Chapter 4
INDEPENDENCE AND IMPARTIALITY OF JUDGES, PROSECUTORS AND LAWYERS

Learning Objectives

- *To consolidate knowledge and understanding of the importance of an independent and impartial Judiciary, independent and impartial prosecutors and an independent legal profession in order to ensure the rule of law and effective protection of the fundamental rights and freedoms of the human person.*
- *To familiarize participants with the existing international and regional legal rules and principles governing the functioning of the Judiciary, prosecutors and lawyers, including the relevant jurisprudence.*

Questions

- *How do you, as judges, prosecutors and lawyers, perceive the role of the principle of separation of powers?*
- *How is this principle ensured in your country?*
- *How are the independence and impartiality of the Judiciary and the independence of lawyers guaranteed in the country where you carry out your work?*
- *Have you ever experienced any difficulties in performing your professional duties in an independent and impartial manner?*
- *If so, what were those difficulties, and how did you deal with them?*
- *More specifically, have you, as judges, prosecutors and lawyers, ever been confronted with attempts to corrupt you?*
- *If so, how did you deal with such propositions?*

Questions (cont.d)

- *For those participants who are women jurists, have you, in the course of your work, experienced any specific problems, difficulties or harassment that may be attributable to your gender?*
- *If so, how did you confront the problems, difficulties, or harassment?*
- *If you have had to deal with any of the above situations, were you aware of the existence of international legal standards aimed at strengthening the role of the Judiciary and the legal professions in general that might have been conducive to strengthening your position vis-à-vis the Executive, Legislature or other groups or persons acting with or without the connivance of the State?*
- *Lastly, in your country, would there be any room for you, as judges, to soften the effect of repressive laws by means of interpretation?*

Relevant Legal Instruments

Universal Instruments

- The International Covenant on Civil and Political Rights, 1966

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- Basic Principles on the Independence of the Judiciary, 1985
- Guidelines on the Role of Prosecutors, 1990
- Basic Principles on the Role of Lawyers, 1990

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The European Convention on Human Rights, 1950

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- Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges.[1]

[1] In addition to these binding and non-binding legal sources, ethical standards have been adopted by professional associations such as judges', prosecutors' and lawyers' associations. Such standards may provide useful guidance to the legal professions. See e.g. the following standards adopted by the International Bar Association (IBA): IBA Minimum Standards of Judicial Independence, 1982; IBA Standards for the Independence of the Legal Profession, 1990. See also the IBA statement of General Principles for Ethics of Lawyers, IBA Resolution on Non-Discrimination in Legal Practice, as well as the IBA paper *Judicial Corruption Identification, Prevention and Cure* of 14 April 2000. These documents can be found at the IBA web site: http://www.ibanet.org.

1. Introduction

This chapter will deal with two of the fundamental pillars of a democratic society respectful of the rule of law and the effective protection of human rights, namely, ***the independence and impartiality of the judiciary and prosecutors,*** and ***the independence of lawyers***. It will first describe the role played by judges, prosecutors and lawyers in this regard; and secondly, will focus on the various legal limitations on, and de facto threats to, the ability of judges, prosecutors and lawyers to exercise their professional responsibilities in an independent and impartial manner. Finally, this chapter will analyse the existing international legal standards relating to the functioning of the legal professions and selected relevant case-law.

2. The Role of Judges, Prosecutors and Lawyers in Upholding the Rule of Law, Including Human Rights Standards

In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of ***separation of powers***, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources.

Only an independent Judiciary is able to render justice ***impartially*** on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be ***seen*** to do so.

Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that ***their duty is and remains to apply the law***. In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law.

A legal system based on respect for the rule of law also needs strong, independent and impartial prosecutors willing resolutely to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity.

Unless judges and prosecutors play their respective key roles to the full in maintaining justice in society, there is a serious risk that a culture of impunity will take root, thereby widening the gap between the population in general and the authorities. If people encounter problems in securing justice for themselves, they may be driven to take the law into their own hands, resulting in a further deterioration in the administration of justice and, possibly, new outbreaks of violence.[2]

Lastly, this legal system would not be complete without independent lawyers who are able to pursue their work freely and without fear of reprisals. Indeed, independent lawyers play a key role in defending human rights and fundamental freedoms ***at all times***, a role which, together with that played by independent and impartial judges and prosecutors, is indispensable for ensuring that the rule of law prevails, and that individual rights are protected effectively.

In this regard it has been pointed out that all special rapporteurs of the United Nations Commission on Human Rights have emphasized the close relationship that exists between the greater or lesser respect for the due process guarantees of article 10 of the Universal Declaration of Human Rights and the greater or lesser gravity of the violations established.[3] Human rights and fundamental freedoms are, in other words, "all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure".[4]

3. Challenges to the Independence and Impartiality of the Legal Professions

In spite of the need for judges, prosecutors and lawyers to exercise their professional responsibilities in true independence, experience shows that they are often subjected to pressures of various kinds aimed at compromising their ability to do so.

For instance, although the way in which judges are appointed varies from country to country, there may be a danger to their independence where they are appointed exclusively by the Executive or Legislature, or even where they are elected. A further threat to their independence is posed by lack of security of tenure, as arises in countries where judges are generally employed on temporary contracts. Such insecurity may make judges more susceptible to inappropriate outside pressure. Inadequate

[2]See e.g. UN doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, para. 87.

[3]UN doc. E/CN.4/Sub.2/1993/25, *Report on the independence of the judiciary and the protection of practising lawyers*, para. 1.

[4]Ibid., loc. cit.

remuneration may also constitute a threat to the independence of judges in that it may for instance make them more amenable to corruption.

Furthermore, the independence of judges, prosecutors and lawyers is frequently threatened by the refusal of the Executive to allow them to organize freely in professional associations. For instance, where the Executive issues licences to lawyers and obliges them to exercise their profession as members of State-run professional organizations, they cannot carry out their work independently.

However, judges, prosecutors and lawyers are frequently also subjected to other kinds of persecution. Such acts may involve public criticism by either the Executive or Legislature aimed at intimidating the legal professions, but they also often take the form of arbitrary detentions and direct threats to their lives, including killings and disappearances.[5] In some countries the fact of being a woman lawyer further adds to the precariousness of the profession. Because of their willingness to take up the defence of cases involving the sensitive issue of women's rights, these lawyers face intimidation and violence, sometimes resulting in death.

The threats and attacks described above are not only perpetrated by State authorities, but are frequently also carried out by private individuals, either independently or in connivance with bodies such as criminal organizations and drugs cartels.

Clearly, unless judges, prosecutors and lawyers are able to exercise their professional duties freely, independently and impartially, and unless the Executive and the Legislature are likewise always prepared to ensure this independence, the rule of law will slowly but steadily be eroded, and with it effective protection of the rights of the individual. As can be seen, it is the entire structure of a free and democratic constitutional order that is upheld by an independent and impartial Judiciary, independent and impartial prosecutors and independent lawyers.

4. International Law and the Independence and Impartiality of the Judiciary

4.1 Applicable international law

All general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal, and the purpose of this section is to analyse the meaning of the terms "independent" and "impartial" in the light of the case-law of the competent international monitoring organs. While these treaties as interpreted do not solve all the

[5] See e.g. UN doc. E/CN.4/2000/61, *Report of the Special Rapporteur on the independence of judges and lawyers,* 74 pp.; and *Attacks on Justice – The Harassment and Persecution of Judges and Lawyers* (Centre for the Independence of Judges and Lawyers (CIJL), Geneva), 10th edn., January 1999-February 2000, 499 pp.

problems arising with particular regard to the notion of independence of the Judiciary, they do provide a number of essential clarifications.

Of the most important treaties, the International Covenant on Civil and Political Rights states in its article 14(1) that "all persons shall be equal before the courts and tribunals" and further, 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***" (emphasis added). The Human Rights Committee has unambiguously held that "the right to be tried by an independent and impartial tribunal is an ***absolute right that may suffer no exception***".[6] It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

Second, 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, in particular, "(b) the right to be presumed innocent until proved guilty ***by a competent court or tribunal***", as well as "(d) the right to be tried within a reasonable time ***by an impartial court or tribunal***" (emphasis added). Furthermore, according to article 26 of the Charter, the States parties "shall have the duty to guarantee the independence of the Courts". It is the view of the African Commission on Human and Peoples' Rights that article 7 "should be considered ***non-derogable***" since it provides "***minimum*** protection to citizens".[7]

Third, 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, labor, fiscal, or any other nature" (emphasis added).

Lastly, 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" (emphasis added).

Although some countries may not yet have ratified or acceded to any of these human rights treaties, they are still bound by customary rules of international law, as well as by general principles of law, of which the principle of an independent and impartial judiciary is generally considered to form part. They are thus also bound by the fundamental principles laid down in the Universal Declaration of Human Rights, which provides in its article 10 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".

[6] Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

[7] *ACHPR, 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*, p. 3 of the text published on http://www1.umn.edu/humanrts/africa/comcases/218-98.html; emphasis added.

4.2 Basic Principles on the Independence of the Judiciary, 1985

In 1985, 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, which were subsequently unanimously endorsed by the General Assembly.[8] These principles can therefore be described as being declaratory of universally accepted views on this matter by the States Members of the United Nations, and they have become an important yardstick in assessing the independence of the Judiciary in the work of international monitoring organs and non-governmental organizations (NGOs).

These principles deal with the following subjects: (i) independence of the Judiciary; (ii) freedom of expression and association; (iii) qualifications, selection and training; (iv) conditions of service and tenure; (v) professional secrecy and immunity; and (vi) discipline, suspension and removal. Without seeking to be in any sense exhaustive, the present chapter will deal with some of the significant issues relating to the independence and impartiality of the judiciary.

4.3 The notions of independence and impartiality: links and basic differences

The notions of "independence" and "impartiality" are closely linked, and in some instances the international control organs have dealt with them jointly. Yet each has its specific meaning and requirements, which will be further explained in more detail below. Suffice it to indicate at this juncture that the concept of "independence" is an expression of the constitutional value of judicial independence and, as stated by the Canadian Supreme Court in the case of *Valiente v. The Queen*, in a passage that conveys well the general understanding of the notion of independence of the Judiciary not only under Canadian constitutional law but also under international human rights law, this notion "connotes not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees".[9] This status or relationship of independence of the Judiciary "involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government".[10]

By contrast, the Supreme Court of Canada described the concept of judicial "impartiality" as referring to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case".[11] This view has also been confirmed at the international level, where, for instance, the Human Rights Committee has held that the

[8] See General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[9] See *(1985) 2.S.C.R Valiente v. The Queen 673*, to be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html, at p. 2.

