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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with Human Rights Council resolution 8/6.

* A/64/150.



Summary

The present report of the Special Rapporteur on the independence of judges and lawyers contains three main chapters. The first presents an analysis of safeguards established by international law to ensure the independence of lawyers and the legal profession, which form a prerequisite for lawyers in the free and effective discharge of their professional functions. Throughout his tenure, the Special Rapporteur has witnessed that the independence of the judiciary, which is crucial to democratic governance, is at risk in all parts of the world and that key actors in this field are the targets of innumerable sorts of attacks affecting their professional and personal integrity. Lawyers, in particular, are often the targets of attacks affecting them in the discharge of their duty as well as their physical and moral integrity. The objective of the present report is to spell out the safeguards to be established in order to guarantee the free and independent functioning of lawyers and the legal profession. Using this approach, the present report is a complement to the most recent report of the Special Rapporteur to the Human Rights Council (A/HRC/11/41), in which he presented a study of the various guarantees that should be established in order to ensure the independence of judges and the judiciary.

In the second chapter, the report contains a brief review and assessment of the work performed by the mandate holder during six years of his tenure, including specific suggestions regarding main challenges and conditions to be addressed in order to ensure the increased effectiveness of this special procedure mandate and that it truly contributes, as it should, to democratic governance throughout the world.

As in all previous reports to the General Assembly and the Human Rights Council, major developments in international justice are presented in chapter three.

The Special Rapporteur would like to take this opportunity to welcome the election, in June 2009, of Ms. Gabriela Carina Knauth de Albuquerque e Silva, a judge from Brazil, as his successor and to wish her all possible success in her endeavours.

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I. Introduction

1. The present report is the last to be submitted to the General Assembly by the Special Rapporteur. His last report to the Human Rights Council was presented in June 2009.

2. In addition to including a brief review of activities carried out since the sixty-third session of the General Assembly, the present report covers three substantive areas. It addresses the issue of the independence of lawyers and the legal profession as a complement to the report which addressed the independence of judges and the judiciary (A/HRC/11/41). In addition, the Special Rapporteur has included a review and assessment of the work he performed over the course of his six years as mandate holder, including a review of the challenges to be addressed contributing to the principle of fair trial, the rule of law and democratic governance throughout the world. The report also refers, as is customary, to the main recent developments in the field of international justice.

II. Activities of the Special Rapporteur

3. The activities carried out by the Special Rapporteur from September to December 2008 are referred to in the report that he submitted to the Human Rights Council in June 2009 (A/HRC/11/41). Since that time, the Special Representative has taken part in various meetings and missions, in addition to taking action on a daily basis in response to the constant claims received from individuals and organizations.

4. In March 2009, a report on technical assistance to the Democratic Republic of the Congo was submitted to the tenth session of the Human Rights Council (A/HRC/10/59). The Special Rapporteur was part of the group of seven independent experts who prepared that report pursuant to Human Rights Council resolutions 7/20 and S-8/1, in which the Council asked them to present recommendations on how best to technically assist the Democratic Republic of the Congo in addressing the situation of human rights, with a view to obtaining tangible improvements on the ground, and also to urgently examine the current situation in the eastern part of the country.

5. On 8 May 2009, the Special Rapporteur contributed to a workshop on “The role of lawyers in the defense of the democratic system”, organized by the Argentine Bar of Lawyers in Córdoba, Argentina, and chaired a panel on the “Competency of the judicial council and of the jury in judicial proceedings”.

6. On 3 June 2009, the Special Rapporteur presented his annual report to the Human Rights Council (A/HRC/11/41 and Add. 1-3). In his thematic report, the Special Rapporteur presented an analysis of guarantees of judicial independence.

7. From 29 June to 3 July, the Special Rapporteur participated in the annual meeting of special procedures, held in Geneva.

8. At the invitation of the Government of Guatemala, the Special Rapporteur visited that country from 26 to 30 January 2009. The Government subsequently invited the Special Rapporteur for a follow-up visit, which took place from 8 to 13 May 2009. The report on the two missions and the recommendations thereof will be included in an addendum to the annual report. The Special Rapporteur wishes to

thank the Government of Guatemala for its cooperation and also to thank all the institutional and non-institutional actors he met. The Special Representative earnestly hopes that his recommendations will assist them in resolving the very important challenges facing the judiciary and ensure respect for its independence.

9. Visit requests to the following Member States are still pending since the respective years indicated: Angola (2008), Bangladesh (2007), Cambodia (2006), Cuba (1995), Egypt (1999), Equatorial Guinea (2002), Fiji (2007), Iran (Islamic Republic of) (2006), Iraq (2008), Kenya (2000), Myanmar (2009), Nigeria (1995), Pakistan (2000), the Philippines (2006), Sri Lanka (1999), Tunisia (1997), Turkmenistan (1996), Uzbekistan (1996) and Zimbabwe (2001). Bearing in mind his consistent experience that in situ visits greatly help dispelling misunderstandings and identifying appropriate solutions with the Special Rapporteur acting as an “honest broker”, he hopes that invitations from the above-mentioned Governments will be extended to his successor in the near future.

III. Independence of lawyers and the legal profession

10. In his latest report to the Human Rights Council, the Special Rapporteur addressed issues relating to the guarantees for the independence of the judiciary as an institution and of judges as key judicial actors. In the present report, he examines issues related to the guarantees for the independence of other main actors involved in the justice system: lawyers and other members of the legal profession. To analyse this complex topic, the Special Representative reviewed the work accomplished under the mandate for the past 15 years. During the six years of his tenure, the Special Representative personally recorded an enormous number of allegations of attacks against, harassment and intimidation of lawyers¹ and had to contact many Governments in all parts of the world in that regard.

11. The preamble of the Basic Principles on the Role of Lawyers² stipulates that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political” requires “that all persons have effective access to legal services provided by an independent legal profession [...]”.³

12. In the exercise of their duty to defend their clients against any unlawful action lawyers are too often identified by governmental and other State bodies, and even sometimes the general public, with the interests and activities of their clients. This prejudice obviously contradicts the role of lawyers in a democratic society. Lawyers are not expected to be impartial in the manner of judges yet they must be as free as judges from external pressures and interference. This is crucial if litigants are to have trust and confidence in them.⁴

¹ See A/HRC/11/41/Add.1, charts 5-10.

² See *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.

³ The right of access to legal advice should be understood in the context of the report of the Special Rapporteur on access to justice (A/HRC/8/4, chap. III).

⁴ See E/CN.4/2004/60, para. 48.

A. Legal framework

1. International standards, norms and guidelines relevant to the role and independence of lawyers and the legal profession

13. At the treaty level, the international standards, norms and guidelines include:

- (a) Article 14 (para. 3) of the International Covenant on Civil and Political Rights;⁵
- (b) Article 6 (para. 3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;⁶
- (c) Article 8 (para. 2) of the American Convention on Human Rights;⁷
- (d) Article 7 (para. 1 (c)) of the African Charter on Human and Peoples' Rights;⁸
- (e) Article 16 of the Arab Charter on Human Rights.

