



General Assembly

Distr.
GENERAL

A/HRC/11/41
24 March 2009

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Eleventh session
Agenda item 3

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

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

* Late submission

GE.09-12563 (E) 310309

Summary

The present report of the Special Rapporteur on the independence of judges and lawyers comprises four main parts. In chapter II, the report describes the Special Rapporteur's activities between May 2008 and March 2009, including country visits conducted during this period.

The Special Rapporteur has devoted this last thematic report to an analysis of parameters necessary to effectively guarantee the independence of judges (chap. III). He analyses both individual and institutional elements, which he deems able to reinforce or hamper the independent administration of justice. He refers to a wealth of international and regional standards relevant to the independence of the judiciary and the extensive work of the treaty bodies and decisions from regional organizations as well as previous work of the mandate.

Lastly, the report indicates the main recent developments in the area of international justice (chap. IV) by looking at developments in the different cases before the International Criminal Court. The Special Rapporteur also refers to recent judgments of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and examines progress made by the Extraordinary Chambers in the Court of Cambodia. Furthermore, the report refers to the Special Tribunal for Lebanon and the institution of proceedings by Belgium before the International Court of Justice concerning the case of the former President of Chad, Hissène Habré.

The Special Rapporteur's conclusions and recommendations are presented in chapter V and focus on measures to be taken by Member States to strengthen the independence of judges, in both its individual and institutional dimensions.

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I. INTRODUCTION

1. Since taking up his duties in August 2003, the Special Rapporteur has addressed one or more main topics in each annual report. This report, the sixth by the current Special Rapporteur and the fifteenth since the mandate was established in 1994, examines parameters necessary to effectively guarantee the independence of judges. The Special Rapporteur analyses both individual and institutional aspects, which he deems able to reinforce or hamper the independent administration of justice.

2. In analysing this complex topic, the Special Rapporteur refers to international and regional standards relevant to the independence of the judiciary, among them article 14 of the International Covenant on Civil and Political Rights (ICCPR), article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 8 of the American Convention on Human Rights, article 26 of the African Charter on Human and Peoples' Rights and article 12 of the Arab Charter on Human Rights, as well as the Basic Principles on the Independence of the Judiciary, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, the Statute of the Ibero-American Judge and the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA (Law Association for Asia and the Pacific) region. Furthermore, he bases his analysis on a wealth of the work of the treaty bodies and decisions from regional organizations as well as on previous work of the mandate, including letters to Governments on alleged human rights violations.

II. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. International meetings

3. In June 2008, the Special Rapporteur took part in the eight session of the Human Rights Council, where he presented his annual report (A/HRC/8/4), a report on exchanges with Governments concerning specific complaints (A/HRC/8/4/Add.1) and a report on his mission to the Democratic Republic of the Congo (A/HRC/8/4/Add.2). In the same month, he also participated in the fifteenth annual meeting of special procedures of the Human Rights Council.

4. In September 2008, the Special Rapporteur attended the seminar "Justice and democracy" which was organized by the Colombian Supreme Court of Justice and held in Cartagena, Colombia. At this occasion, the Special Rapporteur met with a number of high-level authorities.

5. In October 2008, the Special Rapporteur attended the sixty-third session of the General Assembly in New York, where he presented his report (A/63/271), which examined the role of judges in protecting human rights during states of emergency.

6. On 17 October 2008, the Special Rapporteur attended the annual meeting of the International Bar Association, dedicated to the Rule of Law, and made a presentation on the independence of the judiciary in the context of democracy.

7. In December 2008, the Special Rapporteur attended the international conference on “Exclusion, a challenge to democracy” in Paris, organized by ATD Fourth World, where he made a presentation on “Access to justice and vulnerable groups”. On this occasion, he also met with the Paris Bar Association and contributed to its journal *Le Barreau autour du Monde* dedicated to the sixtieth anniversary of the Universal Declaration of Human Rights. During the same month, he presided the panel debate on “New mechanisms to protect human rights” at the International Conference on the sixtieth anniversary of the Universal Declaration of Human Rights, organized by the international section of the Lelio Basso Foundation in Rome. He also met with the organization “Magistrats européens pour la démocratie et la loi” and the Italian Judges Association.

8. On 21 January 2009, the Special Rapporteur contributed to the seminar on the Prevention of Genocide, held in Geneva, and made a presentation focusing on ways and means to support national efforts in the prevention of genocide.

9. On 26 and 27 March 2009, the Special Rapporteur will participate as a resource person in a Cambodian national conference on the role of independent institutions, to be held in Phnom Penh.

B. Country visits

10. At the invitation of the Government of the Russian Federation, the Special Rapporteur visited the country from 19 to 29 May 2008. In January 2009, the Special Rapporteur visited Guatemala, also at the invitation of the Government (see A/HRC/11/41/Add.2 and Add.3, respectively). He wishes to thank both Governments for their cooperation regarding these visits.

11. The Special Rapporteur hopes that the mandate holder will be able to visit Cambodia, Colombia, Fiji, the Islamic Republic of Iran, Kenya, Nigeria, Pakistan and the Philippines in the near future; a positive reply from some of these States is still expected. On the other hand, he is grateful to those Governments that have already confirmed an invitation and hopes that a suitable time for these visits will be arranged shortly. He also recalls that some visit requests are pending for several other States, some of them for over 10 years such as those to Cuba, Egypt and Tunisia. In November 2008, the Special Rapporteur made a request to visit Iraq.

C. Other activities

12. A summary of communications sent to various Governments and the responses received, along with statistics for the reporting period (A/HRC/11/41/Add.1) has been published for the eleventh session of the Council.

13. The Special Rapporteur was part of the group of seven independent experts invited by the Human Rights Council in its resolutions 7/20 and S-8/1 to submit a report with recommendations on how best to assist technically the Democratic Republic of the Congo in addressing the situation of human rights, with a view to obtaining tangible improvements on the ground, taking also into account the needs formulated by the Government of the country, and to also urgently examine the current situation in the East of the Democratic Republic of the Congo. The report (A/HRC/10/59) was presented to the tenth session of the Council.

III. GUARANTEES OF JUDICIAL INDEPENDENCE

14. Since very early in the existence of the mandate, the principle of the independence of judges and lawyers has been defined as international custom and general principle of law recognized by the international community, respectively, in the sense of article 38 (1) (b) and (c) of the Statute of the International Court of Justice. Furthermore, it has also been a treaty-based obligation, as shown by the requirement of “independence of a tribunal” established in article 14, paragraph 1, of the ICCPR, which, as stated by the Human Rights Committee in its general comment No. 32,¹ is an absolute right that is not subject to any exception.

15. In addition, more than 20 years ago, a report to the then Sub-Commission on Prevention of Discrimination and Protection of Minorities highlighted that “The principles of impartiality² and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. ... Their absence leads to a denial of justice and makes the credibility of the judicial process dubious.”³ As expressed in the Bangalore Principles of Judicial Conduct, “Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.”

16. With a view to the paramount importance of this subject, the Special Rapporteur, in this last report to the Human Rights Council in his present function, attempts at defining parameters to effectively guarantee the independence of judges. Without intending to exhaustively present all elements having an impact on the independence of judges, he analyses individual and institutional aspects, which he deems can reinforce or hamper the independent administration of justice.

