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Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Carina Knaul de Albuquerque e Silva*

Summary

The report of the Special Rapporteur on the Independence of Judges and Lawyers examines the need for continuing education in international human rights law for magistrates, judges, prosecutors, public defenders and lawyers. The report begins by stressing the interconnected nature of the rule of law, democracy, the principle of separation of powers and the independence of the judiciary and the independence and impartiality of magistrates and judges. It refers to efforts that have already been undertaken by organs of the international community to identify the need for continuing legal education and training to enable magistrates, judges and lawyers to apply international human rights standards, norms and principles in the consideration of domestic cases.

The Special Rapporteur notes that, despite numerous reports, declarations and resolutions by international organs, there is still a considerable gap between the continuing human rights legal education offered to judges and lawyers, and the outcomes obtained with regard to the application of international human rights law in specific domestic cases. The Special Rapporteur considers that either capacity-building provision has been insufficient, or the tools and methodology used were not the most appropriate. Whatever the case, the specificities inherent to judges and lawyers, and their different levels and categories, should always be considered when designing or implementing human rights education programmes.

The report also notes that magistrates, judges, prosecutors and lawyers are faced with various difficulties with regard to attending continuing education programmes: work overload; high cost of training courses and seminars; lack of opportunity to attend courses, etc. The Special Rapporteur considers that if the objectives of having strong judiciaries and

* Late submission.

independent and impartial judges are to be reached, it is necessary to further explore existing educational possibilities, projects and programmes.

The report emphasizes that this problem should be tackled in two stages: first, a global thematic study should be carried out at the international level to assess the human rights education and continuing training of magistrates, judges, prosecutors, public defenders and lawyers. This would provide the scientific basis for a second stage, an international conference on the ways in which legal human rights education and training are to be provided.

The Special Rapporteur considers that she may play a role in stimulating the creation of a network for the exchange of judicial experiences, particularly between countries from the North and countries from the South; and from the East and the West. It should also be useful to create an international database so as to give States access not only to technical assistance, but also to best practices and case law on which they can base their own practice.

Human rights legal education should be provided using the latest training technologies, including interactive sessions, seminars and workshops. Collaboration with professionals from the education and technological sectors should also be investigated. Judicial human rights education, including continuous learning, should be designed in the broader context of judicial development strategies.

The report also describes, in chapter II, the Special Rapporteur's activities between August 2009 and February 2010, including country visits conducted during this period. In chapter IV, the report indicates the main recent developments in the area of international justice by looking at developments in cases before the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The Special Rapporteur's conclusions and recommendations are presented in chapter V, which focuses on measures to be taken to strengthen the legal education and capacity-building of magistrates, judges, prosecutors, public defenders and international human rights lawyers.

Contents

I. Introduction

1. Gabriela Carina Knaul de Albuquerque e Silva took up her functions as Special Rapporteur on the independence of judges and lawyers on 1 August 2009. This is her first thematic report to the Human Rights Council. The report examines the need for the provision of adequate human rights education for judges and lawyers in order for them to discharge their function of applying human rights principles and standards in an independent manner.

2. In analysing this complex topic, the Special Rapporteur refers to international and regional principles, norms and standards relevant to the independence of the judiciary and of lawyers, the work of the United Nations human rights treaty bodies and special procedures and the observations of her two predecessors, Param Cumaraswamy and Leandro Despouy.

II. Activities of the Special Rapporteur

A. International meetings

3. In September 2009, the Special Rapporteur participated in an induction session for new special procedures mandate holders organized by the Office of the High Commissioner for Human Rights (OHCHR). On this occasion, the Special Rapporteur met the permanent representatives of Azerbaijan, Colombia and Hungary to the United Nations Office at Geneva and members of several non-governmental organizations working in areas relevant to her mandate.

4. In October 2009, the Special Rapporteur attended the sixty-fourth session of the General Assembly, at which she outlined her vision of the mandate and presented the final report of her predecessor (A/63/271), which analysed safeguards to be established at the domestic level in order to ensure the independence of lawyers and the legal profession. On this occasion, the Special Rapporteur held a meeting with the Permanent Representative of Fiji to the United Nations. She also met the Rule of Law and Justice Adviser of the United Nations Development Programme and staff of the United Nations Department of Political Affairs and non-governmental organizations, among them, Lawyers for Lawyers.

5. On 9 and 10 November 2009, the Special Rapporteur was a keynote speaker at a meeting held in Brazil on the drafting of an Ibero-American regional treaty aimed at ensuring the independence of the judiciary.

6. On 16 and 17 November 2009, the Special Rapporteur attended the Colloquium for Judges, on Equality and Non-Discrimination, held in Bandos, Maldives, and gave a presentation on the role of judges in the application of international standards.

B. Country visits

7. At the invitation of the Government of Colombia, the Special Rapporteur visited the country from 7 to 16 December 2009. The resulting mission report is contained in addendum 2 to the present report. The Special Rapporteur wishes to thank the Government of Colombia for its cooperation before and during the visit.

8. The Government of Mexico has invited the Special Rapporteur to carry out an official mission to the country during the second half of 2010.

9. The Special Rapporteur recalls that the following country visit requests are pending: Angola (requested in 2008); Bangladesh (2007); Cambodia (2006); Cuba (1995); Egypt (1999); Equatorial Guinea (2002); Fiji (2007); Iran (Islamic Republic of) (2006); Iraq (2008); Kenya (2000); Myanmar (2009); Nigeria (1995); Pakistan (2000); Philippines (2006); Sri Lanka (1999); Tunisia (1997); Turkmenistan (1996); Uzbekistan (1996) and Zimbabwe (2001).

10. During the first quarter of 2010, the Special Rapporteur sent reminders to Fiji and Kenya. She has also sent new requests for country visits to Bulgaria, Burundi, Guinea-Bissau, Liberia, Mozambique and Romania.

