

Lawyers' Rights Watch Canada

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Written Statement submitted jointly by LRWC, a non-government organization in special consultative status and the Asian Legal Resource Centre (ALRC), a non-government organization in general consultative status.¹

The Need for an Absolute and Non-derogable Right to Independent Courts

LRWC and ALRC call on the Human Right Council to declare unambiguously, through a declaration and recommendations to the UN General Assembly, that the equal right 'to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of criminal charges' as guaranteed by Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) and other international instruments² is absolute and non-derogable. The absence of a specific prohibition is a contributing factor to widespread violations.

¹ The Dutch Lawyers for Lawyers Foundation (L4L), the Pro-Labor Legal Assistance Center (Philippines), the International Association of Democratic Lawyers (IADL), the International Civil Liberties Monitoring Group (ICLMG) and the National Lawyers Guild (NLG) share the views expressed in this statement.

² Other international instruments guaranteeing the right to an independent and impartial court to determine rights and obligations and criminal charges include: Common article 3 of all four Geneva Conventions prohibits the passing of sentences "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."; *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts* (Protocol I), articles, 75(4) requires an "impartial and regularly constituted court; *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) article 6(2), requires, "a court offering the essential guarantees of independence and impartiality"; *Geneva Conventions relative to the Treatment of Prisoners of War* (GC III), article 102 requires judgment, "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power"; *European Convention on Human Rights, Charter of the Fundamental Rights of the European Union*. Non-treaty instruments include the: *Universal Declaration of Human Rights*, article 10; *UN Basic Principles on the Independence of the Judiciary*; *Siracusa Principles on the Limitation and Derogation Provisions*; *Commonwealth (Latimer House) Principles on the Three Branches of Government*; *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*; and the *Bangalore Principles Of Judicial Conduct 2002*..

An independent, impartial and competent judiciary is the key component of the rule of law and the foundation upon which adequate enforcement of all rights, including non-derogable rights, depends.³ The rule of law "...requires that there should be laws which lay down what the state may and may not do and by which one can test whether such power which it claims, or any particular exercise of such power is legitimate and a system of courts independent of every other institution of the state, including the legislators and the executive, which interprets and applies those laws."⁴

The *Universal Declaration of Human Rights* recognizes the rule of law as essential to peace and justice,

"Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,"⁵

Equal access to independent and impartial courts is key to rights enforcement and to protection against arbitrariness. The HRC has determined that Article 14 fair trial rights must take precedence over domestic law and "may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights..."⁶

"The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception."⁷

Article 3 of all four Geneva Conventions ensures that, even in time of conflict, penal sanctions must be determined by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." Depriving a person of 'rights of fair and regular trial' is a war crime.⁸

Independent courts are constituted and function in accordance with laws, properly passed, that determine and secure: a) procedures and qualifications for appointment of judges; b) the term of office of judges and conditions governing promotion, transfer, suspension and removal; c) judges' independence from the executive and legislative branches of government; d) adequate

³ *Latimer House Principles*, endorsed by Commonwealth Heads of Government at their summit in Abuja, Nigeria, December 2003, Article IV, Independence of the Judiciary. See also the Supreme Court of Canada in *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3 at para. 131.

⁴ P. Sieghart, *International Human Rights Law*, cited in Lord Elwyn-Jones, "Judicial Independence and Human Rights" in R. Blackburn & J. Taylor, eds., *Human Rights for the 1990s: Legal and Political and Ethical Issues* (London: Mansell, 1991) at 44.

⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Preamble.

⁶ UN Human Rights Committee (HRC) General Comment No. 32, *Article 14, Right to Equality before courts and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 4, 5, 11 & 19.

<http://www.unhcr.org/refworld/type,GENERAL,,478b2b2f2,0.html>

⁷ UN Human Rights Committee General Comment No. 32, *Article 14, Right to Equality before courts and to fair trial*, 23 August 2007, CCPR/C/GC32, para. 17.