A. Institutional independence: elements having an impact on the independence of the judiciary

17. In this chapter, the Special Rapporteur will analyse features having an impact on the independence of the judiciary as an institution.

1. Independence of the judicial function from other branches of power as prerequisite

18. It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and

¹ Human Rights Committee, art. 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, para. 19; see also communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

² While the independence of the judiciary is referred to as the absence of improper interferences into judicial affairs, impartiality normally denotes absence of prejudice or bias, see Inter-American Court of Human Rights, *Apitz Barbera et al. v. Venezuela*, 5/9/2008, para. 55, and European Court of Human Rights, *Piersack v. Belgium*, 1/10/1982, para. 30.

³ E/CN.4/Sub.2/1985/18, para. 75.

transparency.⁴ In this connection, it should be noted that the Human Rights Committee, in its general comment No. 32, emphasized that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal.⁵ Therefore, the Committee pointed to this concern in several of its concluding recommendations and called for a clear demarcation between the respective competences of the different branches of power.⁶

19. Furthermore, the Special Rapporteur, during several missions to countries in transition, questioned the paramount role of the office of the prosecutor and the amount of influence the prosecutor exerts over the pretrial and trial stages of judicial proceedings.⁷ In this connection, he highlights the importance of the independence of the office of the prosecutor, in particular where it is responsible for the investigation and ex officio prosecution.

2. Guarantee at the constitutional level

20. The Basic Principles provide for the independence of the judiciary to be “guaranteed by the State and enshrined in the Constitution or the law of the country”. Similar provisions are to be found in the regional standards.⁸

21. The Special Rapporteur considers it paramount that the independence of the judiciary be legally guaranteed at the highest possible level. Thus, in several country mission reports, he drew attention to the fact that the independence of the judiciary is enshrined in the Constitution.⁹ In States, where this was not yet the case, he recommended that this principle be spelled out in the Constitution.¹⁰ In other countries, where no written constitution exists, it should be considered a fundamental principle of law.

22. This principle, even if guaranteed in the Constitution, must also be given effect at the legislative level. Thus, domestic legislation needs to be brought in compliance with this principle. The Human Rights Committee expressed its concern at constitutional and legislative

⁴ E/CN.4/2004/60, para. 28.

⁵ CCPR/C/GC/32 (footnote 1), para. 19.

⁶ CCPR/CO/79/GNQ, para. 7; CCPR/C/79/Add.111, para. 10; CCPR/C/79/Add.79, para. 3.

⁷ E/CN.4/2006/52/Add.4, para. 86; E/CN.4/2005/60/Add.2, para. 70; E/CN.4/2006/52/Add.3, para. 76.

⁸ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, A (1) (a); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, principle 4.

⁹ A/HRC/8/4/Add.2, para. 7.

¹⁰ A/HRC/4/25/Add.2, para. 73.

provisions that seriously endanger the independence of the judiciary pointing to the accountability of a court to the legislature.¹¹ In other instances, the Human Rights Committee pronounced its concern at the practice of the judiciary seeking the opinion of a Standing Committee of the legislature on the interpretation of laws, turning a Parliamentary Committee into the instance responsible for setting criteria and instructions which are binding on the judiciary.¹²

3. Selection and appointment

23. The Basic Principles on the Independence of the Judiciary prescribe that judges be selected on the basis of integrity and ability and that any method of judicial selection should include safeguards against judicial appointments for improper motives.¹³ This key principle is also established by a number of regional standards.¹⁴ Furthermore, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight the importance of transparency and accountability in the selection and appointment procedures.¹⁵

24. The Special Rapporteur takes note of the variety of existing systems for the selection and appointment of judges worldwide. One can broadly distinguish political appointments (selection by the legislative or executive branches of power), appointments by popular elections, corporative appointments (by bodies composed of judges only), selection by judicial councils with plural representation, or a variety of mixed systems where the nominating body is of one type (e.g. judicial council) and the one in charge of appointments is of a different nature (e.g. a political appointing body). He wishes to highlight below aspects of selection and appointment procedures that crucially strengthen judicial independence.

25. The Special Rapporteur notes the existence of manifold constitutional provisions and domestic legislation providing for the election of judges by the legislature. He would like to raise the general concern that the involvement of the legislature in judicial appointments risks their politicization.¹⁶ On many occasions and in light of situations studied by the Special Rapporteur, it is difficult to ascertain the benefit this procedure brings, particularly to the selection of lower-level judges. But even for higher-level courts for which the selection of nominees is

¹¹ CCPR/CO/72/PRK, para. 8.

¹² CCPR/CO/75/VNM, para. 9.

¹³ Principle 10.

¹⁴ Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, principle I (2) (c); Principles and Guidelines in Africa (footnote 8), A (4) (h); Beijing Statement (footnote 8), principles 11, 12 and 15.

¹⁵ Principles and Guidelines in Africa (footnote 8), A (4) (h).

¹⁶ See allegation letter to the Government of Serbia of 5 November 2009, A/HRC/11/41/Add.1, Serbia; Committee against Torture, CAT/C/SRB/CO/1, para. 9; also CCPR/C/79/Add.50, para. 288.

usually justified on grounds of the court's need to give particular consideration to matters of general interest or welfare, in most cases political appointments are not appropriate means to reach those objectives. In particular, in times of transition from an authoritarian to a democratic system, it is crucial that the population gain confidence in a court system administering justice in an independent and impartial manner, free from political considerations.

26. Likewise, in many other countries, the executive branch of power has a decisive say in the selection and appointment of judges. The Committee against Torture¹⁷ and the Human Rights Committee¹⁸ expressed several times their concern in this regard, as did also the Special Rapporteur in several country mission reports,¹⁹ given the risk this structure implies for the protection of the rights of individuals before the State.

27. Several regional standards, along with the Human Rights Committee in several concluding observations, recommend the establishment of an independent authority in charge with the selection of judges.²⁰ That was also recommended by the Special Rapporteur in several country visit reports.²¹

28. The composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges. While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference. In the Special Rapporteur's view, if the body is composed primarily of political representatives there is always a risk that these "independent bodies" might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly.

29. In order to ensure that such a body is apt to select judges in an objective, fair and independent manner, the judiciary and other parties directly linked with the justice system must have a substantial say with respect to selecting and appointing the members of such a body.²² According to some regional standards, members of the independent body should be selected by the judiciary.²³

¹⁷ CAT/C/TJK/CO/1, para. 10; CAT/C/UZB/CO/3, para. 19; A/56/44 (Supp.), para. 45; A/55/44, para. 74.

¹⁸ CAT/C/UZB/CO/3, para. 19; CCPR/C/79/Add.62, para. 16.

¹⁹ A/HRC/4/25/Add.2, para. 23; E/CN.4/2006/52/Add.3, para. 43.

²⁰ See footnote 14 and CCPR/C/79/Add.79 (1997), para. 18; art. 9 of the Universal Charter of the Judge.

²¹ A/HRC/8/4/Add.2, paras. 16-18, 69, 74-75; A/HRC/4/25/Add.2, para. 78; E/CN.4/2006/52/Add.3, para. 84; E/CN.4/2006/52/Add.4, paras. 14, 50, 92.