C. Press statements

11. On 5 October 2009, the Special Rapporteur issued a press statement on the lack of transparency in the elections of the Supreme Court of Guatemala noting her disappointment that the recommendations made by her predecessor, Leandro Despouy, had not been taken into account.[1]

12. On 16 December 2009, the Special Rapporteur and the Chair-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteur on the situation of human rights defenders expressed their deep concern about the arrest of a judge in Venezuela. The judge was immediately arrested after having ordered the conditional release pending trial of a detainee whose detention had been declared arbitrary by the United Nations Working Group on Arbitrary Detention on 1 September 2009, on the basis of serious violations of the right to fair trial. In spite of the appeal of the special procedures mandate holders, the Venezuelan judge continues to be held in an ordinary prison, alongside inmates convicted by her.

13. On 10 December 2009, on the occasion of the sixty-first anniversary of the adoption of the Universal Declaration of Human Rights, and together with other special procedures mandate holders, the Special Rapporteur issued a joint statement calling for stronger global commitments and more determined action to defeat discrimination.

14. On 8 March, the Special Rapporteur issued, jointly with other special procedures mandate holders, a press statement on International Women's Day calling for a new vision of women's rights informed by the lessons learned from the 15-year review of the implementation of the Beijing Platform for Action.

D. Other activities

15. A summary of communications sent to various Governments and the responses received for the reporting period is contained in addendum 1 to this report.

16. The Special Rapporteur was one of a group of seven independent experts invited by the Human Rights Council, in its resolution 10/33, to submit a report with recommendations on the human rights situation in the Democratic Republic of the Congo. The report (A/HRC/13/56) was presented to the thirteenth session of the Human Rights Council.

[1] See http://www.oacnudh.org.gt/documentos/comunicados/20097211239370.ComunicadoRelator Despouy(21jul2009)%20(3).pdf.

III. Continuing education on human rights as a guarantee for the independence of judges and lawyers

A. The rule of law, democracy, the principle of separation of powers and the independence of the judiciary

17. The former Commission on Human Rights identified the independence of the judiciary and the separation of powers as two essential elements of democracy.[2] Separation of powers, the rule of law and the principle of legality are inextricably linked in a democratic society. The independence of the judiciary is a core component of democracy, the rule of law and good governance. It should be strengthened both in an institutional manner, vis-à-vis other branches of power, as well as in an individual manner (independence of the judges). States should respect the United Nations Basic Principles on the Independence of the Judiciary, the United Nations Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors.

18. In the reports of her predecessor to the Human Rights Council (A/HRC/11/41) and the General Assembly (A/64/181), an extensive analysis of parameters and safeguards to strengthen the independence of judges and lawyers was presented. In both reports, appropriate legal education for judges and lawyers was described as a determining factor for their independence.[3]

B. Efforts undertaken to improve continuing education on human rights for judges, prosecutors and lawyers

19. The quality of the administration of justice has a direct impact on democracy and the development of States, which is the reason why the independence of the legal profession needs to be strengthened. Judges, prosecutors, public defenders and lawyers must be aware of, and sensitive to, human rights standards, principles, rules and jurisprudence, international human rights systems and international and regional courts in order to strengthen democracy, the rule of law and good governance at the national level. They should be competent to interpret and implement international human rights law at the domestic level, in addition to possessing practical administrative and managerial skills.

20. During her presentation to the sixty-fourth session of the General Assembly, the Special Rapporteur stated that she would try to encourage and stimulate periodic regional meetings with all actors in the judicial system. The examples of the Bangalore Principles of Judicial Conduct and the Harare Declaration by senior judges prove the importance of such meetings. The Special Rapporteur also stated that these meetings could involve training on international human rights principles and norms and, in addition, provide an opportunity for the exchange of information and ideas as to how their implementation can best be achieved in national judicial systems. The Special Rapporteur expresses the hope that such meetings will lay the building blocks for a genuinely judicial approach towards the implementation of international human rights norms.

21. Judges, when considering and deciding a case, first and foremost tend to turn to domestic legislation. Likewise, lawyers will, in the first instance, primarily rely on the

[2] See Commission on Human Rights resolution 2002/46 entitled "Further measures to promote and consolidate democracy" para. 1; and resolution 1999/57 on "Promotion of the right to democracy", para. 2.

[3] A/HRC/11/41, paras. 80–84; A/64/181, paras. 28–30.

national legal framework when advising and representing their clients. However, in many countries, there is a norm at the constitutional level prescribing that international treaties ratified by the country form an integral part of national law. In addition, such provisions often state that, in the case of a contradiction, the norms contained in the international legal instruments shall take precedence. In some States, judicial decisions by the highest instance instruct the courts to be guided by relevant international treaties, including human rights instruments.

22. Thus, judges and lawyers are called upon to uphold not only the domestic law, but also international human rights standards. In disputes relating to an alleged violation of fundamental rights and freedoms, human rights are a key pillar in court cases and judicial deliberations. Consequently, judges and lawyers are required to be aware of, and apply, international human rights principles and standards in the cases before them.

23. In this report, the Special Rapporteur analyses the legal framework for adequate awareness-raising and continuing education on international human rights law for judges and lawyers, as well as the corresponding obligations of Member States, judicial bodies and lawyers' associations.

C. The gap between the efforts undertaken and the local situation

24. In most of the countries visited by the Special Rapporteur's two predecessors, insufficient awareness-raising initiatives and a lack of continuing education opportunities for judges and lawyers were apparent. In one of his country mission reports, the former Special Rapporteur, Leandro Despouy, emphasized that lack of adequate training and professional knowledge also means that judges are more easily influenced.[4] The lack of appropriate capacity-building initiatives thus has a direct impact on judges' capacity to render justice independently and impartially. As a consequence, judges and lawyers require opportunities to enhance their capacity to develop argumentation and analyse issues from a human rights perspective. At times, judges may not adjudicate cases with reference to human rights norms as a result of unfamiliarity with, or lack of awareness of, the linkages between human rights and other branches of the law.[5]

25. United Nations human rights treaty bodies and other special procedures have, for their part, established these linkages. The examples mentioned below shed light on the broad array of human rights which are concerned in connection with legal education for judges and lawyers.