[10] Ibid., loc. cit.

[11] Ibid.

notion of "impartiality" in article 14(1) "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".[12] As to the European Court of Human Rights, it considers that the notion of impartiality contains both a ***subjective*** and an ***objective*** element: not only must the tribunal be impartial, in that "no member of the tribunal should hold any personal prejudice or bias", but it must also "be impartial from an objective viewpoint", in that "it must offer guarantees to exclude any legitimate doubt in this respect".[13] The European Court thus adds to the more subjective mental element of bias the important aspect of availability of ***guarantees***.

4.4 The notion of institutional independence

The notion of institutional independence means that the Judiciary has to be independent of the other branches of government, namely the Executive and Parliament. According to Principle 1 of the Basic Principles on the Independence of the Judiciary:

> "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."

Furthermore, according to Principle 7 of the Basic Principles,

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

In order to secure true independence of the Judiciary from the other two branches of government, it is necessary for this independence to be guaranteed, preferably by the Constitution; or, failing this, by other legal provisions.

4.4.1 Independence as to administrative matters

Although international law does not provide details as to how this institutional independence is to be realized in practice, it is clear that, as a minimum, the Judiciary must be able to handle its own administration and matters that concern its operation in general. This includes "the assignment of cases to judges within the court to which they belong", a matter which, as stated in Principle 14 of the Basic Principles, "is an internal matter of judicial administration".

[12] Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 120, para. 7.2.

[13] *Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000,* para. 30; for the text see the Courts's web site: http://echr.coe.int.

4.4.2 Independence as to financial matters

As supported by Principle 7 of the Basic Principles, the Judiciary must further be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption. Moreover, there must logically be some kind of judicial involvement in the preparation of court budgets.

However, when it comes to administrative and financial issues, independence may not always be *total*, given that the three branches of government, although in principle independent of each other, are also by nature in some respects dependent on each other, for instance with respect to the appropriation of resources. While this inherent tension is probably inevitable in a system based on the separation of powers, it is essential that in situations where, for instance, Parliament controls the budget of the Judiciary, this power is not used to undermine the efficient working of the latter.[14]

4.4.3 Independence as to decision-making

Next, as follows from Principle 1 of the Basic Principles, the other branches of government, including "other institutions", have the duty "to respect and observe the independence of the judiciary". ***This means, more importantly, that the Executive, the Legislature, as well as other authorities, such as the police, prison, social and educational authorities, must respect and abide by the judgements and decisions of the Judiciary, even when they do not agree with them. Such respect for the judicial authority is indispensable for the maintenance of the rule of law, including respect for human rights standards, and all branches of Government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the Judiciary.***

The condition of the Judiciary's independence as to decision-making is further supported by Principle 4 of the Basic Principles, according to which:

> "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."[15]

It is not clear whether executive amnesties and pardons would be contrary to Principle 4, but Governments must in any event always exercise considerable care in resorting to such measures, so that any measures of clemency do not subvert the independent decision-making power of the Judiciary, thereby undermining the rule of law and true respect for human rights standards.

[14] For a discussion of this issue and others, as regards the system in the United States of America, see *An Independent Judiciary, Report of the American Bar Association Commission on Separation of Powers and Judicial Independence*, published on: http://www.abanet.org/govaffairs/judiciary/report.html.

[15] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges provides that "decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law" (Principle I.2.a.i.), and that "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" (Principle I.2.a.iv.)

4.4.4 Jurisdictional competence

According to Principle 3 of the Basic Principles, the independent decision-making power of the Judiciary also comprises "jurisdiction over all issues of a judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law".[16]

This ***rule of judicial autonomy in the determination of questions of competence*** is in fact well established at both national and international levels and can also be found, for instance, in article 36(6) of the Statute of the International Court of Justice, and, as regards the European Court of Human Rights, in article 32(2) of the European Convention on Human Rights.

4.4.5 The right and duty to ensure fair court proceedings and give reasoned decisions

This issue will be dealt with in subsection 4.5.8 below.

The notion of independence of the Judiciary means, in particular, that:

- *the Judiciary must enjoy* ***institutional independence****, in that it must be independent of the other branches of government, namely, the Executive and Parliament;*
- *the Judiciary must be independent as to* ***internal matters of judicial administration****, including the* ***assignment of cases to judges within the court to which they belong****;*
- *the Judiciary must have independence in* ***financial matters*** *and have sufficient funds to perform their functions efficiently;*
- *the Judiciary must be* ***independent as to decision-making****: both the Government and other institutions have the duty to respect and observe the decisions handed down by the Judiciary;*
- *the Judiciary must have* ***jurisdictional competence****, which means that there must be judicial autonomy in the determination of questions of competence;*
- *the Judiciary has both the right and the duty to* ***ensure fair court proceedings*** *and issue* ***reasoned decisions****.*

[16] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe provides that "no organ other than the courts themselves should decide on its own competence, as defined by law" (Principle I.2.a.iii).

4.5 The notion of individual independence

It is not only the Judiciary per se, as a branch of government, that must be independent of the Executive and Parliament; the ***individual judges***, too, have a right to enjoy independence in carrying out their professional duties. This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences: it means, as will be shown below, that ***they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgements in difficult and sensitive cases***. Unfortunately, judges are not always allowed to carry out their work in this spirit of true independence, but in many countries have to suffer undue pressure ranging from inappropriate personal criticism and transfer or dismissal to violent and even fatal attacks on their person.

The independence of the individual judge must be secured in a number of ways, the most important of which will be described below.

4.5.1 Appointment

International law does not provide any details as to *how* judges should be appointed, and the Basic Principles are neutral with regard to the appointment or election of judges. However, according to Principle 10 of the Basic Principles:

> "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."

This principle means that, irrespective of the method of selection of judges, candidates' professional qualifications and their personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of the political views they hold or because, for instance, they profess certain religious beliefs. Such appointments would seriously undermine the independence both of the individual judge and of the Judiciary as such, thereby also undermining public confidence in the administration of justice.

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The Human Rights Committee has expressed concern "that in appearance as well as in fact" the Judiciary in the Sudan was "not truly independent, ... that judges can be subject to pressure through the supervisory authority dominated by the Government, 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".[17] The Human Rights Committee has also recommended to Bolivia that "the nomination of judges be based on their competence and not their political affiliation".[18]

With regard to Zambia, the Human Rights Committee has expressed concern about "the proposals made by the Constitutional Review Committee in regard to the appointment of judges of the Supreme Court by the President after their retirement and the removal of Supreme Court judges by the President, subject only to ratification by the National Assembly without any safeguard or inquiry by an independent judicial tribunal". It concluded that such proposals were "incompatible with the independence of the judiciary and run counter to article 14 of the Covenant".[19]

Consequently, article 14 of the Covenant has not been complied with in cases where judges are appointed or dismissed by the President without these decisions having been taken in consultation with some independent legal authority, even where the President's decisions must be ratified by Parliament.

Likewise, as regards Slovakia the Committee has 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"; it recommended that "specific measures be adopted as a matter of priority guaranteeing the independence of the judiciary and 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".[20]

With regard to the Republic of the Congo, the Committee expressed its "concern at the attacks on the independence of the judiciary in violation of" article 14(1), 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 the judges [were] subjected".[21] It therefore recommended to the State party that it should "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".[22]

Appointments of judges must, in other words, in themselves constitute a strong factor for independence and cannot be left to the exclusive discretion of the Executive and Legislature.

The question of "lack of full independence of the judiciary" has also arisen in connection with Kyrgyzstan, when the Committee noted, in particular, "that the applicable certification 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".[23]

[17] UN doc. *GAOR*, A/53/40 (vol. I), para. 132.

[18] UN doc. *GAOR*, A/52/40 (vol. I), para. 224.

[19] UN doc. *GAOR*, A/51/40, para. 202.

[20] UN doc. *GAOR*, A/52/40 (vol. II), para. 379.

[21] UN doc. *GAOR*, A/55/40 (vol. I), para. 279.

[22] Ibid., para. 280.

[23] UN doc. *GAOR*, A/55/40 (vol. I), para. 405.

As to the *election* of certain judges in the United States of America, the Human Rights Committee noted that it was "concerned about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights" guaranteed by article 14, and it welcomed "the efforts of a number of states in the adoption of a merit-selection system". It also 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".[24]

Accordingly, the election of judges would not seem to be compatible with the notion of independence as set forth in article 14.[25]

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With regard to the Special Military Tribunal in Nigeria, the African Commission on Human and Peoples' Rights held that "the selection of serving military officers, with little or no knowledge of law as members of the Tribunal" was in contravention of Principle 10 of the Basic Principles on the Independence of the Judiciary.[26]

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As to the European Convention on Human Rights, the European Court of Human Rights has consistently held that

> "in order to establish whether a tribunal can be considered 'independent' for the purposes of article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence".[27]

In the case of *Lauko*, the Court thus held that the applicant's right to have a fair hearing by an independent and impartial tribunal under article 6(1) had been violated. The applicant had been fined for committing a minor offence. This decision was imposed by the local office and an appeal rejected by the district office; the Constitutional Court of Slovakia could not deal with the matter since it was a minor offence falling within the competence of the administrative authorities.[28] The Court noted that the local and district offices were "charged with carrying out local State administration under the control of the Government", and that the appointment of the heads of these bodies was controlled by the Executive and their officers, who had the

[24] UN doc. *GAOR*, A/50/40, paras. 288 and 301; emphasis added.

[25] The United Nations Special Rapporteur on the independence of judges and lawyers has emphasized the importance of adhering to the ***objective criteria*** listed in Principle 10 of the United Nations Basic Principles in connection with the election and appointment of judges; see e.g. UN doc. E/CN.4/2000/61/Add.1, *Report of the Special Rapporteur on the independence of judges and lawyers, Addendum: Report on the mission to Guatemala*, paras. 60-64. For concern as to risks that the *election* of judges, and, in particular *re-election*, pose to the independence of judges, see *The Rule of Law and Human Rights: Principles and Definitions* (Geneva, International Commission of Jurists, 1966), p. 30, para. 2. As to the use of objective criteria in the selection of judges, see also Principle I.2.c of Council of Europe Recommendation No. R (94) 12 on the independence, efficiency and role of judges. For general information on the European judiciaries, see *Judicial Organization in Europe (2000)*, Strasbourg, Council of Europe Publication, 2000, 352 pp.

