatives.<sup>197</sup> The right to effective remedy is closely connected with the right of everyone, in the determination of his/her rights, to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>198</sup> According to international jurisprudence, judicial remedies for non-derogable rights are inherently non-derogable.<sup>199</sup>

Remedies, to be effective, must be prompt and provide meaningful access to justice for a potential victim of a human rights violation, as reflected in the jurisprudence of most international human rights bodies.<sup>200</sup> The European Court of

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196 *International Covenant on Civil and Political Rights*, Article 2.3; *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Article 13; *International Convention on the Elimination of Racial Discrimination*, Article 6; *International Convention for the Protection of All Persons from Enforced Disappearance*, Articles 12, 17.2 (f) and 20; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the UN Convention against Transnational Organized Crime*, Article 6.2; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 13; *Charter of Fundamental Rights of the European Union*, Article 47; *American Convention on Human Rights*, Articles 7.1(a) and 25; *American Declaration of the Rights and Duties of Man*, Article XVIII; *Inter-American Convention on Forced Disappearance of Persons*, Article III (1); *Inter-American Convention to Prevent and Punish Torture*, Article 8.1; *African Charter on Human and Peoples' Rights*, Article 7(a); and *Arab Charter on Human Rights*, Article 9.

197 See *inter alia*: *Universal Declaration of Human Rights*, Article 8; *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of humanitarian law*, adopted by the UN General Assembly (resolution 60/147); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the UN General Assembly (resolution 40/34); *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Principle 19, (UN Doc. E/CN.4/2005/102/Add.1); *Declaration on the Protection of All Persons from Enforced Disappearance*, Articles 9 and 13 (resolution 47/133); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principles 4 and 16 endorsed by the UN General Assembly (resolution 44/162); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Article 9 adopted by the UN General Assembly (resolution 53/144); Recommendation (85) 11 E, of the Committee of Ministers of the Council of Europe, *on the position of the victim in the framework of criminal law and procedure* (28 June 1985); *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005); *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* of the African Commission on Human and Peoples' Rights (2003); *Council Framework Decision on the standing of victims in criminal proceedings* of the Council of European Union (2001/220/JHA, 15 March 2001); and *Principal guidelines for a comprehensive reparations policy*, of the Inter-American Commission on Human Rights (OEA/Ser/L/V/II.131, Doc. 1 of 19 February 2008).

198 See also *supra* Principle no. 2 and *infra* Principle no. 4 and their Commentaries.

199 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 15, and Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 25.

200 Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15; Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24; African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, 30th Ordinary Session, October 2001, para. 61; European Court of Human Rights,

Human Rights affirmed that effectiveness means that the remedy must not be theoretical and illusory, but rather must provide practical and real access to justice.<sup>201</sup> It must be capable of finding whether a violation took place and be able to remedy it.<sup>202</sup> The Inter-American Court of Human Rights has considered a remedy to be ineffective “when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy”.<sup>203</sup>

### **v) Militarisation of the administration of justice**

Rendering the armed forces accountable to civilian authority is a necessary condition for the observance of human rights and the Rule of Law. The UN Commission on Human Rights has affirmed that promotion, protection and respect for human rights and fundamental freedoms means that States need to ensure “that the military remains accountable to [...] civilian government”.<sup>204</sup>

The Human Rights Committee has on several occasions pointed to the need for the States parties to the *International Covenant on Civil and Political Rights* to ensure the proper separation of the executive, legislative and judicial branches of government as well as real accountability of the armed forces to the civilian authorities.<sup>205</sup> Addressing the situation of human rights in Lesotho in 1999, the Committee also expressed concern about “the continuing influence of the military in civilian matters and in particular about the climate of impunity for crimes and abuses of authority committed by members of the military” and called on the country’s authorities to take measures “to ensure the primacy of civil and political authority”.<sup>206</sup> Similarly, the Human Rights Committee reiterated that, under the ICCPR, States must ensure that they have a legal framework “defining and limiting the role of the security forces and providing for effective civilian control over

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Judgment of 9 October 1979, *Airey v. Ireland*, Application N° 6289/73, para. 33.

201 European Court of Human Rights, Judgment of 9 October 1979, *Airey v. Ireland*, Application N° 6289/73, para. 24.

202 Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24; and European Court of Human Rights, Judgment of 25 March 1983, *Silver et al. v. United Kingdom*, Application N° 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 113.

203 Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24.

204 See also United Nations General Assembly Resolution 55/96, *Promoting and consolidating democracy*, adopted on 4 December 2000, paragraph 1 (c) (ix); OAS General Assembly Resolution, AG/Res. 1044 (XX-o/90), 8 June 1990.

205 Regarding the independence of the judiciary in general, see *supra* Principle no. 2 and its Commentary.

206 *Concluding Observations of the Human Rights Committee on Lesotho*, UN Doc. CCPR/C/79/Add.106, 8 April 1999, para. 14. See also the *Concluding Observations of the Human Rights Committee on El Salvador*, UN Doc. CCPR/C/79/Add.34, 18 April 1994, para. 8.

them”.<sup>207</sup> The existence of only a formal separation of powers affects not only human rights and basic fair trial guarantees, but also the fundamental principles of representative democracy.<sup>208</sup>

The question of militarisation of the administration of justice is not limited to the role of judges and tribunals, but also concerns that of public prosecutors. The Inter-American Commission on Human Rights has considered that “in a country in which the Office of the Public Prosecutor has a monopoly over criminal actions, a unit of this nature endangers the spirit, aim and *raison d’être* of the institution, since for the proper exercise of its functions it must have autonomy and independence from the other branches of government.”<sup>209</sup> Where public prosecutors are physically placed in military bases and work in close cooperation with military authorities, the Inter-American Commission has considered that “this situation seriously compromises the objectivity and independence of the prosecutor”.<sup>210</sup>

### vi) Military and criminal investigations

The duty to investigate human rights violations is an international obligation under treaties as well as under customary international law.<sup>211</sup> This obligation also applies to acts committed by private individuals or entities and which constitute criminal offences under national or international law.<sup>212</sup>

The UN General Assembly and its former Commission on Human Rights have repeatedly reminded States of their obligation to carry out prompt, impartial and independent investigations with regard to any act of torture, enforced disappearance or extrajudicial, summary or arbitrary execution.<sup>213</sup> As repeatedly asserted

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207 *Concluding Observations of the Human Rights Committee on Romania*, UN Doc. CCPR/C/79/Add.111, 28 July 1999, para. 9. See also the *Concluding Observations of the Human Rights Committee on El Salvador*, UN Doc. CCPR/C/79/Add.34, 18 April 1994, para. 8.

208 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106 Doc. 59 rev., 2 June 2000, para. 238.

209 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Mexico*, OAS Doc. OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para. 381. In the same line see: European Court of Human Rights, Judgment of 10 July 2008, *Medvedyev and others v. France*, Application N° 3394/03, para. 61.

210 Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, of 26 February 1999, para. 108.

211 See also *supra* Principle no. 2 and its Commentary.

212 See *inter alia*: Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8; Committee against Torture, *General Comment No. 2, Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18; Inter-American Court of Human Rights, Judgment of 15 September 2005, *Case of the Mapiripán Massacre v. Colombia*, paras. 111 *et seq.*

213 See *inter alia*: UN General Assembly, Resolution 55/111, 4 December 2000; Commission on Human Rights, Resolutions 1993/35; 1994/39; 1995/38; 2001/62 and 2002/36.

by the Human Rights Committee, the ICCPR imposes the obligation to investigate any violation of the rights protected under it.<sup>214</sup>

The conditions under which the obligation to investigate must be carried out and discharged are laid down in international human rights law, both in treaties and declarations, as well as in the jurisprudence of international human rights protection bodies. This obligation to investigate must be discharged in accordance with the standards set by international law and jurisprudence: the investigations must be prompt, thorough, impartial and independent.<sup>215</sup> The duty to investigate is an “obligation of means”, and the authorities must investigate all alleged human rights violations with due diligence.<sup>216</sup> This means that the duty to investigate must be discharged by initiating *motu proprio* the actions required to clarify the facts and the circumstances surrounding them and to identify the perpetrators. As indicated by the Inter-American Court of Human Rights and the Human Rights Committee, this is a legal duty incumbent upon States and not just a process simply to be commenced by private interests.<sup>217</sup> Therefore, investigations must be opened *ex officio* by the authorities, regardless of whether or not an accusation or formal complaint has been made. The Inter-American Commission on Human Rights has repeatedly pointed out that the obligation to investigate is of a compulsory<sup>218</sup> nature and cannot be delegated.<sup>219</sup>

States Parties to the ICCPR have an obligation to establish mechanisms and procedures to ensure that prompt and impartial investigations which are independent from the armed forces and police can be carried out for human rights violations, including those arising from instances of excessive use of force attributed to

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214 Human Rights Committee, Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Communication N° 563/1993, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995, paragraph 8.6. See also Human Rights Committee, Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication N° 612/1995, UN Doc. CCPR/C/60/D/612/1995, 19 August 1997, para. 8.8.

215 See *inter alia*: Article 12 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*; Article 9 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 13 of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 9 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; Principles 7 and 34 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle 57 of the *Rules for the Protection of Juveniles Deprived of their Liberty* and Principle 2 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

216 Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, para. 174.

217 *Ibid.*, para. 177 and Human Rights Committee, Views of 19 July 1994, *Hugo Rodríguez v. Uruguay*, Communication N° 322/1988, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, para. 12.3.

218 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 230.

219 Inter-American Commission on Human Rights, Report N° 136/99 of 22 December 1999, Case N° 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), para. 230.

State security force personnel.<sup>220</sup> The Human Rights Committee has stressed on many occasions that the fact that human rights violations and abuses attributed to police officers and police forces have not been investigated by an independent body helps to create a climate of impunity.<sup>221</sup> They have made clear that criminal investigations against civilians should be carried out by the ordinary justice system and not by the military authorities.<sup>222</sup>

The investigation is essential, especially in cases concerning torture and ill-treatment. In this regard, the investigation of torture should be supervised directly by an independent judiciary<sup>223</sup> and the involvement of the army in the field of crime prevention and public security should be avoided.<sup>224</sup> The State should ensure that mechanisms and bodies which are not competent to conduct criminal investigations do not do so.<sup>225</sup> In this respect, the UN Special Rapporteur on Torture recommended to Romania that it amend its legislation allowing the military to carry out criminal investigations and “to transfer the power to investigate claims of police abuse and torture from military to civilian prosecutors.”<sup>226</sup>

The practice of conferring Judicial Police powers on the Armed Forces typically gives rise to serious human rights violations.<sup>227</sup> Bodies and mechanisms carrying

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- 220 See *inter alia*, *Concluding Observations of the Human Rights Committee on Venezuela*, UN Doc. CCPR/CO/71/VEN, 26 April 2001, para. 8; *Kyrgyz Republic*, UN Doc. CCPR/Co/69/KGZ, 24 July 2000, para. 7; *Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 10; *Belarus*, UN Doc. CCPR/C/79/add.86, 19 November 1997, para. 9; *Former Yugoslav Republic of Macedonia*, UN Doc. CCPR/C/79/Add.96, 18 August 1998, para. 10; *Cameroon*, UN Doc. CCPR/C/79/Add.116, 4 November 1999, para. 20; *Sudan*, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para. 12; *Mauritius*, UN Doc. CCPR/C/79/Add.60, 4 June 1996, para. 25; *Brazil*, UN Doc. CCPR/C/79/Add.66, 24 July 1996, para. 22; *Germany*, UN Doc. CCPR/C/79/Add.73, 18 November 1996, para. 11; *Bolivia*, UN Doc. CCPR/C/79/Add.74, 1 May 1997, para. 28; *Kuwait*, UN Doc. CCPR/CO/KWT, 27 July 2000, para. 13; *Sri Lanka*, UN Doc. CCPR/C/79/Add.56, 23 July 1995, para. 30; *Yemen*, UN Doc. A/50/40, 30 March 1995, para. 19; *Guyana*, UN Doc. CCPR/C/79/Add.121, 25 April 2000, para. 10; *Algeria*, UN Doc. CCPR/C/79/Add.95, 18 August 1998, paras. 6, 7 and 9; *Peru*, UN Doc. CCPR/C/79/Add.67, 25 July 1995, para. 22.
- 221 *Concluding Observations of the Human Rights Committee on Sri Lanka*, UN Doc. CCPR/C/79/Add.56, 23 July 1995, para. 15; *Concluding Observations of the Human Rights Committee on Belarus*, UN Doc. CCPR/C/79/add.86, 19 November 1997, para. 9.
- 222 See *inter alia*, *Concluding Observations of the Human Rights Committee on Colombia*, UN Doc. CCPR/CO/80/COL, 26 May 2004 and CCPR/C/79/Add.76, 5 May 1997; *Venezuela*, UN Doc. CCPR/CO/71/VEN, 26 April 2001; *Kyrgyzstan*, UN Doc. CCPR/CO/69/KGZ, 24 July 2000; *Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999; *Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997; *Macedonia*, UN Doc. CCPR/C/79/Add.96, 18 August 1998; *France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997.
- 223 *Conclusions and recommendations of the Committee against Torture on Ecuador*, UN Doc. A/49/44, 15 November 1993, para. 105.
- 224 *Conclusions and recommendations of the Committee against Torture on Guatemala*, UN Doc. CAT/C/XXV/Concl.6, 23 November 2000, para. 10 (b).
- 225 *Ibid.*, para. 10 (d).
- 226 *Special Rapporteur on Torture, Mission to Romania*, UN Doc. E/CN.4/2000/9/Add.3, 23 November 1999, para. 57.
- 227 See Inter-American Commission on Human Rights: *Report on the Situation of Human Rights in Mexico*, OAS Doc. OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, paras. 351 and 421; *Report on the Situation of Human Rights in Brazil*, OAS Doc. OEA/Ser.L/V/II.97, Doc.29 rev.1, 29 September 1997, para. 86; *First Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993,

out investigations that are accountable to the military authorities may serve to limit the function of the prosecutors.<sup>228</sup> While prejudicing the effectiveness of the prosecution, the participation of the military in the phase of criminal investigation can undermine the judicial system and adversely affect the right to judicial protection and redress of victims and, more widely, the right to an adequate defence of those implicated in the process.<sup>229</sup>

An independent judiciary will require that specialised bodies of a civilian nature be involved in the exercise of justice outside the sphere of influence of military justice.<sup>230</sup> An armed force with judicial powers would not only imbalance the independence of the judiciary but would be of concern inasmuch as forces trained to combat armed enemies are also used for combating crime, where a different training is required, including regarding elements of human rights law.<sup>231</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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In the *Act of Athens*, adopted by its Congress of Athens (June 1955), the ICJ reaffirmed that “[t]he State is subject to the law”,<sup>232</sup> which is a core principle of the Rule of Law.<sup>233</sup>

In the *Declaration of Delhi*, adopted by its *New Delhi Congress on the Rule of Law in a Free Society* (1959), the ICJ reaffirmed that “an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice.”<sup>234</sup> The New Delhi Congress also reiterated that “[a]n independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the

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para. 24; *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 210; *Fifth Report on the Situation of Human Rights in Guatemala*, OAS Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, para. 31; *Second Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993.

228 Inter-American Commission on Human Rights, *First Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, para. 24.

229 Inter-American Commission on Human Rights, *Fifth Report on the Situation of Human Rights in Guatemala*, OAS Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, paragraph 31. The situation was further aggravated by the lack of transparency of this participation without a civilian control, *Ibid.*, para. 33.

230 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, Chapter IV, “The Right to a Fair Trial” (G. Final Observations).

231 Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, para. 75. See also *Second Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, pp. 61 and 62.

232 Paragraph 1 of the *Act of Athens*, 1955.

233 Paragraph 4 of the *Act of Athens* and the Resolution I “Fundamental principles of penal law” of its Committee on Criminal Law, *Congress of Athens*, 1955.

234 Paragraph 1 of the Preamble of the *Declaration of Delhi*, 1959.

Executive or Legislative with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner.”<sup>235</sup> The Congress pointed out that “[i]t must be recognized that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of judicial business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of the responsibility to the Executive. However, the exercise of such responsibility by the Legislative including any delegation to the Executive should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.”<sup>236</sup>

The *African Conference on the Rule of Law* (Nigeria, 1961) reaffirmed that “[t]he Judiciary should be given the jurisdiction to determine in every case upon application whether the circumstances have arisen or the conditions have been fulfilled under which such power is to be or has been exercised”<sup>237</sup> and that “in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised.”<sup>238</sup>

At its *Congress on Executive Action and the Rule of Law* (Brazil, 1962) the ICJ recalled that “[t]he existence of effective safeguards against the possible abuse of power by the Executive is an all-important aspect of the Rule of Law. Judicial and Legislative control of the Executive are such safeguards.”<sup>239</sup> The Congress pointed out that: “[j]udicial control must be effective, speedy, simple and inexpensive. The exercise of judicial control demands full independence of the Judiciary and complete professional freedom for lawyers.”<sup>240</sup> In addition:

*“Judicial control over the acts of the Executive should ensure that:*

- (a) the Executive acts within the powers conferred upon it by the Constitution and such laws as are not unconstitutional;*
- (b) whenever the rights, interests or status of any person are infringed or threatened by Executive action, such person shall have an inviolable*

235 Report of Fourth Committee on “The Judiciary and the Legal Profession under the Rule of Law”, Clause I, *New Delhi Congress, 1959*.

236 Report of Fourth Committee on “The Judiciary and the Legal Profession under the Rule of Law”, Clause VI, *New Delhi Congress, 1959*.

237 Conclusions of Committee I on “Human Rights and Government Security – the Legislative, Executive and Judiciary”, Clause I, 3, *African Conference on the Rule of Law, 1961*.

238 Conclusions of Committee I on “Human Rights and Government Security – the Legislative, Executive and Judiciary”, Clause I, 7, *African Conference on the Rule of Law, 1961*.

239 Report of Committee II on Control by the Court and the Legislature over Executive Action, Preamble, *Congress on the Executive Action and the Rule of Law, 1962*.

240 Report of Committee II on Control by the Court and the Legislature over Executive Action, paragraphs 1 and 2 of the Section “Judicial Control”, *Congress on the Executive Action and the Rule of Law, 1962*.

*right of access to the Courts and unless the Court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection;*

- (c) *where Executive action is taken under a discretionary power, the Courts shall be entitled to examine the basis on which the discretion has been exercised and if it has been exercised in a proper and reasonable way and in accordance with the principles of natural justice;*
- (d) *the powers validly granted to the Executive are not used for a collateral or improper purpose.*<sup>241</sup>

At its *Conference of Bangkok* (1965), the ICJ affirmed that “[w]hile governments should of their own volition refrain from action infringing fundamental rights and freedoms, the ultimate determination as to whether the law or an executive or administrative act infringes those rights and freedoms should be vested in the courts.”<sup>242</sup>

At its *Conference of French-speaking African Jurists* (Dakar, 1967), the ICJ stated that “the independence of the judiciary remains the best safeguard of legality [...] [t]hat abuses of power occur even in the most enlightened democracies, and it is therefore imperative to have available effective machinery to provide protection against the arbitrary use of power and provide a means to redress if need be.”<sup>243</sup> The Conference also reaffirmed that “[i]t is essential for each individual to have a readily available remedy against acts of the administration which violate his rights and freedoms, and in particular, access to a court of law.”<sup>244</sup>

At its *European Conference of Jurists on the Individual and the State* (1968), the ICJ reiterated, in relation to emergency powers, that “[t]here should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to: (a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised; (b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual; and (c) giving the court a supervisory jurisdiction to ensure that emergency powers are used only for the specific purpose for which they were granted, and that they are exceeded. The

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241 Report of Committee II on Control by the Court and the Legislature over Executive Action, paragraph 3 of the Section “Judicial Control”, *Congress on the Executive Action and the Rule of Law*, 1962.

242 Conclusion 10 (3) of the Committee I on *Basic requirements of representative government under the Rule of Law*, *Conference of Bangkok*, 1965.

243 Declaration of Dakar adopted the 9 January 1967 by the *Conference of French-speaking African Jurists*, 1967.

244 Article V of the Conclusions adopted by the Conference on the proposal of the I Committee, *Conference of French-speaking African Jurists*, 1967.

courts should have the powers to grant effective remedies in cases of misuse or abuse of emergency powers.”<sup>245</sup>

At the ICJ Congress on *Human Rights in an Undemocratic World*, the ICJ reaffirmed that “Inherent in the Rule of Law is the subordination of the civil authority to the constitution and of the military establishment to the civilian authority.”<sup>246</sup> In this Congress, the ICJ reiterated that: “where a state of siege or martial law is declared to deal with the exceptional situation, the following basic safeguards should be strictly observed: (a) Arrests and detention, particularly administrative detentions must be subject to judicial control[...]. (b) [...] All detention centres, prisons and camps for internment of detainees must be subject to judicial control[...]. (e) the independence of the judiciary and of the legal profession should be fully respected[...].”<sup>247</sup>

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Berlin 2004, the ICJ reiterated that: “In the development and implementation of counter-terrorism measures, States have an obligation to guarantee the independence of the judiciary and its role in reviewing State conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.”<sup>248</sup>

## 4. Selected excerpts from international standards

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### 2. International legal framework

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

— *Principle 3 of the UN Basic Principles on the Independence of the Judiciary*

The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence. [...] No *ad hoc* tribunals shall be established to displace jurisdiction properly vested in the courts. [...] No power shall be so exercised as to interfere with the judicial

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<sup>245</sup> Paragraph 19 of the Conclusions of the *European Conference of Jurists on the Individual and the State*, 1968.

<sup>246</sup> Paragraph 2 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human Rights in an Undemocratic World* adopted in Vienna, Austria (April 1977). See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 61.

<sup>247</sup> Paragraph 8 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human Rights in an Undemocratic World* adopted in Vienna, Austria (April 1977).

<sup>248</sup> Principle 2, *Berlin Declaration*, 2004.

process[...]. The Executive shall not have the power to close down or suspend the operation of the courts[...]. The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

— *Article 5 (a), (b), (g), (i) and (j) of the Singhvi Declaration*

The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. [...] The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

— *Principles 33 and 34 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

— *Principle 60 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

While assuming or exercising emergency powers every state shall respect the following principles[...]. The guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.

— *Principle B,3 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

— *Principle B,5 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

— *Principle 22 (c) of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

Only judges themselves should decide on their own competence in individual cases as defined by law.

— *Chapter I.10 of the Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities of the Council of Europe*

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law. [...] Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

— *Principle A(4)(c) and (e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

— *Article 4 of the Inter-American Democratic Charter*

## **2. (ii) The jurisdiction or supervision of ordinary tribunals**

The legislation shall stipulate that no steps taken under a state of emergency shall:

- (a) Impair the effect of the provisions of the Constitution or Fundamental Law or the legislation governing the appointment, mandate and privileges and immunities of the members of the judiciary or the independence and impartiality of the judiciary.
- (b) Restrict the authority of the courts:
  - (i) To examine the compatibility of a declaration of a state of emergency with the laws, the Constitution and the obligations deriving from international law, or to decide that such a declaration is illegal or unconstitutional, in the event of incompatibility;

- (ii) To examine the compatibility of any measures adopted by a public authority with the declaration of the state of emergency;
- (iii) To take legal steps designed to enforce or protect rights recognized by the Constitution or Fundamental Law and by national and international law, the effective exercise of which is not affected by the declaration of a state of emergency;
- (iv) To try criminal cases, including offences connected with the state of emergency.

– *UN Special Rapporteur on states of emergency and human rights, Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 151*

## **2. (iii) Special, extraordinary and *ad hoc* tribunals or non-judicial bodies (commissions)**

Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

– *Principle 5 of the UN Basic Principles on the Independence of the Judiciary*

No *ad hoc* tribunals shall be established to displace jurisdiction properly vested in the courts.

– *Article 5(b) of the Singhvi Declaration*

... everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

– *Resolution 2002/37, Integrity of the judicial system, adopted 22 April 2002 by the UN Commission on Human Rights*

The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.

– *Article 16 (4) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

— *Standard 21 of the Minimum Standards of Judicial Independence of the International Bar Association*

## 2. (iv) Judicial remedies

All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo*, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

— *Article 16 (3) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

States should provide effective access to the law and to justice for victims of terrorist acts by providing: (i) the right of access to competent courts in order to bring a civil action in support of their rights, and (ii) legal aid in appropriate cases.

— *Guideline V of the Guidelines on the Protection of Victims of Terrorist Acts of the Council of Europe*

All remedies, including special ones, such as *habeas corpus* or *amparo*, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country.

— *Principle 1 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

[e]veryone has the right to an effective remedy by *competent national tribunals* for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

— *Principle C(a) of the Principles Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

## 2. (v) Militarisation of the administration of justice

No power shall be so exercised as to interfere with the judicial process[...]. The Executive shall not have the power to close down or suspend the operation of the courts[...]. The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

— *Article 5 (g), (i), (j) of the Singhvi Declaration*

While assuming or exercising emergency powers every state shall respect the following principles[...]. The guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.

— *Principle B,3 of the Paris Minimum Standards of Human Rights Norms In a State of Emergency*

Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

— *Principle A(4)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. [...] The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

— *Principles 5 and 8 of the Draft Principles governing the administration of justice through military tribunals*

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

— *Article 4 of the Inter-American Democratic Charter*



## Principle 4

To safeguard the Rule of Law and the indivisibility of all human rights, all measures adopted to address the crisis, including those taken pursuant to a declared state of emergency or to prevent social dissent in times of economic crisis, must be subject to judicial oversight and review. Affected persons must have the right to fair and effective judicial proceedings to challenge the legality of these measures and/or their conformity with national or international law.

## Commentary

### 1. National unlawful practices

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Access to the courts during times of crisis is vital to ensure that the judiciary is able to effectively review and oversee measures adopted in response to a declared state of emergency or to prevent social dissent in the face of economic upheaval. Despite the essential role the judiciary has to play in such situations, individuals are often denied access to fair and effective judicial proceedings and judges are often unable or unwilling to properly review and oversee the actions of the executive.

In 2005, in Thailand, an Emergency Decree was enacted in response to the insurgency in the south of the country.<sup>249</sup> The Decree gave the power to the Prime Minister to declare a state of emergency,<sup>250</sup> although the question of judicial control over the lawfulness of such a declaration was not addressed.<sup>251</sup> The regulations implementing the Emergency Decree explicitly excluded the jurisdiction of the administrative courts over human rights violations against individuals.<sup>252</sup>

In the 1990s in Nigeria, the Civil Disturbances Act provided that any order, sentence or judgment pronounced by the Special Tribunal - composed of one judge and four members of the armed forces – would not be subject to review in

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249 ICJ, *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, p. 1, available at <http://ejp.icj.org/IMG/ICJThailandReport.pdf> (accessed on 4 February 2011).

250 *Ibid.*

251 *Ibid.*, p. 6.

252 *Ibid.*

any court of law.<sup>253</sup> In practice, the order barred oversight by a competent, national and ordinary judicial body over criminal penalties.<sup>254</sup>

## 2. International legal framework

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### i) Common legal framework for regulating states of emergency

States have an obligation under international law to protect the human rights of people within their jurisdiction, including their right to security.<sup>255</sup> International law, therefore, allows governments to take exceptional measures, including in response to times of crisis. Such situations may have different names in national legislation, such as *état de siège*, “state of exception”, “martial law”, “suspension of guarantees”, or *état d’urgence*. Whatever label may be ascribed to a situation of crisis, States have an international obligation to comply fully with the provisions of international human rights law relating to states of emergency, including continuing protection against human rights abuses. Whatever measures are taken to deal with a situation of crisis, the judiciary must play an independent role in reviewing them and supervising their operation to ensure compliance with domestic law and with international human rights law and standards.<sup>256</sup>

International human rights law provides for both limitations and derogations in respect of rights, subject to strict conditions.<sup>257</sup> Limitation clauses in human rights treaties apply at all times, irrespective of whether a state of emergency or exception is in effect, although they may be invoked more frequently, and sometimes unlawfully, in times of crises.

Under declared and notified states of emergency, certain rights may be subject to temporary derogation.<sup>258</sup> Although the conditions under which derogations are

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253 African Commission on Human and Peoples’ Rights, *The Constitutional Rights Project v. Nigeria*, Communication No. 87/93, 17th Ordinary Session, paras. 10-13.

254 *Ibid.*, para. 11.

255 Article 2 of the *International Covenant on Civil and Political Rights*; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004; Human Rights Committee, Views of 12 July 1990, *William Eduardo Delgado Pérez v. Colombia*, Communication N° 195/1985, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990, paragraph 5-5; Views of 20 March 2000, *Carlos Dias v. Angola*, Communication N° 711/1996, UN Doc. CCPR/C/68/D/711/1996, 18 April 2000, paragraph 8.3; Views of 25 October 2000, *Rodger Chongwe v. Zambia*, Communication N° 821/1998, UN. Doc. CCPR/C/70/D/821/1998, 9 November 2000, para. 5-3; *African Charter on Human and Peoples’ Rights*, Articles 6, 23.

256 Article 12(3) of the *International Covenant on Civil and Political Rights*; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14-17; Human Rights Committee, *General Comment No.10, Freedom of Expression (Article 19)*, 29 June 1983, para. 4; Human Rights Committee, *General Comment No. 27, Freedom of Movement (Article 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, paras. 11-18; *Siracusa Principles*, paras. 7-9, 17-18.

257 See *supra* Principle no. 1 and its Commentary.

258 See also *infra* Principle no. 10 and its Commentary.

allowed vary in the human rights treaties providing for this possibility, there are nevertheless common features. Derogations must be based on the principles of public declaration, legality, legitimacy, necessity, proportionality and temporality. Derogations may serve to narrow the scope of a right, but must never extinguish or impair the essence of the right.<sup>259</sup> The need for a public declaration of the state of emergency is meant to serve the purpose of maintenance of the Rule of Law and of the principle of legality in such extreme moments.<sup>260</sup> At the same time derogations must only be invoked to respond to a threat to the life of the nation.<sup>261</sup>

Not every violent act or disturbance will justify the declaration of such a state of emergency,<sup>262</sup> and local and isolated law and order disturbances or the commission of grave crimes alone are insufficient to trigger an emergency justifying the invocation of derogation provisions.<sup>263</sup>

Measures of derogation must be limited in time, proportional and necessary to the legitimate aim pursued.<sup>264</sup> Each and every derogation or other measure restricting or limiting the scope of human rights protection, must be provided

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259 Article 5(1) of the *International Covenant on Civil and Political Rights*; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6; Nicole Questaux, Special Rapporteur of the Sub-Commission, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, 15 May 1982, para. 192.

260 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 2 and 4; ICJ, *Legal Commentary to the Berlin Declaration*, p. 28.

261 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 2. Article 4 of the *International Covenant on Civil and Political Rights*; Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 4(1) of the *Arab Charter on Human Rights*; Article 27(1) of the *American Convention on Human Rights*.

262 Article 4 of the *International Covenant on Civil and Political Rights*; European Court of Human Rights, Judgment of 19 February 2009, *A. and Others v. United Kingdom*, Application N° 3455/05, paras. 176-181; European Commission on Human Rights, *Greek Case* (1969) 12 YB 1, para. 153; European Court of Human Rights, Judgment of 1 July 1961, *Lawless v. Ireland*, Application N° 332/57, para. 28; Principle 39 of the *Siracusa Principles*.

263 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc. E/CN.4/1984/4 (1984), Principle 39, referred to in Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001 paras. 2 and 3, note 6 [*"Siracusa Principles"*]. The Principles were developed by a conference of 31 international law experts in 1984 and are widely seen as a highly persuasive clarification of the international legal standards governing the permissibility of limitations and derogations of the rights of the International Covenant on Civil and Political Rights.

264 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, paras. 4-6; Human Rights Committee, *General Comment No. 31, The Nature of General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6.

by law<sup>265</sup> and “strictly required by the exigencies of the situation”.<sup>266</sup> The Human Rights Committee has emphasised that an objective consideration of the actual situation must demonstrate that no lesser measures are adequate to meet the specific threat.<sup>267</sup> All such measures of derogation must be in conformity with other international legal obligations, including peremptory international norms that apply at all times.<sup>268</sup> The duration, geographical coverage and material scope of a declared state of emergency must be proportional to the actual threat.<sup>269</sup>

Should a violent situation escalate to the level of a full-fledged armed conflict, the rules of international humanitarian law are applicable. International humanitarian law does not displace the protection of international human rights law. Rather, as the Human Rights Committee has affirmed, human rights law “applies also in situations of armed conflict to which the rules of international humanitarian law

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265 Human Rights Committee, Views of 31 March 1993, *Ballantyne Davidson and McIntyre v. Canada*, Communication N° 359/1989, 385/1989/Rev.1, para. 11.4, UN Doc. CCPR/C/47/D/385/1989, 5 May 1993. See also Human Rights Committee, *General Comment No. 27, Freedom of Movement (Article 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 14; Principles 5 and 17 of the *Siracusa Principles*.

266 Article 4(1) of the *International Covenant on Civil and Political Rights*; Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 4.

267 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, paras. 4, 6, 7, 9; Human Rights Committee, *General Comment No. 31, The Nature of General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6; Human Rights Committee, *General Comment No. 27, Freedom of Movement (Article 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, paras. 1-18 and especially para. 14; Human Rights Committee, *General Comment No. 10, Freedom of expression (Article 19)*, para. 4; Human Rights Committee, *General Comment No. 22, The right to freedom of thought, conscience and religion (Article 18)*, UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8; Human Rights Committee, Views of 31 March 1993, *Ballantyne Davidson and McIntyre v. Canada*, Communication N° 359/1989, 385/1989/Rev.1, para. 11.4, UN Doc. CCPR/C/47/D/385/1989, 5 May 1993; Principles 7-9 and 17-18 of the *Siracusa Principles*.

268 See Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, paras. 9 and ff. Other international laws include, for example, other UN human rights treaties and the *Geneva Conventions of 1949*. States should also have reference to international efforts to identify fundamental rights applicable in all circumstances, including the reports of the Secretary-General to the Commission on Human Rights submitted under Human Rights Commission Resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards, UN Docs. E/CN.4/1999/92, E/CN.4/2000/94 and /CN.4/2001/91; the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, International Law Association, 1984; the *Siracusa Principles*, particularly Principles 66-70; *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997 and the *Final Report of the Special Rapporteur on the Question of Human Rights and States of Emergency*, UN Doc. E/CN.4/Sub.2/1997/19/Add.1, 9 June 1996; the *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998; The *Turku (Abo) Declaration of Minimum Humanitarian Standards*, UN Doc. E/CN.4/1995/116, 2 December 1990; and the work of the International Committee of the Red Cross on the customary rules of international humanitarian law applicable in international and non-international armed conflicts, particularly: Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross Customary International Humanitarian Law*, vols 1-2, Cambridge, Cambridge University Press, 2005.

269 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, paras. 4-5.

are applicable. While, in respect of certain [ICCPR] rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>270</sup> The provisions of international human rights law relating to non-derogable rights and states of emergency nevertheless apply during both international and non-international armed conflicts.<sup>271</sup>

Even in times of crisis, including during properly declared states of emergency, which may include situations of internal or international armed conflict, international law prohibits derogations from certain rights. At a minimum, the following non-derogable rights common to all human rights treaties must be considered as non-derogable under customary international law: the right to life; the right to be free from torture or cruel, inhuman or degrading treatment or punishment; the prohibition on slavery, the slave trade and servitude; freedom from enforced disappearance; the prohibition on imprisonment for failure to fulfil a contractual obligation; the right to recognition as a person before the law; the principle of legality in the field of criminal law; and the right to freedom of thought, conscience and religion.<sup>272</sup>

Torture, hostage taking, abduction and unacknowledged detentions (also known as enforced disappearances) are absolutely prohibited under international

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270 Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

271 International Court of Justice, *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice Reports 1996, para. 25; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2001, para. 49 and Recommendation 3.

272 In the case of the *International Covenant on Civil and Political Rights*: the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for failure to fulfil a contractual obligation, freedom from retroactive criminal liability, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion (Articles 6, 7, 8.1, 8.2, 11, 15, 16 and 18). *European Convention for the Protection of Human Rights and Fundamental Freedoms*: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude and freedom from retroactive liability (Articles 2, 3, 4.1 and 7). *American Convention on Human Rights*: the right to juridical personality, right to life, right to humane treatment, freedom from slavery, freedom from ex post facto laws, freedom of conscience, the rights of the family, right to a name, rights of the child, right to nationality, right to participate in government and the right to judicial guarantees essential to protect non-derogable rights (Articles 3, 4, 5.6, 9, 12, 17, 18, 19, 20, 23 and 27.2). The *Arab Charter on Human Rights*: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude or sexual exploitation, the right to a fair trial before an independent and impartial tribunal, freedom from arbitrary detention, freedom from retroactive criminal liability, freedom from imprisonment for failure to fulfil a contractual obligation, freedom of thought, conscience and religion, the right to humane treatment, the right to recognition as a person before the law, the right to leave one's own country, the right to asylum, the right to nationality and the right to judicial guarantees essential to protect non-derogable rights (Articles 4, 5, 8, 9, 10, 13, 14, 15, 18, 19, 30, 20, 22, 27, 28, and 29). See also the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2.2), the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 1), the *Inter-American Convention to Prevent and Punish Torture* (Article 5) and the *Inter-American Convention on Forced Disappearance of Persons* (Article X).

law.<sup>273</sup> Only a court of law may try and convict a person for a criminal offence, and presumption of innocence must be respected.<sup>274</sup> Any form of detention and all measures affecting the human rights of a person arrested or detained also must be subject to effective review by a judicial authority.<sup>275</sup> Finally, measures taken to address a situation of crisis must not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.<sup>276</sup>

## ii) All measures adopted to address the crisis must be subject to judicial oversight

Observance of the Rule of Law and human rights requires that both a declaration of a state of emergency and any emergency measures adopted under it be subject to judicial oversight. The control of the judiciary over the lawfulness of emergency

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273 Article 7 of the *International Covenant on Civil and Political Rights*; Article 2(2) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 5 of the *Universal Declaration of Human Rights*; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 13; Articles 5 and 6 of the *African Charter on Human and Peoples' Rights*; Article 1(2) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 7 of the *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992; Article 2(2)(i) and (j) of the ASEAN Charter.

274 Common Article 3(d) to the *Geneva Conventions of 1949*; Article 7 of the *African Charter on Human and Peoples' Rights*. Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 15; Article 4(b) of the *Arab Charter on Human Rights*; Article 11(1) of the *Universal Declaration of Human Rights*; Article 2(2)(i) and (j) of the ASEAN Charter.

275 Article 9 of the *International Covenant on Civil and Political Rights*; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, paras. 15-16; *Concluding Observations of the Human Rights Committee on Albania*, CCPR/CO/82/ALB, 2 December 2004, para. 9; Article 27 of the *American Convention on Human Rights*; Inter-American Court of Human Rights: Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial guarantees in states of emergency*; Article 4(b) of the *Arab Charter on Human Rights*; Article 17(2)(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 7 of the *Declaration on the Protection of All Persons from Enforced Disappearance*. See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle M (2)(h); Council of Europe *Guidelines on Human Rights and the Fight against Terrorism*, Article VIII; Article 2(2)(i) and (j) of the ASEAN Charter. See also Principle no. 9 and its Commentary.

276 Articles 4 and 26 of the *International Covenant on Civil and Political Rights*; Articles 2, 3, 18(3) and 19 of the *African Charter on Human and Peoples' Rights*; Article 7 of the *Universal Declaration of Human Rights*; Article 2(2)(i) and (j) of the ASEAN Charter. UNSC Res 1325 (2000), UN Doc. S/RES/1325 (2000), 31 October 2000, paras. 8(c), 9-11; UNSC Res 1889 (2009), UN Doc. S/Res/1889 (2009), 5 October 2009, para. 2. Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (Article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 9; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 8. See *Report of the Independent Expert on the question of the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 9; *Durban Declaration*, UN Doc. A/Conf.189/12, para. 2; *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2007; ICJ *Berlin Declaration on Counter-Terrorism, Human Rights and the Rule of Law*, Principle 4.

measures is part of a system based on the Rule of Law.<sup>277</sup> Judicial oversight of states of emergency is an inherent consequence of the principle of legality.<sup>278</sup>

As the UN Special Rapporteur on states of emergency and human rights has highlighted:

*“[S]tates of emergency are not tantamount to the rule of the arbitrary. They are an institution of the rule of law involving a series of measures designed to come into force only when a crisis situation arises and which remain in reserve during ordinary periods. Therefore, whatever the political dimension which may be attributed to a given state of emergency, its legal nature is such that the acts which constitute it (proclamation, ratification, etc.) and the measures which are adopted when it is in force (suspension or restriction of certain rights, etc.) must lie within the framework of the principles governing the rule of law and are thus subject to controls”.*<sup>279</sup>

The judiciary is an “essential control mechanism” which ensures that emergency measures comply with a State’s international human rights obligations.<sup>280</sup> Judges play a vital role “in ensuring that the executive branch does not abuse its wide-ranging powers during states of emergency, especially in situations in which the regulations governing states of emergency contain ambiguities and unclear elements regarding certain criminal offences, such as those relating to national security”.<sup>281</sup> The courts must also have the authority to examine the motives for the declaration of a state of emergency and the suspension of rights, and to limit emergency measures if they violate national and international law.<sup>282</sup>

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277 Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), para. 40. On the effects of the government action in states of emergency on the individual’s right to liberty see also the case law of the European Court of Human Rights: Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N<sup>o</sup> 14553/89; 14554/89, para. 48; Judgment of 29 November 1988, *Brogan and others v. United Kingdom*, Application N<sup>o</sup> 11209/84; 11234/84; 11266/84; 11386/85, para. 58; Judgment of 27 September 2001, *Günay and others v. Turkey*, Application N<sup>o</sup> 31850/96, para. 22; Judgment of 26 November 1997, *Sakik and others v. Turkey*, Application N<sup>o</sup> 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94, para. 44; COE Venice Commission, *Emergency Powers*, CDL-STD(1995) 012, 1995, p. 16.

278 *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 50.

279 *Sixth revised annual report of justice and list of states which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy*, UN Doc. E/CN.4/Sub.2/1993/23/Rev.1, 17 November 1993, para. 52.

280 *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/63/271, 12 August 2008, para. 17.

281 *Ibid.*

282 *Ibid.*, para. 16.

Because human rights may be subjected to some limitations, including measures of derogation, in situations of emergency, judicial oversight over the implementation of measures pursuant to the emergency is indispensable.<sup>283</sup> Specific measures may be adopted as a result of abuse of State authority or be taken in contravention of the law governing limitations and/or derogation of human rights.<sup>284</sup> The Inter-American Court of Human Rights has indicated that “in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures [adopted under states emergency powers]”.<sup>285</sup>

Judicial oversight of states of emergency serves as a control over the illegitimate declaration of such states and the actions taken deriving from their application.<sup>286</sup> It is therefore necessary that national Constitutions and law guarantee that the control over the compliance of states of emergency is administered by courts.<sup>287</sup>

Thus, where a Constitutional Court had been dismantled and disqualified from exercising its jurisdiction appropriately, particularly with regard to reviewing constitutionality, the Inter-American Court decided that:

*“[t]he Constitutional Court is one of the democratic institutions that guarantee the rule of law. The dismissal of the justices and the omission by Congress to appoint substitutes, violated erga omnes the possibility of exercising the control of constitutionality and the consequent examination of whether the State’s conduct was in harmony with the Constitution.”*<sup>288</sup>

The Inter-American Court concluded that the State had failed to comply with the general obligation in Article 1(1) of the American Convention on Human Rights.

The European Court of Human Rights has repeatedly affirmed that it has the power to review emergency measures that go beyond the limit strictly required to face a situation of crisis.<sup>289</sup> While exercising its jurisdiction, the Court will weight all the relevant factors, i.e. “the nature of the rights affected by the derogation and

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283 Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 27.

284 *Ibid.*, para. 39.

285 *Ibid.*, para. 40.