²² A/HRC/11/41/Add.1, Serbia.

²³ Recommendation No. R (94) 12 (footnote 14), principle I (2) (c); see also CCPR/C/MDG/CO/3, para. 26.

30. In addition to the composition of the selecting body, it is also important to determine the extent of powers given to this organ, as this element has a great impact on the degree of independence of judges, not only from political power, but also from the selecting body itself. The competency of this body could range from conducting competitive examinations and interviews in order to appoint those who score highest to directly possessing the power to appoint nominees at its discretion. In order to secure the independence of judges and the selection of the most suitable candidates, the Special Rapporteur highlights the importance of the establishment and application of objective criteria in the selection of judges. The principle of objective criteria was also highlighted by the Human Rights Committee²⁴ and by the Committee against Torture.²⁵ These objective criteria should relate particularly to qualifications, integrity, ability and efficiency.²⁶ The Special Rapporteur emphasizes that selection of judges must be based on merit alone,²⁷ a key principle also enshrined in Recommendation No. R (94) 12²⁸ and the Statute of the Ibero-American Judge.²⁹ The Special Rapporteur underscores that competitive examinations³⁰ conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process.

31. As a complement to a selection and nomination process that uses objective criteria to select judges, other procedures may be implemented to enhance the public certainty on the nominee's integrity. Such could be the holding of public hearings where citizens, non-governmental organizations or other interested parties, are able to express their concern or support for particular candidates.

32. In this connection the Special Rapporteur refers to the appointment of the judges of the Supreme Court of Ecuador in 2005, which were made in accordance with his recommendations,³¹ in particular those referring to objective criteria to select candidates with a view to their independence, competencies and integrity. This ensured the transparency of the selection and appointment processes. Furthermore, for the first time in Ecuador's history, public

²⁴ CCPR/C/GC/32 (footnote 1), para. 19; CCPR/C/PRY/CO/2, para. 17.

²⁵ Committee against Torture, CAT/C/SRB/CO/1, para. 9; see also Statute of the Ibero-American Judge, art. 12.

²⁶ A/HRC/11/41/Add.1, Serbia; press release on the Special Rapporteur's visit to Guatemala (26-30 January 2009) available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/79AC991E22A2DD8AC12575590056139A?opendocument>, para. 6.

²⁷ A/HRC/11/41/Add. 2, para. 99.

²⁸ Principle I (2) (c).

²⁹ Art. 11.

³⁰ CCPR/CO/70/ARG, para. 6.

³¹ E/CN.4/2005/60/Add.4 and E/CN.4/2006/52/Add.2.

hearings were held at which backgrounds of the nominees could be openly scrutinized. This experience was qualified by the United Nations as a major example of good practices.³²

33. Where an organ of the executive or legislative branch is the one formally appointing judges³³ following their selection by an independent body, recommendations from such a body should only be rejected in exceptional cases and on the basis of well established criteria that have been made public in advance. For such cases, there should be a specific procedure by which the executive body is required to substantiate in a written manner for which reasons it has not followed the recommendation of the above-mentioned independent body for the appointment of a proposed candidate. Furthermore, such written substantiation should be made accessible to the public. Such a procedure would help enhance transparency and accountability of selection and appointment.

34. When conducting country visits, the Special Rapporteur regularly examined the representation of women and of ethnic minorities in the judiciary.³⁴ In some countries, he concluded that this representation is very low or non-existent.³⁵ The Special Rapporteur underlined the importance to adopt and implement temporary special measures to achieve greater representation for both women and ethnic minorities until fair balance has been achieved.³⁶

4. Guarantee of the “lawful” judge (prohibition of ex-post-facto tribunals)

35. The Basic Principles on the Independence of the Judiciary state that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Furthermore, they stipulate that 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.³⁷

36. Throughout his mandate, the Special Rapporteur has focused considerable attention on the question of the military justice³⁸ and the establishment of special courts, in particular for the trial

³² *UN Chronicle*, “Judicial independence as conflict prevention and resolution: The recent case of Ecuador’s High Court”, available at: <http://www.un.org/Pubs/chronicle/2006/issue1/0106p21.htm>.

³³ See Recommendation No. R (94) 12 (footnote 14), principle I (2) (c), para. 2.

³⁴ E/CN.4/2005/60/Add.2, paras. 27-28; E/CN.4/2006/52/Add.3, paras. 60-62; E/CN.4/2006/52/Add.4, paras. 67-68; A/HRC/8/4/Add.2, para. 37.

³⁵ A/HRC/4/25/Add.2, paras. 31 and 66.

³⁶ A/HRC/4/25/Add.2, para. 80.

³⁷ Principle 5.

³⁸ A/61/384, paras. 19-46; E/CN.4/2005/60, paras. 38-41.

of terrorism related cases.³⁹ In this respect, the Special Rapporteur refers to the joint report on the situation of detainees at Guantánamo Bay, in which violations to the principle of the lawful judge and the right to fair trial were found.⁴⁰ The Special Rapporteur further points to the Draft Principles on the Administration of Justice by Military Tribunals which set out the principle that military courts should have no jurisdiction to try civilians.

5. Judicial budget

37. The Basic Principles and some regional standards state that it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.⁴¹ Furthermore, the Beijing Statement stipulates explicitly that executive powers affecting judges in their resources must not be used so as to threaten or bring pressure upon a particular judge or judges.⁴² The Special Rapporteur, following several country visits, recommended that the respective Member States revisit the budget allocated to the judiciary with a view to progressively increasing it. He advocated that a fixed percentage of the GDP be established.⁴³ In one of his reports, he indicated a base line of 2 to 6 per cent of the national budget to be allocated to the judiciary.⁴⁴ In this connection, the Special Rapporteur points to Principle 42 of the Beijing Statement, which stipulates that, under important domestic economic constraints, the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources. The Special Rapporteur would like to point to good practices by some Member States that dispose either of a constitutional provision guaranteeing a fixed minimum percentage of the annual national budget to be allocated to the judiciary or who have otherwise achieved a decision in this regard.⁴⁵

38. With regard to ensuring the independence of the judiciary, two different issues deserve analysis in relation to the judicial budget. First, the question is how to ensure that the allocation of funds to the courts be taken with the strictest respect for judicial independence. A second question arises with respect to the administration of funds allocated to the judiciary.

³⁹ E/CN.4/2006/120; A/61/384, paras. 48-57; E/CN.4/2005/60, paras. 20-24.

⁴⁰ E/CN.4/2006/120, paras. 30-40.

⁴¹ See also Principles and Guidelines in Africa (footnote 8), A (4) (v); Beijing Statement (footnote 8), principle 41; Statute of the Ibero American Judge, art. 6.

⁴² Principle 38; see also Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, Guideline 2.

⁴³ A/HRC/4/25/Add.2, para. 77.

⁴⁴ A/HRC/8/4/Add.2, para. 76.

⁴⁵ For example, Costa Rica and El Salvador were able to achieve a 6 per cent fixed amount.