[26] *ACHPR, Media Rights v. Nigeria, Communication No. 224/98, decision adopted during the 28th session, 28 October – 6 November 2000*, para. 60 at http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

[27] *Eur. Court HR, Case of Incal v. Turkey, judgment of 9 June 1998, Reports 1998-IV*, p. 1571, para. 65.

[28] *Eur. Court HR, Case of Lauko v. Slovakia, judgment of 2 September 1998, Reports 1998-VI*, pp. 2497-2498, paras.12-17.

status of salaried employees.[29] It followed 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 [could not] be considered to be 'independent' of the executive within the meaning of" article 6(1).[30] Although the Court added that it is not inconsistent with the Convention to entrust "the prosecution and punishment of minor offences to administrative authorities", it had "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".[31]

Since in the present case the applicant was unable to have the decisions of the local and district offices reviewed by an independent and impartial tribunal, his rights under article 6(1)of the Convention had been violated.[32]

In some situations, however, the notions of independence and impartiality are closely linked, and, when considering the compatibility with article 6 of the European Convention of the National Security Courts in Turkey and the courts martial in the United Kingdom, the Court has, as will be seen in subsection 4.7 below, examined these notions together. As stated in the case of *Incal*, for instance, what is of decisive importance is whether the manner in which the court concerned functioned "infringed the applicant's right to a fair trial":

> "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 (...)."[33]

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The Inter-American Commission on Human Rights has recommended that the member States of the OAS

> "take the steps necessary to protect the integrity and independence of members of the Judiciary in the performance of their judicial functions, and specifically in relation to the processing of human rights violations; in particular, judges must be free to decide matters before them without any influence, inducements, pressures, threats or interferences, direct or indirect, for any reason or from any quarter".[34]

[29] Ibid., p. 2506, para. 64.

[30] Ibid., loc. cit.

[31] Ibid. at p. 2507.

[32] Ibid., pp. 2506-2507, paras. 64-65. However, the Court came to a different conclusion in the case of *Stallinger and Kuso*, where expert members were included in the Regional and Supreme Land Reform Boards on account of their experience of agronomy, forestry and agriculture: "the adversarial nature of the proceedings before the boards was unaffected by the participation of the 'civil-servant experts'"; hence, there was no violation of article 6(1) of the Convention; see *Eur. Court HR, Case of Stallinger and Kuso v. Austria, judgment of 18 March 1997, Reports 1997-II,* p. 677, para. 37.

[33] *Eur. Court HR, Incal judgment of 9 June 1998, Reports 1998-IV*, pp. 1572-1573, para. 71.

[34] OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, p. 761.

In the *Constitutional Court* case, the Inter-American Court held that the independence of any judge presupposes an adequate process of appointment ("un adecuado proceso de nombramiento"), for a period in the post ("con una duración en el cargo") and with guarantees against external pressures ("con una garantía contra presiones externas").[35]

4.5.2 Security of tenure

As indicated above, unless judges have some long-term security of tenure, there is a serious risk that their independence will be compromised, since they may be more vulnerable to inappropriate influence in their decision-making. Principle 11 of the Basic Principles therefore provides that

> "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."

Principle 12 further specifies 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."[36]

It would consequently be contrary to Principles 11 and 12 to appoint or elect judges with no guarantee of tenure at all or only a brief period of guaranteed term of office.[37] ***It is by providing judges with a permanent mandate that their independence will be maximized, as will public confidence in the Judiciary.***

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With regard to the situation in Armenia, the Human Rights Committee noted that the independence of the Judiciary was not fully guaranteed, observing, in particular, that "the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality".[38]

In some countries judges may be obliged to go through a recertification procedure at certain intervals in order to be authorized to continue in office. Faced with this practice in Peru, the Human Rights Committee noted "with concern that the judges retire at the expiration of seven years and require recertification for reappointment". It considered this "a practice which tends to affect the independence of the Judiciary by denying security of tenure".[39] The Committee therefore recommended to the

[35] *I-A Court HR, Constitutional Court Case (Aguirre Roca, Rey Terry and Revorado Marsano v. Peru), judgment of 31 January 2001*, para. 75 of the Spanish version of the judgment, which can be found on the Court's web site: http://www.corteidh.or.cr/serie_c/C_71_ESP.html.

[36] Recommendation I.3 of Council of Europe Recommendation No. R (94) 12 is identical to Principle 12.

[37] The Special Rapporteur on the independence of judges and lawyers has held that while "fixed-term contracts may not be objectionable and not inconsistent with the principle of judicial independence, a term of five years is too short for security of tenure". In his view "a reasonable term would be 10 years"; UN doc. E/CN.4/2000/61/Add.1, *Report on the Mission to Guatemala*, para. 169(c).

[38] UN doc. *GAOR*, A/54/40 (vol. I), para. 104.

[39] UN doc. *GAOR*, A/51/40, para. 352.

Government that "the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision".[40]

The question of review was also at issue with regard to Lithuania, and the Committee was concerned that, although there were "new provisions aimed at ensuring the independence of the judiciary, District Court judges must still undergo a review by the executive after five years of service in order to secure permanent appointment". Consequently, it recommended that "any such review process should be concerned only with judicial competence and should be carried out only by an independent professional body".[41]

It follows that, in the view of the Human Rights Committee, the practice of executive recertification or review of judges is contrary to article 14(1) of the International Covenant on Civil and Political Rights.

4.5.3 Financial security

The international and regional treaties do not expressly deal with the question of financial security for the Judiciary and individual judges, but Principle 11 of the Basic Principles quoted above provides that judges shall have adequate remuneration and also pensions.

The question of fair and adequate remuneration is important since it may help attract qualified persons to the bench and may also make judges less likely to yield to the temptation of corruption and political or other undue influences. In some countries judges' salaries are protected against decreases, although pay increases may depend on the Executive and Legislature. Where the Executive and Legislature control the budgets of the Judiciary, there may be a potential threat to the latter's independence.

In the case of *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, the Canadian Supreme Court had to decide "whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges".[42] As part of its budget deficit reduction plan, the Province had enacted the Public Sector Pay Reduction Act whereby it reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following these pay reductions, numerous accused persons challenged the constitutionality of their proceedings in the Provincial Court, alleging that, as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal. The Supreme Court concluded that the salary reductions "as part of an overall public economic measure were consistent with s. 11*(d)* of the *Charter*", as there was "no evidence that the reductions were introduced in order to influence or manipulate the judiciary".[43] What constituted a violation of judicial independence was, however, the refusal of the Manitoba Government to sign a joint recommendation to the Judicial Compensation Committee, "unless the judges agreed to forgo their legal challenge "of

[40] Ibid., para. 364.

[41] See UN doc. *GAOR*, A/53/40 (vol. 1), para. 173.

[42] *(1997) 3 S.C.R. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Judges) 3*, at http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0003.html at p. 5.

[43] Ibid., p. 12.

the law whereby the salary reduction was imposed. The Court considered that the Government had thereby "placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes".[44] In its view, "the financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so".[45]

4.5.4 Promotion

Principle 13 of the Basic Principles provides that "promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience". Improper factors not linked to the professional merits of the judges concerned are thus not to be considered for purposes of promotion.[46] Such improper factors might, for instance, include attitudes of discrimination based on gender, race or ethnicity.[47]

4.5.5 Accountability

While there is no disagreement about the need for judicial discipline among judges, the question arises as to how to decide on possible sanctions in cases of misconduct, who should decide, and what the sanctions should be. It is also imperative that judges not be subjected to disciplinary action because of opposition to the merits of the case or cases decided by the judge in question.

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With regard to Belarus, the Human Rights Committee noted "with concern the allegation that two judges were dismissed by the President ... on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive".[48] The Committee was also concerned that the Cambodian Supreme Council of the Magistracy was "not independent of government influence" and that it had "not yet been able to deal with the allegations of judicial incompetence and unethical behaviour". Given its further concern inter alia about the fact that the Ministry of Justice issued circulars that were binding on judges, the Committee recommended that the State party "should take urgent measures to strengthen the judiciary and to guarantee its independence, and to ensure that all allegations of corruption or undue pressure on the judiciary are dealt with promptly".[49]

[44] Ibid., loc. cit. The Judicial Compensation Committee was a body created by The Provincial Court Act for the purpose of issuing reports on judges' salaries to the legislature.

[45] Ibid.

[46] Council of Europe Recommendation No. R (94) 12 emphasizes that "all decisions concerning the selection and career of judges should be based on objective criteria" and that not only the selection of judges but also their career "should be based on merit, having regard to qualifications, integrity, ability and efficiency"; moreover, decisions regarding the career of judges should be independent of both the Government and the administration (principle I.2.c.).

[47] As to minority representation in the legal profession in the United States, see report by the American Bar Association Commission on Racial and Ethnic Diversity in the Profession entitled *Miles to Go 2000*: *Progress of Minorities in the Legal Profession.* According to this report, minority representation in the legal profession is significantly lower than in most other professions. Although mainly devoted to lawyers, the report also contains a subsection on the Judiciary; see www.abanet.org/minorities.

[48] UN doc. *GAOR*, A/53/40 (vol. I), para. 149.

[49] UN doc. *GAOR*, A/54/40 (vol. I), paras. 299-300.

It would thus appear clear that the Human Rights Committee considers that the term "independent" in article 14(1) of the Covenant requires that unethical professional behaviour be dealt with by an organ fully independent of government influence.

The matter of discipline, suspension and removal of judges is also dealt with in Principles 17-20 of the United Nations Basic Principles, which read as follows:

> "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 decisions of the highest court and those of the legislature in impeachment or similar proceedings."