26. The Committee on the Elimination of Racial Discrimination, drawing attention to the prevention of racial discrimination in the administration and functioning of the criminal justice system, has called for specific training for those working within the criminal justice system — police officers, lawyers, prosecutors and judges — in order to increase their awareness of relevant provisions of the Criminal Code and the International Convention on the Elimination of All Forms of Racial Discrimination.[6] The Special Rapporteur on violence against women called upon one Member State to set up a training programme for judges to address the international obligations the country had pledged to respect, including those pertaining to women's rights and the protection of women from violence.[7] The Committee on the Elimination of Discrimination against Women called on another Member State to ensure that the Convention on the Elimination of All Forms of Discrimination

[4] A/HRC/8/4/Add.2, para. 23.
[5] See section III. G. below.
[6] CERD/C/MKD/CO/7, para. 19.
[7] A/HRC/11/6/Add.3, para. 95 (c).

against Women, the Committee's general recommendations and related legislation are made an integral part of legal education and training of judicial officers, including judges, prosecutors and lawyers and to ensure that, in particular, judges and officers of tribunals and special courts are familiar with the Convention's and the State's obligations thereunder.

27. The Committee against Torture called upon one Member State to provide adequate training on the prohibition of torture to judges and prosecutors in order to strengthen the independence of the judiciary.[8] The Human Rights Committee has also recommended that particular attention should be given to the training of judges in order to enable them to render justice promptly and impartially.[9]

28. The Office of the United Nations High Commissioner for Human Rights has developed human rights training materials in the field of the administration of justice.[10]

D. Provision of human rights education for judges, prosecutors and lawyers

Judges

29. Courses for judges, prosecutors and lawyers should be grounded in the international human rights standards concerning the administration of justice, in particular article 14 of the International Covenant on Civil and Political Rights and the Basic Principles on the Independence of the Judiciary. According to the Basic Principles and various regional standards,[11] appropriate education is one of the preconditions for selection for judicial office. The Special Rapporteur would like to point to Recommendation No. R (94) 12 issued by the Committee of Ministers of the Council of Europe, which specifically provides for training during the judicial career which should be free of charge and in particular concern recent legislation and case law.[12] The Recommendation further enshrines the duty of the judges to undergo any necessary capacity-building in order to be able to carry out their duties in an efficient and proper manner.

30. The Statute of the Ibero-American Judge states that continuing training, which is generally voluntary, can be mandatory in specific cases such as the taking up of higher judicial duties or major legal reforms. Furthermore, it enshrines continuing training as a right of the judge and an obligation of the judiciary.

Lawyers

31. The Special Rapporteur would like to point out that Principle 9 of the Basic Principles on the Role of Lawyers provides that Governments must ensure that lawyers

[8] CAT/C/CR/34/ALB, paras. 7 (e) and 8 (e).

[9] CCPR/C/79/Add.118, para. 14.

[10] These include a Manual on Human Rights for Judges, Prosecutors and Lawyers; a Handbook of International Standards relating to Pre-trial Detention; a Manual on Human Rights Training for the Police; a Manual on Human Rights Training for Prison Officials; a Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and a Training Manual on Human Rights Monitoring. OHCHR training and educational material is available online at http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducation.aspx.

[11] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, A (4) (i) and (k); Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, (94) 12, Principle III (1); Statute of the Ibero-American Judge, art. 24.

[12] Principle III (1).

have appropriate education and training,[13] so as to be able to exercise the rights and duties set out in Principles 12 to 15, consisting primarily in advising and protecting the rights of their clients and in upholding the cause of justice.

32. The International Bar Association's (IBA) Standards for the Independence of the Legal Profession define the functions of lawyers' associations as including "to promote a high standard of legal education as a prerequisite for entry into the profession". The functions of the lawyers' associations should also include the continuing education of lawyers and the public on the role of a Lawyers' Association. Also, Principle II (2) of Recommendation No. R (2000) 21 of the Committee of Ministers of the Council of Europe, requires that all necessary measures be taken to provide for the continuing education of lawyers.

E. Roles and responsibilities of main stakeholders

Member States

33. The full implementation of all human rights obligation by a State can only be achieved if those obligations are enforced by judicial, administrative and other decisions or actions. States therefore have a specific interest in ensuring that those involved in the administration of justice have appropriate knowledge of human rights norms and are in a position to implement them. It is thus incumbent on the respective authorities and State institutions to put in place a legislative and policy framework facilitating and supporting human rights legal education and training for judges and lawyers.

34. In this context, it is imperative that the legislature ensures that the judiciary receive sufficient funding from the national budget specifically allocated to continuing legal education. The funding should cover the costs of both human and material resources.

Judiciary

35. The judiciary has a critical role to play in assisting in the application of human rights principles and norms binding on the State. The decisions that are made by courts of law can advance, but also hamper, the enjoyment of human rights. Courts may thus contribute considerably to the upholding and implementing by the State of its international human rights obligations by referring to the commitments that the State has undertaken at the international level. The judiciary is central to reinforcing and ensuring accountability for the obligations that the State has undertaken to honour its commitments at the national level. In most jurisdictions, formal recognition of human rights in the constitution is an initial step. At times, the content of the rights has to be interpreted by the courts in cases of conflicting perceptions, vagueness or lack of conceptual clarity. The courts in this regard are important stakeholders in interpreting the standards and their applicability at the domestic level.

36. In this connection, the specific role of judges within the State structure confers upon the judiciary the obligation[14] to provide for stringent entry exams for admission as judges and subsequently for a continuing scheme of legal education.

[13] See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I (a).

[14] See Statute of the Ibero-American Judge.

Lawyers' associations

37. Lawyers' associations and bar associations have a specific interest in maintaining the integrity, appropriate skills and quality of lawyers. An important aspect in this connection is to ensure the highest standards of legal education for admission to the profession, and to maintain these high standards through continuing legal education.[15]

38. Lawyers play a crucial role in the promotion and protection of human rights through client representation, case approaches and legal submissions and argumentation. This facilitates the application of human rights law by the courts.

39. Judges, prosecutors, public defenders and lawyers should receive continuing education on human rights principles, norms, jurisprudence, declarations, guidelines and rules as a means of strengthening the national systems of administration of justice. In countries affected by armed conflict, training should also be provided on international humanitarian law. This should be delivered via standard courses, workshops and seminars.

