International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors

Practitioners Guide No. 1

INTERNATIONAL
COMMISSION
OF JURISTS

A country's judicial system is central to the protection of human rights and the preservation of the rule of law. Judges, lawyers and prosecutors play a major role in ensuring that victims of human rights violations are protected and in bringing perpetrators of abuses to justice. Furthermore, they guarantee respect for the right to a fair trial. The judiciary is also responsible for ensuring that the executive and the legislature respect international human rights and the rule of law.

The aim of the guide is to provide legal practitioners and policy-makers with detailed and practical references on international standards on the independence of the judicial system. Part one of this guide provides an analysis of the law and concrete examples drawn from international practice. It also outlines the role to be played by an independent legal profession and an impartial and objective prosecuting authority. Part two includes all the relevant global and regional standards on the topic so as to facilitate easy reference.

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International Commission of Jurists

The International Commission of Jurists (ICJ) is a non-governmental organization 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 85 national sections and affiliated organizations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the Organization of African Unity. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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Foreword

Since its creation more than five decades ago, the International Commission of Jurists (ICJ) has actively worked to promote a fair and efficient administration of justice throughout the world as an essential safeguard for human rights. As a network of jurists, the ICJ has always focused on the crucial role that justice systems play in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection, and that perpetrators of human rights violations are brought to justice. They also ensure that anyone suspected of a criminal offence receives a fair trial according to international standards and that the executive and legislative branches of government act according to international human rights and the rule of law.

In different regions and fora, the ICJ has sought ways to develop, and then implement, standards on the administration of justice that ensure every individual's right to a fair trial by an independent and impartial tribunal.

The ICJ has accumulated a quarter century of experience working with justice systems to ensure their independence and active protection of human rights. Through its Centre for the Independence of Judges and Lawyers (CIJL), the ICJ has sought to develop practical tools to promote and protect judicial and legal independence, including the UN Basic Principles on the Independence of the Judiciary and on the Role of Lawyers.

This second, updated, edition of the ICJ Practitioners Guide No.1 provides practical insight on the use of international principles on the independence and accountability of judges, lawyers and prosecutors. Through an analysis of all relevant standards and jurisprudence, the Guide helps national decision-makers develop policies on the administration of justice and assists in the evaluation of a country's judicial system and the formulation of concrete proposals to implement international standards. It also presents the text of all relevant international standards on the topic, thus updating the compilation published by the ICJ in 1990 and the previous edition of this Guide.

The Guide serves as a human rights policy and advocacy tool for judges, legal practitioners, policy-makers, training institutions and human rights organizations, to help them conduct their activities, from judicial training to the adoption of laws and policies in accordance with international standards.

Nicholas Howen
Secretary General

PART 1

The Role of Judges, Lawyers and Prosecutors

"The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development".[1]

Introduction

The judicial system in a country is central to the protection of human rights and freedoms. Courts play a major role in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection, that perpetrators of human rights violations are brought to justice and that anyone suspected of a criminal offence receives a fair trial according to international standards. The judicial system is an essential check and balance on the other branches of government, ensuring that laws of the legislative and the acts of the executive comply with international human rights and the rule of law.

This crucial role has been highlighted by all inter-governmental human rights systems. The United Nations General Assembly has repeatedly stated that "the rule of law and the proper administration of justice [...] play a central role in the promotion and protection of human rights" [2] and that "the administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to democratization processes and sustainable development".[3]

The United Nations General Secretary General has emphasised the fact that "[i]ncreasingly the importance of the rule of law in ensuring respect for human rights, and of the role of judges and lawyers in defending human rights, is being recognized".[4]

The Inter-American Court of Human Rights has said that "[g]uaranteeing rights involves the existence of suitable legal means to define and protect them, with

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1. *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 27
2. See, for example, resolutions 50/181 of 22 December 1995 and 48/137 of 20 December 1993, entitled "Human rights in the administration of justice".
3. *Ibid.*
4. *Strengthening of the rule of law - Report of the Secretary General to the United Nations General Assembly*, UN document A/57/275, para. 41.

intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality".[5] Similarly, the Inter-American Commission on Human Rights has pointed out that "the independence of the judiciary is an essential requisite for the practical observance of human rights".[6] The Commission also considered that "[t]he right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State".[7]

Independence and impartiality

The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities in the defence of human rights. They should in turn be active protectors of human rights, accountable to the people and must maintain the highest level of integrity under national and international law and ethical standards.

However, judges, lawyers and prosecutors are often unable to fulfil their role as protectors of human rights because they lack sufficient professional qualifications, training and resources, including an understanding of international human rights law and how to apply it domestically.

While judges, lawyers and prosecutors enjoy the same human rights as any other human being, they are also specially protected because they are the main guarantors of those human rights for the rest of the population. If judges cannot assess the facts and apply the law, both national and international, the justice system becomes arbitrary. If lawyers cannot communicate freely with their clients, the right of defence and the principle of equality of arms, which requires both parties to a criminal proceeding to be treated in the same manner, are not upheld. If prosecutors are not physically protected when their lives are in danger due to their work, their duty to prosecute is impinged upon.

This special protection, however, carries special responsibilities. The principle of independence of judges is not intended to grant them personal benefits; its rationale

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5. *Legal status and human rights of the child*, Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) OC-17/2002, 28 August 2002, para. 120.

6. *The Situation of Human Rights in Cuba: Seventh Report*, OAS document OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, Chapter IV, para. 2.

7. Report Nº 78/02, Case 11.335, *Guy Malary v. Haiti*, 27 December 2002, para 53.

is to protect individuals against abuses of power. Consequently, judges cannot arbitrarily decide cases according to their own personal preferences, but must apply the law to the facts. In the case of prosecutors, their duty is to investigate and prosecute all violations of human rights irrespective of who perpetrated them. In turn, lawyers must at all times carry out their work in the interest of their clients.

Therefore, judges, lawyers and prosecutors are essential to the right to a fair trial. Unless all of them are able carry out their functions appropriately, the rule of law and the right to a fair trial are seriously endangered.

The right to a fair trial in international law: universal and regional instruments

All general universal and regional human rights instruments guarantee the right to a fair hearing in judicial proceedings (criminal, civil, disciplinary and administrative matters) before an independent and impartial court or tribunal.

Treaties

A treaty is an international written agreement concluded between States and/or intergovernmental organisations and governed by international law.[8] The name the parties give to a treaty is of no relevance here (Covenant, Convention, Treaty, Protocol, etc.); what matters is the content and the language of the treaty, as well as the parties' intention to be bound by it. A treaty always contains language by which the signing parties agree on the legally binding character of the agreement.

The parties to a treaty are obligated under international law to fulfil and implement the provisions of the treaty in good faith, and a State cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.[9]

The *International Covenant on Civil and Political Rights* (ICCPR), signed and ratified by 160 States, stipulates in article 14(1) that "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee, the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception".[10] The Committee has also specified that even in time of war or during a state of emergency, "only a court of law may try and convict a person for a criminal

8. See Article 1 of the Vienna Convention on the Law of Treaties and Article 2 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.

9. Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

10. Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), UN document CCPR/C/46/D/263/1987 (Jurisprudence), para. 5.2.

offence".[11] It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

Similarly, article 18 (1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* states that "[m]igrant workers and members of their families [...] shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

On a regional level, article 8 (1) of the *American Convention on Human Rights* provides that "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature".

With different wording but in similar terms, article 7(1) of the *African Charter on Human and Peoples' Rights* provides that "every individual shall have the right to have his cause heard", a right that comprises "the right to be presumed innocent until proved guilty by a competent court or tribunal" and "the right to be tried within a reasonable time by an impartial court or tribunal". This article must be read in conjunction with article 26 of the Charter, which establishes that the States parties "shall have the duty to guarantee the independence of the Courts". The African Commission on Human and Peoples' Rights has said that article 7 "should be considered non-derogable" since it provides "minimum protection to citizens".[12]

Article 6 (1) of the *European Convention on Human Rights* specifies that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The right to receive a fair trial is also recognised in international humanitarian law. Article 75 (4) of the *First Protocol to the Geneva Conventions* stipulates that "No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure".[13]

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

12. African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria,* Communication No. 218/98, decision adopted during the 29th Ordinary Session, 23 April – 7 May 2001, para. 7.

13. These principles include the following: "(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; [...] (d) anyone charged with an offence is presumed innocent until proved guilty according to law; and (e) anyone charged with an offence shall have the right to be tried in his presence".

Declaratory instruments

Declaratory instruments are not binding in a legal sense, but establish widely recognised standards on a number of human rights topics. Generally these instruments, particularly those adopted in the framework of the United Nations, reflect international law.

Many of these instruments contain provisions that are mere re-statements of those contained in treaties and, in some cases, customary international law. For example, Principle 1 of the *UN Basic Principles on the Role of Lawyers* (on the right to legal representation) simply restates the right contained in Article 14, paragraph 3 (d) of the ICCPR).

A number of declaratory instruments contain provisions on the right to a fair trial before an independent and impartial tribunal. The *Universal Declaration on Human Rights*, adopted by the UN General Assembly in 1948, recognises that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Guideline IX of the *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*[14] stipulates that "[a] person accused of terrorist activities has the right to a [...] hearing [...] by an independent, impartial tribunal established by law". Article 47 of the *Charter of Fundamental Rights of the European Union* states that "[e]veryone is entitled to a [...] hearing [...] by an independent and impartial tribunal previously established by law". Article XXVI of the *American Declaration of the Rights and Duties of Man* lays down that "[...] Every person accused of an offence has the right [...] to be tried by courts previously established in accordance with pre-existing laws".

The right to a fair trial before an independent and impartial tribunal is not only recognised in treaties but it is also part of customary international law. Therefore, those countries that have not acceded to or ratified these treaties are still bound to respect this right and arrange their judicial systems accordingly.

The principle of the natural judge

The principle of the 'natural judge' (*juez natural*) constitutes a fundamental guarantee of the right to a fair trial. This principle means that no one can be tried other than

14. *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th Session of the Council of Europe Ministers' Deputies.

by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, *ad hoc*, 'extraordinary', *ex post facto* and special courts are forbidden. This ban, however, should not be confused with the question of specialist jurisdictions. Although 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, nevertheless, as the Human Rights Committee has pointed out, "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory".[15] However, as the Committee has repeatedly stated, a difference in treatment is only acceptable if it is founded on reasonable and objective criteria.[16]

The Commission on Human Rights has reiterated, in several of its resolutions, the principle of the natural judge. For example, in Resolution 1989/32 the Commission recommended that States should take account of the principles contained in the *Draft Universal Declaration on the Independence of Justice*, also known as the *Singhvi Declaration*.[17] Article 5 of the *Declaration* stipulates that: "(b) no *ad hoc* tribunal shall be established to displace jurisdiction properly vested in the court; (c) Everyone shall have the right to be tried with all due expedition and without undue delay by ordinary courts or judicial tribunal under law subject to review by the courts; [...] (e) 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". It is also worth highlighting two resolutions on the "integrity of the judicial system," in which the Commission reiterated that "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".[18]

- The existence of specialist courts or jurisdictions is widely accepted and is predicated on the specificity of the subject matter. For example, specialist jurisdictions exist in many legal systems to deal with labour, administrative, family and commercial matters. In addition, in criminal matters, as an exceptional case, the existence of specialist jurisdictions for certain parties, such as indigenous peoples and juveniles, is recognized

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15. Communication 172/1984, *S. W. M. Brooks v. the Netherlands*, (Views adopted on 9 April 1987), UN document Supp. 40 (A/42/40) at 139, annex VIII.B, para. 13. See also, among others: Communication No. 182/1984, *Zwaan-de-Vries v. The Netherlands*, (Views adopted on 9 April 1987), UN document Supp. No. 40 (A/42/40) at 160, annex VIII.B; Communication 196/1985, *Ibrahima Gueye and others v. France* (Views adopted on 3 April 1989), UN document CCPR/C/35/D/196/1985; and Communication 516/1992, *Alina Simunek v. The Czech Republic* (Views adopted on 19 July 1995), UN document CCPR/C/54/D/516/1992.

16. *Ibid.*

17. The *Singhvi Declaration* formed the basis for the United Nations' Basic Principles on the Independence of the Judiciary.

18 Operative paragraph N° 2 of Resolutions N° 2002/37 of 22 April 2002 and N°2003/39 of 23 April 2003.

under international law and is predicated on the specificity of those being prosecuted.

The Human Rights Committee has not developed significant jurisprudence on the principle of the "natural judge". However, it has addressed the question of "extraordinary" or special courts. Traditionally, it has not seen special courts as "intrinsically incompatible with article 14(1) of the Covenant".

- In General Comment N° 13, adopted in 1984, the Human Rights Committee took the view that: "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. [...] If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".[19]

In recent years the Committee has repeatedly expressed its concern at the use of special courts[20] and has, on several occasions, recommended that such courts be abolished.[21] The Committee has also seen the abolition of special courts as a positive contributing factor in achieving national implementation of the ICCPR.[22]

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19. Human Rights Committee, General Comment N° 13: Equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14 of the Covenant), para. 4, UN document HR1/GEN/1/Rev.3, p.17.

20. Communication No. 328/1988, *Roberto Zelaya Blanco v. Nicaragua* (Views adopted on 20 July 1994), UN document CCPR/C/51/D/328/1988. See also the *Concluding Observations of the Human Rights Committee on Nigeria,* UN documents CCPR/C/79/Add.65 and CCPR/C/79/Add.64; *Concluding Observations of the Human Rights Committee on Morocco*, UN documents A/47/40, paras. 48-79 and CCPR/C/79/Add.113, para. 18; *Concluding Observations of the Human Rights Committee on France,* UN document CCPR/C/79/Add.80, para. 23; *Concluding Observations of the Human Rights Committee on Iraq,* UN document CCPR/C/79/Add.84, para. 15; and *Concluding Observations of the Human Rights Committee on Egypt,* UN document A/48/40, para. 706.

21. See, for example, the *Concluding Observations of the Human Rights Committee on Gabon,* UN document CCPR/CO/70/GAB, para. 11.

22. See, for example, the *Concluding Observations of the Human Rights Committee on Guinea,* UN document CCPR/C/79/Add.20, para 3, and the *Concluding Observations of the Human Rights Committee on Senegal,* UN document CCPR/C/79/Add.10, para 3.

- The Committee has recommended Nigeria to abrogate "all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts".[23]

- In the case of Nicaragua, the Committee 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".[24]

- The Committee found a violation of the right to a fair trial in a case where the accused was tried and convicted in first instance and on appeal by courts made up of faceless judges, without the due safeguards of a public hearing and adversarial proceedings, was not allowed to be present and defend himself during the trial, either personally or through his representative, and had no opportunity to question the prosecution witness.[25]

- In a similar case concerning Peru, the Committee found that "the very nature of the system of trials by 'faceless judges' in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial [...]: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces.[26]

The Human Rights Committee has specified that special tribunals must conform to the provisions of Article 14 of the ICCPR. It nevertheless went on to say that "[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[27]

The European Court of Human Rights and the European Commission of Human Rights have ruled on the right to be tried by a tribunal established by law, even though they have not referred specifically to the principle of the "natural judge".

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23. *Preliminary Concluding Observations of the Human Rights Committee on Nigeria*, UN document CCPR/C/79/Add.64, para. 11.

24. Communication No. 328/1988, *Roberto Zelaya Blanco v. Nicaragua, doc. cit.*, para. 10.4.

25. Communication No. 1298/2004, *Manuel Francisco Becerra Barney v. Colombia* (Views adopted on 11 July 2006), UN document CCPR/C/87/D/1298/2004, para. 7.2

26. Communication No. 577/1994, *Víctor Alfredo Polay Campos v. Peru* (Views adopted on 6 November 1997), UN document CCPR/C/61/D/577/1994, para. 8.8. See also Communication No. 1126/2002, *Marlem Carranza Alegre v. Peru* (Views adopted on 28 October 2005), UN document CCPR/C/85/D/1126/2002, para. 7.5.

27. Human Rights Committee, General Comment No. 29 - States of Emergency (article 4), *doc. cit.*, para 4.

- In its report on the case of *Zand v. Austria*, the European Commission took the view that the purpose of the clause in article 6(1) [of the European Convention on Human Rights] requiring tribunals to be established by law was to ensure that, in a democratic society, organization of the judiciary was not left to the discretion of the executive but should be regulated by a law of parliament. However, that did not mean that the delegation of powers was in itself unacceptable in the case of matters related to the organization of the judiciary. Article 6(1) did not require that, in this field, the legislature should regulate every detail by means of a formal law as long as it at least established the overall framework of the judiciary.[28]

The Inter-American Commission on Human Rights has also referred to the principle of the natural judge. The Commission's position was clearly summed up in the general recommendations it formulated to its member States in 1997: "With regard to jurisdictional matters, the Commission reminds the member States that their citizens must be judged pursuant to ordinary law and justice and by their natural judges." [29]

Military tribunals

The existence of military criminal tribunals raises serious issues related to the right to a fair trial. The Human Rights Committee has on several occasions recommended in its country observations that legislation be codified so that civilians are tried by civilian courts and not by military tribunals.[30]

- The Human Rights Committee expressed concern about the "broad scope of the jurisdiction of military courts) in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It [also expressed concern] about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures and verdicts by the ordinary courts. The [Committee recommended that] the

28. Report of 12 October 1978, Case of *Primncv Zand v. Austria*, Request Nº 7360/76, para. 70.

29. *Annual Report of the Inter-American Commission on Human Rights - 1997*, OAS document OEA/Ser.L/V/II.98, Doc. 6, Chapter VII, Recommendation I, para. 4.

30 See, for example, the *Concluding Observations of the Human Rights Committee on Peru*, UN document CCPR/C/79/Add.67, para. 12; *Concluding Observations of the Human Rights Committee on Uzbekistan*, UN document CCPR/CO/71/UZB, para. 15; *Concluding Observations of the Human Rights Committee on the Syrian Arab Republic*, UN document CCPR/CO/71/SYR, para. 17; *Concluding Observations of the Human Rights Committee on Kuwait*, UN document CCPR/CO/69/KWT, para. 10; *Concluding Observations of the Human Rights Committee on Egypt* CCPR/C/79/Add.23, para. 9; UN document CCPR/CO/76/EGY, para. 16; *Concluding Observations of the Human Rights Committee on the Russian Federation*, UN document CCPR/C/79/Add.54, para. 25; *Concluding Observations of the Human Rights Committee on Slovakia*, UN document CCPR/C/79/Add.79, para. 20; *Concluding Observations of the Human Rights Committee on Venezuela*, UN document CCPR/C/79/Add.13, para. 8; *Concluding Observations of the Human Rights Committee on Cameroon*, UN document CCPR/C/79/Add.116, para. 21; *Concluding Observations of the Human Rights Committee on Algeria*, UN document CCPR/C/79/Add.1, para. 5; *Concluding Observations of the Human Rights Committee on Poland*, UN document CCPR/C/79/Add.110, para. 21; and *Concluding Observations of the Human Rights Committee on Chile*, UN document CCPR/C/79/Add.104, para. 9.

State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts." [31]

- In the case of Peru, the Committee considered that the prosecution of civilians by military tribunals was incompatible with Article 14 of the ICCPR, because it "is not consistent with the fair, impartial and independent administration of justice".[32]

- In the case of Tajikistan, after noting that "military courts have jurisdiction to examine criminal cases concerning both military and civil persons", the Committee recommended that amendments be made to the Criminal Procedure Code "in order to prohibit this practice, strictly limiting the jurisdiction of military courts to military persons only".[33]

In the view of the Special Rapporteur on the independence of judges and lawyers: "In 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".[34]

Another issue raised by the existence of military tribunals is the scope of their jurisdiction *ratione materiae*, in particular the nature of the crimes that might be tried in such courts. Both the Human Rights Committee and the Committee against Torture have referred in several occasions to the practice in certain States of granting a wide scope of jurisdiction to military tribunals, including for cases of human rights violations carried out by members of the armed forces, and recommended restricting such jurisdiction to crimes of a strict military nature with the exclusion of human rights violations.

- In 1992, the Human Rights Committee recommended Venezuela to take measures to "see to it that all members of the armed forces or the police

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31 *Concluding Observations of the Human Rights Committee on Lebanon*, UN document CCPR/C/79/Add.78, para. 14.

32. *Concluding Observations of the Human Rights Committee on Peru*, UN document CCPR/CO/70/PER, para. 11.

33. *Concluding Observations of the Human Rights Committee on Tajikistan*, UN document CCPR/CO/84/TJK, para. 18. See also the *Concluding Observations of the Human Rights Committee on Serbia*, UN document CCPR/CO/81/SEMO, para. 20, where the Committee expressed its concern at "the possibility of civilians being tried by military courts for crimes such as disclosure of State secrets" and stated that Serbia "should give effect to its aspiration to secure that civilians are not tried by military courts". See also, for example, *Concluding Observations of the Human Rights Committee on Equatorial Guinea*, UN document CCPR/CO/79/GNQ, para. 7.

34. *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Peru*, UN document E/CN.4/1998/39/Add.1, para. 78.

who have committed violations of the rights guaranteed by the Covenant are tried and punished by civilian courts".[35]

- In the case of Brazil, the Committee expressed its concern "over the practice of trying military police accused of human rights violations before military courts" and regretted that "jurisdiction to deal with these cases has not yet been transferred to the civilian courts." [36]

- When analysing the 1992 report submitted by Colombia, the Committee expressed concern "about the phenomenon of impunity for police, security and military personnel. In that connection, the measures that have been taken do not seem to be sufficient to guarantee that all members of the armed forces who abuse their power and violate citizens' rights will be brought to trial and punished. Military courts do not seem to be the most appropriate ones for the protection of citizens' rights in a context where the military itself has violated such rights." [37]

- Pursuant to a draft law on military jurisdiction presented to the Guatemalan Congress which provided that military courts would have jurisdiction to try military personnel accused of ordinary crimes, the Committee against Torture recommended that the draft law should be amended "in order to restrict the jurisdiction of military courts to the trial of military personnel accused of crimes of an exclusively military nature".[38]

- In 2006, the Human Rights Committee expressed its concern at "the continued existence of military courts and at the absence of guarantees of a fair trial in proceedings before these courts" in the Democratic Republic of the Congo and recommended that the State party should abolish military courts for ordinary offences.[39]

- The Committee against Torture has recommended one of its State parties to ensure that "cases involving violations of human rights, especially

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35. *Concluding Observations of the Human Rights Committee on Venezuela*, UN document CCPR/C/79/Add.13., para. 10.

36 *Concluding Observations of the Human Rights Committee on Brazil (1996)*, UN document CCPR/C/79/Add.66, para. 315. In 2005, the Committee reiterated its concern in the following terms: "[…] The ordinary courts should have criminal jurisdiction over all serious human rights violations committed by the military police, including excessive use of force and manslaughter, as well as intentional murder." *Concluding Observations of the Human Rights Committee on Brazil*, UN document CCPR/C/BRA/CO/2, para. 9.

37. *Concluding Observations of the Human Rights Committee on Colombia*, UN document CCPR/C/79/Add.2., para. 393.

38. *Conclusions and Recommendations of the Committee against Torture on Guatemala*, UN document CAT/C/GTM/CO/4, para. 14. See also the ICJ's press release of 31 May 2006 "Guatemala - Draft Laws on Military Justice Incompatible with Human Rights" and the legal memorandum, in Spanish, submitted to Congress.