286 Parliamentary Assembly of the Council of Europe, *The protection of human rights in emergency situations*, Doc. 11858, 9 April 2009, para. 45. See also Inter-American Commission on Human Rights, *Third report of the situation of human rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter II, “Human rights protection in the Colombian legal and political system”, para. 69.

287 *Concluding Observations of the Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras. 23 and 38.

288 Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case (Peru)*, para. 112.

289 European Court of Human Rights, Judgment of 19 February 2009, *A and Others v. United Kingdom*, Application N<sup>o</sup> 3455/05, para. 173.

the circumstances leading to, and the duration of, the emergency situation.”<sup>290</sup> Similarly, the African Commission on Human and Peoples’ Rights asserted its jurisdiction to review national legislation and State action in times of crisis for what concerns compliance with the African Charter and international human rights law.<sup>291</sup>

Notably, in the specific situation of counter-terrorism measures, the European Court of Justice has recognised its jurisdiction over EU counter-terrorism measures deriving from UN Security Council Resolutions to ensure their compliance with human rights.<sup>292</sup>

### **iii) The right to fair and effective legal proceedings to challenge the legality of measures and/or their conformity with national or international law**

In situations of crisis, means and mechanisms must be provided to challenge the lawfulness of measures that limit or restrict human rights, and to provide effective remedies for any abusive application.<sup>293</sup> States are also obliged to provide an effective remedy for violations of human rights by the States themselves, or any abuse of the rights of others by non-state actors.<sup>294</sup> In order for the judiciary to have an opportunity to oversee and review the measures adopted to address the crisis, those affected by such measures, who seek to challenge their legality, must have full access to justice and have the opportunity to exercise their right to fair and effective judicial proceedings.<sup>295</sup>

290 European Court of Human Rights: Judgment of 19 February 2009, *A and Others v. United Kingdom*, Application N° 3455/05, para. 173; Judgment of 18 January 1978, *Ireland v. United Kingdom*, Application N° 5310/1971, para. 207; Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Applications N° 14553/89, 14554/89, para. 43; Judgment of 18 December 1996, *Aksoy v. Turkey*, Application N° 21987/93, para. 68.

291 African Commission on Human and Peoples’ Rights, *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, 11 May 2000, paras. 43, 48-50, 58-59, 68.

292 European Court of Justice, Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. The Council of the European Union and the Commission of the European Communities* (Grand Chamber), Joined Cases C-402/05 P and C-415/05 P, paras. 323-328.

293 Article 12(3) of the *International Covenant on Civil and Political Rights*. See, for example, Human Rights Committee, *General Comment No. 10, Freedom of Expression (Article 19)*, 29 June 1983, para. 4; Human Rights Committee, *General Comment No. 27, Freedom of Movement (Article 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, paras. 11-18; Principles. 7-9, 17-18 of the *Siracusa Principles*; Article 2(2)(i) and (j) of the *ASEAN Charter*.

294 Article 2 of the *International Covenant on Civil and Political Rights*; Article 7 of the *African Charter on Human and Peoples’ Rights*; Article 13 of the *European Convention on Human Rights*; Article 25 of the *American Convention on Human Rights*; Article 23 of the *Arab Charter of Human Rights*; Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14; Human Rights Committee, *General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 11; Article 8 of the *Universal Declaration of Human Rights*; Article 2(2)(i) and (j) of the *ASEAN Charter*.

295 Article 10 of the *Universal Declaration of Human Rights*; Articles 2(3)(b) and 14 of the *International Covenant on Civil and Political Rights*; Article 8(1) of the *American Convention on Human Rights*; Article

Article 25(1) of the American Convention on Human Rights establishes the right of everyone to have recourse to the writ of “amparo” for the protection of his or her fundamental rights that have been violated.<sup>296</sup> This procedure is available for the protection of any right granted by national constitutions and legislation through an accessible and prompt remedy before a competent court or tribunal.<sup>297</sup> This judicial remedy serves the purpose of preserving legality in a democratic society and is of an essential nature for the protection of rights that cannot be the object of derogation in times of emergency.<sup>298</sup>

Similarly, the European Court of Justice, in a case regarding EU counter-terrorism measures affirmed that the principle of effective judicial protection of human rights requires respect for the right to a defence, including the right to be heard and the right to judicial review.<sup>299</sup> In its ruling on a case challenging the inclusion of the plaintiffs on a list of persons subject to restrictive measures due to their alleged association with the Al-Qaeda terrorist network, the Court held that an individual has a right to have the lawfulness of measures restricting the enjoyment of his or her rights reviewed in a judicial process that provides sufficient procedural guarantees.<sup>300</sup> The relevant UN delisting procedure available failed to provide basic guarantees of justice and therefore could not constitute an effective remedy for alleged violations of an individual’s human rights.<sup>301</sup> The reconsideration procedure was primarily diplomatic and provided each State of the committee with a veto; the applicant had no right to make representations or to see the reasons or evidence justifying his or her inclusion on the list; and the decision-making committee was not obliged to provide reasons for its decision if it rejected an applicant’s request.<sup>302</sup>

In situations of crisis, judicial review must accommodate legitimate security concerns while providing applicants with a sufficient measure of procedural justice.<sup>303</sup> A failure to respect procedural rights violates an individual’s right to an effective remedy.<sup>304</sup> The existence of a remedy for human rights violations

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6 of the *European Convention on Human Rights*; Articles 7 and 26 of the *African Charter of Human and Peoples’ Rights*.

296 See also Article XVIII of the *American Declaration of the Rights and Duties of Man*.

297 Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 32.

298 *Ibid.*, paras. 42-43.

299 European Court of Justice, Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. The Council of the European Union and the Commission of the European Communities* (Grand Chamber), Joined Cases C-402/05 P and C-415/05 P, paras. 333, 335.

300 *Ibid.*, paras. 323-328.

301 *Ibid.*

302 *Ibid.*

303 *Ibid.*, paras. 344, 351-352; European Court of Human Rights, Judgment of 15 November 1996, *Chahal v. United Kingdom*, Application N° 22414/93, para. 131

304 European Court of Justice, Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat*

“must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness.”<sup>305</sup> Thus, where lodging a judicial complaint would put an individual in fear for his or her life, or where the jurisdiction of the courts has been ousted by domestic legislation not subject to challenge or judicial review, no effective remedy exists.<sup>306</sup> Even during times of crisis, recourse to a political body cannot constitute an adequate remedy for violations of human rights if the decision-making body is not independent or impartial and if it provides only discretionary, extraordinary remedies of a non-judicial nature without any obligation to refer to legal principles.<sup>307</sup> The existence of a judicial mechanism at the national level is essential, while the “supranational court”, namely the European Court of Human Rights, may assume a supervisory role in respect of the principle of subsidiarity.<sup>308</sup>

The basic elements of the right to a fair trial fall within the category of rights which effectively may not be the subject of derogating measures.<sup>309</sup> In order to guarantee equality of arms, an essential component of trial fairness,<sup>310</sup> all persons must have access to legal representation of their own choosing.<sup>311</sup> Allowing a trial to proceed in the absence of defence counsel, where counsel has resigned after being subject to intimidation and harassment, constitutes a violation of these principles.<sup>312</sup> Disparate treatment in procedural rights, including the absence of a counsel for the defendant and the presence of one for the State, without an objective and reasonable basis may violate the principle of equality before courts and equality of arms.<sup>313</sup> The State must also ensure that there are adequate procedures and

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*International Foundation v. The Council of the European Union and the Commission of the European Communities* (Grand Chamber), Joined Cases C-402/05 P and C-415/05 P, para. 349.

305 African Commission on Human and Peoples' Rights, *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, 11 May 2000, para. 35.

306 African Commission on Human and Peoples' Rights: *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, 11 May 2000, paras. 35-37; *Constitutional Rights Project v. Nigeria*, Communication 87/93 (1995), para. 8.

307 African Commission on Human and Peoples' Rights, *The Constitutional Rights Project v. Nigeria*, Communication 87/93 (1995), para. 8; African Commission on Human and Peoples' Rights, *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, 11 May 2000, para. 61.

308 European Court of Human Rights, Judgment of 19 February 2009, *A. v. United Kingdom*, Application N<sup>o</sup> 3455/05, para. 174, referring also to European Court of Human Rights, Judgment of 10 May 2001, *Z and others v. United Kingdom*, Application N<sup>o</sup> 29392/95, para. 103.

309 See *infra* Principle no. 11 and its Commentary.

310 Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 8,13.

311 Article 14 (3) (d) of the *International Covenant on Civil and Political Rights*; Article 7(1)(c) of the *African Charter of Human and Peoples' Rights*; Article 6(3)(c) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 16(3) of the *Arab Charter of Human Rights*; Article 8(2) (d) of the *American Convention on Human Rights*; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle G (b). See also *infra* Principle no. 8 and its Commentary.

312 African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria*, Communication 87/93 (1995), para. 12.

313 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and*

mechanisms in place to guarantee effective and equal access to lawyers for all people within their territory or subject to their jurisdiction, without discrimination of any kind.<sup>314</sup> These procedures must allow for the affected person to have access to a lawyer of his or her own choosing.<sup>315</sup> Furthermore, States must take measures to inform the public of the important role of lawyers in protecting their rights.<sup>316</sup>

Where the outcome of the proceeding can be a sentence of death, the absence of any possibility of appeal, denial of access to the free choice of a lawyer, and/or restriction of other key rights of defence will constitute a violation both of the right to a fair trial and the right to life.<sup>317</sup> While these obligations are directed towards States, international standards encourage professional associations of lawyers to ensure legal representation *pro bono* where legal assistance is not provided for complaints of serious human rights violations before judicial bodies.<sup>318</sup>

States must take measures to guarantee that everyone within their territory is able to access judicial bodies without discrimination of any kind,<sup>319</sup> and must take special measures to ensure that those in rural communities and women are able to access such bodies.<sup>320</sup> Judicial officials as well as law enforcement officers must be provided with adequate training to ensure that they are able to “deal sensitively and professionally with the special needs and requirements of women.”<sup>321</sup> Special concerns arise in situations of conflict or crises where a gender-oriented access to justice should be implemented.<sup>322</sup>

States must take positive measures to ensure that where there are communities or groups whose needs for judicial services are not met, measures are taken to guarantee them access to such services without discrimination of any kind.<sup>323</sup> Such access must not be impeded by distance to the location of the judicial institutions, by unaffordable or excessive court fees or by lack of assistance to enable the person to understand court procedures and to complete formalities.<sup>324</sup>

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*tribunals and to a fair trial*, UN doc. CCPR/C/GC/32, 23 August 2007, para. 13.

314 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle G (a).

315 *Ibid.*, Principle G (b).

316 *Ibid.*, Principle G(c). See *infra* Principles no. 1 and 13 and their Commentaries.

317 Human Rights Committee, *Preliminary Concluding Observations on Nigeria*, UN Doc. CCPR/C/79/Add.64, 3 April 1996, paras. 8-9.

318 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle H (f)(ii).

319 *Ibid.*, Principle K (a).

320 *Ibid.*, Principle K (b).

321 *Ibid.*

322 UNSC, Res. 1889, UN Doc. S/Res/1889 (2009), 5 October 2009, para. 10.

323 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle K (c).

324 *Ibid.*, Principle K (d).

The assistance of an interpreter must be provided free of charge in the event that the affected person does not speak or understand the language used in court.<sup>325</sup>

States must disseminate information about all available remedies for violations of international human rights law and international humanitarian law.<sup>326</sup> They should also take measures to minimise the inconvenience to victims and their families and to protect complainants and witnesses from intimidation and retaliation.<sup>327</sup> Furthermore, victims should be provided with proper assistance when seeking access to justice;<sup>328</sup> this may include financial assistance by way of legal aid.<sup>329</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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Judicial review and oversight was initially addressed during the *Congress on the Rule of Law*, held in Athens in 1955, during which the Committee on Criminal Law concluded that: “Whoever is deprived of his liberty by arrest or detention has the right to demand a procedure by which a judicial authority may be called upon to determine without delay the legitimacy of the detention, and to order his release if it appears that such detention has not been effected in conformity with the law.”<sup>330</sup>

During the *Congress on the Rule of Law in a Free Society* (New Delhi, 1959) the Second Committee concluded that, “In general, the acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the Courts.”<sup>331</sup> The Fourth Committee dealt with the issue of Justice and Legal Aid from the viewpoint of equal access to the law, concluding that: “Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it.”<sup>332</sup>

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325 Article 14(3)(f) of the *International Covenant on Civil and Political Rights*.

326 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN GA Resolution 60/147, 16 December 2005, Principle VIII, paragraph 12(a).

327 *Ibid.*, Principle VIII, paragraph 12(b).

328 *Ibid.*, Principle VIII, paragraph 12(c).

329 Article 14 (3)(d) of the *International Covenant on Civil and Political Rights*; Council of Europe, *Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer*, 25 October 2000, Principle IV(2) and (3).

330 Paragraph (iv), Conclusions of the Committee on Criminal Law, *Congress of Athens*, 1955.

331 Paragraph 4, Conclusions of the Committee on the Executive and the Rule of Law, *Congress of New Delhi*, 1959.

332 Paragraph 10, Conclusions of the Committee on the Judiciary and the Legal Profession under the Rule of Law, *Congress of New Delhi*, 1959.

During the *African Conference on the Rule of Law* (Lagos, 1961), the First Committee concluded that, “The Judiciary should be given the jurisdiction to determine in every case upon application whether the circumstances have arisen or the conditions have been fulfilled under which such power is to be or has been exercised”<sup>333</sup> and that, “in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised.”<sup>334</sup> The Second Committee went on further to identify what exactly should be available to an individual who is aggrieved by actions of the Executive:

*“While recognizing that inquiry into the merits of the propriety of an individual administrative act by the Executive may in many cases not be appropriate for the ordinary courts, it is agreed that there should be available to the person aggrieved a right of access to: (a) a hierarchy of administrative courts of independent jurisdiction; or (b) where these do not exist, to an administrative tribunal subject to the overriding authority of the ordinary courts.*

*The minimum requirements for such administrative action and subsequent judicial review [...] are as follows: (a) that the full reasons for the action of the Executive be made known to the person aggrieved; and (b) that the aggrieved person shall be given a fair hearing; and (c) that the grounds given by the Executive for its action shall not be regarded as conclusive but shall be objectively considered by the court.”<sup>335</sup>*

The Third Committee, on the other hand, approached the issue of legal aid, recommending that “all steps should be taken to ensure equal access to law for both rich and poor, especially by a provision for and an organization of a system of Legal Aid in both criminal and civil matters.”<sup>336</sup>

The Second Committee then considered preventive detention in particular as a measure used by the Executive during a period of public emergency:

*“During a period of public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary confinement by requiring a prompt administrative*

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333 Paragraph 3, Clause I, Conclusions of the Committee on Human Rights and Government Security – The Legislature, Executive and Judiciary, *Regional Conference for Africa in Lagos*, 1961.

334 Paragraph 7, Clause I, Conclusions of the Committee on Human Rights and Government Security – The Legislature, Executive and Judiciary, *Regional Conference for Africa in Lagos*, 1961.

335 Paragraphs 2 and 3, Conclusions of the Committee on Human Rights and Aspects of Criminal and Administrative Law, *Regional Conference for Africa in Lagos*, 1961.

336 Paragraph 7, Conclusions of the Committee on The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society, *Regional Conference for Africa in Lagos*, 1961.

*hearing and decision upon the need and justification for detention with a right to judicial review.*<sup>337</sup>

The Third Committee at the *Congress of Rio de Janeiro on Executive Action and the Rule of Law* (1962) focused more upon the role and duties of lawyers in relation to access to justice and legal aid, concluding that: “Individual lawyers and their associations have the duty to work with judges, other officials and community organizations to provide indigent persons with adequate legal service.”<sup>338</sup>

During the same Congress, the Second Committee considered that, “The existence of effective safeguards against the possible abuse of power by the Executive is an all-important aspect of the Rule of Law. Judicial and Legislative control of the Executive are such safeguards.”<sup>339</sup> “Judicial control over the acts of the Executive should ensure that: (a) the Executive acts within the powers conferred upon it by the Constitution and such laws as are not unconstitutional; (b) whenever the rights, interests or status of any person are infringed or threatened by Executive action, such person shall have an inviolable right of access to the Courts and, unless the Court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection; (c) where Executive action is taken under a discretionary power, the Courts shall be entitled to examine the basis on which the discretion has been exercised and if it has been exercised in a proper and reasonable way and in accordance with the principles of natural justice; (d) the powers validly granted to the Executive are not used for a collateral or improper purpose.”<sup>340</sup>

In 1967, the *Conference of French-speaking African Jurists on the Function of Law in the Development of Human Communities* in Dakar concluded that: “Respect for the Rule of Law is also based on the effective operation of the judicial system, which implies an absolute respect for the status of the judiciary and a simple, rapid, effective and inexpensive procedure for bringing matters before the courts, for obtaining a judgment and for the execution of judgments.<sup>341</sup> [...] Especially where those seeking justice are very often poor, legal aid, easy to obtain and with maximum coverage, is indispensable for the protection of rights and freedoms.”<sup>342</sup>

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337 Paragraph 5(ii), Conclusions of the Committee on Human Rights and Aspects of Criminal and Administrative Law, *Regional Conference for Africa in Lagos*, 1961.

338 Clause VIII, Conclusions of the Committee on The Role of Lawyers in a Changing World, *Congress of Rio de Janeiro on Executive Action and the Rule of Law*, 1962.

339 Preambular paragraph of the Conclusions of the Committee on Control by the Courts and the Legislature over Executive Action, *Congress of Rio de Janeiro on Executive Action and the Rule of Law*, 1962.

340 Paragraph 3, Conclusions of the Committee on Control by the Courts and the Legislature over Executive Action, *Congress of Rio de Janeiro on Executive Action and the Rule of Law*, 1962.

341 Paragraph 3, Part I: Access of the Individual to the Law, Conclusions of the Committee on Public Opinion and the Rule of Law, Conference of French-speaking African Jurists on The Function of Law in the Development of Human Communities, *Dakar Conference*, 1967.

342 Paragraph 7(c), Part I: Access of the Individual to the Law, Conclusions of the Committee on Public Opinion and the Rule of Law, Conference of French-speaking African Jurists on The Function of Law in the

During the *European Conference of Jurists on the Individual and the State* (Strasbourg, 1968) it was concluded that:

*“There should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to (a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised; (b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual; and (c) giving the courts a supervisory jurisdiction to ensure that emergency powers are used only for the specific purpose for which they were granted, and that they are not exceeded. The courts should have the power to grant effective remedies in cases of misuse or abuse of emergency powers.”*<sup>343</sup>

The *Berlin Declaration* (2004) affirmed the obligation incumbent upon States to “ensure that any person adversely affected by counter-terrorism measures of a State, or of a non-State actor whose conduct is supported or condoned by the State, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures”.<sup>344</sup>

## 4. Selected excerpts from international standards

### 2. (i) Common legal framework for regulating states of emergency

All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant. [...] Legal rules limiting the exercise of human rights shall be clear and accessible to everyone. [...] A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to article 4 (hereinafter called “derogation measures”) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

- (a) Affects the whole of the population and either the whole or part of the territory of the State, and
- (b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic

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Development of Human Communities, *Dakar Conference*, 1967.

<sup>343</sup> Paragraph 19, Part IV: Control over Assumption of Emergency Powers, Conclusions of the European Conference of Jurists on the Individual and the State, *Strasbourg Conference*, 1968.

<sup>344</sup> Principle 9 of the *Berlin Declaration*, 2004.

functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant. [...] A bona fide proclamation of a public emergency permits derogation from specified obligations in the Covenant, but does not authorize a general departure from international obligations. The Covenant in articles 4, paragraph 1 and 5, paragraph 2, expressly prohibits derogations which are inconsistent with other obligations under international law. In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and ILO Conventions.

— *Principles 5, 17, 39 and 66 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

## **2. (ii) All measures adopted to address the crisis must be subject to judicial oversight**

The legislation shall stipulate that no steps taken under a state of emergency shall: [...]

### (b) Restrict the authority of the courts:

- (i) To examine the compatibility of a declaration of a state of emergency with the laws, the Constitution and the obligations deriving from international law, or to decide that such a declaration is illegal or unconstitutional, in the event of incompatibility;
- (ii) To examine the compatibility of any measures adopted by a public authority with the declaration of the state of emergency;
- (iii) To take legal steps designed to enforce or protect rights recognized by the Constitution or Fundamental Law and by national and international law, the effective exercise of which is not affected by the declaration of a state of emergency;
- (iv) To try criminal cases, including offences connected with the state of emergency.

— *UN Special Rapporteur on states of emergency and human rights, Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 151*

The ordinary courts should maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

— *Principle 60 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

The Assembly considers that the following safeguards – in addition to those stated in Article 15 of the European Convention on Human Rights – should always be provided in a state of emergency: [...] judicial scrutiny of the validity of a state of emergency and its implementation.

— *Paragraph 12-12.2 of the PACE Resolution 1659 (2009) on Protection of Human Rights in emergency situations*

The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

— *Principle B,5 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

## **2. (iii) The right to fair and effective legal proceedings to challenge the legality of measures and/or their conformity with national or international law**

Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application. [...] Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

— *Principles 8 and 56 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

The integrity of the judicial system – its competence, independence and impartiality – should be safeguarded, especially as concerns access to a court and to an effective remedy.

– *Paragraph 13 of the PACE Resolution 1659 (2009) on Protection of Human Rights in emergency situations*

All ordinary remedies as well as special ones, such as habeas corpus or amparo, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

– *Draft Article 16.3 Right to a Remedy of Section (C) Non-Derogable Rights and Freedoms of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*



## Principle 5

In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions. The right of judges and lawyers to freedom of association, including the right to establish and join professional associations, must at all times be respected.

### Commentary

#### 1. Unlawful national practices

Security of tenure may become particularly fragile in times of crisis or emergency, precisely the moment when a robust independent judiciary is most critical. In 2007, for example, a judicial crisis in Pakistan was precipitated by the executive's attempt to remove arbitrarily members of the higher judiciary from office. On 9 March 2007, General Pervez Musharraf suspended Supreme Court Chief Justice Iftikhar Muhammad Chaudhry when the latter refused to resign after being accused of judicial improprieties.<sup>345</sup> Following his suspension, an unprecedented wave of support from the legal community<sup>346</sup> culminated in Chief Justice Chaudhry's reinstatement by the Supreme Court of Pakistan on 20 July 2007. However, after General Musharraf won the Presidential election on 6 October 2007, the Supreme Court subsequently declared that he could not take the oath of office until the Court decided a number of petitions challenging his candidacy on the grounds that his re-election while still being the Chief of Army Staff violated the Constitution. In order to avoid an adverse decision by the Supreme Court, General Musharraf declared a state of emergency and required sitting judges to take a fresh oath of office under the Provisional Constitutional Order (PCO). When many judges refused to take this oath, since they viewed the PCO as unconstitutional and a serious infringement on the independence of the judiciary, General Musharraf replaced them with judges willing to do so.

<sup>345</sup> It is widely believed that President Musharraf was motivated to make allegations of impropriety against the Chief Justice because of the latter's robust inquiry into alleged instances of Pakistani security forces engaging in "enforced disappearances" as part of its "war on terror". See *Pakistan Rule of Law Assessment – Final Report*, November 2008, USAID, page 4.

<sup>346</sup> The two-year struggle of the legal community to have deposed Supreme Court judges reinstated is popularly referred to as the "Lawyers' Movement".

In Fiji, on 9 April 2009, a three-member Court of Appeal unanimously ruled that the military regime had assumed power illegally following the coup in December 2006. The Court directed President Ratu Josefa Iloilo to replace the government of Commodore Frank Bainimarama with an interim administration until democracy could be restored through free and fair elections held as soon as possible.<sup>347</sup> Rather than complying with the Appeal Court's judgment, President Iloilo abrogated the Constitution on 10 April 2009 through declaration of a state of emergency.<sup>348</sup> He reappointed Commodore Bainimarama to the post of prime minister for a period of five years, announced a "New Legal Order" under which all of Fiji's judges would be replaced, and indicated that elections would not be held until September 2014. The complete removal of judges resulted in significant erosion of the Rule of Law and weakening of the institutional independence of the Fijian judiciary.

In Belarus, the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997 provided the Ministry of Justice with the competence to license lawyers to practice their profession and obliged such lawyers to be part of an organisation centrally controlled by the Ministry itself.<sup>349</sup>

## 2. International legal framework

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### i) General considerations

The independence of the judiciary requires that judges enjoy security of tenure and not be subject to arbitrary removal. Security of tenure enables judges to make decisions according to the Rule of Law without fear of retribution, even if the decisions they have taken are politically unpopular, and helps to insulate against undue pressure in decision-making. The Special Rapporteur on the Independence of Judges and Lawyers has repeatedly expressed concern at situations wherein States have compromised security of tenure by relying on provisional rather than permanent appointments<sup>350</sup> or subjecting judges to excessively long probationary periods.<sup>351</sup> This uncertainty makes judges more vulnerable to executive interference.

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347 *Qarase v. Bainimarama* [2009] FJCA 9.

348 Public Emergency Regulations 2009, v. 10, No. 5, 10 April 2009.

349 *Concluding Observations of the Human Rights Committee on Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997, para. 14.

350 *Special Rapporteur on the Independence of Judges and Lawyers, Report on the Mission to South Africa*, UN Doc. E/CN.4/2001/65/Add.2, 25 January 2001, paras. 62-69; *Special Rapporteur on the Independence of Judges and Lawyers, Report on the Mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, paras. 105-106.

351 *Special Rapporteur on the Independence of Judges and Lawyers, Report on the Mission to the Russian Federation*, UN Doc. A/HRC/11/41/Add.2, paras. 56-57.

## ii) Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches

As a necessary corollary of the independence of the judiciary and the principle of security of tenure, States must guarantee that judges may not, save in exceptional instances, be removed during their appointment, irrespective of whether they enjoy a lifetime or fixed term appointment.<sup>352</sup>

The principle of irremovability is a core element of the independence of the judiciary.<sup>353</sup> The principle entails that a judge is not subject to removal or transfer without his or her consent and that the terms of office are prescribed by law.<sup>354</sup> As a stronger guarantee, this principle should be enshrined in the Constitution.<sup>355</sup>

Deviations from the principle of irremovability are permitted only in narrow and exceptional circumstances. Such circumstances include where there has been serious misconduct on the part of the judge, the commission of a serious disciplinary or criminal offence or the incapacity of a judge to discharge professional duties.<sup>356</sup> States have an obligation to establish clearly the infractions that may lead to disciplinary measures, including the suspension and removal of judges, actions which must nevertheless be taken only in proportion to these

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352 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 57. See Principle B.3(c) of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*; Principle 18 of the *UN Basic Principles on the Independence of the Judiciary*; Principle 30 of the *Singhvi Declaration*; Article 8.1 of the *Universal Charter of the Judge*; Principle 3.1 of the *Burgh House Principles on the Independence of the International Judiciary*; Paragraph 22 of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*; Principles A(4)(p) and A(4)(n)(2) of the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*; Chapter VI. 49, 50, 52 of the *COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*; Principles 4 and 19 of the *Magna Carta of Judges*; Principle 3.4 of the *European Charter on the Statute for Judges*; Principle IV of the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*. See also *UN Basic Principles on the Independence of the Judiciary*, Paragraph 12; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, Paragraph 18; *Burgh House Principles on the Independence of the International Judiciary*, Paragraph 3; Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19; *Latimer House Guidelines*, Section II, Paragraph 1; *Singhvi Declaration*, Paragraph 16.

353 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 57.

354 Council of Europe Committee of Ministers-European Committee on Legal Cooperation, *Draft Recommendation CM/Rec(2010)...of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities – Explanatory Memorandum*, CM(2010)147 add 1, 21 October 2010, para. 54.

355 Council of Europe Commission of Venice, *Report on the independence of the judicial system Part I: the independence of judges*, CDL-AD(2010)004, 16 March 2010, paras. 40 and 43.

356 See *UN Basic Principles on the Independence of the Judiciary*, Paragraph 18; *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 57. *Concluding Observations of the Human Rights Committee on Viet Nam*, UN Doc. CCPR/CO/75/VNM, 26 July 2002, para. 10.

infractions.<sup>357</sup> Measures taken outside these criteria constitute the arbitrary removal of judges and unwarranted interference with the independence of the judiciary. Departure from the principle of irremovability, subject to the exceptions identified above, would also induce an imbalance among the powers of the State, with the judiciary being subordinate to the political branches.

Judges must not be dismissed or disciplined because of good faith errors in the discharge of their duties. Such measures would lead to political pressure and the impairment of their independence and impartiality.<sup>358</sup> The African Guidelines contain a specific prohibition on removing judges for having their rulings reversed.<sup>359</sup> The security of tenure and irremovability of judges is an essential indicator of the independence of judges both from the individual and institutional perspectives. Since the removal of judges can occur only in exceptional circumstances, the decision in that regard must be justified, in order to guarantee the fairness of the removal and the impartiality of the disciplinary proceeding.<sup>360</sup>

**iii) Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions**

The procedures leading to the removal of a judge and how these must be conducted are critical and elaborated in international standards.<sup>361</sup> Such procedures must be provided by law and respected in the case of dismissal by the executive in order to be compatible with the independence of the judiciary.<sup>362</sup>

The procedures must provide safeguards for the judge and fulfil the requirements for an effective and impartial proceeding to allow the judge meaningfully

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357 *Ibid.*, paras. 57-58. See also Principle no. 13 and its Commentary.

358 *Concluding Observations of the Human Rights Committee on Viet Nam*, UN Doc. CCPR/CO/75/VNM, 26 July 2002, para. 10.

359 Principle A, paragraph 4 (n) (2) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

360 See, for example, African Commission on Human and Peoples' Rights, *Movement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Communication 204/97, 29th Ordinary session, April-May 2001, para. 38; *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, UN Doc. A/HRC/11/41, 24 March 2009, para. 60.

361 Principles 17 and 20 of the *UN Basic Principles on the Independence of the Judiciary*; Principles 26, 27, 28 and 29 of the *Singhvi Declaration*; Article 11 of the *Universal Charter of the Judge*; Principle 5.1 of the *European Charter on the Statute for Judges*; Chapter VII.69 of *Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibility*; Principle 6 of the *Magna Carta of Judges*; Principles A(4)(q) and (r) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principle 26 of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*; Guideline VI of the *Commonwealth Principles of the three branches of the Government*.

362 Human Rights Committee, Views of 31 July 2003, *Mundyo Busyo et al. v. Democratic Republic of Congo*, Communication N° 933/2000, para. 5.2, UN Doc. CCPR/C/78/D/933/2000, 19 September 2003.

to challenge the decision.<sup>363</sup> Pursuant to a fair hearing, an independent and impartial body must decide whether the particular behaviour, or the ability of a judge, constitutes a cause for removal.<sup>364</sup> According to the *UN Basic Principles on the Independence of the Judiciary*, “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”.<sup>365</sup> It is considered essential that any decision to discipline, suspend or remove a judge be subject to an independent review.<sup>366</sup> Disciplinary proceedings should be carried out by an independent court or authority so as to provide the judge with a fair hearing. Council of Europe Standards prescribe that at least half of the members of the body deciding sanctions, or proposing or recommending the commencement of a disciplinary proceeding, should be formed of elected judges.<sup>367</sup> The Human Rights Committee recommended that in order to strengthen judicial independence, a judicial, rather than parliamentary, procedure should occur for the removal of a judge, in order to avoid incompatibility with Article 14 ICCPR.<sup>368</sup> The UN Special Representative on the independence of judges and lawyers has expressed particular concerns regarding the involvement of the Legislative and the Executive in the removal of judges for disciplinary reasons.<sup>369</sup>

Acceptable procedures for the removal of judges and the body in charge of carrying out these proceedings might differ from country to country.<sup>370</sup> Irrespective of the branch of government under which such procedures are established, the right to a fair hearing remains intact.<sup>371</sup> The procedure must provide the judge with the basic rights for a fair trial: full information of the charges, legal representation at the hearing, possibility to make a full defence and to be judged by an independent and impartial tribunal.<sup>372</sup> Summary removals are incompatible with the ICCPR,<sup>373</sup> and “judges should be removed only in accordance with an objective,

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363 *Concluding Observations of the Human Rights Committee on Belarus*, UN Doc. CCPR/C/79/Add.86, 6 November 1997, para. 13; Human Rights Committee, Views of 5 august 2003, *Pastukhov v. Belarus*, Communication N° 814/1998, para. 7.3, UN Doc. CCPR/C/78/D/814/1998, 19 August 2003.

364 Principle 17 of the *UN Basic Principles on the Independence of the Judiciary*.

365 Principles 18 and 19 of the *UN Basic Principles on the Independence of the Judiciary*.

366 Principle 20 of the *UN Basic Principles on the Independence of the Judiciary*.

367 Council of Europe, *European Charter on the Status of Judges – Explanatory Memorandum*, DAJ/Doc (98), para. 5.1.

368 *Concluding Observations of the Human Rights Committee on Sri Lanka*, UN Doc. CCPR/CO/79/LKA, 6 November 2003, para. 16.

369 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 60.

370 *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, Paragraph 23.

371 *Ibid.*, Paragraph 26.

372 *Latimer House Guidelines*, Guideline VI.1, para. (a) (i).

373 *Concluding Observations of the Human Rights Committee on The Gambia*, UN Doc. CCPR/CO/75/GMB, 12 August 2004, para. 14.

independent procedure prescribed by law”.<sup>374</sup> In a case where the dismissal of a judge had been publicly supported by the President of the Supreme Council before the hearing of the case, the Human Rights Committee considered the hearing as not fulfilling the criteria of equality before the tribunal and the removal as an “attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant”.<sup>375</sup>

The Inter-American Court of Human Rights in at least one case determined that the legislature was not an independent and impartial body in respect of the impeachment proceeding against three judges of the Constitutional Court eventually removed by the legislature.<sup>376</sup> The Constitutional Court of Peru had been called to examine the constitutionality of an interpretative law of the Constitution concerning presidential re-election.<sup>377</sup> The Court did not declare the law unconstitutional but stated that it was not applicable in the case.<sup>378</sup> The judges forming the majority of the ruling were subject to harassment and pressure and underwent a trial by the legislature for their removal as a sanction.<sup>379</sup> The Inter-American Court noted also that the proceeding not only lacked independence and impartiality with regard to the deciding body, but also did not ensure due process guarantees.<sup>380</sup>

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374 *Concluding Observations of the Human Rights Committee on the Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, 25 July 2002, para. 12.

375 Human Rights Committee, Views of 31 July 2003, *Mundyo Busyo et al. v. Democratic Republic of Congo*, Communication N° 933/2000, para. 5.2, UN Doc. CCPR/C/78/D/933/2000, 19 September 2003.

376 Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case v. Peru*, para. 84.

377 Inter-American Court of Human Rights, Judgment of 24 September 1999 January, *Constitutional Court Case v. Peru*, para. 2.

378 *Ibid.*

379 *Ibid.*

380 Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case v. Peru*, paras. 77-84.

**iv) The right of judges and lawyers to freedom of association, including the right to establish and join professional associations, must at all times be respected**

Judges and lawyers enjoy the right of all persons to form and join professional associations.<sup>381</sup> The enjoyment of this right by the legal profession is essential in the protection of the Rule of Law.<sup>382</sup>

For judges, the exercise of this right is critical to their ability to defend their independence and professional interests.<sup>383</sup> The existence of an independent professional organisation better allows for judges to be consulted on matters affecting them, but which are decided by other authorities.<sup>384</sup> Indeed, judicial independence and the interests of judges have been said to be better protected “in a corporate way”.<sup>385</sup> An independent professional organisation to which judges can freely adhere may also provide professional training for the members of the association to improve the quality of their decisions.<sup>386</sup>

Especially in times of emergency, the existence and the maintenance of the independence of these professional organisations is crucial. Professional organisations allow judges not only to protect their independence and interests, but also to participate in general debate regarding legal issues<sup>387</sup> and to promote aspects of the Rule of Law in the justice system for a better protection of individuals.<sup>388</sup>

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381 Principles 8 and 9 of the *UN Basic Principles on the Independence of the Judiciary*; Principle 23 of the *Basic Principles on the Role of Lawyers*; Principles 8 and 92 of the *Singhvi Declaration*; Article 11 of the *Universal Charter of the Judge*; Principle 1.3 of the *Council of Europe Recommendation No R. (2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer*; Principle 1.7 of the *European Charter on the Statute for Judges*; Principle 12 of the *Magna Carta of Judges*; Chapter III.25 of the *Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibility*; Principles A(4)(s) and (t) and I(l) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principle 9 of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*; Principle 4.6 of the *Bangalore Principles*; Guideline VIII.3 of the *Latimer House Guidelines*.

382 *Latimer House Guidelines*, Guideline VIII.3.

383 Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, New York and Geneva, 2003, p. 132.

384 Article 12 of the *Universal Charter of the Judge*; Paragraph 1.7 of the *European Charter on the Statute for Judges*; Principle 9 of the *UN Basic Principles*.

385 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 44.

386 *Ibid.*

387 *Ibid.*, para. 45.

388 Council of Europe Committee of Ministers-European Committee on Legal Cooperation, *Draft Recommendation CM/Rec(2010)...of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities – Explanatory Memorandum*, CM(2010)147 add 1, 21 October 2010, para. 33.

Similar to the case of judges, the proper functioning of the legal profession requires that lawyers have the right to freedom of expression and association. Associations of lawyers aim to protect the interests of the legal practitioners, as well as to promote education and training and to safeguard the integrity of the legal profession.<sup>389</sup> Additionally, these organisations must cooperate with governments to ensure effective and equal access to legal services and the independence of lawyers in providing counselling and assistance to clients in accordance with international standards and recognised professional ethics.<sup>390</sup>

Because such associations are created to safeguard the professional interests of lawyers and to protect and strengthen the independence of the legal profession, they must desist from active involvement in partisan political activity.<sup>391</sup> Such conduct would inevitably compromise the independence of their professional category. These associations must aim to uphold human rights, but a distinction exists between primary political engagement and the commitment to protect human rights, which may have a political dimension.<sup>392</sup>

States have an obligation to abstain from interfering in the establishment and work of professional associations of lawyers. The freedom of lawyers to associate may be violated, for example, through the banning of independent professional associations and the establishment of compulsory affiliation to a State-controlled group. It may also be violated if the State requires some form of authorisation from the Executive for the exercise of their work. In this regard, the necessity for lawyers to obtain a licence and to be part of a “centralized Collegium controlled by the Ministry” in order to be able to practice undermines the independence of lawyers, as they are thereby exposed to political pressure.<sup>393</sup>

In the same way, a decree establishing a new governing body for the professional category, in which the Bar Association nominated only 31 of 128 members, leaving the rest to government appointments, was recognised as a violation of the right to freedom of association and of the UN Principles on the Independence of the judiciary.<sup>394</sup> In this respect, the African Commission on Human and Peoples’ Rights indicated that:

*“Freedom of association is enunciated as an individual right and is first and foremost a duty of the state to abstain from interfering with the free formation*

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389 Principle 24 of the *UN Basic Principles on the Role of Lawyers*.

390 *Ibid.*, Principle 25. See also *infra* Principle no. 13 and its Commentary.

391 *Report of the Special Rapporteur for the independence of judges and lawyers, Mr. Param Cumaraswamy*, UN Doc. E/CN.4/1995/39, 6 February 1995, para. 72.

392 *Ibid.*

393 *Concluding Observations of the Human Rights Committee on Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997, para. 14.

394 African Commission on Human and Peoples’ Rights, *Civil Liberties Organisation v. Nigeria (in respect of the Nigerian Bar Association)*, Communication 101/93, Ordinary session March 1995, para. 16.

*of associations. There must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends. [...] In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards”.*<sup>395</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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The International Commission of Jurists has recognised the importance of security of tenure and freedom of association during many of its conferences and congresses since 1955. The two issues are in fact linked: if the right of judges and lawyers to freely associate is recognised and protected, then they are able to form self-governing organisations that can protect their rights and help prevent arbitrary removal.

On the right to freely associate, the First Committee at the *Congress of Athens* (1955) concluded that:

*“Everyone is entitled to freedom of assembly and peaceful association and particularly to become a member of a political party of his own choice. No political party must be put in a preponderant position in the state apparatus through legislative or administrative provisions.”*<sup>396</sup>

This was further addressed during the *Congress of New Delhi* (1959), during which the First Committee concluded that “The legislature must [...] not place restrictions on freedom of speech, freedom of assembly or freedom of association.”<sup>397</sup>

In relation to the protection of the Judiciary from arbitrary removal, the Third Committee at the *Regional Conference for Africa* (1961) in Lagos concluded that:

*“In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the Judiciary, it is recommended: (a) that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the Conseil Supérieur de la magistrature in the African French-speaking countries.”*<sup>398</sup>

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395 *Ibid.*, paras. 14-15.

396 Paragraph 7, Conclusions of the Committee on Public Law, *Congress of Athens*, 1955.

397 Paragraph 3(d), Clause III, Conclusions of the Committee on the Legislative and the Law, *Congress of New Delhi*, 1959.

398 Paragraph 3(a), Conclusions of the Committee on The Responsibility of the Judiciary and of the Bar for

With regard to the relationship between the freedom of association and disciplinary procedures, the Third Committee during the *Congress of Rio de Janeiro on Executive Action and the Rule of Law* (1962), concluded that:

*“The Rule of Law requires an authority which has the power to, and does in fact, exact proper standards for admission to the legal profession and enforces discipline in cases of failure to abide by a high standard of ethics. Those functions are best performed by self-governing democratically organized lawyers’ associations, but in the absence of such associations the Judiciary should act instead. Discipline for violation of ethics must be administered in substantially the same manner as courts administer justice. Associations exercising those functions must be open to all qualified lawyers without discrimination based on race, religion or political persuasion.”*<sup>399</sup>

During the *Conference of French-speaking African Jurists* in Dakar (1967), the right to freedom of association was considered in more detail by the First Committee, in combination with the freedom of religion and expression:

*“III(1). The right to participate in the political life of the country, freedom of religion, freedom of association and trade union rights are all aspects of the fundamental right of each individual to form and express his opinions. This right must be guaranteed against arbitrary suppression or restriction, and must not be limited in any way so long as it is not exercised in a manner detrimental to public order and safety.”*<sup>400</sup>

However, it is very important to note that whilst freedom of association is extremely important, as indicated above, it is a limited right for judges and lawyers. In order to preserve and protect their independence, it is important that judges and lawyers do not involve themselves in political activity, otherwise they might be seen to be, or might actually be, influenced by political considerations.

The importance of security of tenure of the judiciary in relation to the Rule of Law was highlighted during the *European Conference of Jurists on the Individual and the State (Strasbourg, 1968)* during which it was concluded that:

*“... In order to ensure the independence of judges it is essential that their appointment should be free from political interference or patronage; they should enjoy full security of tenure and should receive adequate remuneration which cannot be altered to their disadvantage during their term of office.”*<sup>401</sup>

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the Protection of the Rights of the Individual in Society, *Regional Conference for Africa in Lagos*, 1961.

399 Clause IX, Conclusions of the Committee on The Role of Lawyers in a Changing World, *Congress of Rio de Janeiro on Executive Action and the Rule of Law*, 1962.

400 Article III, paragraph 1, Conclusions adopted by the Committee on the Protection of Human Rights from the Arbitrary Exercise of Power, Conference of French-speaking African Jurists on The Function of Law in the Development of Human Communities, *Dakar Conference*, 1967.

401 Paragraph 3, Part I: Essential Safeguards, Conclusions of the European Conference of Jurists on the

## 4. Selected excerpts from international standards

### 2. (ii) Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches

While assuming or exercising emergency powers every state shall respect the following principles: [...] c) the guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges [...] shall be prohibited by the constitution.