It is noteworthy, however, that Principle 17 speaks only of "an appropriate procedure" and that Principle 20 recommends that decisions in disciplinary and other procedures "*should* be subject to an independent review" (emphasis added). It would thus appear that the interpretation of article 14(1) of the International Covenant on Civil and Political Rights by the Human Rights Committee goes further than the Basic Principles in this respect.[50]

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In a case against Burkina Faso, the African Commission on Human and Peoples' Rights had to consider the State's failure to give any legal reasons to justify the retention of the punishment meted out to two magistrates. The two were among a number of magistrates who had been suspended, dismissed or forced to retire in 1987. Many of the persons affected by this measure were subsequently reinstated by virtue of an amnesty, while many others, including the two magistrates who were the subject of

[50] Principle VI of Council of Europe Recommendation No. R (94) 12 also deals with the failure to carry out responsibilities and disciplinary offences, and, depending on legal principles in force and traditions of the States, disciplinary measures may inter alia include: 1) withdrawal of cases from the judge; 2) moving the judge to other judicial tasks within the court; 3) economic sanctions such as a reduction in salary for a temporary period; and 4) suspension (Principle VI.1.). However, appointed "judges may not be permanently removed from office without valid reasons until mandatory retirement", reasons that "should be defined in precise terms by the law". These reasons could also "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" (Principle VI.2). Moreover, where the measures mentioned in Principles VI.1 and 2 "need to be taken, States should consider setting up, by law, a special competent body which has as its task to apply 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" (emphasis added). The law should also "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" (Principle VI.3).

the case before the Commission, were not so reinstated.[51] In the view of the Commission, this failure constituted a violation of Principles 18 and 19 of the Basic Principles on the Independence of the Judiciary.[52] As to the refusal by the Supreme Court to proceed with the two magistrates' claims for damages, lodged fifteen years earlier, it constituted a violation of article 7(1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time by an impartial court or tribunal.[53]

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The *Constitutional Court* case dealt with by the Inter-American Court of Human Rights concerned the impeachment and final removal by legislative decisions of 28 May 1997 of three judges from the bench of the Constitutional Court. These decisions were a consequence of a complex process that had begun in 1992, when President Fujimori dissolved both Congress and the Court of Constitutional Guarantees. In 1996 the new Constitutional Court was called upon to examine the constitutionality of a law that interpreted article 112 of the Peruvian Constitution regarding presidential re-elections. After five of the seven members had found that the relevant law was "non-applicable", although they did not declare it unconstitutional, the judges forming the majority were allegedly subjected to a campaign of pressure, intimidation and harassment.[54] As noted by the Inter-American Court, the removal of the three judges was the result of the application of a sanction by the legislative power within the framework of a political trial ("juicio político"),[55] and the Court concluded unanimously that articles 8 and 25 of the American Convention on Human Rights had been violated with regard to the three former constitutional court judges.

As to article 8 of the Convention, it had been violated since the proceedings of the political trial to which the three judges were subjected did not ensure due process guarantees and, further, since in this specific case the Legislature did not comply with the necessary condition of independence and impartiality in conducting the political trial of the judges.[56] As to *the lack of impartiality*, it was inter alia due to the fact that some of the 40 members of Congress who had addressed a letter to the Constitutional Court requesting the Court to decide on the question of the constitutionality of the law on presidential elections subsequently participated in the various commissions and sub-commissions appointed during the impeachment proceedings. Furthermore, some of those members taking part in the vote on the removal of the judges were in fact expressly prohibited from doing so on the basis of the Rules of Congress.[57] With regard to the violation of the *due process guarantees*, the three judges in question had not received complete and adequate information as to the charges laid against them and their access

[51] *ACHPR, Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso, Communication No. 204/97, decision adopted during the 29th Ordinary session, 23 April – 7th May 2001*, para. 38; for the text see http://www1.umn.edu/humanrts/africa/comcases/204-97.html.

[52] Ibid., loc. cit.

[53] Ibid., para. 40.

[54] *I-A Court HR, Constitutional Court Case, Competence, judgment of September 24, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, para. 2 at pp. 374-378.

[55] *I-A Court HR, Constitutional Court Case (Aguirre Roca, Rey Terry and Revorado Marsano v. Peru), judgment of 31 January 2001*, para. 67 of the Spanish version of the judgment which can be found on the Court's web site: http://www.corteidh.or.cr/serie_c/C_71_ESP.html.

[56] Ibid., para. 84.

[57] Ibid., para.78.

to the evidence against them was limited. The time available to them for the preparation of their defence was also "extremely short" ("extremadamente corto"). Lastly, they were not allowed to question witnesses whose testimony was at the basis of the decision of the members of Congress to initiate the impeachment proceedings and their eventual decision to remove the three judges.[58]

As to the right to judicial protection laid down in article 25 of the American Convention, that too had been violated. The three judges had in fact filed writs of *amparo* against the decisions to remove them, writs which were considered unfounded by the Superior Court of Justice in Lima; these decisions were subsequently confirmed by the Constitutional Court.[59] According to the Inter-American Court of Human Rights, the failure of these writs was "due to assessments that were not strictly judicial" ("se debe a apreciaciones no estrictamente jurídicas"). It had for instance been established that the judges of the Constitutional Court who considered the writs of *amparo* were the same persons who participated, or were otherwise involved, in the congressional proceedings; consequently, the Constitutional Court did not comply with the Inter-American Court's criteria relating to the *impartiality of a judge*. It followed that the writs filed by the alleged victims were incapable of producing their intended result and were doomed to fail, as indeed they did.[60]

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To sum up, the general assertion can be made that, under international law, judges subjected to disciplinary proceedings must be granted due process before a ***competent***, ***independent*** and ***impartial*** organ which must be – or must be controlled by – an authority independent of the Executive. It would however seem that, at least under the American Convention on Human Rights, disciplinary proceedings may be brought against judges of constitutional courts by the Legislature, provided that the organ determining the charges strictly respects the principles of ***independence and impartiality*** and that the relevant proceedings comply with the ***due process guarantees*** laid down in article 8 of the Convention.

4.5.6 Freedom of expression and association

The rights of judges to freedom of expression and association are essential in a democratic society respectful of the rule of law and human rights. By being free to form associations, judges are better able to defend their independence and other professional interests.

Principle 8 of the 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

[58] Ibid., para. 83.

[59] Ibid., paras. 97 and 56.27.

[60] Ibid., para. 96.

> manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".[61]

4.5.7 Training and education

The training and continued education of judges in national and international human rights law is essential if it is to become a meaningful reality at the domestic level. Without such training, implementation of human rights law will remain illusory. The Human Rights Committee has on several occasions emphasized the importance of providing training in human rights law for judges, other legal professions and law enforcement officers.[62]

The Committee has further recommended that the Republic of the Congo should give "particular attention ... 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"; accordingly, it invited 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".[63]

Whether educational programmes such as, for instance, "social context education" should be made *mandatory* for judges, and, if so, in what way judges would be accountable for refusing to participate, is, however, an issue which has given rise to debate in Canada.[64]

The important point to emphasize in this respect is that it is in any event the Judiciary itself or the independent associations of judges that must ultimately be responsible for the promotion of the professional education and/or training concerned (cf. Principle 9 of the Basic Principles).

4.5.8 The right and duty to ensure fair court proceedings and give reasoned decisions

The independence of a tribunal is indispensable to fair court proceedings, be they criminal or civil. As laid down in Principle 6 of the Basic Principles:

> "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."

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[61] Somewhat more laconically, Council of Europe Recommendation No. R (94) 12 provides in Principle IV that judges "should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interest".

[62] See, as to Libyan Arab Jamahiriya, UN doc. *GAOR*, A/54/40 (vol. 1), para. 134; and as to the Sudan, UN doc. *GAOR*, A/53/40 (vol. I), para. 132.

[63] UN doc. *GAOR*, A/55/40 (vol. I), para. 280.

[64] See speech given by the Rt. Hon. Antonio Lamer, P.C., Chief Justice of Canada, *"The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective"* (Singapore Academy of Law Annual Lecture 1996), published at www.sal.org.sg/lect96.html, discussion at pp. 8-9. Principle V.3.g of the Council of Europe Recommendation provides that judges should have the responsibility "to undergo any necessary training in order to carry out their duties in an efficient and proper manner".

As is made clear in subsequent chapters, and in particular Chapter 7 on *The Right to a Fair Trial* and Chapter 16 concerning *The Administration of Justice during States of Emergency,* this means that judges have an obligation to decide the cases before them according to the law, protect individual rights and freedoms, and constantly respect the various procedural rights that exist under domestic and international law. Further, this important task has to be carried out without any inappropriate or unwarranted interference with the judicial process (Principle 4 of the Basic Principles).

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The Human Rights Committee expressed concern that the new Judiciary in Cambodia was susceptible to "bribery and political pressure" and that it was seeking "the opinions of the Ministry of Justice in regard to the interpretation of laws and that the Ministry issues circulars which are binding on judges". Consequently, it recommended that the State party "should take urgent measures to strengthen the judiciary and to guarantee its independence, and to ensure that all allegations of corruption or undue pressure on the judiciary are dealt with promptly".[65]

It is further inherent in the notion of a competent, independent and impartial tribunal that it must give ***reasons for its decisions***. With regard to article 6(1) of the European Convention on Human Rights, the European Court held in this respect, in the case of *Higgins and Others*, that this obligation "cannot be understood as requiring a detailed answer to every argument", but that "the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case".[66] Where the Court of Cassation had failed in its judgement to give express and specific explanations on a complaint that the Court of Appeal had not been impartial, the Court found a violation of article 6(1).[67]

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The Human Rights Committee has examined numerous cases where Jamaican courts have failed to give reasoned judgements, thereby effectively preventing the convicted persons from exercising their right to appeal. However, rather than examining this issue within the framework of the notion of independence and impartiality in article 14(1) of the Covenant, the Committee has considered it under article 14(3)(c), which guarantees the right to "be tried without undue delay", and article 14(5), which safeguards the right of appeal in criminal cases.[68]

[65] UN doc. *GAOR*, A/54/40 (vol. I), para. 299.

[66] *Eur. Court HR, Case of Higgins and Others v. France, judgment of 19 February 1998, Reports 1998-I*, p. 60, para. 42.

[67] Ibid., p. 61, para. 43.

[68] See, for example, Communication No. 283/1988, *A. Little. v. Jamaica* (Views adopted on 1 November 1991, in UN doc. *GAOR,* A/47/40, p. 284, para. 9 read in conjunction with p. 283, para. 8.5 (violation of article 14(5) of the Covenant; no reasoned judgement issued by the Court of Appeal for more than five years after dismissal); and Communication No. 377/1988, *A. Currie v. Jamaica* (Views adopted on 29 March), in UN doc. *GAOR*, A/49/49 (vol. II), p. 77, para. 13.5 (violation of both article 14(3)(c) and (5) for failure of the Court of Appeal to issue written judgement thirteen years after dismissal of appeal).