14. At the non-treaty level, the international standards, norms and guidelines include:

- (a) The Basic Principles on the Role of Lawyers (henceforth the Basic Principles);²
- (b) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (henceforth the African Principles);
- (c) Recommendation No. R (2000) 21 of the Committee of Ministers of the Council of Europe (henceforth Recommendation No. R (2000) 21);
- (d) The Standards for the Independence of the Legal Profession, adopted by the International Bar Association (henceforth the IBA Standards);
- (e) Decisions by the United Nations treaty bodies and by regional courts and commissions.

2. Domestic legislation regulating the role and activities of lawyers and the legal profession

15. In order to meet the above standards and norms, many Member States have enshrined in their constitutions or equivalent basic charters the right of all citizens to access to legal counsel of their choice. Some States have even enshrined the right to qualified legal assistance.⁹ Such legislation should specify the details of the procedural underpinnings of this right.

16. Such provisions are indeed crucial to ensure the independence of lawyers at the highest possible legal level. However, on the occasion of several country visits,

⁵ See resolution 2200 A (XXI), annex.

⁶ Council of Europe, *European Treaty Series*, No. 5.

⁷ United Nations, *Treaty Series*, vol. 1144, No. 17955.

⁸ *Ibid.*, vol. 1520, No. 26363.

⁹ See A/HRC/11/41/Add.2, para. 38.

the Special Rapporteur learned of the absence of domestic legislation regulating the role and activities of lawyers and the legal profession.¹⁰

17. In other Member States, the legislation in place for guaranteeing the independence of lawyers and the legal profession runs short of the guarantees enshrined in their national constitutions.

18. When adopting regulations, decrees or other acts related to the legal profession, the executive branch should be especially careful in not to affect the independence of lawyers and the legal profession. Instances have been recorded in which Governments adopted executive acts that substantively amended or even replaced legislation guaranteeing the independence of the legal profession.¹¹

B. Organization of the legal profession

19. Principle 23 of the Basic Principles states that “Lawyers like other citizens are entitled to association and assembly, 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”.¹² 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 [...]”.¹³ Associations of lawyers are created for two main purposes: safeguarding the professional interests of lawyers and protecting and strengthening the integrity¹⁴ and independence of the legal profession.¹⁵

20. Since the creation of the mandate, the importance of an organized legal profession has been constantly emphasized.¹⁶ For the Special Rapporteur, the foundation of an independent and self-regulated association is one of the most significant steps in a period of political transition.¹⁷ This is why, in such contexts, he has always recommended the establishment of an independent professional organization as a priority.¹⁸ Treaty bodies have also recommended that Member States take action in this regard.¹⁹

¹⁰ See E/CN.4/2003/65/Add.2, para. 41.

¹¹ E/CN.4/2001/65/Add.1, paras. 66 and 67 and 74 and 75.

¹² See also African Principles, sect. I (k); Recommendation No. R (2000) 21, Principles I (3) and V (1); IBA Standards, Principle (14).

¹³ See also African Principles, sect. I (l); Recommendation No. R (2000) 21, Principle V (1).

¹⁴ In this vein, the Inter-American Court of Human Rights has established that professional associations constitute a means to regulate and control professional ethics, see its Consultative Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 68.

¹⁵ Recommendation No. R (2000) 21, Principle V (4), lists in a non-exhaustive manner the various objectives of lawyers associations; see also IBA Standards, Principle (18).

¹⁶ See A/HRC/4/25/Add.2, paras. 43 and 89; E/CN.4/2003/65/Add.3, para. 39; and E/CN.4/2002/72/Add.1, para. 98.

¹⁷ See A/HRC/11/41/Add.2, para. 73.

¹⁸ See A/HRC/4/25/Add.2, paras. 43 and 89.

¹⁹ See CAT/C/CR/30/1 and Corr.1, para. 7.

21. The Basic Principles (Principle 25) also stipulate that “Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics”. From this provision follows the duty of the authorities to support the establishment and work of professional associations of lawyers without interfering in these processes.

22. Far too often during his years of tenure, the Special Rapporteur has had to criticize the existence of State-controlled associations with compulsory membership owing to the fact that such a stipulation seriously undermines the independence of lawyers.²⁰ He has also underlined that associations of lawyers need to be independent from the executive branch.²¹ The Human Rights Committee also expressed its concern over provisions compelling lawyers to form part of a centralized State-controlled body.²² The Committee against Torture likewise expressed concern at the subordination of lawyers to the control of the Ministry of Justice and an obligatory membership in a State-controlled Collegium of Advocates.²³

23. Although lawyers associations should not be State-controlled, they should enjoy an official status²⁴ in order to be able to carry out their work with the necessary impact.

24. The Special Rapporteur considers it preferable to establish one single professional organization. When forces are consolidated in one main association, it is easier to ensure the integrity of the entire profession and the quality of legal services, allowing the membership to effectively take part in discussions regarding the enhancement of the legal and judicial system and to achieve a desirable impact on other actors in the justice system. This does not, however, preclude the establishment of regional and local professional organizations working under one umbrella association.

25. The closure of such professional associations by the authorities is a trend that the Special Rapporteur has noted with deep concern, and it is a fact that professional associations operate in many countries under a continuing threat of immediate closure by the authorities. This severely hampers the independence of the legal profession, and could render it completely ineffective.

26. According to Principle 24 of the Basic Principles “The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.”²⁵ Principle 17 of the IBA Standards states that such executive bodies should be “freely elected by all the members without interference of any kind by any other body or person”. Nevertheless, the Special Rapporteur has recorded many attempts to install individuals close to the executive branch as heads of professional associations, and similar concerns have been expressed by other mandate holders.²⁶ In all instances, he has emphasized that the

²⁰ See A/HRC/11/41/Add.1, paras. 71 to 76 and 357.

²¹ See E/CN.4/2006/52/Add.4, para. 93.

²² See CCPR/C/79/Add.86, para. 14.

²³ See A/56/44, para. 45 (c).

²⁴ See A/HRC/4/25/Add.2, para. 89.

²⁵ See African Principles, sect. I (l).

²⁶ See A/HRC/4/36, para. 38.

central role in the establishment, the work and appointment of executive bodies of the legal profession need to remain with the lawyers. In one case, he expressed concern at the competency of a Ministry of Justice to nominate a chairperson, who in turn designated the chairpersons of the regional branches, and deputy chairpersons of the Chamber of Lawyers: this clearly represents overreaching on the part of the executive branch in the establishment and functioning of the legal profession.²⁷

27. Finally, the Special Rapporteur considers it crucial for the membership of the executive body of lawyers associations to be pluralistic so that they are not dependent upon one political party's interests, a situation which clearly undermines the integrity and credibility of the profession.