— *Principle B.3(c) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

— *Principle 18 of the UN Basic Principles on the Independence of the Judiciary*

A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

— *Principle 30 of the Singhvi Declaration*

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

— *Article 8.1 of the Universal Charter of the Judge*

Judges [...] may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

— *Principle 3.1 of the Burgh House Principles on the Independence of the International Judiciary*

Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

— *Paragraph 22 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*

Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties. [...] Judges shall not be [...] removed from office or subject to other disciplinary or administrative procedures

by reason only that their decision has been overturned on appeal or review by a higher judicial body.

— *Principles A(4)(p) and A(4)(n)(2) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Security of tenure and irremovability are key elements of the independence of judges. [...] The terms of office should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. [...] A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

— *Chapter VI. 49, 50, 52 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*

Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary. [...] In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions....

— *Principles 4 and 19 of the Magna Carta of Judges*

A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

— *Principle 3.4 of the European Charter on the Statute for Judges*

**2. (iii) Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions**

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate

procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. [...] Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review....

— *Principles 17 and 20 of the UN Basic Principles on the Independence of the Judiciary*

(a) A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. [...]

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

[...] All disciplinary action shall be based upon established standards of judicial conduct. [...] The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing. [...] Judgments in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

— *Principles 26, 27, 28 and 29 of the Singhvi Declaration*

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant. Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation. Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

— *Article 11 of the Universal Charter of the Judge*

Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

— *Chapter VII.69 of COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibility*

Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

— *Principle 6 of the Magna Carta of Judges*

Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings. [...] The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.

— *Principles A(4)(q) and (r) of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*

In any event, the judge who is sought to be removed must have the right to a fair hearing.

— *Principle 26 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*

... any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

— *Guideline VII of the Commonwealth Principles of the Three Branches of the Government*

## **2. (iv) Freedom of association, including the right to establish and join professional associations, for judges and lawyers**

In accordance with the Universal Declaration of Human Rights, members of the judiciary are like the other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. [...] Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

— *Principles 8 and 9 of the UN Basic Principles on the Independence of the Judiciary*

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national and

international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and recognized standards and ethics of the legal profession.

— *Principle 23 of the Basic Principles on the Role of Lawyers*

Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement. [...] Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to:

- (a) Take part in public discussion of matters concerning the law and the administration of justice;
- (b) Join or form freely local, national and international organizations;
- (c) Propose and recommend well considered law reforms in the public interest and inform the public about such matters;
- (d) Take full and active part in the political, social and cultural life of their country.

— *Principles 8 and 92 of the Singhvi Declaration*

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statuses, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

— *Article 12 of the Universal Charter of the Judge*

Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

— *Principle 7.1 of the Burgh House Principles on the Independence of the International Judiciary*

Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms.

— *Principle 1.3 of the COE Recommendation No R. (2000)<sup>21</sup> of the Committee of Ministers to member*

*states on the freedom of exercise of the profession of lawyer*

Professional organizations set up by judges and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

— *Principle 1.7 of the European Charter on the Statute for Judges*

Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.

— *Principle 12 of the Magna Carta of Judges*

Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law.

— *Chapter III.25 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibility*

Judicial officers are entitled to freedom of expression, belief, association and assembly. In exercising these rights, they shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession. [...] Judicial officers shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status. [...] Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional association shall be elected by its members and shall exercise its functions without external interference.

— *Principles A(4)(s) and (t) and I(l) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

— *Principle 9 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*

A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct

himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

— *Principle 4.6 of the Bangalore Principles of Judicial Conduct*

An independent, organised legal profession is an essential component in the protection of the rule of law.

— *Guideline VIII.3 of the Latimer House Guidelines*



## Principle 6

The establishment of temporary or interim judges during times of crisis should be avoided. In respect of exceptional circumstances where it may become necessary to augment the capacity of the judiciary by expanding the number of active judges or through the creation of special chambers or units, the fundamental principles regarding the appointment and security of tenure must be strictly respected. Considerations of merit must remain essential criteria for appointments. Appropriate terms of tenure, protection and remuneration of judges must be ensured and the judiciary must have adequate resources to discharge its functions.

## Commentary

### 1. Unlawful national practices

During times of crisis, weaknesses in the functioning of the judiciary are frequently the result of instability of tenure and arbitrariness in the appointment and removal of judges. In Peru, for example, during the Fujimori administration, a Government of Emergency and National Reconstruction was established (1992). This government summarily dismissed judges at all levels of the judicial branch, including judges of the Supreme Court. The Government subsequently established a system of appointment of judges on a provisional basis, without prior assessment of their qualifications and involving submission of the appointees to discretionary removal.

Similarly when Venezuela adopted the new Constitution of the *Bolivarian Republic of Venezuela* and a framework of governance entitled “Transitional Scheme for Exercising Public Powers” (*“Régimen de Transición del Poder Público”*), a system of provisional judges was implemented in 1999.<sup>402</sup>

When Nigeria established a Special Military Tribunal in the 1990s, it provided that the tribunal would be constituted of serving military personnel hand picked by the Head of State, and that the President of the Tribunal, who was a member of the Provisional Ruling Council (PRC), would be authorised to confirm death sentences passed by the tribunal itself. Selection for membership on the Tribunal was not predicated on an assessment of the candidate’s effective knowledge of law.<sup>403</sup>

402 International Commission of Jurists, *Attacks on Justice 2005*, “Venezuela”, available at <http://www.icj.org/IMG/VENEZUELA.pdf> (accessed on 25 March 2011).

403 See in general, African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria*, Communication 224/98, 28th ordinary Session, October/November 2000.

## 2. International legal framework

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### i) General considerations

The “requirement of competence, independence and impartiality of a tribunal [...] is an absolute right that is not subject to any exception”,<sup>404</sup> States, therefore, have an obligation to guarantee the independence of the judiciary at all times. As outlined in the commentary on Principle 2, the issue of the independence of the judiciary is inherently connected with the principle of separation of powers.<sup>405</sup> While it is necessary that the independence of the judiciary as an institution of the government be guaranteed, it is equally of paramount importance that the independence of individual judges be safeguarded.<sup>406</sup>

### ii) Appointment methods must guarantee the independence of the Judiciary

International standards require that, in order to guarantee the independence and impartiality of the judiciary, States must adopt and implement procedures for the appointment of judges through strict selection criteria and in a transparent manner. The UN *Basic Principles on the Independence of the Judiciary*, as well as other international standards, provide as central elements in the appointment of judges that they must be of high integrity and competency, with appropriate training or qualifications in law.<sup>407</sup> Therefore, clear selection criteria based on merit are an essential guarantee of independence.<sup>408</sup> Although there is no established consensus under international standards as to the method by which judges should be appointed, the different political systems have adopted strict procedures both for the appointment of judges as well as for their dismissal. These

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404 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19; and Views of 28 October 1992, *Case González del Río v. Peru*, *Communication No. 263/1987*, para. 5.2, UN Doc. CCPR/C/46/D/263/1987, 28 October 1992. See Principle 70 (e) of the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*. The Siracusa Principles were reproduced by the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in its UN Doc. E/CN.4/1985/4 Annex (1985). In its *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, the Human Rights Committee recommended that “States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations” (para. 10), which include the Siracusa Principles.

405 See also *supra* Principle no. 2 and its Commentary.

406 Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p. 123.

407 See *infra* Principle no. 10 and its Commentary.

408 See in this sense, for example the case-law from the European Court of Human Rights: Judgment of 22 June 1989, *Langborger v. Sweden*, Application N° 11179/84; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N° 7819/77; 7878/77; Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Application N° 6878/75; 7238/75; Judgment of 1 October 1982, *Piersack v. Belgium*, Application N° 8692/79.

should reflect the standards of the UN *Basic Principles on the Independence of the Judiciary*, in order to guarantee the independence and impartiality of judges.<sup>409</sup>

As indicated by the Human Rights Committee, the procedure and qualifications for the appointment of judges must protect the independence of the judiciary from political interference by the executive branch and legislature, and the nomination of judges should be based on their competence and not their political affiliation.<sup>410</sup> Accordingly, appointment of judges by popular vote or election, as opposed to a merit-based selection system, raises serious concerns regarding the independence and impartiality of the judiciary as well as its politicisation.<sup>411</sup> An appropriate method of appointment of judges is a prerequisite for the independence of the judiciary<sup>412</sup> and is a means of ensuring equal access to the profession.<sup>413</sup> Therefore, the selection must take into account, along with criteria of merits and professional qualifications, the specific duties pertaining to the professional position of a judge.<sup>414</sup>

The same principles pertaining to the regular judiciary must apply to provisional judges.<sup>415</sup> Whereas provisional appointments should be of an exceptional nature,<sup>416</sup> safeguards for the independence of the provisional judiciary must be established. In this regard, the conclusion of the term of office should be predetermined through a condition, such as a deadline or the organisation and completion of a competitive recruitment procedure based on ability and professional quali-

409 See, *inter alia*: Inter-American Court of Human Rights, Judgment of 31 January 2001, Case of the *Constitutional Court v. Peru*; Judgment of 22 November 2005, *Palamara Iribarne v. Chile*; Judgment of 5 August 2008, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*; Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*; and European Court of Human Rights: Judgment of 22 June 1989, *Langborger v. Sweden*, Application N° 11179/84; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N° 7819/77; 7878/77; Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Application N° 6878/75; 7238/75; Judgment of 1 October 1982, *Piersack v. Belgium*, Application N° 8692/79.

410 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19. See also, *inter alia*, the *Concluding Observations of the Human Rights Committee on Bolivia*, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 34; *Lebanon*, UN Doc. CCPR/C/79/Add.78, 10 April 1997, para. 15; *Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 1 November 2001, para. 14; *Slovakia*, UN Doc. CCPR/C/79/Add.79, 30 July 1997, para. 18; *Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, 25 July 2002, para. 12; *Paraguay*, UN Doc. CCPR/C/PRY/CO/2, 28 October 2005, para. 17.

411 See *inter alia*: *Concluding Observations of the Human Rights Committee on the United States of America*, UN Doc. A/50/40, paras. 266-304, 288 and 301; and *Armenia*, UN Doc. CCPR/C/79/Add.100, 4 November 1998, para. 8.

412 See European Court of Human Rights: Judgment of 22 June 1989, *Langborger v. Sweden*, Application N° 11179/84, para. 32; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N° 7819/77; 7878/77, para. 78.

413 Inter-American Court of Human Rights, Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*, para. 72.

414 *Ibid.*

415 In general, concerning provisional judges, see *infra*. See also Inter-American Court of Human Rights, Judgment of 5 August 2008, *Apitz Barbera et Al. ("First Court of Administrative Disputes") v. Venezuela*, para. 43.

416 *Ibid.*

cations, involving either a selection or an exam, aimed at the replacement of the provisional judges.<sup>417</sup>

Noting the variety of existing systems for the selection and appointment of judges worldwide, the UN Special Rapporteur on the independence of judges and lawyers underlined that selection and appointment procedures are crucial to strengthening judicial independence.<sup>418</sup> The election of judges by the legislature as well as involvement of the executive in the selection and appointment of judges raises serious concerns as to the potential for politicisation of the process and the adverse effects such involvement can have on the protection of the rights of individuals before the State.<sup>419</sup> The Human Rights Committee considered that the intervention of the executive in the selection of judges, by means of casting votes, undermined the independence of the judiciary.<sup>420</sup> The Special Rapporteur has highlighted that:

*“in times of transition from an authoritarian to a democratic system, it is crucial that the population gain confidence in a court system administering justice in an independent and impartial manner, free from political considerations.”*<sup>421</sup>

Although international law standards do not prescribe an exclusive method of appointment of judges, a number of international instruments and human rights jurisprudence contain the basic requirements to be taken into account, particularly regarding the role of the other branches of power and the characteristics of the body placed in charge of appointments. Indeed, international standards promote the principle that the selection, recruitment and appointment of judges should be located in an authority independent of the executive and legislative powers.<sup>422</sup> With a view to guaranteeing the full independence and impartiality of the judiciary, the Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers have recommended the establishment of independent bodies charged with the responsibility of appointing judges.<sup>423</sup>

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<sup>417</sup> *Ibid.*

<sup>418</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 24.

<sup>419</sup> *Ibid.*, paras. 25-26.

<sup>420</sup> *Concluding Observations of the Human Rights Committee on Liechtenstein*, UN Doc. CCPR/CO/81/LIE, 28 July 2004, para. 12.

<sup>421</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, of 24 March 2009, para. 25.

<sup>422</sup> See *inter alia*: Principles 13-17 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*; Principle A, paragraph 4 (h) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Council of Europe Recommendation CM/Rec(2010)12 on *judges: independence, efficiency and responsibilities*, Chapter VI.46; Article 9 of the *Universal Charter of the Judge*; Article 11 of the *Statute of the Ibero-American Judge*; Operative paragraph 1.3 of the *European Charter on the Statute for Judges*; Principle II.1 of the *Latimer House Guidelines*.

<sup>423</sup> See *inter alia*: *Concluding Observations of the Human Rights Committee on Tajikistan*, UN Doc. CCPR/

### iii) Security of tenure of judges

A fundamental safeguard of the independence and impartiality of the judiciary is the universally well recognised principle of the security of tenure of judges.<sup>424</sup> As affirmed in several international and regional instruments, independently of the system of appointment or nomination, judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office is reached. The European Court of Human Rights has indicated that the independence of any judge presumes that there is a fixed term for the position<sup>425</sup> and a guarantee against external pressures.<sup>426</sup> The Judicial Integrity Group, in its Commentary of *Bangalore Principles of Judicial Conduct*, has concluded that one of the “minimum conditions for judicial independence [is] Security of tenure: i.e. a tenure, whether for life, until an age of retirement, or for a fixed term, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.”<sup>427</sup>

States have an obligation to provide objective and clear procedures by law or Constitution for the appointment, remuneration, tenure, promotion, suspension, dismissal and disciplinary sanctions of judges.<sup>428</sup> The principle of irremovability is a corollary of the independence of judges.<sup>429</sup> Therefore, the principle of the independence of the judiciary is contravened where the removal procedure has

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CO/84/TJK, 22 July 2005, para. 17; Congo, UN Doc. CCPR/C/79/Add.118, 22 March 2000, para. 14; Honduras, UN Doc. CCPR/C/HND/CO/1/CRP.1, 27 October 2006, para. 16. See also *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, paras. 27 and ff.

- 424 See *inter alia*: Principles 11 and 12 of the UN *Basic Principles on the Independence of the Judiciary*; Principle A(4)(l) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Council of Europe Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, Chapter VI.49. See also Principle 18 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*; Principle 3 of the *Burgh House Principles on the Independence of the International Judiciary Article 8 of the Universal Charter of the Judge*; Article 14 of the *Statute of the Ibero-American Judge*. See additionally *Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42 – Addendum - Mission to South Africa*, UN Doc. E/CN.4/2001/65/Add.2, 25 January 2001, p. 4; Judicial Integrity Groups, *Commentary of Bangalore Principles of Judicial Conduct*, March 2007, p. 36. Inter-American Commission on Human Rights: *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229, and *Report on the Situation of Human Rights in Mexico* (1998), OAS Doc. OEA/Ser.L/V/II.100, Doc. 7 rev.1, 24 September 1998, Chapter V, para. 394; *Concluding Observations of the Human Rights Committee on Georgia*, UN Doc. CCPR/CO/74/GEO, 28 March 2002, para. 12.
- 425 Judgment of 22 June 1989, *Langborger v. Sweden*, Application N<sup>o</sup> 11179/84, para. 32; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N<sup>o</sup> 7819/77; 7878/77, para. 78; Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Application N<sup>o</sup> 6878/75; 7238/75, para. 55.
- 426 *Ibid.*
- 427 Judicial Integrity Group, *Commentary of Bangalore Principles of Judicial Conduct*, March 2007, page 36.
- 428 Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19; *Concluding Observations of the Human Rights Committee on Slovakia*, UN Doc. CCPR/C/79/Add.79, 30 July 1997, para. 18.
- 429 European Court of Human Rights, Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N<sup>o</sup> 7819/77; 7878/77, para. 80.

not followed the ordinary procedural rules<sup>430</sup> or where the executive dismisses a judge, without providing a judicial protection or specific reasons for the removal before the expiry term of office.<sup>431</sup>

These guiding principles are also applicable to “provisional judges”.<sup>432</sup> States have the obligation to guarantee judicial independence for both titular and provisional judges, inasmuch as the parties to a judicial proceeding have the right to have their case heard by an independent judge.<sup>433</sup> Because provisional judges will maintain their position only for a limited period of time, they are more vulnerable to external pressure.<sup>434</sup> It is thus necessary that the security of tenure be modelled according to the time period involved, with guarantees and benefits for the duration of their tenure.<sup>435</sup>

#### iv) Provisional or temporary judges

In general, the Human Rights Committee has considered that national regulations establishing in practice an *interim* or provisional *de facto* status of judges, for example by allowing for the removal of judges as a result of the performance of their professional duties, constitute a threat to the independence of the judiciary.<sup>436</sup> Thus, regarding a system of temporary judges such as that adopted by Peru in the 1990s, the Human Rights Committee has concluded that this system “undermines the independence of the judiciary and the rule of law”.<sup>437</sup>

The UN Special Rapporteur on the independence of judges and lawyers has similarly expressed concern at the use of temporary or *interim* judges, who are appointed on a provisional basis without security of tenure, in breach of Principles 11 and 12 of the *United Nations Basic Principles on the Independence of the Judiciary*.<sup>438</sup> The Special Rapporteur considers that provisional judges who are provided with the same powers as permanent judges and remain in charge for a prolonged time constitute a threat to the independence of the judiciary, inasmuch as they are more vulnerable to pressure from the executive and to tensions

430 Human Rights Committee, Views of 31 July 2003, *Adrien Mundy Busyo et al. v. Democratic Republic of Congo*, Communication N° 933/2000, para. 5.2, UN Doc. CCPR/C/78/D/933/2000, 19 September 2003.

431 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 20.

432 In general, on provisional judges, see *infra*.

433 Inter-American Court of Human Rights, Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*, para. 114.

434 *Ibid.*, para. 117.

435 *Ibid.*, para. 116.

436 *Concluding observations of the Human Rights Committee on Venezuela*, UN Doc. CCPR/CO/71/VEN, 26 April 2001, para. 13.

437 *Concluding observations of the Human Rights Committee on Peru*, UN Doc. CCPR/CO/70/PER, 15 November 2000, para. 10.

438 *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, UN Doc. E/CN.4/1998/39, 12 February 1998, para. 183.

within the judiciary itself.<sup>439</sup> These judges, because they can be freely removed or suspended, may be conditioned in their actions and cannot be protected from external pressure exercised either by the executive or by other branches of the judiciary.<sup>440</sup> At the same time, the configuration of these appointments as a “short probation” (as in the case of the so-called “acting judges”) is a further instance of the lack of the security of tenure.<sup>441</sup>

Where there are a high percentage of judges with this temporary status, the right of individuals to justice is impaired.<sup>442</sup> For example, the situation of persons accused of security-related crimes before a judge who enjoys no security of tenure “constitutes *prima facie* a violation of the right to be tried by an independent tribunal.”<sup>443</sup>

### **v) Exceptions and conditions required to admit provisional or temporary judges**

There may be situations wherein it is appropriate, or even necessary, to resort to provisional or temporary judges. In exceptional circumstances, such as institutional or judicial collapse or a vacuum of judicial power as a consequence of an armed conflict, it may become necessary to augment the capacity of the judiciary by expanding the number of active judges. In such cases, however, the fundamental principles regarding appointment and security of tenure must be strictly respected, in order to preserve the independence of the judiciary and to guarantee fair trials.<sup>444</sup>

When temporary or provisional judges are needed to ensure a fair administration of justice and to face an institutional collapse, the same guarantees must be accorded to them that are enjoyed by judges with a fixed term of office, on the basis of the identity of the functions performed.<sup>445</sup> In the same manner, a dismissal procedure against a provisional judge must respect the same guaran-

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439 *Ibid.* In the same line, see *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 45.

440 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OAS Doc. OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, para. 159. See also Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 236.

441 *Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42 – Addendum - Mission to South Africa*, UN Doc. E/CN.4/2001/65/Add.2, 25 January 2001, para. 100.

442 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OAS Doc. OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, para. 160.

443 *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy – Addendum: Report on the mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, para. 106.

444 See *supra*.

445 *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 62.

tees of a fair trial provided when such a procedure is conducted by an independent body.<sup>446</sup>

As highlighted by the Inter-American Court of Human Rights in the case of provisional judges in Venezuela, “tenure is a guarantee of the judicial independence that at the same time is made up by the following guarantees: continuance in the position, an adequate promotions process, and no unjustified dismissals or free removal. This means that if the State does not comply with one of these guarantees, it affects the tenure and, therefore, it is not complying with its obligation to guarantee judicial independence.”<sup>447</sup>

### **3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences**

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In its *Congress on “The Rule of Law in a Free Society”* (New Delhi, 1959), the ICJ concluded that the independence of the judiciary should be safeguarded by certain measures, including co-operation between at least two branches of the State (i.e. judiciary and legislative) on the appointment of judges, and pointed out that the “irremovability” of the judiciary is an important safeguard of the Rule of Law. Its Committee on the Judiciary and the Legal Profession under the Rule of Law concluded that:

*“1. An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. [...] It is implicit in the concept of independence set out in the present paragraph that provision should be made for the adequate remuneration of the Judiciary and that a judge’s right to the remuneration settled for his office should not during his term of office be altered to his disadvantage. [...]*

*3. The principle of irremovability of the Judiciary, and their security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence, particularly if he is seeking re-appointment, he is subject to greater difficulties and pressure than a judge who enjoys security of tenure for his working life.*

*4. The reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at*

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<sup>446</sup> *Ibid.*

<sup>447</sup> Inter-American Court of Human Rights, Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*, para. 79.

*least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.*<sup>448</sup>

Regarding the issue of the appointment of judges, in its *Conference on the Rule of Law* in Lagos (Nigeria 1961) the ICJ stated that: “In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the Judiciary, it is recommended: a) that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the *Conseil supérieur de la magistrature* in the African French-speaking countries”<sup>449</sup>.

In its Congress on *Executive Action and the Rule of Law* (Rio de Janeiro, 1962), the ICJ highlighted that the exercise of judicial control demanded the full independence of the judiciary<sup>450</sup> and called attention to the fact that security of tenure and freedom from direct or indirect control by the Executive are crucial elements for the independence of the judiciary.<sup>451</sup>

In its *Conference of French-speaking African Jurists* (Dakar, 1967), the ICJ reaffirmed that “the independence of the judiciary is the fundamental element in a system based on the separation of powers and ensuring the protection of human rights against the arbitrary exercise of power”<sup>452</sup> and that “since complete independence of the courts is the best guarantee the individual can have against the arbitrary exercise of executive power, it is indispensable that the principle of the separation of powers should be scrupulously observed.”<sup>453</sup>

In its *European Conference of Jurists* (Strasbourg, 1968), the ICJ reiterated that “The independence of the judiciary should be secured. [...] In order to ensure the independence of judges it is essential that their appointment should be free from political interference or patronage; they should enjoy full security of tenure and should receive adequate remuneration which cannot be altered to their disadvantage during their term of office.”<sup>454</sup>

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448 Conclusions of Committee IV on “the Judiciary and the Legal Professions under the Rule of Law” of the New Delhi Congress, reaffirmed by the Congress in its final declaration. See *CJIL Bulletin – Special Issue, The Independence of Judges and Lawyers: A Compilation of International Standards*, N° 25-26, April- October 1990, pages 84 and 85.

449 Conclusion N° 3 of the Committee “The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society”. The ICJ adopted all resolutions issued by the Committees of the Conference in its final statement, *The Law of Lagos*.

450 Report of Committee II “Control by the Courts and the Legislature over Executive Action”, A.2, *Congress of Rio de Janeiro*, 1962.

451 Paragraph 1 of the *Resolution of Rio, 1962*.

452 Conclusion 1,2,b of Committee II, *Dakar Conference*, 1967.

453 Article IV,4 of Committee I, *Dakar Conference*, 1967.

454 Conclusion 3 of Part I, Essential Safeguards. See “European Conference of Jurists on the Individual and the State”, in *Bulletin of the International Commission of Jurists*, No. 36, December 1968, page 5.

In the ICJ Congress on *Human Rights in an Undemocratic World* (Vienna, 1977), the ICJ restated that “[t]he independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential to any society which has a respect for the Rule of Law.”<sup>455</sup>

## 4. Selected excerpts from international standards

### 2. (i) General considerations

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

— *Principle 1 of the UN Basic Principles on the Independence of the Judiciary*

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. [...] A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

— *Principle 1 of the Bangalore Principles of Judicial Conduct*

The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities.

— *Principle A(4)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.*

The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.

— *Chapter I.7 of the Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities of the Council of Europe*

The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society

<sup>455</sup> See “25th Anniversary Commission Meeting – Conclusions”, “The Rule of Law in Emerging Forms of Society: One-Party States”, para. 5, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 60.

observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

— *Principle 4 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence. [...] Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers.

— *Principles 1 and 2 of the Universal Charter of the Judge*

The Statute for Judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights.

— *Principle 1 of the European Charter of the Statute for Judges*

As a guarantee for the defendants, the Judges are independent in the exercise of their jurisdictional functions and must only comply with the Constitution and the law, with strict compliance to the principle of legal hierarchy. [...] The other powers of the State and, generally speaking, all the national or international authorities, institutions and organisms, as well as the various groups and social, economic and political organisations, must respect and make the independence of the Judiciary efficient.

— *Articles 1 and 2 of the Statute of the Ibero-American Judge*

The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive[...]. The Executive shall not have control over judicial functions.

— *Standards 2 and 5 of the Minimum Standards of Judicial Independence of the International Bar Association*

## **2. (ii) Appointment methods must guarantee the independence of the Judiciary**

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property,

birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

— *Principle 10 of the UN Basic Principles on the Independence of the Judiciary*

Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity. [...] There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory. [...] The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers. [...] However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice. [...] The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

— *Chapters VI.44-48 of the Recommendation CM/Rec(2010)12 on judges: independence, inefficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe*

The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary. [...] The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability[...]. No person shall be appointed to

judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

— *Principle A(4)(h), (i) and (k) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

— *Article 9 of the Universal Charter of the Judge*

The rules of the statute [...] base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

— *Paragraph 2.1 of the European Charter on the Statute for Judges*

The process of selection and appointment have to be realised through organs predetermined by the law, which also apply predetermined and public processes assessing objectively the professional knowledge and merits of the applicants. [...] The mechanisms of selection shall be adapted to the necessities of each country and shall be directed, in any case, to the objective determination of the applicants' suitability. [...] Transfers and promotions of judges shall be decided on objective criteria predetermined in the law, based principally, on the professional experience and capacity of the applicants.

— *Articles 11, 12 and 17 of the Statute of the Ibero-American Judge*

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

— *Guideline II.1 of the Latimer House Guidelines*

Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority. Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

— *Standard 3 of the Minimum Standards of Judicial Independence of the International Bar Association*

## 2. (iii) Security of tenure of judges

Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

— *Principle 12 of the UN Basic Principles on the Independence of the Judiciary*

Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.

— *Principle A(4)(l) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.

— *Chapter VI.49 Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities of the Council of Europe*

Judges must have security of tenure.

— *Principle 18 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

— *Article 8 of the Universal Charter of the Judge*

Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

— *Article 1(b) of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence*

Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

— *Principle 3 of the Burgh House Principles on the Independence of the International Judiciary*

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

— *Principles 8 of the Universal Charter of the Judge*

As a guarantee of their independence, the judges cannot be removed from the moment in which they acquire the said category and join the Judicial Career, in the terms established by the Constitution.

— *Article 14 of the Statute of the Ibero-American Judge*

Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

— *Standard 22 of the Minimum Standards of Judicial Independence of the International Bar Association*

## 2. (iv) Provisional or temporary judges

At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.

— *Principle 22 (a) of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

— *Standards 23 of the Minimum Standards of Judicial Independence of the International Bar Association*

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

— *Guideline II.1 of the Latimer House Guidelines*

## **2. (v) Exceptions and conditions required to admit provisional or temporary Judges**

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

— *Guideline II.1 of the Latimer House Guidelines*

## Principle 7

Since the protection of human rights may be precarious in times of crisis, lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and the defence of human rights. All branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights. In particular, lawyers must not be identified with their clients or clients' causes as a result of discharging their functions. The authorities must desist from and protect against all such adverse actions. Lawyers must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients.

## Commentary

### 1. National unlawful practices

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In times of crisis, lawyers and particularly those who are active in the defence of human rights become the targets of governmental authorities. State authorities may act, by posing legal obstacles or direct attacks, to prevent lawyers from performing their professional duties. Human rights defenders are particularly vulnerable in this regard. Lawyers representing victims of human rights violations or their relatives in judicial proceedings are often harassed, threatened with death, killed or subjected to enforced disappearance.

Lawyers may be subjected to harassment, intimidation and threats; assault, including physical violence; extrajudicial killing; arbitrary detention; enforced disappearance; restrictions on freedom of movement; judicial or disciplinary proceedings; and economic or other sanctions. In reprisal for their human rights activities, lawyers have sometimes been threatened with being disbarred for alleged misconduct violating the rules of the legal profession, or have been placed under investigation for alleged financial irregularities. In some instances, lawyers may be subject to investigation or criminal charges based on alleged support for their client's purported criminal activities. Frequently, lawyers have faced disciplinary proceedings and have been sanctioned by their professional boards, resulting in some instances in their disbarment or revocation of their licence to practice.

In Syria, a human rights lawyer, Muhannad Al-Hasani who is an ICJ Commissioner and President of the Syrian Human Rights Organization was convicted following an unfair trial for the crimes of “*weakening national sentiments and encouraging racist and sectarian feelings*”, and “*transferring false and exaggerated news that weakens national sentiments*”.<sup>456</sup> The charges against him were in reaction to his conducting work as a trial observer in a case before the State Security Court.

In the Republic of Dagestan in the Russian Federation, a lawyer was accused of insulting “a representative of state power”.<sup>457</sup> She was charged with assaulting police officers the day after she filed a complaint alleging abuse of powers against the officers for having subjected her to beatings when she tried to access her client who was being held in the police department.<sup>458</sup>

Following the December 2010 protests in Minsk, after the presidential elections, there has been an increase of harassment and persecution against lawyers.<sup>459</sup> Some have had their licences annulled and have been subject to disciplinary proceedings because of their participation in “unsanctioned” meetings or because of statements made that were deemed to be a distortion of the facts.<sup>460</sup> In exercising this repression, the Government of Belarus has taken adverse measures against lawyers as a consequence of the discharge of their professional duties or for exercising their freedom of expression.<sup>461</sup>

## 2. International legal framework

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### i) General considerations

The essential role of lawyers in defending human rights and the Rule of Law has been underscored repeatedly by United Nations authorities,<sup>462</sup> regional intergovernmental organisations<sup>463</sup> and international and regional human rights bodies

<sup>456</sup> ICJ, *Syria: ICJ Commissioner Muhannad Al-Hasani sentenced to three years imprisonment: the ICJ calls for his immediate and unconditional release* - 23 June 2010, available at [http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23019](http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal_Documentation&id=23019) (accessed on 28 January 2011).

<sup>457</sup> ICJ, *Russian Federation: ICJ observes hearing in prosecution of Dagestan Lawyer*, Press Release, 29 November 2010, available at [http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23594](http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal_Documentation&id=23594) (accessed on 28 January 2011).

<sup>458</sup> *Ibid.*

<sup>459</sup> ICJ, *Belarus: ICJ Calls for End to Harassment of Lawyers*, Press Release, 12 January 2011, available at [http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23655](http://www.icj.org/default.asp?nodelD=349&sessID=&langage=1&myPage=Legal_Documentation&id=23655) (accessed on 24 March 2011).

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.*

<sup>462</sup> *Strengthening of the rule of law - Report of the Secretary General to the United Nations General Assembly*, UN Doc. A/57/275, 5 August 2002, para. 41; Commission on Human Rights, Resolution 2004/33, *Independence and Impartiality of the judiciary, jurors and assessors and the independence of lawyers*, UN Doc. E/CN.4/RES/2004/33, 19 April 2004.

<sup>463</sup> See *inter alia*: European Parliament, *Resolution on the legal professions and the general interest in the*

or instruments.<sup>464</sup> Lawyers necessarily play a critical role in protecting the right against arbitrary detention by challenging arrests and filing writs of *habeas corpus*.<sup>465</sup> They act to ensure a full and effective right to a fair trial, to challenge where necessary the court's independence and impartiality and to ensure that the defendants' rights are respected.<sup>466</sup> Lawyers also advise and represent victims of human rights violations and their relatives in criminal proceedings against alleged perpetrators of such violations and in lawsuits aimed at obtaining remedy and reparation. They play a vital role in combating impunity. Furthermore, lawyers are typically in a position to challenge before the courts national legislation that undermines basic principles of human rights and the Rule of Law.<sup>467</sup> The European Parliament has "Recognise[d] fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice".<sup>468</sup> The European Parliament has also reaffirmed "the importance of rules which

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*functioning of legal systems*, P6\_TA(2006)0108, 23 March 2006.

- 464 See *inter alia*: Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, doc. 9 rev. 1, 26 February 1999, p. 245 (chapter VII) and *Second Report on the Human Rights Situation in Peru*, OAS Doc. OEA/Ser.L/V/II.106 Doc. 59 rev., 2 June 2000, para. 133 (chapter II, C).
- 465 Human Rights Committee, *General Comment No. 20, Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992, para. 11; *Concluding Observations of the Human Rights Committee on Tajikistan*, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 12; *Thailand*, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 15. See *inter alia*: *UN Basic Principles on the Role of Lawyers*; *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; *Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer* of the Committee of Ministers to Member States of the Council of Europe; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. See also *infra* Principle no. 9 and its Commentary.
- 466 See, for example, the Principle 1 of the *UN Basic Principles on the Role of Lawyers*; Article 14(3)(d) of the *International Covenant on Civil and Political Rights*; Article 7(1)(c) of the *African Charter on Human and Peoples' Rights*; Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 8 of the *American Convention on Human Rights*; Principle 11 of the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.
- 467 See, for example, Principles 4 and 12 of the *United Nations Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; Articles 1, 9, 11 of the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; Principle 5 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 13 of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; Principles 3 and 4 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Rules 18, 60 and 78 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*; Rules 7.1 and 15.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*; Rule 93 of the *Standard Minimum Rules for the Treatment of Prisoners*; Articles 17 and 18 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.
- 468 European Parliament, *Resolution on the legal professions and the general interest in the functioning of legal systems*, P6\_TA(2006)0108, 23 March 2006, para. 1.

are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the public interest.”<sup>469</sup>

The independence of lawyers is essential for a sound administration of justice, and for upholding democracy and the Rule of Law.<sup>470</sup> In this regard, States, when adopting the necessary legislation, must ensure that the criteria for accessing the Bar and maintaining such membership do not undermine the independence of lawyers.<sup>471</sup> In meeting their obligation to respect and uphold the independence of judges and lawyers States should adopt effective measures, including legislation and enforcement, to enable lawyers to perform their duties without harassment or intimidation.<sup>472</sup>

States must protect lawyers from any interference with their work, to enable them to discharge their professional functions in an independent manner. Such interference can range from steps to prevent lawyers from communicating with their clients to threats and physical attacks. In this respect, the UN Special Rapporteur on the independence of judges and lawyers has concluded that:

*“[f]reedom to carry out their legal work is paramount if lawyers are to play their given role in society. Preconditions for lawyers to adequately provide legal counselling include their unhindered access to any relevant information and the confidentiality of their relationship with their clients.”*<sup>473</sup>

## ii) Protection against violence, intimidation, threats or discrimination

An independent legal profession requires that lawyers must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attacks, harassment and persecution, including when they act in defence of human rights.<sup>474</sup> International instruments on human rights defenders affirm the duty of States to protect such defenders, including those who

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469 *Ibid.*, para. 4.

470 *Concluding Observations of the Human Rights Committee on Belarus*, UN Doc. CCPR/C/79/Add.86, 6 November 1997, para. 14.

471 *Concluding Observations of the Human Rights Committee on Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 1 November 2001, para. 14.

472 Commission on Human Rights, Resolution 2004/33, *Independence and Impartiality of the judiciary, jurors and assessors and the independence of lawyers*, UN Doc. E/CN.4/RES/2004/33, 19 April 2004.

473 *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. A/64/181, 28 July 2009, para. 103. See also *infra* Principle no. 8 and its Commentary.

474 See, among others, the UN *Basic Principles on the Independence of the Judiciary*; the UN *Guidelines on the Role of Prosecutors*; the UN *Basic Principles on the Role of Lawyers*; the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; Council of Europe Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer of the Committee of Ministers to Member States.

are lawyers, from attacks, harassment and improper interference and to take all necessary measures to ensure the protection of such persons.<sup>475</sup>

The Inter-American Commission on Human Rights has found that harassment and intimidation of lawyers, in situations where they are defending persons accused of terrorism, violates the *American Convention on Human Rights*.<sup>476</sup> The Inter-American Commission underscores that “[w]henver criminal proceedings are used as a tool to harass defense attorneys directly, the right of the victim to his or her mental and moral integrity is compromised, and with it respect for Article 5 of the American Convention. These proceedings may also be manipulated for the purpose of publicly accusing attorneys who defend persons accused of ‘terrorism’. As the latter form a category considered ‘enemies of the State’ by the security forces, this can place the physical security and even the life of these attorneys at risk.”<sup>477</sup> Harassment and intimidation of lawyers is sometimes undertaken via “legal” measures, for example through the withholding of licenses to practice. The Inter-American Commission has recommended repeatedly to States to take the necessary measures to guarantee proper protection for lawyers, so that they may properly perform their special tasks.<sup>478</sup>

The Human Rights Committee has also identified other methods of improper interference with the legitimate exercise of the legal profession, in particular regarding the activities of human rights lawyers. In the case of a French lawyer expelled from Madagascar, apparently as a result of human rights activities he carried out in cooperation with international organisations and the Human Rights Committee itself, the Committee stated that such motivation for expulsion was incompatible with the ICCPR.<sup>479</sup> The Human Rights Committee has also considered that the detention of a lawyer for 50 hours without charges in retaliation for his human rights activities was arbitrary and in violation of the ICCPR.<sup>480</sup> In another case, in which a lawyer was charged at the instance of the Attorney-General with spreading false rumours as a consequence of an enquiry he made concerning his

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475 See *inter alia*: the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Guidelines on Human Rights Defenders of the European Union; the Resolution on the protection of human rights defenders in Africa of the African Commission on Human and Peoples' Rights (4 June 2004); General Assembly of the Organization of American States, Resolutions AG/Res. 1671 (XXIX-o/99), 7 June 1999, AG/Res. 1711 (XXX-O/00), 5 June 2000, and AG/Res. 2412 (XXXVIII-O/08), 3 June 2008.

476 Inter-American Commission on Human Rights, *Second Report on the Human Rights Situation in Peru*, OAS Doc. OEA/Ser.L/V/II.106 Doc. 59 rev., 2 June 2000, paras. 133-148 (chapter II, C).

477 *Ibid.*, para. 149.

478 See *inter alia*, Inter-American Commission on Human Rights, *Annual Report 1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Part II “Recommendations”; and *Report on the Situation on Human Rights in Paraguay*, OAS Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, 31 January 1978, Chapter “Conclusions and Recommendations”, Recommendation No. 5.

479 Human Rights Committee, Views of 3 April 1987, *Eric Hammel v. Madagascar*, Communication No. 155/1983, UN Doc. CCPR/C/29/D/155/1983, 3 April 1983.

480 Human Rights Committee, Views of 5 November 1987, *Ramón B. Martínez Portorreal v. Dominican Republic*, Communication No. 188/1984, UN Doc. CCPR/C/31/D/188/1984, 5 November 1987.

client's state of health, the Human Rights Committee found that the right to legal assistance of the detainee had been unlawfully impaired.<sup>481</sup>

State authorities have the duty to prevent attacks and harassment against lawyers and to protect them by taking the measures necessary to ensure their security and ability to perform their duties. They are also required to investigate and to bring to justice the alleged perpetrators of such attacks. The lack of effective measures of protection or of public condemnation by the authorities, as well as the absence of investigations and prosecutions against the alleged perpetrators, create an atmosphere of impunity that may serve to inhibit members of the legal profession from acting in defence of human rights and of the Rule of Law. The State's failure to act aggravates the vulnerable condition of lawyers.<sup>482</sup>

States have the general obligation to safeguard the security of lawyers, when they are threatened as a result of discharging their functions.<sup>483</sup> This obligation entails initiation of a prompt, impartial and independent investigation into any case of harassment or physical assault against lawyers.<sup>484</sup> Such accountability also serves a preventive function.<sup>485</sup> In a case involving the killing of a Colombian human rights lawyer, the Inter-American Court of Human Rights recalled that:

*“States must implement the necessary measures to ensure that those who denounce human rights violations can carry out their activities freely; to protect human rights defenders when they are threatened in order to avoid attacks on their life and personal integrity; to generate the conditions necessary to eradicate human rights violations by State agents or individuals; to abstain from imposing obstacles to the work of human rights defenders; and investigate effectively and efficiently violations committed against them, in order to combat impunity.”*<sup>486</sup>

### iii) Lawyers must not be identified with their clients or their causes

The principle that lawyers must not be identified with their clients or their causes is recognised by several international standards as well as by the charters of bar

481 Human Rights Committee, Views of 24 March 1983, *Dave Marais, Jr v. Madagascar*, Communication No. 49/1979, UN Doc. CCPR/C/18/D/49/1979, 24 March 1983.

482 See *inter alia*: Inter-American Court of Human Rights, Judgment of 27 November 2008, *Valle-Jaramillo et al. v. Colombia*; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas*, OAS Doc. OEA/Ser.L/V/II.124, Doc. 5 rev. 1, 7 March 2006.

483 Principle 17 of the UN *Basic Principles on the Role of Lawyers* and Principle 1(b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

484 *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. A/64/181, 28 July 2009, para. 69; see also para. 107 (b), in which, the Special Rapporteur recalls that “[a]cts of harassment, threats or physical assaults against lawyers should be promptly investigated by an impartial and independent body”.

485 *Ibid.*, para. 69.

486 Inter-American Court of Human Rights, Judgment of 27 November 2008, *Valle-Jaramillo et al. v. Colombia*, para. 92.

associations around the world.<sup>487</sup> This principle, which guarantees that lawyers can perform their professional duties fairly in absolute independence and without improper interference, has been frequently breached, especially with regard to lawyers defending clients in cases concerning terrorism, drug trafficking, organised crime, corruption and politically sensitive cases.<sup>488</sup>

For many years, the UN Special Rapporteur on the Independence of Judges and Lawyers raised concerns regarding the increasing number of cases of lawyers being identified with their clients and consequently being made themselves the subject of accusation.<sup>489</sup> Such practices may amount to intimidation and harassment by the authorities.<sup>490</sup> Under international standards, in cases in which there exists evidence that a lawyer may have adopted the conduct of his or her client, governments must refer complaints to the appropriate disciplinary body of the legal profession which is competent to decide upon the complaint.<sup>491</sup> The Special Rapporteur highlighted that:

*“[i]n the exercise of their duty to defend their clients against any unlawful action lawyers are too often identified by governmental and other State bodies, and even sometimes the general public, with the interests and activities of their clients. This prejudice obviously contradicts the role of lawyers in a democratic society. Lawyers are not expected to be impartial in the manner of judges, yet they must be as free as judges from external pressures and interference. This is crucial if litigants are to have trust and confidence in them.”*<sup>492</sup>

In order to guarantee the independent functioning of lawyers in the performance of their duties, States must refrain from expressing comments in public identifying a lawyer with his or her clients.<sup>493</sup>

#### **iv) Immunity and disciplinary proceedings**

According to international standards, lawyers should enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in

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487 See *inter alia*: Principle 18 of the UN *Basic Principles on the Role of Lawyers*; Principle 1(g) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and Principle 7 of the *Standards for the Independence of the Legal Profession* of the International Bar Association.