The notion of independence of the Judiciary also means that

- ***individual judges** must enjoy **independence in the performance of their professional duties**; individual judges have a right and a duty to decide cases before them according to law, free from outside interference including the threat of reprisals and personal criticism;*
- ***individual judges** must be appointed or elected exclusively on the basis of their **professional qualifications and personal integrity**;*
- ***individual judges** must enjoy **long-term security of tenure**;*
- ***individual judges** must be **adequately remunerated**;*
- *the **promotion of individual judges** must be based on **objective factors**;*
- *the question of **accountability of individual judges** for unethical professional behaviour must be dealt with by a fully independent and impartial organ ensuring due process of law.*

4.6 The notion of impartiality

As previously noted, the concept of impartiality is closely linked to that of independence and sometimes the two notions are considered together. The requirement of impartiality is contained in article 14(1) of the International Covenant on Civil and Political Rights, article 7(1) of the African Charter of Human and Peoples' Rights, article 8(1) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights.

Principle 2 of the Basic Principles also specifies that

> "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."

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In the case of *Arvo O. Karttunen*, the Human Rights Committee explained 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(1) of the Covenant, adding that the notion of impartiality "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".[69] It specified that, "where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to

[69] Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 120, para. 7.2.

consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. ... A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14".[70] In this particular case, the Finnish Court of Appeal had considered, on the basis of only written evidence, that the verdict of the District Court "had not been influenced by the presence of lay judge V. S., while admitting that V. S. manifestly should have been disqualified".[71] The lay judge had made some allegedly improper remarks during the testimony given by the author's wife, remarks that, as admitted by the Government itself, "could very well have influenced the procurement of evidence and the content of the court's decision".[72] The Committee concluded that, in the absence of oral proceedings before the Court of Appeal, which was the only means of determining "whether the procedural flaw had indeed affected the verdict of the District Court", there had been a violation of article 14.[73]

As further emphasized by the Human Rights Committee, ***in addressing a jury***, the presiding judge must not give instructions that are either arbitrary, amount to a denial of justice, or violate his obligations of impartiality.[74]

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In the case concerning the *Constitutional Rights Project*, the African Commission on Human and Peoples' Rights had, inter alia, to consider the compatibility with article 7(1)(d) of the African Charter on Human and Peoples' Rights of the Civil Disturbances (Special Tribunal) Act, under the terms of which that tribunal should consist of one judge and four members of the armed forces. In the view of the Commission, the tribunal was as such "composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act".[75] The Commission then recalled that article 7(1)(d) of the Charter "requires the court or tribunal to be impartial", adding that, "regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality". Consequently, there had been a violation of the said provision in this case.[76]

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[70] Ibid., loc. cit.

[71] Ibid., p. 120, para. 7.3.

[72] Ibid., p. 117, para. 2.3 and p. 119, para. 6.3 read together.

[73] Ibid., p. 120, para. 7.3.

[74] Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), para. 9.4 at p. 128; in this particular case there was no evidence "to show that the trial judge's instructions or the conduct of the trial suffered from any such defects".

[75] *ACHPR, Constitutional Rights Project v. Nigeria, Communication No. 87/93,* para. 13; for the text of the judgment, see e.g. http://www1.umn.edu/humanrts/africa/comcases/87-93.html. See also *ACHPR, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision of 1 October 1998*, para. 86; for the text see http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

[76] Ibid., para. 14.

As to the requirement of impartiality in article 6(1) of the European Convention on Human Rights, the European Court of Human Rights has consistently ruled that it has two requirements, namely, one ***subjective*** and one ***objective*** requirement. In the first place, "the tribunal must be ***subjectively impartial***", in that "no member of the tribunal should hold any personal prejudice or bias", and this personal "impartiality is presumed unless there is evidence to the contrary".[77] Secondly, "the tribunal must also be impartial from an objective viewpoint", in that "it must offer guarantees to exclude any legitimate doubt in this respect".[78] With regard to the ***objective test***, the Court added that it must be determined whether there are ascertainable facts, which may raise doubts as to the impartiality of the judges, and that, in this respect, "even appearances may be of a certain importance", because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings".[79]

Thus, in the case of *Oberschlick*, the European Court concluded that article 6(1) had been violated for lack of impartiality since a judge who had taken part in a decision quashing an order dismissing criminal proceedings subsequently sat in the hearing of an appeal against the applicant's conviction.[80] The possibility exists, nevertheless, "that a higher or the highest tribunal may, in some circumstances, make reparation for an initial violation of one of the Convention's provisions".[81] However, this is only possible where the subsequent control is exercised by a judicial body having "full jurisdiction" and providing the guarantees foreseen by article 6(1).[82] Issues that may be of relevance to assess the adequacy of the review, on a point of law for instance, may be "the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the contents of the dispute, including the desired and actual grounds of appeal".[83] Where the higher court does not have full jurisdiction to make such review, the Court has found a violation of article 6(1).[84]

In the case of *Daktaras*, the Court concluded that article 6(1) had been violated because the applicant's doubts as to the impartiality of the Lithuanian Supreme Court "may be said to have been ***objectively*** justified".[85] In this case, the President of the Criminal Division of the Supreme Court had lodged a petition for cassation with the judges of that Division, at the request of the judge at first instance, who was dissatisfied with the judgement of the Court of Appeal. The President proposed that the appellate decision be quashed but the same President also appointed the Judge Rapporteur and constituted the chamber that was to examine the case. The President's cassation petition was endorsed at the hearing by the prosecution and finally accepted by the

[77] *Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000,* para. 30; emphasis added.

[78] Ibid., loc. cit.

[79] Ibid., para. 32.

[80] *Eur. Court HR, Case of Oberschlick v. Austria (1), judgment of 23 may 1991, Series A, No. 204,* p. 13, para. 16 and p. 15 para. 22. For similar cases, see also *Eur. Court HR, Case of Castillo Algar v. Spain, judgment of 28 October 1998, Reports 1998*-VIII, p. 3124 ff. and *Eur. Court HR, the Case of de Haan v. the Netherlands, judgment of 26 August 1997, Reports 1997-IV*, p. 1379 ff.

[81] *Eur. Court HR, Case of de Haan v. the Netherlands, judgment of 26 August 1997, Reports 1997-IV*, p. 1393, para. 54.

[82] *Eur. Court HR, Case of Kingsley v. the United Kingdom, judgment of 7 November 2000,* para. 51; for the text of the judgment, see http://www.echr.coe.int/.

[83] *Eur. Court HR, Case of Bryan v. the United Kingdom, judgment of 22 November 1995, Series A, No. 335-A,* p. 17, para. 45.

[84] *Eur. Court HR, Kingsley v. the United Kingdom, judgment of 7 November 2000*, para. 59.

[85] *Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000*, para. 38; emphasis added.

Supreme Court. As to the ***subjective test***, there was no evidence of ***personal bias*** of the individual judges of the Supreme Court,[86] but, under the ***objective test***, the conclusion was different. In the view of the Court, the legal opinion given by the President in submitting a cassation petition could not be regarded as neutral from the parties' point of view, since, "by recommending that a particular decision be adopted or quashed, [he] necessarily becomes the defendant's ally or opponent".[87] The European Court added that, "when the President of the Criminal Division not only takes up the prosecution case but also, in addition to his organisational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure". Further, the fact that the President's intervention was prompted by the judge at first instance only aggravated the situation.[88]

The notion of impartiality is also applicable to ***jurors***, and, in the case of *Sander,* the European Court found a violation of article 6(1) after a juror had made racist remarks and jokes and the judge's subsequent direction had failed to dispel the reasonable impression and fear of a lack of impartiality. The Court accepted that, "although discharging the jury may not always be the only means to achieve a fair trial, there are certain circumstances where this is required by Article 6 § 1 of the Convention".[89] In this particular case, "the judge was faced with a serious allegation that the applicant risked being condemned because of his ethnic origin", and, moreover, "one of the jurors indirectly admitted to making racist comments"; given "the importance attached by all Contracting States to the need to combat racism", the Court considered "that the judge should have acted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence".[90] It concluded that, "by failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court", which was not, consequently, "impartial from an objective point of view".[91]

In a second case concerning a juror who had allegedly uttered a racist slur, the Court also emphasized that article 6(1) of the Convention "imposes an obligation on every national court to check whether, as constituted, it is 'an impartial tribunal' within the meaning of that provision ... [where] this is disputed on a ground that does not immediately appear to be manifestly devoid of merit".[92] In the case of *Remli* the court concerned had not made such a check, and, consequently, the applicant had been deprived "of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention".[93]

[86] Ibid., para. 31.

[87] Ibid., para. 35.

[88] Ibid., para. 36.

[89] *Eur. Court HR, Case of Sander v. the United Kingdom, judgment of 9 May 2000,* para. 34; for the text of the judgment, see http://www.echr.coe.int/.

[90] Ibid., loc. cit.

[91] Ibid. For other cases involving the notion of impartiality, see e.g., *Eur. Court HR, Case of Diennet v. France, judgment of 26 September 1995, Series A, No. 325-A* (no violation); and the cases mentioned under the section dealing with "Military and other special courts or tribunals".

[92] *Eur. Court HR, Case of Remli v. France, judgment of 30 March 1996, Reports 1996-II*, p. 574, para. 48.

[93] Ibid., loc. cit.

The notion of ***impartiality of the judiciary*** *is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties.*

4.7 Military and other special courts and tribunals

The creation in special situations of military courts or other courts of special jurisdiction such as State Security Courts is commonplace and often gives rise to violations of the right to due process of law. While the international treaties examined in this Manual do not draw any express distinction between ordinary and special, including military, tribunals, the Human Rights Committee made it clear in its General Comment No. 13 that the provisions of article 14 of the Covenant "apply to all courts and tribunals within the scope of that article whether ordinary or specialized".[94] This means, for instance, that likewise, military or other special tribunals which try civilians must comply with the condition of independence and impartiality. The Committee admitted that this could cause a problem, since "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".[95] Yet, "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".[96]

In the case of *R. Espinoza de Polay*, the Human Rights Committee further expressed the view that special tribunals composed of anonymous, so called "faceless", judges are not compatible with article 14, because they "fail to guarantee a cardinal aspect of a fair trial within the meaning of article 14", namely, "that the tribunal must be, and be seen to be, independent and impartial".[97] It added that, "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".[98] The Committee has also severely criticized the system of trial of civilians by "faceless judges" in a military court during the consideration of Peru's periodic reports, since it was the same military force that detained, charged and tried the persons accused of terrorism, without there being any possibility of review by a higher independent and impartial court.[99] The Committee emphasized "that trials of

[94] *United Nations Compilation of General Comments*, p. 123, para. 4.