39. *Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo*, UN document CCPR/C/COD/CO/3, para. 21.

torture and cruel, inhuman or degrading treatment, committed by military personnel against civilians, are always heard in civil courts, even when the violations are service-related." [40]

The United Nations Working Group on Arbitrary Detention has laid down clear rules on military tribunals, when it considered that "if some form of military justice is to continue to exist, it should observe four rules:

- It should be incompetent to try civilians;
- It should be incompetent to try military personnel if the victims include civilians;
- 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;
- It should be prohibited from imposing the death penalty under any circumstances".[41]

The European Court of Human Rights has also referred to military judges and tribunals on numerous occasions. According to the Court, military judges cannot be considered independent and impartial due to the nature of the body they belong to.

- In *Findlay v. The United Kingdom*, the European Court found that the applicant's court martial was neither independent nor impartial because its members were subordinate in rank to the convening officer, who also acted as "confirming officer" and who could modify whatever sentence was handed down.[42]

Generally speaking, the African Commission of Human and Peoples' Rights (ACHPR) has taken the view that "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process." However, the Commission made the point that "military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process".[43] The ACHPR also considered that the fundamental question was to

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40. *Conclusions and Recommendations of the Committee against Torture on Mexico*, UN document CAT/C/MEX/CO/4, para. 14. See also the *Conclusions and Recommendations of the Committee against Torture on Peru*, UN document CAT/C/PER/CO/4, para. 16: "The State party should: (a) Guarantee the prompt, impartial and thorough investigation of all reports of acts of torture and ill-treatment and forced disappearances perpetrated by agents of the State. Such investigations should not be carried out by the military criminal justice system."

41. *Report of the Working Group on Arbitrary Detention*, UN document E/CN.4/1999/63, para. 80.

42. *Findlay v. The United Kingdom*, judgment of the European Court of Human Rights (ECtHR) of 25 February 1997, Series 1997-I, paras. 74-77. In *Incal v. Turkey*, the Court found that the presence of a military judge on the State Security Court was contrary to the principles of independence and impartiality, which are essential prerequisites for a fair trial. *Incal v. Turkey*, ECtHR judgment of 9 June 1998, Series 1998-IV, paras 67-73.

43. Decision of May 2001, Communication 218/98 (Nigeria), para. 44.

determine whether such courts met the standards of independence and impartiality required of any court.[44]

The ACHPR has stated that "[t[he purpose of military courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards. They 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." [45]

In a decision on Nigeria, the African Commission examined the trial and conviction of several civilians by special military tribunals set up under the Civil Disturbances Act. The members of such tribunals had been appointed by the executive. Those convicted by them were unable to lodge an appeal in the ordinary courts and the body which was responsible for confirming the sentences was the Provisional Ruling Council (PRG), a body made up solely of members of the Armed Forces. The ACHPR considered that removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch compromised the impartiality required of a court under the terms of the African Charter. The ACHPR also considered that it was not safe to view the confirming authority, the PRG, as a competent judicial body in that it was neither independent nor impartial. On this basis, the ACHPR concluded that neither the special tribunals nor the PRG were independent and that therefore Nigeria was in breach of its duty under article 26 of the African Charter to guarantee the independence of the courts. The ACHPR also concluded that, in the case in question, the right to be tried by an impartial tribunal, among others, had been violated.[46]

After reaffirming the principle of the natural judge, the Inter-American Commission on Human Rights stated that " [...] civilians should not be subject to Military Tribunals. Military justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanors or offences pertaining to their

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44. See the Decision of November 2000, Communication N° 223/98 (Sierra Leone); Decision of April 1997, Communication N° 39/90 (Cameroon); Decision of November 1999, Communication N° 151/96 (Nigeria); Decision of November 1999, Communication N° 206/97 (Nigeria); Decision of 1995, Communication N° 60/91 (Nigeria) para. 15; and Decision of 1995, Communication N° 87/93 (Nigeria).

45. Declaration and Recommendations on the Right to a Fair Trial in Africa, approved by the Dakar Seminar on the Right to a Fair Trial in Africa, para. 3. See also Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003.: "a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel; 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".

46. Decision of 31 October 1998, Communication N° 137/94, 139/94, 154/96 and 161/97 (Nigeria), paras. 86, 93 and 95.

function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations."[47]

In its study on Terrorism and Human Rights, the Commission recalled that "the jurisprudence of the Inter-American system has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process. This has included in particular the use of *ad hoc* or special courts or military tribunals to prosecute civilians for security offences in times of emergency, which practice has been condemned by this Commission, the Inter-American Court and other international authorities. The basis of this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes." [48]

The Inter-American Court of Human Rights, in the case of *Castillo Petruzzi et al. v. Peru*, adopted a clear and unequivocal position on the practice of trying civilians in military courts. In an *obiter dictum* contained in its judgment of 30 May 1999, the Court considered that the "basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law".[49]

Although a trial by a special court or tribunal does not entail, per se, a violation of the right to receive a fair trial by an independent and impartial tribunal, an inextricable link can be found between the displacement of the natural jurisdiction and the unfairness of a given proceeding. Under international law, military tribunals should under no circumstances try civilians and their jurisdiction should be strictly limited to offences of a military nature, with the exclusion of human rights violations.

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47. *Annual Report of the Inter-American Commission on Human Rights - 1997*, *doc. cit.*, Chapter VII, Recommendation 1, para. 4: "The Commission recommends that the member States adopt measures to improve the administration of justice within their respective jurisdictions." With regard to the principle of the 'natural judge', see also: Report Nº 50/00 of 13 April 2000, Case 11,298 *Reinaldo Figueredo Planchart v. Bolivarian Republic of Venezuela* and *Report on the Situation of Human Rights in Chile,* OAS document OEA/Ser.L/V/II.77.rev.1, Doc. 18.

48. *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 230

49. Case of *Castillo Petruzzi et al. v. Peru*, IACtHR judgment of 30 May 1999, Series C No. 52, para. 128. See also Case of *Cantoral Benavides v. Peru*, IACtHR judgment of 18 August 2000, Series C No. 69, para. 112.

A. Judges

1. Independence

Overview

For a trial to be fair, the judge or judges sitting on the case must be independent. All international human rights instruments refer to a fair trial by "an independent and impartial tribunal". The Human Rights Committee has repeatedly taken the view that the right to an independent and impartial tribunal is "an absolute right that may suffer no exception".[50]

Even though a person's right to a fair trial may be respected in a particular case when a judge is independent, a State would be in breach of its international obligations if the judiciary were not an independent branch of power. Therefore, in this context, independence refers both to the individual judge as well as to the judiciary as a whole.

International standards

The *UN Basic Principles on the Independence of the Judiciary* lay out the requisite of independence in the first Principle:

> *"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".*[51]

The Council of Europe's *Recommendation on the Independence of Judges* states that the independence of judges must be guaranteed by inserting specific provisions in constitutions or other legislation and that "[t]he executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges".[52]

The independence of the judiciary is also specifically recognised in other regional contexts, namely Africa and Asia-Pacific. In the case of Africa, it is worth highlighting the resolution on the respect and strengthening of the independence of the judiciary,

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50. Communication N° 263/1987, Case of *Miguel González del Río v. Peru*, *doc. cit*., para. 5.2.

51. United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Hereinafter, *UN Basic Principles*.

52. Council of Europe, *Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 13 October 1994, Principle 2 (b)

adopted in 1999 by the African Commission on Human and People's Rights.[53] In Asia-Pacific, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (the *Beijing Principles*) stipulate that the "Independence of the Judiciary requires that [it] decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source".[54]

The *Universal Charter of the Judge*, an instrument approved by judges from all regions of the world, establishes that "[t]he 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." [55]

The principle of separation of powers

The principle of an independent judiciary derives from the basic principles of the rule of law, in particular the principle of separation of powers. The Human Rights Committee has said that the principle of legality and the rule of law are inherent in the ICCPR.[56] The Inter-American Court of Human Rights has also stressed that "there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law".[57] According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere.[58]

The principle of the separation of powers is the cornerstone of an independent and impartial justice system.

- The Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the independence of judges and lawyers have concluded that "[t]he separation of power[s] and executive respect

53. Adopted in April 1996 at the 19th Session of the African Commission on Human and People's Rights.

54 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in 1995 and adopted by the LAWASIA Council in 2001, operative para. 3.a.

55. The Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, article 1. The IAJ was founded in 1953 as a professional, non-political, international organisation, grouping not individual judges, but national associations of judges. The main aim of the Association, which encompasses 67 such national associations or representative groups, is to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom.

56. Human Rights Committee, General Comment No. 29 - States of Emergency (article 4), *doc. cit.*, para 16.

57. *Habeas Corpus in Emergency Situations (articles 27.2, 25.1 and 7.6 American Convention on Human Rights)*, IACtHR Advisory Opinion OC-8/87, Series A No. 8, paras. 24 and 26.

58. See Inter-American Democratic Charter, adopted by the OAS General Assembly on 11 September 2001, Articles 3 and 4.

for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively".[59]

- The Special Rapporteur on the independence of judges and lawyers has underscored that "the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State [...]." [60] In a similar vein, he said that "the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law. [...] [T]he underlying concepts of judicial independence and impartiality [...] are 'general principles of law recognized by civilized nations' in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice." [61]

The Inter-American Court of Human Rights, in its judgment on the *Constitutional Court (Peru)* case, said that "one of the principal purposes of the separation of public powers is to guarantee the independence of judges".[62] The Court therefore considered that "under the rule of law, the independence of all judges must be guaranteed [...]".[63]

The Human Rights Committee has also referred to the principle of separation of powers when it noted that "lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy".[64] The Committee has repeatedly recommended that States adopt legislation and measures to ensure that there is a clear distinction between the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible.[65]

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59. *Report of Special Rapporteurs on the situation of human rights in Nigeria*, UN document E/CN.4/1997/62/Add.1, para. 71.
60. *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1995/39, para. 55.
61. *Ibid.*, paras. 32 and 34.
62. *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru)*, IACtHR judgment of 31 January 2001, Series C No. 55, para. 73.
63. *Ibid.*, para. 75.
64. *Concluding Observations of the Human Rights Committee on Slovakia*, CCPR/C/79/Add.79, para. 3.
65. *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/79/Add.111, para. 10. See also the Committee's *Concluding Observations on Peru*, CCPR/CO/70/PER, para. 10; the *Concluding Observations on El Salvador*, CCPR/C/79/Add.34, para. 15; the *Concluding Observations on Tunisia*, CCPR/C/79/Add.43, para. 14; and the *Concluding Observations on Nepal*, CCPR/C/79/Add.42, para. 18.

- In the case of North Korea, the Committee expressed its concern "about constitutional and legislative provisions that seriously endanger the impartiality and independence of the judiciary, notably that the Central Court is accountable to the Supreme People's Assembly".[66]

For its part, the European Court of Human Rights has reaffirmed that respect for the principle of the separation of powers is an essential principle of a functioning democracy which cannot be called into doubt.[67]

Under international law, the State is obliged to organise its apparatus in such a way that internationally protected rights and freedoms are guaranteed and their enjoyment is assured. In this connection, the Inter-American Court of Human Rights has said that "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power".[68] The State apparatus must be organised in such a way that it is compatible with the State's international obligations, whether they be explicit or implicit. On this matter, the Inter-American Court of Human Rights has stated that "[t]he obligation to respect and guarantee such rights, which Article 1(1) [of the *American Convention on Human Rights*] imposes on the States Parties, implies [...] the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".[69]

Intrinsic to compliance with the obligation to respect and guarantee human rights is the obligation to organise the State in such a way as to ensure that, among other things, the structure and operation of State power is founded on the true separation of its executive, legislative and judicial branches, the existence of an independent and impartial judiciary and implementation by the authorities in all their activities of the rule of law and the principle of legality.

The principle of the separation of powers is an essential requirement of the proper administration of justice. In fact, having a judiciary that is independent of the other branches of government is a necessary condition for the fair administration of justice as well as intrinsic to the rule of law.

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66. *Concluding Observations of the Human Rights Committee on the Democratic People's Republic of Korea*, CCPR/CO/72/PRK, para. 8. The Supreme People's Assembly is the North Korean legislature.

67. *Chevrol v. France*, ECtHR judgment of 13 February 2003, Series 2003-III, para. 74.

68. *The word "laws" in article 30 of the American Convention on Human Rights*, Advisory Opinion of the IACtHR of 9 May 1986, OC-6/86, Series A No. 6, para. 21. See also *Velásquez Rodríguez Case*, IACtHR judgment of 29 July 1988, Series C No. 4, para. 165; and *Godínez Cruz Case*, IACtHR judgment of 20 January 1989, Series C No. 5 , para. 174.

69. *Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights*), Advisory Opinion of the IACtHR of 10 August 1990, OC-11/90, Series A No. 11, para. 23. See also *Velásquez Rodríguez Case*, *doc. cit.,* para. 166; and, *Godínez Cruz Case*, *doc. cit.*, para. 175.

Institutional independence

Independence and impartiality are closely linked, and in many instances tribunals have dealt with them jointly.[70] However, each concept has its own distinct meaning. In general terms, "independence" refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as "institutional independence) and to the particular judge (independence from other members of the judiciary, or "individual independence"). "Independence" requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers. On the contrary, "impartiality" refers to the state of mind of a judge or tribunal towards a case and the parties to it. The Human Rights Committee has stated that in the context of article 14.1 of the ICCPR, "impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[71]

The notion of institutional independence is set out in the second sentence of Principle 1 of the *UN Basic Principles*, wherein the duty of all institutions to respect and observe that independence is guaranteed. This notion means that the judiciary has to be independent of the other branches of government, namely the executive and parliament, which, like all other State institutions, have a duty to respect and abide by the judgments and decisions of the judiciary. This constitutes a safeguard against disagreements over rulings by other institutions and their potential refusal to comply with them. Such independence as to decision-making is essential for upholding the rule of law and human rights.

The European Court of Human Rights. has stated that a court must be independent both of the executive branch of government as well as of the parties to the proceedings.[72]

The notion of institutional independence is related to several issues. On this matter, the Inter-American Commission of Human Rights has stated that:

- "the requirement of independence [...] necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent

70. See, for instance, the *Conclusions and Recommendations of the Committee against Torture on Burundi*, UN document CAT/C/BDI/CO/1, para. 12: "The Committee is concerned at the judiciary's de facto dependence on the executive, which poses a major obstacle to the immediate institution of an impartial inquiry when there are substantial grounds for believing that an act of torture has been committed in any territory under its jurisdiction."

71. Communication 387/1989, *Arvo. O Karttunen v. Finland* (Views adopted on 23 October 1992), UN document CCPR/C/46/D/387/1989 (Jurisprudence), para. 7.2.

72. *Ringeisen v. Austria*, ECtHR judgment of 16 July 1971, Series A13, para. 95.

performance of judicial functions, including tenure and appropriate professional training".[73]

The Human Rights Committee has dealt with a number of requirements that pertain to institutional independence. For example, it has pointed out that delays in the payment of salaries and the lack of adequate security of tenure for judges have an adverse effect on the independence of the judiciary.[74] The Committee has also considered that the lack of any independent mechanism responsible for the recruitment and discipline of judges limits the independence of the judiciary.[75]

International law contains a number of provisions related to certain essential aspects of the institutional independence of the judiciary. One of the possible means to control the outcome of particular cases is to assign them to specific judges who could potentially rule in favour of particular interests. In order to prevent this unwarranted interference, the *UN Basic Principles* provide that "The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration".[76]

- In the case of Romania, the Human Rights Committee has considered that the powers exercised by the Ministry of Justice in regard to judicial matters, including the appeal process, and its powers of inspection of the courts constituted an interference by the executive and a threat to the independence of the judiciary.[77]

Furthermore, the independence of the judiciary requires it to have exclusive jurisdiction over all issues of judicial nature and to decide whether an issue before it is of judicial nature. As a corollary, judicial decisions cannot be changed by a non-judicial authority, except for cases of mitigation or commutation of sentences and pardons.[78]

The European Court of Human Rights has extensively analysed the relationship between the judiciary and the legislature, concluding that the independence of the courts must be preserved and respected by the legislature.

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73. *Report on Terrorism and Human Rights*, *doc. cit.*, para. 229.

74. *Concluding Observations of the Human Rights Committee on Georgia*, UN document CCPR/CO/74/GEO, para. 12.

75. *Concluding Observations of the Human Rights Committee on the Congo*, UN document CCPR/C/79/Add.118, para. 14.

76. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.,* Principle 14.

77. *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/7 9/Add.111, para. 10.

78. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.*, Principles 3 and 4. Principle 3 states: "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 4 says: "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."

- In a case in which a parliament adopted a law overturning the jurisdiction of the courts to hear certain requests for compensation against the Government and declaring the legally decreed damages to be null and void, the Court found that the independence of the courts had been violated. It stated that "[t]he principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute".[79]

- In *Papageorgiou v. Greece*, the European Court ruled that the adoption of a law by the parliament concerned in which it declared that certain cases could not be examined by the courts and ordering the ongoing legal proceedings to be suspended, constituted a violation of the independence of the judiciary.[80]

- In *Findlay v. The United Kingdom*, the European Court recalled that it is a widely recognised principle that legal decisions should not be changed by authorities who are not part of the judiciary. In other words, it is not possible for the juridical validity of judicial decisions and their status as *res judicata* to be subject to action by other branches of government. The Court therefore found the independence of courts to have been violated if it is possible for their decisions to be changed by officials or bodies belonging to the executive and if such decisions can only be considered *res judicata* if they have been confirmed by such authorities.[81] The irreversibility of judicial decisions, the fact that they cannot be changed or confirmed by authorities other than the judiciary, is, according to the Court, a well-established principle and "inherent in the very notion of 'tribunal' and [...] a component of [...] 'independence'".[82]

Individual independence

While it constitutes a vital safeguard, institutional independence is not sufficient for the right to a fair trial to be respected on every occasion. Unless individual judges are free from unwarranted interferences when they decide a particular case, the individual right to receive a fair trial is violated.

There are a number of factors, some of which will be dealt with below, in order to determine whether a tribunal is independent. As general criteria, the European Court of Human Rights has stated that "regard must be had, *inter alia*, to the manner of

79. *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR judgment of 9 December 1994, Series A301-B, para. 49.

80. *Papageorgiou v. Greece*, ECtHR judgment of 22 October 1997, Series 1997-VI.

81. *Findlay v. The United Kingdom*, *doc. cit.*, para. 77. See also *Campbell and Fell v. The United Kingdom*, ECtHR judgment of 28 June 1984, Series A80, para. 79.

82. *Ibid*.

appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presents an appearance of independence" when reviewing the independence of a tribunal.[83] The Court further stated that "the irremovability of judges by the executive must in general be considered as a corollary of their independence".[84] It has also pointed out that a court or judge must not only fulfil these objective criteria but must also be seen to be independent.[85]

Such independence does not mean that judges can decide cases according to their personal preferences. On the contrary, judges have a right and a duty to decide cases before them according to the law, free from fear of reprisals of any kind. As Principle 2 of the *UN Basic Principles* says: "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 for any reason". Regrettably, many judges around the world suffer from subtle and not-so-subtle pressure, ranging from killings and torture to extortion, transfer, proceedings for carrying out their professional duties, and unlawful removal from office.[86]

Various UN bodies have repeatedly called on States to take all necessary measures to enable judges to discharge their functions freely.

- The UN Commission on Human Rights has called upon all Governments to "respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind".[87]

- In the context of Colombia, the UN High Commissioner for Human Rights urged the State to "assume responsibility for protecting the life and integrity of prosecutors, judges, judicial police officials, victims and witnesses, without violating the fundamental rights of the accused".[88]

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83. *Incal v. Turkey*, *doc. cit*., para. 65. See also, among others, *Findlay v the United Kingdom*, *doc. cit.*, para. 73 and *Bryan v. the United Kingdom*, ECtHR judgment of 22 November 1995, Series A no. 335-A, para. 37.

84. *Campbell and Fell v. United Kingdom, doc. cit.*, para. 80.

85. See, *inter alia, Incal v. Turkey*, *doc. cit.,* para. 65 and *Findlay v. United Kingdom, doc. cit.,* para. 73.

86. See "Attacks on Justice: A Global Report on the Independence of Judges and Lawyers", 11th edition, International Commission of Jurists, Geneva 2002. Available online at www.icj.org.

87. Commission on Human Rights Resolution 2004/33, operative paragraph 7.

88. *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, UN document E/CN.4/2000/11, para. 189 See also the *Report by the United Nations High Commissioner for Human Rights to the Commission on Human Rights*, UN document E/CN.4/1998/16, para. 200, where the High Commissioner invited the Colombian Government to "take immediate steps to guarantee the full operation of the justice system, particularly through the effective protection of members of the judiciary [...]".

From the perspective of their personal independence, it is crucial that judges are not subordinated hierarchically to the executive or legislative, nor that they are civil employees of these two powers. One of the fundamental requirements of judicial independence is that judges at all levels should be officers of the judiciary and not subordinate or accountable to other branches of government, especially the executive.

- In *Findlay v. The United Kingdom*, the European Court of Human Rights considered that the court martial which tried the petitioner was neither independent nor impartial because its members were hierarchically subordinate to the officer discharging the function of both "convening officer" and prosecutor, who, in his capacity as "confirming officer", was also authorized to change the sentence that had been imposed.[89]

- The United Nations Working Group on Arbitrary Detention found that the fact that the majority of the judges sitting on a Security Tribunal in the Republic of Djibouti were government officials was contrary to article 14 of the ICCPR which requires courts to be independent.[90]

- The Inter-American Commission on Human Rights found that the fact that a court was made up of officials from the executive who, in the case in question, were serving military officers violated the right to be tried by an independent tribunal.[91]

Every State has the duty to put in place the necessary safeguards so that judges can decide cases in an independent manner. The independence of the judiciary must be upheld by refraining from interfering in its work and by complying with its rulings. The judiciary must be independent as an institution and individual judges must enjoy personal independence within the judiciary and in relation to other institutions.

89. *Findlay v. The United Kingdom*, *doc. cit.*, paras. 74 to 77. See also *Coyne v. The United Kingdom* ECtHR judgment of 24 September 1997, Series 1997-V, paras. 56-58.

90. Decision Nº 40/1993 (Djibouti), 29 September 1993, UN document E/CN.4/1994/27.

91. Report Nº 78/02, Case 11.335, *doc. cit.*, para. 76.

2. Impartiality

Overview

The right to a fair trial requires judges to be impartial. The right to be tried by an impartial tribunal implies that judges (or jurors) have no interest or stake in a particular case and do not hold pre-formed opinions about it or the parties. Cases must only be decided "on the basis of facts and in accordance with the law, without any restriction".[92] To this end, the State, other institutions and private parties have an obligation to refrain from putting pressure on or inducing judges to rule in a certain way and judges have a correlative duty to conduct themselves impartially. The *UN Basic Principles* spell out this requirement: "[...] 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".[93] The Council of Europe has reiterated this principle, by saying that "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law".[94]

The Human Rights Committee has taken the view that the impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1.

- "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria." [95]

- The Committee has also pointed out that the right to an impartial tribunal is closely bound up with the procedural guarantees conferred on the defence. Thus, in one case, the Committee said that "[a]n essential

92. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.*, Principle 2.

93. *Ibid.*, Principle 8.

94. Council of Europe, *Recommendation No. R (94)*, *doc. cit*, Principle I.2.d. See also Principle V.3.b: "Judges should in particular have the following responsibilities: to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention".