488 *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. A/64/181, 28 July 2009, para. 64.

489 *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. E/CN.4/1998/39, para. 179.

490 *Ibid.*

491 *Ibid.*, para. 181.

492 *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc A/64/181, 28 July 2009, para. 12.

493 *Ibid.*, para. 107 (a).

their professional appearances before a judicial body or other legal or administrative authority.<sup>494</sup>

This safeguard does not exclude, however, their accountability for situations of misconduct or criminal activities.<sup>495</sup> Indeed, like other individuals with public responsibilities, lawyers must conduct themselves according to ethical standards. International standards provide basic procedural guarantees and requirements to be followed in disciplinary proceedings against lawyers in order to conform to international law and to avoid arbitrary measures.<sup>496</sup>

These requirements of due process establish that lawyers may only be sanctioned pursuant to a procedure that respects a number of guarantees. As a primary condition, procedures carried out against lawyers must be fair and expeditious and must guarantee the right to a fair trial and to assistance by a lawyer of the accused's own choice.<sup>497</sup> Furthermore, the procedure must be brought before either an impartial disciplinary body of the legal profession or an independent statutory authority or a court, with the possibility of independent judicial review.<sup>498</sup> In any case, these proceedings may never contemplate disciplinary measures for the act of performing lawful professional duties such as representing a particular client or making a statement in court.

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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In the Act of Athens, adopted at the *Congress of Athens* in 1955, the ICJ declared: "Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial."<sup>499</sup>

The Congress emphasised that "[t]he lawyer must be exempted from any claim for damages, either personal or professional, based on his assurance of a proper defence not offending the dignity of the court."<sup>500</sup>

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494 Principle 20 of the *UN Basic Principles on the Role of Lawyers*; Article 89 of the *Singhvi Declaration*; Principle I(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and Principle 11 of the *Standards for the Independence of the Legal Profession* of the International Bar Association.

495 See also *infra* Principle no. 13 and its Commentary.

496 Principles 27, 28 and 29 of the *UN Basic Principles on the Role of Lawyers*; Principle I(n), (o) and (p) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and Principles 7 and following of the *Standards for the Independence of the Legal Profession* of the International Bar Association.

497 Principle 27 of the *UN Basic Principles on the Role of Lawyers*.

498 Principle 28 of the *UN Basic Principles on the Role of Lawyers*.

499 Paragraph 4, *Act of Athens*, 1955.

500 Resolution I "Fundamental principles of penal law" (Committee on Criminal Law), *Congress of Athens*, 1955.

In the *Congress on “The Rule of Law in a Free Society”* (New Delhi, 1959), the ICJ reaffirmed that a free and independent legal profession is “essential to the maintenance of the Rule of Law.”<sup>501</sup> The ICJ Congress highlighted that “[t]he primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.”<sup>502</sup> The Congress further pointed out “that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy [...] Once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause[...]. It is the duty of the lawyer which he should be able to discharge without fear of consequences to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.”<sup>503</sup>

In its *Conference on the Rule of Law* in Lagos (Nigeria, 1961), the ICJ expressed the view that “[t]o maintain respect for the rule of law it is necessary that the legal profession should be free from any interference. (b) In countries where an organized Bar exists, the lawyers themselves should have the right to control the admission to the profession and the discipline of the members according to rules established by law. (c) In countries where an organized Bar does not exist, the power to discipline lawyers should be exercised by the Judiciary in consultation with senior practising lawyers and never by the Executive.”<sup>504</sup>

In its Congress of Rio on *Executive Action and the Rule of Law* (Brazil, 1962), the ICJ recalled that “[t]he exercise of judicial control demands [...] complete professional freedom for lawyers.”<sup>505</sup>

In the ICJ Congress on *Human Rights in an Undemocratic World* (Vienna, 1977), the ICJ affirmed that “[t]he independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their client.”<sup>506</sup> The ICJ Congress also reiterated that “[w]here a state of siege or

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501 Resolution “The legal profession under the Rule of Law” (Committee IV), adopted by the *Congress of New Delhi, 1959*.

502 *Ibid.*

503 Resolution “The Judiciary and the Legal Profession under the Rule of Law” (Committee IV), Clause IX, *Congress of New Delhi, 1959*.

504 Conclusion of Committee III “The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society”, *Lagos, 1961*.

505 Resolution “Control by the Court and the Legislature over Executive Action” (Committee II), Clause A,2, *Congress of Rio, 1962*.

506 Paragraph 6 of the Section “The Rule of Law in Emerging Forms of Society One-Party States” of the ICJ Declaration on *Human Rights in an Undemocratic World, 1977*. See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 60.

martial law is declared to deal with the exceptional situation, the following basic safeguard should be strictly observed: [...] (e) The independence of the judiciary and of the legal profession should be fully respected. The right and duty of lawyers to act in the defence of, and to have access to, political and other prisoners, and their immunity for action taken within the law in defence of their client, should be fully recognised and respected.”<sup>507</sup>

In its Congress of Caracas on *The Independence of Judges and Lawyers* (Venezuela, 1989), the ICJ reaffirmed that the existence of a free, fearless, independent but responsible and responsive legal profession is essential for the preservation of the Rule of Law.<sup>508</sup>

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted in Berlin (Germany, 2004), the ICJ reiterated that “lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.”<sup>509</sup>

## 4. Selected excerpts from international standards

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### 2. (i) General considerations

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

— *Principle 2 of the UN Basic Principles on the Role of Lawyers*

The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights.

— *Article 74 of the Singhvi Declaration*

A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms depend as much on the independence of lawyers as on the independence and impartiality of the judiciary. The

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<sup>507</sup> Paragraph 8 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human Rights in an Undemocratic World*, 1977. See “25th Anniversary Commission Meeting – Conclusions”, p. 62.

<sup>508</sup> Rapporteurs’ Summaries, II. *The independence of the Legal Profession*, para. 1, *Congress of Caracas*, 1989.

<sup>509</sup> Principle 7 of the *Berlin Declaration*, 2004.

independence of lawyers and of the judiciary mutually complement and support each other as integral parts of the same system of justice.

– *Article 3 of the Draft Principles on the Independence of the Legal Profession (Noto Principles)*

All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

– *Principle I (1) of the Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer of the Council of Europe*

States shall ensure that lawyers: 1) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; 2) are able to travel and to consult with their clients freely both within their own country and abroad; 3) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

– *Principle I(b) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in Society.

– *Article 1(1) of the Code of Conduct for European Lawyers*

The core principles are, in particular: (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case.

– *Principle 1(a) of the Charter of core principles of the European legal profession*

## **2. (ii) Protection against violence, intimidation, threats or discrimination**

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened

with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. [...] Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

— *Principles 16 and 17 of the UN Basic Principles on the Role of Lawyers*

No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or assisted any client or for having represented any client's cause.

— *Article 85 of the Singhvi Declaration*

Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

— *Principle I (4) of the Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer*

Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

— *Principle I(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

An equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.

— *Preamble of the Standards for the Independence of the Legal Profession (IBA)*

## **2. (iii) Lawyers must not be identified with their clients or their causes**

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

— *Principle 18 of the UN Basic Principles on the Role of Lawyers*

As every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interest or cause within the law, and as it is the duty of the lawyer to do so to the best of his ability, the lawyer is not in consequence to

be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

— *Article 18 of the Draft Principles on the Independence of the Legal Profession (Nota Principles)*

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

— *Principle I(g) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

The lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be.

— *Principle 7 the Standards for the Independence of the Legal Profession (IBA)*

## **2. (iv) Immunity and disciplinary proceedings**

Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

— *Principle 20 of the UN Basic Principles on the Role of Lawyers*

Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice. [...] Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review. [...] All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

— *Principles 27, 28 and 29 of the UN Basic Principles on the Role of Lawyers*

... a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearance before a court, tribunal or other legal or administrative authority.

— *Article 89 of the Singhvi Declaration*

No lawyer shall suffer or be threatened with penal, civil administrative, economic or other sanction by reason of his having advised or represented any client or client cause.

— *Article 19 of the Draft Principles on the Independence of the Legal Profession (Noto Principles)*

Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral proceedings or in their professional appearances before a judicial body or other legal or administrative authority.

— *Principle 1(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice. [...] Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or even before a judicial body, and shall be subject to an independent judicial review. [...] All disciplinary proceedings shall be determined in accordance with the code of professional conduct, other recognized standards and ethics of the legal profession and international standards.

— *Principle 1(n), (o) and (p) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause. [...] Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his or her professional appearances before a court, tribunal or other legal or administrative authority.

— *Principles 8 and 11 the Standards for the Independence of the Legal Profession (IBA)*

## Principle 8

In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients, including to those deprived of their liberty, and to relevant documentation and evidence, at all stages of proceedings. All branches of government must take necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including substantial and timely access to all relevant case files.

## Commentary

### 1. National unlawful practices

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During times of crisis, States frequently resort to the practice of incommunicado detention for prolonged periods and deny the access of lawyers to the detainees. The problem is especially pronounced in respect of persons held in administrative detention, purportedly for preventive or other security-related reasons. For example, many persons held by the United States at the detention facility at Guantanamo Bay, Cuba, following the attacks of 11 September 2001 were denied the right to counsel until the US Supreme Court recognised the right in 2004.<sup>510</sup>

In the Occupied Palestinian Territory, persons from the West Bank detained on suspicion of terrorism-related offences are sometimes held in military bases in Israel.<sup>511</sup> The additional visa requirements for entering into Israel have in practice hindered the effective work of lawyers in the defence of such detainees.<sup>512</sup>

Special rules of criminal procedure are sometimes introduced which limit the possibility for persons to receive legal assistance. Such rules may allow for the application of special measures which curtail ordinary fair trial rights, such as allowing for anonymous witnesses and/or for the admission of secret evidence. During the judicial proceedings, the “state secrets” doctrine may be invoked, whereby authorities refuse to disclose relevant – and sometimes critical – information, on the basis of a purported national security or similar purpose.<sup>513</sup>

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510 See: *Hamid v. Rumsfeld*, 542 US 507 (2004); *Rasul v. Bush & Al Odah v. United States* 542 US 466 (2004).

511 ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Report: Assessing Damage, Urging Action*, Geneva, 2009, p. 138.

512 *Ibid.*

513 See in general *Ibid.*, pp. 152-153.

In many situations, lawyers are not allowed to meet their client detainees in private. Frequently their conversations and communications with their clients are monitored or recorded and are also used as evidence in the criminal proceedings. In Cambodia in 2001, lawyers were allegedly denied confidential meetings with their clients accused of organised crime, terrorism and complicity in terrorism.<sup>514</sup>

## 2. International legal framework

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The elements enunciated in this principle, including the need to safeguard the prompt, regular and confidential access of lawyers to their clients and to relevant documentation and evidence at all stages of the proceedings, serve a dual function. On one hand, they facilitate the effective discharge of the fundamental professional functions of the lawyer. In addition, these provisions serve to safeguard a series of basic rights, including the right to liberty, encompassing freedom from arbitrary detention, the right to a fair trial, the right of the victims of human rights violations to an effective remedy and to obtain reparation, and the right to legal assistance. Indeed, the right to legal assistance of detainees with or without criminal charge (pre-trial or administrative detention),<sup>515</sup> of persons accused or under a criminal trial,<sup>516</sup> or of victims and their relatives pursuing a judicial claim or proceedings to obtain an effective remedy and reparation<sup>517</sup> is well recognised under international standards.

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<sup>514</sup> *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. E/CN.4/2002/72, 11 February 2002, para. 20.

<sup>515</sup> See *inter alia*: Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Rules 93 and 95 of the *Standard Minimum Rules for the Treatment of Prisoners*; Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principles 1, 5, 6, 7, 8, 16, 21 and 22 of the *UN Basic Principles on the Role of Lawyers*; Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*; Principle M(2) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

<sup>516</sup> See *inter alia*: Article 10 of the *Universal Declaration of Human Rights*; Article 14 of the *International Covenant on Civil and Political Rights*; Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 18 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Article 11 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principles 1, 5, 7, 8, 16, 21 and 22 of the *UN Basic Principles on the Role of Lawyers*; Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 47 of the *Charter of Fundamental Rights of the European Union*; Article XXVI of the *American Declaration of the Rights and Duties of Man*; Article 8 of the *American Convention on Human Rights*; Articles 7 and 26 of the *African Charter on Human and Peoples' Rights*; Article 13 of the *Arab Charter on Human Rights*.

<sup>517</sup> See *inter alia*: Articles 12 and 24 of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; Principles 13, 14, 16 and 21 of the *UN Basic Principles on the Role of Lawyers*; Principle 6 of the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principle H of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 47 of the *Charter of Fundamental Rights of the European Union*; European Court of Human Rights, Judgment of 9 October 1979, *Airey v. Ireland*, Application N<sup>o</sup> 6289/73, para. 33.

## i) Legal assistance and detention

The right to legal assistance is closely linked with the right not to be arbitrarily detained and to challenge the lawfulness of the deprivation of liberty, for example, by presenting *habeas corpus* petitions.<sup>518</sup> The right to receive legal assistance and to communicate with one's own lawyer is also closely related to the absolute prohibition under international law of secret detention, unacknowledged detention, prolonged incommunicado detention and prolonged solitary confinement.<sup>519</sup>

Any person who is arrested or detained, irrespective of whether in a situation of pre-trial detention, detention pending trial or administrative detention, has the right to be assisted by a lawyer without delay.<sup>520</sup> The Human Rights Committee has underlined that prompt and regular access to a lawyer is a condition for the protection of detainees<sup>521</sup> and that such access shall be accorded immediately to any person who is deprived of liberty.<sup>522</sup> A violation of this principle resulting

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518 Human Rights Committee, *General Comment No. 20, Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992, para. 11; *Concluding Observations of the Human Rights Committee on Tajikistan*, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 12; *Thailand*, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 15. See *inter alia*: UN *Basic Principles on the Role of Lawyers*; UN *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; Council of Europe *Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer* of the Committee of Ministers to Member States; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. See *infra* Principle no. 9 and its Commentary.

519 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 11 and 13; *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para. 6; *Concluding Observations of the Human Rights Committee on United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12; Committee against Torture, *Reports*: UN Doc. A/54/44, 26 June 1999, paras. 121 and 146; UN Doc. A/53/44, 16 September 1998, para. 135; UN Doc. A/55/44, 2 January 2001, para. 182; European Court of Human Rights, *Judgment of 25 May 1998, Kurt v. Turkey*, Application N<sup>o</sup> 24276/94, paras. 123 and 124; Inter-American Court of Human Rights, *Judgment 29 July 1988, Velasquez Rodriguez v. Honduras*, para. 156; *Judgment of 12 November 1997, Suárez Rosero v. Ecuador*, paras. 90-91; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 211 and 213; Article 17.1 of the *International Convention on the Protection of All Persons from Enforced Disappearance*; Principle I of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

520 See, among others, Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Rules 93 and 94 of the *Standard Minimum Rules for the Treatment of Prisoners*; Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principles 1, 5, 6, 7 and 8 of the UN *Basic Principles on the Role of Lawyers*; Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*; Principle M(2) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. See also: *Concluding Observations of the Human Rights Committee on Georgia*, UN Doc. CCPR/C/79/Add.75, 5 May 1997, para. 27; *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 23 August 2003, para. 13; *Report of the Special Rapporteur on Torture*, UN Doc. A/57/173, 2 July 2002, para. 18 and UN Doc. E/CN.4/2004/56, 23 March 2004, para. 32.

521 Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para. 11. See also the *Concluding Observations of the Human Rights Committee on Tajikistan*, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 11; *Thailand*, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 15.

522 *Concluding Observations of the Human Rights Committee on Georgia*, UN Doc. CCPR/C/79/Add.75, 5 May

in a prolonged detention without access to a legal counsel violates Articles 7, 9, 10 and 14(3)(b) of the ICCPR.<sup>523</sup> In this regard, according to the Human Rights Committee, 48 hours should be the maximum time limit for detention without access to a lawyer,<sup>524</sup> and all detainees, including those in administrative detention, enjoy the right to have access to a lawyer promptly.<sup>525</sup> The European Court of Human Rights has recognised this right as being of an absolute nature and legally enforceable.<sup>526</sup> The UN Special Rapporteur on Torture has underscored that international law requires, and State practice confirms, that any legislation, including anti-terrorism legislation concerning detention, should maintain basic safeguards, including that one should not spend more than 24 hours without a lawyer after the arrest.<sup>527</sup>

The right to be assisted by a lawyer includes the right to communicate and consult with the lawyer without interception or censorship and in full confidentiality.<sup>528</sup> The Human Rights Committee has stated that forbidding detainees “to speak or to write to anyone”, in particular their lawyer, while in preventive detention, constitutes a violation of the ICCPR.<sup>529</sup> The right to communicate with counsel requires that the accused be granted prompt access to his or her lawyer. Lawyers must be able to meet their clients in private and to communicate with them in conditions that fully respect the confidentiality of their communications, whether written or by telephone.<sup>530</sup> Such interviews or telephone calls may be conducted in sight, but not earshot of law enforcement officials.<sup>531</sup>

Access to a lawyer may be delayed only in exceptional circumstances and such a delay must comply with strict criteria determined by law or legally established regulations, for instance if a judge or other authority deems it essential and indispensable to maintaining security and order or where exceptional needs of the

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1997, para. 27.

523 *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 13.

524 *Ibid.*

525 *Ibid.*; *Concluding Observations of the Human Rights Committee on Switzerland*, UN Doc. CCPR/C/79/Add.70, 8 November 1996, para. 26; Human Rights Committee, Views of 27 July 1993, *Henry Kalenga v. Zambia*, Communication No. 326/1988, UN Doc. CCPR/C/48/D/326/1988, 2 August 1993, para. 6.3.

526 European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N<sup>o</sup> 14553/89; 14554/89, para. 64.

527 *Report of the Special Rapporteur on Torture*, UN Doc. A/57/173, 2 July 2002, para. 18. See also: *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 March 2004, para. 32.

528 Principle 18(3) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle 8 of the *UN Basic Principles on the Role of Lawyers*.

529 Human Rights Committee, Views of 6 November 1997, *Victor Alfredo Polay Campos v. Peru*, Communication No. 577/1994, UN Doc. CCPR/C/61/D/577/1994, 9 January 1998, para. 8.4.

530 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 34.

531 Principle 18(4) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

investigation so require.<sup>532</sup> However, any decision to restrict a person's right to legal assistance must comply with judicial safeguards: it must be taken by a judicial or other impartial and independent authority pursuant to the law, with the possibility to challenge the lawfulness of the decision before a tribunal.<sup>533</sup> Any such restrictions may never result in prolonged incommunicado detention or prolonged solitary confinement, both of which are prohibited by international law.<sup>534</sup> The UN Special Rapporteur on Torture has pointed out that "[i]n exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association".<sup>535</sup> Under all circumstances, the person deprived of liberty must have access to a lawyer within 48 hours of his or her arrest or detention.<sup>536</sup> The Human Rights Committee has found that counter-terrorism legislation allowing detainees to be held in incommunicado detention for several days and denying them access to a lawyer of their own choice and the right to appeal against court decisions is inconsistent with Article 14 of the ICCPR.<sup>537</sup>

## ii) Legal assistance and fair trial

In criminal cases, the right to a legal counsel is also a crucial element of the fair trial.<sup>538</sup> Unless they decide to undertake their own defence, individuals who are charged with a crime must at all times be represented by a lawyer, who should

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532 Principles 15, 16 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

533 See European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N<sup>o</sup> 14553/89;14554/89, para. 64.

534 Human Rights Committee, *General Comment No. 20, Article 7 (The prohibition of torture or cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, paras. 6 and 11. See also the *Concluding Observations of the Human Rights Committee on Spain*, UN Doc. CCPR/C/79/Add.61, 3 April 1996, paras 12 and 18; *Israel*, UN Doc. CCPR/C/79/Add.93, 18 August 1998, paras. 20 and 21; *Peru*, UN Doc. CCPR/C/79/Add.67, 25 July 1996, paras. 23-24; Principle 15 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

535 *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 March 2004, para. 32; *Report of the Special Rapporteur on Torture*, UN Doc. A/57/173, 2 July 2002, paras. 16-17.

536 Principle 7 of the UN *Basic Principles on the Role of Lawyers*; Human Rights Committee, *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 13; and European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N<sup>o</sup> 14553/89, 14554/89, para. 64.

537 See, among others, the *Concluding Observations of the Human Rights Committee on Spain*, UN Doc. CCPR/C/79/Add.61, 3 April 1996; *France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997; *United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/50/40, 3 October 1995.

538 Human Rights Committee, Views of 29 March 1984, *Antonio Viana Acosta v. Uruguay*, Communication N<sup>o</sup> 110/1981, UN Doc. CCPR/C/21/D/110/1981, 29 March 1984. See also: Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 37-38; Inter-American Commission on Human Rights: Report N<sup>o</sup> 58/02 of 21 October 2002, Case N<sup>o</sup> 12.275, *Denton Aitken (Jamaica)*, para. 148; Report N<sup>o</sup> 56/02 of 21 October 2002, Case N<sup>o</sup> 12.158, *Benedict Jacob (Grenada)*, para. 102.

ensure that their right to a fair trial by an independent and impartial tribunal is respected throughout the proceedings. Lawyers must be authorised to challenge the court's independence and impartiality and must seek to ensure that the defendant's rights and judicial guarantees are respected.<sup>539</sup> The right to be assisted by a lawyer, even if the individual cannot afford one, is an integral part of the right to a fair trial as recognised under international law. The fundamental elements of a fair trial must be guaranteed even in times of emergency.<sup>540</sup> Among the protections which "apply to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict",<sup>541</sup> the Inter-American Commission on Human Rights drew particular attention to the "non-derogable procedural protections":

*"the right to defend himself or herself personally and to have adequate time and means to prepare his or her defense, which necessarily includes the right to be assisted by counsel of his or her choosing or, in the case of indigent defendants, the right to counsel free of charge where such assistance is necessary for a fair hearing, and the right to be advised on conviction of his or her judicial and other remedies and of the time limits within which they may be exercised, which may include a right to appeal the judgment to a higher court".*<sup>542</sup>

Every person charged with a criminal offence has the right to appoint a lawyer of his or her choice or to defend himself or herself in person. In principle, a tribunal may not assign a lawyer to the accused if he or she already has a lawyer of own choice. Although the right to defence entails the right not to be forced to accept an assigned lawyer<sup>543</sup> and to refuse assistance from any legal counsel, the right

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539 See, for example, Principles 1 and 5 of the UN *Basic Principles on the Role of Lawyers*; Article 14(3)(d) of the *International Covenant on Civil and Political Rights*; Article 7(1)(c) of the *African Charter on Human and Peoples' Rights*; Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 8 of the *American Convention on Human Rights*; Principle 11 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

540 Human Rights Committee, *General Comment No. 29, States of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.1, 31 August 2001, para. 15. See also in this sense Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L.V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261.

541 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L.V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261.

542 *Ibid.*, Chapter IV, "Recommendations", point 10 E.

543 See, *inter alia*, Human Rights Committee: Views of 29 July 1981, *Sadías de Lopez v. Uruguay*, Communication N° 52/1979, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; Views of 29 March 1983, *Estrella v. Uruguay*, Communication N° 74/1980, UN Doc. CCPR/C/18/D/74/1980, 23 March 1983. See also: Views of 20 July 1990, *Pinto v. Trinidad & Tobago*, Communication N° 232/1987, UN Doc. CCPR/C/39/D/232/2987, 21 August 1990; Views of 6 April 1998, *Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, Communications N° 623/1995; 624/1995; 626/1995; 627/1995, para. 18.9, UN Doc. CCPR/C/62/D/627/1995, 29 May 1998.

to defend oneself without a lawyer is not absolute.<sup>544</sup> Any restriction of the right to defend oneself when accused must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. However, although the right to defence entails the right not to be forced to accept a court-appointed counsel,<sup>545</sup> the Human Rights Committee has pointed out that in cases where the accused person is risking capital punishment, the assistance of a lawyer throughout all the proceedings is unquestionable.<sup>546</sup> In these cases, since the accused refuses to appoint a lawyer or to defend himself or herself, the Tribunal must appoint a lawyer.<sup>547</sup> This need to ensure legal assistance in cases involving capital punishment is not restricted to the judicial proceeding in first instance. Indeed, the Human Rights Committee also affirmed that “[t]he right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d) [of the ICCPR], but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.”<sup>548</sup>

Similarly, in judicial proceedings other than those involving capital punishment, the interests of justice may, in specific cases, require the assignment of a lawyer against the wishes of the accused. A Tribunal should appoint a lawyer in cases of persistent obstruction on the part of the defendant, of inability of the defendant to pursue his or her own interests when facing serious charges, or in case of refusal to appoint a lawyer or to be defended by an appointed lawyer.<sup>549</sup> Such a lawyer

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544 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 37.

545 See, *inter alia*, Human Rights Committee: Views of 29 July 1981, *Sadiás de Lopez v. Uruguay*, Communication N° 52/1979, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; Views of 29 March 1983, *Estrella v. Uruguay*, Communication N° 74/1980, UN Doc. CCPR/C/18/D/74/1980, 23 March 1983. See also: Views of 20 July 1990, *Pinto v. Trinidad & Tobago*, Communication N° 232/1987, para. 12.5, UN Doc. CCPR/C/39/D/232/2987, 21 August 1990; Views of 6 April 1998, *Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, Communications Nos. 623/1995; 624/1995; 626/1995 and 627/1995, para. 18.9, UN Doc. CCPR/C/62/D/627/1995, 29 May 1998.

546 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 38. See also: Human Rights Committee, Views of 6 November 2003, *Kurbanova v. Tajikistan*, Communication N° 1096/2002, para. 6.5, UN Doc. CCPR/C/79/D/1096/2002, 12 November 2003; Views of 7 August 2003, *Aliiev v. Ukraine*, Communication N° 781/1997, UN Doc. CCPR/C/78/D/781/1997; Views of 30 March 1989, *Robinson v. Jamaica*, Communication N° 223/1987, para. 10.4, UN Doc. CCPR/C/35/D/223/1987; Views of 23 March 1999, *Brown v. Jamaica*, Communication N° 775/1997, UN Doc. CCPR/C/65/D/775/1997, 11 May 1999.

547 European Court of Human Rights, Judgment of 25 September 1992, *Croissant v. Germany*, Application N° 13611/88, and Human Rights Committee, *General Comment No. 32, Article 14: Right of equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 37-38.

548 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 51.

549 European Court of Human Rights, Judgment of 25 September 1992, *Croissant v. Germany*, Application N° 13611/88.

should, in any case, be qualified and trained, and the guarantees for the discharge of his or her professional duties must be safeguarded.

The right to be assisted by a lawyer at all stages of the proceedings is not limited to pre-trial and trial stage, but also applies to post-trial proceedings. The Human Rights Committee has concluded that refusal of permission to a lawyer to have access to clients following sentencing violates the right to an effective legal assistance.<sup>550</sup> As an inherent element of the right to a fair trial, the higher tribunal, when considering a challenge or review of a conviction, must observe the right to legal assistance.<sup>551</sup> The right to have counsel appointed to represent the appellant on appeal is subject to conditions similar to those governing the right to have counsel appointed at trial: it must be deemed to be in the interests of justice. If the lawyer who defended the accused at trial does not intend to appeal the conviction or sentence or submit arguments to a higher tribunal or court, because, for example, he or she does not think there are grounds to challenge the court's verdict, the defendant has the right to be so informed, as well as to appoint another lawyer so that his or her concerns can be examined on appeal. The higher tribunal must take steps to ensure that this right is made effective.<sup>552</sup>

All trial proceedings must be conducted with full respect for fair trial safeguards, including, in particular, the right of defendants to communicate with their counsel, the right to have time and facilities to prepare their defence and the right to have their conviction reviewed.<sup>553</sup> The Human Rights Committee has highlighted that the court or other competent authority should not prevent lawyers from carrying out their duties properly, for instance by preventing the accused from talking to them.<sup>554</sup> The requirement of adequate time and facilities for the preparation of the defence applies to all stages of the judicial proceedings and is simultaneously a crucial element of the right to a fair trial and a consequence of the principle of equality of arms.<sup>555</sup> Where a lawyer is not allowed to meet his or her client in

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550 See *inter alia*, Views of 30 March 2006, *Ruzmetov v. Uzbekistan*, Communication N<sup>o</sup> 915/2000, para. 7.4, UN Doc. CCPR/C/86/D/915/2000, 19 April 2006.

551 Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 48 *et seq.*, and Views of 24 July 2006, *Francisco Juan Larrañaga v. Philippines*, Communication N<sup>o</sup> 1421/2005, para. 7.4 *et seq.*, UN Doc. CCPR/C/87/D/1421/2005, 14 September 2006; and Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 161; and Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, paras. 192-193.

552 Human Rights Committee, Views of 25 October 2001, *Boodlal Sooklal v. Trinidad and Tobago*, Communication N<sup>o</sup> 928/2000, para. 4.10, UN Doc. CCPR/C/73/D/928/2000, 8 November 2001; Views of 31 March 1998, *Anthony McLeod v. Jamaica*, Communication N<sup>o</sup> 734/1997, para. 6.3, UN Doc. CCPR/C/62/D/734/1997, 3 June 1998.

553 *Concluding Observations of the Human Rights Committee on Peru*, UN Doc. CCPR/CO/70/PER, 15 November 2000, paras. 12 and 19.

554 Human Rights Committee, Views of 27 March 2004, *Arutyunyan v. Uzbekistan*, Communication N<sup>o</sup> 917/2000, para. 6.3, UN Doc. CCPR/C/80/D/917/2000, 13 May 2004.

555 Human Rights Committee, Views of 31 March 1992, *Alrick Thomas v. Jamaica*, Communication N<sup>o</sup> 272/1988, UN Doc. CCPR/C/44/D/272/1988, 8 April 1992, para. 11.4. See also Human Rights Committee,

private, but only in the presence of investigators, including during the pre-trial detention, there will be a violation of the right of the accused to be effectively assisted by a lawyer at all stages of the proceedings.<sup>556</sup>

To effectively ensure the right of defence of their clients, lawyers must have timely access to all relevant documentation and evidence, at all stages of the proceedings.<sup>557</sup> This requirement is inherently linked with the principle of equality of arms and of adversary proceedings and is derived from Article 14(1) ICCPR.<sup>558</sup> The principle of equality of arms means that the procedural conditions at trial and sentencing must be the same for the accused, for his or her lawyer and for the prosecution.<sup>559</sup> The Human Rights Committee has concluded that there is no equality of arms if, for instance, only the prosecutor, and not the lawyer of the defendant, is allowed to appeal a certain decision.<sup>560</sup> The Human Rights Committee has also concluded that convictions imposed as a result of a trial without adversarial proceedings, where the defence lawyer was not able to challenge witnesses or evidence<sup>561</sup> or where the defence lawyer had insufficient time to examine the case file,<sup>562</sup> constitute a violation of the right to a fair trial.

Timely access to all relevant documentation and evidence is also closely linked with the right to adequate facilities to prepare a defence. This principle requires

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*General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 32 and ff.; Views of 1 November 1991, *Aston Little v. Jamaica*, Communication N° 283/1988, UN Doc. CCPR/C/43/D/283/1998, 19 November 1991; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L.V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 235, 236 and 237.

556 See *inter alia*, Human Rights Committee, Views of 16 March 2007, *Dimitryi Chikunov v. Uzbekistan*, Communication N° 1043/2002, para. 7.4, UN Doc. CCPR/C/89/D/1043/2002, 3 May 2007.

557 See *inter alia*, Human Rights Committee, Views of 15 July 1994, *Barry Stephen Harward v. Norway*, Communication N° 451/1991, paras. 9.4 and 9.5, UN Doc. CCPR/C/51/d/451/1991, 18 August 1994.

558 Human Rights Committee, Views of 26 March 1992, *Dieter Wolf v. Panama*, Communication N° 289/1988, para. 6.6, UN Doc. CCPR/C/44/d/289/1988, 8 April 1992.

559 International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Judgment of 15 July 1999, *The Prosecutor v. Tadic*, No.IT-94-1-T; Human Rights Committee, Decision on admissibility of 30 March 1989, *B.d.B. et al. v. Netherlands*, Communication N° 273/1988, UN Doc. CCPR/C/35/D/273/1988, 2 May 1989; European Court of Human Rights, Judgment of 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, Application N° 14448/88; and Inter-American Commission on Human Rights, Report No. 52/01 of 4 April 2001, Case N° 12.243, *Juan Raul Garza (United States of America)*.

560 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 13.

561 See *inter alia*: Views of 11 July 2006, *Manuel Francisco Becerra Barney v. Colombia*, Communication N° 1298/2004, UN Doc. CCPR/C/87/D/1298/2004, 10 August 2006; Views of 28 October 2005, *Marlem Carranza Alegre v. Peru*, Communication N° 1126/2002, UN Doc. CCPR/C/85/D/1126/2002, 17 November 2005; Views of 26 October 2005, *Antonino Vargas Más v. Peru*, Communication N° 1058/2002, UN Doc. CCPR/C/85/D/1058/2002, 16 November 2005.

562 See, *inter alia*, Human Rights Committee: Views of 21 October 2005, *Jorge Luis Quispe Roque v. Peru*, Communication N° 1125/2002, UN Doc. CCPR/C/85/D/1125/2002, 17 November 2005; Views of 20 March 2007, *Rozik Ashurov on behalf of his son, Olimzhon Ashurov, v. Tajikistan*, Communication N° 1348/2005, UN Doc. CCPR/C/89/D/1348/2005, 2 April 2007; Views of 27 July 2004, *Ramil Rayos v. The Philippines*, Communication N° 1167/2003, CCPR/C/81/D/1167/2003, 7 September 2004.

that the accused and his or her lawyer be guaranteed access to all appropriate information, documents and other evidence that the prosecution plans to offer in court against the accused or that are exculpatory.<sup>563</sup> This access shall not be limited to accusatorial documentation and evidence but also to potentially exculpatory materials collected by the prosecution.<sup>564</sup>

With regard to procedures that allow for secret evidence to be used and/or witnesses to remain anonymous or which totally or partially prevent the accused and his or her lawyer from having access to legal documents and evidence, the Human Rights Committee has called on States “to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access”.<sup>565</sup> The Inter-American Commission on Human Rights has taken the view that systems of criminal procedure that allow secret evidence and secret witnesses do not provide adequate due process guarantees.<sup>566</sup> The Commission stressed that, if witnesses are secret, no effective cross-examination is possible, due to the lack of information regarding the origin and motivation of the witness and the modalities according to which the witness has come to obtain the information comprising his or her testimony.<sup>567</sup>

In a judgment relating to human rights protection in Peru, the Inter-American Court of Human Rights concluded that in judicial proceedings which resorted to secret evidence and anonymous witnesses, the presence and action of the defence lawyer was a mere formality and the right of defence was not effectively protected.<sup>568</sup> It should be noted that the jurisprudence of the European Court of Human Rights is more nuanced with regard to anonymous witnesses and secret evidence. It does not rule out the use of anonymous witnesses *per se*. Nevertheless, the Court has said that no one should be convicted solely or mainly

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563 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

564 International Criminal Court, Pretrial Chamber I, Decision of 24 May 2006, Case *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06. See Also, Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

565 *Concluding Observations of the Human Rights Committee on Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 13. Along similar lines, see the *Concluding Observations of the Human Rights Committee on United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18.

566 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 5 rev., 2 June 2000, paras. 103, 104 and 110, and *Third Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev.1, 26 February 1999, paras. 121-124.

567 Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev.1, 26 February 1999, paras. 121-124; *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 233.

568 See, *inter alia*, Inter-American Court of Human Rights: Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 148; Judgment of 18 August 2000, *Case of Cantoral Benavides v. Peru*, para. 127; Judgment of 25 November 2004, *Lori Berenson Mejia v. Peru*, para. 167.

on the basis of evidence that has not been subjected to adversarial argument during the preliminary investigation or the trial.<sup>569</sup> Any anonymous witness must be subjected to the principle of adversarial proceedings and cannot be the only or main basis for conviction.<sup>570</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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The *Act of Athens*, adopted at the ICJ Congress on *the Rule of Law* (1955), solemnly declared that “Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.”<sup>571</sup>

In its Congress on the *Rule of Law in a Free Society* (New Delhi, 1959), the ICJ highlighted that “wherever a man’s life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy”.<sup>572</sup> The Congress reaffirmed that “[o]n any arrest the arrested person should at once and at all times thereafter be entitled to the assistance of a legal adviser of his own choice”.<sup>573</sup> The Congress also reaffirmed that “[t]he Rule of Law requires that an accused person should have adequate opportunity to prepare his defence and this involves: (1) That he should at all times be entitled to the assistance of a legal adviser of his own choice, and to have freedom of communication with him.”<sup>574</sup> The Congress furthermore highlighted that “[i]f the Prosecution has evidence favourable to the accused which it does not propose to use, it should put such evidence at the disposal of the accused or his legal adviser in sufficient time to enable him to make proper use of it.”<sup>575</sup>

In its Congress on *Executive Action and the Rule of Law* (Rio de Janeiro, 1962), the ICJ affirmed that “[i]t is essential to the Rule of Law that the client be free to

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569 European Court of Human Rights, Judgment of 14 December 1999, *A.M. v. Italy*, Application N° 37019/97, para. 25.

570 European Court of Human Rights: Judgment of 20 November 1989, *Kostovski v. Netherlands*, Application N° 11454/85; Judgment of 15 June 1992, *Lüdi v. Switzerland*, Application N° 12433/86; Judgment of 26 March 1996, *Doorson v. Netherlands*, Application N° 20524/92; Judgment of 23 April 1992, *Van Mechelen and others v. Netherlands*, Application N° 21363/93, 21364/93, 21427/93, 22056/93.

571 Para. 4 of the *Act of Athens*, 1955.

572 Conclusion on *The Legal Profession under the Rule of Law* (Committee IV), Clause IX, *Congress of New Delhi*, 1959.

573 Conclusions on *The Criminal Process and the Rule of Law* (Committee III), Clause III (3), *Congress of New Delhi*, 1959.

574 *Ibid.*, Clause V, *Congress of New Delhi*, 1959.

575 *Ibid.*, Clause VI, *Congress of New Delhi*, 1959.

discuss all matters with his lawyer without fear of disclosure by the lawyer, either voluntarily or by compulsion.”<sup>576</sup>

In its *Conference of Bangkok* (1965), the ICJ pointed out that “[a]n indispensable aspect of the maintenance of the Rule of Law is the availability of lawyers to defend the civil, personal and public rights of all individuals and the readiness to act for those purposes resolutely and courageously.”<sup>577</sup>

In its *Conference of French-speaking African Jurists* (Dakar, 1967), the ICJ reaffirmed that “[e]very person accused of a criminal offence has the right to all the necessary safeguards for his defence.”<sup>578</sup>

In the Congress on *Human Rights in an Undemocratic World* (Vienna, 1977), the ICJ concluded that “[w]here a state of siege or martial law is declared to deal with the exceptional situation the following basic safeguards should be strictly observed: (a) [...] The right of every detainee to legal assistance by a lawyer of his choice must at all times be recognised. [...] The right and duty of lawyers to act in the defence of, and to have access to, political and other prisoners, and their immunity for action taken within the law in defence of their clients should be fully recognised and respected.”<sup>579</sup>

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted at its Congress of Berlin (2004), the ICJ reaffirmed that “States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, [...] States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the [...] rights of defence, especially the right to effective legal counsel”.<sup>580</sup>

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576 Conclusions on the role of lawyers in a changing world (Committee III), para. X.3, *Congress of Rio*, 1962.

577 Conclusions on the role of the lawyer in a developing country (Committee III), para. 2, *Conference of Bangkok*, 1965.

578 Article IV (3) of the Conclusions adopted by the Conference on the proposal of the Committee I, *Conference of Dakar*, 1967.

579 Paragraph 8 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human Rights in an Undemocratic World* adopted in Vienna, Austria (April 1977). See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, pages 61 and 62.

580 Principles 6 and 7 of the *Berlin Declaration*, 2004.

## 4. Selected excerpts from international standards

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### 2. International legal framework

All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. [...] Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. [...] Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence. [...] Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention. [...] All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials. [...] It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. [...] Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

— *Principles 1, 2, 5, 7, 8, 21 and 22 of the UN Basic Principles on the Role of Lawyers*

All persons shall have effective access to legal services provided by an independent lawyer of their choice, to protect and establish their economic, social and cultural as well as civil and political rights. [...] Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: (a) Confidentiality of the lawyer-client relationship and the right to refuse to give testimony if it impinges on such confidentiality; (b) The right to travel and to consult with their clients freely born within their own country and abroad; (c) The right to visit, to communicate with and to take instructions from their clients.

— *Articles 76 and 91 of the Singhvi Declaration*

Any law providing for preventive or administrative detention shall secure the following minimum rights of the detainee: [...] The right to communicate with, and consult, a lawyer of his own choice, at any time after detention.

— *Article 5 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

no person shall be held in isolation without communication with his family, friend, or lawyer for longer than a few days [...] any person charged with a criminal offense shall be entitled [...] to at least the following rights to ensure a fair trial: [...] the right to have adequate time and facilities to prepare the defense including the right to communicate confidentially with his lawyer [...] the right to a lawyer of his choice.

— *Principle 70 (e) of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

States shall ensure that lawyers: [...] are able to travel and to consult with their clients freely both within their own country and abroad; [...] States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential [...] It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

— *Principle 1(b)(ii), (c) and (d) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free, fair and confidential legal assistance, including the lawyer's right of access to such persons. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities. Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: a) confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications; b) the right to travel and to consult with their clients freely both within their own country and abroad.

— *Principles 12 and 13 of the Standards for the Independence of the Legal Profession (IBA)*

In relation to a person in custody the independence of lawyers is of a particular significance in order to ensure that he received full and adequate representation. Safeguards are required to avoid any possible suggestion of collusion, arrangement, or dependence between the lawyer who acts for him and the authorities.

In particular: a) A person taken into custody shall have a free and unfettered right to select a lawyer of his choice to act for him; b) When a lawyer is engaged by the family or by some other interested person to represent a person in custody, that lawyer shall be entitled to have access to the person in custody to ascertain whether he wishes him to act or wishes some other lawyer to do so; c) To meet cases where the person in custody has no lawyer it is the responsibility of the bar association to arrange with the authorities a system that enables him to be provided with a lawyer, or a choice of lawyers, in such a way the choice or appointment is not influenced by the police, the prosecution or a court; d) A lawyer shall have such access to a client in custody as the lawyer considers necessary in accordance with his client's needs, and shall have the right to meet and correspond with his client with full respect for the confidentiality of their communications; e) When a person in custody wishes to terminate or dispense with the services of a lawyer, the lawyer shall be entitled to communicate personally with him in order to satisfy himself that this decision has been taken freely by his client.

— *Article 23 of the Draft Principles on the Independence of the Legal Profession (Nota Principles)*

Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards. [...] All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law. [...] Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards. [...] All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.

— *Principles I (5), (6) and (7) and IV (1) of the Council of Europe Recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer*

The core principles are, in particular: [...] b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy.

— *Principle b of the Charter of core principles of the European legal profession*



## Principle 9

In times of crisis, anyone who is deprived of liberty or any person with a legitimate interest has the right to challenge the lawfulness of detention (*habeas corpus*, *amparo*) before an ordinary tribunal or court and to be released if the detention is arbitrary or otherwise unlawful. Deprivation of liberty must at all times be under judicial control or supervision. Judges, prosecutors, lawyers and other competent authorities must do all in their power to ensure that detainees enjoy the right to prompt access to lawyers, contact with family members, and when necessary, access to adequate and prompt medical attention.

## Commentary

### 1. National unlawful practices

One of the most common measures States have adopted in times of crisis is action to limit or suspend the right to a judicial remedy, such as *amparo* or *habeas corpus*, or to render such remedies unworkable in practice, or generally to limit judicial oversight of deprivation of liberty. Incommunicado detention, secret detention and administrative detention<sup>581</sup> are practices to which authoritarian military regimes have often resorted, especially during the Cold War era.<sup>582</sup> Executive authorities have at times ordered administrative detention without the possibility of judicial oversight or access to remedies.