F. Types of education and awareness-raising

Pre-service education and awareness-raising

40. At the outset, it must be noted that education and awareness-raising play a major role prior to, and throughout, the career of a judge or lawyer. In order to ensure the quality of judges' and lawyers' work, it is necessary in the first place to pay particular attention to the curricula at university law schools and faculties. In several States, university law courses do not follow a unified framework. In this connection, previous Special Rapporteurs have noted that in times of political transition and economic liberalization there is often a "proliferation" of law faculties which operate in the absence of an approved and unified, or at least harmonized, national curriculum.[16] Furthermore, in such situations one often notes shortages of qualified teaching personnel.[17]

41. While in some States there is a specific entry exam and possibly a preparatory and educational period for judges to be selected for office, there is no equivalent admission procedure for lawyers. In a number of States admission to the bar is granted on the basis of a university examination in law. In view of the varying educational quality of such university examinations, this may pose a significant obstacle to the reliability and effectiveness of the professional legal counsel provided by lawyers. The introduction of a mandatory training period prior to admission to the legal profession would certainly enhance the general quality of lawyers' services.[18]

Initial education

42. In some States, judges, upon entry into office, are required to participate in induction courses for the judiciary. In other States, however, owing to the lack of a harmonized framework, the length and content of such courses or initiatives depend on the tribunal or court where the judge takes up his or her duty. In most States, this initially relates to the updating of relevant knowledge in the legal area in which the judges will perform their functions. The Special Rapporteur considers that initial education should also cover basic education on the country's human rights international obligations. Incoming judges should also be made acquainted with the impact of decisions of international or regional judicial or

[15] See IBA Standards for the independence of the legal profession, article 18 h.
[16] E/CN.4/2006/52/Add.4, para. 27; E/CN.4/2006/52/Add.3, para. 55; E/CN.4/2005/60/Add.2, para. 24.
[17] Ibid.
[18] E/CN.4/2006/52/Add.4, para. 93.

quasi-judicial bodies, including treaty bodies and special procedures decisions, on domestic law.

43. Courts should develop and standardize induction courses and legal education programmes.

Continuing legal education

44. Besides the importance of pre-service and initial educational initiatives, particular weight should be given to continuing learning opportunities for judges[19] and lawyers[20] to allow them to discharge their duties independently in accordance with the relevant professional standards and at a satisfactory level. United Nations treaty bodies have also made relevant observations and recommendations in this respect.[21]

45. Previous Special Rapporteurs noted that while, in certain cases, judicial organs have decided on the requirement of continuing legal education, no action had been taken to translate these requirements into legislation. In other cases, legislation reflects the requirement for continuing legal education for judges, but that requirement is not implemented in practice.

46. Courts should introduce and develop programmes of continuing legal education, including a range of presentations, conferences, interactive dialogues, workshops, seminars and electronic publications that address judges' educational needs in terms of human rights. Such programmes can provide an opportunity for the courts to evaluate and monitor progress in facilitating the enjoyment of human rights through judicial action by noting the gaps which remain in the domestic system and analysing the consistency of national laws with international norms.

G. Specificities of continuing education

Content

47. Particular attention should be given to the different levels and categories of judges. Education programmes should be designed to take into account the different perceptions, expectations, responsibilities and interests of each level and category.

48. The Special Rapporteur notes that in a great number of States, pre-service, initial and continuing legal education focuses almost entirely on domestic criminal, civil, commercial and administrative law and the respective procedural provisions. Only in a few States does continuing legal education cover the international obligations entered into by the State, particularly in the human rights sphere. The Special Rapporteur is of the opinion that pre-service, initial and continuing legal education should include relevant recent case law at the international and regional levels and major legislative changes, which often stem from the ratification of international or regional human rights instruments and other recent developments in human rights law. It should further increase capacity-building on human rights issues, in particular their application to specific cases.[22]

49. Sometimes, legal systems undergo an entire structural and systemic transformation such as has been witnessed by the Special Rapporteur in a recent country visit, notably at

[19] Most recently A/HRC/11/41/Add.2, para. 99; A/HRC/4/25/Add.2, para. 26.

[20] See A/HRC/11/41/Add.2, para. 65; A/HRC/4/25/Add.2, para. 41; E/CN.4/2006/52/Add.4. para. 62; E/CN.4/2000/61/Add.1, para. 155.

[21] CAT/C/KAZ/CO/2, para. 27.

[22] For lawyers see Recommendation No. R (2000) 21, Principle II (3).

the criminal procedural level, with the transition from a written inquisitorial to an accusatorial system. In such cases, the obligations of the judge, prosecutor and lawyers change dramatically, as do the rights for the parties to cases. Such changes have major human rights implications, making constant hands-on updating of legal education, including human rights, indispensable.

50. The possibility of magistrates, experienced judges and practising lawyers acting as mentors in the planning and establishment of the courses should be explored.

51. Furthermore, in countries which have been affected by situations of armed conflict, particular attention should be given to continuing learning on transitional justice mechanisms especially designed to address issues of gross violations of human rights, such as truth and reconciliation commissions, justice and peace tribunals, hybrid tribunals or related initiatives.[23]

52. The goals and objectives of the programme of judicial education should be strategically developed. The priorities, structure and content of the curriculum should be clear from the outset.

Institution

53. During several country missions, previous mandate holders noted with appreciation the existence of an institution providing for continuing legal education[24] or recommended that States establish such an institution where one had not yet been set up.[25] In some cases, they noted the establishment of an institute mandated to provide continuing legal education to all legal professions, which, in one case, was established under the auspices of the Ministry of Justice.[26] In other cases, a specialized body, such as an academy of justice or school for the judiciary was established to provide both initial and continuing legal education solely for judges and court staff. The Special Rapporteur considers that such institutes or judicial academies should preferably be administered and run by an independent body in charge of the selection, appointment, promotion and disciplining of judges.[27] In order to guarantee the independence of that institution and consequently the independence of the judges trained by that institute or school, it should neither be administered by, nor run under, any organ of the executive power.

54. In another case, a judicial training centre was established by the national judges association, which conducted continuing legal education courses for sitting judges, but had no mandate to educate incoming judges.[28] The Special Rapporteur recommends that such institutions provide both incoming and sitting judges with legal education in order to ensure the consistency and coherence of their levels of knowledge and awareness.