39. With respect to the former, the Special Rapporteur consistently insisted that the judiciary needs to be effectively involved in the drafting of its budget.⁴⁶ He notes that there exist different traditions and practices in this connection. In some Member States, the judiciary proposes its draft budget directly to the executive body in charge of finances; in other cases the budgetary allocations are submitted indirectly through the executive body in charge of judicial affairs. In other States, the courts make their proposals directly. The Special Rapporteur highlights that, where it exists, the independent body responsible for the judiciary⁴⁷ should be vested with the role of receiving proposals from the courts, preparing a consolidated draft for the judicial budget and presenting it to the legislature.

40. The Special Rapporteur commends those Member States which have established a further safeguard for the active involvement of the judiciary: the right of the judiciary to participate in the deliberations of the budget in the legislature.

41. Furthermore, the Special Rapporteur attaches great importance to safeguards established to ensure that the amount of the budget resources allocated to fund the courts in the current fiscal year or subject to be allocated for the next financial year may be reduced solely with the consent of the judiciary or a body representing it.⁴⁸ He underlines that a reduction of the courts' budget significantly hampers the administration of justice. As a result, unjustified long delays occur in the appointment of judges and some Member States resort to the appointment of provisional judges.⁴⁹

42. The second issue, as mentioned above, is the management and administration of the budget allocated to the courts. The Special Rapporteur notes that in some Member States this task is entrusted to the judiciary or an independent authority responsible for the judiciary, while in others it is undertaken by a governmental body. Mixed systems also exist, in which budgets of higher or highest level courts are administered by themselves and the budget for the remaining courts by a special department of the executive.⁵⁰

43. The Special Rapporteur would like to emphasize that, in his opinion, entrusting the administration of funds directly to the judiciary or an independent body responsible for the judiciary is much more likely to reinforce the independence of the judiciary,⁵¹ particularly in times of transition and/or tensions between the judicial and executive branches. Hence, he has

⁴⁶ See also Principles and Guidelines in Africa (footnote 8), A (4) (v) (2).

⁴⁷ See above paras. 27-30.

⁴⁸ A/HRC/11/41/Add.2, para. 81.

⁴⁹ This is currently the case in Argentina.

⁵⁰ E/CN.4/2006/52/Add.3, para. 19.

⁵¹ E/CN.4/2005/60/Add.2, para. 26; E/CN.4/2006/52/Add.3, para. 82; E/CN.4/2006/52/Add.4, para. 90.

issued recommendations in this regard to some Member States.⁵² However, the judiciary or the above-mentioned independent body remain, as all other public authorities, accountable to independent and external oversight.

6. Freedom of association and expression

44. According to principle 9 of the Basic Principles, judges are free to form and join associations of judges or other organizations. The aim of such associations is to represent the judges' interests and to protect their judicial independence as this can be done more effectively in a corporate way.⁵³ One regional standard refers specifically to the objective of professional organizations to promote professional training⁵⁴ to strengthen the quality of decision-making.

45. The Special Rapporteur notes the importance of the participation of judges in debates concerning their functions and status as well as general legal debates. As such, judges need to preserve the dignity of their office and the impartiality and independence of the judiciary, as stipulated in the Basic Principles⁵⁵ and the Bangalore Principles.⁵⁶

7. Assignment of court cases

46. The method for assigning cases within the judiciary is paramount for guaranteeing the independent decision-making of judges. The Basic Principles stipulate that such assignment within the court is an internal matter of judicial administration. This means that there must be no interference from the outside.

47. Furthermore, there needs to be a mechanism of allocation that also protects judges from interference from within the judiciary. During several country visits, the Special Rapporteur pointed to practices of allocation of court cases hampering the independence of judges. For example, assignment of court cases at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others.⁵⁷ The Beijing Statement stipulates that ultimate control over the assignment of cases must belong to the chief judicial officer of the relevant court.⁵⁸ Also, in some Member States, court chairpersons, in specific cases, retain the power to assign cases to or withdraw them from

⁵² E/CN.4/2006/52/Add.4, para. 92.

⁵³ See Recommendation No. R (94) 12 (footnote 14), principle IV; Beijing Statement (footnote 8), principle 9.

⁵⁴ Principles and Guidelines in Africa (footnote 8), A (4) (t).

⁵⁵ Principle 8.

⁵⁶ Principle 4.6.

⁵⁷ A/HRC/11/41/Add.2, para. 61; E/CN.4/2006/52/Add.3, para. 67.

⁵⁸ Beijing Statement (footnote 8), principle 35.

specific judges which, in practice, can lead to serious abuse.⁵⁹ Therefore, the Special Rapporteur recommends to Member States to establish a mechanism to allocate court cases in an objective manner. One possibility could be drawing of lots or a system for automatic distribution according to alphabetic order.⁶⁰ A second one could be done through pre-determined court management plans which should incorporate objective criteria⁶¹ according to which cases are to be allocated. These plans need to be as detailed as to prevent manipulation in the allocations of cases.

8. Independence within the judiciary

48. The Special Rapporteur notes that the independence of judges needs to be protected both from outside and internal interference. For both, adequate structures within the judiciary are decisive. In this context, the Special Rapporteur draws attention to the procedures applied for the appointment or election of court chairpersons.

49. Judges need to work in an environment which is conducive to independent decision-making. To avoid having internal judicial hierarchy run counter to the independence of judges, the Special Rapporteur encourages Member States to consider introducing a system whereby court chairpersons are elected by the judges of their respective court.

50. Furthermore, appropriate structures and conditions need to be put in place in order to avoid situations in which the overturn of judgements by higher judicial bodies includes a sanction to the lower-level judges that made those rulings, which would result in a lessening of the independence of an individual judge within the judiciary.

9. Investigations into allegations of improper interference

51. An important indicator for the independence of the judiciary is that inquiries are conducted into improper interferences into judicial affairs. In this context, it is important to note that the Human Rights Committee recommended to several Member States that independent and impartial investigations into all allegations of interference be conducted thoroughly and promptly and that perpetrators be prosecuted and punished.⁶² The Special Rapporteur emphasizes that such investigations are a key means to prevent the reoccurrence of further interference and to detect systemic problems hampering the independence of the judiciary.

⁵⁹ E/CN.4/2005/60/Add.2, para. 59.

⁶⁰ See also Recommendation No. R (94) 12 (footnote 14), principle I (2) (e).

⁶¹ These criteria could include: the date of the application or referral to the court, per alphabetic order of the surname of one of the parties or their residence or per area of law of the dispute at hand.

⁶² CCPR/CO/82/ALB, para. 18; CCPR/C/BRA/CO/2, para. 17.

B. Independence of judges: elements having an impact on the status of judges

52. In this section, the Special Rapporteur analyses elements having an impact on the individual independence of judges. The Human Rights Committee, in its general comment No. 32, stated that the requirement of independence refers, in addition to the procedure and qualifications for the appointment of judges, to the guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.⁶³

1. Tenure and irremovability

53. Principle 12 of the Basic Principles on the Independence of the Judiciary, principle I.3 of the Recommendation N. R (94) 12 and principle A 4 (1) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa require guaranteed tenures of judges until mandatory retirement age or the expiry of their term of office, where such exist.