In 1985, The International Commission of Jurists (ICJ) counted at least 85 countries with legislation in force allowing for administrative detention for reasons of public order or State or national security. Amongst these 85 countries, 43 provided for deprivation of liberty for an indefinite period of time for several

581 Administrative detention for public order or on state security grounds has been given different names, depending on national systems: “administrative detention” (*detención administrativa*, *détention administrative*); “preventive detention”; “detention without charge or trial”; “ministerial detention”; “*mise aux arrêts*”; “*a disposición del poder ejecutivo nacional*”; “administrative internment” (*internement administratif*); “*rétention administrative*”; “prompt security measures”; “extrajudicial detention” (*détention extrajudiciaire*); and “house arrest” (*detención domiciliaria*, *assignation a résidence*).

582 For example, in the United Kingdom (1940), Ghana (Laws N° 57 of 1958 and N° 5 of 1959), Singapore (the Preservation of Public Security Ordinance of 1955 and Ordinances of 1958 and 1959), Philippines, Bulgaria (the law of 10 January 1959), Burma (Laws N° XXVIII and N° LXXIX of 1947), India (the Defence of India Act and Defence of India Rules of 1939, Prevention of Detention Act of 1951), Argentina (PEN legislation, Institutional Act of September 1 of 1977, Law 21,650 of September 26 of 1977, etc), Chile (1973 legislation on the state of siege and “State of War”), Uruguay (Decree N° 393/973), Paraguay (1959 legislation on the state of siege) and South Africa (Apartheid, the internal security acts of 1950 and 1976 and the terrorist act of 1967).

years or even for decades.<sup>583</sup> In the context of internal political crisis or counter-terrorism measures, a number of countries currently resort or have resorted in the past to the practice of administrative detention, either pursuant to states of emergency or in the absence of a declaration of emergency. These include, among others, Algeria, Australia, Bangladesh, Cameroon, Canada, Egypt, Israel and the Occupied Palestinian Territory, Jordan, Malaysia, Nepal, Pakistan, Sri Lanka, Tanzania, Thailand, United Kingdom and Northern Ireland, and United States of America.

In Nepal, the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance* (TADO) largely replaced criminal prosecutions during the civil conflict there and allowed for administrative detention under “incommunicado” regime. Other countries, such as Algeria, Colombia, Kenya, the Russian Federation and Uganda, recurred to *de facto* administrative detention.<sup>584</sup> In Cameroon, under Article 2 of Law No. 90/024 of 19 December 1990, administrative detention could be extended indefinitely and no remedy was available by way of appeal or application of *habeas corpus*. For example, in Malaysia, under the *Internal Security Act*, detainees may file petitions of *habeas corpus*, but the courts are limited to reviewing procedural irregularities, rather than the substantive grounds for detention.

## 2. International legal framework

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### i) General considerations

The right not to be arbitrarily deprived of liberty is a longstanding universally recognised human right under international law.<sup>585</sup> The Human Rights Committee has said that States may not invoke situations of exception to justify the arbitrary deprivation of liberty.<sup>586</sup> States must ensure that no one is arbitrarily deprived of

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583 *ICJ News Letters N° 24*, January /March 1985, p. 53.

584 ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Report: Assessing Damage, Urging Action*, Geneva, 2009, pp. 77 and 109.

585 Articles 3 and 9 of the *The Universal Declaration of Human Rights*; Article 9 of the *International Covenant on Civil and Political Rights*; Article 16 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 5.1 of the *Declaration on the human rights of individuals who are not nationals of the country in which they live*; Article 6 of the *African Charter on Human and Peoples’ Rights*; Principle M of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Articles I and XXV of the *American Declaration of the Rights and Duties of Man*; Article 7 of the *American Convention on Human Rights*; Article 14 of the *Arab Charter on Human Rights*; Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

586 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

their liberty, as a result of arbitrary arrest<sup>587</sup> or detention,<sup>588</sup> and that any deprivation of liberty is carried out only in strict compliance with legal grounds and procedures and the requirements of international human rights law. The right not to be arbitrarily deprived of liberty is not restricted to situations of pre-trial detention: it also applies to situations of administrative detention, imprisonment as a result of a conviction for a criminal offence imposed by a court judgment, and any other situation where a person may be deprived of liberty. Indeed, as highlighted by the UN Working Group on Arbitrary Detention, a deprivation of liberty is arbitrary: “A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)[...]; B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights[...]; C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character[...].”<sup>589</sup>

## ii) The right to *habeas corpus*

In order to protect the right to liberty, the right to challenge the lawfulness of detention before a tribunal, court or judge is essential and is among the most effective means of prevention of and protection against arbitrary detention.<sup>590</sup> The right to challenge the legality of the deprivation of liberty is given effect through judicial procedures, which, depending on the domestic jurisdiction, may include *habeas corpus*, *amparo*, *jugement en référé*, *mandato de segurança*, or *recurso de protección*. International human rights instruments and jurisprudence typically refer to *habeas corpus*, which generically may be taken to include any judicial proceeding to challenge the lawfulness of a deprivation of liberty.

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587 The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* gives the following definition of ‘arrest’: “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”.

588 According to the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, a ‘Detained Person’ means “any person deprived of personal liberty except as a result of conviction for an offence” (“Use of Terms”).

589 Working Group on Arbitrary Detention, *Fact Sheet No. 26: Working Group on Arbitrary Detention* (which summarises the doctrine of the Working Group); see also *Report of the Special Rapporteur on the Independence of judges and lawyers*, UN Doc. E/CN.4/1998/39/Add.1, 12 February 1998, para. 129.

590 *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 62. See also UN General Assembly, Resolution 34/178, *The right of amparo, habeas corpus or other legal remedies to the same effect*, UN Doc. A/RES/34/178, 17 December 1979.

In addition to protecting against arbitrary deprivation, the right to *habeas corpus* and similar remedies, is also essential for preventing torture and ill-treatment,<sup>591</sup> enforced disappearance,<sup>592</sup> incommunicado detention<sup>593</sup> and other grave violations of human rights.<sup>594</sup> As highlighted by the Inter-American Court of Human Rights, “writs of *habeas corpus* and of *amparo* are among those judicial remedies [...] [that] serve, moreover, to preserve legality in a democratic society.”<sup>595</sup>

The UN General Assembly has called upon “all Governments to guarantee to persons within their jurisdiction the full enjoyment of the rights of *amparo*, *habeas corpus* or other legal remedies to the same effect.”<sup>596</sup> The UN Special Rapporteur

591 The importance of *habeas corpus* in preventing torture and ill-treatment has been underlined by the Special Rapporteur on torture (*Report of the Special Rapporteur on the question of torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39; UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); and *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/57/173, 2 July 2002, para. 16) and the Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, para. 38. See also Human Rights Council, *Resolution 13/19 on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, UN Doc. A/HRC/Res/13/19, 26 March 2010, para. 5.

592 The importance of *habeas corpus* in the prevention of enforced disappearances had been underlined by the UN Working Group on Enforced or Involuntary Disappearances: *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1983/14, 21 January 1983, para. 141; *Report on the Mission to Peru*, UN Doc. E/CN.4/1986/18/Add.1, 8 January 1986, paras. 55-58; *Report on the Mission to Colombia*, UN Doc. E/CN.4/1989/18/Add.1, 6 February 1989, para. 136; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1990/13, para. 346; *Report on the Mission to the Philippines*, UN Doc. E/CN.4/1991/20/Add.1, 10 January 1991, para. 167; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1991/20, 17 January 1991, para. 409; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1992/18, 30 December 1991, paras. 368-370; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1993/25, 7 January 1993, para. 514. See also Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, UN Doc. E/CN.4/2002/71, 8 January 2002; and the Inter-American Court on Human Rights: Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, para. 38.

593 See, among others, European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89; 14554/89, paras. 62-63, and Judgment of 12 March 2003, *Öcalan v. Turkey*, Application N° 46221/99, para. 86.

594 See *inter alia*: Inter-American Court of Human Rights, Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 128.

595 *Ibid.* See also, Inter-American Court of Human Rights: Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations*, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), para. 42; and see Judgment of 8 July 2004, Case of *Gómez Paquiyauri v. Peru*, para. 97; Judgment of 16 August 2000, Case of *Durand-Ugarte*, para. 106; and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, para. 33. See also in general UN General Assembly, Resolution 34/178, *The right of amparo, habeas corpus or other legal remedies to the same effect*, UN Doc. A/RES/34/178, 17 December 1979.

596 UN General Assembly, *Resolution 34/178, The right of amparo, habeas corpus or other legal remedies to the same effect*, UN Doc. A/RES/34/178, 17 December 1979, para. 3. Similarly, the former UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities has called on all States “to establish a procedure such as *habeas corpus* by which anyone who is deprived

on Torture has specified that right to *habeas corpus* is one of the “basic legal safeguards” that “should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation. [...] These safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment while in detention.”<sup>597</sup>

Regional human rights bodies also consider the right to *habeas corpus* and *amparo* for those under arrest or held in detention to be an essential safeguard against unlawful deprivation of liberty, and the absence of such remedies to be a violation of States’ human rights obligations.<sup>598</sup>

It is, therefore, a duty of States to enact legislation providing those detained and those interested in the health and well-being of detainees with an effective judicial remedy, which would also confer the national or international authorities with the power to access places of detention.<sup>599</sup> The right to *habeas corpus* requires that the authority responsible for determining the lawfulness of a deprivation of liberty must be a judicial body, independent of the executive branch of government.<sup>600</sup> That judicial body must be an independent and impartial tribunal established by law.<sup>601</sup> In the case of civilians who are deprived of their liberty, the right to challenge the legality of detention must in all circumstances be guaranteed under ordinary jurisdiction.

The effectiveness of the writ of *habeas corpus* may be impaired by limiting the grounds according to which it can be obtained, such as through legal provisions requiring the exhaustion of other remedies, or the absence of a legal right to place a person in custody or the manifest violation of due process guarantees.<sup>602</sup>

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of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful” (Commission Resolution 1992/35 and Sub-Commission Resolution 1991/15, respectively).

597 *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/57/173, 2 July 2002, para. 18.

598 Inter-American Court of Human Rights, Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 129. See also Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 98; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 138; European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89, 14554/89, para. 63; Judgment of 15 November 1996, *Chahal v. United Kingdom*, Application N° 22414/93, paras. 132-133.

599 Principle M(5) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

600 European Court of Human Rights, Judgment of 22 October 2002, *Sakik and others v. Turkey*, Application N° 23878/94, 23879/94, 23880/94, 23882/94, 23881/94, para. 31; the Inter-American Court of Human Rights, Advisory Opinion N° OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, paras. 35 and 42; Principle M(5)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

601 Inter-American Court of Human Rights, Advisory Opinion No. OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, paras. 35 and 42; Principle M(5)(e) of *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

602 *Concluding Observations of the Human Rights Committee on Japan*, UN Doc. CCRP/C/79/Add.102, 19

The effectiveness of the remedy of *habeas corpus* requires that it be possible to invoke it without limitations or restrictions. Prolonged or delayed *habeas corpus* proceedings are also incompatible with Article 9 of the ICCPR.<sup>603</sup>

International human rights standards and jurisprudence have considered the right to challenge the lawfulness of detention before a tribunal, court or judge as an effectively non-derogable right.<sup>604</sup> The non-derogable nature of *habeas corpus* is also recognised and reaffirmed by the special procedures of the former UN Commission on Human Rights.<sup>605</sup> Indeed, the Working Group on Arbitrary Detention, *inter alia*, has underlined that the right to challenge the legality of detention or to petition for a writ of *habeas corpus* or remedy of *amparo* must in all circumstances be guaranteed.<sup>606</sup> The former UN Commission on Human Rights has called upon States to ensure that the right to *habeas corpus* is maintained at all times, including in times of emergency.<sup>607</sup>

Although the right to an effective remedy is not explicitly enumerated among the rights not subject to derogation in emergency situations in the International Covenant on Civil and Political Rights,<sup>608</sup> the Human Rights Committee has made clear that such right is a guarantee inherent to the ICCPR as a whole and that the obligation upon States is therefore an obligation to comply with it even in times

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November 1998, para. 24.

603 *Concluding Observations of the Human Rights Committee on the Dominican Republic*, UN Doc. CCPR/CO/71/DOM, 26 March 2001.

604 See, *inter alia*: Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16 and *Concluding Observations of the Human Rights Committee on Albania*, UN Doc. CCPR/CO/82/ALB, 2 December 2004, para. 9; Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, (Arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial guarantees in states of emergency*, (Arts. 27(2), 25 and 8 *American Convention on Human Rights*); Article 27 of the *American Convention on Human Rights*; Articles 4 and 14 of the *Arab Charter on Human Rights*; Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principle 32 of *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle M (5)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 9 of the *Declaration on the Protection of All Persons from Enforced Disappearance* and Commission on Human Rights, Resolution 1992/35 on *Habeas Corpus*, 28 February 1992.

605 See *inter alia*: *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, paras. 107 and ff.

606 *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003, paras. 62 and 85 and *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1994/27, 17 December 1993, para. 74.

607 Commission on Human Rights, Resolution 1992/35 on *Habeas Corpus*, 28 February 1992; Resolution 1993/36 on *Question of Arbitrary Detention*, 5 March 1993.

608 However, it is considered as non-derogable according to Article 27 of the *American Convention on Human Rights* and Articles 4 and 14 of the *Arab Charter on Human Rights*.

of emergency.<sup>609</sup> Moreover, the right to *habeas corpus* is an essential remedy for the protection of other rights, including those that are non-derogable.<sup>610</sup>

In the view of the African Commission on Human and Peoples' Rights, the adoption by the executive of measures to remove jurisdiction from the ordinary courts for fundamental issues such as complaints about abuses or *habeas corpus* constitutes a violation by the State of its obligation to ensure that the judiciary is independent.<sup>611</sup> The African Commission has also taken the view that suspending the right to *habeas corpus* for State security reasons violated Articles 6 and 7.1 (a) and (d) of the African Charter on Human and Peoples' Rights.<sup>612</sup>

### iii) Administrative detention, judicial control and remedies

According to international standards and jurisprudence, administrative detention on security grounds is only permissible under exceptional circumstances or pursuant to a lawful derogation under human rights treaty obligations.<sup>613</sup> It must

609 See also *infra* Principle no. 11 and its Commentary. Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16; *Concluding Observation of the Human Rights Committee on Albania*, UN Doc. CCPR/CO/82/ALB, 2 December 2004, para. 9. See also European Court of Human Rights, Judgment of 1 July 1961, *Lawless v. Ireland*, Application N° 332/57; Judgment of 18 January 1978, *Ireland v. United Kingdom*, Application N° 5310/71; Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89; 14554/89. Regarding the African system of human rights see: Principle M(5)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

610 See Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16; *Concluding Observations of the Human Rights Committee on Nigeria*, UN Doc. CCPR/C/79/Add.64, 3 April 1996, para. 7; Views of 26 October 1979, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication N° 9/1977, UN Doc. CCPR/C/8/D/9/1977, 26 October 1979; Views of 29 July 1980, *Miguel A. Millan Sequeira v. Uruguay*, Communication N° 6/1977, UN Doc. CCPR/C/10/D/6/1977, 29 July 1980; and Views of 27 March 1981, *Esther Soriano de Bouton v. Uruguay*, Communication N° 37/1978, UN Doc. CCPR/C/12/D/37/1978, 27 March 1981. In this sense, *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 114. On the regional level, see: Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial guarantees in states of emergency*, (Arts. 27(2), 25 and 8 American Convention on Human Rights); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 138.

611 See African Commission on Human and Peoples' Rights: *Civil Liberties Organisation v. Nigeria*, Communication 151/96, 15 November 1999; *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communications 143/95, 150/96, 15 November 1999; *Civil Liberties Organisation v. Nigeria*, Communication 129/94, 17th Ordinary Session; *Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegba and others)*, Communication 60/91, 17th Ordinary Session; *The Constitutional rights Project (in respect of Zamani Lakwot and 6 Others) v. Nigeria*, Communication 87/93, 17th Ordinary Session.

612 African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil liberties Organisation v. Nigeria* Communication 143/95, 150/96, 15 November 1999, para. 31. See also *supra* Principle no. 3 and its Commentary.

613 See, among others, the *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; European Court of Human Rights, Judgment of 1

be strictly limited to a short period of time and may never be indefinite.<sup>614</sup> The UN *Standard Minimum Rules for the Treatment of Prisoners* provides that persons under administrative detention shall be accorded the same protection as that accorded to prisoners under arrest or awaiting trial.<sup>615</sup>

The UN Working Group on Arbitrary Detention has highlighted the growing problem of “the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights”, and “a further expansion of States’ recourse to emergency legislation diluting the right of *habeas corpus* or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism, [whereby] States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention.”<sup>616</sup> The Working Group highlighted that “this kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pre-trial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence.”<sup>617</sup>

Restrictions to the access to counsel and the absence of full disclosure of the grounds upon which the detention is based undermine the effectiveness of the judicial remedy and the protection against torture and ill-treatment and violate

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July 1961, *Lawless v. Ireland*, Application N<sup>o</sup> 332/57, paras. 13, 15 and 20; Judgment of 18 January 1978, *Ireland v. United Kingdom*, Application N<sup>o</sup> 5310/71, para. 214; and Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N<sup>o</sup> 14553/89; 14554/89; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 138; *Concluding Observations of the Human Rights Committee on Jordan*, UN Doc. CCPR/C/79/Add.35, 27 July 1994, paras. 226-244, and *Morocco*, UN Doc. CCPR/C/79/Add.44, 2 November 1994, para. 21; European Court of Human Rights, Judgment of 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, Application N<sup>o</sup> 12244/86, 12245/86, 12383/86, para. 32; Judgment of 28 October 1994, *Murray v. United Kingdom*, Application N<sup>o</sup> 14310/88, para. 51; and Inter-American Commission on Human Rights, *Annual Report, 1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part I.

614 See *inter alia*: *Concluding Observations of the Human Rights Committee on Cameroon*, UN Doc. CCPR/C/79/Add.33, 7 April 1994, para. 22 and CCPR/C/79/Add.116, 3 November 1999, para. 19; *Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 12 and *Switzerland*, UN Doc. CCPR/C/79/Add.70, 7 November 1996, para. 26; *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 61, 75; Inter-American Commission on Human Rights, *Annual Report-1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Section II, Part I; Inter-American Commission on Human Rights, *Annual Report-1978*, OAS Doc. OEA/Ser.L/V/II.47, Doc. 13 rev. 1, 29 June 1979, Part II; and Inter-American Commission on Human Rights *Annual Report-1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V. See also: Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1, 11 April 1980, Chapter IV; and *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1, 31 January 1978, Chapter IV, para. 11.

615 Rule 95 of the *UN Standard Minimum Rules for the Treatment of Prisoners*. See also *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, of 17 December 2002, para. 26(h).

616 *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 61.

617 *Ibid.*

the core right to liberty, including in times of emergency.<sup>618</sup> Prolonged administrative detention may lead to torture, ill-treatment and other violations of human rights.<sup>619</sup> The Human Rights Committee has outlined the general conditions which shall govern administrative detention for reasons of public security: “it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”<sup>620</sup>

Individuals in administrative detention have the right to recur to an effective remedy at all times and in all circumstances, as well as to appeal to a court.<sup>621</sup> A regular review of administrative detention, without delay, even in cases of prolonged or extended detention, must be guaranteed to explore the

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618 *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 12.

619 See *inter alia*: *Concluding Observations of the Human Rights Committee on Egypt*, UN Doc. CCPR/C/79/Add.23, 29 July 1993, para. 10; *Ukraine*, UN Doc. CCPR/C/79/Add.52, 26 July 1995.

620 Human Rights Committee, *General Comment No. 8, Right to liberty and security of persons (Article 9)*, 30 June 1982, para. 4. See also *Concluding Observations of the Human Rights Committee on Norway*, UN Doc. CCPR/C/79/Add.112, 26 October 1999; Human Rights Committee, Views of 12 October 1982, *David Alberto Campora Schweizer v. Uruguay*, Communication N° 66/1980, UN Doc. CCPR/C/17/D/66/1980, 12 October 1982.

621 See *inter alia*: *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1, 1964, paras. 783 to 787; *Concluding Observations of the Human Rights Committee on Cameroon*, UN Doc. CCPR/C/79/Add.33, 7 April 1994, para. 22; *Lithuania*, UN Doc. CCPR/CO/80/LTU, 1 April 2004, para. 13; *Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, 25 July 2002, para. 11; *Cameroon* CCPR/C/79/Add.116, 3 November 1999, para. 19; Human Rights Committee, Views of the 29 March 2004, *Mansour Ahani v. Canada*, Communication N° 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 15 June 2004, para. 10.2; Views of 27 July 1993, *Henry Kalenga v. Zambia* Communication N° 326/1988, UN Doc. CCPR/C/48/D/326/1988, 2 August 1993, para. 6.3; Views of 23 July 1980, *William Torres Ramirez v. Uruguay*, Communication N° 4/1977, UN Doc. CCPR/C/10/D/4/1977, 8 April 1980, para. 18; Views of 27 March 1981, *Alba Pietraroia v. Uruguay*, Communication N° 44/1979, UN Doc. CCPR/C/12/D/44/1979, 9 April 1981, para. 17; Committee against Torture, *Conclusions and recommendations: Israel*, UN Doc. A/57/44, paras. 47-53; *Report of the Special Rapporteur on Torture*: UN Doc A/57/173, 2 July 2002, paras. 39, 16; UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); *Report of the Independent Expert on the question of protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 37; *Study of the implication for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982, para. 203; *Report on the practice of administrative detention*, UN Doc. E/CN.4/Sub.2/1990/29, 24 July 1990, paras. 64 and ff; European Court of Human Rights: Judgment of 1 July 1961, *Lawless v. Ireland*, Application N° 332/57; Judgment of 18 January 1978, *Ireland v. United Kingdom*, Application N° 5310/71; Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89, 14554/89; Inter-American Commission on Human Rights: *Report on the Situation of Human Rights in Paraguay*, OAS Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, 31 January 1978, Chapter VIII, Recommendations 1 to 4.5; *Report on the Status of Human Rights in Chile*, OAS Doc. OEA/Ser.L/V/II.34, doc. 21 corr.1, 25 October 1974, Chapter XVII Recommendations, Recommendation N° 3 and *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7; and the African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil liberties Organisation v. Nigeria* Communications 143/95, 150/96, 15 November 1999.

reasonableness and the justification on substantial grounds of the measure.<sup>622</sup> A denial of this right amounts to a denial of the safeguards contained in Article 9(4) ICCPR.<sup>623</sup> The right to *habeas corpus* necessarily applies to individuals detained on suspicion of terrorism-related offences.<sup>624</sup>

Judicial control over administrative detention, and in general over limitation of an individual's right to liberty, assumes a crucial role in a system based on the Rule of Law, and its absence violates the fundamental principle of the separation of powers.<sup>625</sup>

#### iv) Right to access a lawyer and to communicate with the outside world

Under international standards, secret detention, unacknowledged detention, prolonged incommunicado detention and prolonged solitary confinement are absolutely prohibited.<sup>626</sup> Solitary confinement or incommunicado detention may amount to prohibited acts such as torture or cruel, inhuman, or degrading treatment or punishment.<sup>627</sup> The UN Human Rights Committee has pointed out

622 See *inter alia*: *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; Human Rights Committee, Views of the 29 March 2004, *Mansour Ahani v. Canada*, Communication N° 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 15 June 2004, para. 10.2; Views of 3 April 1997, *A (name deleted) v. Australia*, Communication N° 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4; *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/C/79/Add.93, 28 July 1998, para. 21; *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 77; *Report of the Special Rapporteur on Torture*, UN Doc A/57/173, 2 July 2002, paras. 16, 39 and UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); European Court of Human Rights: Judgment of 1 July 1961, *Lawless v. Ireland*, Application N° 332/57; Judgment of 18 January 1978, *Ireland v. United Kingdom*, Application N° 5310/1971; Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application N° 14553/89; 14554/89; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7.

623 Human Rights Committee: Views of 26 October 1979, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication N° 9/1977, UN Doc. CCPR/C/8/D/9/1977, 26 October 1979; Views of 29 July 1980, *Miguel A. Millan Sequeira v. Uruguay*, Communication N° 6/1977, UN Doc. CCPR/C/10/D/6/1977, 29 July 1980; Views of 27 March 1981, *Esther Soriano de Bouton v. Uruguay*, Communication N° 37/1978, UN Doc. CCPR/C/12/D/37/1978, 27 March 1981.

624 *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 75. See also the Legal Commentary to the ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.

625 *Report of the Special Rapporteur on Torture*, UN Doc. A/57/173, 2 July 2002, para. 15; Inter-American Commission on Human Rights, *Annual Report– 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V.

626 See, *inter alia*: Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 11 and 13; *Concluding Observations of the Human Rights Committee on United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12; European Court of Human Rights, Judgment of 25 May 1998, *Kurt v. Turkey*, Application N° 24276/94, paras. 123-124; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 211 and 213; Article 17.1 of the *International Convention on the Protection of All Persons from Enforced Disappearance*; and Principle III of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

627 See, *inter alia*: Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para. 6; *Report of the Committee against Torture*, UN Doc. A/54/44, 26 June 1999, paras. 121 and 146; *Report of the Committee*

that “[t]he absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law”.<sup>628</sup> The UN Working Group on Enforced and Involuntary Disappearances has pointed out that prolonged and indefinite incommunicado detention can amount to enforced disappearance, if national authorities deny that they are holding the detainee in custody.<sup>629</sup> The Inter-American Commission on Human Rights has underlined that “all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited. This could include [...] prolonged incommunicado detention.”<sup>630</sup>

Any person who is arrested or detained has the right to have prompt access to a lawyer without delay,<sup>631</sup> which includes the right to communicate and consult with him or her without interference or censorship and in full confidentiality.<sup>632</sup> The right to have prompt access to a lawyer is universally recognised and protected.<sup>633</sup> Immediate access to a lawyer is an essential means of protection of detainees, the denial of which amounts to a violation of Articles 7, 9, 10 and 14(3)(b) of the ICCPR.<sup>634</sup> The Committee has stated “that no one is [to be] held for more than 48

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*against Torture*, UN Doc. A/53/44, 16 September 1998, para. 135; *Report of the Committee against Torture*, UN Doc. A/55/44, 2 January 2001, para. 182; and Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez v. Honduras*, para. 156 and Judgment of 12 November 1997, *Sudrez Rosero v. Ecuador*, paras. 90-91.

628 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13 (b). See also the European Court of Human Rights, Judgment of 25 May 1998, *Kurt v. Turkey*, Application N<sup>o</sup> 24276/94, paras. 123-124.

629 *Report of the Working Group on enforced or involuntary disappearances*, UN Doc. E/CN.4/1435, 26 January 1981, paras. 175 and ff.; UN Doc. E/CN.4/1492, 31 December 1981, para. 158; and UN Doc. E/CN.4/1983/14, 21 January 1983, para. 96.

630 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 211 and 213.

631 See, among others, Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle 7 of the *UN Basic Principles on the Role of Lawyers*; Principle V of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*; and Principle M (2) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. See also *supra* Principle no. 8 and its Commentary. See also: Human Rights Committee: *Concluding Observations of the Human Rights Committee on Georgia*, UN Doc. CCPR/C/79/Add.75, 5 May 1997, para. 27; *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 23 August 2003, para. 13; and *Report of the Special Rapporteur on Torture*, UN Doc. A/57/173, 2 July 2002, para. 18 and UN Doc. E/CN.4/2004/56, 23 March 2004, para. 32.

632 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18 (3) and the *UN Basic Principles on the Role of Lawyers*, Principle 8.

633 Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Rule 93 of the *Standard Minimum Rules for the Treatment of Prisoners*; Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principles 1, 5, 6, 7 and 8 of the *UN Basic Principles on the Role of Lawyers*; Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution* and Principle M(2) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

634 Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para. 11. See also the *Concluding Observations of the Human Rights Committee on Tajikistan*, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 11; *Thailand*, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 15; *Georgia*, UN Doc. CCPR/C/79/Add.75, 5

hours without access to a lawyer”<sup>635</sup> and that all detainees, including those being held in administrative detention, have the right to prompt access to a lawyer.<sup>636</sup>

Arrested or detained persons must be allowed to communicate with the outside world, especially their family. Indeed, international human rights standards protect the right of detainees to inform their family immediately of their arrest, detention or transfer and to communicate with them.<sup>637</sup> Detainees and prisoners have the right to be visited by and to correspond with members of their family and friends and must be given adequate opportunity to communicate with the outside world.<sup>638</sup>

Detainees have the right to be given a proper medical examination as promptly as possible after admission to the place of detention, and thereafter medical care and treatment shall be provided whenever necessary. This right is an essential safeguard that is universally recognised.<sup>639</sup> The Inter-American Commission on Human Rights has made clear that this right constitutes a fundamental standard for the protection of detainees, including people held in administrative detention, and that it may not be suspended even in circumstances allowing derogation in emergency situations.<sup>640</sup>

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May 1997, para. 27; *Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 13.

635 *Concluding Observations of the Human Rights Committee on Israel*, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 13.

636 *Ibid.*; *Concluding Observations of the Human Rights Committee on Switzerland*, UN Doc. CCPR/C/79/Add.70, 7 November 1996, para. 26; Human Rights Committee, Views of 27 July 1993, *Henry Kalenga v. Zambia*, Communication No<sup>o</sup> 326/1988, UN Doc. CCPR/C/48/D/326/1988, 2 August 1993, para. 6.3.

637 Article 17 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principles 15, 16.1 and 19 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Article 10 of the *Declaration on the Protection of all Persons from Enforced Disappearance*; Rules 37 and 92 of the *Standard Minimum Rules for the Treatment of Prisoners*; Article 17 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Principle 6 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*; Principle M of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principle V of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

638 Principle 19 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Rules 37, 38, 39 and 92 of the *Standard Minimum Rules for the Treatment of Prisoners* and Rules 59, 60, 61 and 62 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

639 Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Article 10 of the *Declaration on the Protection of all Persons from Enforced Disappearance*; Rules 37 and 92 of the *Standard Minimum Rules for the Treatment of Prisoners*; Article 6 of the *Code of Conduct for Law Enforcement Officials*; Principle 5(c) of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*; Principle IX(3) of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*; Principle M(2)(b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

640 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 127 and 139 and Recommendation N<sup>o</sup> 7.

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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In its Congress of Athens on *the Rule of Law* (1955), the ICJ recalled that “[e]veryone has the right to liberty and security. No one shall be arbitrarily arrested, detained or deported.”<sup>641</sup> The ICJ Congress highlighted that “[w]hoever is deprived of his liberty by arrest or detention [pre-trial or administrative detention] has the right to demand a procedure by which a judicial authority may be called upon to determine without delay the legitimacy of the detention, and to order his release if it appears that such detention has not been effected in conformity with the law.”<sup>642</sup>

In its *Congress on the Rule of Law in a Free Society* (New Delhi, 1959), the ICJ stressed that “Every legislature in a free society under the Rule of law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights. [...] The Legislature must: [...] provide procedural machinery (‘Procedural Due Process’) and safeguards whereby the abovementioned freedoms are given effect to and protected.”<sup>643</sup> The ICJ Congress also reaffirmed that, including in times of public emergency which may require delegation of powers from the Legislature to the Executive, “in no event shall fundamental human rights be abrogated by means of delegated legislation.”<sup>644</sup> The ICJ Congress went on to state that “[e]very arrested person should be brought, within as short a period as possible, fixed by law, before an appropriate judicial authority.”<sup>645</sup>

In its *African Conference on the Rule of Law* (Lagos, 1961), the ICJ affirmed that “in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised.”<sup>646</sup> The Conference stated also that “[n]o person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offence; further, except during a public emergency, preventive detention without trial is held to be contrary to the Rule of Law. [...] During a period of public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary

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641 Resolution I “Fundamental principles of penal law”, para. 4, of the Committee on Criminal Law, *Congress of Athens*, 1955.

642 *Ibid.*

643 Clause III of the Conclusions of Committee I “The Legislature and the Rule of Law”, *Congress of New Delhi*, 1959.

644 Clause I of the Conclusions of Committee II “The Executive and the Rule of Law”, *Congress of New Delhi*, 1959.

645 Clause III.4 of the Conclusion of Committee III “The criminal process and the Rule of Law”, *Congress of New Delhi*, 1959.

646 Resolution of Committee I, *Human rights and government security*, Article 7, *Conference of Lagos*, 1961.

confinement by requiring a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review.”<sup>647</sup>

In its *Bangkok Conference* in 1965, the ICJ adopted the following conclusions, recommended by its First Working Commission, regarding administrative detention:

*“It should be lawful only during a period of public emergency threatening the life of the nation[...]. There should be a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review, and with representation by counsel at all stages; [...] Except in time of war, it should be effective only for a specified period of time, not exceeding six months, and renewable only by the Legislature after careful consideration of its necessity.”*<sup>648</sup>

In its *Conference of French-speaking African Jurists* (Dakar, 1967), the ICJ reaffirmed that “[f]reedom from arbitrary arrest or detention should be scrupulously safeguarded by law and in practice. Preventive detention without trial must be considered contrary to the Rule of Law. Every person on arrest should be brought before a judge or magistrate within a very short time, and should be set free if he has been arbitrarily arrested.”<sup>649</sup>

In its *European Conference of Jurists on the Individual and the State* (Strasbourg, 1968), the ICJ reaffirmed that “during periods of public emergency, legislation authorising preventive detention should contain safeguards for the individual against continuing arbitrary confinement by requiring in each case a prompt hearing and decision upon the need and justification for the detention. Such decision should always be subject to judicial review.”<sup>650</sup>

In its Congress on *Human Rights in an Undemocratic World* (Vienna 1977), the ICJ concluded that “Where a state of siege or martial law is declared to deal with the exceptional situation, the following basic safeguard should be strictly observed: (a) Arrest and detentions, particularly administrative detentions, must be subject to judicial control, and remedies such as *habeas corpus* or *amparo* must always be available to test the legality of any arrest or detention. Any other forms of review prescribed by the law of the country in case of emergency should also be available. The right of every detainee to legal assistance by a lawyer of his choice must at all times be recognised.”<sup>651</sup>

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647 Resolution of Committee II, *Human rights and aspects of criminal and administrative law*, Article 5, *Conference of Lagos*, 1961.

648 *ICJ News Letters* N° 24, January /March 1985, pp. 52-53.

649 Article IV (2) of the Conclusions adopted by the Conference on the proposal of the Committee I, *Dakar Conference*, 1967.

650 Paragraph 22 of the Conclusions of the Conference, *Conference of Strasbourg*, 1968.

651 Paragraph 8 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human*

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted at its Congress in Berlin (2004), the ICJ stated that “States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to *habeas corpus* or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.”<sup>652</sup>

## 4. Selected excerpts from international standards

### 2. International legal framework

The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated. [...] no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge; [...] where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal.

— *Principle 70 (b) and (d) of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

The objectives and functions of the judiciary include the following: a) To ensure that all persons are able to live securely under the rule of law; b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and c) To administer the law impartially among person and between persons and the State.

— *Principle 10 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may

*Rights in an Undemocratic World*, adopted in Vienna, 1977. See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 61.

652 Principle 6 - Deprivation of liberty, *Berlin Declaration*, 2004.

decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.

— *Principle M (4) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.

— *Principle V of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*

States should: [...] Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

— *Guideline 32 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*

## 2. (ii) The right to *habeas corpus*

The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

— *Principle 60 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo*, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

— *Article 16 (3) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as *habeas corpus* proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of *habeas corpus* or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive

jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

— *Principle 12 of the Draft Principles Governing the Administration of Justice through Military Tribunals*

In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of person administratively without charge shall be subject to review by courts of other independent authority by way of *habeas corpus* or similar procedures.

— *Principle 43 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

Judicial bodies shall at all times hear and act upon petitions for *habeas corpus*, *amparo* or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to *habeas corpus*, *amparo* or similar procedures.

— *Principle M(5)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

All remedies, including special ones, such as *habeas corpus* or *amparo*, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country.

— *Principle 21 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

## 2. (iii) Administrative detention, judicial control and remedies

No person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge; [...] where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal.

— *Principle 70 (b) and (d) of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

In every case of detention without trial, during an emergency, the remedy of *habeas corpus* (or *amparo*) must be available to the detainee at least for the limited purpose of ensuring the supervisory jurisdiction of a competent court of law in five respects: (a) for determination whether the relevant law of preventive or administrative detention is in compliance with the relevant constitutional requirements; (b) whether the order of detention is in compliance with the law of preventive or administrative detention; (c) whether the detainee is the person

against whom the order of detention was issued and whether the order was made *mala fides* or in violation of natural justice; (d) for ensuring that every detainee is treated with humanity and with respect by directing, *inter alia*, his medical examination and inspection of the prison or place of detention; and (e) for ensuring that the minimum rights of the detainee mentioned in the preceding paragraphs are duly implemented by the detaining authority.

— *Standards 3 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty and supervision of the execution of, or compliance with, punishments.

— *Principle VI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*

Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.

— *Principle M(2)(h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

## **2. (iv) Right to access a lawyer and to communicate with the outside world**

The law shall prohibit, in all circumstances, incommunicado detention of persons and secret deprivation of liberty since they constitute cruel and inhuman treatment. [...] Persons deprived of liberty shall have the right [...] to communicate with their family. [...] All persons deprived of liberty shall have the right to a defense and to legal counsel [...] they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.

— *Principles III and V of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*

Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right[...]. Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. [...] States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends[...]. Any person arrested or detained shall have prompt access to a lawyer...

— *Principle M(2)(b), (c), (e) and (f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*



## Principle 10

In times of crisis, only courts and tribunals should dispense justice and only a court of law or tribunal should try and convict a person for a criminal offence. Every person has the right to a fair trial by an independent and impartial tribunal or court established by law. In times of crisis, civilians must only be tried by ordinary courts or tribunals, except when special rules of international law allow military tribunals to try civilians. All such proceedings must respect the inherent minimum guarantees of a fair trial. In particular, governments must not, even in times of emergency, derogate from or suspend the presumption of innocence, the right to be informed of the charge, the right of defence, the right against self-incrimination, the principle of equality of arms, the right to test evidence, the prohibition against the use of information obtained under torture or other serious human rights violations, the non-retroactivity of criminal liability and the right to judicial appeal.

## Commentary

### 1. Unlawful national practices

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In times of crisis, States sometimes establish new – or resort to existing – forms of military tribunals which are given jurisdiction over civilians. In many instances this practice constitutes denial of the right to be tried by an independent and impartial court in which judicial safeguards are fully respected. It has also resulted in the practice of arbitrary detention and has frequently been used to suppress peaceful political activity and the legitimate exercise of fundamental liberties such as freedom of expression, association and assembly.

Historically, throughout the world, the practice of trying civilians under “military justice” has been used by authoritarian or military governments as a tool of political repression for containing opposition or dissident activity. Military courts established by military or *de facto* military regimes were used, for example, on the Iberian peninsula during the protracted regime of Francisco Franco in Spain.<sup>653</sup> Similarly, the practice was in evidence in the period stretching from the 1970s

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653 Andreu-Guzmán Federico, *Military jurisdiction and international law. Military courts and gross human rights violations (Vol. I)*, International Commission of Jurists, Colombian Commission of Jurists, Geneva, 2004, p. 325.

through the 1990s in States as diverse as Chile,<sup>654</sup> Uruguay,<sup>655</sup> Peru<sup>656</sup> and Syria.<sup>657</sup> In other countries, such as Turkey, individuals could be tried not only by military courts but also by special or ‘extraordinary’ courts, often called State Security Courts or Tribunals and constituted in whole or in part of military officers.

Frequently States invoke exceptional powers pursuant to a state of emergency to “legitimate” this practice. Such was the situation in Colombia, until the Supreme Court of Justice on 5 March 1987 declared the trial of civilians by military courts to be unconstitutional.<sup>658</sup> States have also invoked the existence of an armed conflict, or a situation of foreign occupation to justify resorting to this practice, including, over the past three decades, Israel and the Occupied Territories,<sup>659</sup> Democratic Republic of Congo,<sup>660</sup> Nepal<sup>661</sup> and Sudan.<sup>662</sup> Other pretexts include the need to defend against an “internal enemy”, “enemy of the State”, “terrorists”, separatist activities or political subversives. Governments have invoked such justifications for example in Turkey<sup>663</sup> and the United States of America.<sup>664</sup>

## 2. International legal framework

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### i) General consideration: the complementarity of international humanitarian law and international human rights law

Situations of crisis may reach the threshold of international or non-international armed conflict. In such instances, determination as to whether there exists an armed conflict will depend on the criteria set by international humanitarian law. However, even in respect of such cases where an armed conflict has arisen, both international human rights law and international humanitarian law will continue

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654 *Ibid.*, pp. 206-208.

655 *Ibid.*, pp. 359-361.

656 *Ibid.*, pp. 305-309.

657 International Commission of Jurists, *Attacks on Justice – June 1992-June 1993*, Geneva, 1993, pp. 186-187.

658 Andreu-Guzmán Federico, *Military jurisdiction and international law. Military courts and gross human rights violations (Vol. I)*, International Commission of Jurists, Colombian Commission of Jurists, Geneva, 2004, p. 228.

659 International Commission of Jurists, *Attacks on Justice 2002*, 11th Edition, Geneva, 2002, p. 299.

660 *Ibid.*, pp. 174-175.

661 International Commission of Jurists, *Attacks on Justice 2005 – Nepal*, available at <http://www.icj.org/dwn/database/NEPAL.pdf> (accessed on 31 March 2011).

662 International Commission of Jurists, *Attacks on Justice 2002*, 11th Edition, Geneva, 2002, p. 492.

663 Council of Europe Committee of Experts on Terrorism (CDEXTER), *Profiles on Counter-Terrorist Capacity – Turkey*, June 2006, available at [http://www.coe.int/t/dlapil/codexter/4\\_Theme\\_Files/Country\\_Profiles/CDEXTER%20Profiles%20\(2006\)%20Turkey%20E.pdf](http://www.coe.int/t/dlapil/codexter/4_Theme_Files/Country_Profiles/CDEXTER%20Profiles%20(2006)%20Turkey%20E.pdf), (accessed on 31 March 2011).

664 Andreu-Guzmán Federico, *Military jurisdiction and international law. Military courts and gross human rights violations (Vol. I)*, International Commission of Jurists, Colombian Commission of Jurists, Geneva, 2004, p. 359.

to apply. In fact, both branches of international law are complementary.<sup>665</sup> As the International Court of Justice has affirmed:

*“The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”*<sup>666</sup>

The Human Rights Committee has stated that: “While, in respect of certain [ICCPR] rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [such] rights, both spheres of law are complementary, not mutually exclusive.”<sup>667</sup> The *raison d’être* of this dual application and complementary relevance is in the fact that both bodies of law serve the purpose of protecting human dignity.<sup>668</sup>

## ii) Civilian and Military Tribunals: the general principle

Although international human rights law does not prohibit military tribunals *per se*, like any other court, military tribunals and their functions must be in conformity with international fair trial standards, and to the same extent as the ordinary courts. Indeed, the Human Rights Committee,<sup>669</sup> the European Court of Human Rights,<sup>670</sup> the Inter-American Court of Human Rights,<sup>671</sup> the Inter-American Commission on Human Rights<sup>672</sup> and the African Commission on Human and Peoples’ Rights<sup>673</sup> have all affirmed that the principle of the independence of the tribunal and standards on fair trial are also applicable to military courts.

665 For a more detailed analysis, please see the Legal Commentary to the ICJ Berlin Declaration, Principle no. 11.

666 International Court of Justice, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, para. 106. See also: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1986, para. 25.