C. Legal education and training, including continuing education

28. Principle 9 of the Basic Principles provides that Governments must ensure that lawyers have appropriate education and training²⁸ to be able to exercise the rights and duties spelled out in Principles 12 to 15. These rights and duties consist primarily in advising and protecting the rights of clients and upholding the cause of justice. Adequate representation cannot be provided by individuals who have not received the same level of education and training as professional lawyers and who do not have the depth of knowledge obtained through the regular practice of law.²⁹

29. In addition to the importance of pre-service and initial training, continuing learning opportunities are crucial if lawyers are to discharge their duties at accepted standards.³⁰ In this connection, Principle II (2) of Recommendation No. R (2000) 21 requires that all necessary measures be taken to provide for the continuing education of lawyers.

30. The Special Rapporteur finds it crucial that the legal profession adopt a uniform and mandatory scheme of continuing legal education for lawyers, which should also include training on ethical rules, rule of law issues and international and human rights standards, including the Basic Principles.³¹

D. Admission to the legal profession

31. Different schemes of admission to the legal profession exist around the world and in many States access to the legal profession is conditioned or controlled by the executive branch, with the legal profession having no role or a very limited role in licensing procedures. The Special Rapporteur has often expressed concern in this

²⁷ See A/HRC/11/41/Add.1, para. 356.

²⁸ See African Principles (Principle I (a)).

²⁹ See E/CN.4/2003/65/Add.3, para. 92.

³⁰ See A/HRC/11/41/Add.2, para. 64; A/HRC/4/25/Add.2, para. 41; E/CN.4/2006/52/Add.4, para. 62; and E/CN.4/2000/61/Add.1, para. 155.

³¹ See E/CN.4/2004/60, para. 42; Recommendation No. R (2000) 21, Principle II (3); and IBA Standards, Principle (3).

regard, including during several country visits.³² The Human Rights Committee has likewise raised its concern.³³

32. The most common form of executive control over the legal profession is a licensing regime administered by the Ministry of Justice or an equivalent ministry.

33. In some cases, a written and/or oral qualification exam must be passed in order to gain admission to the profession. In some States, this exam is organized either by a ministerial body or a “qualification commission”. Wherever a qualification commission is in charge, the legal profession may gain a degree of influence over the admission, depending on the extent to which lawyers form part of the commission. However, this applies only if the ministry issuing the licenses does not retain the ultimate decision-making power regardless of the conclusions of the qualifications commission following the results of the exam.³⁴

34. In the view of the Special Rapporteur, the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates. This would further help in preserving its independence and self-governance, as advised in the Basic Principles. In this connection, it may be recalled that Principle I (2) in Recommendation No. R (2000) 21 also provides that all decisions concerning the authorization to practise as a lawyer or to accede to this profession should be taken by an independent body.

35. Strict and clear admission procedures for mandatory membership are paramount in order to preserve the integrity of the legal profession and to maintain credibility with the public and with the relevant branches of government. Furthermore, the Inter-American Commission of Human Rights has declared that a mandatory membership contributes to the protection of the equality of lawyers before the law.³⁵

36. At a minimum, candidates should have a law degree obtained following an average length of four years of study at university. Furthermore, the Special Rapporteur advises that a mandatory internship of significant length should be required. Only candidates fulfilling these criteria should be admitted to pass a uniform written bar exam, conducted without their identity being revealed in order to guarantee objectivity.³⁶ The written exam would be supplemented by an oral examination before an examining body, primarily composed of lawyers, appointed by the professional association.

37. The admission procedure should provide for the right of the candidate to appeal examinations results.³⁶ Furthermore, as advocated in Recommendation No. R (2000) 21, decisions concerning the authorization to practise as lawyers should be subject to a review by an independent and impartial judicial authority.

38. In certain countries lawyers are required to reapply to the Ministry of Justice for re-registration or re-licensing after a certain period of time, which may vary

³² See A/HRC/4/25/Add.2, para. 42; E/CN.4/2006/52/Add.4, para. 61; E/CN.4/2006/52/Add.3, para. 57; E/CN.4/2003/65/Add.2, para. 44.

³³ See CCPR/C/79/Add.86, para. 14.

³⁴ See E/CN.4/2001/65/Add.1, para. 69.

³⁵ The Inter-American Commission of Human Rights, OEA/Ser.L/V/II.74 Doc. 10/rev. 1, 16 September 1988, cases 9777 and 9718 vs. Argentina, 30 March 1988, conclusions, para. 8.

³⁶ E/CN.4/2006/52/Add.4, para. 93.

between one to several years. This procedure significantly restricts the independent functioning of lawyers and undermines their independence, a concern which the Special Rapporteur has addressed in several communications to Member States,³⁷ as has the Human Rights Committee in its concluding observations.³⁸

39. The arbitrary withdrawal of lawyers' licences, registration or practicing certificates is a measure applied by the executive branch that the Special Rapporteur has also noted frequently throughout his mandate.³⁹ This happens particularly often where lawyers take on politically sensitive cases and are perceived by the authorities as being identified with their clients' interests. Such cases often generate defamation complaints. In the view of the Special Rapporteur, no withdrawal of licences should take place without the prior consent of the relevant lawyers' association,⁴⁰ and any formal decision should be subject to judicial review (see sect. H below).

E. Lawyers' access to relevant information

40. International law enshrines the right of lawyers to all the information relevant to the cases they defend. To that end, the Basic Principles provide that States must "ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients".⁴¹ The Principles further stipulate that "such access should be provided at the earliest appropriate time".

41. Article 14 (para. 3 (b)) of the International Covenant on Civil and Political Rights⁵ establishes that "in the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defence ...". The Human Rights Committee, in its General Comment 32, interpreted the words "adequate time and facilities" as including access to documents and other evidence. According to the Committee, "this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory", comprising also evidence that could assist the defence, for example indications that a confession was not voluntary.⁴² The Committee has also observed that the non-disclosure of information in connection with or during the course of proceedings, which could cause injury to international relations, national defence or national security, may not fully abide by the requirements of article 14 of the Covenant.⁴³ Thus, the State party should ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access.⁴³

³⁷ See A/HRC/11/41/Add.1, paras. 71, 72, 355 and 357.

³⁸ CN.4/2001/65/Add.1, para. 69.

³⁹ A/HRC/4/25, para. 26.

⁴⁰ A/HRC/11/41/Add.2, paras. 79 and 101.

⁴¹ See Principle 21; African Principles, sect. I (d); Recommendation No. R (2000) 21, Principle I (7).

⁴² See CCPR/C/GC/32, para. 33.

⁴³ See CCPR/C/CAN/CO/5 (2005), para. 13.