⁸ Protocol I, articles 85.4(e) and 5; GC III, article 130; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC IV), article 147; *Rome Statute of the International Criminal Court*, article 8.2.1.iv.

remuneration; e) conditions of service; f) pensions; and, e) retirement age.⁹ These safeguards allow courts to perform their adjudicative role without interference, including from the executive or legislative branches of government.¹⁰

It has long been recognized that independent courts that can prevent and punish violations of non-derogable rights are necessary.

“...In this connection, it should be noted that in time of war, and even in time of armed conflict not of an international character, article 3, which is common to the Geneva Conventions on the humanitarian law of war, prohibits “at any time and in any place whatsoever” the infringement of a basic set of principles that are deemed to be inalienable, such as the prohibition of torture. This will apply a fortiori in the event of purely internal disorders. It would be paradoxical if the guarantees in peace-time were weaker than those in war-time.”¹¹

In 1997, the Special Rapporteur on the Independence of Judges and Lawyers concluded that;

- The rule of law, democracy and human rights form a single entity that a state of emergency cannot break either exceptionally or temporarily.¹²
- Even during a state of emergency, *jus cogens* requires the observance of judicial guarantees, which are recognized as indispensable.¹³

In spite of these clear statements, states frequently treat judicial independence as a right that can be displaced for a variety of arbitrary reasons under the rubric of emergency measures and threats to national security.

“The Special Rapporteur draws the attention of the General Assembly to the repeated violations of the right to a fair trial and other human rights that occur during states of emergency.”¹⁴

The Special Rapporteur observed that, “...judicial oversight is of vital importance both in checking that [the state of emergency] has been lawfully declared and in protecting human

⁹ *Ibid.* See also *R. v. Valente*, [1985] 2 S.C.R. 673 at page 685f-j and Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Article 11. www.unhchr.ch/html/menu3/b/h_comp50.htm.

¹⁰ *Supra* footnote 5 para. 19.

¹¹ UN Special Rapporteur on States of Emergency, Nicole Questiaux, *Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency* of 27 July 1982, UN Doc. E/CN.4/sub.2/1982/15 at pp. 19-20.

<http://daccessdds.un.org/doc/UNDOC/GEN/N82/117/27/PDF/N8211727.pdf?OpenElement>

¹² Leandro Despouy, Special Rapporteur per Economic and Social Council res. 1985/37, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency*, 23 June 1997, E/CN.4/Sub.2/1997/19, para. 101. <http://www.derechos.org/nizkor/except/despouy97en.html>

¹³ *Ibid.*, para 113 citing *Zelaya v. Nicaragua*, Human Rights Committee, communication 328/1988 adopted 20 July, 1994.

¹⁴ *Civil and political rights, including the questions of independence of the judiciary, administration of justice and impunity*, 6 August 2007, Report of the Special Rapporteur on the Independence of Judges and Lawyers submitted to the UN General Assembly U.N. Doc A/62/207, Summary, p. 1.

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/451/70/PDF/N0745170.pdf?OpenElement>

rights while it is in force.”¹⁵ He concluded that it was imperative that the independence and impartiality of the judiciary and the mandate of the courts to review the legitimacy of emergency measures, to protect rights and to try criminal cases, be preserved during states of emergency and recommended an international declaration incorporating such provisions.¹⁶

Examples of countries that have used arbitrarily determined states of emergency to remove universal access to independent and impartial courts include Syria, Pakistan, and the United States of America (U.S.) (the latter in relation to captured of non-U.S. citizens).

In each of these examples, the absence independent courts enabled widespread and egregious violations of internationally protected non-derogable rights, the denial of remedies for victims and impunity for perpetrators.