667 UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11.

668 See International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Judgment of 10 December 1998, *Prosecutor v. Anto Furundizija*, N° IT/95-17/I-T, para. 183; statement by the President of the ICRC to the 60th Annual Session of the UN Commission on Human Rights, Geneva 17 March 2004, available at <http://www.icrc.org/eng/resources/documents/misc/5x6mys.htm> (accessed on 19 April 2011).

669 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22.

670 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99; Judgment of 10 May 2001, *Cyprus v. Turkey*, Application N° 25781/94.

671 Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo-Petruzzi et al. v. Peru*, paras. 129 and 131; Judgment of 18 August 2000, *Cantoral-Benavides v. Peru*, paras. 75 and 114.

672 See, *inter alia*, Inter-American Commission on Human Rights, Resolution on “*Terrorism and Human Rights*”, 12 December 2001.

673 African Commission on Human and Peoples’ Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98, para. 44, 29th Ordinary Session.

Under international human rights law, the scope of jurisdiction of military tribunals is circumscribed by a number of criteria: a) jurisdiction of military tribunals should be confined to military offences committed by military personnel;<sup>674</sup> b) military tribunals are not competent to try military personnel for gross human rights violations, which are ordinary criminal offences under the jurisdiction of ordinary courts and which cannot be considered as criminal offences related to military service;<sup>675</sup> and c) as a matter of principle, military tribunals are not competent to try civilians.<sup>676</sup>

The rationale of this limited scope of jurisdiction of military tribunals derives from the fact that these tribunals constitute a challenge to the “right to be tried by ordinary courts or tribunals using established legal procedure”, which is universally protected,<sup>677</sup> and the right to equality before the law and tribunals. Both rights are inherently linked with the principle of the “natural judge” (*juge naturel, juez natural, gesetzlicher Richter, giudice naturale*), also known as the principle of the “lawful judge” or the right to a “competent tribunal”.<sup>678</sup>

The principle of the “natural judge” reflects the premise that it is the legally established court or tribunal which has competence. The lawful sphere of competence of a judge is delimited by law in terms of territory (*ratione loci*), subject matter (*ratione materiae*), person (*ratione personae*) and time (*ratione tempore*). However, reducing the principle of the “natural judge” to a formal or legalistic definition is tantamount to emptying it of its content. It is therefore not sufficient that a tribunal be formally established by law.<sup>679</sup> While it may be acceptable for

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674 See *inter alia*: Principle 29 of the *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*; Principle 8 of the *Draft principles governing the administration of justice through military tribunals*; Article 5 (f) of the *Singhvi Declaration*; Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and Principle 44 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*.

675 Article 16 (2) of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 29 of the *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*; Principles 8 and 9 of the *Draft principles governing the administration of justice through military tribunals*; Article IX of the *Inter-American Convention on Forced Disappearance* and Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

676 See *inter alia*: Article 5 (e) of the *Singhvi Declaration*; Principle 5 of the *Draft principles governing the administration of justice through military tribunals*; Principle 22 (b) of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*; Principle 43 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*; Principle 70 (f) of the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*; Article 16 (4) of the *Paris Minimum Standards of Human Rights Norms In a State of Emergency*; and Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

677 See *inter alia*, Principle 5 of the *UN Basic Principles on the Independence of the Judiciary*; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, paras. 128-129; and African Commission of Human and Peoples' Rights, *Forum of Conscience v. Sierra Leone*, Communication 223/98, para. 60, 28th Ordinary Session.

678 See also *supra* Principle no. 3 and its Commentary.

679 Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 125.

specialised jurisdictions to be established, their legitimacy, as underscored by the Human Rights Committee, will depend upon whether the different treatment is based on reasonable and objective grounds.<sup>680</sup> The Inter-American Court of Human Rights also noted in a case concerning Peru that “several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances.”<sup>681</sup> The Court has therefore taken the view that:

*“[i]n a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces [so that] only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order”.*<sup>682</sup>

Both the Court and the Inter-American Commission on Human Rights as well as the European Court of Human Rights<sup>683</sup> and the African Commission on Human and Peoples’ Rights consider military criminal jurisdiction to be an exclusively functional forum for the maintenance of discipline in the Armed Forces, dealing with strictly military crimes committed by military personnel. This restrictive scope of jurisdiction of the military tribunal was reiterated by the UN General Assembly in several resolutions<sup>684</sup> and by the former UN Commission on Human Rights.<sup>685</sup>

680 Human Rights Committee, Views of 4 April 2001, *Joseph Kavanagh v. Ireland*, Communication N° 819/1998, para. 10.2, UN Doc. CCPR/C/71/D/819/1998, 26 April 2001.

681 Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 128.

682 Inter-American Court of Human Rights, Judgment of 16 August 2000, *Durand and Ugarte v. Peru*, para. 117.

683 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99; Judgment of 10 May 2001, *Cyprus v. Turkey*, Application N° 25781/94; Judgment of 21 December 2006, *Maszni v. Romania*, Application N° 59892/00.

684 See *inter alia*: UN General Assembly, *Resolution 39/121 on the Situation of human rights and fundamental freedoms in Chile*, UN Doc. A/RES/39/121, 14 December 1984; *Resolution 40/145 on the Situation of human rights and fundamental freedoms in Chile*, UN Doc. A/RES/40/145, 13 December 1985; *Resolution 41/161 on the Situation of human rights and fundamental freedoms in Chile*, UN Doc. A/RES/41/161, 4 December 1986; *Resolution 42/147 on the Situation of human rights and fundamental freedoms in Chile*, UN Doc. A/RES/42/147, 7 December 1987; *Resolution 54/179 on the Situation of human rights in the Democratic Republic of Congo*, UN Doc. A/RES/54/179, 17 December 1999; *Resolution 55/117 on the Situation of human rights in the Democratic Republic of Congo*, UN Doc. A/RES/55/117, 4 December 2000; *Resolution 56/173 on the Situation of human rights in the Democratic Republic of Congo*, UN Doc. A/RES/56/173, 19 December 2001; *Resolution 50/199 on the Situation of human rights in Nigeria*, UN Doc. A/RES/50/199, 22 December 1995; *Resolution 52/144 on the Situation of human rights in Nigeria*, UN Doc. A/RES/52/144, 12 December 1997.

685 Commission on Human Rights: *Resolution 1989/32 on the Independence and Impartiality of the judiciary, jurors and assessors and the independence of lawyers*, UN Doc. E/CN.4/RES/1989/32, 6 March 1989; *Resolution 1992/79 on the Situation in Equatorial Guinea*, 5 March 1992; *Resolution 1993/69 on the Situation in Equatorial Guinea*, 10 March 1993; *Resolution 1997/67 on the Situation of Human Rights in Equatorial Guinea and assistance in the field of human rights*, 16 April 1997; *Resolution 1998/71*

Along the same lines, the Human Rights Committee has affirmed that the scope of the jurisdiction of a military tribunal should generally be restricted to disciplinary matters and its application to military personnel.<sup>686</sup>

Although human rights treaties contain no provisions that specifically prohibit the trial of civilians by military tribunals, a number of international non-treaty instruments and international standards address this question.<sup>687</sup> The prohibition is reflected in the *Draft principles governing the administration of justice through military tribunals*, adopted by the former UN Sub-Commission on the Promotion and the Protection of Human Rights,<sup>688</sup> which remains pending consideration by the UN Human Rights Council but which is considered by the European Court of Human Rights as reflecting the “developments over the last decade at the international level”.<sup>689</sup>

The UN Special Rapporteur on the Independence of Judges and Lawyers has reached the conclusion that “[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice.”<sup>690</sup> While not excluding the possibility that the practice could be lawful in limited situations,<sup>691</sup> the Human Rights Committee, in respect of the specific cases it has examined, has considered such

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on the *Situation of human rights in Equatorial Guinea and assistance in the field of human rights*, UN Doc. E/CN.4/RES/1998/71, 21 April 1998; Resolution 1998/61 on the *Situation of human rights in the Democratic Republic of Congo*, UN Doc. E/CN.4/RES/1998/61, 21 April 1998; Resolution 1999/19 on the *Situation of human rights in Equatorial Guinea and assistance in the field of human rights*, UN Doc. E/CN.4/RES/1999/19, 23 April 1999; Resolution 1999/56 on the *Situation of human rights in the Democratic Republic of Congo*, UN Doc. E/CN.4/1999/56, 27 April 1999; Resolution 2000/15 on the *Situation of human rights in the Democratic Republic of Congo*, UN Doc. E/CN.4/RES/2000/15, 18 April 2000; Resolution 2000/19 on the *Situation of human rights in Equatorial Guinea and assistance in the field of human rights*, UN Doc. E/CN.4/RES/2000/19, 18 April 2000; Resolution 2001/22 on the *Situation in Equatorial Guinea and assistance in the field of human rights*, UN Doc. E/CN.4/RES/2001/22, 20 April 2001; Resolution 2002/14 on the *Situation of human rights in the Democratic Republic of Congo*, 19 April 2002; Resolution 2002/37 on the *Integrity of the judicial system*, 22 April 2002; Resolution 2003/39 on the *Integrity of the judicial system*, 23 April 2003.

686 *Concluding Observations of the Human Rights Committee on Lebanon*, UN Doc. CCPR/C/79/Add.78, 1 April 1997, para. 14.

687 Principle 5 of the *UN Basic Principles on the Independence of the Judiciary*; Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principles 43 and 44 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*; Principle 22(b) of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*; Article 16(4) of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*.

688 Transmitted to the Commission on Human Rights by the UN Sub-Commission on the Promotion and Protection on Human Rights through resolution 2005/15 of 10 August 2006. Available in UN Doc. E/CN.4/2006/58 of 13 January 2006.

689 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N<sup>o</sup> 47533/99; Judgment of 21 December 2006, *Maszni v. Romania*, Application N<sup>o</sup> 59892/00; Judgment of 8 July 2008, *Satik v. Turkey*, Application N<sup>o</sup> 60999/00.

690 *Special Rapporteur on the independence of judges and lawyers, Report on the Mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, para. 5.

691 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22.

practices to be incompatible with Article 14 of the ICCPR.<sup>692</sup> The UN Committee against Torture has also expressed its concern about the practice of trying civilians in military courts and has recommended its abolition.<sup>693</sup> The UN Committee on the Rights of the Child has repeatedly insisted that minors should not be subject to the jurisdiction of military courts.<sup>694</sup>

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has recommended the disestablishment of the system of US Military Commissions for trying detainees held at Guantanamo Bay and has said that terrorism suspects should be tried in ordinary courts due to incompatibilities in the composition and functioning of the Commission system with the ICCPR.<sup>695</sup> The Working Group on Arbitrary Detention has reached the conclusion that military justice leads to a substantial incidence of arbitrary detention of civilians. While examining the practice of civilians being tried by military courts in the context of individual cases and decisions as well as of in-country missions, the Working Group concluded that such practices were in conflict with the requirements of the right to a fair trial recognised both in the *Universal Declaration of Human Rights* (Articles 10 and 11) and in the ICCPR (Article 14) and gave rise to arbitrary detentions. Within this framework, the Working Group drew up the following general recommendation: "... if some form of military justice is to continue to exist, it should observe four rules: a) It should be incompetent to try civilians; [...] c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime."<sup>696</sup>

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692 *Concluding Observations of the Human Rights Committee on Peru*, UN Doc. CCPR/CO/70/PER, 1 November 2000, para. 11. See also *Concluding Observations of the Human Rights Committee on Egypt*, UN Doc. CCPR/CO/76/EGY, 1 November 2002, para. 16; *Russian Federation*, UN Doc. CCPR/C/79/Add.54, 26 July 1995, para. 25; *Kuwait*, UN Doc. CCPR/CO/69/KWT, 27 July 2000, para. 17-18; *Slovakia*, UN Doc. CCPR/C/79/Add.79, 4 August 1997, para. 20; *Uzbekistan*, UN Doc. CCPR/CO/71/UZB, 26 May 2001, para. 15; *Cameroon*, UN Doc. CCPR/C/79/Add.116, 4 November 1999, para. 21; *Algeria*, UN Doc. CCPR/C/79/Add.1, 25 September 1992, para. 5; *Nigeria*, UN Doc. CCPR/C/79/Add.64, 3 April 1996; *Poland*, UN Doc. CCPR/C/79/Add.110, 29 July 1999, para. 21; *Lebanon*, UN Doc. CCPR/C/79/Add.78, 1 April 1997, para. 14; *Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 9; *Syria*, UN Doc. CCPR/CO/71/SYR, para. 17; *Morocco*, UN Doc. CCPR/C/79/Add.113, 1 November 1999, para. 18; *Venezuela*, UN Doc. CCPR/C/79/Add.13, 28 December 1992, para. 8; *Peru*, UN Doc. CCPR/C/79/Add.67, 25 July 1996, para. 12.

693 *Concluding Observations of the Committee against Torture on Peru*, UN Doc. A/50/44, 26 July 1995, paras. 62-73 and UN Doc. A/55/44, 15 November 1999, para. 59; *Jordan*, UN Doc. A/50/44, 26 July 1995, paras. 159-182; *Chile*, UN Doc. A/50/44, 26 July 1995, paras. 52-61.

694 *Concluding Observations of the Committee on the Rights of the Child on Democratic Republic of the Congo*, UN Doc. CRC/C/15/Add.153, 9 July 2001, para. 75; *Turkey*, UN Doc. CRC/C/15/Add.152, 9 July 2001, para. 65; *Peru*, UN Doc. CRC/C/15/Add.120, 22 February 2000, para. 11.

695 *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, para. 59

696 *Ibid.*, para. 80. In its 2000 report to the Commission on Human Rights, the Working Group reiterated this general recommendation (*Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2000/4, 28 December 1999, paras. 67 and 68).

The same consensus towards the prohibition of trials of civilians by military courts has been reached on the part of regional human rights jurisprudence as well. The Inter-American system<sup>697</sup> has held that although there is no express treaty prohibition on the trial of civilians by military tribunals,<sup>698</sup> such practice is nevertheless in violation of the principle of the natural judge and the right to be tried by a competent, independent and impartial tribunal. Military courts have a functional competence limited to crimes committed by military personnel in the discharge of their duties.<sup>699</sup> Extending this competence to matters subject to the jurisdiction of regular courts would impair due process guarantees and therefore the right to access to a court.<sup>700</sup> Referring to the UN Basic Principles on the Independence of the Judiciary, the Inter-American Court held that “States are not to create [t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”<sup>701</sup> Accordingly, “[t]he trial of civilians is incumbent on the ordinary justice [system].”<sup>702</sup>

The African Commission on Human and Peoples’ Rights in its General Recommendations, as well as in its resolutions on countries and its decisions on individual cases, has affirmed that trial of civilians by military personnel is in breach of Articles 7 and 26 of the *African Charter on Human and Peoples’ Rights* and the UN *Basic Principles on the Independence of the Judiciary*.<sup>703</sup>

The European Court of Human Rights has pointed out that although the Convention does not prohibit military tribunals ruling over military personnel for criminal

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697 See *inter alia*: Inter-American Commission on Human Rights, *Annual Report - 1997*, OAS Doc. OEA/Ser.L/V/II.98, doc. 6, 17 February 1998, Chapter VII, Point 1; *Annual Report - 1998*, OAS Doc. OEA/Ser.L/V/II.102, doc. 6 rev., 16 April 1999, Chapter VII; *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

698 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, doc. 59 rev., 2 June 2000, Chapter II “Administration of justice and rule of law”, para. 152. See also *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 231 and para. 10 of the Recommendations, Recommendation E, “Right to Due Process and to a Fair Trial”.

699 Inter-American Commission on Human Rights, Report N° 88/99 of 27 September 1999, Case N° 12,013, *Lino César Oviedo (Paraguay)*, para. 30; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 128.

700 Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 128.

701 *Ibid.*, para. 129.

702 Inter-American Court of Human Rights, Judgment of 22 November 2005, *Palamara-Iribarne v. Chile*, para. 143.

703 African Commission on Human and Peoples’ Rights, *Forum of Conscience v. Sierra Leone*, Communication 223/98, para. 60, 28th Ordinary Session; *Annette Pagnoule v. Cameroon*, Communication 39/90, April 1997; *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*, Communication 137/94, 139/94, 154/96 and 161/97, 31 October 1998; *Civil Liberties Organisation v. Nigeria*, Communication 151/96, 15 November 1999; *Centre for Free Speech v. Nigeria*, Communication 206/97, 15 November 1999; *Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegade and others)*, Communication 60/91, 1995; *The Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v. Nigeria*, Communication 87/93, 1995.

charges, with due regard to the safeguards of independence and impartiality, trying civilians on the basis of criminal charges by such courts poses concerns.<sup>704</sup> The European Court clarified that the jurisdiction of military courts over civilians must be carefully analysed.<sup>705</sup> Making reference to the UN *Draft principles governing the administration of justice through military tribunals* and jurisprudence from the UN Human Rights Committee and the Inter-American Court and Commission, the European Court supported “its approach from developments over the last decade at international level, which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians. [...] Their jurisdiction should therefore be reserved for military personnel who had committed crimes or lesser offences in the performance of their duties.”<sup>706</sup> With respect to the particular position of the military within a State, deemed to be limited to national security, and given that the judicial power is “in principle an attribute of civil society,”<sup>707</sup> the trial of civilians by military courts, composed of military officers having close links with the executive, cannot be regarded as fulfilling the requirements of Article 6 of the European Convention.<sup>708</sup>

### iii) Exceptions to the general principle

Although under international human rights law civilians may generally not be tried by military tribunals, human rights authorities have accepted exceptions to this general principle. The Human Rights Committee,<sup>709</sup> the Inter-American Commission on Human Rights<sup>710</sup> and the European Court of Human Rights<sup>711</sup> have considered that only in very exceptional circumstances would trials of civilians by military tribunals be compatible with the right to a fair trial. However, these exceptions are conditioned upon strict and cumulative criteria and conditions.

First, military tribunals must meet the minimum requirements and guarantees established under international law regarding an independent, impartial and competent tribunal.<sup>712</sup> Secondly, trials conducted by such tribunals must be under-

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704 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99, paras. 40-41. See also Judgment of 21 December 2006, *Maszni v. Romania*, Application N° 59892/00, paras. 42-43.

705 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99, para. 42.

706 *Ibid.*, para. 45.

707 *Ibid.*, para. 46.

708 European Court of Human Rights, Judgment of 10 May 2001, *Cyprus v. Turkey*, Application N° 25781/94, paras. 358 – 359.

709 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22.

710 Inter-American Commission on Human Rights, Resolution on *Terrorism and Human Rights*, 12 December 2001.

711 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99, para. 44.

712 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and*

taken in full conformity with the requirements of a fair trial as provided under Article 14 of the ICCPR<sup>713</sup> and the special or military character of these courts cannot limit or modify such guarantees.<sup>714</sup> Thirdly, trials of civilians by military tribunals may take place only in exceptional circumstances, where such trials are necessary and justified by objective and serious reasons, or are authorised by international humanitarian law. Regarding the first exception, the Human Rights Committee has stated that the exceptional circumstances may be fulfilled where a State can justify the resort to the trial of civilians by military tribunals on the grounds of necessity, objective and serious justifications and on the inability of regular civilian courts to try that specific class of individuals and offences.<sup>715</sup> In any case, because of the different treatment that a civilian might receive if tried by a military court, as compared to being tried by regular tribunals, and because of concerns as to the impartiality of military courts if exercising jurisdiction over acts committed against armed forces, there is the need to justify each specific case according to such criteria.<sup>716</sup>

As to those cases authorised by international humanitarian law, reference must be made to certain provisions of the 1949 Geneva Conventions permitting the trial of civilians in an occupied territory or civilians who follow or accompany military troops in the context of an international armed conflict. In principle, combatants and individuals with prisoner of war status must be tried only by a military court.<sup>717</sup> In this context, in international armed conflicts, IHL regulates the situation of civilians who follow or accompany military troops without actually belonging to them.<sup>718</sup> This group of civilians includes civilian members of the crew of military aircraft, suppliers and members of work or service units responsible

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*tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 19 and 22; Inter-American Commission on Human Rights, *Resolution on Terrorism and Human Rights*, 12 December 2001; European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N<sup>o</sup> 47533/99; Judgment 10 May 2001, *Cyprus v. Turkey*, Application N<sup>o</sup> 25781/94; Judgment of 8 July 2008, *Satik v. Turkey*, Application N<sup>o</sup> 60999/00; Judgment of 21 December 2006, *Maszni v. Romania*, Application N<sup>o</sup> 59892/00; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98, 29th Ordinary Session.

713 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22. See also Inter-American Commission on Human Rights, *Resolution on Terrorism and Human Rights*, 12 December 2001.

714 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22

715 *Ibid.* See also Inter-American Commission on Human Rights, *Resolution on Terrorism and Human Rights*, 12 December 2001. See also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

716 European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey*, Application N<sup>o</sup> 47533/99, paras. 47-49. See also: Judgment of 8 July 2008, *Satik v. Turkey*, Application N<sup>o</sup> 60999/00, para. 48.

717 Article 84 of *Convention (III) relative to the Treatment of Prisoners of War*. See also Articles 43 and ff of *Protocol I*. However, Article 84 of the *III Geneva Convention* provides also that "Unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war..."

718 See *inter alia* Article 4 (4) of the *Convention (III) relative to the Treatment of Prisoners of War*.

for the welfare of service personnel, as long as they have received authorisation from the armed forces they are accompanying.<sup>719</sup> These persons have the right to prisoner of war status if they fall into the hands of the enemy.<sup>720</sup> However, this list is not exhaustive.<sup>721</sup> For example, the person concerned must have been carrying out duties analogous to those described above and have been authorised to do so by the armed forces in question.<sup>722</sup> Similarly, under certain conditions, civilians taking part in a *levée en masse* (“mass levies”)<sup>723</sup> and members of crews of the merchant marine and the crews of civil aircraft of the Parties of the conflict<sup>724</sup> have the right to the status of prisoner of war.

Irrespective of the status of prisoner of war, civilians in occupied territory may be tried by a military tribunal of the Occupying Power.<sup>725</sup> However, the Human Rights Committee has pointed out that the ICCPR also applies in armed conflicts and that, since in certain situations international humanitarian law should guide the interpretation of the provisions of the Covenant, the two bodies of law are complementary.<sup>726</sup> The previous dispositions on civilians in occupied territory, adopted 60 years ago, has been challenged by the International Committee of the Red Cross (ICRC) and human rights jurisprudence, taking into account the evolution of international law concerning the trial of civilians by military tribunals. Indeed, the ICRC has pointed out in relation to Article 66 of the IV Geneva Convention that “regional human rights bodies have found, however, that the trial of civilians by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal.”<sup>727</sup> In this regard, the European Court of Human Rights in the case of *Cyprus v. Turkey*, dealing with Turkey’s continuing occupation of Northern Cyprus, held that given the “close structural links between the executive power and the military officers serving on the military courts”<sup>728</sup>, the practice

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719 Verri Pietro, *Diccionario de derecho internacional de los conflictos armados*, Ediciones TM-Editores /CICR, Bogotá, 1998, p. 86.

720 Article 13 of the *Geneva Convention I*, Article 13 of the *Geneva Convention II* and Article 4 of the *Geneva Convention III*. See also Article 13 of the Regulations attached to the *Fourth Hague Convention of 1907* and Article 81 of the *Convention relative to the Treatment of Prisoners of War*, Geneva, 1929.

721 ICRC Commentary on Article 4 of *Geneva Convention (III)*.

722 *Ibid.*

723 See *inter alia* Article 4 (6) of the *Convention (III) relative to the Treatment of Prisoners of War*.

724 See *inter alia* Article 4 (5) of the *Convention (III) relative to the Treatment of Prisoners of War*.

725 See Articles 66 and ff of the *Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (IV Convention)*.

726 Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11. See also Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

727 ICRC, *Customary International Humanitarian Law, Volume I, Rules*, Cambridge Press University, pp. 356-357.

728 European Court of Human Rights, Judgment of 10 May 2001, *Cyprus v. Turkey*, Application N<sup>o</sup> 25781/94, para. 358.

of trying civilians before military courts constituted a violation of Article 6 of the European Convention.<sup>729</sup>

In respect of non-international armed conflict, international humanitarian law does not contain express provisions referring to military or ordinary courts.<sup>730</sup> However, as pointed out by the Inter-American Commission on Human Rights, with regard to civilians involved in armed conflict, “international human rights law prohibits the trial of civilians by military tribunals”.<sup>731</sup> Regarding the issue of acts of terrorism, and irrespective of whether such acts may be committed in times of peace or national emergency, including armed conflict, the Inter-American Commission considered that even in cases of terrorism imputable to civilians, the “right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards” requires “trial by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians.”<sup>732</sup> In various situations of non-international armed conflict, the Inter-American Commission on Human Rights has asked the States concerned to repeal legislation allowing the trial of civilians, including members of armed opposition groups, by military tribunals and to ensure that they are tried by ordinary courts.<sup>733</sup>

#### iv) Fair trial and judicial guarantees

As a corollary of the principle of the separation of powers, only the judicial organs of the State are authorised to dispense justice. This principle has been reaffirmed by the Human Rights Committee in its General Comment 29, where it stressed that in war or in a state of emergency “[o]nly a court of law may try and convict a person for a criminal offence”.<sup>734</sup> The Inter-American Commission on Human Rights also affirmed that:

*“[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established*

729 *Ibid.*, para. 359.

730 See Article 6 (2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

731 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 256.

732 *Ibid.*, para. 261 (b).

733 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Colombia*, OAS Doc. OEA/Ser.L/V/II.53, doc. 22, 30 June 1981; *Report on the Situation of Human Rights in Guatemala*, OAS Doc. OEA/Ser.L/V/II.61, doc. 47, 3 October 1983; *Report on the Situation of Human Rights in Nicaragua*, OAS Doc. OEA/Ser.L/V/II.45, doc. 16 rev. 1, 17 November 1978; and *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, doc. 59 rev., 2 June 2000.

734 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

*with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled ius puniendi*".<sup>735</sup>

The right to be tried by an independent and impartial tribunal is universally recognised and protected in numerous international human rights treaties and instruments<sup>736</sup> and international humanitarian law.<sup>737</sup> The Human Rights Committee has repeatedly emphasised that the right to be tried by a competent, impartial and independent tribunal is not subject to any exception.<sup>738</sup> Moreover, the fundamental principles of the right to a fair trial, including the presumption of innocence can never be subject to derogation.<sup>739</sup> The Committee has further explained that "[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations."<sup>740</sup>

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735 Inter-American Commission on Human Rights, Report N° 49/00 of 13 April 2000, Case N° 11,182, *Rodolfo Gerbert, Ascencio Lindo et al. v. Peru*, para. 86.

736 For example, at the universal level: Article 10 of the *Universal Declaration of Human Rights*; Article 14(1) of the *International Covenant on Civil and Political Rights*; Article 5(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 37(d) and 40.2 of the *Convention on the Rights of the Child*; the *UN Basic Principles on the Independence of the Judiciary*; the *UN Guidelines on the Role of Prosecutors* and the *UN Basic Principles on the Role of Lawyers*. Among those to be found at the regional level are the following: Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*; Guideline IX of the Council of Europe *Guidelines on Human Rights and the Fight against Terrorism*; Article 47 of the *Charter of Fundamental Rights of the European Union*; Article XXVI of the *American Declaration of the Rights and Duties of Man*; Article 8(1) of the *American Convention on Human Rights*; Articles 7 and 26 of the *African Charter on Human and Peoples' Rights*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; Article 13 of the *Arab Charter on Human Rights* and the *Charter of Paris for a new Europe: A new era of Democracy, Peace and Unity*, adopted on 21 November 1990 by the Meeting of the Heads of State or Government of the Participating States of the Conference on Security and Cooperation in Europe, held under the auspices of the Organization for Security and Cooperation in Europe.

737 For example, Article 84 of the *III Geneva Convention*, Articles 54, 64 to 74 and 117 to 126 of the *IV Geneva Convention*, Article 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts* (Protocol I), and Article 6 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

738 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19. See also, Human Rights Committee, Views of 28 October 1992, *Miguel González del Río v. Peru*, Communication N° 263/1987, para. 5.2, UN Doc. CCPR/C/46/263/1987, 28 October 1992.

739 Human rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

740 *Ibid.*, para. 16.

International humanitarian law also affirms the right to be tried by an independent and impartial tribunal.<sup>741</sup> In the case of international armed conflict and regarding prisoners of war and protected persons, the denial of a fair trial or trial by a court which does not offer the essential guarantees of independence and impartiality, constitute a war crime.<sup>742</sup> The International Committee of the Red Cross (ICRC) has considered Article 75 of Protocol I to the Geneva Conventions as a “summary of the law” particularly in the very complex field of judicial guarantees”.<sup>743</sup> In the context of non-international armed conflict, international humanitarian law prescribes the strict respect of the rule of fair trial by independent and impartial tribunals.<sup>744</sup> Although common Article 3 to the four Geneva Conventions of 1949 does not explicitly refer to an “independent and impartial tribunal”, it is clear that it embodies such principle. In his commentary on common Article 3 of the Geneva Conventions, Jean Pictet stated that “[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point: it is only “summary” justice which it is intended to prohibit”.<sup>745</sup>

The ICRC, in its *Study on Customary International Humanitarian Law*, has concluded that the provision “no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees” is a rule of customary international law applicable to both international and internal armed conflicts.<sup>746</sup> The ICRC has highlighted that “trial by an independent, impartial and regularly constituted court” is one of the basic elements of these essential judicial guarantees.<sup>747</sup> In both international and non international armed conflicts, the denial of a fair trial by independent and impartial tribunals constitutes a crime under international law.<sup>748</sup>

741 For example, Articles 84 and 130 of the *Third Geneva Convention relative to the treatment of prisoners of war*; Articles 54, 64 to 74 and 117 to 126 of the *Fourth Geneva Convention*.

742 See *inter alia*: Article 84 of the *Third Geneva Convention relative to the treatment of prisoners of war*; Articles 71-71 and 147 of the *Fourth Convention relative to the Protection of Civilian Persons in Time of War*; Article 75 (4) of *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol I); and Article 8 (2)(a)(vi) of the *Rome Statute on the International Criminal Court*.

743 ICRC Commentary on Article 75(4), para. 3007, available at <http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument>, (accessed on 31 March 2011).

744 Article 3 *Common to the four Geneva Conventions of 1949* and Article 6(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

745 See International Committee of the Red Cross (ICRC)’s website at: <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/1919123e0d121fec12563cd0041fc08?OpenDocument>, (accessed on 19 April 2011).

746 Rule N<sup>o</sup> 100 in International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge Press University, 2005, p. 352.

747 *Ibid.*, p. 354.

748 See *inter alia*: Article 20 (a)v(i) of the *Draft Code of Crimes against the Peace and Security of Mankind* of the UN International Law Commission (1996); Article 8 (2)(a)(vi) of the *Rome Statute on the International*

The right to a fair trial must be guaranteed irrespective of the gravity of the crime of which a person is accused, even in cases of crimes under international law.<sup>749</sup>

Within this framework, the Human Rights Committee has specifically identified the following judicial guarantees as not subject to derogation, even in times of emergency: the principle of presumption of innocence; the right not to be compelled to testify against oneself or to confess guilt; the prohibition on using statements, confessions or other evidence obtained under torture or ill-treatment; and the principle that, in the case of trials resulting in the imposition of the death penalty during states of emergency, all judicial guarantees established in article 14 of the ICCPR must be applied.<sup>750</sup> The Inter-American Commission on Human Rights has stated that even in cases where military courts are allowed to try civilians, i.e. where no civilian court exists or trial by a civilian court is materially impossible, the minimum guarantees of a fair trial must be guaranteed.<sup>751</sup> These minimum guarantees have been identified as including the principle of non-discrimination between citizens and others under the jurisdiction of the State; the impartiality of the judge; the right to have legal representation and assistance of a counsel freely chosen; the right of access to inculpatory evidence and the right to contest it.<sup>752</sup> Indeed, the most fundamental fair trial requirements, which apply to investigation, prosecution and punishment of all crimes, including those related to terrorism, cannot be suspended in times of emergency, including armed conflict,

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*Criminal Court*; Article 4 (g) of the *Statute of the International Criminal Tribunal for Rwanda*; Article 2 (f) of the *Statute of the International Criminal Tribunal for the former Yugoslavia*; Article 3 (g) of the *Statute of the Special Court for Sierra Leone*; Article 6 of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (endorsed by the UN General Assembly Resolution 57/288 B); and Section 6.1 (a)(vi) and (c)(iv) of the *UN Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences of the United Nations Transitional Administration in East Timor* (UNTAET/REG/2000/15 of 6 June 2000).

749 See *inter alia*: Principle V of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 1950; Article 41 of the *Draft Statute for an International Criminal Court* of the UN International Law Commission, 1994; Article 11(a) of the *Draft Code of Crimes against the Peace and Security of Mankind* of the UN International Law Commission, 1996; Article 11 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 8(6) of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; Article 16 of the *Declaration on the Protection of all Persons from Enforced Disappearance*; Article 20 of the *Statute of the International Criminal Tribunal for Rwanda*; Article 21 of the *Statute of the International Criminal Tribunal for the former Yugoslavia*; Article 67 of the *Rome Statute on the International Criminal Court*; Article 17 of the *Statute of the Special Court for Sierra Leone*; Article 16 of the *Statute of the Special Tribunal for Lebanon*; Article 13 of the *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea*; Guideline IX of the Council of Europe *Guidelines on human rights and the fight against terrorism*.

750 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.17/Add.11, 31 August 2001, para. 15; and *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 6.

751 Inter-American Commission on Human Rights, *Resolution on Terrorism and Human Rights*, 12 December 2001.

752 *Ibid.*

or in times of peace, either under international human rights law or international humanitarian law.<sup>753</sup>

In sum, under international law the following elements of the right to a fair trial must be considered as not allowing for derogation or similar restriction:

- the right to be tried by an independent, impartial, competent and regularly constituted court;
- the presumption of innocence;
- the principle of individual criminal responsibility;
- the principle of non-retroactivity of criminal law;
- the principle of *ne bis in idem* (no one shall be tried twice for the same offence);
- the right to be informed of the nature and cause of any charges;
- the rights required for defence and the means of ensuring them, including: the right to a legal defence; the right to free legal assistance if the interests of justice so require; the right to sufficient time and facilities to prepare the defence; and the right for the accused to communicate freely with counsel;
- the right to be tried without delay;
- the right to examine witnesses or have them examined on one's behalf;
- the principle of equality of arms;
- the right to the assistance of an interpreter, if the accused cannot understand the language used in the proceedings;
- the right not to be compelled to testify against oneself or to confess guilt;
- the right to have the judgment pronounced publicly; and
- the right to appeal and judicial review of one's conviction.

### **3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences**

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Since its early years, the ICJ has called on States to guarantee that every accused person has the fundamental right to a fair trial by an independent, impartial and

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<sup>753</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261.

competent tribunal, even in times of emergency. In the Congress of Athens (June, 1955),<sup>754</sup> in the New Delhi Congress on the Rule of Law in a Free Society (1959),<sup>755</sup> in the African Conference on the Rule of Law (Lagos, 1961)<sup>756</sup> and in the European Conference of Jurists on the Individual and the State (Strasbourg, 1968),<sup>757</sup> the ICJ reaffirmed the principles of criminal law and basic judicial guarantees of a fair trial, which constitute a cornerstone of the Rule of Law.

The ICJ has paid particular attention to the maintenance of these fundamental guarantees in times of emergency. In the *Conference of French-speaking African Jurists* (Dakar, 1967) the ICJ expressed that in situations of emergency the creation of special courts may be allowed only for the strict exigencies required by the emergency, and that such practice is “subject to the observance, in all circumstances, of the safeguards set out in this Article [i.e. the basic fair trial guarantees in a criminal process].”<sup>758</sup>

In its Congress on *Human Rights in an Undemocratic World* (Vienna, 1977), the ICJ reiterated that “Where a state of siege or martial law is declared to deal with an exceptional situation, the following basic safeguards should be strictly observed: [...] (d) The jurisdiction of military tribunals should be restricted to offences by the armed forces. Civilians should not be tried in military tribunals.”<sup>759</sup>

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted in Berlin (2004), the ICJ reiterated that “States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military tribunals....”<sup>760</sup>

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754 Paragraph 4 of the *Act of Athens* and the Resolution I “Fundamental principles of penal law” of its Committee on Criminal Law, *Congress of Athens*, 1955.

755 Resolution “The criminal process and the Rule of Law” of Committee III of the *Congress of New Delhi*, 1959.

756 Paragraph 3 of the ICJ Declaration Law of Lagos and Resolution II “Personal liberty and the criminal process” of Committee II of the Conference, *Conference of Lagos*, 1961.

757 Paragraphs 6 to 10 of the Conclusions of the Conference, *Conference of Strasbourg*, 1968.

758 Article IV of the Conclusions adopted by the Conference on the proposal of the I Committee, *Dakar Conference*, 1967.

759 Paragraph 8 of the Section “The Rule of Law under Military Regimes” of the ICJ Declaration on *Human Rights in an Undemocratic World* adopted in Vienna, 1977. See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 61.

760 Principle 7 “Fair Trial” of the *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Berlin, 2004.

ICJ Congresses have also underlined that the right to a fair trial is not exhausted with the basic judicial procedural guarantees but also incorporates the basic principles of criminal law. These include the principle of the legality of crimes and punishment (principle *nullum crimen sine lege, nulla poena sine lege*); the principle of individual criminal liability and the prohibition of collective punishment; and the principle of the non-retroactive application of criminal law.<sup>761</sup>

#### 4. Selected excerpts from international standards

##### 2. (ii) Civilian and Military Tribunals: the general principle

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

— *Principle 5 of the UN Basic Principles on the Independence of the Judiciary*

In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts. [...] The jurisdiction of military tribunals shall be confined to military offences.

— *Article 5 (e) and (f) of the Singhvi Declaration*

civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority.

— *Principle 70 (f) of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

In no case may a civilian be tried for a security-related crime by a military court or tribunal.

— *Principle 22 (b) of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

in times of grave public emergency [...] the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary

<sup>761</sup> Resolution of Congress of New Delhi on the Rule of Law in a Free Society, Resolution “The criminal process and the Rule of Law” of Committee III; Principle 3 of the *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Berlin, 2004.

civilian courts[...]. The jurisdiction of military tribunals must be confined to military offences.

— *Principles 43 and 44 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. [...] The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

— *Principles 5 and 8 of the UN Draft Principles Governing the Administration of Justice Through Military Tribunals*

civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.

— *Article 16(4) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel. b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines. c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

— *Principle L of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

## 2. (iii) Fair trial and judicial guarantees

The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(l)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

— *Principle 1 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

any person charged with an offense shall be entitled to a fair trial by a competent, independent and impartial court established by law.

— *Principle 70 (e) of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

Judges shall in all their work ensure the rights of everyone to a fair trial.

— *Article 1 of the Universal Charter of the Judge*

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

— *Principle V of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950*

No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.

— *Principle R of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts.

— *Article 5 (c) of the Singhvi Declaration*

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

— *Principle A(1) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

— *Standard 21 of the Minimum Standards of Judicial Independence of the International Bar Association*

## Principle 11

The executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to deprive victims of human rights violations and/or their relatives of their rights to effective access to justice, effective judicial remedies and full reparation. The adoption of measures to remove jurisdiction or the judicial remedies for human rights violations from the ordinary courts constitutes a serious attack against the independence of the judiciary and basic principles of the Rule of Law. State secrecy and similar restrictions must not impede the right to an effective remedy for human rights violations.

## Commentary

### 1. National unlawful practices

In times of crisis, the legal remedies normally available for human rights violations are vulnerable to being curtailed, leaving victims of abuses committed by the State without effective relief. Frequently, the right to an effective judicial remedy is suspended during times of crisis. In a number of countries, national legislation granting blanket immunity from prosecution has been accorded to State agents for human rights violations committed in the course of military or law enforcement operations. Frequently, procedural amendments have been introduced in the legislation governing remedies that have impaired the right to an effective remedy. In other cases, the right to a judicial remedy has been abrogated. There have been also cases where the jurisdiction of the ordinary tribunals to consider complaints has been removed in favour of military tribunals or administrative bodies.

In Argentina, until they were declared unconstitutional by the Supreme Court in 2005, the “full stop” and “due obedience” laws in force impaired the right of victims and their relatives to secure investigations and prosecutions for human rights violations.<sup>762</sup>

In 2006, the Special Rapporteur on the independence of judges and lawyers expressed concern at legislation in Tajikistan which provided for the jurisdiction of military courts in civil cases involving members of the military and in criminal cases in which at least one of the crimes or one of the accused fell within the military jurisdiction.<sup>763</sup> The fact that military courts operate irrespective of whether

<sup>762</sup> *Report of the UN Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/60/321, 31 August 2005, para. 45.

<sup>763</sup> *Report of the UN Special Rapporteur of the Commission on Human Rights on the independence of judges*

the case concerns civil liability or gross human rights violations is an impairment of each individual's right to effective remedy and access to an impartial and independent tribunal in cases of such human rights violations.<sup>764</sup>

## 2. International legal framework

Under international human rights law, including both customary and treaty law, States have the duty to guarantee that human rights are respected.<sup>765</sup> This duty to guarantee entails responsibility by the State to prevent violations, to investigate them, to bring to justice and punish perpetrators, to provide an effective remedy for the victims of human rights violations, and to provide fair and adequate reparation to the victims and their relatives.<sup>766</sup> These obligations are complementary, not alternative, and may not be substituted for one another.<sup>767</sup> The State, therefore, is the guarantor of human rights and, as such, has a fundamental obligation to protect and safeguard those rights.

Under international law, every person has the right to an effective remedy before an independent authority in the event that his or her human rights have been violated, in order to obtain reparation. It is a general principle of public

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and lawyers, *Leandro Despouy*, UN Doc. A/61/384, 12 September 2006, para. 45.

<sup>764</sup> *Ibid.*

<sup>765</sup> See, among others, Article 2 of the *International Covenant on Civil and Political Rights*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2(c) of the *Convention on the Elimination of All Forms of Discrimination against Women*; the *International Convention for the Protection of All Persons from Enforced Disappearance*; the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; the *Declaration on the Protection of All Persons from Enforced Disappearance*; the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; Article 1(1) of the *American Convention on Human Rights*; Article 1 of the *Inter-American Convention on Forced Disappearance of Persons*; Article 1 of the *Inter-American Convention to Prevent and Punish Torture*; Article 1 of the *African Charter on Human and Peoples' Rights*; Article 3 of the *Arab Charter on Human Rights*; Article 1 of the *European Convention on Human Rights*.

<sup>766</sup> See, among others, the Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCRP/C/21/Rev.1/Add.13, 26 May 2004; Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez v. Honduras*, paras. 166 and 174; Inter-American Commission on Human Rights, *Report N° 1/96 of 1 March 1996, Case N° 10,559, Chumbivilcas (Peru)*; African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication 155/96, 30th Ordinary Session; and the *Third Report of the UN Observer Mission in El Salvador ONUSAL*, UN Doc. A/46/876 S/23580, 19 February 1992, para. 28.