42. For his part, the Special Rapporteur has recalled the above principles in a great number of communications,⁴⁴ country visits⁴⁵ and other relevant reports.⁴⁶

43. Experience shows that in some States restrictions in obtaining access to and extracting files of case materials mainly apply during the investigative stage,⁴⁷ while in others, according to domestic provisions, all details of criminal cases under investigation are considered to be “State secrets”.⁴⁸ Most restrictions occur in cases which the government authorities claims relate to State security. In recent years this has been particularly frequent in cases related to terrorism.⁴⁹ In this connection, a matter of special concern is the fact that, quite often, the legal provisions on “State secret” and “terrorism” are very broad, lacking a precise definition. This leads to a discretionary power on the part of the judges and/or the investigating bodies in granting or refusing access to the relevant information.

F. Confidential nature of lawyer-client relations

44. A key principle for the functioning of lawyers relates to the privileged lawyer-client relation. On this point, Principle 22 of the Basic Principles stipulates that “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential”.⁵⁰ This principle acquires even more importance when the lawyer’s client is deprived of liberty.⁵¹

45. In one instance, the Special Rapporteur advised against the adoption of a draft law requiring lawyers to provide their working files as part of potential inquiry.⁵²

46. The previous mandate holder, on the occasion of a country visit, was informed that prison officials of a maximum security prison did not allow lawyers to hand documents directly to the accused, but only through the prison’s service attendants, allegations being made that photocopies thereof may be made on this occasion; moreover, lawyers claimed that their conversations with their clients were listened to or taped.⁵³

47. The Working Group on Arbitrary Detention expressed its concern over a national legislation providing that, in cases where a lawyer is suspected of being a member of a terrorist organization, his/her interaction with a detainee who is his/her client could be monitored by prison authorities.⁵⁴

⁴⁴ See A/HRC/11/41/Add.1, paras. 41, 148, 149 and 332.

⁴⁵ See A/HRC/11/41/Add.2, para. 37.

⁴⁶ See E/CN.4/2006/120, para. 35.

⁴⁷ See A/HRC/11/41/Add.2, para. 37.

⁴⁸ See E/CN.4/2006/6/Add.6, para. 24.

⁴⁹ See A/HRC/4/26/Add.2, para. 20.

⁵⁰ See African Principles, sect. I (c); Recommendation No. R (2000) 21, Principle I (6); and IBA Standards, Principle 13 (a).

⁵¹ See IBA Standards, Principle (12).

⁵² See A/HRC/11/41/Add.2, para. 79.

⁵³ See E/CN.4/2002/72/Add.1, para. 105.

⁵⁴ See A/HRC/4/40/Add.5, para. 42.

48. Treaty bodies have also expressed their concern that in cases related to terrorism lawyers are released from their obligation of professional confidentiality and obliged to testify or face the risk of imprisonment.⁵⁵

G. Freedom of expression

49. Principle 23 of the Basic Principles prescribes that “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly”. The Principles further spell out that lawyers 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.⁵⁶

50. Freedom of expression and association, in particular, constitute essential requirements for the proper and independent functioning of the legal profession and must be established and guaranteed by law.⁵⁷ Although these freedoms are enjoyed by all persons, they carry specific importance in the case of persons involved in the administration of justice. Furthermore, in a case in which a lawyer has been prosecuted for defamation, the Inter-American Court of Human Rights has established that everyone has the right to freedom of expression and the simple fact of being a lawyer should not limit that right.⁵⁸

51. On several occasions, the Special Rapporteur received information on the harassment of lawyers that advocated the direct election of the chairs of lawyers’ associations.⁵⁹ He notes that this constitutes an unjustifiable restriction of the freedom of expression of lawyers in addition to a serious obstacle to the self-government and the independence of the legal profession. Furthermore, the Special Rapporteur has recorded instances where lawyers were threatened or even effectively prevented from taking part in conferences, training sessions or similar events related to human rights or the legal system.⁶⁰

52. The Basic Principles also stipulate that “In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

H. Ethical rules and disciplinary measures

53. Principle 26 of the Basic Principles provides that codes of professional conduct for lawyers should be established by the legal profession or by legislation, in accordance with national law and custom and recognized international standards and norms. Similar provisions can be found in regional standards.⁶¹ In the view of the Special Rapporteur, ethical codes should be drafted by associations of lawyers

⁵⁵ See CCPR/C/TUN/CO/5, para. 15.

⁵⁶ See African Principles, sect. I (k); Recommendation No. R (2000) 21, Principles I (3) and V (1); IBA Standards, Principle (14).

⁵⁷ See E/CN.4/2004/60, para. 46.

⁵⁸ See Inter-American Court of Human Rights, *Tristán Donoso vs. Panama*, 27 January 2009, Series C, No. 193, para. 114.

⁵⁹ See A/HRC/11/41/Add.1, para. 78.

⁶⁰ See A/HRC/8/4/Add.1, paras. 133, 320 and 159; A/HRC/4/25, para. 26; A/HRC/4/25/Add.1, paras. 64 and 171; and E/CN.4/2006/52/Add.1, para. 23.

⁶¹ See African Principles, sect. I (m); and Recommendation No. R (2000) 21, Principle VI (1).

themselves and, where they are established by law, the legal profession should be duly consulted at all stages of the legislative process.

54. Furthermore, it is advisable to establish a unified code of ethics applicable to all lawyers country-wide since whenever different codes are established by different associations there is a risk that lawyers expelled from one association could join another association, thus authorizing them to continue practising despite possible breaches of ethical rules.⁶²

55. According to Principle 28 of the Basic Principles, 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.⁶³ Thus, the body in charge should be free from any influence or pressure from the legislative or the executive branches of power or any other party.

56. Ideally, disciplinary bodies should be established by the legal profession itself.⁶⁴ However, it is usual for either the Ministry of Justice⁶⁵ or a qualification commission⁶⁶ to be responsible for conducting disciplinary proceedings. In some Member States, such commissions are heavily controlled by the executive or are composed mainly of state officials, a situation that clearly affects the independence of the legal profession.

57. As stated in Principle 27 of the Basic Principles, complaints against lawyers in their professional capacity “should be processed expeditiously and fairly under appropriate procedures”,⁶⁷ and lawyers should have “the right to a fair hearing, including the right to be assisted by a lawyer of their choice”. The Special Rapporteur has emphasized this point on the occasion of several country visits.⁶⁸

58. Finally, regardless of the nature of the disciplining body, any disciplinary proceedings should be subject to independent judicial review, as provided by Principle 28 of the Basic Principles.⁶⁹ The Special Rapporteur has underlined the importance of such judicial review on the occasion of a number of country visits.⁷⁰

I. Safeguards from unlawful interference and for the security of lawyers

59. Principle 16 of the Basic Principles provides that “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,

⁶² See E/CN.4/2003/65/Add.2, para. 42.

⁶³ See African Principles, sect. I (o).