54. The Human Rights Committee has repeatedly expressed concern at the lack of security of tenure.⁶⁴ Particularly, it raised concern about short terms of office⁶⁵ and requirements for regular review of judges' appointments by the executive.⁶⁶ The Special Rapporteur concluded that a short term for judges weakens the judiciary, affects their independence and their professional development.⁶⁷

55. When reforming judicial systems, specific attention should be given to the issue of judges' tenure of office. In this connection, the Special Rapporteur recommended to some Member States, which were in situations of transition from an authoritarian to a democratic system, that reforms be directed at gradually extending tenures of judges so as to progressively introduce life tenures.⁶⁸

⁶³ CCPR/C/GC/32 (footnote 1), para. 19.

⁶⁴ CCPR/CO/73/AZE, para. 14; CCPR/CO/74/GEO, para. 12; CCPR/CO/75/VNM, para. 10.

⁶⁵ CCPR/CO/71/UZB, para. 8; CCPR/CO/75/VNM, para. 10; CCPR/CO/72/PRK, para. 8; CCPR/CO/71/SYR, para. 15.

⁶⁶ CCPR/CO/83/UZB, para. 16; CCPR/C/79/Add.87, para. 16.

⁶⁷ Press release on the Special Rapporteur's visit to Guatemala (footnote 26), para. 8.

⁶⁸ E/CN.4/2006/52/Add.3, para. 84; E/CN.4/2006/52/Add.4, para. 92.

56. The Special Rapporteur also notes that probationary periods for judges are used by some Member States. Specific safeguards need to be established in order to prevent that such short initial appointments turn into a risk for the independence of the judiciary.⁶⁹ In the Special Rapporteur's view, a short, non-extendable, probationary period may be employed, provided that life appointment or fixed tenure is automatically granted afterwards, except for probationary judges who were dismissed as a consequence of disciplinary measures or the decision of an independent body following a specialized procedure that determined that a certain individual is not capable of fulfilling the role of a judge.⁷⁰ In any case, the Special Rapporteur is concerned that the requirement of re-appointment following a probationary period runs counter to the principle of the independence of judges.⁷¹

57. Independently of whether the mandate of the judge is for life or for a limited period of time, it is crucial that tenure be guaranteed through the irremovability of the judge for the period he/she has been appointed. The irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary. Only in exceptional circumstances may the principle of irremovability be transgressed. One of these exceptions is the application of disciplinary measures, including suspension and removal. As the Special Rapporteur noted in one of his country mission reports, the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.⁷² This requirement is also reflected on Recommendation N. R (94) 12, principle VI (2).

58. In this connection, the Special Rapporteur recalls that disciplinary measures to be adopted must be in proportionality to the gravity of the infraction committed by the judge. Therefore, he calls for the adoption of a well-defined scheme of available disciplinary measures.⁷³ In this context, the Special Rapporteur underscores that judges must not be removed from office because of errors in judicial decisions or because their decision has been overturned on appeal or review by a higher judicial body. This has also been confirmed by the Human Rights Committee on several occasions.⁷⁴

⁶⁹ CCPR/CO/75/MDA, para. 12.

⁷⁰ A/HRC/11/41/Add.2, para. 99.

⁷¹ *Ibid.*, para. 57.

⁷² *Ibid.*, para. 99.

⁷³ See for examples of different disciplinary measures, see Recommendation No. R (94) 12 (footnote 14), principle VI (1).

⁷⁴ CCPR/CO/75/VNM, para. 10; CCPR/CO/71/UZB, para. 14.

59. According to the Basic Principles, judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. The Human Rights Committee, in paragraph 20 of its general comment No. 32, specified that judges may be dismissed only on serious grounds of misconduct or incompetence.⁷⁵

60. On many occasions, the Special Rapporteur expressed concern that, in a number of Member States, the legislature or executive branches play an important, if not decisive, role in disciplining judges. The Human Rights Committee has also raised its concern about parliamentary control over disciplinary procedures of judges⁷⁶ and about the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without specific legal and procedural safeguards.⁷⁷ The Special Rapporteur has expressed his concern with regard to the Judicial Commission of the Supreme Court of Venezuela which can remove judges at its discretion without neither a justified cause nor disciplinary proceedings guaranteeing the fairness of the dismissal.⁷⁸

61. In this context, it is vital to note that the Human Rights Committee highlighted the importance of the existence of an independent body or mechanism with the responsibility of disciplining judges.⁷⁹ It further highlighted that the procedure before such a body must be in compliance with the due process and fair trial guarantees.⁸⁰ This requirement applies also if the removal is decided by political bodies, e.g. the legislative branch. Most importantly and regardless of the type of disciplinary body, an independent review of the decision of the

⁷⁵ See also communication No. 1376/2005, *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, para. 7.3.

⁷⁶ CCPR/CO/79/LKA, para. 16.

⁷⁷ CCPR/C/GC/32 (footnote 1), para. 20; communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3; communication No. 933/2000, *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, CCPR/C/78/D/933/200, para. 5.2.

⁷⁸ See allegation letter to the Government of Venezuela of 9 March 2009, A/HRC/11/41/Add.1, Venezuela.

⁷⁹ CCPR/CO/84/TJK, para. 17; CCPR/C/79/Add.118, para. 14.

⁸⁰ CCPR/C/93/D/1376/2005 (footnote 75), para. 6.5; CCPR/C/78/D/933/2000 (footnote 77), para. 5.2; CCPR/CO/75/MDA, para. 12; see also Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, 31/1/2001, paras. 74 and 84; Inter-American Court of Human Rights, *Apitz Barbera et al. v. Venezuela*, para. 44.

disciplinary body is paramount.⁸¹ In cases of dismissal by political bodies, it is even more important that their decision be subject to judicial review. This requirement is also reflected in international and regional standards.⁸²

62. The Special Rapporteur considers that temporary or provisional judges, which exist in a few Member States, must have the same guarantees as those with a life or fixed-term tenure, given that they perform judicial tasks. He highlighted that the discretionary dismissal of temporary judges puts the independence of the judiciary at stake.⁸³ Therefore, temporary judges can only be dismissed by disciplinary procedures that respect fair trial guarantees and are conducted by an independent body.

63. In order to enhance transparency, it is recommended that decisions related to disciplinary measures be made public.⁸⁴

64. As a second exception, one may refer to situations of transition from an authoritarian to a democratic system, in which the objective of limitations to the principle of irremovability would be to end impunity and to prevent the reoccurrence of serious human rights violations. The Special Rapporteur has analysed these issues in more detail in previous reports.⁸⁵ In the current context, he wishes to reiterate that while judicial renewal may be approached in different ways, in all cases compliance with the Basic Principles on the Independence of the Judiciary must be ensured. Furthermore, the Special Rapporteur highlights that an individualized analysis (“review”) together with the possibility to appeal the decision with a view to obtaining an independent review in compliance with the Basic Principles on the Independence of the Judiciary⁸⁶ is the preferable approach for judicial renewal.⁸⁷ Thus, in such cases, it would be

⁸¹ Basic Principles on the Independence of the Judiciary, principle 20; Beijing Statement (footnote 8), principle 26; Principles and Guidelines in Africa (footnote 8), A (4) (q).

⁸² Basic Principles on the Independence of the Judiciary, principle 17; Recommendation No. R (94) 12 (footnote 14), principles VI (3); Statute of the Ibero-American Judge, art. 20; Beijing Statement (footnote 8), principle 26; Principles and Guidelines in Africa (footnote 8), A (4) (q).