<sup>767</sup> See, among others, the *Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1994/7, 7 December 1993, paras. 688 and 711; Inter-American Commission on Human Rights, *Report N° 28/92 of 2 October 1992, Cases N° 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina)*, para. 52; *Report N° 36/96 of 15 October 1996, Case N° 10,843 (Chile)*, para. 77; *Report N° 34/96 of 15 October 1996, Cases N° 11,228, 11,229, 11,231 and 11,282 (Chile)*, para. 76; *Report N° 25/98 of 7 April 1998, Cases N° 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile)*, para. 50; and Inter-American Court of Human Rights, *Judgment of 27 August 1998, Garrido and Baigorria v. Argentina*, para. 72.

international law that any wrongful act, i.e. any breach of an obligation under international law, gives rise to an obligation to make reparation for that wrongful act.<sup>768</sup> The right to a remedy for victims of violations of human rights and international humanitarian law is a fundamental principle of general international law and one of the basic pillars of the Rule of Law in a democratic society. Violation of the State's obligation to respect and ensure the observance of human rights gives rise to an independent international obligation to provide reparation,<sup>769</sup> which has been affirmed by international tribunals.<sup>770</sup> Similarly, the violation of the norms of international humanitarian law gives rise to a duty to provide reparations.<sup>771</sup>

The right to an effective remedy is enshrined in the vast majority of universal and regional human rights instruments and is so widely accepted that it is a principle of customary international law.<sup>772</sup> The Human Rights Committee had

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768 Permanent Court of International Justice, *Factory at Chorzow, Jurisdiction*, Judgment n° 8, 1927, P.C.I.J., Series A, no. 17, p. 29; International Court of Justice, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; International Court of Justice, *Interpretation of peace treaties with Bulgaria, Hungary and Romania, second phase*, Advisory Opinion, I.C.J. Reports 1950, p. 228. See also Article 1 of the draft *Articles on State Responsibility* adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State.", UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility"). See also Principles no. 3 and 9 and their Legal Commentary.

769 See among others: Article 8 of the *Universal Declaration of Human Rights*; Articles 2(3), 9(5) and 14(6) of the *International Covenant on Civil and Political Rights*; Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 39 of the *Convention on the Rights of the Child*; Article 14 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 24 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 75 of the *Rome Statute for an International Criminal Court*; Articles 25, 68 and 63(1) of the *American Convention on Human Rights*; Article 21(2) of the *African Charter of Human and Peoples' Rights*. See also: *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; *UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of international humanitarian law*; Article 19 of the *UN Declaration on the Protection of all Persons from Enforced Disappearance*; Principle 20 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; *UN Declaration on the Elimination of Violence against Women*; Council of Europe Committee of Ministers Recommendation No. R (85) 11 to member states on the position of the victim in the framework of criminal law and procedure (28 June 1985); *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005); *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*; and Council of European Union *Council Framework Decision on the standing of victims in criminal proceedings, 2001/220/JHA*.

770 See *inter alia*: Inter-American Court of Human Rights, Judgment of 29 July 1989, *Velásquez Rodríguez v. Honduras*, para. 174; European Court of Human Rights, Judgment of 31 October 1995, *Papamichalopoulos v. Greece*, Application N° 14556/89, para. 36.

771 Under international humanitarian law, Article 3 of the *Hague Convention IV respecting the Laws and Customs of War on Land* includes specific requirements to pay compensation. Likewise, the four *Geneva Conventions* of 12 August 1949 contain a provision of liability for grave breaches and Article 91 of the 1977 *Additional Protocol I* specifically provides for liability to pay compensation. See also, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

772 See Article 2(3) of the *International Covenant on Civil and Political Rights*; Article 13 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*; Articles 12, 17(2)(f) and 20 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 6(2) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*,

highlighted that “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.”<sup>773</sup> The Inter-American Court of Human Rights has highlighted that “[a]ll the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole”.<sup>774</sup> The Committee on the Rights of the Child has affirmed that “[f]or rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties”.<sup>775</sup>

### **i) Non-derogability of the right to an effective remedy**

While the right to a remedy is not specifically identified in international treaties as a right not subject to derogation,<sup>776</sup> it is among the most essential rights for the effective protection of all other human rights and must be guaranteed even in times of emergency.<sup>777</sup> The Human Rights Committee has stated that although

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*supplementing the United Nations Convention against Transnational Organized Crime; Article 6(2) of the Universal Declaration of Human Rights; Articles 9 and 13 of the Declaration on the Protection of All Persons from Enforced Disappearance; Principles 4 and 16 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions; Principles 4-7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Article 27 of the Vienna Declaration and Programme of Action; Articles 13,160-162 and 165 of the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Article 9 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Article 13 of the European Convention on Human Rights; Article 47 of the Charter of Fundamental Rights of the European Union; Articles 7(1)(a) and 25 of the American Convention on Human Rights; Article XVIII of the American Declaration of the Rights and Duties of Man; Article III(1) of the Inter-American Convention on Forced Disappearance of Persons; Article 8(1) of the Inter-American Convention to Prevent and Punish Torture; Article 7(a) of the African Charter of Human and Peoples' Rights; Article 9 of the Arab Charter on Human Rights.*

773 Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 16.

774 Inter-American Court of Human Rights, Judgment of 29 August 2002, “*El Caracazo*” v. *Venezuela*, para. 115. See also: Judgment of 27 February 2002, *Trujillo Oroza v. Bolivia*, para. 99; Judgment of 22 February 2002, *Bámaca Velásquez v. Guatemala*, paras. 75 and 77; and Judgment of 3 December 2001, *Cantoral Benavides v. Peru*, paras. 69-70

775 Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5, 27 November 2003, para. 24.

776 Nevertheless, the *American Convention on Human Rights* prohibits the suspension of judicial guarantees that are essential for the protection of non-derogable rights (Article 27(1)). Similarly, the *International Convention for the Protection of All Persons from Enforced Disappearance* establishes *habeas corpus* as non-derogable.

777 See the Human Rights Committee: *General Comment No.29, States of Emergency (Article 4)*, UN Doc.

the right to an effective remedy (Article 2(3) of the ICCPR) is not enumerated as non-derogable, its importance in ensuring the discharge of obligations under the ICCPR is such that States may not impair the obligation to provide an effective remedy.<sup>778</sup> The Human Rights Committee likewise highlighted that: “[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”.<sup>779</sup>

The Inter-American Court of Human Rights has also emphasised that judicial remedies essential to protect non-derogable rights are themselves non-derogable.<sup>780</sup> The Court further underlined that the right to an effective remedy is one of the basic foundations of the American Convention and of the Rule of Law in a democratic society.<sup>781</sup> Within this framework, the absence of an effective recourse against human rights violations constitutes a violation of the Convention itself.<sup>782</sup>

## ii) Access to justice and judicial remedies

Access to justice and the determination of rights by an independent and impartial tribunal are fundamental for the victims of human rights violations and their relatives. These rights have frequently been characterised as constituting the most essential rights for the effective protection of all other human rights.<sup>783</sup> It is well established that any person whose rights have been affected is entitled, in the determination of his or her rights, to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>784</sup>

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CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14; the UN Commission on Human Rights, Resolution 1992/35 on *habeas corpus*, 28 February 1992, para. 2; the European Court of Human Rights: Judgment of 18 December 1996, *Aksoy v. Turkey*, Application N° 21897/93, para. 83; and the Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas Corpus in Emergency Situations*, para. 42, and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, operative paras. 2 and 3.

778 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16. See also the *Concluding Observations of the Human Rights Committee on Albania*, UN Doc. CCPR/CO/82/ALB, 2 December 2004, para. 9.

779 Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 15.

780 Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*.

781 Inter-American Court of Human Rights, Judgment of 3 November 1997, *Castillo Páez v. Peru*, para. 82.

782 Inter-American Court of Human Rights, Judgment of 16 August 2000, *Durand and Ugarte v. Peru*, paras. 102-103.

783 *Report of the Special Representative on Human Rights Defenders*, UN Doc. A/56/341, 10 September 2001, para. 9; *Report of the Special Rapporteur on violence against women on cultural practices in the family that are violent towards women*, UN Doc. E/CN.4/2002/83, 31 January 2002, para. 116.

784 See *inter alia*: Article 10 of the *Universal Declaration of Human Rights*; Article 14(1) of the *International Covenant on Civil and Political Rights*; Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 47 of the *Charter of Fundamental Rights of the European Union*;

The question as to what constitutes an effective remedy has been the subject of jurisprudence by international human rights bodies. Under the ICCPR (Article 2(3)(b)), the nature of the remedy may be judicial, administrative, legislative or of another nature. However, the Human Rights Committee has highlighted that the remedy must be available and effective and must be understood primarily as a remedy of a judicial nature, bearing in mind that the effectiveness might depend upon the type of the alleged violation.<sup>785</sup> Whereas the Human Rights Committee leaves open the possibility that non-judicial, including administrative, remedies could be appropriate for certain violations, in respect of serious human rights violations such remedies are not sufficient to discharge the obligation to provide an effective remedy.<sup>786</sup>

The African Commission on Human and Peoples' Rights has interpreted the right to an effective remedy as consisting in a judicial remedy.<sup>787</sup> The *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* provide also that "States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination."<sup>788</sup> In the same respect, under inter-American standards, the right to an effective remedy entails a judicial remedy.<sup>789</sup> The Inter-American Court of Human Rights has held since its very first judgment that victims must have a right to judicial remedies, "remedies that must be substantiated in accordance with the rules of due process of law."<sup>790</sup>

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Article XXVI of the *American Declaration of the Rights and Duties of Man*; Article 8(1) of the *American Convention on Human Rights*; Articles 7 and 26 of the *African Charter on Human and Peoples' Rights*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; Article 13 of the *Arab Charter on Human Rights*; *Charter of Paris for a new Europe: A new era of Democracy, Peace and Unity*, adopted on 21 November 1990 by the Meeting of the Heads of State or Government of the Participating States of the Conference on Security and Cooperation in Europe, held under the auspices of the Organization for Security and Cooperation in Europe.

785 Human Rights Committee, Views on admissibility of 14 March 1996, *José Vicente and Amado Villafaña Chaparro et al v. Colombia*, Communication Nº 612/1995, UN Doc. CCPR/C/56/D/612/1995, 19 August 1997, para. 5.3 (original in Spanish, free translation).

786 Human Rights Committee, Views of 27 October 1995, *Nydia Erika Bautista v. Colombia*, Communication Nº 563/1993, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995, para. 8.2. See also: Views of 29 July 1997, *José Vicente and Amado Villafaña Chaparro et al v. Colombia*, Communication Nº 612/1995, UN Doc. CCPR/C/60/D/612/1995, 19 August 1997, paras. 8.2 and 5.3.

787 Principle C(a) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; see also: African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, 30th Ordinary Session, para. 61, in which the Commission considered that the State had to ensure 'legal remedies'.

788 Principle E "Locus standi".

789 Article XVIII of the *American Declaration of the Rights and Duties of Man* and Article 25 of the *American Convention on Human Rights*.

790 Inter-American Court of Human Rights: Judgment of 25 November 2000, *Bámaca Velásquez v. Guatemala*, paras. 184-196; Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, paras. 114-136; Judgment of 25 November 2003, *Myrna Mack Chang v. Guatemala*, paras. 159-218; and Judgment of 27 November 2003, *Maritza Urrutia v. Guatemala*, para. 111.

Although remedies may vary in nature depending on the right that has been breached or the seriousness of the violation, in the case of gross human rights violations, criminal acts, and crimes under international law, the effective remedy must be a judicial remedy before an independent and impartial tribunal established by law.<sup>791</sup> The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (adopted by the UN General Assembly),<sup>792</sup> various UN treaties<sup>793</sup> and several regional instruments<sup>794</sup> address the issue of the effective access to the criminal justice system for victims of criminal offences, gross human rights violations, and crimes under international law, and their rights in criminal proceedings.

### iii) Judicial remedies and ordinary tribunals

A fundamental requirement for a remedy is that it be effective, i.e. provide meaningful access to justice for an alleged victim of a human rights violation.<sup>795</sup> Effectiveness means that the remedy must not be theoretical and illusory, but

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791 See, *inter alia*: Human Rights Committee, Views of 2 November 1989, *Birindwa and Tshisekedi v. Zaire*, Communications N<sup>o</sup> 241/1987 and 242/1987, UN Doc. CCPR/C/37/D/242/1987, 29 November 1989, para. 14; Views of 27 October 1995, *Nydia Erika Bautista v. Colombia*, Communication N<sup>o</sup> 563/1993, CCPR/C/55/D/563/1993, 13 November 1995, para. 8.2. See also the Views of 29 July 1997, *Arhuaco v. Colombia*, Communication N<sup>o</sup> 612/1995, UN Doc. CCPR/C/60/D/612/1995, 19 August 1997, para. 8.2; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19 on Violence against Women*, 29 January 1992, UN Doc. A/47/38, 19 February 1992, para. 24 (f); Principle C (a) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

792 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006. See also *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, in particular Principle 19, para. 2; the Set of Principles was recommended by the Commission on Human Rights in Resolution 2005/81 on *Human Rights Resolution: impunity*, of 21 April 2005, UN Doc. E/CN.4/RES/2005/81.

793 See *inter alia*: Article 8 of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; Article 6(2) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*.

794 See *inter alia*: the Council of Europe Committee of Ministers Recommendation No. R (85) 11 to member states on the *position of the victim in the framework of criminal law and procedure* (25 June 1985); the Council of Europe Committee of Ministers *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005); the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; the Council of European Union *Council Framework Decision on the standing of victims in criminal proceedings*, 2001/220/JHA.

795 Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15; Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24; Principle C of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, 30th Ordinary Session.

must provide practical and real access to justice,<sup>796</sup> and must be capable of determining whether a violation took place and be able to remedy it.<sup>797</sup>

Military tribunals cannot be considered an “effective remedy” in case of human rights violations committed by military personnel and only a judicial proceeding before an ordinary court should be considered to be such an effective remedy.<sup>798</sup> Several international instruments<sup>799</sup> stipulate the obligation to provide for judicial proceedings against those responsible for gross human rights violations in the ordinary jurisdiction and not in special or military jurisdictions. The Human Rights Committee has repeatedly affirmed that the practice of using military courts to try military and police personnel who have committed human rights violations is incompatible with the obligations assumed under the ICCPR, especially those stemming from Articles 2(3) (effective remedy) and 14 (right to a fair trial).<sup>800</sup> The Committee against Torture has adopted the same approach.<sup>801</sup> In respect of the mandates concerning torture,<sup>802</sup> enforced disappearances<sup>803</sup> and extra-judicial,

796 European Court of Human Rights, Judgment of 9 October 1979, *Airey v. Ireland*, Application N<sup>o</sup> 6289/73, para. 24.

797 Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24; and European Court of Human Rights, Judgment of 25 March 1983, *Silver and others v. United Kingdom*, Application N<sup>o</sup> 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 113.

798 See also Principle no. 10 and its Commentary.

799 Article 16(2) of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 29 of the *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*; Principles 8 and 9 of the *UN Draft principles governing the administration of justice through military tribunals*; Commission on Human Rights, Resolution 1994/67 on *Civil Defense Forces*; Article IX of the *Inter-American Convention on Forced Disappearance of Persons*; and Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

800 *Concluding Observations of the Human Rights Committee on Bolivia*, UN Doc. CCPR/C/79/Add.74, 1 May 1997, para. 11; *Brazil*, UN Doc. CCPR/C/79/Add.66, 24 July 1996, para. 10; *Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 9; *Colombia*, UN Doc. CCPR/C/79/Add.2, 25 September 1992, para. 393 and UN Doc. CCPR/C/79/Add.76, 5 May 1997, para. 18; *Croatia*, UN Doc. CCPR/C/79/Add.15, 28 December 1992, para. 369; *Dominican Republic* UN Doc. CCPR/CO/71/DOM, 26 April 2001, para. 10; *El Salvador*, UN Doc. CCPR/C/79/Add.34, 18 April 1994, para. 5; *Ecuador*, UN Doc. CCPR/C/79/Add.92, 18 August 1998, para. 7; *Guatemala*, UN Doc. CCPR/CO/72/GTM, 27 August 2001, paras. 10 and 20; *Lebanon*, UN Doc. CCPR/C/79/Add.78, 1 April 1997, para. 14; *Peru*, UN Doc. CCPR/C/79/Add.8, 25 September 1992, para. 8; *Venezuela*, UN Doc. CCPR/C/79/Add.13, 28 December 1992, para. 7.

801 See, *inter alia*, *Concluding Observations of Committee against Torture on Peru*, UN Doc. A/55/44, 16 November 1999, paras. 61 and 62; *Colombia*, UN Doc. A/51/44, 9 July 1996, paras. 76 and 80; *Jordan*, UN Doc. A/50/44, 26 July 1997, para. 175; *Venezuela*, UN Doc. A/54/44, 5 May 1999, para. 142; *Guatemala*, UN Doc. A/53/44, 27 May 1998, para. 162 (e).

802 See *inter alia*: *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1990/17, 18 December 1989, para. 271.

803 General comments on Article 16(2) of the *Declaration on the Protection of All Persons from Enforced Disappearance: Report of the Working Group on enforced or involuntary disappearances*, UN Doc. E/CN.4/1996/38, 15 January 1996, para. 56. See also: *Working Group on enforced or involuntary disappearances, Report on the Mission to Colombia*, UN Doc. E/CN.4/1989/18/Add.1, 6 February 1989, para. 136; *Report of the Working Group on enforced or involuntary disappearances*. UN Doc. E/CN.4/1990/13, 24 January 1990, para. 345; *Report of the Working Group on enforced or involuntary disappearances*, UN Doc. E/CN.4/1991/20, 17 January 1991, para. 408; *Report of the Working Group on enforced or involuntary disappearances*, UN Doc. E/CN.4/1992/18, 30 December 1991, para. 367; *Report of the Working Group on*

arbitrary or summary executions,<sup>804</sup> arbitrary detention<sup>805</sup> and the independence of judges and lawyers,<sup>806</sup> the UN special procedures of the Human Rights Council and former UN Commission on Human Rights have reflected similar views.

The Inter-American Court and the Inter-American Commission on Human Rights have also considered that military tribunals cannot be considered an effective remedy in case of human rights violations committed against civilians.<sup>807</sup> The Inter-American Commission on Human Rights has concluded that “military tribunals may not be used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts.”<sup>808</sup>

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*enforced or involuntary disappearances*, UN Doc. E/CN.4/1993/25, 7 January 1993, para. 46.

- 804 See *inter alia*: *Colombia - Joint Report of the Special Rapporteur on the question of Torture, and the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/1995/111, 16 January 1995, para. 120 (f); *Report by the Special Rapporteur on summary or arbitrary executions*, UN Doc. E/CN.4/1989/25, 6 February 1989, para. 220; *Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/1994/7, 7 December 1993, para. 697; *UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Report on Mission to Peru*, UN Doc. E/CN.4/1994/7/Add.2, 15 November 1993, para. 48; *Report by the Special Rapporteur on summary or arbitrary executions*, UN Doc. E/CN.4/1984/29, 21 February 1984, para. 131; *UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Report on Visit to Mexico*, UN Doc. E/CN.4/2000/3/Add.3, 25 November 1999, para. 44; *Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/2001/9, 11 January 2001, paras. 56 and 62.
- 805 *Report of the Working Group on arbitrary detentions*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80.
- 806 See *inter alia*: *UN Special Rapporteur on the independence of judges and lawyers, Report on the Mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998; *UN Special Rapporteur on the independence of judges and lawyers, Report on the Mission to Colombia*, UN Doc. E/CN.4/1998/39/Add.2, 30 March 1998; *UN Special Rapporteur on the independence of judges and lawyers, Report on the Mission to Mexico*, UN Doc. E/CN.4/2002/72/Add.1, 24 January 2002.
- 807 Inter-American Court of Human Rights: Judgment of 16 August 2000, *Durand and Ugarte v. Peru*; Judgment of 22 November 2005, *Palamara Iribarn v. Chile*; Judgment of 15 September 2005, “*Masacre de Mapiripán*” *v. Colombia*; Judgment of 5 July 2004, *19 Comerciantes v. Colombia*; Judgment of 6 December 2001, *Las Palmeras v. Colombia*. See also, Inter-American Commission on Human Rights: *Annual Report 1986 - 1987*, OAS Doc. OEA/Ser.L/V/II.71, Doc. 9 rev. 1, 22 September 1987, chapter IV (b); *Annual Report 1992 - 1993*, OAS Doc. OEA/Ser.L/V/II.83, Doc. 14, 12 March 1993, Chapter V(VII), para. 6; *Annual Report - 1993*, OAS Doc. OEA/Ser.L/V/II.85, Doc. 8 rev., 11 February 1994, Chapter V (IV), Final Recommendations; *Annual Report - 1997*, OAS Doc. OEA/Ser.L/V/II.98, Doc. 6, Chapter VII, 17 February 1998; *Annual Report - 1998*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 6, Rev., 16 April 1999, Chapter VII, Section 1; *Report on the Situation of Human Rights in Brazil*, OAS Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, 29 September 1997; *Second Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.84, Doc. 39 rev. 14 October 1993; *Third Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999; *Report on the Situation of Human Rights in Ecuador*, OAS Doc. OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, 24 April 1997; *Report on the Situation of Human Rights in Guatemala*, OAS Doc. OEA/Ser.L/V/II.61, Doc. 47 rev. 1, 5 October 1983; *Third Report on the Situation of Human Rights in Paraguay*, OAS Doc. OEA/Ser.L/VII.110, Doc. 52, 9 March 2001; *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000.
- 808 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 231.

#### iv) Denial of judicial remedy

National legislation that denies, suspends or overrides judicial remedies in cases of human rights violations is incompatible with the international obligation to guarantee and to protect human rights and the non-derogable nature of the right to an effective remedy. The Human Rights Committee has pointed out that legislation which suspends constitutional rights and which is not open to review by the tribunals is incompatible with the ICCPR.<sup>809</sup>

The Human Rights Committee has highlighted that “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.”<sup>810</sup> The African Commission on Human and Peoples’ Rights has affirmed that the adoption by the executive of measures to remove jurisdiction from the ordinary courts for fundamental issues such as complaints about abuses or *habeas corpus* constitutes a violation by the State of its obligation to ensure that the judiciary is independent.<sup>811</sup> The Inter-American Court of Human Rights has considered that a remedy is ineffective “when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”<sup>812</sup> The Inter-American Court has concluded that “A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.”<sup>813</sup>

A correlative of the right to an effective remedy is the duty of the State to ensure a prompt, thorough, independent and impartial investigation of any human rights violations,<sup>814</sup> and to ensure that the perpetrators of serious human rights viola-

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809 *Concluding Observations of the Human Rights Committee on Nigeria*, UN Doc. CCPR/C/79/Add.65, 24 July 1996.

810 Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR7C/21/Rev.1/Add.13, 26 May 2004, para. 16.

811 See the decisions of the African Commission on Human and Peoples’ Rights relating to: *Civil Liberties Organisation v. Nigeria*, Communication 151/96, 15 November 1999; *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communications 143/95, 150/96, 15 November 1999; *Civil Liberties Organisation v. Nigeria*, Communication 129/94, 17th Ordinary Session; *Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegba and others)*, Communication 60/91, 17th Ordinary Session; *The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v. Nigeria*, Communication 87/93, 17th Ordinary Session.

812 Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency*, para. 24.

813 *Ibid.*

814 See *inter alia*: Article 12 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 13 of the UN *Declaration on the Protection of All Persons from Enforced Disappearance*; the *International Convention for the Protection of*

tions are brought to justice.<sup>815</sup> The Human Rights Committee has highlighted that the right to an effective remedy and to reparation involve the State's obligation to conduct effective investigations and bring to justice the perpetrators of human rights violations.<sup>816</sup> Where impunity prevails, justice is denied, in violation of the rights to an effective remedy and reparation.<sup>817</sup>

The Human Rights Committee has considered that legislation establishing a blanket immunity from prosecution or an exoneration of criminal or disciplinary responsibility for criminal acts committed during military or police operations, is incompatible with the obligation of the ICCPR, to protect human rights and to guarantee an effective remedy.<sup>818</sup> The Human Rights Committee has also insisted that counter-terrorism legislation cannot exempt law enforcement and military personnel from liability for harm caused during counter-terrorist operations.<sup>819</sup> Regarding the issue of amnesties for human rights violations, the Human Rights Committee has concluded that: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation

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*All Persons from Enforced Disappearance*; Article 62 of the *Vienna Declaration and Programme of Action of 1993*; Principle 9 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15; Inter-American Commission on Human Rights, Report N° 1/96 of 1 March 1996, Case N° 10,559, *Chumbivilcas (Peru)*; the Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, para. 174; the European Court of Human Rights, Judgment of 27 September 1995, *McCann and others v. United Kingdom*, Application N° 18984/91, para. 161; and African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication 155/96, 30th Ordinary Session; *Malawi African Association et al. v. Mauritania*, Communications 54/91 et al., 27th Ordinary Session, recommendations, lit. 1.

815 Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

816 *Ibid.*, para. 16 and Human Rights Committee, Views of 19 July 1994, *Hugo Rodríguez v. Uruguay*, Communication N° 322/1988, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, paras. 12.3 and 12.4. See *supra* Principle no. 2 and its Commentary. See also European Court of Human Rights: Judgment of 18 December 1996, *Aksoy v. Turkey*, Application N° 21987/93, paras. 95-100; Judgment of 28 October 1998, *Assenov v. Bulgaria*, Application N° 24760/94, para. 102; Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake v. Guatemala*, para. 97; Judgment of 19 November 1999, *Villagrán Morales et al v. Guatemala (The "Street Children" Case)*, para. 225; Judgment of 3 November 1997, *Castillo Páez v. Peru*, para. 90; Judgment of 16 August 2000, *Durand and Ugarte v. Peru*, para. 130; Judgment of 25 November 2000, *Bámaca Velásquez v. Guatemala*, para. 197; Judgment of 6 December 2001, *Las Palmeras v. Colombia*, para. 65; Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, paras. 121-136.

817 Theo Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/8, 2 July 1993, paras. 126-127.

818 See *inter alia*: Human Rights Committee, Views of 31 March 1982, *Suárez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, 31 March 1982, para. 15.

819 *Concluding Observations of the Human Rights Committee on the Russian Federation*, UN Doc. CCPR/CO/79/RUS, 6 November 2003, para. 13.

and such full rehabilitation as may be possible.”<sup>820</sup> This fundamental principle is also reflected in other international standards.<sup>821</sup>

The Inter-American Court of Human Rights has concluded that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>822</sup> The Inter-American Court has highlighted that States parties to the American Convention adopting amnesty laws or legislation with similar effects are in violation of Articles 1(1), 2, 8 and 25 of the Convention, inasmuch as they are under the obligation to ensure that no person is deprived of judicial protection and the right to an effective and simple remedy. “Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.”<sup>823</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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At its Congress on the *Rule of Law in a Free Society* (New Delhi, 1959) the ICJ affirmed that “[a] citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy either in the form of a proceeding

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820 Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 15. See also: *Concluding Observations of the Human Rights Committee on Argentina*, UN Doc. CCPR/C/79/Add.46, 5 April 1995 and UN Doc. CCPR/CO/70/ARG, 3 November 2000; *Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999; *El Salvador*, UN Doc. CCPR/CO/78/SLV, 22 July 2003 and UN Doc. CCPR/C/79/Add.34, 18 April 1994; *France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997; *Haiti*, UN Doc. A/50/40, 3 October 1995, paras. 224-241; *Lebanon*, UN Doc. CCPR/C/79/Add.78, 1 April 1997; *Niger*, UN Doc. CCPR/C/79/Add.17, 29 April 1993; *Peru*, UN Doc. CCPR/C/79/Add.67, 25 July 1996 (*Preliminary Observations of the Human Rights Committee*) and UN Doc. CCPR/CO/70/PER, 15 November 2000; *Senegal*, UN Doc. CCPR/C/79/Ad.10, 5 November 1992; *Congo*, UN Doc. CCPR/C/79/Add.118, 27 March 2000; *Croatia*, UN Doc. CCPR/CO/71/HRV, 30 April 2001; *Uruguay*, UN Doc. CCPR/C/79/Add.19, 8 April 1993 and UN Doc. CCPR/C/79/Add.90, 6 April 1998. See also *supra* Principle no. 2 and its Commentary.

821 Principle 19 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* and Article 18(1) of the *UN Declaration on the Protection of all Persons from Enforced Disappearance*.

822 Inter-American Court of Human Rights, Judgment of 14 March 2001, *Barrios Altos v. Peru*, para. 41. See also: Judgment of 29 November 2006, *La Cantuta v. Peru*, paras. 174 and ff; and Judgment of 26 September 2006, *Almonacid-Arellano et al. v. Chile*, paras. 128-129.

823 Inter-American Court of Human Rights, Judgment of 14 March 2001, *Barrios Altos v. Peru*, para. 43.

against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both.”<sup>824</sup>

In its *African Conference on the Rule of Law* (Nigeria, 1961), the ICJ highlighted that “in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised.”<sup>825</sup>

In its Congress on *Executive Action and the Rule of Law* (Rio de Janeiro, 1962), the ICJ reaffirmed that “Judicial control over the acts of the Executive should ensure that: [...] (b) whenever the rights, interests or status of any person are infringed or threatened by Executive action, such person shall have an inviolable right of access to the Courts and unless the Court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection.”<sup>826</sup>

In its *Conference of lawyers from the Asian and Pacific Region* (Colombo, 1966), the ICJ recalled “[t]hat it is essential to the Rule of Law that on the one hand the citizen should have confidence in the efficiency and fairness of public officials and have prompt means of redress for legitimate grievances and that on the other hand the conduct of public officials should be vindicated when criticized without justification”.<sup>827</sup>

The *Conference of French-speaking African Jurists* (Dakar, 1967) underlined that “abuses of power occur even in the most enlightened democracies, and it is therefore imperative to have available effective machinery to provide protection against the arbitrary use of power and provide a means to redress if need be.”<sup>828</sup> The Conference also reaffirmed that “[i]t is essential for each individual to have a readily available remedy against acts of the administration which violate his rights and freedoms, and in particular, access to a court of law.”<sup>829</sup>

In its *European Conference of Jurists on the Individual and the State* (Strasbourg, 1968), the ICJ stressed that “[re]medies should be provided by law against infringements of the rights of the individual by State organs, public authorities or individuals.”<sup>830</sup> The ICJ also reaffirmed that, including in times of emergency,

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824 Conclusions on “The Executive and the Rule of Law”, (Committee II), Clause VI, *Congress of New Delhi*, 1959.

825 Conclusions of Committee I on “Human Rights and Government Security – the Legislative, Executive and Judiciary”, Clause I, 7, *Conference of Lagos*, 1961.

826 Paragraph 3 of the Section “A. Judicial Control”, Report of Committee II on Control by the Court and the Legislature over Executive Action, *Congress of Rio De Janeiro*, 1962.

827 Paragraph 3 of the Declaration of Colombo, *Conference of Colombo*, 1966.

828 Declaration of Dakar adopted the 9 January 1967 by the *Conference of French-speaking African Jurists*.

829 Article V of the Conclusions adopted by the Conference on the proposal of the I Committee, *Dakar Conference*, 1967.

830 Paragraph 4 of the Conclusions of the Conference, Part I “Essential Safeguards”, *Conference of Strasbourg*, 1968.

“[t]he courts should have the power to grant effective remedies in case of misuse or abuse of emergency powers”.<sup>831</sup>

In the ICJ Congress on *Human Rights in an Undemocratic World* (Vienna, 1977), the ICJ stated that “[f]acilities for speedy legal redress of grievances against administrative action in both party and government should be readily available to the individual.”<sup>832</sup>

In its *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted at its Congress in Berlin (2004), the ICJ reaffirmed that: “States must ensure that any person adversely affected by counter-terrorism measures of a State, or of a non-State actor whose conduct is supported or condoned by the State, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.”<sup>833</sup>

## 4. Selected excerpts from international standards

### 2. (i) Non-derogability of the right to an effective remedy

All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo*, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

— *Article 16 (3) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

All remedies, including special ones, such as *habeas corpus* or *amparo*, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country.

— *Principle 1 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*

831 Paragraph 19 (c) of the Conclusions of the Conference, Part IV “Control over Assumption of Emergency Powers”, *Conference of Strasbourg*, 1968.

832 Paragraph 8 of the Section “The Rule of Law in Emerging Forms of Society: One-Party States” of the ICJ Declaration on *Human Rights in an Undemocratic World* adopted in Vienna, 1977. See “25th Anniversary Commission Meeting – Conclusions”, in *International Commission of Jurists – The Review*, No. 18, June 1977, page 60.

833 Principle 9 of the Declaration, *Berlin*, 2004.

## 2. (ii) Access to justice and judicial remedies

States should provide effective access to the law and to justice for victims of terrorist acts by providing: (i) the right of access to competent courts in order to bring a civil action in support of their rights, and (ii) legal aid in appropriate cases.

— *Guideline V of the Guidelines on the Protection of Victims of Terrorist Acts*

[e]veryone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

— *Principle C (a) of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*

## 2. (iii) Judicial remedies and ordinary tribunals

Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

— *Principle 5 of the UN Basic Principles on the Independence of the Judiciary*

No *ad hoc* tribunals shall be established to displace jurisdiction properly vested in the courts. [...] The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

— *Article 5 of the Singhvi Declaration*

The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

— *Principle 60 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*

The judiciary shall have the power and jurisdiction to decide: [...] thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality.

— *Principle B,5 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

— *Principle A(4)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

## Principle 12

The integrity of the judicial system is central to the maintenance of a democratic society. Impartiality of the judiciary requires that cases be decided only on the basis of lawfully and fairly obtained evidence and on the application in good faith of the law, free from any extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

### Commentary

#### 1. Unlawful national practices

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Ensuring protection of the integrity and impartiality of the judiciary is vital for the maintenance of a democratic society. If the judiciary is open to corruption and cases are not decided solely on the basis of the evidence and the applicable law, then there is no independent check on the activities of the executive and the legislature, and the Rule of Law is seriously undermined. However, in a number of countries judges are prone to corruption and other extraneous influences.

For instance, in the Democratic Republic of the Congo, judges are paid such a minimal salary that justice is effectively for sale to those who can afford to pay for it. One judge in particular admitted accepting payment from a party in a case, in order to pay for medical treatment for his daughter.<sup>834</sup> Similarly, there is corruption at every stage of the legal process in Indonesia, including when a case has finally reached the court.<sup>835</sup>

The Special Rapporteur on the Independence of Judges and Lawyers pointed out in 2005 that due to the power and authority afforded to the prosecutor in Tajikistan, judges tend to base their decisions mainly on arguments put forward by the prosecutor and not the defence. Moreover, judges were not in a position to independently pronounce judgments for fear of possible retaliation, since a judge acquitting a person charged of a criminal offence may be suspected of having been bribed and is exposed to arrest and charges of corruption.<sup>836</sup>

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<sup>834</sup> *Special Rapporteur for the Independence of Judges and Lawyers, Report on the Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/8/4/Add.2, 11 April 2008, para. 35.

<sup>835</sup> *Special Rapporteur for the Independence of Judges and Lawyers, Report on the Mission to Indonesia*, UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, paras. 30 and 34.

<sup>836</sup> *Special Rapporteur for the Independence of Judges and Lawyers, Report on the Mission to Tajikistan*, UN Doc. E/CN.4/2006/52/Add.4, 30 December 2005, para. 40.

## 2. International legal framework

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### i) General considerations

The independence of the judiciary is a necessary precondition for the administration of impartial justice. While intimately connected, the dual principles of independence and impartiality of the judiciary should be distinguished.

The Canadian Supreme Court has provided useful general guidance for distinguishing independence and impartiality both under Canadian Constitutional Law and international human rights law. In the case *Valente v. The Queen*,<sup>837</sup> the Court identified the independence of the judiciary as “not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.”<sup>838</sup> Impartiality, by contrast, entails “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word ‘impartial’ [...] connotes absence of bias, actual or perceived.”<sup>839</sup>

### ii) The integrity of the judicial system is central to the maintenance of a democratic society

Central to the proper administration of justice is the integrity of the judiciary.<sup>840</sup> Integrity, according to the Bangalore Principles of Judicial Conduct, requires that judges ensure their “conduct is above approach in the view of any reasonable observer.”<sup>841</sup> Moreover, “[t]he behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done”.<sup>842</sup>

An essential element of democracy is public confidence in the administration of justice,<sup>843</sup> which must be seen and perceived as impartial and fair. In this regard, in order to uphold and strengthen judicial integrity, the fight against judicial

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837 Canadian Supreme Court, *Valente v. The Queen*, (1985) 2.S.C.R. 673, available at <http://csc.lexum.org/en/1985/1985scr2-673/1985scr2-673.html> (accessed on 19 April 2011).

838 *Ibid.*, para. 15.

839 *Ibid.*

840 Value no. 3 of the *Bangalore Principles on Judicial Conduct*; Chapter VIII.72 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; Principle 8 of the *Singhvi Declaration*; Article 5.2 of the *Universal Charter of the Judge*; Principle 7 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*.

841 Application Principle no. 3.1. of the *Bangalore Principles on Judicial Conduct*.

842 Application Principle no. 3.2. of the *Bangalore Principles on Judicial Conduct*.

843 Council of Europe Committee of Ministers, *Draft Recommendation CM/Rec(2010)...of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities – Explanatory Memorandum*, CM(2010)147 add 1, 21 October 2010, para. 69. See also Principle no. 13 and its Commentary.

corruption is crucial.<sup>844</sup> The Special Rapporteur on the Independence of Judges and Lawyers has noted that while corruption is a lethal wound to an efficient administration of justice and to democracy, the reasons why it occurs vary from the low salaries of judges to the politicisation of the judiciary itself.<sup>845</sup>

Where the judiciary lacks integrity, the administration of justice, including the principle of equality of arms, is necessarily ruptured.<sup>846</sup> For instance, when a judge accepts a bribe or other inappropriate inducement, an unfair privilege is created in favour of one of the parties of the proceeding, thus adversely affecting the other party.<sup>847</sup>

**iii) Impartiality of the judiciary requires that cases be decided only on the basis of lawfully and fairly obtained evidence and on the application in good faith of the law, free from any extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason**

The existence and maintenance of independent and impartial tribunals<sup>848</sup> is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. It is axiomatic that the judiciary must fulfil its professional duties in an impartial manner.<sup>849</sup> The impartiality of the judiciary is essential to any judicial system, as it is among the main instruments through which human rights can be protected and the Rule of Law upheld.<sup>850</sup> This function is especially indispensable in times of crisis, where rights are at greatest risk of abuse.<sup>851</sup>

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844 See also *infra* Principle no. 13 and its Commentary.

845 *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 39.

846 Petter Langseth, Oliver Stolpe, “Strengthening the judiciary against corruption”, in *CJL Yearbook 2000*, volume IX, pp. 55-56.

847 *Ibid.*

848 As indicated by the Human Rights Committee, the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception. See Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19. See also Article 14(1) of the *International Covenant on Civil and Political Rights*; Article 11(3) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 37(d) of the *Convention on the Rights of the Child*; Article 18(1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Article 8 of the *American Convention on Human Rights*.

849 Article 5.1 of the *Universal Charter of the Judge*; Principle 1.1 of the *European Charter on the Statute for Judges*.

850 Value 2 of the *Bangalore Principles on Judicial Conduct*; Principle 2 of the *Magna Carta of Judges*; Principle IV of the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*.

851 Article 16.1 of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*.

For a judge to maintain impartiality requires that he or she have no connection, bias, or prejudice about the case and/or the parties to the case and that the conduct of the judge be free from reproach both in court and outside.<sup>852</sup> There is also an obligation on States and a responsibility of private parties to abstain from interfering with the judiciary through any inducement and pressure, so as not to undermine the judge's maintenance of impartiality.

Where judges make statements referring to the political implications of a specific case in order to justify its delay, the right to be tried by an independent and impartial tribunal is violated.<sup>853</sup> Another way in which the impartiality of the court – or the lack of it - may become manifest involves the manner in which instructions to the jury are given. Where judges do not communicate all the available information to the jury<sup>854</sup> or where such instructions “were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality,”<sup>855</sup> there is a clear violation of Article 14(1) of the ICCPR.

The Human Rights Committee affirmed that “[t]he requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. [footnote omitted] Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial. [footnote omitted]”<sup>856</sup> In the words of the Inter-American Commission on Human Rights, in its report on Terrorism and Human Rights:

*“The impartiality of a tribunal must be evaluated from both a subjective and objective perspective, to ensure the absence of actual prejudice on the part of a judge or tribunal as well as sufficient assurances to exclude any legitimate doubt in this respect. These requirements in turn require that a judge*

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852 Application Principle 2.2 of the *Bangalore Principles on Judicial Conduct*.

853 Human Rights Committee, Views of 28 October 1992, *González del Río v. Peru*, Communication N° 263/1987, UN Doc. CCPR/C/46/D/263/1987, 28 October 1992, para. 5.2.

854 Human Rights Committee, Views of 27 July 1992, *Wright v. Jamaica*, Communication N° 349/1989, UN Doc. CCPR/C/45/D/349/1989, 27 August 1992, para. 8.3.

855 Human Rights Committee, Views of 8 April 1991, *Kelly v. Jamaica*, Communication N° 253/1987, UN Doc. CCPR/C/41/D/253/1987, 10 April 1991, para. 5.13.

856 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 21. See also: European Court of Human Rights, Judgment of 26 February 1993, *Padovani v. Italy*, Application N° 13396/87, para. 25; Judgment of 25 July 2000, *Tierce and Others v. San Marino*, Application N° 24954/94; 24971/94; 24972/94, para. 75; African Commission on Human and Peoples' Rights, *Marcel Wetsh'okonda Koso and others v. Democratic Republic of Congo*, Communication 281/2003, 44th Ordinary Session, paras. 77-78.

*or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.”*<sup>857</sup>

The Human Rights Committee has noted that the rights guaranteed under Article 14 of the ICCPR, including with respect to impartiality, apply to all courts and tribunals within the scope of that article whether ordinary, specialised, civilian or military.<sup>858</sup> Military tribunals and other special courts may raise particular concerns in respect of impartiality. In this regard, a court formed by one judge and four members of the armed forces, and therefore connected with the government, was not recognised by the African Commission on Human and Peoples’ Rights as impartial.<sup>859</sup> In this case, without entering into an inquiry into the actual bias of the court, it was sufficient that the composition did not provide the appearance of impartiality.<sup>860</sup> Moreover, the use of “faceless judges” generally does not meet the condition of impartiality, since without knowing the identity of the judge, it is impossible to assess questions surrounding integrity. For instance, there is a risk that the judges could be members of the armed forces.<sup>861</sup> The Human Rights Committee has indicated that the fact that a defendant is not able to see the judge trying him or her makes it impossible to ensure an adequate degree of impartiality as “this system fails to guarantee a cardinal aspect of a fair trial within the meaning of art. 14 of the Covenant: that the tribunal must be, and must be seen to be, independent and impartial.”<sup>862</sup>

Further concerns may arise in respect of impartiality in the context of armed conflict. The Inter-American Court of Human Rights has pointed out, in a case involving the trial of alleged members of armed opposition groups by military tribunals, that “the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have.”<sup>863</sup> The Court, in another case, noted that “the impartiality of the judge is affected by the fact that the armed forces have the double function of combating the subversive groups with military means, and judging and imposing penalties on the members of these groups.”<sup>864</sup>

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857 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116/Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

858 Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 22.

859 African Commission on Human and Peoples’ Rights, *Constitutional Rights Project v. Nigeria*, Communication N° 87/93, 1 October 1995, para. 13.

860 *Ibid.*, para. 14.

861 Human Rights Committee, Views of 6 November 1997, *Polay Campos v. Peru*, Communication N° 577/1994, UN Doc. CCPR/C/61/D/577/1994, 9 January 1998, para. 8.8. See also Principle no. 13 and its Commentary.

862 Human Rights Committee, Views of 6 November 1997, *Polay Campos v. Peru*, Communication N° 577/1994, para. 8.8. See also Human Rights Committee, Views of 26 March 2002, *Gutiérrez Vivanco v. Peru*, Communication N° 678/1996, para. 7.1.

863 Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, para. 130.