95. Communication 387/1989, *Arvo O. Karttunen v. Finland*, *doc. cit.*, para. 7.2.

> element of this right [to an impartial tribunal] is that an accused must have adequate time and facilities to prepare his defence".[96]

For its part, the Inter-American Commission on Human Rights has said that "[a]n impartial tribunal is one of the core elements of the minimum guarantees in the administration of justice".[97]

Actual and apparent impartiality

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. However, there are cases in which this bias will not be manifest but only apparent. That is the reason why the impartiality of courts must be examined from a subjective as well as an objective perspective.

The European Court of Human Rights makes a distinction between "a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect".[98] The first of these concepts is called subjective impartiality; the second is referred to as objective impartiality. A trial will be unfair not only if the judge is not impartial but also if he or she is not perceived to be impartial.

The European Court of Human Rights has a long line of jurisprudence in which these two requirements of impartiality are defined. According to the Court, a judge or tribunal will only be impartial if it passes the subjective and objective tests. The subjective test "consists in seeking to determine the personal conviction of a particular judge in a given case".[99] This entails that "no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary".[100] The objective requirement of impartiality "consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt" as to his or her impartiality.[101] Under the Court's jurisprudence, if either test fails, a trial will be deemed unfair.

- In *De Cubber v. Belgium*, the Court considered that the successive exercise of the duties of investigating judge and trial judge by the same

96. Communication No. 451/1991, *Barry Stephen Harward v. Norway* (Views adopted on 15 July 1994), UN document CCPR/C/51/D/451/1991, para. 9.4. See also Communication Nº 577/1994, *Víctor Alfredo Polay Campos v. Peru* (Views adopted on 6 November 1997), UN document CCPR/C/61/D/577/1994, para. 8.8, where the Committee took the view that "a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant [is] that the tribunal must be, and be seen to be, independent and impartial".

97. Report Nº 78/02, Case 11.335, *doc. cit.*, para. 74.

98. For this distinction see, among others, *Piersack v. Belgium*, ECtHR judgment of 1 October 1982, Series A53, para. 30.

99. *Tierce and Others v. San Marino*, ECtHR judgment of 25 July 2000, Series 2000-IX, para. 75.

100. *Daktaras v. Lithuania*, ECtHR judgment of 10 October 2000, Series 2000-X, para. 30.

101. *Padovani v. Italy*, ECtHR judgment of 26 February 1993, Series A257-B, para. 25.

person can raise legitimate doubts about the impartiality of the court and constitute a violation of the right to be tried by an impartial tribunal.[102] Although the Court found no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it acknowledged that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part.

- In *Castillo Algar v. Spain*, the Court found that when a judge who has confirmed an indictment on the grounds that there is sufficient evidence against the accused goes on to sit on the tribunal that will be determining the merits of a case, legitimate doubts can be raised about the impartiality of that tribunal, thereby constituting a violation of the right to be tried by an impartial tribunal.[103]

- In *Svetlana Naumenko v. Ukraine*, the European Court had to determine whether a judge's impartiality was affected by the fact that he lodged a "protest" which was dealt with by a tribunal of which he was a member. In the opinion of the Court, that practice is "incompatible with the 'subjective impartiality' of a judge hearing a particular case, since no one can be both plaintiff and judge in his own case" and therefore a violation of the applicant's right to a fair trial by an impartial tribunal.[104]

- In its Report on Human Rights and Terrorism, the Commission said that "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 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." [105]

The African Commission on Human and Peoples' Rights has also considered the issue of actual and apparent impartiality. In the *Constitutional Rights Project* case, the Commission decided that a tribunal composed of one judge and members of the armed forces could not be considered impartial because "regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality".[106]

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102. *De Cubber v. Belgium*, ECtHR judgment of 26 October 1984, Series A86, paras 27 *et seq.*
103. Case of *Castillo Algar v. Spain*, ECtHR judgment of 28 October 1998, Series 1998-VIII, paras 47 to 51.
104. Case of *Svetlana Naumenko v. Ukraine*, ECtHR judgement of 9 November 2004, Application 41984/98, para. 97.
105. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, para. 229.
106. *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 87/93 (1995), paras. 13-14.

The judicial duty to excuse oneself

The concept of impartiality creates a correlative duty for judges to step down from cases in which they think they will not be able to impart justice impartially or when their actual impartiality may be compromised. In these cases, they should not expect the parties to a case to challenge their impartiality but should excuse themselves and abstain from sitting in the case.

The *Bangalore Principles of Judicial Conduct*, which were adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights,[107] include impartiality as one of the fundamental values inherent in the judicial function. Principle 2.5 provides detailed guidelines as to the cases in which judges should disqualify themselves from a case:

> 2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
>
> 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:
>
> Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.[108]

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* contain detailed criteria to determine the impartiality of a tribunal and specific cases in which impartiality would be undermined. Among the latter, the African Commission has included cases such as that of a former public prosecutor or legal representative sitting as a judicial officer in a case in which he or she prosecuted or represented a party and a judicial official sitting as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body. If any of the

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107. Commission on Human Rights, Resolution 2003/43.

108. The *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002

circumstances described in the *Guidelines* is present, the judicial official is under an obligation to step down from the case.[109]

The European Court of Human Rights has established the principle that "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw".[110]

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. Courts must be impartial and appear impartial. Thus, judges have a duty to step down from cases in which there are sufficient motives to put their impartiality into question.

109. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003, Principle A, para. 5.

110. Case of *Indra v. Slovakia*, ECtHR judgment of 1 February 2005, Application 46845/99, para. 49.

3. Financial autonomy and sufficient resources

Overview

The judiciary needs adequate resources to discharge its functions appropriately. As one of the three branches of power, the judiciary receives its resources from the national budget, which, in turn, is usually determined by either the legislature or the executive. It is essential that those outlining and approving the State budget take the needs of the judiciary into consideration. Inadequate resources may render the judiciary vulnerable to corruption, which could result in a weakening of its independence and impartiality. In determining the resources allocated to the judiciary, consultations must be held with judges or groups of judges.[111]

Another factor that undermines judicial independence and impartiality is the lack of participation of the judiciary in the elaboration of its budget. This is due to the fact that one of the most common and effective ways of controlling any institution is by restricting its finances. Inasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary. To this end, many States have created, within the judiciary, bodies in charge of administering judicial resources, thus reinforcing the autonomy of the judicial organ.

- The Inter-American Commission on Human Rights had considered that the institutional autonomy of the judiciary - including management, administration and financial matters - "are essential and indispensable for maintaining the necessary balance of power in a democratic society".[112]

- On several occasions, the Human Rights Committee has called on States to allocate sufficient resources to the judiciary as a means of ensuring its independence.[113]

- The Human Rights Committee has expressed its concern at the low remuneration of judges and has made a connection between this situation and corruption. It therefore recommended the implementation of adequate terms and conditions for local judges whereby they are shielded from

111. See the *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*, ICJ's Centre for the Independence of Judges and Lawyers (CIJL), CIJL Yearbook 2000, p. 127 *et seq.*

112. Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS document OEA/Ser.L/V/II.106 Doc. 59 rev., Chapter II "Administration of justice and Rule of law", para. 13.

113. See, for instance, the *Concluding Observations of the Human Rights Committee on the Central African Republic*, UN document CCPR/C/CAF/CO/2, para. 16.

corruption.[114] In the case of Congo, the Committee expressed its concern at the "at the low pay [the judges] receive, which frequently results in their corruption".[115]

International standards on financial autonomy

Various international instruments recognise the need for the judiciary to receive sufficient funds. For example, the *UN Basic Principles* establish that "It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions".[116] The *European Charter on the statute for judges* stipulates that "the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period".[117] The *Beijing Principles* also acknowledge this requirement by stating that "It is essential that judges be provided with the resources necessary to enable them to perform their functions".[118]

The *Latimer House Guidelines*, which were approved by judges from Commonwealth countries, contain a detailed provision on funding:

> *"Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary."* [119]

In the African context, the *Guidelines on a Right to a Fair Trial in Africa* establish that "States shall endow judicial bodies with adequate resources for the performance of their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation." [120]

It is worth noting that international standards allow every State to determine the best way to guarantee that the judiciary receives adequate funds. As adequate

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114. *Concluding Observations of the Human Rights Committee on Kosovo (Serbia)*, UN document CCPR/C/UNK/CO/1, para. 20. See also the *Concluding Observations of the Human Rights Committee on Tajikistan*, UN document CCPR/CO/84/TJK, para. 17.

115. *Concluding Observations of the Human Rights Committee on the Democratic Republic of The Congo*, UN document CCPR/C/COD/CO/3, para. 21

116. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.,* Principle 7.

117. Council of Europe, *European Charter on the statute for judges*, DAJ/DOC (98) 23, operative paragraph 1.6.

118. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, doc. cit.*, operative paragraph 41. See also *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe*, *doc. cit.*, Principle III.

119. *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*, adopted on 19 June 1998, Guideline II.2.

120. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, paragraph A, 4 (v). See also the *Universal Charter of the Judge*, *op. cit.*, article 14.

funding is an essential component of the independence of the judiciary,[121] this principle should be included in each country's legal system, preferably in the constitution. In order to comply with this requirement, certain constitutions include a provision by which they stipulate that a fixed percentage of the budget shall be allocated to the administration of justice.

Certain countries, particularly those in the developing world, might be incapable of providing the judiciary with the resources that the latter deems necessary for the proper discharge of its functions. On this matter, the *Beijing Principles* stipulate that:

> *"where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources".*[122]

A further requirement regarding financial autonomy dictates that the judiciary should be autonomous to decide how to allocate its resources. In this regard, all other institutions must refrain from interfering with the way the judiciary disposes of the resources allocated to it. Even though the way resources are spent is the judiciary's own internal matter, that branch of power is accountable to the others by virtue of the system of checks and balances.

The judiciary should be adequately funded in order to discharge its functions. States have a duty to guarantee this requirement, preferably by means of legislation. Judicial participation in the delineation of the budget constitutes an important safeguard against insufficient funding. Even though the judiciary enjoys financial autonomy as to the way it allocates resources, it must remain accountable for any misuse to the other branches of power.

121. See *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.*, which require States to guarantee the independence of the judiciary and to enshrine it in the Constitution or the law of the country (Principle 1).

122. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit.*, operative paragraph 42.

4. Fundamental freedoms

Overview

Principle 8 of the *UN Basic Principles* provides that:

> *In accordance with the Universal Declaration of Human Rights, members of the judiciary are like 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.*[123]

This provision reaffirms the importance of these freedoms as a means for judges to protect their independence. As the principle states, these freedoms are also enjoyed by all other citizens and are recognised by all major international human rights treaties. However, as judges are essential guarantors of human rights and the rule of law, these freedoms have an added importance. In particular, freedom of association and expression are fundamental to the fulfilment of their roles.

Freedom of association

Associations of judges play an essential role in ensuring that the independence of the judiciary and the rule of law are respected. These associations bring judges together and allow them to organise themselves in order to defend their independence and that of the judicial profession more effectively.

In this regard, the *Latimer House Guidelines* state: "An independent, organised legal profession is an essential component in the protection of the rule of law".[124] The *European Charter on the statute for judges* recognises the fundamental role played by associations of judges when it stipulates that:

> *"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."* [125]

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123. In similar terms, see Principle 4.6 of the *Bangalore Principles* and Principle A, paragraph 4 (s) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

124. *Latimer House Guidelines*, *doc. cit.*, Guideline VII.3. See also article 12 of the *Universal Charter of the Judge*: "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 statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests".

125. *European Charter on the statute for judges*, *doc. cit.*, operative paragraph 1.7. See also Principle 9 of the *UN Basic Principles*: "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".

The Council of Europe has also acknowledged judges' freedom of association in its *Recommendation No. R (94) 12*: "Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests".[126] The *Beijing Principles* also recognise this freedom when they stipulate that "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".[127]

Freedom of expression

Freedom of expression is also vital to a judge's role. As guarantors of the rule of law and an integral part of the legal community, judges must necessarily participate in the debate for reforms and other legal issues.

Beyond the general recognition it receives in all major international human rights treaties, the right to freedom of expression is included in a number of specific instruments related to the independence of the judiciary, most notably Principle 8 of the *UN Basic Principles*.

However, this right is not unlimited but subject to certain limitations inherent in the judicial function. In the case of judges, an unfettered exercise of the right to freedom of expression may compromise their independence or impartiality, for example if they disclose relevant information on a particular case to one of the parties or to the media. Thus, judges must refrain from undermining the right to a fair trial, including the presumption of innocence, particularly in the cases *sub judice*.

In this sense, the *European Charter on the statute for judges* stipulates that "Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence".[128]

The *Bangalore Principles* also call on judges to refrain from compromising the requisites their position require when they state that:

> *"A judge, like any other citizen, is entitled to freedom of expression, [...], but in exercising such rights, a judge shall always conduct himself or herself*

126. *Recommendation No. R (94) 12*, *doc. cit.*, Principle IV.

127. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit.* operative paragraph 9. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4 (t): "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".

128. *European Charter on the statute for judges*, *doc. cit.*, operative paragraph 4.3.

in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary".[129]

Therefore, while judges can freely express their opinions on any matters, they must abstain from making pronouncements that would, in the eyes of an objective observer, compromise their ability to impart justice independently and impartially.

Judges enjoy the same fundamental freedoms as other individuals. Due to their fundamental role in the administration of justice, freedom of expression and association are particularly important. In exercising these freedoms, judges must be careful not to compromise their independence and impartiality.

129. *Bangalore Principles*, Principle 4.6. See also Principle 4.10: "Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties".

5. Appointment

Overview

In order to guarantee the independence and impartiality of the judiciary, international law requires States to appoint judges through strict selection criteria and in a transparent manner. Unless judges are appointed and promoted on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially. Therefore, clear selection criteria based on merit are an essential guarantee of independence. There is, however, no agreement in international law as to the method of appointment. In this field, a certain degree of discretion is left to individual States, provided that the selection be always based on the candidates' professional qualifications and personal integrity.

Thus, there are two crucial issues related to the appointment of judges. The first is related to the criteria applied to the appointment, where international law stipulates clear guidelines. The second issue consists of the body, and the procedure within that body, in charge of appointing members of the judiciary. On this topic, international standards do not explicitly determine which body within a State has the power to appoint judges or the exact procedure to be followed. However, it is important to bear in mind that any appointment procedure must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective. This requirement derives from the principle of separation of powers and of checks and balances, which constitute indispensable safeguards to this end.

Appointment criteria

In order to avoid appointments that would seriously undermine the independence and impartiality of the judiciary, international law specifically excludes selection criteria such as a person's political views, race or colour. These motives are irrelevant to the judicial function, the exception being the requirement for a person to be a national of the State concerned.

The *UN Basic Principles* establish that:

> *"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."* [130]

Similarly, the *Universal Charter of the Judge* stipulates that: "The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification".[131]

The *European Charter on the statute for judges* also excludes improper criteria: "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." [132]

The Council of Europe has recommended that "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency." [133] As the appointment of a judge is part of his or her career, this recommendation refers to both a judge's initial entry into the judicial career as well as to any subsequent promotion.

The *African Principles and Guidelines on the Right to a Fair Trial* establish that:

> "*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*".

Furthermore, the *Guidelines* refer to the essential skills a candidate must possess:

"No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions".[134]

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130. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit*., Principle 10

131. *Universal Charter of the Judge*, *doc. cit.* article 9.

132. *European Charter on the statute for judges*, *doc. cit.*, operative paragraph 2.1. The Charter further envisages that "The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties." (operative paragraph 2.2).

133. Council of Europe, *Recommendation No. R (94) 12*, *doc. cit.*, Principle I.2.

134. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, Principle A, paragraphs 4 (i) and (k). The *Guidelines* also contain a non-discrimination clause, with, however, certain exceptions: "Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to: 1. prescribe a minimum age or experience for candidates for judicial office; 2. prescribe a maximum or retirement age or duration of service for judicial officers; 3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary; 4. require that only nationals of the state concerned shall be eligible for appointment to judicial office." (Principle 4.j).

In the Asia-Pacific region, the *Beijing Principles* also contain a provision against discrimination with a similar caveat on nationality: "In the selection [of] judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, 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." [135]

The *Latimer House Guidelines* a similar provision to the one found in other instruments, with the particularity that it includes an obligation to work towards the removal of disparities within the judiciary:

> *"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".*[136]

The Human Rights Committee has repeatedly referred to the criteria under which judges are appointed and has established that judges should be appointed for their professional skills.

- After examining the State report from Bolivia, the Committee recommended "that the nomination of judges should be based on their competence and not their political affiliation".[137]

- In the case of Azerbaijan, the Committee recommended that country to "[institute] clear and transparent procedures to be applied in judicial appointments and assignments, in order to [...] safeguard the independence and impartiality of the judiciary".[138]

- Regarding Sudan, the Committee expressed its concern that "in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications [...] and that very few non-Muslims or women occupy judicial positions at all levels". It therefore recommended that "measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women and members of minorities".[139]

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135. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit.*, operative paragraph 13.

136. *Latimer House Guidelines, doc. cit*, Principle II.1.

137. *Concluding Observations of the Human Rights Committee on Bolivia*, UN document CCPR/C/79/Add.74, para. 34. See also the *Concluding Observations on Lebanon*, UN document CCPR/C/79/Add.78, para. 15.

138. *Concluding Observations of the Human Rights Committee on Azerbaijan*, UN document CCPR/CO/73/AZE, para. 14.

139. *Concluding Observations of the Human Rights Committee on Sudan*, UN document CCPR/C/79/Add.85, para. 21.

- In the case of Slovakia, the Committee "noted with concern" that the rules in force "governing the appointment of judges by the Government with approval of Parliament could have a negative effect on the independence of the judiciary" and recommended the adoption of "specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary".[140]

- In the case of the Republic of Moldova, the Committee expressed its concern at "short initial appointments for judges, beyond which they must satisfy certain criteria in order to gain an extension of their term", and recommended the Government to "revise its law to ensure that judges' tenure is sufficiently long to ensure their independence, in compliance with the requirements of article 14, paragraph 1 [on the right to a fair trial by an independent and impartial tribunal]".[141]

- When analysing the report of Paraguay, the Human Rights Committee regretted "the lack of objective criteria governing the appointment and removal of judges, including Supreme Court justices, which may undermine the independence of the judiciary".[142]

These criteria also apply to international judges in those countries where they are performing their professional functions. When it analysed the report on the situation in Kosovo, where a number of international judges had been appointed, the Human Rights Committee expressed its concern "about the absence of adequate guarantees for the independence of international judges" and recommended the United Nations Mission in Kosovo to "establish independent procedures for the recruitment, appointment and discipline of international judges".[143] In the case of Qatar, the Committee against Torture expressed concern at the "threats to the independence, in practice, of judges, a large proportion of whom are foreign nationals." As civil authorities were entrusted with granting residency permits for foreign judges, the Committee noted "a sense of uncertainty as to the security of their tenure and an undue dependency on the discretion of such authorities may be created, thus bringing pressure on judges." [144]

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140. *Concluding Observations of the Human Rights Committee on Slovakia*, UN document CCPR/C/79/Add.79, para. 18.

141. *Concluding Observations of the Human Rights Committee on the Republic of Moldova*, UN document CCPR/CO/75/MDA, para. 12.

142. *Concluding Observations of the Human Rights Committee on Paraguay*, UN document CCPR/C/PRY/CO/2, para. 17.

143. *Concluding observations of the Human Rights Committee on Kosovo (Serbia)*, UN document CCPR/C/UNK/CO/1, para. 20.

144. *Conclusions and Recommendations of the Committee against Torture on Qatar*, UN document CAT/C/QAT/CO/1, para. 11.

Appointment procedure

As stated in the introduction to this chapter, international law does not lay down one single appointment procedure. However, a number of international instruments contain certain requirements to be taken into account in this matter, particularly on the role of the other branches of power and the characteristics of the body in charge of appointments.

In general terms, it is preferable for judges to be elected by their peers or by a body independent from the executive and the legislature. This is, for example, what the *European Charter on the statute for judges* envisages when it stipulates that: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary".[145]

For its part, the Council of Europe has laid down detailed guidelines on appointment procedures and the body in charge of selecting judges:

> *"The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules".*[146]

The Council, however, acknowledges that in certain States it is common for the Government to appoint judges and that this practice can be compatible with the independence of the judiciary as long as certain safeguards are put into place. In this sense, the Council has stipulated that "[...] where the constitutional or legal provisions and traditions allow judges to be appointed by the government, *there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above*".[147]

For their part, the *African Guidelines* support the idea of an independent body entrusted with selecting judicial officers, but allow for other bodies, including the

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145. *European Charter on the statute for judges*, *doc. cit.*, operative paragraph 1.3

146. *Recommendation No. R (94) 12*, *doc. cit.*, Principle I.2.c. See also article 9 of the *Universal Charter of the Judge*: "[...] 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".

147. *Recommendation No. R (94) 12*, *doc. cit.*, Principle I.2.c, emphasis added. In order to ensure this transparency, a number of examples are provided for in the recommendation: "a special independent and competent body to give the government advice which it follows in practice; or the right for an individual to appeal against a decision to an independent authority; or the authority which makes the decision safeguards against undue or improper influences". This is not an exhaustive list and the examples are not mutually exclusive.

other branches of power, to perform this function as long as they comply with certain criteria:

> *"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."* [148]

There have been numerous occasions where the Human Rights Committee has referred to the manner in which judges are appointed and recommended more transparent proceedings.

- In the case of the Congo, the Committee expressed its concern at "the attacks on the independence of the judiciary, in violation of article 14, paragraph 1, of the Covenant" and drew attention to the fact that such independence was "limited owing to the lack of any independent mechanism responsible for the recruitment and discipline of judges, and to the many pressures and influences, including those of the executive branch, to which judges are subjected". The Committee recommended the Congolese Government to "take the appropriate steps to ensure the independence of the judiciary, in particular by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment".[149]

- In the case of Liechtenstein, the Committee considered that the intervention of the executive in the selection of judges, by means of casting votes, undermined the independence of the judiciary.[150]

- In the case of Tajikistan, after expressing concern "about the apparent lack of independence of the judiciary, as reflected in the process of appointment and dismissal of judges", the Committee recommended the Tajik Government to "guarantee the full independence and impartiality of the judiciary by establishing an independent body charged with the

148. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, Principle A, paragraph 4 (h). See also the *Beijing Principles*, Principles 13 to 17 and the *Latimer House Guidelines*, *doc. cit*., principle II.1.

149. *Concluding Observations of the Human Rights Committee on the Congo*, UN document CCPR/C/79/Add.118, para. 14. The Committee further said that "particular attention should be given to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures, ensure their security of tenure and enable them to render justice promptly and impartially. It invites the State party to adopt effective measures to that end and to take the appropriate steps to ensure that more judges are given adequate training.

150. *Concluding Observations of the Human Rights Committee on Liechtenstein*, UN document CCPR/CO/81/LIE, para. 12.

responsibility of appointing, promoting and disciplining judges at all levels".[151]

- When analyzing the report submitted by Honduras, the Committee expressed its concern "at the failure to establish an independent body to safeguard the independence of the judiciary and to supervise the appointment, promotion and regulation of the profession" and recommended "the prompt establishment" of such a body.[152]

The European Court of Human Rights has also dealt with cases in which the independence and impartiality of a tribunal was challenged due to the manner in which its judges had been appointed.