55. The body providing for continuing legal education for lawyers should ideally be established by the lawyers' or bar association and remain under its aegis. The corresponding legal foundation could either be established by the statute of the lawyers' or bar association or by legislation.

[23] See reports on transitional justice (A/HRC/4/87) and impunity (A/HRC/4/84).
[24] A/HRC/11/41/Add.2, para. 65; E/CN.4/2006/52/Add.4, para. 62; E/CN.4/2005/60/Add.2, para. 74.
[25] A/HRC/8/4/Add.2, para. 79.
[26] E/CN.4/2006/52/Add.4, para. 62.
[27] For the "independent body in charge of the selection, appointment, promotion and disciplining of judges", see A/HRC/11/41, paras. 27–33, 61 and 71.
[28] E/CN.4/2006/52/Add.3, para. 42.

Compulsory or optional schemes

56. In many States, continuing legal education for judges and lawyers appears to be optional[29] and at the discretion of the respective individual judges and lawyers. In other States, there is a predetermined scheme and schedule for such educational undertakings. Again in some other countries, there is a framework for continuing education. Judges should be required to undergo all necessary courses to allow them to carry out their duties in an efficient, impartial and proper manner.[30]

57. The Special Rapporteur is of the view that a basic scheme of continuing legal education should be compulsory for all judges[31] and lawyers. Specific additional education should be undertaken in certain circumstances, for example in the case of taking up higher judicial duties or changing to another jurisdiction. Also, targeted additional continuing education should be conducted prior to and following major legal reforms. Such reforms are sometimes precipitated by the ratification of an international or regional human rights treaty, which should consequently also be part of the educational programme.

Periodicity

58. A characteristic of human rights standards and rules is that they evolve over time. This requires legal education programmes for judges and lawyers to be planned and implemented on an ongoing basis at specific intervals.

Examinations

59. The Special Rapporteur notes that few States have judicial career systems with periodic examinations that serve to ensure the continuing quality of the administration of justice. She would like to emphasize the importance of such schemes, which should also be given due consideration in the promotion of judges and in the process of election for judges and magistrates.

Costs and resources

60. Legal education programmes for judges should be free of charge and financed from the judiciary budget within a specific budget line. This should likewise be the case for lawyers while the budget should be covered by the membership fees paid by lawyers to their associations.

61. It is of paramount importance that educational institutions and structures for judges and lawyers be adequately equipped with human and material resources as otherwise the quality of the education may suffer and not bring about the expected results.[32]

62. The Special Rapporteur notes that there are good practices and standards in a number of States that it would be important and meaningful to share with other States. The Special Rapporteur will be sending out a questionnaire to Member States regarding certain aspects and practices of legal education for judges and lawyers.

[29] See for example E/CN.4/2006/52/Add.3, para. 42.
[30] See also Recommendation No. R (94) 12, Principle V, para. 2 (g).
[31] See also E/CN.4/2006/52/Add.3, para. 86.
[32] See also E/CN.4/2006/52/Add.3, para. 86.

H. The continuing education of judges as a means to strengthening the independence of the judiciary

63. As mentioned above, judges can and should play an active role in the implementation of the human rights obligations of the State. This may take several forms. One possibility is that the judge — while making his/her deliberations — discovers that there is a discrepancy between the national constitution, which enshrines human rights and fundamental freedoms, and the legislation, traditional law or directives, which may not yet have been adapted to the obligations undertaken by the State. Thus, while many constitutions proclaim the promotion and protection of human rights, domestic legislation is not always in line with this proclamation. When considering cases, judges may be in doubt as to the constitutionality of a certain domestic provision which will be decisive for the judgement to be made. In several Member States, judges are then able to refer the question of whether the legislative norm is constitutional to a higher domestic court.

64. In other instances, when the constitution and other legislation do not meet the human rights obligations of the State concerned or where there is a legal vacuum, judges themselves refer in their judgements to the international standards. Sometimes, they even refer to the case law of international or regional courts, quasi-judicial bodies, treaty bodies or special procedures or their advisory opinions or views, particularly human rights mechanisms at the United Nations, in order to underscore their decision, because of a lack of familiarity with these international institutions. In these instances, judges take a proactive role and help the State to meet the obligations the country has entered into.

65. In previous reports, the need for the establishment of various safeguards necessary to effectively guarantee the independence of judges[33] and lawyers[34] was examined. In this report, the Special Rapporteur would like to point to several circumstances that prevent judges and lawyers examining international human rights standards and applying them when deciding cases or defending a client before the court.

66. In the first scenario, judges and lawyers are aware that their State has entered into international human rights obligations through the ratification of treaties or otherwise. However, in some cases, the texts of the international treaties are not available to judges and lawyers. In other cases, it appears that while the text of the treaty is available, the relevant case law is not available to judges and lawyers or can only be obtained at considerable financial cost and difficulty. In some Member States, international human rights standards are cited in decisions of the highest judicial instance, which instruct the lower court judges to be guided by those standards. However, those decisions are not always available to lower-level courts or judges. These impediments were detected by the Special Rapporteur's predecessors in a number of countries.

67. Furthermore, in some States, the information flow entering the country is so slight or restricted that judges and lawyers are not even sure which international human rights obligations the State has undertaken, or if it has done so. In such situations, criteria for judicial decisions are often developed specifically to prevent judges from referring to human rights standards in their decisions. While the cold war era is a vivid example of such circumstances, the Special Rapporteur notes that such conditions still exist in a considerable number of countries.

68. Finally, in some States judges and lawyers are well aware of international human rights standards applicable to their countries and even of relevant case law established by

[33] See A/HRC/11/41, paras. 14–84.
[34] See A/64/181, paras. 10–69.

international or regional judicial or quasi-judicial bodies. However, the application of these standards is severely punished by the executive branch so that judges risk sanctions and even deprivation of liberty.[35]

I. An independent and informed judiciary to support good governance and to combat corruption

69. Courts have increasingly been called upon to adjudicate on matters relating to good governance, corruption, counterterrorism measures, ensuring democratic accountability, and promotion of human rights in relation to areas such as health, labour and property rights. The courts have also been instrumental in combating impunity, ensuring accountability for human rights violations and providing reparation for victims. An effective and independent judiciary is one of the key institutions in the promotion of the rule of law by confronting corruption, promoting security and political and social stability and providing effective remedies to litigants.