[95] Ibid., loc. cit.

[96] Ibid.

[97] Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc *GAOR*, A/53/40 (vol. II), p. 43, para. 8.8.

[98] Ibid., loc. cit. In the view of the Committee this system also "fails to safeguard the presumption of innocence as guaranteed by" article 14(2), ibid. See also Communication No. 688/1996, *C. T. Arredondo v. Peru,* (Views adopted on 27 July 2000), in UN doc. *GAOR,* A/55/40 (vol. II) p. 60, para. 10.5.

[99] UN doc. *GAOR*, A/51/40, p. 62, para. 350; see also p. 64, para. 363.

non-military persons should be conducted in civilian courts before an independent and impartial judiciary".[100]

The Committee further expressed its concern that the Government of Nigeria had "not abrogated the decrees establishing special tribunals or those revoking normal constitutional guarantees of fundamental rights as well as the jurisdiction of the normal courts".[101] It emphasized that "all decrees revoking or limiting guarantees of fundamental rights and freedoms should be abrogated", and that all "courts and tribunals must comply with all standards of fair trial and guarantees of justice prescribed by article 14 of the Covenant".[102] Similarly, the Committee has noted with concern that special courts in Iraq "may impose the death penalty", although they "do not provide for all procedural guarantees required by article 14 of the Covenant, and in particular the right of appeal". It informed the State party in this respect that "Courts exercising criminal jurisdiction should not be constituted other than by independent and impartial judges, in accordance with article 14, paragraph 1, of the Covenant"; and, further, that "the jurisdiction of such courts should be strictly defined by law and all procedural safeguards protected by article 14, including the right of appeal, should be fully respected".[103]

The question of military tribunals has also arisen with regard to Cameroon, with the Committee expressing concern about the jurisdiction of military courts over civilians and about the extension of that jurisdiction to offences which are not per se of a military nature, for example all offences involving firearms. The Committee consequently recommended that the State party "should ensure that the jurisdiction of military tribunals is limited to military offences committed by military personnel".[104] With regard to Guatemala the Committee noted that "the wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations". The Committee consequently informed the State party that it should "amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature".[105] The same recommendation was made to Uzbekistan after the Committee had expressed concern about the "broad jurisdiction" of the military courts, which was "not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of courts of general jurisdiction".[106] After having also considered with concern "the broad scope of the jurisdiction of military courts" in Lebanon, the Committee recommended that the State party "should review the jurisdiction of the military courts and transfer the competence of [these] courts, in all trials concerning

[100]Ibid., p. 62, para. 350.

[101]Ibid., p. 51, para. 278.

[102]Ibid., p. 53, para. 293.

[103]UN doc. *GAOR*, A/53/40, pp. 20-21, para. 104.

[104]UN doc. *GAOR*, A/55/40 (vol. I), paras. 215-216.

[105]UN doc. *GAOR*, A/56/40 (vol. I), p. 96, para. 20.

[106]Ibid., p. 61, para. 15.

civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts".[107]

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The African Commission on Human and Peoples' Rights concluded that, inter alia, article 7(1)(d) of the African Charter on Human and Peoples' Rights was violated in a case concerning special tribunals set up in Nigeria by the Robbery and Firearms (Special Provisions) Act. These tribunals consisted of three persons, namely, one judge, one officer of the army, navy or air force and one officer of the police force. As noted by the African Commission, jurisdiction had "thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the Robbery and Firearms Decree, whose members do not necessarily possess any legal expertise". The Commission then concluded that such courts violated the condition laid down in article 7(1)(d) of the African Charter requiring the court or tribunal to be impartial; "regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality".[108]

The question of the compatibility of purely military tribunals with the African Charter was at issue in the *Media Rights Agenda* case concerning the secret trial before a Special Military Tribunal of Niran Malaolu, editor of an independent Nigerian daily newspaper, *The Diet*. The Tribunal sentenced Mr. Malaolu to life imprisonment after having found him guilty of treason.[109] As to its general position on the issue of trials of civilians by Military Tribunals, the African Commission recalled the terms of its Resolution on the Right to Fair Trial and Legal Assistance in Africa, where it had held that:

> ***"'In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards.'"***[110]

The Commission now added that military courts ***"should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts".***[111] The Commission considered, inter alia, that the creation of the Special Military Tribunal for the trial of treason and other related offences impinged on the independence of the judiciary, inasmuch as such offences were being recognized in

[107] UN doc. *GAOR*, A/52/40 (vol. I), p. 55, para. 344.

[108] *ACHPR, Constitutional Rights Project (in respect of Wahab Akamu, Gbolahan Adeaga and Others) v. Nigeria, Communication No. 60/91, decision adopted on 3 November 1994, 16th session*, paras. 36-37; text can be found at http://www.up.ac.za/chr/; for a similar case, see *ACHPR, Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria, Communication No. 87/93, decision adopted during the 16th session, October 1994*, paras. 30-31; for the text, see preceding web site.

[109] *ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000*, paras. 6-8; for the text of the decision, see http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

[110] Ibid., para. 62; Commission's own emphasis.

[111] Ibid., loc. cit.; emphasis added.

Nigeria as falling within the jurisdiction of the regular courts; and that the trial before the Court further violated the right to a fair trial as guaranteed by article 7(1)(d) of the African Charter and Principle 5 of the Basic Principles on the Independence of the Judiciary, which provides that

> "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."

Furthermore, the Tribunal also violated article 26 of the Charter, according to which the States parties "shall have the duty to guarantee the independence of the Courts".[112]

Lastly, in a case concerning a Special Military Tribunal set up under the Nigerian Military Government, the African Commission had to consider ***the fairness of legal proceedings before this court against military officers accused of offences punishable in terms of military discipline***. In this case the Commission stated that it

> "... must be clearly understood that the military tribunal here is one under an undemocratic military regime. In other words, the authority of the Executive and the Legislature has been subsumed under the military rule. Far from this suggesting that military rulers have carte blanche to govern at the whim of a gun, we wish to underscore the fact that the laws of human rights, justice and fairness must still prevail."[113]

It was the view of the Commission, furthermore, that "the provisions of Article 7 should be considered non-derogable, providing as they do the minimum protection to citizens and military officers alike, especially under an unaccountable, undemocratic military regime". The Commission thereafter referred to General Comment No. 13 of the Human Rights Committee, as well as the case-law of the European Commission of Human Rights, according to which "the purpose of requiring that courts be 'established by law' is that the organization of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament". The African Commission added with regard to military tribunals that the "critical factor is whether the process is fair, just and impartial".[114] While considering that "a military tribunal *per se* is not offensive to the rights in the Charter" and does not imply "an unfair or unjust process", 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. What causes offence is failure to observe basic and fundamental standards that would ensure fairness."[115]

[112] Ibid., para. 66.

[113] *ACHPR, 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*, at p. 3 of the text published at http://www1.umn.edu/humanrts/africa/comcases/218-98.html.

[114] Ibid., loc. cit.

[115] Ibid., p. 6, para. 44.

Since the military tribunal had in this case already failed the independence test, the Commission did not find it necessary also to decide whether the fact that the tribunal was presided over by a military officer was another violation of the Charter.[116]

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In its judgment on the merits of the case of *Castillo Petruzzi et al.*, the Inter-American Court of Human Rights found that the military tribunals that had tried the victims for the crimes of treason "did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law".[117] In 1992 a decree-law had extended the competence of military courts to try civilians accused of treason "regardless of temporal considerations", while previously they had been allowed to do so only when the country was at war abroad. DINCOTE, the National Counter-Terrorism Bureau, "was given investigative authority, and a summary proceeding 'in the theatre of operations' was conducted, as stipulated in the Code of Military Justice".[118] The pertinent parts of the Court's reasoning read as follows:

> "128. ... Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviours that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.
>
> 129. A 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. States are not to create 'tribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals'.[119]
>
> 130. Under article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be

[116] Ibid., loc. cit.

[117] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report I-A Court HR 1999*, Appendix IX, p. 263, para. 132.

[118] Ibid., p. 262, para. 127.

[119] The Court here quoted the United Nations Basic Principles on the Independence of the Judiciary.

> promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question".[120]

With regard to the fact that the presiding judges were "faceless" the Court said, more specifically, that in such cases "defendants have no way of knowing the identity of their judge and therefore, of assessing their competence". An additional problem was "the fact that the law does not allow these judges to recuse themselves".[121]

In the *Genie Lacayo* case, however, the Court stated that the fact that it involved a military court did not per se signify that the human rights guaranteed to the accusing party by the Convention were being violated.[122] In this particular case, the applicant had been "able to participate in the military proceeding, submit evidence, avail himself of the appropriate remedies and, lastly, apply for judicial review before the Supreme Court of Justice of Nicaragua"; consequently, he could not claim that the application of the decrees on military trials had restricted his procedural rights as protected by the Convention.[123] As to the allegation that the decrees concerning military trials violated the principle of independence and impartiality of the military tribunals, not only because of their composition, particularly in the second instance where senior army officials were involved, but also because of the possible use of ideological elements such as that of "*Sandinista* juridical conscience" on evaluation of evidence, the Court felt that

> "... although those provisions were in force when the military case was heard and ... could have impaired the independence and impartiality of the military tribunals that heard the case, they were not applied in this specific Case".[124]

On the other hand, the Court admitted that in the military court of first instance the court had, inter alia, invoked a legal provision in which the expression "*Sandinista* law" was used; however, this term had "only a superficial ideological connotation" and it had "not been proven that the invoking [thereof had] either diminished the impartiality and independence of the tribunals or violated Mr. Raymond Genie-Peñalba's procedural rights".[125]

In the light of the different reasoning in these two judgments rendered by the Inter-American Court of Human Rights the question might be raised whether, with respect to the second case, it would not have been appropriate to apply the principle that justice must not only be done but *also be seen to be done*.

[120] Ibid., pp. 262-263, paras. 128-130.

[121] Ibid., p. 263, para. 133. The Inter-American Commission on Human Rights has also severely criticized the use of "faceless judges" in Peru; see OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, pp. 736-737.

[122] *I-A Court HR, Genie Lacayo Case, judgment of January 29, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report I-A Court HR 1997*, p. 54, para. 84.