Emergency measures in Syria, in effect since 9 March 1963, give the executive broad powers to derogate from rights and control the courts. The military and security courts created under the emergency measures are subject to a limited mandate and executive control and suffer from a lack of transparency. Emergency measures have eroded freedoms of expression, association, assembly, the right to a fair trial and freedom from arbitrary detention. The lack of independent courts allows security forces to engage, unchecked, in torture.¹⁷

In Pakistan, one of the reasons proffered for imposing emergency measures was the oversight of independent courts. On 3 November 2007, President Pervez Musharraf issued a Proclamation of Emergency, suspended the *Constitution of the Islamic Republic of Pakistan* (Constitution) and proclaimed the Provisional Constitution Order No. 1 of 2007 (PCO). All superior court judges were removed from office and it was decreed that only judges sworn to uphold the PCO and not the Constitution, could continue in office. Judicial safeguards against arbitrary or illegal acts by the state including the violation of non-derogable rights were lost and state official who committed criminal acts and civil wrongs enjoyed impunity.¹⁸

On 14 September 2001,¹⁹ President G.W. Bush declared a national emergency and on 13 November 2001 issued an edict that established an extra-legal regime under which the U.S. captured non-Americans and stripped them of all rights under international and U.S. law.²⁰ These individuals were arbitrarily designated as taliban, al Qaida or possible threats to the citizens, foreign policy, economy or national security of the U.S.. Under this edict, captives

¹⁵ U.N. Doc A/HRC/4/25, Implementation of General Assembly resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 18 January 2007 at para. 64.

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/103/18/PDF/G0710318.pdf?OpenElement>

¹⁶ *Ibid*, paras. 69 flg.

¹⁷ Michael Macaulay, *Syria: The Need to Reform Monitoring of States of Emergency*, December 2005.

<http://www.lrwc.org/documents/Syria.StateofEmergency.Macaulay.Feb..06.pdf>

¹⁸ Provisional Constitution Order No. 1 of 2007, 3 November 2007, s. 2(1) &(3) and Oath of Office (Judges) Order, 2007. See also *Statement by Lawyers Rights Watch Canada to the Seventh Session of the Human Rights Council regarding unlawful emergency measures in Pakistan*, 20 February 2008.

¹⁹ Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proc. No. 7463, Sept. 14, 2001, 66 F.R. 48199.

²⁰ *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, Executive Order issued November 13, 2001, <http://www.ess.uwe.ac.uk/WCC/execordmilcomm.htm>

are detained indefinitely, denied protection of the Geneva Conventions and access to “any court of the United States...of any foreign nation or...any international tribunal.”²¹ The detention and treatment of these captive, still unchecked by an independent court, violates all applicable internationally protected rights, including non-derogable rights to liberty and freedom from torture and *ex post facto* penal sanctions. Captives have suffered irremediable damage including death and permanent injury. The continued existence of Guantánamo Bay threatens to undermine worldwide public confidence in the power of the rule of law.²²

Recommendations

LRWC and ALRC call on the HRC:

1. To declare the right to an independent and impartial tribunal to determine rights and criminal charges absolute and non-derogable.
2. To declare that states have the duty to pass laws that determine and secure a) procedures and qualifications for appointment of judges; b) the term of office of judges and conditions governing promotion, transfer, suspension and removal; c) independence from the executive and legislative arms of government; d) adequate remuneration; e) conditions of service; f) pensions; and, e) age of retirement so as to ensure that the court and judge perform their adjudicative duties free from interference from the executive and legislative branches of government.
3. To declare that a state of emergency “is a legal institution governed by the rule of law so that judicial oversight is of vital importance both in checking that it has been lawfully declared and in protecting human rights while it is in force.”
4. To declare that the right to an independent and impartial tribunal to determine rights and criminal charges must be maintained during emergency measures.
5. To declare that, during states of emergency independent courts must have and retain the mandate to adjudicate the legitimacy of emergency measures.
6. To declare that upon cessation of emergency measures all modification of laws carried out under the emergency measures will be null and void automatically and any laws repealed under emergency measures will be automatically revived.

²¹ *Ibid*, Section 7.3 (b)(2) the individual shall not be privileged to seek any remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceeding sought on the individuals’ behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”

²² As of 21 May 2009, 240 people remain imprisoned in Guantánamo Bay prison. Of the 779 people imprisoned in Guantánamo Bay prison since 2002, charges have been laid against only 27 people and all these have been charged with *Military Commissions Act 2006* offences.