- In *Incal v. Turkey*, the Court had to determine the impartiality of the tribunal that had convicted Mr. Incal. The defendant argued that the presence of a military judge violated his right to be tried by an independent tribunal because the said judge was subordinated to the executive. The Court ruled that "In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. [...] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified." The Court concluded that Mr. Incal "could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case" and, therefore, that he "had legitimate cause to doubt the independence and impartiality of the [...] Court".[153]

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151. *Concluding Observations of the Human Rights Committee on Tajikistan*, UN document CCPR/CO/84/TJK, para. 17. The Committee against Torture expressed similar concerns at the "inadequate independence and effectiveness of the judiciary, as judges are both appointed and dismissed by the President". See *Conclusions and Recommendations of the Committee against Torture on Tajikistan*, UN document CAT/C/TJK/CO/1, para. 10.

152. *Concluding Observations of the Human Rights Committee on Honduras*, UN document CCPR/C/HND/CO/1, para. 16.

153. *Incal v. Turkey*, *doc. cit.*, paras. 71-73. See also *Sahiner v. Turkey*, ECtHR judgment of 25 September 2001, Series 2001-IX, paras. 45-46, where the Court said that "where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society." The Court concluded that Mr. Sahiner, who had been tried in a martial-law court on charges of attempting to undermine the constitutional order of the State "could have legitimate reason to fear being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court makes no difference in this respect".

- In *Lauko v. Slovakia*, the Court had to determine whether Mr. Lauko's right to a fair trial had been violated after a local office fined him and a district office confirmed the fine. The Court noted that the local office and the district office were charged with "carrying out local state administration under the control of the government" and that "the appointment of the heads of those bodies is controlled by the executive and their officers, whose employment contracts are governed by the provisions of the Labour Code, have the status of salaried employees". The Court concluded that "the manner of appointment of the officers of the local and district offices together with the lack of any guarantees against outside pressures and any appearance of independence clearly show that those bodies cannot be considered to be 'independent' of the executive within the meaning of Article 6 § 1 of the Convention [on the right to a fair trial]". According to the Court, "entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the Convention, it is to be stressed that the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6". The Court found that Mr. Lauko's right to a fair trial had been violated because he was "unable to have the decisions [...] reviewed by an independent and impartial tribunal since his complaint was dismissed by the Constitutional Court on the ground that the minor offence in issue could not be examined by a court".[154]

Regarding the appointment of judges, the Inter-American Court of Human Rights has considered that "one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal" and that "the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures".[155]

Election by popular vote

In certain countries it is common for judges to be elected by popular vote. While this may seem more democratic, and thus more transparent than appointment by a designated body, popular election raises many issues as to the suitability of the candidates elected. When dealing with this practice in some states in the United States of America, the Human Rights Committee expressed its concern "about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the Covenant [on the right to be tried by an independent and impartial tribunal]" and welcomed "the efforts of a number of states in the adoption of a merit-selection system". Furthermore,

154. *Lauko v. Slovakia*, ECtHR judgment of 2 September 1998, Series 1998-IV, para. 64.

155. *IACtHR Constitutional Court Case*, *doc. cit*, paras. 73 and 75 respectively.

the Committee recommended that the system of "appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body".[156]

Judges should be appointed on their professional qualifications and through a transparent procedure. Even though international standards do not forbid that appointments be carried out by the executive or the legislature, it is preferable that the selection be entrusted to an independent body so that political considerations do not play any role in the proceedings. Irrespective of the body in charge of appointing judges, the outcome of such selection must always guarantee that the candidates appointed to the judiciary possess the necessary skills and independence.

156. *Concluding Observations of the Human Rights Committee on the United States of America*, UN document CCPR/C/79/Add.50; A/50/40,paras. 266-304, paras. 288 and 301. See also the Committee's *Concluding Observations on Armenia*, where it said that "the independence of the judiciary is not fully guaranteed. In particular, it observes that the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality", UN document CCPR/C/79/Add.100, para. 8.

6. Conditions of tenure and promotion

Overview

One of the basic conditions for judges to retain their independence is that of security of tenure. Unless judges have long-term security of tenure, they are susceptible to undue pressure from different quarters, mainly those in charge of renewing their posts. This problem is particularly acute in countries where the executive plays a predominant role in the selection and appointment of judges. In such countries, judges may be subjected to, and succumb to, political pressure in order to have their posts renewed, thereby compromising their independence.

Another way of guaranteeing the independence of the judiciary is by establishing a clear system of promotion for judges. In this sense, systems based on competence or seniority of the judges are acceptable. Irrespective of the system chosen, States must ensure that judges advance in their careers according to objective criteria determined by an independent body.

International standards on tenure

The international standards on the independence of the judiciary establish a number of requirements related to the conditions of service and tenure of judges. For example, the *UN Basic Principles* stipulate that States have the duty to guarantee the conditions of service and tenure in their legislation: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law".[157] When referring specifically to tenure, the *Principles* stipulate that "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".[158] While this provision does not unambiguously state that it is preferable for judges to be appointed for life (always subject to their ability to properly discharge their functions), tenure for life provides a safeguard for judicial independence.

Tenure for life is provided for in the *Latimer House Guidelines*, which clearly state that permanent appointments should be the norm. The *Guidelines* also recognise that certain countries will appoint judges for temporary posts. These appointments, however, must comply with the general conditions of tenure in order to safeguard their independence.[159] This is also the case with the *Universal Charter of the Judge*,

157. *UN Basic Principles on the Independence of the Judiciary*, Principle 11. Principle I.3 of the Council of Europe's *Recommendation No. R (94 12)* is identical.

158. *Ibid.*, Principle 12.

159. *Latimer House Guidelines*, *doc. cit.*, Guideline II.1: "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".

which provides that "A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered".[160]

In the African system, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that: "Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office" and that "the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law".[161] The *African Guidelines* are also quite clear on appointments limited in time when they state that "judicial officers shall not be appointed under a contract for a fixed term".[162]

The *Beijing Principles* also establish that "Judges must have security of tenure". However, the *Principles* acknowledge that in different systems "the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure". In such cases, it is recommended "that all judges exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age".[163]

Practices that affect tenure

One of the most common practices that affects judges' tenure is that of appointing "provisional judges" , i.e. judges who not enjoy security of tenure in their positions and can be freely removed or suspended. According to the Inter-American Commission on Human Rights, the provisional character of these judges "implies that their actions are subject to conditions, and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources".[164] On this matter, the Commission has stated that "having a high percentage of provisional judges has a serious detrimental impact on citizens' right to proper justice and on the judges' right to stability in their positions as a guarantee of judicial independence and autonomy".[165]

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160. *Universal Charter of the Judge*, *doc. cit.*, article 8. The same article also contains a provision on retirement: "Any change to the judicial obligatory retirement age must not have retroactive effect".

161. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, Principle A, paragraphs 4 (l) and (m).

162. *Ibid.*, Principle A, paragraph 4 (n) 3.

163. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit*., operative paragraphs 18-20. See also operative paragraph 21, which states that "A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office".

164. *Report on the Situation of Human Rights in Venezuela*, OAS document OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, para. 159.

165. *Ibid.*, para. 160 and the Commission's conclusion that "the provisional tenure of most of the judges in Venezuela affects their stability in office, which is a necessary condition for the independence of the judiciary", at para. 540. See also the *Second Report on the Situation of Human Rights in Peru*, OAS document OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 14-15.

Another way to impinge on judges' tenure is to make them undergo a rectification, procedure at certain intervals in order to determine whether they can continue in office.

- The Human Rights Committee has referred to the practice of rectification procedures when it analysed the case of Peru. On that occasion, the Committee noted with concern that "judges retire at the end of seven years and require recertification for reappointment, a practice which tends to affect the independence of the judiciary by denying security of tenure". The Committee recommended that "the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision".[166]

- In the case of Lithuania, the Committee noted that "District Court judges must still undergo a review by the executive after five years of service in order to secure permanent appointment" and recommended that "any such review process should be concerned only with judicial competence and should be carried out only by an independent professional body".[167]

- In the case of Viet Nam, the Committee expressed its concern about the "procedures for the selection of judges as well as their lack of security of tenure" because judges where appointed for only four years. These factors, combined with the possibility of taking far-reaching disciplinary measures against judges, exposed them to political pressure and jeopardised their independence and impartiality.[168]

- After evaluating the report submitted by Kyrgyzstan, the Committee noted that "the applicable attestation procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery".[169]

- In the case of Uzbekistan, the Committee reiterated its concern "that the judiciary is not fully independent and that the appointment of judges has to be reviewed by the executive branch every five years".[170]

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166. *Concluding Observations of the Human Rights Committee on Peru*, Report of the Human Rights Committee, Volume I, GAOR A/51/40, paras. 352 and 364.

167. *Concluding Observations of the Human Rights Committee on Lithuania*, UN document CCPR/C/79/Add.87, para. 16. See also the Committee's *Concluding Observations on Azerbaijan*, UN document CCPR/CO/73/AZE, para. 14, where the Committee expressed its concern "at the lack of security of tenure for judges".

168. *Concluding Observations of the Human Rights Committee on Viet Nam*, UN document CCPR/CO/75/VNM, para. 10.

169. *Concluding Observations of the Human Rights Committee on Kyrgyzstan*, UN document CCPR/CO/69/KGZ, para. 15.

170. *Concluding Observations of the Human Rights Committee on Uzbekistan*, UN document CCPR/CO/83/UZB, para. 16.

- The Committee against Torture has evaluated the possibility of appointing part-time judges and expressed its concern as it would "jeopardize [the judges'] independence and impartiality." [171]

Promotion

Another aspect of tenure refers to the factors that determine promotions. In this case, the criteria are similar to those that regulate appointment, i.e. objective. For example, the *UN Basic Principles* establish that

> *"Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience".*[172]

The *Beijing Principles* contain similar wording, but add independence as a factor: "Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience".[173]

The *European Charter on the statute for judges* contemplates two systems of promotion of judges: on the one hand, a system based on seniority, under which judges are promoted after spending a fixed time at a post (and are still able to discharge their professional duties); on the other, a system of promotions based on merit, in which improper factors such as race, sex or religious or political affiliation have no role to play. The operative paragraph says: "When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions on promotion are then pronounced by the authority referred to at paragraph 1.3 [an authority independent of the executive and legislative within which at least one half are judges elected by their peers] hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority." [174]

Security of tenure for judges constitutes an essential guarantee to maintain judicial independence. Decisions on promotion of judges must be based on the same objective criteria as appointment and must be the outcome of transparent and fair proceedings.

171. *Conclusions and Recommendations of the Committee against Torture on Guyana*, UN document CAT/C/GUY/CO/1, para. 17.

172. *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.*, principle 13. Principle A, paragraph 4 (o) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is identical.

173. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit.*, operative paragraph 17.

174. *European Charter on the statute for judges*, *doc. cit.*, operative paragraph 4.1.

7. Accountability

Overview

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour.[175] For this reason, judges must conduct themselves according to ethical guidelines. In order to provide judges with clear rules of conduct, several countries have approved codes of ethics to regulate judicial behaviour.[176] In some cases, judges have drafted these codes; in other cases, Governments have sought their input. In the international sphere, the *Bangalore Principles of Judicial Conduct* contain the set of values that should determine judicial behaviour. These values, which are reflected in most codes of conduct, are: independence, impartiality, integrity, propriety, equality, competence and diligence. Grounds for removal based on a judge's conduct will normally be based on these principles.

It is worth distinguishing between judicial accountability for the discharge of professional functions, for which there are clear rules of conduct, and accountability for ordinary crimes judges may commit in their private capacity, for which the applicable rules are the same as for other individuals.

International standards on accountability

As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for *bona fide* errors[177] or for disagreeing with a particular interpretation of the law. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their rulings.[178]

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175. For a discussion on corruption in the judiciary, see Richard J. Scott, "Towards an ethic to control judicial corruption", in *Strengthening Judicial Independence, Eliminating Judicial Corruption*, CIJL Yearbook 2000, p. 117.

176. See, for instance, the *Code of Conduct for United States Judges* and the *Code of Ethics of the Peruvian Judiciary* (Código de Ética del Poder Judicial del Perú).

177. See the *Concluding Observations of the Human Rights Committee on Viet Nam*, UN document CCPR/CO/75/VNM, para. 10, where the Committee expressed its concern at "the procedures for the selection of judges as well as their lack of security of tenure (appointments of only four years), combined with the possibility, provided by law, of *taking disciplinary measures against judges because of errors in judicial decisions*. These circumstances expose judges to political pressure and jeopardize their independence and impartiality." (emphasis added)

178. See Principle 16 of the *UN Basic Principles on the Independence of the Judiciary*, *doc. cit.*, which establishes that "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions". For other provisions with similar content, see operative paragraph 32 of the *Beijing Principles* and article 10 of the *Universal Charter of the Judge*.

States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

The *UN Basic Principles* contain a number of provisions on discipline and removal of judges. Principle 17 states that "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." Principle 18, which deals with the grounds for removal, spells out the permissible categories for removal:

> *"Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".*[179]

Furthermore, the *UN Basic Principles* sanction the obligation on passing legislation to enable judges to appeal disciplinary decisions. Principle 20 stipulates that "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review ".[180]

It is worth highlighting that the Council of Europe's recommendation on the independence of the judiciary lays down clear guidelines on the grounds that can lead to the removal of a judge:

> *"Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules."* [181]

Furthermore, the Council has established clear requirements on removal proceedings, in particular the creation of a special body subject to judicial control and the enjoyment by judges of all procedural guarantees:

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179. See also Principle 19 of the *UN Basic Principles*, which states that "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct". Operative paragraph 27 of the *Beijing Principles* is identical.

180. Principle 20 excludes this requirement in specific cases, namely "decisions of the highest court and those of the legislature in impeachment or similar proceedings".

181. *Recommendation No. R (94) 12*, *doc. cit.*, Principle VI.2. The Recommendation n also contemplates other sanctions short of removal: "Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance: *a*. withdrawal of cases from the judge; *b*. moving the judge to other judicial tasks within the court; *c*. economic sanctions such as a reduction in salary for a temporary period; *d*. suspension." (Principle VI.1).

> *"Where measures [on discipline] need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the [European] Convention [on Human Rights], for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."* [182]

The *European Charter on the statute for judges* includes detailed provisions on these matters, in particular about the composition of the body that should either direct or intervene in the proceedings, the procedural guarantees enjoyed by judges and the requirement that sanctions be proportional to the misdeed. Operative paragraph 5.1 states that "The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as (*sic*) to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority." [183]

In the African context, the *Guidelines on fair trial* also include strict criteria for removal when they establish that judges can only be removed if they commit a serious misdeed or if they are incapable of performing their judicial activities. The *Guidelines* establish that: "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".[184] It is worth mentioning that the *African Guidelines* are the only instrument on the independence of the judiciary to contain a specific prohibition on removing judges for having their rulings reversed:

> *"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".* [185]

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182. *Recommendation No. R (94) 12*, *doc. cit.*, Principle VI.3.

183. *European Charter on the statute for judges* , doc *cit.*, operative paragraph 5.1.

184. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, Principle A, paragraph 4 (p).

185. *Ibid.*, Principle A, paragraph 4 (n) 2.

With regard to procedural guarantees in disciplinary proceedings, the *Guidelines* contain the following provision:

> *"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".*[186]

In the Asia-Pacific region the criteria are similar. According to the *Beijing Principles*, judges can only be removed for incapacity or misconduct: "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".[187] As to the kind of procedure to remove judges as well as to the body entrusted with this prerogative, the *Beijing Principles* are not conclusive and acknowledge that these may change from country to country: "It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse." [188] However, when this prerogative does not fall under parliament or popular vote, removal of judges must be carried out by the judiciary.[189] But irrespective of the body in charge, the right to a fair hearing remains intact.[190]

The *Latimer House Guidelines*, which are aimed at Commonwealth jurisdictions, also contain provisions related to judicial discipline and removal. The *Guidelines* specify the causes for removal as well as the procedural guarantees and the characteristics of the body charged with the proceedings. Guideline VI says: "In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should

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186. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *doc. cit.*, Principle A, paragraph 4 (q). Paragraph (r) further provides that "[…] Complaints against judicial officers shall be processed promptly, expeditiously and fairly".

187. *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *doc. cit.*, operative paragraph 22.

188. *Ibid.*, operative paragraph 23.

189. *Ibid.*, operative paragraph 24. See also operative paragraph 25: "Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them."

190. *Ibid.*, operative paragraph 26: "In any event, the judge who is sought to be removed must have the right to a fair hearing."

be limited to: (A) inability to perform judicial duties; and (B) serious misconduct." [191] The *Guidelines* also contain a prohibition on public admonitions.[192]

International case-law

The Human Rights Committee has referred to removal of judges on a number of occasions, both in the context of its concluding observations on State reports and on individual cases. A reading of the Committee's observations confirms the provisions of international standards, in that judges should not be removed on grounds other that misconduct or incapacity to continue in their posts and that removal proceedings must be conducted fairly.

- In the case of Sri Lanka, the Committee expressed its concern that "the procedure for the removal of judges of the Supreme Court and the Courts of Appeal [...] is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges" and it went on to recommend that "the State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct".[193]

- In the case of Belarus, the Committee noted its concern that "the judges of the Constitutional Court and Supreme Court can be dismissed by the President of the Republic without any safeguards".[194]

- In the case of Viet Nam, the Committee urged the State to "ensure that judges may not be removed from their posts unless they are found guilty by an independent tribunal of inappropriate conduct".[195]

- In relation to judicial corruption, in the case of Georgia, the Committee stated that "The State party should also ensure that documented complaints of judicial corruption are investigated by an independent agency and that the appropriate disciplinary or penal measures are taken".[196]

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191. *Latimer House Guidelines*, *doc. cit.*, Guideline VI.1, paragraph (a) (i).

192. *Ibid.*, Guideline VI.1, paragraph (a) (iii).

193. *Concluding Observations of the Human Rights Committee on Sri Lanka*, UN document CCPR/CO/79/LKA, para. 16.

194. *Concluding Observations of the Human Rights Committee on Belarus*, UN document CCPR/C/79/Add.86, para. 13. See also Communication Nº 814/1998, *Mikhail Ivanovich Pastukhov v. Belarus* (Views adopted on 5 August 2003), UN document CCPR/C/78/D/814/1998, para. 7.3.

195. *Concluding Observations of the Human Rights Committee on Viet Nam*, UN document CCPR/CO/75/VNM, para. 10.

196. *Concluding Observations of the Human Rights Committee on Georgia*, UN document CCPR/CO/74/GEO, para. 12.

- The Committee has also determined that summary removals are incompatible with the Covenant,[197] and that "judges should be removed only in accordance with an objective, independent procedure prescribed by law".[198]

In a case of judges dismissed by a presidential decree on the grounds that they were "immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions", the Human Rights Committee concluded that the judges "did not benefit from the guarantees to which they were entitled in their capacity as judges". By virtue of these guarantees the judges should have been brought before the Supreme Council of the Judiciary in accordance with the law. Furthermore, the Committee found that "the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place thus damaging the equitable hearing of the case", and concluded that the removal had entailed "an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant".[199]

- On the characteristics of disciplinary measures against civil servants, the Committee has stated that, in principle, it "does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. [...] While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee." [200] Moreover, in regard to the length of disciplinary proceedings, the Committee considered that "the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals

197. *Concluding Observations of the Human Rights Committee on The Gambia*, UN document CCPR/CO/75/GMB, para. 14.

198. *Concluding Observations of the Human Rights Committee on the Republic of Moldova*, UN document CCPR/CO/75/MDA, para. 12.

199. Communication Nº 933/2000, *Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et. al. v. Democratic Republic of the Congo* (Views adopted on 31 July 2003), UN document CCPR/C/78/D/933/2000, para. 5.2.

200. Communication 1015/2001, *Paul Perterer v. Austria* (Views adopted 20 July 2004), UN document CCPR/C/81/D/1015/2001, para. 9.4.

must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms".[201]

For its part, the Inter-American Court of Human Rights has also referred to the issue of removal of judges. In the *Constitutional Court* case, the Court established that judges enjoy all procedural guarantees when facing removal. The case was brought by three judges who had been dismissed as a result of the application of a sanction by the Legislature, in the context of an impeachment proceeding. After noting that "the authority in charge of the procedure to remove a judge must behave impartially in the procedure established to this end and allow the latter to exercise the right of defense", the Court decided that the judges' right to a fair trial had been violated because "the impeachment proceeding to which the dismissed justices were submitted did not ensure them guarantees of due legal process and did not comply with the requirement of the impartiality of the judge".[202] Moreover, the Court also ruled that in the specific case of these judges "the Legislature did not have the necessary conditions of independence and impartiality to conduct the impeachment proceeding against the three justices of the Constitutional Court".[203]

Judges must conduct themselves according to ethical standards and will be held accountable if they fail to do so. International law clearly establishes that judges can only be removed for serious misconduct or incapacity. Disciplinary proceedings must be conducted by an independent and impartial body and in full respect for procedural guarantees.

201. Communication 1015/2001, *Paul Perterer v. Austria* (Views adopted 20 July 2004), UN document CCPR/C/81/D/1015/2001, para. 10.7.

202. *IACtHR Constitutional Court Case*, *doc. cit.*, paragraphs 74 and 84.

203. *Ibid.*, para. 84.

B. The Role of Lawyers

Introduction

Lawyers are, with judges and prosecutors, one of the pillars upon which human rights and the rule of law rest. Lawyers play an essential role in protecting human rights and in guaranteeing that the right to a fair trial is respected by providing accused persons with a proper defence in court.

In protecting human rights, lawyers play a crucial role in protecting the right against arbitrary detentions by challenging arrests, for example through presenting *habeas corpus*. Lawyers also advise and represent victims of human rights violations and their relatives in criminal proceedings against alleged perpetrators of such violations and in proceedings aimed at obtaining reparation. Furthermore, lawyers are in the best position to challenge before courts national legislation that undermines basic principles of human rights and the rule of law.[204]

The right to be represented by a lawyer, even when the person has no financial means to procure one, constitutes an integral part of the right to a fair trial as recognised by international law. Individuals who are charged with a crime must at all times be represented by a lawyer, who will guarantee that his right to receive a fair trial by an independent and impartial tribunal is respected throughout the proceedings. Lawyers are the ones who will challenge the court's independence and impartiality and who will ensure that the defendants' rights are respected.[205]

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204. See, for example, the 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; 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*, articles 1, 9, 11; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Principle 5; *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 6; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principles 3 and 4; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rules 18, 60 and 78; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (*"The Beijing Rules"*), Rules 7.1 and 15.1; *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, articles 17 and 18.

205. See, for example, the *UN Basic Principles on the Role of Lawyers*, *doc. cit.*, Principle 1; *International Covenant on Civil and Political Rights*, article 14, para. 3 (d); *African Charter on Human and Peoples' Rights*, article 7, para. 1 (c); *European Convention on Human Rights*, article 6; *American Convention on Human Rights*, article 8.

The independence of lawyers

In order for legal assistance to be effective, it must be carried out independently. This is recognised in the preface to the *UN Basic Principles on the Role of Lawyers* (UN Basic Principles), which states that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession".[206] To this end, international law establishes certain safeguards aimed at ensuring the independence of individual lawyers as well as of the legal profession as a whole.

Essential guarantees for the functioning of the legal profession

For lawyers to carry out their professional functions in an independent manner, it is necessary for States to protect them from any unlawful interference with their work. This interference can range from obstacles to communicating with their clients to threats and physical attacks.