[123] Ibid., p. 54, para. 85.

[124] Ibid., p. 54, para. 86.

[125] Ibid., para. 87.

Lastly, the Inter-American Commission on Human Rights has recommended that all member States of the OAS

> "... take the legislative and other measures necessary, pursuant to article 2 of the American Convention, to ensure that civilians charged with criminal offences of any kind be tried by ordinary courts which offer all the essential guarantees of independence and impartiality, and that the jurisdiction of military tribunals be confined to strictly military offences".[126]

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While the European Court of Human Rights has decided, with respect to Turkey, that it considers that "its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts", it still has the task of examining whether, "viewed objectively", the applicants concerned, being civilians, "had a legitimate reason to fear that [the court trying them] lacked independence and impartiality".[127] In the *Sürek* case, among others, the applicant was prosecuted in the Istanbul National Security Court for disclosing the identity of officials involved in the fight against terrorism; the Court concluded that it was understandable that he "should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service".[128] It followed that

> "he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction."[129]

As to the trial of army officers by *courts martial*, the European Court of Human Rights has in numerous cases had to consider whether such courts in the United Kingdom have been "independent and impartial" within the meaning of article 6(1) of the European Convention on Human Rights. In the case of *Findlay*, for instance, it concluded that a court martial did not comply with these requirements in view in particular of the central part played in the prosecution by the convening officer, who "decided which charges should be brought and which type of court martial was most appropriate"; he further "convened the court martial and appointed its members and the prosecuting and defending officers".[130] Furthermore, the court members appointed by the convening officer were of subordinate rank to him, and many of these members, including the president, "were directly or ultimately under his command". The

[126] OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, p. 761.

[127] See e.g. *Eur. Court HR, Case of Sürek v. Turkey, judgment of 8 July 1999*.

[128] Ibid., loc. cit.

[129] Ibid. For similar cases see e.g. *Eur. Court HR, Case of Incal v. Turkey, judgment of 9 June 1998, Reports 1998-IV*, p. 1547 ff.; *Eur. Court HR, Case of Çiraklar v. Turkey, judgment of 28 October 1998, Reports 1998-VI*, p. 3059 ff.; and *Eur. Court HR, Case of Okçuoglu v. Turkey, judgment of 8 July 1999*; for the text of this judgment, see http://www.echr.coe.int.

[130] *Eur. Court HR, Case of Findlay v. the United Kingdom, judgment of 21 January 1997*, *Reports 1997-I*, p. 281, para. 74.

convening officer also "had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial".[131] The European Court concluded that "in order to maintain confidence in the independence and impartiality of the court, appearances may be of importance", and that, since "the members of the court martial ... were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified".[132]

For the European Court of Human Rights it was also of importance that the convening officer was "confirming officer", in that "the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit".[133] In the view of the Court this competence was

> "... contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6 § 1".[134]

The fair trial or due process guarantees in international human rights law, including the condition of independence and impartiality of the Judiciary, apply with full force to military and other special courts or tribunals also when trying civilians.

Under the African Charter on Human and Peoples' Rights, military tribunals shall under no circumstances try civilians, and special tribunals shall not deal with cases falling within the jurisdiction of ordinary courts of law.

Although the Human Rights Committee has not, as such, held that trials of civilians by military courts would in all circumstances be unlawful under article 14 of the International Covenant on Civil and Political Rights, the clear trend is to recommend that the States parties transfer the competence of such courts in all cases concerning civilians to the ordinary courts of law.

[131] Ibid., p. 282, para. 75.

[132] Ibid., para. 76.

[133] Ibid., para. 77.

[134] Ibid., loc. cit. For similar cases, see e.g. *Eur. Court HR, Case of Coyne v. the United Kingdom, judgment of 24 September 1997,Reports 1997-V*, p. 1842 ff., and *Eur. Court HR, Case of Cable and Others v. the United Kingdom, judgment of 18 February 1999*; see http://www.echr.coe.int.

5. International Law and the Independence of Prosecutors

5.1 Guidelines on the Role of Prosecutors, 1990

The need for strong, independent and impartial prosecutorial authorities for the effective maintenance of the rule of law and human rights standards has already been emphasized in this chapter. While the specific professional duties of prosecutors under international human rights law will be further dealt with whenever relevant in this Manual, the present section will limit itself to providing an overview of the contents of the Guidelines on the Role of Prosecutors, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 "to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings" (final preambular paragraph).

This document provides 24 Guidelines covering the following questions: qualifications, selection and training; status and conditions of service; freedom of expression and association; role in criminal proceedings; discretionary functions; alternatives to prosecution; relations with other government agencies or institutions; disciplinary proceedings; and observance of the Guidelines.

As noted in the fifth preambular paragraph of the Guidelines as read in conjunction with the second preambular paragraph, "prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect and compliance with ... 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..." for the purpose of "contributing to fair and equitable criminal justice and the effective protection of citizens against crime".

5.2 Professional qualifications

Guidelines 1 and 2 provide respectively that "persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications", and that States shall ensure that "selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice" on various stated grounds, "except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned". Further, according to Guideline 2(b), States shall ensure that "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".

5.3 Status and conditions of service

While prosecutors, "as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession" (Guideline 3), States shall, for their part, "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" (Guideline 4). Furthermore, "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" (Guideline 5). The law or published regulations shall, inter alia, set out "reasonable conditions of service of prosecutors, adequate remuneration", and, wherever a system of promotion exists, it "shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures" (Guidelines 6 and 7).

It is noteworthy that, unlike these Guidelines, the Basic Principles on the Independence of the Judiciary contain no specific provision concerning the duty of States to protect judges' personal safety when necessary.

5.4 Freedom of expression and association

"Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly", and they have, in particular, "the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national and international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization." However, "in exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession" (Guideline 8).

5.5 The role in criminal proceedings

As to its role in criminal proceedings, "the office of prosecutors shall be strictly separated from judicial functions" (Guideline 10). Furthermore, 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 or 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" (Guideline 11).

Like judges, prosecutors cannot act according to their own preferences but are duty-bound to act "in accordance with the law" and to

> "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system" (Guideline 12).

In performing their duties, prosecutors shall, inter alia, "carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination", and

> "shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences" (Guideline 15).

Prosecutors have a special obligation with regard to "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". In situations of this kind they shall either "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" (Guideline 16).

The Human Rights Committee expressed concern with regard to France "at existing procedures of investigation against the police for human rights abuses" and also "at the failure or inertia of prosecutors in applying the law to investigating human rights violations where law enforcement officers are concerned and at the delays and unreasonably lengthy proceedings in investigation and prosecution of alleged human rights violations involving law enforcement officers". It therefore recommended that the State party "take appropriate measures fully to guarantee that all investigations and prosecutions are undertaken in full compliance with" the provisions of articles 2(3), 9 and 14 of the Covenant.[135]

5.6 Alternatives to prosecution

The Guidelines concerning alternatives to prosecution, in particular in cases where the prosecutors are dealing with juveniles (Guidelines 18 and 19) will be dealt with in Chapter 10 concerning *The Rights of the Child in the Administration of Justice.*

[135]UN doc. *GAOR*, A/52/40 (vol. I), para. 402.

5.7 Accountability

Disciplinary proceedings against prosecutors alleged to have "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"; and, as with respect to judges, the decision "shall be subject to independent review", a requirement that eliminates the possibility of undue interference by the Executive and strengthens the independence of the prosecutors (Guideline 21).

Prosecutors fulfil an essential function in the administration of justice and must be strictly separated from the Judiciary and the Executive. Prosecutors must, in particular:

- *be able to perform their professional duties in criminal proceedings in safety, without hindrance or harassment;*
- *act objectively and impartially, respect the principles of equality before the law, the presumption of innocence and due process guarantees;*
- *give due attention to human rights abuses committed by public officials, including law enforcement officials;*
- *not use evidence obtained by unlawful methods which violate human rights (forced confessions through torture, etc.).*

6. International Law and the Independence of Lawyers

6.1 Applicable international law

In addition to independent and impartial judges and prosecutors, lawyers constitute the third fundamental pillar for maintaining the rule of law in a democratic society and ensuring the efficient protection of human rights. As stated in the ninth preambular paragraph of the Basic Principles on the Role of Lawyers, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990:

> "... 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".

In order to be able to carry out their professional duties effectively, lawyers must not only be granted all the due process guarantees afforded by domestic and international law, but must also be free from pressures of the kind previously described

with regard to judges and prosecutors: ***in other words, a just and efficient administration of justice requires that lawyers too should be allowed to work without being subjected to physical attacks, harassment, corruption, and other kinds of intimidation.***

The various procedural guarantees contained in international law that allow lawyers to represent the interests of their clients in an independent and efficient manner in civil and criminal proceedings will be considered in other parts of this Manual. Here, the analysis will be limited to highlighting some of the main principles contained in the Basic Principles on the Role of Lawyers, as well as some statements made, and cases decided by, the international monitoring organs concerning the rights of lawyers.

6.2 Duties and responsibilities

Principle 12 of the Basic Principles provides that "lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice", and, according to Principle 13, their duties "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".

In "protecting the rights of their clients and in promoting the cause of justice", lawyers shall also "seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession" (Principle 14). Lastly, "lawyers shall always loyally respect the interests of their clients" (Principle 15).

6.3. Guarantees for the functioning of lawyers

According to Principle 16 of the Basic Principle on the Role of Lawyers,

> "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."

Furthermore, "where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities" (Principle 17).

As already mentioned, every year many lawyers are killed, threatened, intimidated or harassed in various ways in order to prevail upon them to relinquish the defence of clients seeking to claim their rights and freedoms. It is therefore essential that Governments do their utmost to protect lawyers against this kind of interference in the exercise of their professional duties.

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The African Commission has concluded that the right to defence as guaranteed by article 7(1)(c) of the African Charter on Human and Peoples' Rights was violated in a case where two defence teams had been "harassed into quitting the defence of the accused persons".[136]

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Another important rule is laid down in Principle 18, according to which "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions". The question of lawyers' identification with their clients has been dealt with by the Special Rapporteur on the independence of judges and lawyers, who in 1998 for instance stated that he viewed "with some concern the increased number of complaints concerning Governments' identification of lawyers with their clients' cause", adding that lawyers "representing accused persons in politically sensitive cases are often subjected to such accusations".[137] However, "identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned". According to the Special Rapporteur, "Governments have an obligation to protect such lawyers from intimidation and harassment".[138] If Governments have evidence to the effect that lawyers identify themselves with their clients' cause, it is, as stressed by the Special Rapporteur, "incumbent on [them] to refer the complaints to the appropriate disciplinary bodies of the legal profession",[139] where, as described below, they will be dealt with in accordance with due process of law.