⁸³ A/HRC/11/41/Add.1, Venezuela (footnote 78); see also Inter-American Court of Human Rights, *Apitz Barbera et al. v. Venezuela*, paras. 42-46.

⁸⁴ Beijing Statement (footnote 8), principle 28.

⁸⁵ E/CN.4/2006/52, paras. 40-55; E/CN.4/2005/50, paras. 43-56.

⁸⁶ Principle 20.

⁸⁷ See E/CN.4/2006/52, para. 54.

crucial to inquire objectively on a case-by-case basis whether a judge was appointed unlawfully or whether he/she derives judicial power from an act of allegiance so as to determine to relieve the person from his/her functions.⁸⁸

2. Immunity

65. The Basic Principles stipulate that judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions. According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, judicial officers shall also not be criminally liable for such acts or omissions. The Human Rights Committee emphasized that judges should not be held criminally liable for handing down “unjust judgments” or committing legal errors in their decisions.⁸⁹

66. In order to protect judges from unwarranted prosecution, the Special Rapporteur considers it essential that judges also be granted some degree of criminal immunity.⁹⁰ The principle is far from being implemented universally and he noted the absence of legislation on judicial immunity during a recent country visit recommending the adoption of specific norms.⁹¹

67. On the other hand, the Special Rapporteur emphasizes that it is paramount to ensure the accountability of judges so that immunity may not be abused. In this connection, in several country mission reports, he has made reference to procedures for lifting judicial immunity.⁹² The Special Rapporteur underscores that such procedures must be legislated in great detail and should aim at reinforcing the independence of the judiciary. He therefore considers that if such a decision solely depends on the discretion of a body of the executive branch, this may expose judges to political pressure and jeopardize their independence.

3. Promotion

68. Principle 13 of the Basic Principles of the Independence of the Judiciary stipulates that the promotion of judges should be based on objective factors, in particular ability, integrity and experience. Similar provisions are contained in the regional standards.⁹³

⁸⁸ Principle 30 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102.

⁸⁹ CCPR/CO/72/PRK, para. 8; A/56/44 (Supp.), paras. 37 and 39.

⁹⁰ See art. 10, Universal Charter of the Judge.

⁹¹ A/HRC/4/25/Add.2, paras. 30 and 82.

⁹² E/CN.4/2005/60/Add.2, para. 36; E/CN.4/2006/52/Add.4, para. 52.

⁹³ Recommendation No. R (94) 12 (footnote 14), principle I (2); Principles and Guidelines in Africa (footnote 8), A (4) (o); Beijing Statement (footnote 8), principle 17; Statute of the Ibero-American Judge, principle 17.

69. The Human Rights Committee, in its general comment No. 32, recommended that States establish clear procedures and objective criteria for the promotion of judges.⁹⁴ In this context, the Committee noted with satisfaction the establishment of a career structure for the judiciary.⁹⁵

70. Furthermore, the Human Rights Committee raised the question of the body⁹⁶ and method by which judges are granted promotion. It emphasized that if such a decision depends on the discretion of the administrative authorities, this may expose judges to political pressure and jeopardize their independence and impartiality.⁹⁷

71. The Special Rapporteur emphasizes that final decisions on promotions should be preferably taken by an independent body in charge of the selection of judges, composed of at least a majority of judges.⁹⁸ This would enhance the coherence of any decision taken in relation to the judicial career and thereby strengthen the independence of the judiciary.

72. The Special Rapporteur underscores that, while adequate professional experience is an essential prerequisite for promotion, it should not be the only factor taken into account in such decisions. Promotion, like with initial selection and appointment, should be merit-based, having regard to qualifications, integrity, ability and efficiency.

4. Conditions of service

(a) Judicial salary

73. International and regional standards require that the remuneration of judges be guaranteed by law. Principle 11 of the Basic Principles and selected regional standards also require that the remuneration be adequate.⁹⁹ Yet, reality on the ground is far from being consistent with this principle.

⁹⁴ CCPR/C/GC/32 (footnote 1), para. 19.

⁹⁵ CCPR/CO/72/GTM, para. 7.

⁹⁶ CCPR/C/MDG/CO/3, para. 26.

⁹⁷ CCPR/CO/73/AZE, para. 14.

⁹⁸ See paras. 27-30 above; see also European Charter on the Statute of Judges, sections 4.1 and 1.3.

⁹⁹ Principles and Guidelines in Africa (footnote 8), A 4 (m); Beijing Statement (footnote 8), principle 31.

74. In this connection, it is worth recalling that the Special Rapporteur, in several of his country mission reports, noted the low level of judicial salaries, in some instances constituting remuneration well below the average national income or not even providing for a decent livelihood.¹⁰⁰ The Special Rapporteur also highlighted the problem that, despite the existence of pertinent legal provisions, salaries effectively paid to the judges are not adequate.¹⁰¹ Another specific problem is the great difference in remuneration between different levels of judges, which causes problems to attract and keep judges in rural areas.¹⁰²

75. Both the Special Rapporteur and the Human Rights Committee have further raised in several instances the concern of significant delay in the payment of salaries.¹⁰³ The Special Rapporteur is concerned that low salaries and salary arrears are a major factor contributing to the endemic corruption within several judicial systems. He therefore calls that judges be remunerated with due regard for the responsibilities and the nature of their office, as also recommended by the Human Rights Committee.¹⁰⁴

(b) Human and material resources

76. The Basic Principles on the Independence of the Judiciary and regional standards require that Member States provide adequate resources to enable the judiciary to properly perform its functions. The Human Rights Committee deplored that the lack of human and material resources is an aspect which may undermine the independence of the judiciary.¹⁰⁵ Recommendation No. R (94) 12 gives specific examples for proper working conditions.¹⁰⁶

77. The Special Rapporteur, in his country mission reports, underlined the importance of adequate human and material resources to the proper functioning of justice. He noted that in some countries there is a negligible share of the budget allocated to the judicial authority, which causes a shortage of judges and courts, low salaries and unacceptable material conditions.¹⁰⁷ As a consequence, he actively recommended that a higher percentage of the national budget be allocated to improving human and material resources of the judicial system.¹⁰⁸ In some countries,

¹⁰⁰ A/HRC/8/4/Add.2, para. 35; A/HRC/4/25/Add.2, para. 27; E/CN.4/2006/52/Add.4, para. 53.

¹⁰¹ A/HRC/8/4/Add.2, para. 35; E/CN.4/2006/52/Add.3, para. 47.

¹⁰² E/CN.4/2005/60/Add.2, para. 37.

¹⁰³ CCPR/CO/74/GEO, para. 12; E/CN.4/2006/52/Add.3, para. 47.

¹⁰⁴ CCPR/CO/84/TJK, para. 17; see also Recommendation No. R (94) 12 (footnote 14), principle III (1) (b); Statute of the Ibero-American Judge, art. 32.

¹⁰⁵ CCPR/CO/75/VNM, para. 9; CCPR/CO/83/KEN, para. 20.

¹⁰⁶ Principle III.

¹⁰⁷ A/HRC/8/4/Add.2, para. 35.