⁶⁴ See A/HRC/8/4/Add.2, para. 46; A/HRC/11/41/Add.2, para. 78.

⁶⁵ See A/HRC/4/25/Add.2, para. 42.

⁶⁶ See E/CN.4/2006/52/Add.4, para. 64; E/CN.4/2006/52/Add.3, para. 59.

⁶⁷ See African Principles, sect. I (n); see also Recommendation No. R (2000) 21, Principle VI (3), which requires that disciplinary proceedings be conducted in compliance with the European Convention on Human Rights.

⁶⁸ See A/HRC/11/41/Add.2, para. 78.

⁶⁹ See IBA Standards, Principle (24).

⁷⁰ See A/HRC/11/41/Add.2, para. 78; and E/CN.4/2006/52/Add.4, para. 64.

economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”⁷¹

60. The work of the mandate since 1994 has shown, however, that lawyers are exposed to risks, including: harassment, intimidation and threats; assault, including physical violence and murder; arbitrary arrest, detention and disappearance; restrictions on their freedom of movement; and economic or other sanctions for measures they have taken in accordance with recognized professional obligations and standards and ethics.

61. As mentioned in the Special Rapporteur’s most recent report on communications (A/HRC/11/41/Add.1), 11 per cent of all communications in the previous 12 months were related to intimidation and harassment of, threats to and assaults against lawyers, including physical violence and murder.⁷² In this connection, there are disturbing information and reports from non-governmental organizations dedicated to promoting the independence of lawyers throughout the world.⁷³

62. On the occasion of a country visit, the Special Rapporteur heard disturbing allegations about judges summoning lawyers on some pretext prior to their client’s hearings in order to intimidate them and interfere with their work. Such action prevents lawyers from attending hearings and effectively defending their clients.⁷⁴

63. In other cases, the freedom of movement of lawyers is restricted so that they are not in a position to meet with their clients.⁷⁵

64. Principle 18 of the Basic Principles provides that “Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.”⁷⁶ Throughout his mandate, however, the Special Rapporteur discovered, as had his predecessor,⁷⁷ that this principle is one of the most routinely breached. This occurs particularly where lawyers defend clients in politically sensitive cases⁷⁸ or cases related to large-scale corruption, organized crime, terrorism and drug trafficking.⁷⁹ It is far from uncommon that an investigation be initiated against lawyers on grounds of an alleged link to or the provision of support for their clients’ alleged criminal activities or that they are eventually charged with defamation solely for representing and defending their clients.⁸⁰

65. In this connection, another important safeguard for lawyers which should be emphasized is that “Lawyers shall enjoy civil and penal immunity for relevant

⁷¹ See also African Principles, sect. I (b); Recommendation No. R (2000) 21, Principle I (3), (4), (5); IBA Standards, Principle (8).

⁷² See A/HRC/11/41/Add.2, para. 240.

⁷³ See reports of the International Bar Association, Lawyers for Lawyers (L4L), Canada Lawyers Rights Watch.

⁷⁴ See A/HRC/8/4/Add.2, para. 48.

⁷⁵ See E/CN.4/2006/95/Add.3, para. 78.

⁷⁶ See African Principles, sect. I (g); IBA Standards, Principle (7).

⁷⁷ See E/CN.4/1998/39, para. 179.

⁷⁸ See E/CN.4/2004/60, para. 49.

⁷⁹ See E/CN.4/2002/72/Add.1, para. 108.

⁸⁰ Most recently: press release of 1 July 2009, available at the website of the Office of the United Nations High Commissioner for Human Rights.

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.”⁸¹

66. By 1998, Param Cumaraswamy had already concluded that “Identifying lawyers with their clients’ causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned”, and emphasized that “where there is evidence of lawyers identifying with their clients’ causes, it is incumbent on the Government to refer the complaints to the appropriate disciplinary body of the legal profession.”⁸²

67. The Special Rapporteur and other mandate holders have expressed serious concerns about cases in which lawyers were put under pressure and ran the risk of reprisals or even prosecution after denouncing ill-treatment suffered by their clients or malfunctions in the system of justice.⁸³ Similar concerns have been raised by treaty bodies.⁸⁴ In some instances, the level of violence against those involved in the administration of justice was such that lawyers denied taking up the cases in question.⁸⁵

68. Principle 17 of the Basic Principles stipulates that “Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.” Thus, there exists a positive obligation of States to take effective measures to ensure the security of lawyers.

69. Such an obligation entails that, in the event of any harassment or physical assault against a lawyer, impartial and independent investigations must be made promptly. It is crucial to bring the perpetrators of such crimes to justice in order to prevent a reoccurrence of similar events. Recommendation No. R (2000) 21, in its Principle V (5), requires professional organizations to take any necessary action in cases such as arrests or detention of lawyers, decisions to take proceedings calling into question the integrity of lawyers in order to defend their interests. Principle 20 of the IBA Standards stipulates that lawyers’ association should be informed immediately of the reason and the legal basis for the arrest or detention and place of detention of any lawyer and that lawyers’ associations should have access to lawyers who have been arrested or detained.

IV. Brief review and assessment of six years of the mandate

A. Scope of the mandate and mandate holders

70. The mandate of the Special Rapporteur was first established by the then Commission on Human Rights (resolution 1994/41) following several years of work previously carried out by the then Subcommission on the Prevention of Discrimination and the Protection of Minorities. Thus far, two mandate holders have been entrusted with this mandate: Param Cumaraswamy, from 1994 to July 2003, and Leandro Despony, the author of the present report, from August 2003 to July

⁸¹ Principle 20 of the Basic Principles; IBA Standards, Principle (11).

⁸² E/CN.4/1998/39, paras. 179 and 181.

⁸³ See E/CN.4/2006/6/Add.6, para. 25; E/CN.4/2006/61/Add.3, para. 55.

⁸⁴ See CAT/C/RUS/CO/4, para. 8.

⁸⁵ See E/CN.4/2006/52, para. 57.

2009. Ms. Gabriela Carina Knaul de Albuquerque e Silva was elected new mandate holder as of 1 August 2009.

71. In the 15 years of its existence, the initial scope of this mandate has evolved dramatically, further to successive decisions by the Commission on Human Rights and later the Human Rights Council. Initially focused on the situation of individual judges, lawyers and legal professionals, the current scope of the mandate could be described as covering all issues related to the structure and functioning of the judiciary and the administration of justice in a democratic environment, including access to justice, the right to due process of law and the guarantees thereof.

72. In the view of the Special Rapporteur, this development is justified and appropriate as violations and abuses affecting judicial actors are more than often non-dissociable from situations affecting the structure and functioning of the judiciary as such.