70. The judiciary has considerable responsibility for the promotion of the rule of law and upholding good governance by establishing or developing on existing human rights standards and enhancing their applicability at national level. In cases where the national statutory framework violates basic human rights standards, a proactive judiciary can recommend the repeal or amendment of a law or rule if inconsistent with international human rights standards.

71. The independence of the judiciary derives from its competence, professionalism and integrity and from maintaining its accountability as a service delivery institution. Despite the fact that the judiciary has a mandate in every jurisdiction to further good governance, the rule of law and the promotion and protection of human rights norms, there remains a discernible gap between the law and practice on the ground.

72. There are instances when the judiciary has acted to the detriment of litigants in areas such as social empowerment, equality and minority protection and has contributed to political insecurity. There are other trends which show that the judiciary has contributed towards the perpetuation of human rights violation by the continued application of domestic legal norms and provisions which are not consistent with international human rights practice. In other jurisdictions, the judiciary may have promoted and contributed to a culture of impunity.

73. Corruption is one of the most serious obstacles to the promotion and protection of human rights. Therefore, judges and lawyers should receive continued training on good governance, particularly in combating corruption in the public and private sectors, including the judiciary. Corruption has a detrimental impact on human rights, the rule of law and democracy. Corruption makes national institutions weak and public trust in them is eroded.

74. Corruption can be political, economic or corporate, but, in all its forms, it undermines democratic values and institutions and the enjoyment of human rights. Judicial integrity is a key element of impartial justice. Judges, prosecutors and lawyers should be trained in the need to combat corruption and in the international norms and declarations. In

[35] See for example the case of Venezuelan Judge Afiuni who was arrested after having ordered the conditional release pending trial of a defendant who had spent more than two years in pretrial detention and whose detention was declared arbitrary by the Working Group on Arbitrary Detention on 1 September 2009, citing serious violations of the right to fair trial. Available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9677&LangID=E.

this aspect, particular attention should be given to the Bangalore Principles on Judicial Conduct.

75. Particular emphasis should also be given to the training of judges and lawyers on general issues of the rule of law. Sessions on the duty to combat and prevent impunity should be given specific emphasis.

J. An independent and informed judiciary to strengthen access to justice

76. Access to justice should not be understood exclusively as access to the judiciary. It also means access to less formal types of institutions and mechanisms such as national human rights institutions, ombudsmen, conciliators and mediators able to assist people to claim their rights. Vulnerable or disadvantaged groups, including members of minority groups, are generally deprived of access to justice owing to poverty, illiteracy, lack of education or discrimination.

77. Judges, prosecutors and lawyers should be educated in ways to combat this phenomenon and to guarantee the access to justice and protection of disadvantaged groups. They should receive awareness training on the special needs of disadvantaged groups, including rural women, indigenous people, Afro-descendants, members of minorities and the illiterate.

K. Need for an international conference

78. If the objective of strong judiciaries and independent and impartial judges and lawyers with a sound training in international human rights is to be achieved, it will be necessary to further investigate the existing educational options, projects and programmes. The problem should be tackled in two stages: firstly, a definitive thematic study conducted on a scientific basis of human rights education and the continuous training of magistrates, judges, prosecutors, public defenders and lawyers should be carried out at the international level to assess the current situation.

79. This would provide a scientific basis for the second stage, which would be an international conference on how human rights education and training for the legal professions is to be provided. Among the objectives of the proposed international conference would be to identify means and mechanisms to enhance the continuing human rights education of judges in order to improve the work of courts and tribunals and the role of lawyers in the vindication of human rights and the provision of justice. The conference would also allow discussion on how international human rights law can be more effectively used by judges and national courts at all levels. Authorities from the judiciaries and attorneys' general or prosecutors' offices, representatives of associations of magistrates, judges and lawyers and members of the civil society could jointly identify the internal and structural features of judicial systems that affect their capacities to implement international and regional standards on human rights.

80. The proposed global thematic study and the conclusions of the international conference could be taken into consideration in the development of new guidelines for the continuing international human rights education of judges, prosecutors and lawyers.

IV. Major developments in international justice

A. International Criminal Court

81. The Special Rapporteur intends to follow developments in international justice closely and to support efforts to strengthen the rules and procedures of these international judicial institutions.

Situation in Darfur, Sudan

82. On 3 February 2010, the Appeals Chamber of the International Criminal Court (ICC) rendered its judgment in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* on the Prosecutor's appeal, reversing Pre-Trial Chamber I's decision of 4 March 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide. The Appeals Chamber explained that it was not concerned with the question of whether Mr Omar Al-Bashir is, or is not, responsible for the crime of genocide. Rather, the Appeals Chamber addressed a question of procedural law, namely whether the Pre-Trial Chamber applied the correct standard of proof when disposing of the Prosecutor's application for an arrest warrant. In its 4 March 2009, decision, Pre-Trial Chamber I rejected the Prosecutor's application in respect of genocide stating that it would issue an arrest warrant for genocide only if the only reasonable conclusion to be drawn from the Prosecutor's evidence, based on "proof by inference", was that there were reasonable grounds to believe in the existence of genocidal intent. The Appeals Chamber found this standard of proof to be too demanding at the arrest warrant stage, which is governed by article 58 of the Rome Statute. This amounted to an error of law. The case has now been remanded back to the Pre-Trial Chamber to reconsider whether there were "reasonable grounds to believe" that Al-Bashir acted with genocidal intent.