¹⁰⁸ *Ibid.*, para. 76.

he noted a significant discrepancy between courts in different regions, depending on the degree of willingness of the respective local authorities to support their functioning with material resources.¹⁰⁹ In this connection, the Special Rapporteur emphasizes that while duly respecting the federal systems of some Member States, it remains the task of the central authorities to ensure that appropriate human and material resources are available to the courts so as to administer justice properly.

(c) Security

78. The Special Rapporteur emphasizes that the security of judges is a subject too often neglected in the face of multiple and multifaceted attacks against members of the judiciary in a number of countries. This is reflected in the Special Rapporteur's annual reports on country situations, which show the dimension of this concern.¹¹⁰ The Human Rights Committee, in paragraph 19 of its general comment No. 32, stated that it is necessary to protect judges against conflicts of interest and intimidation. To this end, the security of judges should be adequately guaranteed by law, as it is also enshrined in the Basic Principles.¹¹¹ In accordance with the Beijing Statement, it is incumbent upon the executive authorities to ensure the security and physical protection of judges and their families at all times. Furthermore, the Statute of the Ibero-American Judge requires that the necessary measures be in accordance with the risks to which judges and their families are exposed.¹¹² Recommendation No. R (94) 12 gives specific examples of security measures, such as providing for security guards on court premises or police protection for judges who may become or are victims of serious threats.¹¹³

79. In numerous cases, the Special Rapporteur has denounced the inadequate efforts by State authorities to respond and provide protection to judges, even when reports had been submitted to the police or the judicial authorities.¹¹⁴ In this connection, he underlines once again the importance of the adoption of preventive security measures for increased protection of judges, in particular to protect those judges examining cases of large-scale corruption and organized crime, terrorism and crimes against humanity.¹¹⁵

¹⁰⁹ E/CN.4/2006/52/Add.4, para. 70.

¹¹⁰ For example, A/HRC/4/25, paras. 14-17.

¹¹¹ Principle 11.

¹¹² Art. 35.

¹¹³ Principle III (2).

¹¹⁴ A/HRC/4/25, para. 14.

¹¹⁵ A/HRC/11/41/Add. 2, para. 99.

(d) Training

80. According to the Basic Principles and various regional standards,¹¹⁶ appropriate training is one of the preconditions to be selected for judicial office. The Human Rights Committee recommended that particular attention should be given to the training of judges in order to enable them to render justice promptly and impartially.¹¹⁷

81. Besides the importance of pre-service and initial training, the Special Rapporteur has focused his attention on continuing learning opportunities of judges.¹¹⁸ In one of his country mission reports, he emphasized that lack of adequate training and professional knowledge also means that judges are more easily influenced.¹¹⁹

82. In this context, he would like to emphasize that Recommendation No. R (94) 12 specifically provides for training also during the judicial career, which should be free of charge and concern particularly recent legislation and case law.¹²⁰ The Statute of the Ibero-American Judge states that continuing training is generally voluntary, but can be mandatory in specific cases, such as taking up higher judicial duties or major legal reforms. Furthermore, it enshrines that continuing training is a right of the judge and an obligation of the judiciary. Recommendation No. R (94) 12 enshrines the duty of the judges to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

83. On the occasion of several country missions, the Special Rapporteur noted with satisfaction the existence of an institution providing for continuing legal education¹²¹ or recommended the establishment of such an institution to the those Member States which had not yet set up such body.¹²²

84. In this connection, the Special Rapporteur also wishes to point to systems of judicial careers with periodic examinations, which exist in some Member States. Such examinations should be carried out by the independent body in charge with the selection of judges and serve the continuing quality of the administration of justice.

¹¹⁶ Principles and guidelines in Africa (footnote 8), A (4) (i) and (k); Recommendation No. R (94) 12 (footnote 14), principle III (1); Statute of the Ibero-American Judge, art. 24.

¹¹⁷ CCPR/C/79/Add.118, para. 14.

¹¹⁸ See A/HRC/11/41/Add.2, para. 99; A/HRC/4/25/Add.2, para. 26.

¹¹⁹ A/HRC/8/4/Add.2, para. 23.

¹²⁰ Principle III (1).

¹²¹ A/HRC/11/41/Add.2, para. 65; E/CN.4/2006/52/Add.4, para. 62; E/CN.4/2005/60/Add.2, para. 74.

¹²² A/HRC/8/4/Add.2, para. 79.

IV. MAJOR DEVELOPMENTS IN INTERNATIONAL JUSTICE

A. International Criminal Court

85. **Central African Republic.** Jean-Pierre Bemba Gombo, the alleged President and Commander-in-chief of the Movement for the Liberation of Congo (MLC) was transferred to The Hague on 3 July 2008, following his arrest by Belgian authorities on 24 May 2008 at the request of the ICC. He initially appeared before Pre-Trial Chamber III of the International Criminal Court (ICC) on 4 July 2008.
86. **Darfur, Sudan.** The Special Rapporteur regrets that, at the time of writing of this report, no developments have been reported by the Government regarding the execution of warrants for Ahmad Harun and Ali Kushayb on 51 counts of war crimes and crimes against humanity. He urges the Government to follow up promptly on the Court's request of October 2007.
87. On 4 March 2009, the Pre-Trial Chamber I issued a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of the Sudan, for war crimes and crimes against humanity. The crime of genocide is not included in the warrant issued for the arrest. Nevertheless, the judges stressed that if additional evidence is gathered by the Prosecution, the decision would not prevent the Prosecution from requesting an amendment to the warrant of arrest in order to include the crime of genocide. This is the first warrant of arrest ever issued for a sitting Head of State by the ICC.
88. **Democratic Republic of the Congo.** On 18 November 2008, the ICC decided to proceed with the trial of Thomas Lubanga Dyilo, the founder and leader of the Union des patriotes congolais (Union of Congolese Patriots). Trial Chamber I recommenced the trial on 26 January 2009. On 26 September 2008, the charges were confirmed for Mathieu Ngudjolo Chui, the alleged former leader of the National Integrationist Front (FNI) and Germain Katanga, the alleged commander of the Patriotic Resistance Force in Ituri (FRPI).

B. International Criminal Tribunal for the former Yugoslavia

89. On 26 February 2009, the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down its first judgement for crimes perpetrated by Federal Republic of Yugoslavia (FRY) and Serbian forces against Kosovo Albanians during the 1999 conflict in Kosovo. Former Yugoslav Deputy Prime Minister Nikola Šainović, Yugoslav Army (VJ) General Nebojša Pavković and Serbian Police General Sreten Lukić were each sentenced to 22 years' imprisonment for crimes against humanity and violation of the laws or customs of war. Yugoslav Army General, Vladimir Lazarević, and Chief of the General Staff, Dragoljub Ojdanić, were found guilty of aiding and abetting the commission of a number of charges of deportation and forcible transfer of the ethnic Albanian population of Kosovo and each sentenced to 15 years' imprisonment. Milan Milutinović, the former President of Serbia, was acquitted of all charges.
90. Radovan Karadžić, who was arrested on 21 July 2008 by the Serbian authorities, was subsequently transferred to the ICTY on 30 July 2008. Crimes for which he was indicted include genocide, complicity in genocide, extermination, murder and wilful killing. He initially appeared before the court on 31 July 2008.