73. Furthermore, the development of international justice in the last decade, with its multiple forms and modalities, has opened completely new areas in the field of the administration of justice, within which principles, standards and norms of a universal character are developed. It is quite appropriate, therefore, that these matters are reflected in the reports under the mandate since they project a trend in the universal reach of principles of law. In the Special Rapporteur's view, these developments have reached a point where, beyond facts and figures, they deserve to be analysed from a substantive point of view in the context of the mandate. This would obviously require increasing the resources and means at the disposal of the mandate, in particular permitting annual thematic reports to be more extensive in length than is currently allowed.

74. Finally, as part of efforts by the international community to ensure good governance, technical assistance in the field of the administration of justice, particularly in those States undergoing a transition or a crisis situation, has also been a key feature over the last decade. It is thus important that those efforts find an echo in the Special Rapporteur's reports and that they be analysed from a substantive point of view in order to help identifying good practices and strengthening the cost to impact relationship. The United Nations should place emphasis on this process, and the Office of the United Nations High Commissioner for Human Rights (OHCHR) should be closely associated with the endeavour.

B. Reporting to the General Assembly

75. In 2005, the Special Rapporteur was mandated to present a first progress report to the Sixtieth session of the General Assembly, a procedure which has been continued and institutionalized since that time.

76. The Special Rapporteur considers this specific institutional development to be particularly appropriate as it offers a second opportunity in the course of the past 12 months to present recent developments and substantive issues of interest relevant to the mandate to the Member States.

C. Main issues addressed in the annual thematic reports

77. The successive annual reports of the Special Rapporteurs to the Commission on Human Rights and later to the Human Rights Council, and the successive progress reports to the General Assembly, have addressed the following issues:

- (a) 2004: E/CN.4/2004/60: (i) review of developments since the mandate's creation in 1994; and (ii) an approach to the work ahead based on a detailed review of crucial issues affecting the judiciary and its actors;
- (b) 2005: E/CN.4/2005/60: (i) justice and the fight against terrorism, with special emphasis on the creation of the figure of the "enemy combatant" and its effects; (ii) justice in periods of transition;
A/60/321: (i) cooperation with and mission to Ecuador as a best practice; (ii) counter-terrorism and the right to a fair trial;
- (c) 2006: E/CN.4/2006/52: (i) administration of justice and the right to the truth; (ii) the judiciary and justice in a period of transition;
A/61/384: (i) military justice trying civilians and serious human rights violations; (ii) the situation of detainees at Guantánamo Bay;
- (d) 2007: A/HRC/4/25: (i) the rule of law and states of emergency; (ii) classifications of situations addressed by the mandate 1994-2006;
A/62/207: (i) conditions influencing the administration of justice and the independence of judges, prosecutors and lawyers; (ii) access to justice;
- (e) 2008: A/HRC/8/4: access to justice;
A/63/271: the role of judges in relation to states of emergency;
- (f) 2009: A/HRC/11/41: guarantees of judicial independence;
A/64/181: independence of lawyers and the legal profession.

78. The above reports addressed a great variety of other issues, ranging from the financial independence of the judiciary and the material conditions in which the institution and its actors operate to legal training and continuing education for judges and lawyers, from judicial corruption to imbalances in the respective roles of the prosecutor and the judge, from the respective level of participation and functions of men and women in the judiciary throughout the world to the coexistence of various systems of justice in many parts of the world. All of these topics were usually addressed in detail in the context of specific country mission reports. These issues deserve a more in-depth analysis.

D. Communications procedure and reports

79. From August 2003 to the end of July 2009, 670 communications on situations in 97 Member States were addressed to the respective Governments, in the form of letters containing allegations and urgent appeals.

80. In many instances, owing to the scope and complexity of the issues at stake, the Special Rapporteur chose to contact the authorities of the Member State

concerned jointly with the other relevant special procedures mandate holders, a procedure which, as experience shows, is both appropriate and effective. The Special Rapporteur takes this opportunity to express his gratitude to his colleagues for their invaluable support and cooperation, particularly with a view to all that could be achieved through joint efforts.

81. In various reports on communications, the Special Rapporteur has presented statistical data to provide an idea of the level of tension experienced by the judiciary and its actors, the different types of violations covered and the level of cooperation enjoyed from Governments. While considering that scientific improvements need to be made in this area, he trusts that the data provided are indicative of the mandate, its work and impact.

82. In this connection, in the six years of work, the Special Rapporteur noted a clear increase in and improvement of the cooperation he has enjoyed from Member States. He welcomes this development as part of the dialogue between States and special procedure mandate holders that is crucial in order to cross-check allegations and find solutions consistent with international principles and norms, wherever appropriate. Nevertheless, he remains concerned at the number of communications that remain without any reply or without a substantive response in relation to the requirements expressed in his requests.

83. The Special Rapporteur sincerely hopes that increased resources may be offered to his successor and, in general, to all special procedures mandate holders so that the communications procedure may be systematized and improved follow-up procedures implemented. It is unfortunate that currently it is not possible to take advantage of this very important and useful procedure for lack of resources to the maximum possible extent. In the context of the mandate, a kind of “jurisprudence” could also be usefully developed to help both the mandate holder and Member States in their efforts to find solutions to the issues that are the subject of allegations.

E. Country visits

84. In his six years of his tenure, the Special Rapporteur was able to carry out 12 country visits (see below), all of which gave rise to a detailed mission report containing a description of the court system and the situation of the judges, prosecutors and lawyers as observed in the country, followed by specific recommendations:

- 2004: Kazakhstan, Brazil;
- 2005: Ecuador (twice), Kyrgyzstan, Tajikistan;
- 2007: Maldives, Democratic Republic of the Congo;
- 2008: Russian Federation;
- 2009: Guatemala (three times).

85. In developing his mission reports, the Special Rapporteur established a well-defined pattern permitting him to consistently address all crucial issues affecting the justice system and its actors. Based on the detailed analysis, it is his objective to

develop conclusions and detailed, specific recommendations in order to help the different actors involved to identify effective solutions to the problems they face.

86. The Special Rapporteur is grateful to all those States that invited him and offered him their cooperation, permitting a frank and fruitful dialogue, and he expresses his gratitude to all local actors for their confidence and cooperation. The Special Rapporteur would also like to thank the Secretariat for the assistance it has provided in that context.

87. The number of countries visited as compared to the number of States contacted through communications is inevitably relatively small. In addition, the above-mentioned visits were generally short as compared to their scope, including number of actors to meet with and to interview. In addition, in relatively rare cases, the Special Rapporteur was able to carry out a follow-up visit to ascertain the extent to which his recommendations had been effective. These matters could be considered by the Human Rights Council. In particular, the Special Rapporteur hopes that the matter of follow-up visits may be properly addressed during his successor's tenure, especially as it is not uncommon for States that were visited by the Special Rapporteur to insist on a subsequent visit.