- The *UN Basic Principles* include a set of provisions that establish safeguards in this respect: "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".[207]

- The *Basic Principles* stipulate that "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".[208] States shall also take measures to ensure that lawyers involved in the complaint or in the investigation of human rights violations are protected against ill-treatment, intimidations or reprisals.[209]

The Human Rights Committee has referred on a number of occasions to obstacles faced by lawyers in the discharge of their professional functions.

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206. *United Nations Basic Principles on the Role of Lawyers*, *doc. cit.*, Principle 16. Other relevant instruments on the role of lawyers are: the Council of Europe's *Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer* and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle I.

207. *Ibid.*, Principle 16.

208. *Ibid.*, Principle 17.

209. See, for example, *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 15; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, Principle 3

- When examining a new Law on the Bar in Azerbaijan, the Committee concluded that the said law "may compromise lawyers' free and independent exercise of their functions," and recommended the Government to "ensure that the criteria for access to and the conditions of membership in the Bar do not compromise the independence of lawyers".[210]

- In the case of Libya, the Committee noted that serious doubts arose as to "[...] the liberty of advocates to exercise their profession freely, without being in the employment of the State, and to provide legal aid services," and recommended that "measures be taken to ensure full compliance with article 14 of the Covenant as well as with [...] the Basic Principles on the Role of Lawyers".[211]

International law further recognises the need for lawyers to have access to all the relevant information to a case in which they may be involved. Thus, States must "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".[212]

Another important provision is related to the secrecy of communications between lawyers and their clients. In order for lawyers to effectively represent their clients, the competent authorities must respect this secrecy, which is the cornerstone of the lawyer-client relationship. To this end, the *UN Basic Principles* provide that "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential".[213]

A possible obstacle to be faced by lawyers is the lack of recognition as such by official bodies, be they courts or others. Except in cases in which the lawyer has been disbarred or disqualified following the appropriate procedures, such bodies must acknowledge the lawyer's qualifications. The *UN Basic Principles* provide for this recognition when they state that "No court or administrative authority before whom the

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210. *Concluding Observations of the Human Rights Committee on Azerbaijan*, UN document CCPR/CO/73/AZE, para. 14.

211. *Concluding observations of the Human Rights Committee on the Libyan Arab Jamahiriya*, CCPR/C/79/Add.101, para. 14.

212. *UN Basic Principles*, Principle 21. This Principle also stipulates that "Such access should be provided at the earliest appropriate time". See also, 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*, articles 1, 9, 11; *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13 (4); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 6; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principle 4; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 11, 12, 15 and 17; and *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93.

213. *UN Basic Principles on the Role of Lawyers*, *doc. cit.*, Principle 22. See also *Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 18 and *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93

right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles".[214]

According to Principle 18 of the *UN Basic Principles*, "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions". This rule is extremely important due to the tendency, in certain countries, to assimilate clients' causes to their lawyers.

- In one report to the UN Commission on Human Rights, the Special Rapporteur on the independence of judges and lawyers noted his concern at "the increased number of complaints concerning Governments' identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to such accusations".[215] The Special Rapporteur concluded that "Identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned".[216] According to international law, the Special Rapporteur said, "where there is evidence of lawyers identifying with their clients' causes, it is incumbent on the Government to refer the complaints to the appropriate disciplinary body of the legal profession".[217]

Professional duties

Beyond the protections afforded to them by international law, lawyers have basic professional duties, mostly related to their clients. Thus, Principle 13 of the *UN Basic Principles* establishes the basic obligation of providing legal assistance to the best of their abilities. According to this Principle, this duty includes:

> *"(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate".*

Furthermore, "lawyers shall always loyally respect the interests of their clients".[218]

Besides those particular duties towards the clients they may represent at a given time, lawyers have an obligation towards their colleagues to "at all times maintain

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214. *UN Basic Principles on the Role of Lawyers, doc. cit.,* Principle 19.

215. *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1998/39, para. 179.

216. *Ibid.,*

217. *Ibid.*, para. 181.

218. *UN Basic Principles on the Role of Lawyers*, *doc. cit.*, Principle 15.

the honour and dignity of their profession [...]".[219] It is also incumbent upon lawyers, due to their fundamental role within the administration of justice, to "[...] uphold human rights and fundamental freedoms recognized by national and international law [...]".[220] Lastly, lawyers must "[...] at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession".[221]

Freedom of expression and association

As is the case with judges, freedom of expression and association constitute essential requirements for the proper functioning of the legal profession. Although these freedoms are enjoyed by all persons, they acquire specific importance in the case of persons involved in the administration of justice. Principle 23 of the *UN Basic Principles* spells out this freedom in clear terms: "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 or 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 the recognized standards and ethics of the legal profession."

Regarding professional associations of lawyers (or Bar associations), the *UN Basic Principles* establish that "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 associations shall be elected by its members and shall exercise its functions without external interference." [222] Furthermore, "Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics".[223] Read together, these provisions clearly establish the duty for States to abstain from interfering in the establishment and work of professional associations of lawyers.

219. *UN Basic Principles on the Role of Lawyers*, *doc. cit.*, Principle 12.

220. *Ibid.*, Principle 14.

221. *Ibid*.

222. *Ibid.*, Principle 24.

223. *Ibid.*, Principle 25.

The Committee of Ministers of the Council of Europe said: "[...] it is essential to the protection of human rights, as well as to the maintenance of the rule of law, that there be an organised legal profession free to manage its own affairs".[224]

Associations of lawyers are thus created for two main purposes: safeguarding the professional interests of lawyers and protecting and strengthening the independence of the legal profession.

- These associations shall not, as pointed out by the Special Rapporteur, "indulge in partisan politics", which would lead to "compromising the independence of the legal profession". The Special Rapporteur thus made the distinction between "engagement in the protection of those human rights which have political connotations" and "engagement in politics *per se*".[225]

Apart from banning associations altogether, the most common way in which lawyers' freedom of association is violated is by establishing compulsory affiliation to a State-controlled association or, similarly, to require some form of authorisation from the Executive as requisites for the exercise of their work.

- The Human Rights Committee has referred to these practices in the context of Belarus, where it noted with concern "the adoption of the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997, which gives competence to the Ministry of Justice for licensing lawyers and obliges them, in order to be able to practise, to be members of a centralized Collegium controlled by the Ministry, thus undermining the independence of lawyers". After stressing that "the independence of the judiciary and the legal profession is essential for a sound administration of justice and for the maintenance of democracy and the rule of law," the Committee urged the Belarusian Government to "take all appropriate measures, including review of the Constitution and the laws, in order to ensure that judges and lawyers are independent of any political or other external pressure" and, to that end, drew its attention to the *UN Basic Principles on the Role of Lawyers*.[226]

Accountability

As other individuals with public responsibilities, lawyers must conduct themselves according to ethical standards. These codes shall include clear norms of behaviour and the possibility for lawyers to be held accountable in cases of misconduct. Thus,

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224. *Explanatory Memorandum on Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer*, para. 10.

225. *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1995/39, para. 72.

226. *Concluding Observations of the Human Rights Committee on Belarus*, CCPR/C/79/Add.86, para. 14.

Principle 29 of the *UN Basic Principles* provides that "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". These codes shall be preferably drafted by associations of lawyers or, in case they are established by law, with the input from these associations. In this respect, the *UN Basic Principles* state that "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".[227] In any case, these codes cannot foresee disciplinary measures for carrying out lawful professional duties such as representing a particular client or making a statement in court.[228]

The *UN Basic Principles* also contain certain basic requirements to be followed in disciplinary proceedings against lawyers so that they conform to international law. These requirements of due process establish that lawyers can only be sanctioned pursuant to a procedure that respects a number of guarantees. Firstly, complaints against lawyers in their professional capacity "shall be processed expeditiously and fairly under appropriate procedures".[229] Furthermore, lawyers shall have "the right to a fair hearing, including the right to be assisted by a lawyer of their choice".[230] As to the characteristics of the body in charge of the proceedings and subsequent appeals, the *Basic Principles* establish that "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".[231]

> *The legal profession plays an essential role in the defence of human rights and the rule of law. Lawyers must be able to work independently and without fear and to freely communicate with their clients. Lawyers must not be identified with their clients' causes and have the right to freely express their opinions and to form associations without any interference. Lawyers must discharge their professional functions according to ethical standards and are accountable for violations of their rules of professional conduct.*

227. See article 85 of the *Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)*, which states that "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". On immunity for statements, see Principle 20 of the *UN Basic Principles on the Role of Lawyers*, which states that "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".

228. *UN Basic Principles*, *doc. cit.*, Principle 26.

229. *Ibid.*, Principle 27.

230. *Ibid.*

231. *Ibid.*, Principle 28.

C. The Role of Prosecutors

Introduction

Prosecutors play a crucial role in the administration of justice. Respect for human rights and the rule of law presupposes a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality. Within the prosecuting institution, each prosecutor must be empowered to fulfil his professional duties in an independent, impartial and objective manner.

The *UN Guidelines on the Role of Prosecutors* were formulated to assist States "in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".[232] The *Guidelines* set forth principles that are applicable to all jurisdictions irrespective of the nature of their prosecuting authority. Thus, the *Guidelines* remain neutral on issues such as appointment procedures and the status of prosecutors within States.

Impartiality and objectivity

States have a duty to ensure that prosecutors can carry out their professional functions impartially and objectively. Unlike with judges and lawyers, international law does not contain a provision that guarantees the institutional independence of prosecutors. This is due to the fact that in some systems prosecutors are appointed by the executive branch of power or are under a certain level of dependency of this power, thus resulting in the duty to observe certain orders received from the Government. Whilst an independent prosecutorial authority is preferable to one that belongs to the executive, States always have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively.

- In the context of Mexico, the Inter-American Commission on Human Rights has referred to the issue of the independence of prosecutors, where it reiterated the proposition that "the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch".[233] The Commission also stated that

232. *United Nations Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, hereinafter *UN Guidelines*. Other relevant instruments on the role of prosecutors are the Council of Europe's *Recommendation No. R (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system* and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle F.

233. Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, para. 372.

the proper exercise of prosecutorial functions requires "autonomy and independence from the other branches of government".[234]

In situations where public prosecutors are physically placed in military bases and they work in close cooperation with military authorities, the Inter-American Commission on Human Rights has considered that "this situation seriously compromises the objectivity and independence of the prosecutor".[235]

Qualifications, selection and training

The *UN Guidelines* do not specify one type of procedure to be followed in appointing prosecutors. However, and echoing general and specific human rights standards, the *UN Guidelines* contain clear rules on the acceptable criteria for selecting prosecutors. Thus, States, regardless of the proceedings they institute, must ensure that "Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications".[236] Furthermore, selection criteria must not be discriminatory and must "embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status [...]".[237]

- In the case of Kosovo, the Human Rights Committee expressed its concern at "absence of adequate guarantees for the independence of international [...] prosecutors" and at "the low remuneration of local [...] prosecutors" and recommended that the United Nations Mission in Kosovo "establish independent procedures for the recruitment, appointment and discipline of international [...] prosecutors" and "ensure adequate terms and conditions for local [...] prosecutors whereby they are shielded from corruption" [238]

Guarantees for the functioning of prosecutors

In order for prosecutors to discharge their professional functions adequately, international law contains a number of safeguards addressed to States. The most important safeguard is the duty for States to "ensure that prosecutors are able to

234. Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, *doc. cit.*, para. 381.

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

236. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guideline 1.

237. *Ibid.*, Guideline 2 (a). As in the case of judges, it is not considered discriminatory to "require a candidate for prosecutorial office to be a national of the country concerned." UN document CCPR/C/UNK/CO/1, para. 20.

238. *Concluding Observations of the Human Rights Committee on Kosovo (Serbia)*, UN document CCPR/C/UNK/CO/1, para. 20.

perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability".[239] One particularly serious way in which prosecutors may be intimidated is through physical violence. That is why the *UN Guidelines* contain a specific duty on States to protect prosecutors and their families "when their personal safety is threatened as a result of the discharge of prosecutorial functions".[240]

- In the case of Colombia, the Special Rapporteurs on torture and extrajudicial, summary or arbitrary executions recommended that "effective protection should be provided for all members of the judiciary and the Public Ministry from threats and attempts on their lives and physical integrity, and investigations into such threats and attempts should be carried out with a view to determining their origin and opening criminal and/or disciplinary proceedings, as appropriate".[241]

Other guarantees for the proper discharge of prosecutorial functions include "reasonable conditions of service, adequate remuneration and, where applicable, tenure, pension and age of retirement". These requirements "shall be set out by law or published rules or regulations".[242]

Prosecutors, like judges, must be promoted according to objective criteria, in particular "professional qualifications, ability, integrity and experience", and the procedure leading to promotions must be fair and impartial.[243]

Freedom of expression and association

Like judges and lawyers, "prosecutors 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 or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession".[244]

Regarding freedom of association, Guideline 9 of the *UN Guidelines* includes a provision identical to the one contained in the UN standards applicable to judges, in the

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239. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guideline 4.
240. *Ibid.*, Guideline 5.
241. *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions on their visit to Colombia*, UN Document E/CN.4/1995/111, para. 117 (d).
242. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guideline 6.
243. *Ibid.*, Guideline 7.
244. *Ibid., Guideline 8.*

sense that "Prosecutors 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".

Professional duties

As essential actors in the administration of justice, prosecutors are entrusted with a number of functions, which they must carry out in an impartial and objective manner and avoiding political, social, religious, racial, cultural, sexual or any other kind of discrimination.[245] This duty constitutes a guiding principle for the proper discharge of prosecutorial functions and implies that prosecutors shall be free from any bias when carrying out all their professional duties. Furthermore, prosecutors have special duties related to the protection of human rights and to ensuring due process and a correct administration of justice.

- 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.[246]

Prosecutors need to be watchful of human rights violations that may come to their knowledge, both in terms of investigating them and of evidence. In the latter case, prosecutors have a duty to refuse to take into account evidence "that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights".In such cases, prosecutors must inform the Court about the existence of such evidence and "shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".[247]

In case of human rights violations, Public Prosecutors have a duty to ensure a prompt, exhaustive and impartial investigation.

- The Committee against Torture has stated that a Public Prosecutor commits a breach of his duty of impartiality if he fails to appeal for the dismissal of a judicial decision in a case where there is evidence of torture.[248]

Prosecutors play an active role in criminal proceedings. Even though their professional functions vary in different legal systems, the basic functions of prosecutors

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245. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guideline 13, para. (a).

246. *Ibid.*, Guideline 12.

247. *Ibid.*, Guideline 16.

248. Communication N° 60/1996, *Khaled Ben M'Barek v. Tunisia* (Decision of 10 November 1999), UN document CAT/C/23/D/60/1996, para. 11.10.

are summarised in Guideline 11 of the *UN Guidelines*: "Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest".

According to the *UN Guidelines*, "the office of prosecutors shall be strictly separated from judicial functions". Even though this provision is clear, prosecutors do, in some systems, have certain judicial functions. These may include ordering a preventive detention or collecting evidence. In case they are accepted in the legal system, these functions must always be limited to the pre-trial stages of the proceedings and exercised impartially and with respect for the rights of the suspects. These judicial functions must always be subject to independent judicial review.

The Human Rights Committee has dealt with the exercise of judicial functions by prosecutors.

- In a case where a prosecutor who was subordinate to the executive ordered and subsequently renewed a pre-trial detention based on insufficient evidence, the Committee stated that it was not "satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3) [of the International Covenant on Civil and Political Rights]".[249]

One of the crucial provisions related to prosecutors is contained in Guideline 15 of the *UN Guidelines*, which provides that 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". This provision states the essential position prosecutors play in upholding the rule of law and in applying the law equally to all citizens, particularly to those who hold official positions.

There are systems in which prosecutors have discretionary functions, mainly related to investigating cases and filing charges. In such cases, the *UN Guidelines* provide that "the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution".[250]

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249. Communication N°521/1992, *Vladimir Kulomin v. Hungary*, (Views of 22 of March 1996), UN document CCPR/C/56/D/521/1992, para. 11.3. Article 9.3 of the Covenant stipulates that "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power".

250. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guideline 17.

Other prosecutorial duties include: not initiating or halting prosecutions when the charges are unfounded; taking proper account of the position of the suspect and the victim, and paying attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; keeping matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise; considering the views and concerns of victims when their personal interests are affected and ensuring that victims are informed of their rights in accordance with the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; and cooperating with the police, the courts, the legal profession, public defenders and other government agencies or institutions.[251]

Disciplinary proceedings

When they are suspected of having violated their professional duties, prosecutors must be made accountable through disciplinary proceedings. The *UN Guidelines* establish clear criteria on both the grounds for disciplining prosecutors as well as the guarantees enjoyed by them when facing such proceedings.

With respect to the grounds for disciplinary action, the *Guidelines* establish that "disciplinary offences of prosecutors shall be based on law or lawful regulations".[252] These regulations must be clear on which acts constitute misconduct and on the possible sanctions. Even though the *Guidelines* do not explicitly refer to a prosecutor's incapacity to carry out his or her functions, it is implicit that this constitutes a ground for removal.

The *Guidelines* contain a number of principles that apply to disciplinary proceedings. For example, complaints against prosecutors "shall be processed expeditiously and fairly under appropriate procedures". Furthermore, prosecutors have the right to a fair hearing and "the decision shall be subject to independent review".[253] Lastly, the outcome of the proceedings must be "an objective evaluation and decision.[254]

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251. *UN Guidelines on the Role of Prosecutors*, *doc. cit.*, Guidelines 14, 13 paras. (b) to (d) and 20.

252. *Ibid.*, Guideline 21.

253. *UN Guidelines on the Role of Prosecutors, doc. cit.*, Guideline 21.

254. *Ibid.*, Guideline 22. The Guideline also says that the disciplinary proceedings "shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines".

Prosecutors fulfil an essential role in the administration of justice by prosecuting human rights violations and ensuring respect for the right to a fair trial. Prosecutors must carry out their professional functions impartially and objectively. States must ensure that prosecutors are able to perform their functions free of interference and must actively protect them. Prosecutors must pay special attention to crimes committed by public officials and must refuse to use evidence obtained as a result of human rights violations.

PART 2

International Instruments on the Independence and Accountability of Judges, Lawyers and Prosecutors

I. United Nations

A. Specific standards on the independence of judges, lawyers and prosecutors

Basic Principles on the Independence of the Judiciary

(Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985)

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines

relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. 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.

2. 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 for any reason.

3. 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.

4. 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.

5. 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.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like 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.

9. 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.

Qualifications, selection and training

10. 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.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. 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.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their

duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. 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.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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)

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safe guards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. 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.

2. 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.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers 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. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. 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.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them

in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. 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.

8. 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.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

    (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. 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.

15. Lawyers shall always loyally respect the interests of their clients. Guarantees for the functioning of lawyers

16. 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.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. 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.

21. 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.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. 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 or 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 the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. 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 associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. 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.

27. 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.

28. 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.

29. 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.

Guidelines on the Role of Prosecutors

(Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia,* their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the

Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

2. States shall ensure that:

   (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

   (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

8. Prosecutors 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 or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors 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.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. 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.

13. In the performance of their duties, prosecutors shall:

    (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

    (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

    (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

    (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. 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.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance

fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pretrial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary

(Adopted by the Economic and Social Council in Resolution 1989/60 and endorsed by the General Assembly in Resolution 44/162 of 15 December 1989)

Procedure 1

All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.

Procedure 2

No judge shall be appointed or elected for purposes, or be required to perform services, that are inconsistent with the Basic Principles. No judge shall accept judicial office on the basis of an appointment or election, or perform services, that are inconsistent with the Basic Principles.

Procedure 3

The Basic Principles shall apply to all judges, including, as appropriate, lay judges, where they exist.

Procedure 4

States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary.

Procedure 5

In implementing principles 7 and 11 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

Procedure 6

States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

Procedure 7

In accordance with Economic and Social Council resolution 1986/10, section V, Member States shall inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced and difficulties or obstacles encountered in their implementation at the national level and the assistance that might be needed from the international community.

Procedure 8

The Secretary-General shall prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments under Procedure 7, as well as other information available within the United Nations system, including information on the technical co-operation and training provided by institutes, experts and regional and interregional advisers. In the preparation of those reports the Secretary-General shall also enlist the co-operation of specialized agencies and the relevant intergovernmental organizations and non-governmental organizations, in particular professional associations of judges and lawyers, in consultative status with the Economic and Social Council, and take into account the information provided by such agencies and organizations.

Procedure 9

The Secretary-General shall disseminate the Basic Principles, the present implementing procedures and the periodic reports on their implementation referred to in Procedures 7 and 8, in as many languages as possible, and make them available to all States and intergovernmental and non-governmental organizations concerned, in order to ensure the widest circulation of those documents.

Procedure 10

The Secretary-General shall ensure the widest possible reference to and use of the text of the Basic Principles and the present implementing procedures by the United Nations in all its relevant programmes and the inclusion of the Basic Principles as soon as possible in the United Nations publication entitled *Human Rights: A Compilation of International Instruments,* in accordance with Economic and Social Council resolution 1986/10, section V.

Procedure 11

As part of its technical co-operation programme, the United Nations, in particular the Department of Technical Co-operation and Development and the United Nations Development Programme, shall:

(a) Assist Governments, at their request, in setting up and strengthening independent and effective judicial systems;

(b) Make available to Governments requesting them, the services of experts and regional and interregional advisers on judicial matters to assist in implementing the Basic Principles;

(c) Enhance research concerning effective measures for implementing the Basic Principles, with emphasis on new developments in that area;

(d) Promote national and regional seminars, as well as other meetings at the professional and non-professional level, on the role of the judiciary in society, the necessity for its independence, and the importance of implementing the Basic Principles to further those goals;

(e) Strengthen substantive support to the United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other entities within the United Nations system concerned with implementing the Basic Principles.

Procedure 12

The United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other concerned entities within the United Nations system, shall assist in the implementation process. They shall pay special attention to ways and means of enhancing the application of the Basic Principles in their research and training programmes, and to providing technical assistance upon the request of Member States. For this purpose, the United Nations institutes, in co-operation with national institutions and intergovernmental and non-governmental organizations concerned, shall develop curricula and training materials based on the Principles and the present implementing procedures, which are suitable for use in legal education programmes at all levels, as well as in specialized courses on human rights and related subjects.

Procedure 13

The regional commissions, the specialized agencies and other entities within the United Nations system as well as other concerned intergovernmental organizations shall become actively involved in the implementation process. They shall inform the Secretary-General of the efforts made to disseminate the Basic Principles, the measures taken to give effect to them and any obstacles and shortcomings encountered. The Secretary-General shall also take steps to ensure that non-governmental organizations in consultative status with the Economic and Social Council become actively involved in the implementation process and the related reporting procedures.

Procedure 14

The Committee on Crime Prevention and Control shall assist the General Assembly and the Economic and Social Council in following up the present implementing procedures, including periodic reporting under Procedures 6 and 7 above. To this end, the Committee shall identify existing obstacles to, or shortcomings in, the implementation of the Basic Principles and the reasons for them. In this context, the Committee shall make specific recommendations, as appropriate, to the Assembly and the Council and any other relevant United Nations human rights bodies, on further action required for the effective implementation of the Basic Principles.

Procedure 15

The Committee on Crime Prevention and Control shall assist the General Assembly, the Economic and Social Council and any other relevant United Nations human rights bodies, as appropriate, with recommendations relating to reports of *ad hoc* inquiry commissions or bodies, with respect to matters pertaining to the application and implementation of the Basic Principles.