C. International Criminal Tribunal for Rwanda

91. On 18 December 2008, the International Criminal Tribunal for Rwanda rendered its judgement concerning four senior officers of the Rwandan army in 1994. It sentenced Colonel Théoneste Bagosora, Director of Cabinet in the Rwandan Ministry of Defence, Major Aloys Ntabakuze, commander of the Para Commando Battalion, and Colonel Anatole Nsengiyumva, commander of the Operational Sector of Gisenyi, to life imprisonment for genocide, crimes against humanity and war crimes based on their role in crimes committed in Rwanda. The court acquitted General Gratien Kabiligi, head of the military operations bureau (G-3) of the army general staff, of all charges against him and ordered his release. It also acquitted each of the accused of conspiring to commit genocide before 7 April 1994.

D. Other relevant developments

92. **Extraordinary Chambers in the Court of Cambodia.** On 17 February 2009, the initial hearing in the first case of the Extraordinary Chambers in the Courts of Cambodia (ECCC) started with the trial of Kaing Guek Eav (“Duch”) who faces charges of crimes against humanity and grave breaches of the Geneva Conventions of 1949, in addition to the offences of homicide and torture under Cambodian criminal law.

93. **Special Tribunal for Lebanon.** The Special Tribunal for Lebanon started functioning on 1 March 2009. The Tribunal was established pursuant to Security Council resolution 1757 (2007) to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons and related cases. On 3 March 2009, the Security Council reiterated the importance of the full cooperation of Member States with the Office of the Prosecutor in order to enable effective investigations and prosecutions. The mixed or “hybrid” tribunal comprises seven foreign and four Lebanese judges.

94. **International Court of Justice.** On 19 February 2009, Belgium instituted proceedings before the International Court of Justice (ICJ) against Senegal regarding Senegal’s obligation to prosecute the former President of Chad, Hissène Habré, or to extradite him to Belgium for the purposes of criminal proceedings. In its application, Belgium maintains that Senegal, where Mr. Habré has been living in exile since 1990, has taken no action on its repeated requests to see Mr. Habré prosecuted in Senegal, failing his extradition to Belgium, for acts including crimes of torture and crimes against humanity. Mr. Habré was indicted on 3 February 2000 in Senegal for complicity in crimes against humanity, acts of torture and barbarity and placed under house arrest.

V. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

95. **The present report demonstrates the number and variety of factors that impact on the independence of judges, both in an individual and institutional dimension. It shows that procedures for the selection and appointment of judges as well as the term and security of their tenure are key factors to ensure the independence of judges. Among the factors**

endangering the independence of the judiciary, the Special Rapporteur underscores with profound concern the growing tendency of several Member States to fail to comply with their obligation to appoint an adequate number of judges necessary for an effective functioning of the administration of justice and to appoint temporary or probationary judges. Moreover, the possibility of a judicial career, including procedures for promotion, and adequate working conditions are decisive factors for the status of judges. A constitutionally provided guarantee of the independence of the judiciary is paramount, along with respect to the principle of the “lawful” judge. Emphasis is to be given to the allocation of sufficient funding to the judiciary and a self-governed financial management. Independence from within the judiciary was noted as an important concern, together with the assignment of court cases. Finally, the right of judges to participate in general and legal debates, together with the guarantee to form and join associations and to defend their status and rights in a corporate way were given special attention.

B. Recommendations

96. In order to assist Member States to strengthen the independence of judges, the Special Rapporteur makes the recommendations that follow.

97. With respect to selection, appointment and promotion of judges, he recommends that:

- Member States consider establishing an independent body in charge of the selection of judges, which should have a plural and balanced composition, and avoid politicization by giving judges a substantial say.
- Member States adopt legislation enshrining objective criteria to be applied in the selection of judges, ensuring that selection of judges be based on merit only. Member States consider the possibility of selecting judges by competitive exams conducted at least partly in a written and anonymous manner.
- Selection and appointment procedures be transparent and public access to relevant records be ensured.
- Clear procedures and objective criteria for the promotion of judges be established by law. Final decisions on promotions be preferably taken by the independent body in charge of the selection of judges.

98. As regards tenure, irremovability, disciplinary measures and immunity, the Special Rapporteur recommends that:

- Member States consider the progressive introduction of life tenures for judges.
- Reviews of judges’ appointments by the executive be abolished.
- Specific safeguards be established to ensure that probationary appointments of judges do not put the independence of the judiciary at stake. Probationary judges

be automatically granted life appointment or fixed tenure unless they were dismissed as a consequence of disciplinary measures or the decision of an independent body following a specialized procedure that determined that a certain individual is not capable of fulfilling the role of a judge.

- **Member States give paramount attention to upholding the key principle of irremovability.**
- **Member States establish an independent body in charge of disciplining judges.**
- **Member States adopt legislation giving detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure. Disciplinary measures must be proportional to the gravity of the infraction.**
- **Decisions related to disciplinary measures be made public.**
- **Adequate civil and criminal immunity for judges be guaranteed by the Constitution or equivalent, and that detailed procedures for lifting immunity be inscribed in law, reinforcing the independence of the judiciary.**

99. **Regarding conditions of service, he recommends that:**

- **Judges be remunerated adequately, with due regard for the responsibilities and the nature of their office and without delay.**
- **Adequate human and material resources be allocated to ensure the proper functioning of justice.**
- **Special attention be paid to ensuring the security of judges, in particular the adoption of preventive security measures for increased protection of judges handling cases of large-scale corruption, organized crime, terrorism, crimes against humanity, or any other cases exposing them to higher risk.**
- **Besides pre-service and initial training, focused attention be paid to continuing legal education of sitting judges.**

100. **With respect to institutional guarantees, the Special Rapporteur recommends that:**

- **Competencies of the different branches of power be clearly distinguished and enshrined in the Constitution or equivalent.**
- **The independence of the judiciary be enshrined in the Constitution or be considered as a fundamental principle of law. Both principles must adequately be translated into domestic law.**

101. As regards the judicial budget, he recommends that:

- A minimum fixed percentage of gross domestic product (GDP) be allocated to the judiciary by the Constitution or by law. Under important domestic economic constraints, the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.
- The judiciary be given active involvement in the preparation of its budget.
- The administration of funds allocated to the court system be entrusted directly to the judiciary or an independent body responsible for the judiciary.

102. To strengthen freedom of expression and association of judges, the Special Rapporteur recommends that:

- Freedom of expression and association of judges be effectively guaranteed by law and practice.
- The establishment of a Judges' Association be supported by Member States on account of its importance as a guarantor of an independent judiciary.

103. To strengthen structures and procedures within the judiciary, he recommends that:

- Member States create a mechanism to allocate court cases in an objective manner.
- Adequate structures within the judiciary and the courts be established to prevent improper interference from within the judiciary.
- Allegations of improper interference be inquired by independent and impartial investigations in a thorough and prompt manner.

104. The present analysis and the above recommendations are based on the vast experience accumulated by the mandate since its creation in 1994. The Special Rapporteur is of the opinion that time has come to approve a comprehensive set of principles in order to ensure and further the independence of the judiciary. This tool may serve as a reference to all Member States and particularly those undergoing a period of political transition. Furthermore, the Special Rapporteur recommends that the mandate elaborate an updated study on individual and institutional parameters to ensure and strengthen the independence of prosecutors, public defenders and lawyers.