83. The confirmation hearing for *Bahr Idriss Abu Garda*, the Chair and General Coordinator of Military Operations of the United Resistance Front, was held from 19 to 29 October 2009, during which the prosecutors alleged that Abu Garda controlled the Justice and Equality Movement during the 2007 attacks, which resulted in the death of 12 African Union Mission in Sudan (AMIS) soldiers and several injuries. On 8 February 2009, the Pre-Trial Chamber I of the ICC issued a decision declining to confirm the charges against Bahar Idriss Abu Garda. The Chamber was not satisfied that there was sufficient evidence to establish substantial grounds to believe that Bahar Idriss Abu Garda could be held criminally responsible either as a direct or as an indirect co-perpetrator for the commission of the crimes with which he was charged by the prosecution. Abu Garda was charged with three war crimes, namely violence to life, intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission, and pillaging, allegedly committed during an attack carried out on 29 September, 2007, against the African Union Mission in Sudan (AMIS), a peacekeeping mission stationed at the Haskanita Military Group Site (MGS Haskanita), in the locality of Umm Kadada, North Darfur. The decision does not preclude the prosecution from subsequently requesting the confirmation of the charges against Abu Garda if such a request is supported by additional evidence. The prosecution can also submit a request to Pre-Trial Chamber I for leave to appeal the decision on the confirmation of charges.

Situation in the Democratic Republic of the Congo

84. The trial against Mathieu Ngudjolo Chui, the alleged former leader of the National Integrationist Front, and Germain Katanga, the alleged commander of the Patriotic

Resistance Force in Ituri, commenced on 24 November 2009. On 2 December 2009, Trial Chamber II of the ICC decided to postpone the hearings in the case. The trial resumed on 26 January 2010.

Situation in Uganda

85. Almost five years have passed since the issue of arrest warrants for Joseph Kony and other senior Lords Resistance Army (LRA) commanders, including Okot Odhiambo and Dominic Ongwen for crimes against humanity and war crimes they are suspected to have committed between 2002 and 2004. They are alleged to have abducted children and used them as soldiers and sexual slaves. The suspects still remain at large. In July 2009, the ICC Office of the Prosecutor applauded past State cooperation in the effort to apprehend the LRA fugitives. The Office stated that it was encouraged by the fact that the Governments of the region are now acting together with the support of the United Nations Organization Mission in the Democratic Republic of the Congo to address the issue of arresting LRA suspects.

Kenya

86. On 26 November 2009, the ICC Prosecutor sought authorization from Pre-Trial Chamber II of the ICC to commence an investigation in relation to the crimes within the jurisdiction of the Court allegedly committed on the territory of the Republic of Kenya within the context of the 2007–2008 post-election violence. The Prosecutor claimed that the alleged crimes appear to constitute crimes against humanity. On 18 February 2010, Pre-Trial Chamber II requested the Prosecutor to provide, no later than 3 March 2010, clarification and additional information in the process of assessing whether or not to authorize the Prosecutor to commence an investigation with regard to the situation in the Republic of Kenya. In response to this request, on 3 March, the Prosecutor clarified that senior political and business leaders associated with the main political parties organized, enticed and/or financed attacks against the civilian population on account of their perceived ethnic and/or political affiliation pursuant to or on furtherance of a State and/or organizational policy. The Prosecutor provided the ICC with a list of the most serious criminal incidents and a selected list of 20 names of persons who appear to bear the gravest responsibility for these crimes. The Prosecutor indicated that these names are indicative only at this stage and allegations will have to be measured against the evidence gathered independently by the Prosecutor's office.

Guinea

87. In a statement, made on 19 February 2010, at the end of a three-day visit to Guinea, the Deputy Prosecutor of the ICC said that crimes against humanity may have been committed during the September 2008 events in Conakry, Guinea. Based on the findings of the visit, a preliminary investigation will continue.

B. International Criminal Tribunal for the former Yugoslavia

88. The trial of Radovan Karadžić resumed on 1 March 2010. Prior to this, on 12 February, the Appeals Chamber dismissed in its entirety Karadžić's motion against the imposition of a court-appointed lawyer. The Appeals Chamber ruled that an accused is not entitled to enjoy simultaneously both the right to defend himself in person and the right to be defended through legal assistance of his own choosing. The Chamber specified that as Karadžić has chosen self-representation, he "does not enjoy any rights that are derived from choosing to be represented by legal counsel". In December 2009, the Trial Chamber rejected Karadžić's motion challenging the legitimacy of the Court. Karadžić faces 11

charges, including genocide and murder, for war crimes allegedly committed during the 1992–1995 Bosnian conflict.

89. The trial of Zdravko Tolimir, a former high-ranking official of the Bosnian Serb Army (VRS), started on 26 February 2010. He is the last accused in ICTY custody to be put on trial. Mr. Tolimir is charged with genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war committed between July and November 1995 against Bosnian Muslims in Srebrenica and Žepa. During the period relevant to the indictment, Mr. Tolimir was the Assistant Commander for Intelligence and Security of the Main Staff of the VRS. In this position, Zdravko Tolimir was one of seven Assistant Commanders who reported directly to the Commander of the Main Staff of the VRS, Ratko Mladić.

C. International Criminal Tribunal for Rwanda

90. The court has issued a number of convictions in the cases of Lieutenant Colonel Ephrem Setako who was head of the division of legal affairs in the Ministry of Defence in 1994; Emmanuel Rukondo, former Military Captain in the Rwandan Armed Forces; Callixte Kalimanzila, former *Directeur de Cabinet* of the Ministry of the Interior; and Michael Baragaza, former Director General of the office controlling the Rwandan tea industry. The accused have been convicted for crimes ranging from genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (murder). On 7 July the Security Council extended the term of office of the six permanent judges of the Court until 31 December 2010 or until the completion of the cases assigned to them.