Draft Universal Declaration on the Independence of Justice

("Singhvi Declaration")

Judges

Objectives and Functions

1. The objectives and functions of the judiciary shall include:

   (a) Administering the law impartially irrespective of parties;

   (b) Promoting, within the proper limits of the 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.

Independence

2. 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.

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely. Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.

4. The Judiciary shall be independent of the Executive and Legislature.

5.

   (a) 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.

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

   (c) 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.

(d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.

(e) 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 persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.

(f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.

(g) No power shall be so exercised as to interfere with the judicial process.

(h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.

(i) The Executive shall not have the power to close down or suspend the operation of the courts.

(j) 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.

6. 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.

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. 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.

Qualifications, Selection and Training

9. Candidates chosen for judicial office shall be individuals of integrity and ability. They shall have equality of access to judicial office; except in case of lay judges, they should be well-trained in the law.

10. In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may however be subject to citizenship requirements and consideration of suitability for judicial office.

11.

    (a) The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

    (b) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.

    (c) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.

12. Continuing education shall be available to judges.

Posting, Promotion and Transfer

13. Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.

14. Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.

15. Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge.

Tenure

16.

(a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

(b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

18.

(a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

(c) Retirement age shall not be altered for judges in office without their consent.

19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.

Immunities and Privileges

20. Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority.

21. Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties other

than in public proceedings. Judges shall not be required to testify on such matters.

Disqualifications

22. Judges may not serve in a non-judicial capacity which compromises their judicial independence.

23. Judges and courts shall not render advisory opinions except under an express constitutional or statutory provision.

24. Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property. Judges shall not engage in law practice.

25. A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest of incompatibility of functions may arise.

Discipline and Removal

26.

(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. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(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.

27. All disciplinary action shall be based upon established standards of judicial conduct.

28. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

29. Judgments in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

30. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

31. In the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.

Court Administration

32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

33. 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; judicial and administrative personnel; and operating budgets.

34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

35. The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

36. The head of the court may exercise supervisory powers over judges only in administrative matters.

Miscellaneous

37. A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

38. Judges shall accord respect to the members of the Bar, as well as to assessors, procurators, public prosecutors and jurors as the case may be.

39. The State shall ensure the due and proper execution of orders and judgments of the Courts; but supervision over the execution of orders and over the service or process shall be vested in the judiciary.

40. Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

41. These principles and standards shall apply to all persons exercising judicial functions, including international judges, assessors, arbitrators, public prosecutors and procurators who perform judicial functions, unless a

reference to the context necessarily makes them inapplicable or inappropriate.

Assessors

42. An assessor may either perform the functions of a judge or an associate or auxiliary judge or a consultant or a legal or technical expert. In performing any of these functions the assessors shall discharge their duties and perform their functions impartially and independently. Principles and standards which apply to judges are applicable to assessors unless a reference to the context necessarily make them inapplicable or inappropriate.

43. Assessors or Peoples' Assessors, or Nyaya Panchas, may be elected for specified terms on the basis of such franchise and by such electorates as may be provided by law to participate in the collegiate process of adjudication along with elected or appointed judges. There shall be no discrimination by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status among citizens in the matter of their eligibility for election as assessors. On their election, such assessors may be empanelled for short and limited periods to discharge their functions as assessors. Assessors may also be appointed or empanelled for technical advice or assistance on the basis of their specialized knowledge appointed to discharge certain simple adjudicating functions.

44. Assessors shall be duly and adequately compensated with a reasonable allowance for the duration of their service as assessors by the State except when they receive such allowance paid to them in their place of employment.

45. Assessors who are elected to participate in the process of adjudication or are appointed to render technical and other assistance shall be free from any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, except that elected assessors may give periodic explanations to their electorate as a part of the system of citizen participation in the justice system.

46. Assessors shall be independent of the judges and of the Executive and Legislature and shall be entitled to participate in the process of adjudication to the extent and in the manner provided for in the law and practice of the legal system. Peoples' assessors who are elected to participate in the process of adjudication shall also be entitled to record their minutes of dissent which shall form a part of the record.

47. Any method of empanelment of assessors shall scrupulously safeguard against any improper motive in the matter of empanelment.

48. A provision may be made for the orientation and instruction for Peoples' Assessors or Nyaya Panchas elected to participate in the process of adjudication.

49. An assessor may be recalled by the electorate or may be disqualified or removed or his appointment may be terminated, but always strictly in accordance with the procedure established by law.

[...]

Lawyers

Definitions

73. In this chapter:

    (a) "Lawyer" means a person qualified and authorized to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters, and shall, for the purposes of this chapter, include agents, assistants, procuradores, paraprofessionals and other persons authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable;

    (b) "Bar Association" means a professional association, guild, faculty, college, bureau, council or any other recognized professional body under any nomenclature within a given jurisdiction, and shall, for the purposes of this chapter, include any association under any nomenclature of agents, assistants, procuradores, paraprofessionals and other persons who are authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable.

General Principles

74. The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights.

75. There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

76. 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.

Legal Education and Entry into the Legal Profession

77. Legal education and entry into the legal profession shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status.

78. Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

79. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

80. Every person having the necessary qualifications, integrity and good character shall be entitled to become a lawyer and to continue to practise as a lawyer without discrimination on the ground of race, colour, sex, religion or political or other opinion, national, linguistic, or social origin, property, income, birth or status or for having been convicted of an offence for exercising his internationally recognized civil or political rights. The conditions for the disbarment, disqualification or suspension of a lawyer shall, as far as practicably, be specified in the statutes, rules or precedents applicable to lawyers and others performing the functions of lawyers.

Education of the Public Concerning the Law

81. It shall be the responsibility of the lawyers and Bar Associations to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and the important role lawyers, judges, jurors, and assessors play in protecting Fundamental rights and liberties and to inform the members of the public about their rights and duties and the relevant and available remedies. In particular, the Bar Associations shall prepare and implement appropriate educational programmes for lawyers as well as for the general public, and shall collaborate with the authorities, non-governmental organizations, bodies of citizens and educational institutions in promoting and co-ordinating such programmes.

Duties and Rights of Lawyers

82. The duties of a lawyer towards his client include:

    (a) Advising the client as to his legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the client's legal rights and obligations;

    (b) Assisting the client in every appropriate way, and taking legal action to protect him and his interest; and,

    (c) Representing him before courts, tribunals or administrative authorities.

83. The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

84. Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability and with integrity and independence. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

85. 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.

86. Save and except when the right of representation by a lawyer before an administrative department or a domestic forum may have been excluded by law, or when a lawyer is suspended, disqualified or disbarred by an appropriate authority, no court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client, provided, however, that such exclusion, suspension, disqualification or disbarment shall be subject to independent judicial review.

87. It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

88. If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge or judges who participated in the proceedings which gave rise to the charge against the lawyer, except that the judge or judges concerned may in such

a case suspend the proceedings and decline to continue to hear the lawyer concerned.

89. 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 professional appearance before a court, tribunal or other legal or administrative authority.

90. The independence of lawyers in advising, assisting and representing persons deprived of their liberty shall be guaranteed so as to ensure that such persons have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

91. 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;

    (d) The right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;

    (e) The right to accept or refuse a client or a brief on reasonable personal or professional grounds.

92. 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.

93. Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

Legal Service for the Poor

94. 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 and particularly to its weaker sections, so that free legal aid may be given in appropriate cases, no one may be denied justice, and the Bar may promote the cause of justice by protecting economic, social, cultural, civil and political human rights of individuals and groups.

95. Governments shall be responsible for providing sufficient funding for appropriate legal service programmes for those who cannot afford the expenses on their legitimate litigation. Governments shall also be responsible for laying down the criteria and prescribing the procedure for making such legal services available in such cases.

96. Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

    (a) The direction of such programmes or organizations being entrusted to Bar Associations or independent boards composed mainly or entirely of members of the profession, with effective control over its policies, allocated budget and staff;

    (b) Recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgement.

The Bar Association

97. There may be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

98. In order to foster the solidarity and maintain the independence of the legal profession, it shall be the duty of a lawyer to enrol himself as a member of an appropriate Bar Association.

Functions of the Bar Association

99. The functions of a Bar Association in ensuring the independence of the legal professional shall be inter alia:

    (a) To promote and uphold the cause of justice, without fear or favour;

    (b) To maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;

    (c) To defend the role of lawyers in society and preserve the independence of the profession;

    (d) To protect and defend the dignity and independence of the judiciary;

    (e) To promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;

    (f) To promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all such proceedings;

    (g) To promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;

    (h) To promote a high standard of legal education as a prerequisite for entry into the profession;

    (i) To ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;

    (j) To promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;

    (k) To affiliate with and participate in the activities of international organizations of lawyers.

100. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall, as far as practicable, co-operate in assisting the foreign lawyer to obtain the necessary right of audience.

101. To enable the Bar Association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis

for the arrest or detention of any of its members or any lawyer practising within its jurisdiction; and for the same purpose the Association shall have notice of:

(a) Any search of his person or property;

(b) Any seizure of documents in his possession;

(c) Any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases, the Bar Association shall be entitled to be represented by its president or nominee to follow the proceedings and in particular to ensure that professional secrecy and independence are safeguarded.

Disciplinary Proceedings

102. The Bar Association shall establish and enforce in accordance with the law a code of professional conduct of lawyers. Such a code of conduct may also be established by legislation.

103. The Bar Association or an independent statutory authority consisting mainly of lawyers shall ordinarily have the primary competence to conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant or a public-spirited citizen. A court or a public authority may also report a case to the Bar Association or the statutory authority which may on that basis initiate disciplinary proceedings.

104. Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

105. An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

106. Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this Declaration.

B. Treaty Norms

International Covenant on Civil and Political Rights

(Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966,entry into force 23 March 1976)

Article 14

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

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

(Adopted by General Assembly resolution 45/158 of 18 December 1990, entry into force 1 July 2003)

Article 18

1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Convention on the Rights of the Child

(Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990)

Article 37

States Parties shall ensure that:

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

International Convention for the Protection of All Persons from Enforced Disappearance

(Adopted on 20 December 2006)

Article 11

[...]

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

C. Declaratory Norms

Universal Declaration of Human Rights

(Adopted by General Assembly resolution 217 A (III) of 10 December 1948)

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

(General Assembly resolution 53/144, adopted on 8 March 1999)

Article 9

2. […] Everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

D. Other Standards

Commission on Human Rights Resolution 2004/33

(Adopted without a vote on 19 April 2004)

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

The Commission on Human Rights,

7. *Calls upon* all Governments to respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind.

Commission on Human Rights resolution 2003/39

(Adopted by a recorded vote of 31 votes to 1, with 21 abstentions on 23 April 2003)

Integrity of the judicial system

The Commission on Human Rights,

1. *Reiterates* that every person is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her;

2. *Also reiterates* that everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use such duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;

3. *Further reiterates* that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

[...]

6. *Underlines* that any court trying a person charged with a criminal offence should be based on the principles of independence and impartiality;

Code of Professional Conduct for counsel before the International Criminal Court

(Adopted at the 3rd plenary meeting on 2 December 2005, by consensus)

Chapter 1: General provisions

[...]

Article 6: Independence of counsel

1. Counsel shall act honourably, independently and freely.

2. Counsel shall not:

   (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or

   (b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7: Professional conduct of counsel

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.

2. Counsel shall maintain a high level of competence in the law applicable before the Court. He or she shall participate in training initiatives required to maintain such competence.

3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court, including the enforcement of this Code.

4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

Article 8: Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with

the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. The relevant provisions referred to in paragraph 1 of this article include, inter alia, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.

3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.

4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

Article 9: Counsel-client relationship

1. Counsel shall not engage in any discriminatory conduct in relation to any other person, in particular his or her client, on grounds of race, colour, ethnic or national origin, nationality, citizenship, political opinions, religious convictions, gender, sexual orientation, disability, marital status or any other personal or economic status.

2. In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

3. Where a client's ability to make decisions concerning representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence.

4. Counsel shall not engage in any improper conduct, such as demanding sexual relations, coercion, intimidation, or exercise any other undue influence in his or her relations with a client.

Article 10: Advertising

Counsel may advertise provided the information is:

(a) Accurate; and

(b) Respectful of counsel's obligations regarding confidentiality and privilege.

Chapter 2: Representation by Counsel

[...]

Article 12: Impediments to representation

1. Counsel shall not represent a client in a case:

   (a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation; or

   (b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

2. In the case of paragraph 1 (a) of this article, where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained. Such notice shall be provided in a manner consistent with counsel's duties of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence.

3. Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless:

   (a) The testimony relates to an uncontested issue; or

   (b) The testimony relates to the nature and value of legal services rendered in the case.

4. This article is without prejudice to article 16 of this Code.

Article 13: Refusal by counsel of a representation agreement

1. Counsel has the right to refuse an agreement without stating reasons.

2. Counsel has a duty to refuse an agreement where:

   (a) There is a conflict of interest under article16 of this Code;

   (b) Counsel is incapable of dealing with the matter diligently; or

   (c) Counsel does not consider that he or she has the requisite expertise.

Article 14: Performance in good faith of a representation agreement

1. The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client.

2. When representing a client, counsel shall:

   (a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code; and

   (b) Consult the client on the means by which the objectives of his or her representation are to be pursued.

Article 15: Communication between counsel and the client

1. Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.

2. When counsel is discharged from or terminates the agreement, he or she shall convey as promptly as possible to the former client or replacement counsel any communication that counsel received relating to the representation, without prejudice to the duties which subsist after the end of the representation.

3. When communicating with the client, counsel shall ensure the confidentiality of such communication.

Article 16: Conflict of interest

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the

provisions of the Statute, the Rules of Procedure and Evidence, and this Code.

2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.

3. Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either:

   (a) Withdraw from the representation of one or more clients with the prior consent of the Chamber; or

   (b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

Article 17: Duration of the representation agreement

1. Counsel shall advise and represent a client until:

   (a) The case before the Court has been finally determined, including all appeals;

   (b) Counsel has withdrawn from the agreement in accordance with article 16 or 18 of this Code; or

   (c) A counsel assigned by the Court has been withdrawn.

2. The duties of counsel towards the client continue until the representation has ended, except for those duties which subsist under this Code.

Article 18: Termination of the representation

1. With the prior consent of the Chamber, counsel may withdraw from the agreement in accordance with the Regulations of the Court if:

   (a) The client insists on pursuing an objective that counsel considers repugnant; or

   (b) The client fails to fulfil an obligation to counsel regarding counsel's services and has been given reasonable warning that counsel will withdraw unless the obligation is fulfilled.

2. Where counsel withdraws from the agreement, he or she remains subject to article 8 of this Code, as well as any provisions of the Statute and the Rules of Procedure and Evidence relating to confidentiality.

3. Where counsel is discharged by the client, counsel may be discharged in accordance with the Regulations of the Court.

4. Where counsel's physical or mental condition materially impairs his or her ability to represent the client, counsel may be withdrawn by the Chamber at his or her request or at the request of the client or the Registrar.

5. In addition to complying with the duties imposed by article 15, paragraph 2, of this Code, counsel shall convey to replacement counsel the entire case file, including any material or document relating to it.

Article 19: Conservation of files

Following the termination of the representation, counsel shall keep files containing documents and records of work carried out in fulfilment of the agreement for five years. Counsel shall allow the former client to inspect the file unless he or she has substantial grounds for refusing to do so. After this time counsel shall seek instructions from the former client, his or her heirs or the Registrar on the disposal of the files, with due regard to confidentiality.

Article 20: Counsel's fees

Prior to establishing an agreement, counsel shall inform the client in writing of the rate of fees to be charged and the criteria for setting them, the basis for calculating the costs, the billing arrangements and the client's right to receive a bill of costs.

Article 21: Prohibitions

1. Notwithstanding article 22, counsel shall not accept remuneration, in cash or in kind, from a source other than the client unless the client consents thereto in writing after consultation and counsel's independence and relationship with the client are not thereby affected.

2. Counsel shall never make his or her fees contingent on the outcome of a case in which he or she is involved.

3. Counsel shall not mix funds of a client with his or her own funds, or with funds of counsel's employer or associates. Counsel shall not retain money received on behalf of a client.

4. Counsel shall not borrow monies or assets from the client.

Article 22: Remuneration of counsel in the framework of legal assistance

1. The fees of counsel where his or her client benefits from legal assistance shall be paid exclusively by the Registry of the Court. Counsel shall not accept remuneration in cash or in kind from any other source.

2. Counsel shall neither transfer nor lend all or part of the fees received for representation of a client or any other assets or monies to a client, his or her relatives, acquaintances, or any other third person or organization in relation to which the client has a personal interest.

3. Counsel shall sign an undertaking to respect the obligations under this article when accepting the appointment to provide legal assistance. The signed undertaking shall be sent to the Registry.

4. Where counsel is requested, induced or encouraged to violate the obligations under this article, counsel shall advise the client of the prohibition of such conduct.

5. Breach of any obligations under this article by Counsel shall amount to misconduct and shall be subject to a disciplinary procedure pursuant to this Code. This may lead to a permanent ban on practising before the Court and being struck off the list of counsel, with transmission to the respective national authority.

Chapter 3: Relations with the Court and others

Article 23: Communications with the Chambers and judges

Unless the judge or the Chamber dealing with a case permits counsel to do so in exceptional circumstances, counsel shall not:

(a) Make contact with a judge or Chamber relative to the merits of a particular case other than within the proper context of the proceedings; or

(b) Transmit evidence, notes or documents to a judge or Chamber except through the Registry.

Article 24: Duties towards the Court

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.

2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.

3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.

4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.

5. Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings.

Article 25: Evidence

1. Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.

2. If counsel, while collecting evidence, reasonably believes that the evidence found may be destroyed or tampered with, counsel shall request the Chamber to issue an order to collect the evidence pursuant to rule 116 of the Rules of Procedure and Evidence.

Article 26: Relations with unrepresented persons

1. When required in the course of representation, counsel may communicate with and meet an unrepresented person in the client's interest.

2. When counsel communicates with unrepresented persons he or she shall:

   (a) Inform them of their right to assistance from counsel and, if applicable, to their right to legal assistance; and

   (b) Without infringing upon the confidentiality of counsel-client privilege, inform them of the interest that counsel represents and the purpose of the communication.

3. If counsel becomes aware of a potential conflict of interest in the course of a communication or meeting with an unrepresented person, he or she shall, notwithstanding paragraph 1 of this article, refrain immediately from engaging in any further contact or communication with the person.

Article 27: Relations with other counsel

1. In dealing with other counsel and their clients, counsel shall act fairly, in good faith and courteously.

2. All correspondence between counsel representing clients with a common interest in a litigated or non-litigated matter and who agree on exchanging

information concerning the matter, shall be presumed confidential and privileged by counsel.

3. When counsel does not expect particular correspondence between counsel to be confidential, he or she shall state clearly at the outset that such correspondence is not confidential.

Article 28: Relations with persons already represented by counsel

Counsel shall not address directly the client of another counsel except through or with the permission of that counsel.

Article 29: Relations with witnesses and victims

1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom.

2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

Chapter 4: Disciplinary regime

Article 30: Conflict with other disciplinary regimes

Subject to article 38 of this Code, the present chapter is without prejudice to the disciplinary powers of any other disciplinary authority that may apply to counsel subject to this Code.

Article 31: Misconduct

Counsel commits misconduct when he or she:

(a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her;

(b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this article, or does so through the acts of another person; or

(c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.

Article 32: Liability for conduct of assistants or other staff

1. Counsel shall be liable for misconduct under article 31 of this Code by his or her assistants or staff when he or she:

   (a) Orders or approves the conduct involved; or

   (b) Knows or has information suggesting that violations may be committed and takes no reasonable remedial action.

2. Counsel shall instruct his or her assistants or staff in the standards set by this Code.

Article 33: The Commissioner

1. A Commissioner responsible for investigating complaints of misconduct in accordance with this chapter shall be appointed for four years by the Presidency. The Commissioner shall be chosen from amongst persons with established competence in professional ethics and legal matters.

2. The Commissioner shall not be eligible for re-appointment. A Commissioner who is involved in an investigation when his or her mandate expires shall continue to conduct such an investigation until it is concluded.

Article 34: Filing a complaint of misconduct

1. Complaints against counsel regarding misconduct as referred to in articles 31 and 32 of this Code may be submitted to the Registry by:

   (a) The Chamber dealing with the case;

   (b) The Prosecutor; or

   (c) Any person or group of persons whose rights or interests may have been affected by the alleged misconduct.

2. The complaint shall be made in writing or, if the complainant is unable to do so, orally before a staff member of the Registry. It shall identify the complainant and the counsel against whom the complaint is made and shall describe in sufficient detail the alleged misconduct.

3. The Registrar shall transmit the complaint to the Commissioner.

4. The Registrar may, on his or her own initiative, make complaints to the Commissioner regarding the misconduct referred to in articles 31 and 32 of this Code.

5. All complaints shall be kept confidential by the Registry.

Article 35: Limitation period

The right to file a complaint against counsel for misconduct shall lapse five years after the termination of the representation agreement.

Article 36: Composition and management of the Disciplinary Board

1. The Disciplinary Board shall comprise three members, two of whom shall be permanent and one *ad hoc*.

2. The members of the Disciplinary Board shall perform their functions under this Code in an independent and impartial manner.

3. The Registry shall make appropriate arrangements for the elections, provided for in paragraph 4 of this article, in consultation with counsel and, as appropriate, national authorities.

4. The two permanent members, as well as one alternate member who may serve as a replacement in accordance with paragraph 10 of this article, shall be elected for four years by all counsel entitled to practise before the Court. They shall be chosen from amongst persons with established competence in professional ethics and legal matters.

5. The *ad hoc* member shall be a person appointed by the national authority competent to regulate and control the activities of counsel subject to the disciplinary procedure.

6. The permanent members shall not be eligible for re-election.

7. Notwithstanding paragraph 4 of this article, at the first election one of the permanent members shall be selected by lot to serve for a term of six years.

8. After each election and in advance of the first meeting of the newly-elected Disciplinary Board, the permanent and alternate members shall elect one of the permanent members as a chairperson.

9. All members of the Disciplinary Board shall have the same rights and votes. The Disciplinary Board shall decide by majority vote. An alternate member serving on a case pursuant to paragraph 10 of this article shall have the same rights and votes as permanent and *ad hoc* members serving on the same case.

10. If one of the permanent members is unavailable to deal with the case or serve on the Disciplinary Board, the chairperson or, where the chairperson is the permanent member concerned, the other permanent member, shall request the alternate member to serve as a replacement on the Disciplinary Board.

11. Permanent members or the alternate member whose mandates have expired shall continue to deal with the cases they already have under consideration until such cases are finally determined including all appeals.

12. The Registrar shall appoint a staff member of the Registry who will render secretariat services to the Disciplinary Board. Once appointed, the relevant staff member of the Registry shall act at arm's length from the Registry and, subject to article 44, paragraph 12 of this Code, solely as the secretariat of the Disciplinary Board.

Article 37: Preliminary procedures

1. If the complaint filed meets the requirements in article 34 of this Code, the Commissioner shall forward it to counsel subject to the disciplinary procedure, who shall submit a response within sixty days from the date the complaint is forwarded.

2. The response shall indicate whether the alleged misconduct has been or is the subject of a disciplinary procedure before the national authority. If so, it shall include:

   (a) The identity of the national authority deciding on the alleged misconduct; and

   (b) A certified communication by the national authority stating the alleged facts that are the basis of the disciplinary procedure before it.