F. Technical assistance and the development of best practices

88. During his tenure, the Special Rapporteur was able to offer technical assistance to the authorities of Ecuador,⁸⁶ Guatemala and Maldives. From all three experiences, he trusts that a number of good practices may be derived and inspire action in other contexts. By way of an example, the Special Rapporteur would like to refer to the case of Maldives, where his main recommendations were implemented prior to, during and after the democratic transition process.⁸⁷

G. Participation in events and conferences

89. Time and means permitting, the Special Rapporteur has taken part in as many relevant events and conferences as possible, and has always noted that they provided a crucial opportunity not only to present the mandate but also to receive feedback and suggestions that have dramatically helped him in discharging.

H. Contacts with legal professionals and their associations

90. Throughout his tenure, the Special Rapporteur was particularly keen to develop continuing contacts with actors involved in the administration of justice and their associations on the understanding that they need to be as closely as possible associated with United Nations efforts to guarantee their independence. He wishes to take this opportunity to express his gratitude to all those in the legal profession and those involved in organizations promoting the independence and fair functioning of the judiciary for their invaluable contribution and support.

⁸⁶ See *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>.

⁸⁷ See A/HRC/4/25/Add.2.

V. Major developments in international justice

A. International Criminal Court

Central African Republic

91. In the case of Jean Pierre Bemba Gombo, the alleged President and Commander in chief of the Movement for the Liberation of Congo, on 15 June 2009 the court issued its decision to confirm the charges on two counts of crimes against humanity, that is, murder (article 7 (1) (a) of the Rome Statute) and rape (article 7 (1) (g) of the Statute) and three counts of war crime: murder (article 8 (2) (c) (i) of the Statute); rape (article 8 (2) (e) (vi) of the Statute); and pillaging (article 8 (2) (e) (v) of the Statute).

Darfur, the Sudan

92. On 4 March 2009, Pre-Trial Chamber I issued a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of the Sudan, the first warrant of arrest ever issued for a sitting Head of State by the International Criminal Court. Although the warrant cited war crimes and crimes against humanity, the crime of genocide was not included in it. The judges stressed, however, that if additional evidence was gathered, the decision would not prevent the prosecution from requesting an amendment to the warrant of arrest. On 7 July 2009, the Office of the Prosecutor of the International Criminal Court lodged an appeal, requesting the inclusion of the charge of genocide. It is expected that the Appeal Chamber may take a few months before taking a decision on the issue. President Al-Bashir, who does not recognize the competence of the Court, has received the support of Assembly of Heads of State and Government of the African Union, as expressed by its resolution of 3 July 2009, which stated that, owing to the fact that its request to postpone the indictment had not been pursued, it would not contribute to the arrest or extradition of a colleague.

93. Bahr Idriss Abu Garda, the Chairman and General Coordinator of Military Operations of the United Resistance Front, who is thought to be criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under article 25 (3) (a) of the Rome Statute, first appeared before the court on 18 May 2009. The confirmation hearing is scheduled to take place for 12 October 2009.

Democratic Republic of the Congo

94. Pursuant to the decision of the International Criminal Court of 18 November 2008 to proceed with the trial of Thomas Lubanga Dyilo, the founder and leader of the Union of Congolese Patriots, the trial recommenced before Trial Chamber I on 26 January 2009. The trial is in process at the time of the writing of the present report.

95. The date of the commencement of the trial against Mathieu Ngudjolo Chui, the alleged former leader of the National Integrationist Front, and Germain Katanga, the alleged commander of the Patriotic Resistance Force in Ituri, has been set for 24 September 2009.

Kenya

96. On 9 July 2009, the Chair of the Panel of Eminent African Personalities that negotiated Kenya's national accord, Kofi Annan, announced that he had transmitted to the International Criminal Court a list of names of those suspected to bear the greatest responsibility for the violence that followed the presidential elections in Kenya in December 2007, in which over 1,100 persons had died. The Waki Commission, which was established and tasked by the Government of Kenya to investigate the post-election violence, had recommended that a special tribunal be created to investigate and prosecute the main perpetrators, failure of which would cause a list of alleged main perpetrators to be provided to the prosecutor of the International Criminal Court.

B. International Tribunal for the Former Yugoslavia

97. On 26 February 2009, the International Tribunal for the Former Yugoslavia handed down its first judgement for crimes perpetrated by forces of the Federal Republic of Yugoslavia and Serbia against Kosovo Albanians during the 1999 conflict in Kosovo.⁸⁸

98. On 8 July 2009, the International Tribunal for the Former Yugoslavia rejected an immunity claim brought by Radovan Karadzic, who has been indicted for genocide, complicity in genocide, extermination, murder and wilful killing. The decision to reject the claims followed Karadzic's recent renewal of his immunity defence in which he claimed that charges against him should be dropped because of a deal he claimed to have made with former United States Ambassador to the United Nations, Richard Holbrooke. Karadzic requested an evidentiary hearing on the claims, maintaining that the Ambassador had offered him immunity from prosecution if he voluntarily left power in 1996, and that there had been two witnesses to the agreement. The court ruled that Karadzic had failed to show that the Ambassador had acted with the authority of the Security Council and that there was an abuse of process in the proceedings. Earlier in 2009, the appellate chamber of the Tribunal upheld a ruling of December 2008, which declared that no immunity agreement existed and that even if there was such an agreement it would not be valid under international law.

C. International Criminal Tribunal for Rwanda

99. On 22 June 2009, Trial Chamber III of the International Criminal Tribunal for Rwanda found Callixte Kalimanzira, a former director of the cabinet of the Ministry of the Interior, guilty of genocide and direct and public incitement to commit genocide and sentenced him to 30 years imprisonment.

D. Special Tribunal for Sierra Leone

100. On 14 July 2009, Charles Taylor, former President of Liberia, denied war crimes allegations while testifying for the first time at his trial in the Special Court

⁸⁸ See A/HRC/11/41, para. 89.

for Sierra Leone. Mr. Taylor faces 11 counts of crimes against humanity, violations of the Geneva conventions and other violations of international humanitarian law stemming from a “campaign to terrorize the civilian population” of Sierra Leone. Following the court’s denial of Mr. Taylor’s motion for acquittal in May 2009, the trial has recommenced. The trial is being held in The Hague owing to security concerns in Sierra Leone.

E. Extraordinary Chambers in the Courts of Cambodia

101. In the first trial before the Extraordinary Chambers in the Courts of Cambodia, the substantial hearing in the trial of Kaing Guek Eav (alias Duch) commenced on 30 March 2009. The accused is the first of a group of five former Khmer leaders to appear before the court on 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, committed between 1975 and 1979. On 8 June 2009, the accused admitted responsibility in the killing of children detained at security centre S-21 while arguing that he was acting under orders of the Communist Party of Kampuchea.