The question of identification of lawyers with their clients is particularly relevant when they are called upon to represent human rights defenders. However, here too lawyers must be given the same guarantees of security enabling them to carry out their professional duties independently and efficiently without governmental or other undue interference. Again, any alleged professional misconduct should be referred to the established independent organs.

With regard to guarantees for the functioning of lawyers, Principle 19 of the Basic Principles also provides that

[136] *ACHPR, International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr. And Civil Liberties Organisation) v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998*, para. 101; text of the decision to be found at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

[137] UN doc. E/CN.4/1998/39, *Report of the Special Rapporteur on the independence of judges and lawyers,* para. A.1 of the *Conclusions.*

[138] Ibid., loc. cit.

[139] Ibid., para. 2

> "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."

Lastly, Principle 20 adds 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."

6.4 Lawyers and fundamental freedoms

Principle 23 of the Basic Principles on the Role of Lawyers provides that

> "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."

Principle 24 further states 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". Moreover, according to this principle "the executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference". It follows from this principle that these associations shall aim at safeguarding the professional interests of the lawyers and strengthening the independence of the legal profession. As pointed out by the Special Rapporteur, Bar Associations shall not, consequently, be used "to indulge in partisan politics" whereby they would compromise "the independence of the legal profession".[140]

6.4.1 Executive permission to exercise the legal profession

One of the keys to ensuring the independence of lawyers is to allow them to work freely without being obliged to obtain clearance or permission from the Executive to carry out their work. This view was confirmed by the Human Rights Committee with regard to Belarus when 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". Stressing that "the independence of the judiciary and the legal profession is essential for a sound administration of justice and

[140] UN doc. E/CN.4/1995/39, *Report of the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers,* para. 72.

for the maintenance of democracy and the rule of law", the Committee urged the State party "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".[141] In this respect the Committee drew the attention of the State party to the Basic Principles on the Independence of the Judiciary as well as the basic Principles on the Role of Lawyers.[142]

The Committee has also expressed "serious doubts" both as to the independence of the Judiciary in the Libyan Arab Jamahiriya and as to "the liberty of advocates to exercise their profession freely, without being in the employment of the State, and to provide legal services"; it recommended "that measures be taken to ensure full compliance with article 14 of the Covenant as well as with United Nations Basic Principles on the Independence of the Judiciary and the basic Principles on the Role of Lawyers".[143]

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It is thus beyond doubt that the obligation in some States for lawyers to be *in government employment* runs counter to the fair trial guarantees laid down in article 14 of the International Covenant on Civil and Political Rights.

6.4.2 The right to peaceful assembly

In the case of *Ezelin*, the European Court of Human Rights examined the justifiability of an interference with the entitlement of an *avocat* in France to exercise his right to peaceful assembly. In this particular case, the Court examined the complaint under article 11 of the European Convention on Human Rights, which guarantees the right to peaceful assembly, as a *lex specialis* in relation to article 10 of the Convention, which secures the right to freedom of expression. The lawyer had been reprimanded for taking part in a demonstration in the course of which some unruly incidents occurred. He was disciplined for having failed to dissociate himself from these incidents, although he had not in any way been violent or unruly himself. This conduct was judged "inconsistent with the obligations of his profession".[144] The Court examined, "in the light of the case as a whole", whether the reprimand "was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance".[145] It concluded that

> "the proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in *avocats* being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions".[146]

[141] UN doc. *GAOR*, A/53/40, para. 150.

[142] Ibid., loc. cit.

[143] UN doc. *GAOR*, A/54/40, para. 134.

[144] *Eur. Court HR, Ezelin v. France judgment of 26 April 1991, Series A, No. 202*, p. 20, para. 38.

[145] Ibid., p. 23, para. 51.

[146] Ibid., para. 52.

Although "minimal" in this case, the sanction against Mr. Ezelin did "not appear to have been 'necessary in a democratic society'" and therefore violated article 11 of the Convention.[147] The European Court of Human Rights consequently construes very strictly the possibilities for the States parties to limit the exercise of the right to peaceful assembly, even in the case of lawyers.

6.4.3 The right to freedom of association

In a case against Nigeria, the African Commission on Human and Peoples' Rights had to consider whether the Legal Practitioners (Amendment) Decree, 1993, was consistent with the terms of the African Charter on Human and Peoples' Rights. This decree established a new governing body of the Nigerian Bar Association; of the total of 128 members of this organ, called the Body of Benchers, only 31 were nominees of the Bar Association while the other members were nominated by the Government.[148]

As pointed out by the Commission, the Body of Benchers was "dominated by representatives of the government" and had "wide discretionary powers, among them the disciplining of lawyers"; as "an association of lawyers legally independent of the government, the Nigerian Bar Association should be able to choose its own governing body". The Commission added that "interference with the self-governance of the Bar Association may limit or negate the reasons for which lawyers desire in the first place to form an association".[149] The Commission next pointed out that it had

> "... resolved several years ago that, where regulation of the right to freedom of association is necessary, the competent authorities should not enact provisions which limit the exercise of this freedom or are against obligations under the Charter. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights instruments".[150]

In the present case, the Government intervention in the governing of the Nigerian Bar Association was "inconsistent with the preamble of the African Charter, where states reaffirm adherence to the principles of human and peoples' rights contained in declarations such as the UN Principles on the Independence of the judiciary and thereby constitutes a violation of Article 10 of the African Charter", which guarantees the right to freedom of association.[151]

[147] Ibid., para. 53.

[148] *ACHPR, Civil Liberties Organisation v. Nigeria (in respect of the Nigerian Bar Association), Communication No. 101/93, decision adopted during the 17th Ordinary session, March 1995*, para, 1; for the text of the decision, see http://www.up.ac.za/chr/.

[149] Ibid., para. 24.

[150] Ibid., para. 25; footnote omitted.

[151] Ibid., para. 26; footnote omitted.

6.4.4 The right to freedom of expression

In the case of *Schöpfer*, the European Court of Human Rights arrived at the conclusion that there had been no violation of article 10 of the European Convention on Human Rights when the Lawyers' Supervisory Board in the Canton of Lucerne, Switzerland, imposed a fine of 500 Swiss francs on the applicant for breach of professional ethics after he had called a press conference at which he criticized the actions of a district prefect and two district clerks in a pending case in which he was involved. The Court confirmed its previous jurisprudence according to which "the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts", adding that "such a position explains the usual restrictions on the conduct of members of the Bar".[152] Considering that "the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence", and, having regard, furthermore, to "the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein".[153] Quite significantly, it emphasized that

> "It also goes without saying that freedom of expression is secured to lawyers too, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession... . Because of their direct, continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. That is why they have a certain margin of appreciation in assessing the necessity of an interference in this area, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them".[154]

The Court concluded in this case that, in imposing a fine of "modest amount", the authorities had not gone beyond their margin of appreciation in punishing the lawyer. It noted that the lawyer had in this case "raised in public his complaints on the subject of criminal proceedings which were at that time pending before a criminal court", and, "in addition to the general nature, the seriousness and the tone of the applicant's assertions", he had "first held a press conference, claiming that this was his last resort, and only afterwards lodged an appeal before the Lucerne Court of Appeal, which was partly successful"; lastly, he had also failed to apply to the prosecutor's office, "whose ineffectiveness he did not attempt to establish except by means of mere assertions".[155]

[152] *Eur. Court HR, Schöpfer case v. Switzerland, judgment of 20 May 1998*, *Reports 1998-III*, p. 1052, para. 29.

[153] Ibid. p. 1053.

[154] Ibid., pp. 1053-1054, para. 33.

[155] Ibid., p. 1054, para. 34.

6.5 Codes of professional discipline

With regard to professional discipline, Principle 26 of the Basic Principles provides 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."

Complaints against lawyers "shall be processed expeditiously and fairly under appropriate procedures", and lawyers "shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice" (Principle 27). Furthermore, "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" (Principle 28). Finally, all such 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" (Principle 29).

It follows from these principles that any disciplinary proceedings against lawyers who are accused of having failed to conduct themselves in accordance with the recognized standards and ethics of their profession must be truly independent of the Executive and guarantee due process in the course of the proceedings.

Lawyers constitute a fundamental pillar for maintaining the rule of law and ensuring the effective protection of human rights. In order to be able to fulfil their professional duties, lawyers must, in particular:

- *be able to work in true independence, free from external political or other pressure, threats and harassment; e.g., they shall not have to obtain Executive permission to exercise their professional duties;*
- *be ensured due process guarantees, which include the legal right and duty to advise and assist their clients in every appropriate way in order to protect their interests;*
- *be able to act to uphold nationally and internationally recognized human rights;*
- *be allowed to answer for violations of rules of professional conduct before an independent disciplinary board respecting due process guarantees.*

Lawyers also enjoy the fundamental freedoms of association, assembly and expression.

7. Concluding Remarks

As emphasized throughout this chapter, judges, prosecutors and lawyers are three professional groups that play a crucial role in the administration of justice and in the prevention of impunity for human rights violations. They are consequently also essential for the preservation of a democratic society and the maintenance of a just rule of law. It is therefore indispensable that States assume their international legal duties derived from the various sources of international law, whereby they must permit judges, prosecutors and lawyers to carry out their professional responsibilities independently and impartially without undue interference from the Executive, Legislature or private groups or individuals. States' duty to secure the independence and impartiality of judges and prosecutors and the independence of lawyers is not necessarily fulfilled by passively allowing these professions to go about their business: through having a legal obligation to *ensure* their independence, States may have to take positive actions to protect judges, lawyers, and prosecutors against violence, intimidation, hindrance, harassment or other improper interference so as to enable them to perform all their professional functions effectively.

In situations where judges, prosecutors and lawyers are either unwilling or unable fully to assume their responsibilities, inter alia of investigation and instituting criminal proceedings against public officials suspected of corruption and serious human rights violations, the rule of law cannot be maintained and human rights cannot be enforced. It is not only individuals who will suffer in such a situation: it is the entire free and democratic constitutional order of the State concerned that will ultimately be in jeopardy.