Article 38: Complementarity of disciplinary measures

1. The disciplinary procedure in this Code shall be applied by the Disciplinary Board.

2. The *ad hoc* member of the Disciplinary Board shall serve as the contact point with the relevant national authority for all communication and consultation regarding the procedure.

3. Counsel subject to the disciplinary procedure shall request the national authority dealing with the matter to inform the Disciplinary Board of the progress of any national disciplinary procedure concerning the alleged misconduct and of its final decision, and shall take all measures necessary to facilitate such communication.

4. When the alleged misconduct is the basis of a disciplinary procedure which has already been initiated before the relevant national authority, the procedure before the Disciplinary Board shall be suspended until a final decision is reached regarding the former procedure, unless:

(a) the national authority does not respond to communications and consultations in accordance with paragraph 2 of this article within a reasonable time;

(b) the Disciplinary Board considers that the information received is not satisfactory; or

(c) the Disciplinary Board considers that, in the light of the information received, the national authority is unable or unwilling to conclude the disciplinary procedure.

5. As soon as it receives the decision of the national authority, the Disciplinary Board shall:

(a) declare the procedure closed, unless the decision adopted does not adequately address a complaint of misconduct under this Code; or

(b) declare that the decision of the national authority does not cover or only partially covers the misconduct brought before the Disciplinary Board and that therefore the procedure is to be continued.

6. In the case of paragraphs 3 and paragraph 4 (b) of this article, the Disciplinary Board may ask counsel subject to the disciplinary procedure to provide detailed information about the procedure, including any minute or evidence which might have been submitted.

7. A decision by the Disciplinary Board based on this article may be appealed before the Disciplinary Appeals Board.

Article 39: Disciplinary procedure

1. The Commissioner conducting the investigation may dismiss a complaint without any further investigation if he or she considers on the basis of the information at his or her disposal that the allegation of misconduct is unfounded in fact or in law. He or she shall notify the complainant accordingly.

2. Should the Commissioner consider otherwise, he or she shall promptly investigate the counsel's alleged misconduct and decide either to submit a report to the Disciplinary Board or to bring the procedure to an end.

3. The Commissioner shall take into consideration all evidence, whether oral, written or any other form, which is relevant and has probative value. He or she shall keep all information concerning the disciplinary procedure confidential.

4. The Commissioner may try to find an amicable settlement if he or she deems it appropriate. The Commissioner shall report the outcome of any such efforts to reach an amicable settlement to the Disciplinary Board, which may

take it into consideration. Any amicable settlement shall be without prejudice to the competence or powers of the Disciplinary Board under this Code.

5. The report of the Commissioner shall be submitted to the Disciplinary Board.

6. The Disciplinary Board hearing shall be public. However, the Disciplinary Board may decide to hold a hearing or parts of it in closed session, in particular to safeguard the confidentiality of information in the report of the Commissioner or to protect victims and witnesses.

7. The Commissioner and the counsel subject to the disciplinary procedure shall be called and heard. The Disciplinary Board may also call and hear any other person deemed useful for the establishment of the truth.

8. In exceptional cases, where the alleged misconduct is of such a nature as to seriously prejudice the interests of justice, the Commissioner may lodge an urgent motion with the Chamber before which the counsel who is the subject of the complaint is appearing, so that it may, as appropriate, declare a temporary suspension of such counsel.

Article 40: Rights of counsel subject to the disciplinary procedure

1. Counsel subject to the disciplinary procedure shall be entitled to assistance from other counsel.

2. Counsel shall have the right to remain silent before the Disciplinary Board, which may draw any inferences it deems appropriate and reasonable from such silence in the light of all the information submitted to it.

3. Counsel shall have the right to full disclosure of the information and evidence gathered by the Commissioner as well as the Commissioner's report.

4. Counsel shall be given the time required to prepare his or her defence.

5. Counsel shall have the right to question, personally or through his or her counsel, any person called by the Disciplinary Board to testify before it.

Article 41: Decisions by the Disciplinary Board

1. The Disciplinary Board may conclude the procedure finding no misconduct on the basis of the evidence submitted to it or finding that counsel subject to disciplinary procedure committed the alleged misconduct.

2. The decision shall be made public. It shall be reasoned and issued in writing.

3. The decision shall be notified to counsel subject to the disciplinary procedure and to the Registrar.

4. When the decision is final, it shall be published in the Official Journal of the Court and transmitted to the national authority.

Article 42: Sanctions

1. When misconduct has been established, the Disciplinary Board may impose one or more of the following sanctions:

   (a) Admonishment;

   (b) Public reprimand with an entry in counsel's personal file;

   (c) Payment of a fine of up to €30,000;

   (d) Suspension of the right to practise before the Court for a period not exceeding two years; and

   (e) Permanent ban on practising before the Court and striking off the list of counsel.

2. The admonishment may include recommendations by the Disciplinary Board.

3. The costs of the disciplinary procedure shall be within the discretion of the Disciplinary Board.

Article 43: Appeals

1. Sanctioned counsel and the Commissioner shall have the right to appeal the decision of the Disciplinary Board on factual or legal grounds.

2. The appeal shall be notified to the secretariat of the Disciplinary Board within thirty days from the day on which the decision has been delivered.

3. The secretariat of the Disciplinary Board shall transmit the notification of the appeal to the secretariat of the Disciplinary Appeals Board.

4. The Disciplinary Appeals Board shall decide on the appeal according to the procedure followed before the Disciplinary Board.

Article 44: Composition and management of the Disciplinary Appeals Board

1. The Disciplinary Appeals Board shall decide on appeals against decisions of the Disciplinary Board.

2. The members of the Disciplinary Appeals Board shall perform their functions under this Code in an independent and impartial manner.

3. The Registry shall make appropriate arrangements for the elections provided for in paragraph 5 of this article, in consultation with counsel and, as appropriate, national authorities.

4. The Disciplinary Appeals Board shall comprise five members:

   (a) The three judges of the Court who take precedence under regulation 10 of the Regulations of the Court, not including:

      - the judges dealing with the case from which the complaint subject to the disciplinary procedure arose; or

      - any members or former members of the Presidency who appointed the Commissioner.

   (b) Two persons elected in accordance with paragraph 5 of this article.

5. The two members of the Disciplinary Appeals Board referred to in paragraph 4 (b) of this article, as well as an alternate member who may serve as a replacement in accordance with paragraph 6 of this article, shall be elected for four years by all counsel entitled to practise before the Court. They shall be chosen from amongst persons with established competence in professional ethics and legal matters.

6. If one of the elected members is unavailable to deal with the case or serve on the Disciplinary Appeal Board, the chairperson shall request the alternate member to serve as a replacement on the Disciplinary Appeals Board.

7. The functions of members of the Disciplinary Appeals Board are incompatible with those of members of the Disciplinary Board.

8. The elected members shall not be eligible for re-election.

9. The judge who takes precedence among the three judges referred to in paragraph 4 (a) of this article shall be the chairperson of the Disciplinary Appeals Board.

10. All members of the Disciplinary Appeals Board shall have the same rights and votes. The Disciplinary Appeals Board shall decide by majority vote. An alternate member serving on a case pursuant to paragraph 6 of this article shall have the same rights and votes as other members serving on the same case.

11. Members whose mandates have expired shall continue to deal with the cases they already have under consideration until such cases are finally determined.

12. The staff member of the Registry appointed by the Registrar pursuant to article 36, paragraph 12, of this Code to provide secretariat services to the Disciplinary Board shall also act as the secretariat of the Disciplinary Appeals Board. Once appointed, the relevant staff member of the Registry shall act at arm's length from the Registry.

[...]

Draft Principles Governing the Administration of Justice through Military Tribunals

(Adopted by the Sub-Commission on the Promotion and Protection of Human Rights in its fifty-seventh session, 2005)

Principle No. 1: Establishment of military tribunals by the constitution or the law

Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.

Principle No. 2: Respect for the standards of international law

Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.

[...]

Principle No. 4: Jurisdiction of military courts to try civilians

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.

[...]

Principle No. 7: Functional authority of military 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.

Principle No. 8: Trial of persons accused of serious human rights violations

In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

[...]

Principle No. 11: Guarantee of habeas corpus

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 No. 12: Right to a competent, independent and impartial tribunal

The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or "faceless" judges and prosecutors.

[...]

Principle No. 16: Recourse procedures in the ordinary courts

In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court.

Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

[...]

2. Other Global Standards

The Bangalore Principles of Judicial Conduct

(The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)

Preamble

Whereas the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

Whereas the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Whereas the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

Whereas the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

Whereas a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

Whereas public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

Whereas it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

Whereas the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

And whereas the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

The following Principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. 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 rules of law and conduct which bind the judge.

Value 1: Independence

Principle:

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.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 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.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2: Impartiality

Principle:

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.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3: Integrity

Principle*:*

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The 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.

Value 4: Propriety

Principle*:*

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 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.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5: Equality

Principle*:*

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6: Competence and Diligence

Principle*:*

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Implementation

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

The Universal Charter of the Judge

(Approved by the International Association of Judges on 17 November 1999)

Preamble

Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International Association of Judges as general minimal norms.

The text of the Charter was unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999.

Article 1. Independence

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.

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.

Article 2. Status

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.

Article 3. Submission to the law

In the performance of the judicial duties the judge is subject only to the law and must consider only the law.

Article 4. Personal autonomy

No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.

Article 5. Impartiality and restraint

In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

Article 6. Efficiency

The judge must diligently and efficiently perform his or her duties without any undue delays.

Article 7. Outside activity

The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.

The judge must not be subject to outside appointments without his or her consent.

Article 8. Security of office

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.

Any change to the judicial obligatory retirement age must not have retroactive effect.

Article 9. Appointment

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 10. Civil and penal responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

Article 11. Administration and disciplinary action

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 12. Associations

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 statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

Article 13. Remuneration and retirement

The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges work and must not be reduced during his or her judicial service.

The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.

After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

Article 14. Support

The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

Article 15. Public prosecution

In countries where members of the public prosecution are judges, the above principles apply *mutatis mutandis* to these judges.

The Burgh House Principles on the Independence of the International Judiciary

The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals:

Recognising the need for guidelines of general application to contribute to the independence and impartiality of the international judiciary, with a view to ensuring the legitimacy and effectiveness of the international judicial process;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international rules and standards relating to judicial independence and the right to a fair trial;

Mindful of the special challenges facing the international judiciary in view of the non-national context in which they operate;

Noting in particular that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges;

Considering the following principles of international law to be of general application:

- to ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established;
- judges must be free from undue influence from any source;
- judges shall decide cases impartially, on the basis of the facts of the case and the applicable law;
- judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests;
- judges shall refrain from impropriety in their judicial and related activities;

Proposes the following Principles which shall apply primarily to standing international courts and tribunals (hereafter "courts") and to full-time judges. The Principles should also be applied as appropriate to judges *ad hoc*, judges *ad litem* and part-time judges, to international arbitral proceedings and to other exercises of international judicial power.

1. Independence and freedom from interference

1.1 The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

1.2 Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

1.4 Deliberations of the court shall remain confidential.

2. Nomination, election and appointment

2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

2.5 Where the governing instruments of the court concerned permits the re-election of judges, the principles and criteria set out above for the nomination, election and appointment of judges shall apply *mutatis mutandis* to their re-election.

3. Security of tenure

3.1 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.

3.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

4. Service and remuneration

4.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

4.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

4.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

4.4 Conditions of service should include adequate pension arrangements.

5. Privileges and immunities

5.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function.

5.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

5.3 Documents and papers of the court, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

5.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

6. Budget

States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

7.Freedom of expression and association

7.1 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.

7.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extrajudicially upon pending cases.

7.3 Judges shall exercise appropriate restraint in commenting extrajudicially upon judgments and procedures of their own and other courts and upon any legislation, drafts, proposals or subject-matter likely to come before their court.

8. Extra-judicial activity

8.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

8.2 Judges shall not exercise any political function.

8.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

9. Past links to a case

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

10. Past links to a party

Judges shall not sit in any case involving a party for whom they have served as agent, counsel, adviser, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

11. Interest in the outcome of a case

11.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

11.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material personal, professional or financial interest.

11.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of the judge's participation in the proceedings.

12. Contacts with a party

12.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisers and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with their judicial function and that may not affect or reasonably appear to affect their independence and impartiality.

12.2 Judges shall discourage ex parte communications from parties, and except as provided by the rules of the court such communications shall be disclosed to the court and the other party.

13. Post-service limitations

13.1 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party, that may affect or may reasonably appear to affect their independence or impartiality.

13.2 Former judges shall not, except as permitted by rules of the court, act in any capacity in relation to any case on which they sat while serving on the court.

13.3 Former judges shall not act as agent, counsel, adviser or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

13.4 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party.

14. Disclosure

14.1 Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 7 to 13 apply.

14.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case.

15. Waiver

Notwithstanding Principles 7 to 13, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, and where the court expresses no objections and the parties give their express and informed consent to the judge acting.

16. Withdrawal or disqualification

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 the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

17. Misconduct

17.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the part of a judge that may affect independence or impartiality.

17.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. In any case where the court determines that fuller investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

17.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

17.4 The outcome of any complaint shall be communicated to the complainant.

3. Council of Europe

A. Specific standards on the independence of judges, lawyers and prosecutors

Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges

(Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the independence of judges in order to strengthen the Rule of Law in democratic states;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles:

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.

2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken:

    a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:

        i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;

        ii. the terms of office of judges and their remuneration should be guaranteed by law;

        iii. no organ other than the courts themselves should decide on its own competence, as defined by law;

        iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.

    b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

    c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government

and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

i. a special independent and competent body to give the government advice which it follows in practice; or

ii. the right for an individual to appeal against a decision to an independent authority; or

iii. the authority which makes the decision safeguards against undue or improper influences.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. 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 II - The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III - Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

    a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

    b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

    c. providing a clear career structure in order to recruit and retain able judges;

    d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

    e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV - Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests.

Principle V - Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

3. Judges should in particular have the following responsibilities:

    a. to act independently in all cases and free from any outside influence;

    b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;

    c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;

    d. where necessary, to explain in an impartial manner procedural matters to parties;

    e. where appropriate, to encourage the parties to reach a friendly settlement;

    f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

    g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI - Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the

constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:

a. withdrawal of cases from the judge;

b. moving the judge to other judicial tasks within the court;

c. economic sanctions such as a reduction in salary for a temporary period;

d. suspension.

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer

(Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the provisions of the European Convention on Human Rights;

Having regard to the United Nations Basic Principles on the Role of Lawyers, endorsed by the General Assembly of the United Nations in December 1990;

Having regard to Recommendation No. R (94) 12 on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994;

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients;

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member states to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in this recommendation.

For the purpose of this recommendation, "lawyer" means a person qualified and authorised according to the national law to plead and act on behalf of his or her

clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.

Principle I - General principles on the freedom of exercise of the profession of lawyer

1. 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.

2. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.

3. 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.

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

5. 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.

6. 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.

7. 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.

8. All lawyers acting in the same case should be accorded equal respect by the court.

Principle II - Legal education, training and entry into the legal profession

1. Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

3. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.

Principle III - Role and duty of lawyers

1. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.

2. Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.

3. The duties of lawyers towards their clients should include:

    a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;

    b. endeavouring first and foremost to resolve a case amicably;

    c. taking legal action to protect, respect and enforce the rights and interests of their clients;

    d. avoiding conflicts of interest;

    e. not taking up more work than they can reasonably manage.

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

Principle IV - Access for all persons to lawyers

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.

2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.

3. Governments of member states should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds.

Principle V - Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

    a. promote and uphold the cause of justice, without fear;

    b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;

    c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

    d. promote and support law reform and discussion on existing and proposed legislation;

    e. promote the welfare of members of the profession and assist them or their families if circumstances so require;

    f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;

g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.

5. Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

   a. arrest or detention of a lawyer;

   b. any decision to take proceedings calling into question the integrity of a lawyer;

   c. any search of lawyers themselves or their property;

   d. any seizure of documents or materials in a lawyers' possession;

   e. publication of press reports which require action on behalf of lawyers.

Principle VI - Disciplinary proceedings

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system

(Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members;

Bearing in mind that it is also the Council of Europe's purpose to promote the rule of law; which constitutes the basis of all genuine democracies;

Considering that the criminal justice system plays a key role in safeguarding the rule of law;

Aware of the common need of all member states to step up the fight against crime both at national and international level;

Considering that, to that end, the efficiency of not only national criminal justice systems but also international co-operation on criminal matters should be enhanced, whilst safeguarding the principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms;

Aware that the public prosecution also plays a key role in the criminal justice system as well as in international co-operation in criminal matters;

Convinced that, to that end, the definition of common principles for public prosecutors in member states should be encouraged;

Taking into account all the principles and rules laid down in texts on criminal matters adopted by the Committee of Ministers,

Recommends that governments of member states base their legislation and practices concerning the role of public prosecution in the criminal justice system on the following principles:

Functions of the public prosecutor

1. "Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

2. In all criminal justice systems, public prosecutors:

    - decide whether to initiate or continue prosecutions;
    - conduct prosecutions before the courts;
    - may appeal or conduct appeals concerning all or some court decisions.

3. In certain criminal justice systems, public prosecutors also:

    - implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
    - conduct, direct or supervise investigations;
    - ensure that victims are effectively assisted;
    - decide on alternatives to prosecution;
    - supervise the execution of court decisions;
    - etc.

Safeguards provided to public prosecutors for carrying out their functions

4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors.

5. States should take measures to ensure that:

    a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;

    b. the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience;

    c. the mobility of public prosecutors is governed also by the needs of the service;

d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review;

f. public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected;

g. public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions.

6. States should also take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should 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 or international organisations and attend their meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. The rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional[255] position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available.

7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

a. the principles and ethical duties of their office;

b. the constitutional and legal protection of suspects, victims and witnesses;

c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;

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255. The word "constitutional" is used here with reference to the legally established aims and powers of the public prosecutor, not to the Constitution of any state.

d. principles and practices of organisation of work, management and human resources in a judicial context;

e. mechanisms and materials which contribute to consistency in their activities.

Furthermore, states should take effective measures to provide for additional training on specific issues or in specific sectors, in the light of present-day conditions, taking into account in particular the types and the development of criminality, as well as international co-operation on criminal matters.

8. In order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.

9. With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter.

10. All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.

Relationship between public prosecutors and the executive and legislative powers

11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.

13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;

b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;

c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;

d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

- to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;
- duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;
- to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;

e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;

f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.

15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should co-operate with government agencies and institutions in so far as this is in accordance with the law.

16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

Relationship between public prosecutors and court judges

17. States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.

18. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.

20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.

Relationship between public prosecutors and the police

21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.

22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:

    a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police.

Duties of the public prosecutor towards individuals

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

a. carry out their functions fairly, impartially and objectively;

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

c. seek to ensure that the criminal justice system operates as expeditiously as possible.

25. Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.

26. Public prosecutors should ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage.

27. Public prosecutors should not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.

28. Public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence.

29. Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law – any information which they possess which may affect the justice of the proceedings.

30. Public prosecutors should keep confidential information obtained from third parties, in particular where the presumption of innocence is at stake, unless disclosure is required in the interest of justice or by law.

31. Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible.

32. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.

33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

35. States should ensure that in carrying out their duties, public prosecutors are bound by "codes of conduct". Breaches of such codes may lead to appropriate sanctions in accordance with paragraph 5 above. The performance of public prosecutors should be subject to regular internal review.

36.

    a. With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to:

        - give prime consideration to hierarchical methods of organisation, without however letting such organisational methods lead to ineffective or obstructive bureaucratic structures;

        - define general guidelines for the implementation of criminal policy;

        - define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.

    b. The above-mentioned methods of organisation, guidelines, principles and criteria should be decided by parliament or by government or, if

national law enshrines the independence of the public prosecutor, by representatives of the public prosecution.

c. The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.

International co-operation

37. Despite the role that might belong to other organs in matters pertaining to international judicial co-operation, direct contacts between public prosecutors of different countries should be furthered, within the framework of international agreements where they exist or otherwise on the basis of practical arrangements.

38. Steps should be taken in a number of areas to further direct contacts between public prosecutors in the context of international judicial co-operation. Such steps should in particular consist in:

    a. disseminating documentation;

    b. compiling a list of contacts and addresses giving the names of the relevant contact persons in the different prosecuting authorities, as well as their specialist fields, their areas of responsibility, etc;

    c. establishing regular personal contacts between public prosecutors from different countries, in particular by organising regular meetings between Prosecutors General;

    d. organising training and awareness-enhancing sessions;

    e. introducing and developing the function of liaison law officers based in a foreign country;

    f. training in foreign languages;

    g. developing the use of electronic data transmission;

    h. organising working seminars with other states, on questions regarding mutual aid and shared crime issues.

39. In order to improve rationalisation and achieve co-ordination of mutual assistance procedures, efforts should be taken to promote:

    a. among public prosecutors in general, awareness of the need for active participation in international co-operation, and

b. the specialisation of some public prosecutors in the field of international co-operation.

To this effect, states should take steps to ensure that the public prosecutor of the requesting state, where he or she is in charge of international co-operation, may address requests for mutual assistance directly to the authority of the requested state that is competent to carry out the requested action, and that the latter authority may return directly to him or her the evidence obtained.

European Charter on the statute for judges and Explanatory Memorandum

(DAJ/DOC (98))

The participants at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Having referred to Recommendation No R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges, and having made their own, the objectives which it expresses;

Being concerned to see the promotion of judicial independence, necessary for the strengthening of the pre-eminence of law and for the protection of individual liberties within democratic states, made more effective;

Conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States;

Desiring to see the judges' statutes of the different European States take into account these provisions in order to ensure in concrete terms the best level of guarantees;

Have adopted the present European Charter on the statute for judges.

1. General Principles

1.1 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. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

1.2 In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.

1.3 In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4 The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

1.5 Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

1.6 The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

1.7 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.

1.8 Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

2. Selection, Recruitment and Initial Training

2.1 The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, 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.

2.2 The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

2.3 The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

3. Appointment and Irremovability

3.1 The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.2 The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

3.3 Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4 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.

4. Career Development

4.1 When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

4.2 Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3 Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

4.4 The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

5. Liability

5.1 The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.2 Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of

legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

5.3 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.

6. Remuneration and Social Welfare

6.1 Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2 Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3 The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4 In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. Termination of Office

7.1 A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2 The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

Explanatory Memorandum

1. General Principles

The provisions of the European Charter cover not only professional but also non-professional judges, because it is important that all judges should enjoy certain safeguards relating to their recruitment, incompatibilities, conduct outside, and the termination of their office. However, the Charter also lays down specific provisions on professional judges, and in fact this specificity is inherent in certain concepts such as careers.

The provisions of the Charter concern the statute for judges of all jurisdictions to which people are called to submit their case or which are called upon to decide their case, be it a civil, criminal, administrative or other jurisdiction.

1.1 The Charter endeavours to define the content of the statute for judges on the basis of the objectives to be attained: ensuring the competence, independence and impartiality which all members of the public are entitled to expect of the courts and judges entrusted with protecting their rights. The Charter is therefore not an end in itself but rather a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.

These safeguards on individuals' rights are ensured by judicial competence, in the sense of ability, independence and impartiality. These are positive references because the judge's statute must strive to guarantee them; however, they are also negative because the statute must not include any element which might adversely affect public confidence in such competence, independence and impartiality.