V. Conclusions and recommendations

A. Conclusions

91. **The Special Rapporteur would like to stress the need for magistrates, judges, prosecutors, public defenders and lawyers throughout the world to receive, in addition to legal training, continuing education in international and regional human rights standards and systems.**

92. **In a democratic State, the judiciary should be a partner with the other branches of Government, working together to vindicate human rights and provide justice. The courts alone cannot provide effective justice and remedies. In some countries, judges might enhance their ability to tackle deep patterns of human rights violations that persist year after year in their States. For this purpose, continuing education in international human rights law and continuous updating on its development is essential.**

93. **The principle of separation of powers is the basis on which the judicial independence and the impartiality of judges is founded. This principle must be respected by all States. Member States should give priority to strengthening their judicial systems, guaranteeing their full independence as institutions as well as the independence and impartiality of their magistrates and judges. An independent judiciary is fundamental for the respect of the rule of law and the development of democracy. It is also fundamental to combating corruption, to guaranteeing equal access to justice, to providing effective justice and remedies to citizens, to countering patterns or contexts of abuse and to guaranteeing health, labour rights and non-discrimination.**

94. **From the reports of the Special Rapporteur's predecessors and her own experience, the Special Rapporteur concludes that there is an imperative and urgent need for the systematic and continued international human rights law education of judges, prosecutors, public defenders and lawyers. They should be given the opportunity of continuing education in international human rights principles, norms, rules and jurisprudence, from the United Nations and regional organs and treaty bodies, and from the United Nations special procedures on issues such as the due process of law or the right to a fair trial. Judges, prosecutors and lawyers must be given the necessary information on the possibilities of application, at the domestic level, of international human rights principles, norms and standards.**

95. **In the opinion of the Special Rapporteur, this problem should be tackled in two stages. First, a global thematic study should be carried out at the international level to assess the human rights education and continuing training of judges, prosecutors, public defenders and lawyers currently in place. This would provide the scientific basis for a second stage, an international conference on the methods for the legal human rights education and training to be provided.**

96. **In this context, it seems necessary to determine the internal and structural features of domestic judicial systems that affect their capacities to contribute to the implementation of international and regional human rights principles, norms and standards.**

97. **Judges, prosecutors, public defenders and lawyers must be adequately educated and informed on a regular and continuing basis on new developments in international human rights law, principles, standards and case law.**

98. **The legal education and continuing training of judges, prosecutors, public defenders and lawyers is a theme which should be sustained. States should establish compulsory, periodic and continuing legal education for judges, prosecutors, public defenders and lawyers, particularly in the area of international human rights law, and in countries affected by armed conflicts, particularly in the area of international humanitarian law and transitional justice. Particular attention should be given to the methods for the domestic application of international human rights law.**

B. Recommendations

99. **The Special Rapporteur submits to the Human Rights Council the following recommendations:**

(a) The Office of the United Nations High Commissioner for Human Rights (OHCHR), in cooperation with the Special Rapporteur on independence of judges and lawyers, should support initiatives whereby the education and continuing education of judges, prosecutors, public defenders and lawyers on international human rights law will be strengthened. Such initiatives should ensure the integration of human rights principles, norms and standards in their efforts to strengthening national justice systems and institutions;

(b) The development of human rights education programmes for judges, prosecutors, public defenders and lawyers is crucial to ensuring a solid foundation for democracy and the rule of law. International cooperation, including that provided by OHCHR, should be encouraged and supported;

(c) Continuing learning on international case law and national case law relevant to human rights should be supported. An international database should be

created so as to give States access not only to technical assistance, but also to best practices and case law on which they can base their programmes;

(d) Strategic partnerships with international, regional and national judges' associations and bar associations are critical to the work of the Special Rapporteur. The Special Rapporteur may play a role in stimulating the establishment of a network for an exchange of judicial experiences, particularly between countries from the North and from the South; and from the East and the West;

(e) States should give priority to strengthening judicial systems, particularly through continuous education in international human rights law for judges, prosecutors, public defenders and lawyers;

(f) International human rights law should be included in the curricula of all law faculties and law schools, and in the curricula of schools for the judiciary and the academic programmes of bar associations;

(g) Particular attention should be given to the different levels and categories of judges. Education programmes should be designed taking into account the expectations, responsibilities and interests of each level and category;

(h) The need to enhance the education of judicial staff (such as court secretaries, assistants, law clerks and registrars) should also be studied;

(i) Legal education for judges, prosecutors and lawyers should be delivered using the latest training methodologies, including interactive sessions, seminars and workshops. Collaboration with professionals from the education and technological sectors to establish modern methodologies and tools should be examined;

(j) States should undertake an assessment of the resources currently available and needed to establish the programmes of continuing international human rights law education, including infrastructure, human resources and financial requirements;

(k) Judicial human rights education, including continuous learning, should be designed in the broader context of judicial development strategies;

(l) An effective partnership between the judiciary and the executive power should be developed to obtain adequate and sustainable resourcing while always preserving judicial independence;

(m) Universities and law faculties should operate within an approved and harmonized national curriculum, which should particularly include international human rights law education;

(n) Bar associations and associations of magistrates have a crucial role to play in the effective training of judges and lawyers and their support to the Special Rapporteur and OHCHR is particularly important;

(o) The introduction of a mandatory human rights training period prior to being admitted to the bar is of paramount importance to ensuring the independence, integrity and effectiveness of professional legal counsel provided by lawyers;

(p) Initial education initiatives for judges should particularly cover basic education on the country's international obligations with an emphasis on human rights. Incoming judges should also be acquainted with the impact of decisions of international or regional judicial or quasi-judicial bodies on domestic law.

100. **The Special Rapporteur should be apprised, on a regular basis, of requests made for advisory services and technical assistance to OHCHR in the area of**

administration of justice, in particular with regard to the independence and impartiality of the judiciary and to the continuing human rights education of judges, prosecutors, public defenders and lawyers.

101. **In order to enhance the continuing education of judges, prosecutors, public defenders and lawyers in international human rights law, an international conference should be convened with the participation of State representatives, judiciary authorities and the public prosecutor's offices, representatives of the magistrates and bar associations and members of the civil society. The objectives of the international conference would be, inter alia, to:**

(a) Identify the internal and structural features of judicial systems that affect their capacities to implement international and regional standards on human rights;

(b) Identify means of improving the continuing human rights education of judges in order to improve the work of courts to vindicate human rights and provide justice;

(c) Enquire of judiciaries and judges as to what they are doing and what they might do to address and provide redress in relation to deeper patterns of human rights violations that persist year after year in their States;

(d) Explore how the advances in international human rights law can be used more effectively by judges and national courts at all levels;

(e) Exchange information on how to better promote and use international human rights jurisprudence and precedents of deliberative bodies;

(f) Review challenges to the implementation of civil and political rights and economic, social and cultural rights.