VI. Conclusions and recommendations

A. Conclusions

102. **The present report reveals the manifold obstacles that lawyers face when discharging their functions. It also demonstrates the various safeguards that need to be established and implemented by the Member States in order to guarantee the independence of lawyers and the legal profession. The Special Rapporteur has observed that the establishment of an organized legal profession is a key element to the independence of lawyers. Furthermore, clear criteria and transparent procedures for admission to the legal profession and for disciplinary proceedings are decisive factors. Among the most vicious factors endangering the independence of lawyers are harassment, threats or even physical attacks against them in addition to other unlawful interference in their work.**

103. **Freedom to carry out their legal work is paramount if lawyers are to play their given role in society. Preconditions for lawyers to adequately provide legal counselling include their unhindered access to any relevant information and the confidentiality of their relationship with their clients. Being part of the system of the administration of justice, freedom of expression and association carry particular significance for lawyers. Continuing legal education should be a priority task for the legal profession.**

B. Recommendations

104. **In order to assist Member States to strengthen the independence of lawyers and the legal profession, the Special Rapporteur submits the recommendations set out below.**

105. With respect to the legal and institutional framework, the Special Rapporteur recommends that:

(a) The right to legal counsel of choice be enshrined at constitutional level or be considered as a fundamental principle of law; this fundamental right must be adequately translated into domestic legislation;

(b) In those Member States where there is no organized legal profession, an independent and self-regulated professional organization should be established as a priority; it is the duty of the authorities to support the establishment and work of such professional associations without interfering in these processes;

(c) Legislation regulating the role and activities of lawyers and the legal profession be developed, adopted and implemented in accordance with international standards; such legislation should enhance the independence, self-regulation and integrity of the legal profession; in the process leading to the legislation's adoption, the legal profession should be effectively consulted at all relevant stages of the legislating process;

(d) Such legislation should, provide as basic standards, inter alia, that (i) executive bodies of the professional associations shall be directly and freely elected by its members; (ii) mandatory membership shall be established for lawyers in professional self-regulatory and independent associations; (iii) admission to the legal profession shall be the responsibility of the lawyers association; (iv) there be a right to appeal against decisions for admission to the profession; (v) withdrawals of the right to practice as a lawyer may only be made with an explicit approval of the respective lawyers' association; (vi) there shall be a right to appeal against withdrawals of the right to practice;

(e) In those Member States where the admission to the legal profession is conducted or controlled by the authorities, such responsibility should be gradually transferred to the legal profession itself within a determined time frame;

(f) In those Member States where there is a re-licensing or re-registration requirement for lawyers to continue practicing, that scheme be discontinued.

106. Regarding ethical rules and disciplinary proceedings, the Special Rapporteur recommends that:

(a) A unified ethical code, applicable to all lawyers in the respective country should preferably be drafted by associations of lawyers themselves; in the event that they are established by law, the legal profession must be effectively consulted at all relevant stages of the legislating process;

(b) An impartial disciplining body should be established by the legal profession and a pre-established procedure should be adopted for the conduct of disciplinary proceedings in line with international standards;

(c) There should be disciplinary proceedings ensuring the right to a fair hearing, including the right to be assisted by a lawyer of choice, which should be subject to independent judicial review.

107. As regards freedom to carry out legal work, the Special Rapporteur recommends that:

(a) Authorities cease, with immediate effect, to associate lawyers with the interests of their clients and refrain from expressing related comments in the public sphere;

(b) Member States take measures to strengthen the awareness of the population of the role of lawyers and support lawyers associations in their awareness raising efforts.

108. To strengthen safeguards from unlawful interference and for security of lawyers, the Special Rapporteur recommends that:

(a) Authorities refrain from directly or indirectly interfering in the work and functioning of lawyers, including from any form of reprisals against them;

(b) Acts of harassment, threats or physical assaults against lawyers should be promptly investigated by an impartial and independent body;

(c) Where the security of lawyers is threatened as a result of discharging their functions, the authorities should be required to adopt effective measures to ensure their security;

(d) When a lawyer is arrested or detained, the respective legal profession should be informed immediately of the reason and be granted access to the lawyer in question, in addition to the obligations of the authorities as prescribed by law.

109. With a view to lawyers' access to information, the Special Rapporteur recommends that legislation be adopted and implemented to guarantee full access to appropriate information, files and documents in the possession or control of the authorities; such access should already be accorded at the investigative stage in order to allow for the preparation of an adequate defence; appropriate information should include all materials that are exculpatory or that the prosecution plans to offer in court against the accused.

110. In order to guarantee the confidential nature of lawyer-client relation, the Special Rapporteur recommends that:

(a) The authorities ensure that all communications and consultations between lawyers and their clients within their professional relationship be confidential. In cases where the client is detained additional measures need to be adopted in order to guarantee a direct and confidential communication of the client with legal counsel;

(b) Lawyers' files and documents should be protected from seizure or inspection by law and in practice and their electronic communications should not be intercepted.

111. To ensure freedom of expression and association of lawyers, the Special Rapporteur recommends that:

(a) Member States recognize that freedom of expression and association of lawyers constitute essential requirements for the proper and independent functioning of the legal profession and must be established and guaranteed by law and in practice;

(b) Lawyers' voices have particular important weight concerning matters related to the administration of justice;

(c) Member States refrain from preventing lawyers from taking part in conferences, training sessions or similar events related to human rights and the legal system, conducted both within and outside the country; Member States should support such initiatives.

112. In order to assist lawyers associations to strengthen the independence of lawyers and the legal profession, the Special Rapporteur recommends that:

(a) Lawyers' associations strive to ensure a pluralistic membership of their executive bodies in order to prevent political or any other third-party interference;

(b) Criteria and the procedure for admission to the legal profession should be defined by the legal profession in clear guidelines; minimum criteria to be admitted to sit the bar exam should consist of a legal university degree and a mandatory internship period with a lawyer; candidates fulfilling these criteria should be admitted to sit a uniform written bar exam, which should be conducted on an anonymous basis in order to guarantee objectivity; an examining body of the legal profession, appointed by the bar association, should decide on the admission of the candidates; such process should be subject to judicial review;

(c) Lawyers' associations should develop a unified ethical code, applicable to all lawyers in the respective country; this code should provide for the applicable disciplinary procedure and give detailed guidance on the infractions by lawyers triggering disciplinary measures; disciplinary measures must be proportional to the gravity of the infraction; ethical codes should be vigorously and coherently implemented and enforced by the legal organization;

(d) Legal professions should adopt a uniform and mandatory scheme of continuing legal education for lawyers, which should also include training on ethical rules, rule of law issues and international and human rights standards, including the Basic Principles on the Role of Lawyers.

113. The present analysis and recommendations, which are based on the vast experience accumulated by the mandate holders since the inception of the mandate in 1994, reveal that the Basic Principles on the Role of Lawyers are a key pillar to any fair judicial proceeding since they spell out, in detail, preconditions and safeguards for the free and independent functioning of lawyers and the legal profession. The Special Rapporteur therefore recommends that the General Assembly formally endorse the Basic Principles.