The question arose whether the provisions of the Charter should be mandatory, i.e. whether it should be made compulsory to include them in national statutes regulating the judiciary, or whether they should have the force of recommendations, so that different provisions deemed capable of ensuring equivalent guarantees could be implemented instead.

The latter approach could be justified by a reluctance to criticise national systems in which a long-standing, well-established practice has ensured effective guarantees on statutory protection of the judiciary, even if the system barely mentions such protection.

However, it has also been argued that in a fair number of countries, including new Council of Europe member States, which do not regulate the exercise by political authorities of powers in the area of appointing, assigning, promoting or terminating the office of judges, the safeguards on competence, independence and impartiality are ineffective.

This is why, even though the Charter's provisions are not actually mandatory, they are presented as being the optimum means of ensuring that the aforementioned objectives are attained.

Many of the Charter's provisions are inapplicable in systems where judges are directly elected by the citizens. It would have been impossible to draw up a Charter exclusively comprising provisions compatible with such elective systems, as this would have reduced the text to the lowest common denominator. Nor is the Charter aimed at "invalidating" elective systems, because where they do exist they may be regarded by nationals of the countries concerned as "quintessentially democratic". We might consider that the provisions apply as far as possible to systems in which the judiciary is elected. For instance, the provisions set out in paragraphs 2.2 and 2.3 (first sentence) are certainly applicable to such systems, for which they provide highly appropriate safeguards.

The provisions of the Charter aim to raise the level of guarantees in the various European States. The importance of such raising will depend on the level already achieved in a country. But the provisions of the Charter must not in any way serve as the basis for modifying national statutes so as on the contrary to decrease the level of guarantees already achieved in any one country.

1.2 The fundamental principles constituting a statute for judges, determining the safeguard on the competence, independence and impartiality of the judges and courts, must be enacted in the normative rules at the highest level, that is to say in the Constitution, in the case of European States which have established such a basic text. The rules included in the statute will normally be enacted at the legislative level, which is also the highest level in States with flexible constitutions.

The requirement to enshrine the fundamental principles and rules in legislation or the Constitution protects the latter from being amended under a cursory procedure unsuited to the issues at stake. In particular, where the fundamental principles are enshrined in the Constitution, it prevents the enactment of legislation aimed at or having the effect of infringing them.

In stipulating that these principles must be included in domestic legal systems, the Charter is not prejudging the respect that is due under such systems for protective provisions set out in international instruments binding upon the European States. This is especially true because the Charter takes the foremost among these provisions as a source of inspiration, as stated in the preamble.

1.3 The Charter provides for the intervention of a body independent from the executive and the legislature where a decision is required on the selection,

recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the official appointments body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal so to do.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision.

The question arose of the membership of the independent body. The Charter at this point stipulates that at least one half of the body's members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges.

1.4 The Charter enshrines the "right of appeal" of any judge who considers that his or her rights under the statute or more generally independence, or that of the legal process, is threatened or infringed in any way, so that he or she can refer the matter to an independent body as described above.

This means that judges are not left defenceless against an infringement of their independence. The right of appeal is a necessary safeguard because it is mere wishful thinking to set out principles to protect the judiciary unless they are consistently backed with mechanisms to guarantee their effective implementation. The intervention of the independent body before any decision is taken on the judge's individual status does not necessarily cover all possible situations in which his or her independence is affected, and it is vital to ensure that judges can apply to this body on their own initiative.

The Charter stipulates that the body thus applied to must have the power to remedy the situation affecting the judge's independence of its own accord, or to propose that the competent authority remedy it. This formula takes account of the diversity of national systems, and even a straightforward recommendation from an independent body on a given situation provides a considerable incentive for the authority in question to remedy the situation complained of.

1.5 The Charter sets out the judge's main duties in the exercise of his or her functions.

"Availability" refers both to the time required to judge cases properly and to the attention and alertness that are obviously required for such important duties, since it is the judge's decision that safeguards individual rights. Respect for individuals is particularly vital in positions of power such as that occupied by the judge, especially since individuals often feel very vulnerable when confronted with the judicial system. This paragraph also mentions the judge's obligation to respect the confidentiality of information which comes to his or her attention in the course of proceedings. It ends by pointing out that judges must ensure that they maintain the high level of competence that the hearing of cases demands. This means that the high level of competence and of ability is a constant requirement for the judge in examining and adjudicating on cases, and also that he or she must maintain this high level, if necessary through further training. As is pointed out later in the text, judges must be granted access to training facilities.

1.6 The Charter makes it clear that the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

Without explicit indication of this obligation which is the responsibility of the State, the justifications of the propositions related to the responsibility of the judges would be deteriorated.

1.7 The Charter recognises the role of professional associations formed by judges, to which all judges are freely entitled to adhere, which precludes any form of legal discrimination vis-à-vis the right to join them. It also points out that such associations contribute in particular to the defence of judges' statutory rights before such authorities and bodies as may be involved in decisions affecting them. Judges may therefore not be prohibited from forming or adhering to professional associations.

Although the Charter does not assign these associations exclusive responsibility for defending judges' statutory rights, it does indicate that their contribution to such defence before the authorities and bodies involved in decisions affecting judges must be recognised and respected. This applies, inter alia, to the independent authority referred to in paragraph 1.3.

1.8 The Charter provides that judges should be associated through their representatives, particularly those that are members of the authority referred to in paragraph 1.3, and through their professional associations, with any decisions taken on the administration of the courts, the determination of the courts' budgetary resources and the implementation of such decisions at the local and national levels.

Without advocating any specific legal form or degree of constraint, this provision lays down that judges should be associated in the determination of the overall judicial budget and the resources earmarked for individual courts, which implies establishing consultation or representation procedures at the national and local levels. This also applies more broadly to the administration of justice and of the courts. The Charter does not stipulate that judges should be responsible for such administration, but it does require them not to be left out of administrative decisions.

Consultation of judges by their representatives or professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, should ensure that judges are not left out of the decision-making process in these fields. Nevertheless, the Charter does not authorise encroachment on the decision-making powers vested in the national bodies responsible for such matters under the Constitution.

2. Selection, Recruitment and Initial Training

2.1 Judicial candidates must be selected and recruited by an independent body or panel.

The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used, provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure.

The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things.

The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Lastly, selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or political opinions or religious conviction.

2.2 In order to ensure the ability to carry out the duties involved in judicial office, the rules on selection and recruitment must set out requirements as to qualifications and previous experience. This applies, for instance, to systems in which recruitment is conditional upon a set number of years' legal or judicial experience.

2.3 The nature of judicial office, which requires the judge to intervene in complex situations that are often difficult in terms of respect for human dignity, is such that "abstract" verification of aptitude for such office is not enough.

Candidates selected to discharge judicial duties must therefore be prepared for the task by means of appropriate training, which must be financed by the State.

Certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training

programmes and the functioning of the bodies implementing them. This is why the Charter provides that the authority referred to in paragraph 1.3 must ensure the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The said authority must have the resources so to ensure. Accordingly, the rules set out in the the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programmes and their implementation by the training bodies.

3. Appointment and Irremovability

3.1 National systems may draw a distinction between the actual selection procedure and the procedures of appointing a judge and assigning him or her to a specific court. It should be noted that decisions to appoint or assign judges are taken by the independent authority referred to at paragraph 1.3 hereof or are reached upon its proposal or recommendation or with its agreement or following its opinion.

3.2 The Charter deals with the question of incompatibilities. It discarded the hypothesis of absolute incompatibilities as this would hamper judicial appointments on the grounds of candidates' or their relatives' previous activities. On the other hand, it considers that when a judge is to be assigned to a specific court, regard must be had to the above-mentioned circumstances where they give rise to legitimate and objective doubts as to his or her impartiality and independence. For example, a lawyer who has previously practised in a given town cannot possibly be immediately assigned as a judge to a court in the same town. It is also difficult to imagine a judge being assigned to a court in a town in which his or her spouse, father or mother, for instance, is mayor or member of parliament. Therefore, where judges are to be assigned to a given court, the relevant statute must take account of situations liable to give rise to legitimate and objective doubts as to their independence and impartiality.

3.3 The recruitment procedure in some national systems provides for a probationary period before a permanent judicial appointment is made, and others recruit judges on fixed-term renewable contracts.

In such cases the decision not to make a permanent appointment or not to renew an appointment can only be taken by the independent authority referred to at paragraph 1.3 hereof or upon its proposal, recommendation or following its opinion. Clearly, the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed. Safeguards must therefore be provided through the intervention of the independent authority.

In so far as the quality as a judge of an individual who is the subject of a trial period may be under discussion, the Charter lays down that the right to make a reference to an independent authority, as referred to in paragraph 1.4, is applicable to such an individual.

3.4 The Charter enshrines the irremovability of judges, which means that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is provided for within a disciplinary framework, when a lawful re-organization of the court system takes place involving for example the closing down of a court or a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute.

Nevertheless, since the problem of transferring a judge without his or her consent is highly sensitive, it is recalled that under the terms of paragraph 1.4 he or she has a general right of appeal before an independent authority, which can investigate the legitimacy of the transfer. In fact, this right of appeal can also remedy situations which have not been specifically catered for in the provisions of the Charter where a judge has such an excessive workload as to be unable in practice to carry out his or her responsibilities normally.

4. Career Development

4.1 Apart from cases where judges are promoted strictly on the basis of length of service, a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence, but which presupposes that high-quality recruitment will be absolutely guaranteed in the countries concerned, it is important to ensure that the judge's independence and impartiality are not infringed in the area of promotion. It must be specified that there are two potential issues here: judges illegitimately barred from promotion, and judges unduly promoted.

This is why the Charter defines the criteria for promotion exclusively as the qualities and merits observed in the performance of judicial duties by means of objective assessments carried out by one or more judges and discussed with the judge assessed.

Decisions concerning promotion are then taken on the basis of these assessments in the light of the proposal by the independent authority referred to in paragraph 1.3 or upon its recommendation or with its agreement or following its opinion. It is expressly stipulated that a judge who is proposed with a view to promotion submitted for examination by the independent authority must be entitled to present his or her case before the said authority.

The provisions of paragraph 4.1 are obviously not intended to apply to systems in which judges are not promoted, and there is no judicial hierarchy, systems which are also in this regard highly protective of judicial independence.

4.2 The Charter deals here with activities conducted alongside judicial functions. It provides that judges may freely exercise activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom, which constitutes the principle, may not know of limitation except only in so far as judges engage in outside activities incompatible either with public confidence in their impartiality and independence or with the availability required to consider the cases submitted to them with due care and within a reasonable time.

The Charter does not specify any particular type of activity. The negative effects of outside activities on the conditions under which judicial duties are discharged must be pragmatically assessed. The Charter stipulates that judges should request authorisation to engage in activities other than literary or artistic when they are remunerated.

4.3 The Charter addresses the question of what is sometimes called "judicial discretion". It adopts a position which derives from Article 6 of the European Convention on Human Rights and the case-law of the European Court of Human Rights thereupon, laying down that judges must refrain from any behaviour, action or expression likely to affect public confidence in their impartiality and independence. The reference to the risk of such confidence being undermined obviates any excessive rigidity which would result in the judge becoming a social and civic outcast.

4.4 The Charter lays down "the judge's right to in-house training": he or she must have regular access to training courses organized at public expense, aimed at ensuring that judges can maintain and improve their technical, social and cultural skills. The State must ensure that such training programmes are so organised as to respect the conditions set out in paragraph 2.3, which relate to the role of the independent authority referred to in paragraph 1.3, in order to guarantee appropriateness in the content of training courses and in the functioning of the bodies implementing such courses, to the requirements of open-mindedness, competence and impartiality.

The definition of these guarantees set out in paragraphs 2.3 and 4.4 on training is very flexible, enabling them to be tailored to the various national training systems: training colleges administered by the Ministry of Justice, institutes operating under the higher council of judges, private law foundations, etc.

5. Liability

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' Statute.

Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

5.2 Here the Charter relates to judges' civil and pecuniary liability. It posits the principle that State compensation shall be paid for damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions whilst acting as a judge. This means that it is the State which is in every case the guarantor of compensation to the victim for such damage.

In specifying that such a State guarantee applies to damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions, the Charter does not necessarily refer to the wrongful or unlawful nature of the conduct or of the exercise of functions, but rather emphasises the damage sustained as a result of that "wrongful" or "unlawful" nature. This is fully compatible with liability based not upon misconduct by the judge, but upon the abnormal, special and serious nature of the damage resulting from his or her wrongful conduct or unlawful exercise of functions. This is important in the light of concerns that judges' judicial independence should not be affected through a civil liability system.

The Charter also provides that, when the damage which the State had to guarantee is the result of a gross and inexcusable breach of the rules governing the performance of judicial duties, the statute may confer on the State the possibility of bringing legal proceedings with a view to requiring the judge to reimburse it for the compensation paid within a limit fixed by the statute. The requirement for gross and inexcusable negligence and the legal nature of the proceedings to obtain reimbursement must constitute significant guarantees

that the procedure is not abused. An additional guarantee is provided by way of the prior agreement which the authority referred to at paragraph 1.3 must give before a claim may be submitted to the competent court.

5.3 Here the Charter looks at the issue of complaints by members of the public about miscarriages of justice.

States have organised their complaints procedures to varying degrees, and it is not always very well organised.

This is why the Charter provides for the possibility to be open to an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities. Were full and careful consideration by such a body to reveal a clear prima facie disciplinary breach by a judge, the body concerned would have the power to refer the matter to the disciplinary authority having jurisdiction over judges, or at least to a body competent, under the rules of the national statute, to make such referral. Neither this body nor this authority will be constrained to adopt the same opinion as the body to which the complaint was made. In the outcome there are genuine guarantees against the risks of the complaints procedure being led astray by those to be tried, desiring in reality to bring pressure to bear on the justice system.

The independent body concerned would not necessarily be designed specifically to verify whether judges have committed breaches. Judges have no monopoly on miscarriages of justice. It would therefore be conceivable for this same independent body similarly to refer matters, when it considers such referral justified, to the disciplinary authority having jurisdiction over, or to the body responsible for taking proceedings against lawyers, court officials, bailiffs, etc.

The Charter, however, relating to the judges' statute, has to cover in greater detail only the matter of referral relating to judges.

6. Remuneration and Social Welfare

The provisions under this heading relate only to professional judges.

6.1 The Charter provides that the level of the remuneration to which judges are entitled for performing their professional judicial duties must be set so as to shield them from pressures intended to influence their decisions or judicial conduct in general, impairing their independence and impartiality.

It seemed preferable to state that the level of the remuneration paid had to be such as to shield judges from pressures, rather than to provide for this level to be set by reference to the remuneration paid to holders of senior

posts in the legislature or the executive, as the holders of such posts are far from being treated on a comparable basis in the different national systems.

6.2 The level of remuneration of one judge as compared to another may be subject to variations depending on length of service, the nature of the duties which they are assigned to discharge and the importance of the tasks which are imposed on them, such as weekend duties. However, such tasks justifying higher remuneration must be assessed on the basis of transparent criteria, so as to avoid differences in treatment unconnected with considerations relating to the work done or the availability required.

6.3 The Charter provides for judges to benefit from social security, i.e protection against the usual social risks, namely illness, maternity, invalidity, old age and death.

6.4 It specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. Termination of Office

7.1 Vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment. These are when a judge resigns, is medically certified as physically unfit for further judicial office, reaches the age limit, comes to the end of a fixed term of office or is dismissed in the context of disciplinary liability.

7.2 On occurrence of the events which are grounds for termination of employment other than the ones - ie the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by the authority referred to in paragraph 1.3. This condition is easily realised when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement.

B. Treaty Norms

European Convention for the Protection of Human Rights and Fundamental Freedoms

(Adopted in Rome on 4 September 1950)

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

C. Other Standards

Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism

(Adopted on 15 July 2002)

IX. Legal proceedings

1. 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.

4. Inter-American System

A. Treaty Norms

American Convention on Human Rights

(Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.

B. Declaratory Norms

American Declaration of the Rights and Duties of Man

(Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

Article XXVI

Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Inter-American Democratic Charter

(Adopted by the OAS General Assembly at its special session held in Lima, Peru, 11 September, 2001)

Article 3

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms [...] and the separation of powers and independence of the branches of government.

Article 4

[...]

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.

5. African System

A. Specific standards on the independence of judges, lawyers and prosecutors

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

(Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of AU held in Maputo from 4-12 July 2003)

A. General Principles Applicable To All Legal Proceedings

Fair and Public Hearing

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.

4. Independent tribunal

(a) 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;

(b) 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 whether an issue submitted for decision is within the competence of a judicial body as defined by law;

(d) A judicial body's jurisdiction may be determined, inter alia, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties;

(e) 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;

(f) 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;

(g) All judicial bodies shall be independent from the executive branch.

(h) 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.

(i) 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.

(j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:

1. prescribe a minimum age or experience for candidates for judicial office;

2. prescribe a maximum or retirement age or duration of service for judicial officers;

3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;

4. require that only nationals of the state concerned shall be eligible for appointment to judicial office.

(k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

(l) Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.

(m) The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.

(n) Judicial officers shall not be:

1. liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions;

2. 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;

3. appointed under a contract for a fixed term.

(o) Promotion of judicial officials shall be based on objective factors, in particular ability, integrity and experience.

(p) 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.

(q) 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.

(r) 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.

(s) 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.

(t) 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.

(u) States may establish independent or administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery processes of judicial bodies. Such mechanisms, which shall be constituted in equal part of members the judiciary and representatives of the Ministry responsible for judicial affairs, may include processes for judicial bodies receiving and processing complaints against its officers.

(v) States shall endow judicial bodies with adequate resources for the performance of their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.

5. Impartial Tribunal

(a) A judicial body shall base its decision only on objective evidence, arguments and facts presented before it. 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.

(b) Any party to proceedings before a judicial body shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of the judge or judicial body appears to be in doubt.

(c) The impartiality of a judicial body could be determined on the basis of three relevant facts:

1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;

2. the judicial officer may have expressed an opinion which would influence the decision-making;

3. the judicial official would have to rule on an action taken in a prior capacity.

(d) The impartiality of a judicial body would be undermined when:

1. a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;

2. a judicial official secretly participated in the investigation of a case;

3. a judicial official has some connection with the case or a party to the case;

3. a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down.

(e) A judicial official may not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.

B. Judicial Training

(a) States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.

(b) States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.

(c) States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation.

[...]

F. Role Of Prosecutors

(a) States shall ensure that:

1. Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law, including the Charter.

2. Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

(b) Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, housing, transport, conditions of physical and social security, pension and age of retirement and other conditions of service shall be set out by law or published rules or regulations.

(c) Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

(d) Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

(e) Prosecutors 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.

(f) The office of prosecutors shall be strictly separated from judicial functions.

(g) Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with

local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of decisions of judicial bodies and the exercise of other functions as representatives of the public interest.

(h) 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.

(i) In the performance of their duties, prosecutors shall:

1. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;

2. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

3. keep matters in their possession confidential, unless the performance of duty or needs of justice require otherwise;

4. consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the provisions below relating to victims.

(j) Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

(k) 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.

(l) When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

(m) In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, judicial bodies, the legal profession, paralegals, non-governmental organisations and other government agencies or institutions.

(n) Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors, which allege that they acted in a manner that is inconsistent with professional standards, shall be processed expeditiously and fairly under appropriate procedures prescribed by law. Prosecutors shall have the right to a fair hearing including the right to be represented by a legal representative of their choice. The decision shall be subject to independent review.

(o) Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

[...]

I. Independence Of Lawyers

(a) States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

(b) 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.

(c) States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

(d) 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.

(e) 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 judicial body or other legal or administrative authority.

(f) Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

(g) Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

(h) Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

(i) 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.

(j) Lawyers shall always loyally respect the interests of their clients.

(k) 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 the protection of human rights and to join or form local, national or 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 the recognized standards and ethics of the legal profession.

(l) 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.

(m) 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.

(n) 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.

(o) 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.

(p) 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.

[...]

L. Right Of Civilians Not To Be Tried By Military Courts

(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.

[...]

Q. Traditional Courts

[...]

(c) 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.

(d) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.

1. The impartiality of a traditional court would be undermined when one of its members has:

1.1 expressed an opinion which would influence the decision-making;

1.2 some connection or involvement with the case or a party to the case;

1.3 a pecuniary or other interest linked to the outcome of the case.

2. Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness any of its members or the traditional court appears to be in doubt.

(e) The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

B. Treaty Norms

African Charter on Human and Peoples' Rights

(Adopted 27 June 1981, entered into force 21 October 1986)

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

African Charter on the Rights and Welfare of the Child

(Entered into force 29 November 1999)

Article 17: Administration of Juvenile Justice

[...]

2. States Parties to the present Charter shall in particular:

   [...]

   (c) ensure that every child accused in infringing the penal law:

   [...]

   (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

6. European Union

Charter of Fundamental Rights of the European Union

(Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council on 7 December 2000)

Chapter VI: Justice

Article 47: Right to an effective remedy and to a fair trial

[...]

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

7. Asia-Pacific

Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

(Adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001)

Judicial Independence

1. The Judiciary is an institution of the highest value in every society.

2. 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.

   An independent Judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that:

   (a) 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 or indirect, from any source; and

   (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

4. 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.

5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.

6. In the decision-making process, any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3 (a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9. 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.

Objectives of the Judiciary

10. 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 persons and between persons and the State.

Appointment of Judges

11. To enable the Judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, 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.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the Judiciary is a career service; in other, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

Tenure

18. Judges must have security of tenure.

19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.

20. However, it is recommended that all judges exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.

22. 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.

23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining

whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgments in disciplinary proceedings, whether held *in camera* or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one Jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the Judiciary, such consent shall not be unreasonably withheld by an individual judge.

Judicial Conditions

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Jurisdiction

33. 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.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

Relationship with the Executive

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

Resources

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

Emergency

43. Some derogations from judicial independence may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. 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 persons administratively without charge shall be subject to review by courts or other independent authority by way of *habeas corpus* or similar procedures.

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

8. Commonwealth

Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence

(Adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association)

[...]

II. Preserving Judicial Independence

1. Judicial appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

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.

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.

Judicial vacancies should be advertised.

2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

3. Training

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.

[...]

V. Judicial and Parliamentary Ethics

1. Judicial Ethics

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;

[...]

VI. Accountability Mechanisms

1. Judicial Accountability

(a) Discipline:

In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

(i) inability to perform judicial duties; and serious misconduct.

(ii) In all other matters, the process should be conducted by the chief judge of the courts;

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism:

(i) Legitimate public criticism of judicial performance is a means of ensuring accountability;

(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

[...]

VII. The Role of Non-Judicial and Non-Parliamentary Institutions

[...]

2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.

3. An independent, organised legal profession is an essential component in the protection of the rule of law.

4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.

5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.

6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.

[...]

Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government

(As agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003)

[...]

I) The Three Branches of Government

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

II) Parliament and the Judiciary

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

[...]

IV) Independence of the Judiciary

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. 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.

To secure these aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

- equality of opportunity for all who are eligible for judicial office;
- appointment on merit; and
- that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

V) Public Office Holders

(a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;

(b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

VI) Ethical Governance

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

VII) Accountability Mechanisms

[...]

(b) Judicial Accountability

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.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, 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.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

(c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

[...]

9. International Humanitarian Law

Article 3 Common to the Four Geneva Conventions of 1949

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

[...]

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Article 75. Fundamental guarantees

[...]

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure,

[...]

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Article 6. Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

[...]

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