864 Inter-American Court of Human Rights, Judgment of 25 November 2005, *Lori Berenson Mejía v. Peru*, para. 145.

The European Court of Human Rights, considering the trial of civilians by military tribunals for acts characterised as criminal offences against the Army, highlighted that “it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to his purported agreement to betray information prejudicial to army concerns, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. [...] The applicant’s doubts about the independence and impartiality of that court can therefore be regarded as objectively justified.”<sup>865</sup>

Adherence to the principle of impartiality requires that decisions must be taken on the basis of facts and in accordance with the law.<sup>866</sup> A key judicial function in this respect is evaluation of evidence in a proceeding, especially in criminal proceedings. However, where such evaluation is conducted in a clearly arbitrary manner, there is a violation of the impartiality of the tribunal.<sup>867</sup>

Impartiality of the court is an essential element of the right to a fair trial such that judges have a responsibility to recuse themselves from a case where questions as to their impartiality arise. In some instances, the duty of recusal is set forth in law.<sup>868</sup> In those cases, the court has an obligation “to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria.”<sup>869</sup>

In some jurisdictions, there is no express provision in law identifying those specific situations according to which recusal is required. Yet as the European Court of Human Rights has affirmed, where there is a legitimate reason to doubt the impartiality of the court, a judge should disqualify him or herself.<sup>870</sup> Indeed,

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865 European Court of Human Rights, Judgment of 8 July 2008, *Satik v. Turkey*, Application N° 60999/00, paras. 47-48. In the same line see Judgment of 4 May 2006, *Ergin v. Turkey*, Application N° 47533/99, para. 54.

866 Principle 2 of the *UN Basic Principle on the Independence of the Judiciary*; Principle 2 of the *Singhvi Declaration*; Principle 3(a) of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*; Chapter 1.5 of the Council of Europe *Recommendation CM/Rec(2010)12 of the Committee of Ministers to members states on judges: independence, efficiency and responsibilities*; Principle A(5)(a) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

867 Human Rights Committee, Views of 3 April 2003, *Bondarenko v. Belarus*, Communication N° 886/1999, UN Doc. CCPR/C/77/D/886/1999, 28 April 1999, para. 9.3; Views of 2 November 2004, *Riedl-Riedenstein and others v. Germany*, Communication N° 1188/2003, UN Doc. CCPR/C/82/D/1188/2003, 11 November 2004, para. 7.3; Views of 24 March 2004, *Arenz and others v. Germany*, Communication N° 1138/2002, UN Doc. CCPR/C/80/D/1138/2002, 29 April 2004, para. 8.6.

868 See, for example, Principles 9, 10, 11 of the *Burgh House Principles on the Independence of the International Judiciary* and Principle A(5)(d) of the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* which contain specific cases undermining the impartiality of a court.

869 Human Rights Committee, Views of 23 October 1992, *Karttunen v. Finland*, Communication N° 387/1989, UN Doc. CCPR/C/46/D/387/1989, 5 November 1992, para. 7.2.

870 European Court of Human Rights, Judgment of 1 February 2005, *Indra v. Slovakia*, Application N° 46845/99, para. 49.

the ultimate objective of the protection of impartiality is the confidence of the public in the courts in a democratic society.<sup>871</sup>

Irrespective of the presentation of evidence regarding the existence of actual bias of the court, the recusal of a judge may be required by the circumstances. In a recent US Supreme Court case, the court affirmed that “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own case.”<sup>872</sup>

Another possible means to control the outcome of individual cases is to assign them to specific judges who could potentially rule in favour of particular interests. In order to prevent this unwarranted interference, international and regional standards require that the assignment of cases to a judge be a matter of internal administration in order to avoid any interference or manipulation regarding the impartiality of the court.<sup>873</sup>

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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The integrity and impartiality of the judiciary were addressed by the International Commission of Jurists during the *Congress of Athens* (1955) and the ICJ *Commission Meeting in Vienna* (April 1977).

The First Committee at the *Congress of Athens* concentrated on Public Law issues and concluded that “the independence of the judiciary and the guarantee of its impartiality are indispensable conditions of a free and democratic state.”<sup>874</sup> The *Act of Athens* (1955) that emerged from the Congress states that “Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as Judges.”<sup>875</sup>

Subsequently, the Committee on the Judiciary and the Legal Profession under the Rule of Law during the *Congress of New Delhi* in 1959 concluded that, while independence of the judiciary from the executive or legislative must be ensured in the exercise of its functions, this “does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it.”<sup>876</sup>

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871 *Ibid.*

872 *Caperton v. A. T. Massey Coal co.*, 556 US \_\_ (2009), 129 S.Ct. 2252 at 2265; 173 L.Ed.2d 1208.

873 Principle 14 of the *UN Basic Principles on the Independence of the Judiciary*; Chapter III.24 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to members states on judges: *independence, efficiency and responsibilities*.

874 Conclusions of the Committee on Public Law, Resolution V, *Congress of Athens*, 1955.

875 *Act of Athens*, paragraph 3.

876 Clause I, Conclusions of the Fourth Committee, *the Judiciary and the Legal Profession under the Rule of*

At the *Conference of Bangkok* (1965) the First Committee underlined that “it is essential for the effective operation of the Rule of Law that there should be an efficient, honest and impartial civil service”.<sup>877</sup>

At the *European Conference of Jurists on the Individual and the State* (Strasbourg, 1968), the ICJ reiterated the need for the judiciary to be guaranteed the “freedom to interpret and apply the laws of the land in accordance with the Rule of law and the fundamental principles of justice”.<sup>878</sup>

The ICJ *Commission Meeting in Vienna* (1977) included the following among its conclusions: “Members of the judiciary at all levels should be free to dispense impartial justice without fear in conformity with the Rule of Law.”<sup>879</sup>

#### 4. Selected excerpts from international standards

##### 2. (ii) The integrity of the judicial system is central to the maintenance of a democratic society

Integrity is essential to the proper discharge of the judicial office.

— *Value 3 of the Bangalore Principles on Judicial Conduct*

Judges should be guided in their activities by ethical principles of professional conduct....

— *Chapter VIII.72 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*

Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary....

— *Principle 8 of the Singhvi Declaration*

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

— *Article 5.2 of the Universal Charter of the Judge*

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*Law, Congress of New Delhi, 1959.*

877 Paragraph 9 of the *Conference of Bangkok*, First Committee, 1965.

878 Paragraph 3 of Part. I: Essential Safeguards of the Conclusions of the European Conference of Jurists on the Individual and the State, *Conference of Strasbourg*, 1968.

879 The International Commission of Jurists Commission Meeting in Vienna, The Rule of Law in Emerging Forms of Society: One Party States, *Conclusions of Vienna*, paragraph 5.

Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

— *Principle 7 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

## 2. (iii) Impartiality of the judiciary

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or any reason [...] judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary[...]. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

— *Principles 2, 8 and 14 of the UN Basic Principle on the Independence of the Judiciary*

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

— *Value 2 of the Bangalore Principles on Judicial Conduct*

Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

— *Principle 2 of the Singhvi Declaration*

In the performance of the judicial duties the judge must be impartial and must so be seen.

— *Article 5.1 of the Universal Charter of the Judge*

Each Court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of application of these principles or for any reason of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

— *Principle 16 of the Burgh House Principles on the Independence of the International Judiciary*

the institution of an independent and impartial judiciary is essential for ensuring the rule of law, particularly in time of emergency.

— *Article 16(1) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency*

Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts[...]. The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.

— *Chapters I.5 and III.24 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers to members states on judges: independence, efficiency and responsibilities*

Judicial independence and impartiality are essential prerequisites for the operation of justice.

— *Principle 2 of the Magna Carta of Judges*

The Statute for Judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality....

— *Principle 1.1 of the European Charter on the Statute for Judges*

Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

— *Principle A(5)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct and indirect, from any source; ....

— *Principle 3(a) of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice....

— *Principle IV of the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*

## Principle 13

Members of the legal profession, including members of the judiciary and their legal staff, prosecutors, legal advisers to the executive and legislature, public defenders, members of the private bar, and lawyers' associations have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights and to ensure that in carrying out their professional functions they take no measures that would impair the enjoyment of human rights. Judges in times of crisis are under a special duty to resist actions which would undermine their independence and the Rule of Law. Judges are entitled to protection to enable them to discharge their professional duties. A lawyer who knowingly gives advice which would foreseeably lead to a violation of human rights or international humanitarian law or to a crime under international law breaches his or her professional responsibility. When such advice leads to a crime under international law, the offending lawyer should incur civil and criminal responsibility.

## Commentary

### 1. Unlawful national practices

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As primary guarantors of the protection and promotion of human rights and the Rule of Law, members of the legal profession must respect the highest ethical standards of conduct, particularly during times of crisis. In order to secure compliance with such standards, States must establish adequate mechanisms and institutions aimed towards ensuring professional accountability from judges and legal practitioners. If a State fails to create effective accountability mechanisms, the integrity of the judiciary and the legal profession as a whole are highly jeopardised and the risks of development of a culture of corruption are pronounced. As a consequence, the wider public may lose confidence in the justice system.

In Indonesia in the years following the collapse of the Suharto regime, inadequate financial and human resources were allocated for the establishment of a system of judicial oversight, and the Deputy Chief Justice entrusted with the coordination of this system did not discharge the tasks and responsibilities related to his position. As a result, “the office of the judge and the judiciary as an institution [...] completely lost their prestige and dignity”, judges “have, over the years, lost their self-esteem”, and bribery was said to be routine within the Indonesian society.<sup>880</sup> In Kazakhstan in the post-Soviet period, the relation between the inex-

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<sup>880</sup> *Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, Report on*

istence of appropriate supervision of the judiciary and the prevalence of a climate conducive to judicial corruption was manifest and no compulsory code of judicial ethics setting a robust legal framework of professional responsibility has been adopted.<sup>881</sup>

Public accountability of members of the legal profession is a fundamental guarantee to enable the legal system to play its role in ensuring the full enjoyment of human rights of all persons. As promoting access to justice is a cornerstone of the professional responsibility of lawyers, the existence of organised and accountable bar associations is a key factor for ensuring fair trials and administration of justice and securing appropriate judicial remedies and reparations at the national level. In various States, bar associations do not exist, and/or effective codes of professional conduct are not in force<sup>882</sup> or are not enforced consistently.<sup>883</sup>

The ineffectiveness or absence of mechanisms that sanction grave professional misconduct committed by legal professionals, together with the lack of political will to address the civil and criminal responsibility triggered by unethical or corrupt legal activity, leading to aiding or abetting the perpetration of international crimes, may result in impunity for the most serious human rights violations.

In the United States, in July 2009 the Department of Justice's Office of Professional Responsibility (OPR) determined that former Assistant Attorney General Jay S. Bybee and senior lawyer John Yoo from the Office of the Legal Counsel (OLC) had engaged in professional misconduct as authors of what became to be known as the "torture memos", legal memoranda drafted by a number of OLC lawyers between August 2002 and March 2003 containing advice addressing issues related to the legal status and treatment of Al-Qaeda and Taliban detainees held outside the United States.<sup>884</sup> Among the advice given was that that "alien unlawful combatants" were not entitled to protection under either the Geneva Conventions, the War Crimes Act or federal laws against torture, including that implementing the Convention against Torture. The authors of those legal opinions also maintained that those individuals could legitimately be subjected by CIA investigators to "enhanced interrogation techniques" falling short of organ failure or death, as such techniques constituted neither torture nor cruel, inhuman or degrading treatment or punishment pursuant to the Convention against Torture and US anti-

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*the Mission to Indonesia*, UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, para. 2.

881 *Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy, Report on the Mission to Kazakhstan*, UN Doc. E/CN.4/2005/60/Add.2, 11 January 2005, para. 86.

882 *Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, Report on the Mission to Mexico*, UN Doc. E/CN.4/2002/72/Add.1, 24 January 2002, paras. 180-181.

883 *Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, Report on the Mission to Indonesia*, UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, paras. 41, 42 and 93.

884 US Department of Justice, Office of Professional Responsibility, *Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, 29 July 2009, available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (accessed on 19 April 2011).

torture statute.<sup>885</sup> Before any disciplinary action based on the findings by the OPR could be considered by State Bar committees, in January 2010 US Associate Deputy Attorney General David Margolis effectively overruled the OPR conclusion regarding professional misconduct and downgraded the conclusion reached in OPR's report by qualifying the conducts of Yoo and Bybee as "poor judgment" in a memo to the Attorney General (AG), excluding the possibility that a criminal prosecution against the two lawyers could be commenced before US courts.<sup>886</sup> The content of the opinion to the AG echoed the position already expressed in a number of public statements delivered by the Attorney General and US President Obama upon the release of the memos, revealing a lack of political will to carry out any criminal investigations at the national level on the conduct of the government advisers involved in the drafting.<sup>887</sup>

## 2. International legal framework

### i) General considerations – Ethical Principles and Codes of Professional Conduct

The compliance by members of the legal profession with ethical principles of professional conduct is a condition *sine qua non* for the effective functioning of the legal system.<sup>888</sup> Ethical standards applicable to judges, lawyers and public prosecutors exist beyond their mere stipulation in legal rules. With respect to judges and public prosecutors, these standards "lie between and connect the judge/public prosecutors as a human being and his *persona* as dispenser of

885 See US Department of Justice, Office of Legal Counsel - Office of the Assistant Attorney General, Jay S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, available at [www.findlaw.com/wp/docs/doj/bybee80102mem.pdf](http://www.findlaw.com/wp/docs/doj/bybee80102mem.pdf) (accessed on 19 April 2011). US Department of Justice, Office of Legal Counsel - Office of the Assistant Attorney General, Jay S. Bybee, *Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative*, 1 August 2002, available at <http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf> (accessed on 19 April 2011). US Department of Justice, Office of Legal Counsel - Office of the Deputy Assistant Attorney General, John Yoo, *Memorandum for William J. Haynes II General Counsel, Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 14 March 2003, available at [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf) (accessed on 19 April 2011).

886 US Department of Justice, Office of Legal Counsel - Office of the Associate Deputy Attorney General, David Margolis, *Memorandum for the Attorney General, Re: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, 5 January 2010, available at <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf> (accessed on 19 April 2011).

887 See for instance Statement of President Barack Obama on Release of OLC Memos, 16 April 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/) (accessed on 19 April 2011). See also Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available at <http://www.globalsecurity.org/intell/library/news/2009/intell-090824-doj01.htm> (accessed on 19 April 2011).

888 See for instance Article 8.2 of the *United Nations Convention against Corruption*.

justice”.<sup>889</sup> In respect of legal practitioners more generally, such ethical standards are intimately linked to their necessary contribution in promoting justice.<sup>890</sup>

It is essential in a democratic society that justice is actually administered fairly, but also that there is prevailing public confidence that justice will be so administered.<sup>891</sup> This public perception also constitutes an important factor in reinforcing the legitimacy for the implementation of judicial rulings rendered by national courts and tribunals.<sup>892</sup>

Judges must behave in such a way as to ensure that their conduct does not undermine the reputation of the judiciary, since the failure to comply with ethical standards on the part of individual judges can have disruptive repercussions on the judiciary in its entirety.<sup>893</sup> These considerations also apply to legal practitioners, upon whom ethical principles impose an obligation to act in all circumstances in the best interest of the profession.<sup>894</sup> As underscored in the Commentary to the *Charter of Core Principles of the European Legal Profession*, these principles do not impose upon lawyers the duty to be “perfect individuals.” Rather, they indicate that lawyers “must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession.”<sup>895</sup>

National codes of conduct and discipline have a two-fold dimension. First, the ethical principles pronounced in such codes are meant to offer ethical guidance to legal professionals as to the most appropriate way to address what may be

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889 See Council of Europe European Commission for the Efficiency of Justice, Lisbon Network, *Magistrates Ethics and Deontology*, available at [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Ethics/Paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Ethics/Paper2_en.asp) (accessed on 19 April 2011).

890 See, *inter alia*, Preamble, para. 9, of the *UN Basic Principles on the Role of Lawyers*; Principle I of the *Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community*; Preamble, para. 7, of the *IBA Resolution on Multi-Disciplinary Practices*. See also Article 11 of the *Declaration on human rights defenders*.

891 See for instance Chapter VI.1 (b)(i) of the *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*; Standard 33 of the *IBA Minimum Standards of Judicial Independence*.

892 See ECOSOC Resolution 2007/22 on *Strengthening basic principles of judicial conduct*, Preamble, 26 July 2007, para. 5; Principle VII (b) of the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*; Chapters II.20 and VIII.73 of the Council of Europe Recommendation *CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*.

893 See Council of Europe Venice Commission, Opinion No. 408/2006, *Opinion on the Law of Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia*, CDL-AD(2007)009, 19 March 2007, para. 7.

894 See Principles 12 and 26 of the *UN Basic Principles on the Role of Lawyers*; Article 17 of the *Draft Principles on the Independence of the Legal Profession* (Noto Principles); Principle (d) of the *Charter of Core Principles of the European Legal Profession*.

895 See Council of Bars and Law Societies of Europe, *Commentary on the Charter of Core Principles of the European Legal Profession*, Principle (d), available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/EN\\_Code\\_of\\_conductp1\\_1249308118.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1249308118.pdf) (accessed on 19 April 2011). See also Rule 2 of the *IBA International Code of Ethics*.

delicate or contested issues arising from the exercise of their professions, as well as to manage their institutional roles as human rights protectors. Secondly, codes of professional conduct set the normative standards against which the individual behaviour of judges and legal practitioners may be weighed, and the violation of which may give rise to disciplinary measures.<sup>896</sup>

For the codes of professional conduct and discipline to serve effectively the purpose of offering normative guidance to judges and lawyers, the respective professional associations must exercise primary responsibility for their elaboration and implementation.<sup>897</sup> For their part, all members of the legal community must comply at the individual level with such standards and contribute to their dissemination and strengthening at the collective level, including through monitoring their observance by other members of the legal profession.

The need for establishing a system of disciplinary responsibility for judges flows directly from the principle of judicial independence, according to which any alleged violation of judicial duties set out in codes of conduct and discipline must be ascertained by independent and impartial authorities, preferably consisting of judges of the highest integrity, pursuant to procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge.<sup>898</sup> Bar associations, bar councils and law societies or similar organisations are concerned, their foundation should be established in every State and every jurisdiction. Lawyers' professional associations must supervise codes of professional conduct, and the appropriate implementation of disciplinary measures.<sup>899</sup>

Although the substantive content of domestic codes of professional conduct for judges and lawyers vary from one country to another, in no circumstance should regulations adopted by such self-governing bodies conflict with binding standards of conduct existing at the national, international or regional level.<sup>900</sup>

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896 See Chapter VIII.72 of the Council of Europe *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*; Article 1(a) and (b) of the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* adopted by the International Association of Prosecutors; Principle 1 of the *Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community*. See also Principle 14 of the *UN Basic Principles on the Role of Lawyers*.

897 Preamble, para. 8, *Bangalore Principles of Judicial Conduct*; Chapter V.1 (a) of the *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*. See also *Charter of Core Principles of the European Legal Profession*, Principle (j) (on self-regulation of the legal profession) and the relevant Commentary.

898 See the *Budapest Conclusions on the Guarantee of the Independence of Judges - Evaluation of Judicial Reform*, Conclusions of the multilateral meeting organised by the Council of Europe in collaboration with the Association of Judges of Hungary, 1998, para. 3. For a more comprehensive analysis of international law requirements with regards to disciplinary proceedings against judges see *supra*, Principle no. 5 and its Commentary.

899 See Principle 26 of the *UN Basic Principles on the Role of Lawyers*.

900 See Preamble, para. 10, of the *Bangalore Principles of Judicial Conduct*.

Codes of judicial conduct commonly require from judges “to refrain from conduct that is likely to compromise the integrity and independence of the judiciary; to avoid undue delays in the performance of their duties; to behave in such a manner as not to damage nor discredit the reputation of the judiciary; not to commit offences nor omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgments.”<sup>901</sup>

**ii) The responsibility of judges and prosecutors to uphold and promote the Rule of Law and human rights and the special duty to resist actions which would undermine the independence of the judiciary and the Rule of Law**

Public prosecutors should act to ensure the effectiveness of criminal justice systems within the framework of the fair administration of justice, and have a key role to play in safeguarding the exercise of the right to obtain effective remedy and appropriate reparation for human rights violations.<sup>902</sup> The adequate discharge of prosecutorial duties, which include carrying out effective investigations and prosecution for human rights violations giving rise to criminal responsibility, is indispensable for combating impunity for crimes committed by public officials<sup>903</sup> and guaranteeing the respect of human rights by other actors of the criminal justice sector.<sup>904</sup>

An independent and impartial judiciary constitutes an essential guarantee for the realisation of human rights and the observance of the Rule of Law,<sup>905</sup> and is of vital importance when the pursuit of both objectives is obstructed.<sup>906</sup> While exercising their functions, judges are accountable under the principles enshrined in national laws and constitutions that must comply with the overarching values of judicial independence and impartiality.<sup>907</sup> However, as the Human Rights Committee has indicated, the judiciary cannot be accountable to the legislature or subject to national provisions aimed at subjecting judges to criminal liability for handing down “unjust judgments”.<sup>908</sup> The Special Rapporteur on the Independence of Judges and Lawyers considers that while “some degree” of criminal immunity is

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901 See Council of Europe Venice Commission, Opinion No. 408/2006, *Opinion on the Law of Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia*, CDL-AD(2007)009, 19 March 2007, para. 7.

902 See Guideline 12 of the *UN Basic Guidelines on the Role of Prosecutors*.

903 Guideline F (k) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

904 Article 1(h) and Article 4.2(b) of the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* adopted by the International Association of Prosecutors.

905 Article 1 (b) and (c) of the *Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)*. See also Policy 1 on the “Force, Promotion, Protection and Respect of Human Rights” of the *Declaration of Caracas of the Ibero-American Summit of Presidents Of Supreme Justice Tribunals And Courts*.

906 See Article 16.1 of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*.

907 See Principle VII(b) of the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*.

908 *Concluding Observations of the Human Rights Committee on Democratic People’s Republic of Korea*, UN Doc. CCPR/CO/72/PRK, 27 August 2001, para. 8.

critical to allow judges to discharge their functions effectively, the principle of judicial accountability acts as a counterbalance against the abuse of immunity, though procedures for lifting judicial immunity “must be legislated in great detail and should aim at reinforcing the independence of the judiciary.”<sup>909</sup>

In this respect, members of the judiciary should only be held civilly or criminally responsible pursuant to, and within the limits of, appropriately tailored legislation, and in no case must they be subject to civil and criminal measures that undermine their independence. Judges should enjoy “limited functional immunity” which should cover arrest, detention and “other criminal proceedings that interfere with the workings of the court”.<sup>910</sup> A wider immunity, however, would not be justifiable.<sup>911</sup>

As highlighted by the COE Consultative Council of European Judges (CCJE), similar considerations apply as regards the opportunity of holding judges civilly responsible “for the consequences of their wrong decisions or for other failings (e.g. excessive delay)”.<sup>912</sup> Drawing from the observations formulated in the Commentary to the *European Charter on the Statute for Judges* on the need to “restrict judges’ civil liability to (a) reimbursing the state for (b) ‘gross and inexcusable negligence’ by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority [with substantial judicial representation]”, the CCJE concluded that “it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.”<sup>913</sup>

From the primary responsibility of the judiciary to pursue the cause of justice flows a stringent duty to act in full impartiality, and a complementary obligation to strive to be seen to act under no kind of external interference.<sup>914</sup> Judicial corruption is not limited to the acceptance of financial benefits with a view to intentionally

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909 *Report of the Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, paras. 66 and 67.

910 See Council of Europe Venice Commission, Opinion No. 394/2005, *Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia*, CDL-AD(2005)023, 24 October 2005, para. 18.

911 *Ibid.* In support of the argument that judges should not benefit from a general immunity from criminal prosecutions see also Council of Europe Venice Commission, Opinion No. 246/2003, *Memorandum on the Reform of the Judicial System in Bulgaria*, CDL-AD(2003)12, 20 June 2003, para. 15.a.

912 See Council of Europe Consultative Council of European Judges, Opinion No. 3, *Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality*, CCJE (2002) Op. N° 3, 19 November 2002, para. 55.

913 *Ibid.*, para. 57. See also Council of Europe, *European Charter on the Statute for Judges*, para. 5.2, and the relevant point in the *Explanatory Memorandum* to the European Charter.

914 See Article 11 of the *United Nations Convention against Corruption*. On the impartiality of the judiciary see also *supra*, Principle no. 12 and its Commentary.

departing from the fair administration of justice. As expressed by the Special Rapporteur on the Independence of Judges and Lawyers:

*“[T]he phenomenon of corruption within the judiciary throughout the world [...] goes far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary by Parliament or bribes[...]. It may also concern administration within the judiciary (lack of transparency, system of bribes) or take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage.”*<sup>915</sup>

### **iii) Judges are entitled to protection to enable them to discharge their professional duties**

In times of crisis, judges are exposed to heightened risks of threats, harassment, or persecution at the hand of other State authorities. Attempts by the executive and the legislature to curtail judicial independence frequently reveal the institutional fragilities of the judicial body, which in turn render individual judges more vulnerable to external interferences.<sup>916</sup> As highlighted by the European Court of Human Rights, the “existence of safeguards against outside pressures” is one of the criteria to be taken into account for establishing “whether a tribunal can be considered ‘independent’ for the purposes of Article 6 § 1”.<sup>917</sup>

States must ensure that members of the judiciary and their legal staff are adequately protected.<sup>918</sup> Assuring the physical safety and the guarantee of safe work environments for judges and clerks is tantamount to creating the primary conditions for the discharge of judicial functions.<sup>919</sup> For achieving this goal, adequate resources must be allocated to improve the security of courtrooms and court buildings,<sup>920</sup> and to secure the physical protection of members of the bench and their families.<sup>921</sup>

<sup>915</sup> *Report of the Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy*, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 39.

<sup>916</sup> See for instance Part I, Section II.1.02, and Part II, Section IX.2.41 of the *Universal Declaration on the Independence of Justice (Montreal Declaration)*.

<sup>917</sup> Among many other authorities, see European Court of Human Rights, Judgment of 9 June 1998, *Incal v. Turkey*, Application N<sup>o</sup> 22678/93, para. 65. See also Human Rights Committee, *General Comment No. 32, Article 14: right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

<sup>918</sup> See Procedure 5 of the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*. See also Article 7 of the *Judges’ Charter in Europe*.

<sup>919</sup> See for instance also *Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy, Report on the Mission to Kyrgyzstan*, UN Doc. E/CN.4/2006/52/Add.3, 30 December 2005, paras. 65 and 86.

<sup>920</sup> See Chapter V.38 of the Council of Europe *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*.

<sup>921</sup> See Article 19 of the *Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)* and Principle 40 of the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA*

When allegations are made that judges and judicial officers have been victims of improper interference by other State powers, effective investigations must be conducted. The duty of States to carry out such investigation constitutes a key element of the obligation to ensure the security of judges. As highlighted by the Special Rapporteur on the Independence of Judges and Lawyers, “such investigations are a key means to prevent the reoccurrence of further interference and to detect systemic problems hampering the independence of the judiciary”.<sup>922</sup>

#### **iv) Professional, civil and criminal responsibility of lawyers**

When engaging in their professional functions, lawyers are under the duty to exercise independent legal judgment and render, thorough objective and candid legal advice, a straightforward and independent assessment of the law.<sup>923</sup> The unique function that lawyers play in a democratic society also gives rise to duties *vis-à-vis* the judicial branch of government, the legal profession and the public, for the fulfilment of the public interest in the due administration of justice.<sup>924</sup> For example, the lawyer retains an ethical and legal obligation never to counsel a client to engage in any conduct that the lawyer knows is criminal or fraudulent, or to assist a client who is engaged in such behaviour.

Under international law, lawyers who provide legal advice which would foreseeably lead to the commission of a crime under international law may be held criminally responsible, as accomplices of the principals responsible, for aiding or abetting the perpetration of the crime. This complicity principle is reflected in international law and standards. For instance, the statute of the International Criminal Court provides in Article 25, which lays out the general elements of criminal responsibility, that:

*“a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a*

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*Region.*

922 *Report of the Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy*, UN Doc. A/HRC/11/41, 24 March 2009, para. 51.

923 See Rule 10 of the *IBA International Code of Ethics*.

924 See Principle II of the *Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community*. See also Preamble, para. 6, of the *Commentary to the Charter of Core Principles of the European Legal Profession*.

*crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime....”*

The Convention against Torture provides in Article 4 that: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes *complicity or participation* in torture.” (emphasis added). The UN Committee against Torture has underlined the obligation of States to take effective measures to prevent public authorities, including government legal advisers, from playing any role in respect of torture:

*“... States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. The Committee has concluded that States parties are in violation of the Convention when they fail to fulfil these obligations.”*<sup>925</sup>

Accordingly, lawyers may incur criminal liability as a consequence of their knowledge that the professional advice provided will have the effect of assisting or facilitating the perpetration of an international crime. With regard to the knowledge of the criminal nature of the conduct advised, the implications of the general criminal law principle that “*ignorantia legis non excusat*” align, in the case of lawyers, with the special obligations laid upon them by the specific education and training received, together with “the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.”<sup>926</sup>

There are precedents arising in at least two cases from the post-World War Two trials of officials of the Nazi regime in Germany. The *Ministries Case (United States v. von Weizsäcker et al.)*<sup>927</sup> involved the prosecution of a number of government ministers and secretaries, including those serving as two of the Government’s top legal advisers: Ernst von Weizäcker (State Secretary in the Foreign Office) and Ernst Woemann (Under-Secretary of State and Head of the Political Department in the Foreign Office). They were convicted of Crimes against Humanity for conduct which included approving the deportation of 6,000 Jews from France to the Auschwitz concentration camp. According to the tribunal, the accused knew the

925 UN Committee Against Torture, *General Comment No. 2, Implementation of article 2 by State parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 17.

926 See *inter alia* Principle 9 of the *UN Basic Principles on the Role of Lawyers*.

927 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, volume 14 (1952).

deportations were in violation “of every principle of international law and in direct contradiction of the Hague Convention,”<sup>928</sup> and that they had an absolute duty as Governments to object to the deportations when asked by the SS to assess their legality. According to the court:

*“The Foreign Office was the only official agency of the Reich which had either the jurisdiction or right to advise the government as to whether or not proposed German action was in accordance with or contrary to the principles of international law[...]. [Its] duty was to pass and advise upon questions of international law, as to whether or not it had any objection to the proposal[...]. If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government. [...] Unfortunately for Woermann and his chief von Weizsaecker, they did not fulfill that duty. By stating that they had no ‘misgivings’ or ‘no objections’, they gave the ‘go ahead’ signal to the criminals who desired to commit the crime.”<sup>929</sup>*

A second case, the *Justice Case, United States v. Alstoetter*,<sup>930</sup> involved 16 defendants, including judges, prosecutors and officials in the Ministry of Justice. Among the number of crimes was the execution of the “Night and Fog (Nacht und Nebel)” Decree, which involved deportations, murder, torture, ill-treatment, illegal imprisonment and unfair trials. At least three of the defendants served as government legal advisers. The tribunal held that “[a]ll of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out, knew that its enforcement violated the international law of war.”<sup>931</sup>

As the indictment indicates:

*“5. It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution[...]. the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, torture, atrocities, and other inhumane acts, more fully described in counts two and three of this indictment. [...]”*

*7. The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of ‘races.’ The special political tribunals mentioned above visited cruel punishment and death upon political*

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928 *Ibid.*, p. 497.

929 *Ibid.*, at 958-59.

930 *United States v. Alstoetter (The Justice Case)*, in III Trials Of War Criminals Before The Nuremburg Military Tribunals Under Control Council Law No. 10 (1951).

931 *Ibid.*, at p. 17 (para. 5).

*opponents and members of certain ‘racial’ and national groups. The People’s Court was presided over by a minority of trusted Nazi lawyers[...]. The People’s Court in collaboration with the Gestapo became a terror court, notorious for the severity of punishment, secrecy of proceedings, and denial to the accused of all semblance of judicial process. Punishment was meted out by Special Courts to victims under a law which condemned all who offended the ‘healthy sentiment of the people.’ Independence of the judiciary was destroyed. Judges were removed from the bench for political and ‘racial’ reasons. Periodic ‘letters’ were sent by the Ministry of Justice to all Reich judges and public prosecutors, instructing them as to the results they must accomplish. Both the bench and bar were continually spied upon by the Gestapo and SD, and were directed to keep disposition of their cases politically acceptable. Judges, prosecutors and, in many cases, defense counsel were reduced in effect to an administrative arm of the Nazi Party”.*<sup>932</sup>

Lawyers may also be held civilly liable for serious human rights violations committed under the legal cover of their professional advice, for “set[ting] in motion a series of events that resulted in the deprivation of [...] rights”, as the US District Court for the Northern District of California declared in *Padilla v. Yoo*.<sup>933</sup> In that specific case, the District judge substantially refused to dismiss the allegations formulated against Justice Department legal adviser John Yoo, who was “the *de facto* head of war-on-terrorism legal issues” under the Bush administration and “key member of a highly-influential group of senior administration officials known as the ‘War Council’”<sup>934</sup> when the alleged torture took place. Jose Padilla, a US citizen, was detained for almost four years, in large part incommunicado, in a military brig in South Carolina after being designated an “enemy combatant” by the US government. According to Mr. Padilla’s allegations, then US Deputy Assistant Attorney General John Yoo

*“intended or was deliberately indifferent to the fact that Mr Padilla would be subjected to the illegal policies [Yoo] set in motion and to the substantial risk that Mr. Padilla would suffer harm as a result. [Yoo] personally recommended Mr Padilla’s unlawful military detention as a suspected enemy combatant and wrote opinions to justify the use of unlawful interrogation methods against persons suspected of being enemy combatants. It was foreseeable that the illegal interrogation policies would be applied to Mr. Padilla....”*<sup>935</sup>

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932 *Ibid.*, at p.18 (para. 7).

933 *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), p. 34.

934 *Padilla v. Yoo*, *op. cit.*, p. 6.

935 *Ibid.*, p. 34.

### 3. Declarations, Statements and Resolutions adopted by ICJ Congresses & Conferences

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The ethical and legal responsibility of all members of the legal profession to secure respect of the Rule of Law and the protection and promotion of human rights, together with their instrumental role in ensuring the independence of the judiciary and the fair administration of justice have been underscored by the ICJ since the inception of the organisation.<sup>936</sup>

With specific regard to the professional and legal duties of the members of the bar, the Third Committee created during the *International Congress of Rio de Janeiro on Executive Action and the Rule of Law* (1962), called upon lawyers to “strive [at all times] to be a visible example of the ideals of his profession – integrity, competence, courage and dedication to the service of his fellow men.”<sup>937</sup> The Committee also highlighted the necessity, as a Rule of Law requirement, of establishing in all countries an authority which administers discipline in cases of failure to abide by high standards of ethics “in substantially the same manner as courts administer justice”.<sup>938</sup>

Along the same lines, at the *Conference of French-speaking African Jurists in Dakar* (1967) participants adopted the conclusions of the Second Committee which stressed that a lawyer’s obligation to apply and observe strictly the rules and ethics of his profession “should provide the necessary safeguards both of his independence vis-à-vis the authorities, and of conditions permitting him fully to perform his duty, especially in criminal cases.”<sup>939</sup>

In 1975, the ICJ supported the Campaign for the Abolition of Torture launched by Amnesty International, premised on the assumption that the legal profession bears a “special responsibility” with regard to the protection of every individual against torture or other cruel, inhuman or degrading treatment or punishment. The ICJ collaborated in the formulation of the “*Draft principles for a code of ethics for lawyers, relevant to torture and other cruel, inhuman or degrading treatment or punishment*”, which were meant to provide guidelines for an international code of ethics for lawyers to be adopted with the collaboration of national and international legal bodies.<sup>940</sup>

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936 See *supra*, Principle no. 1 and its Commentary.

937 Conclusions of Committee III, Clause XII, *Congress of Rio de Janeiro*, 1962.

938 *Ibid.*, Clause IX.

939 Section I.2(c) of the Conclusions adopted by the Conference on the proposals of Committee II, *Public Opinion and the Rule of Law, Dakar Conference*, 1967.

940 See “Lawyers against torture”, document prepared by Amnesty International, *ICJ Review*, No. 16, June 1976, p. 29 *et seq.*

At the *ICJ 25th Anniversary Meeting in Vienna (1977)* the Committee on “The Rule of Law in Emerging Forms of Society: One-Party States” stressed in its report “the duty of lawyers to be ready to represent fearlessly any client, however unpopular” and argued that they should enjoy “complete immunity” for actions taken within the law in defence of their clients.<sup>941</sup> According to the Committee on “The Rule of Law in Emerging Forms of Society – The Rule of Law under Military Regimes”, in countries where a state of siege or martial law is declared, “[t]he right and duty of lawyers to act in the defence of, and to have access to, political and other prisoners, and their immunity for action taken within the law in defence of their clients should be fully recognised and respected” and constitute “basic safeguards” that should be strictly observed.<sup>942</sup>

In 2000, the Centre for the Independence of Judges and Lawyers (CIJL) at the ICJ convened in Geneva an expert meeting to adopt a “*Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*”. The Policy Framework asserted that “Impartiality in the judiciary requires that cases be decided only according to evidence and the law. Any other influence on the decision-making process constitutes corruption”.<sup>943</sup> The document also stressed that codes of ethics play a fundamental role in the prevention and elimination of corruption in the judicial system, in that they “explain the ethical aspects of appropriate conduct to judges and court officers, encourage informed public understanding of the judicial system, and inspire public confidence in the integrity of the judicial institution”.<sup>944</sup> The Policy Framework recalled that:

*“the common form of judicial oath requires judges to exercise the judicial power without fear or favour, affectation or ill-will. The guarantee of judicial impartiality is the universal expectation of all persons who access or appear before a court. Without it there will be no rule of law and the democratic quality of society will fail.”*<sup>945</sup>

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941 Report of the Committee *The Rule of Law in Emerging Forms of Society – One-Party States*, ICJ 25th Anniversary Meeting, Vienna, 1977, para. 6.

942 Report of the Committee *The Rule of Law in Emerging Forms of Society – The Rule of Law under Military Regimes*, ICJ 25th Anniversary Meeting, Vienna, 1977, para. 8.

943 “Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System”, *CIJL Yearbook 2000, Strengthening Judicial Independence. Eliminating Judicial Corruption*, February 2001, p. 127.

944 *Ibid.*, p. 132.

945 *Ibid.*, p. 134.

## 4. Selected excerpts from international standards

### 2. (i) General considerations – Ethical Principles and Codes of Professional Conduct

Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

– *Article 11 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on human rights defenders)*

Judges should be guided in their activities by ethical principles of professional conduct. Those principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves[...]. These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the development of such codes.

– *Chapter VII.72 and 73 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities*

Whereas the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

– *Preamble, paragraph 8, of the Bangalore Principles of Judicial Conduct*

These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing binding rules of law and conduct which bind the judge.

– *Preamble, paragraph 10, of the Bangalore Principles of Judicial Conduct*

A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.

– *Chapter V.1 (a) of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*

[E]ach State party shall endeavour to apply, within its own institutional and legal system, codes or standards of conduct for the correct, honourable and proper performance of public functions.

— *Article 8.2 of the United Nations Convention against Corruption*

Prosecutors shall: a) at all times maintain the honour and dignity of their profession; b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; c) at all times exercise the highest standards of integrity and care.

— *Article 1(a), (b) and (c) of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors*

Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice[...]. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

— *Principles 12 and 26 of the UN Basic Principles on the Role of Lawyers*

The lawyer shall at all times act diligently and fearlessly within the law in accordance with the wishes of his client and subject to the established standards and ethics of the legal profession.

— *Article 17 of the Draft Principles on the Independence of the Legal Profession (Nota Principles)*

Rules of professional conduct are not designed simply to define obligations, a breach of which may involve a disciplinary sanction. A disciplinary sanction is imposed only as a remedy of last resort[...]. Rules of professional conduct are designed, through their willing acceptance by the lawyers concerned, to ensure the proper performance by lawyers of a function which is recognised as essential in all civilised societies....

— *Principle I of the Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community*

Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members.

— *Rule 2 of the IBA International Code of Ethics*

The core principles underlie the various national and international codes which govern the conduct of lawyers[...]. The core principles are, in particular: [...] (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer.

– *Principle (d) of the Charter of Core Principles of the European Legal Profession adopted by the Council of Bars and Law Societies of Europe*

**2. (ii) The responsibility of judges and prosecutors to uphold and promote the Rule of Law and human rights and the special duty to resist actions which would undermine the independence of the judiciary and the Rule of Law**

The objectives and functions of the judiciary shall include: [...] (b) Promoting, within the proper limits of judicial function, the observance and the attainment of human rights; (c) Ensuring that all peoples are able to live securely under the rule of law.

– *Article 1 (b) and (c) of the Singhvi Declaration*

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

– *Principle VII (b) of the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*

It is fundamental that judicial instances guarantee the protection of civil, cultural, economic, political and social Human Rights, including the right to development....

– *Policy 1 on the “Force, Promotion, Protection and Respect of Human Rights” of the Declaration of Caracas of the Ibero-American Summit of Presidents Of Supreme Justice Tribunals And Court*

Legitimate public criticism of judicial performance is a means of ensuring accountability.

– *Chapter V.1 (a) of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*

It should be recognised that judicial independence does not render the judge free from public accountability....

— *Standard 33 of the IBA Minimum Standards of Judicial Independence*

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. 2. Measures to the same effect as those taken pursuant to paragraph 1 of the article may be introduced and applied within the prosecution service....

— *Article 11 of the United Nations Convention against Corruption*

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

— *Guideline 12 of the UN Basic Guidelines on the Role of Prosecutors*

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

— *Guideline F (k) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

Prosecutors shall: [...] h) respect, protect and uphold the universal concept of human dignity and human rights [...] when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights.

— *Article 1(h) and Article 4.2(b) of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors*

## 2. (iii) Judges are entitled to protection to enable them to discharge their professional duties

The executive authorities shall at all times ensure the security and physical protection of judges and their families.

— *Article 19 of the Singhvi Declaration*

The Executive authorities must at all times ensure the security and physical protection of judges and their families.

— *Principle 40 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*

... States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities[...]. It shall be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency....

— *Part I, Section II.1.02, and Part II, Section IX.2.41 of the Universal Declaration on the Independence of Justice (Montreal Declaration)*

All necessary measures should be taken to ensure the safety of judges. These measures may involve protection of courts and of judges who may become or are, victims of threats or acts of violence.

— *Chapter V.38 of the COE Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities*

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including [...] offering judges appropriate personal security....

— *Procedure 5 of the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*

The other organs of the state have an obligation to give the judiciary all necessary means to perform their function[...]. The judiciary must participate in decisions taken in relation to these matters.

— *Article 7 of the Judges' Charter in Europe*

## 2. (iv) Professional, civil and criminal responsibility of lawyers

Lawyers shall at any time give clients a candid opinion on any case[...]. The loyal defence of a client's case may never cause advocates to be other than perfectly candid, subject to any right or privilege to the contrary which clients choose them to exercise, or knowingly to go against the law.

— *Rule 10 of the IBA International Code of Ethics*

In a society founded on the respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance or what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. A lawyer's function therefore lays on him or her a variety of legal and moral obligations....

— *Preamble, Section 1.1. of the Code of Conduct for European Lawyers*

... A lawyer must serve the interests of justice as well as of those who seek it and it is his duty, not only to plead his client's cause, but to be his adviser. A lawyer's function therefore lays on him a variety of duties and obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the client's family and other people towards whom the client is under a legal or moral obligation;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public, for whom the existence of a free and independent but regulated profession is an essential guarantee that the rights of man will be respected.

— *Principle II of the Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community*

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized

by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

— *Principle 14 of the UN Basic Principles on the Role of Lawyers*

It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

— *Part III, Section VI.3.02 of the Universal Declaration on the Independence of Justice (Montreal Declaration)*

The lawyer's role [...] is as client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer [...] also fulfils the functions of the lawyer in Society – which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law.

— *Preamble, paragraph 6, of the Commentary to the Charter of Core Principles of the European Legal Profession*

Whereas recognition of the rule of law places heavy emphasis on the necessity for adequate access to justice and lawyers form an essential element of access to justice that the legal profession is a necessary element in the implementation of any system based on the rule of law.

— *Preamble, paragraph 7, of the IBA Resolution on Multi-Disciplinary Practices*