



# Guarantees for the independence of justice operators

Towards strengthening access to justice  
and the rule of law in the Americas

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Inter-American  
Commission on  
Human Rights **IACHR**



Organization of  
American States



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Human Rights **IACHR**

## **INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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# **GUARANTEES FOR THE INDEPENDENCE OF JUSTICE OPERATORS. TOWARDS STRENGTHENING ACCESS TO JUSTICE AND THE RULE OF LAW IN THE AMERICAS**

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**GUARANTEES FOR THE INDEPENDENCE OF JUSTICE OPERATORS.  
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IN THE AMERICAS**

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**INTRODUCTION AND METHODOLOGY**

**A. Introduction**

1. The effectiveness of rights and freedoms under a democratic system requires a legal and international order in which the law takes precedence over the will of the governing and private parties and in which there is effective judicial oversight of the constitutionality and legality of the acts of government. Accordingly, the Inter-American Commission on Human Rights (hereinafter “Commission”, “Inter-American Commission” or the “IACHR”) has underscored the crucial role that justice operators play in preserving the Rule of Law by enabling every complaint to follow its proper course through the jurisdictional mechanisms established by the State and, in cases of human rights violations, by ensuring that the violations are investigated, that those responsible are punished and that the victims receive redress, all the while guaranteeing due process of law to any person facing the State’s punitive authority.

2. As the Special Rapporteur of the United Nations on the Situation of Human Rights Defenders observed, “[w]hether an individual works as a local government official, a policeman upholding the law or an entertainer using his or her position to highlight injustices, all can play a role in the advancement of human rights. The key is to look at how such people act to support human rights and, in some instances, to see whether a ‘special effort’ is made.”<sup>1</sup> Within the Inter-American Commission on Human Rights, the Rapporteurship on Human Rights Defenders has been the focal point for following and monitoring the situation of justice operators, in recognition of the special function that they, as the guarantors of the right of access to justice and redress, perform in the defense of human rights.<sup>2</sup>

3. The Commission’s experience is that although the international community has underscored the fact that judges, prosecutors and public defenders are essential to ensuring access to justice and due process, in some States of the region these

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<sup>1</sup> UN Special Rapporteur on the situation of human rights defenders. Fact Sheet No. 29. Human Rights Defenders: Protecting the Right to Defend Human Rights, p. 9.

<sup>2</sup> In its Report on the Situation of Human Rights Defenders in the Americas, the Commission underscored the important work of defending human rights done by those charged with administering justice and investigating human rights violations. IACHR. *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, 7 March 2006, paragraph 110. Likewise, in its Second Report on the Situation of Human Rights Defenders in the Americas, the Commission made reference to the work that judges, prosecutors, solicitors, public defenders, and agents of the administration of justice perform in the defense of human rights. IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II, Doc. 66, December 31, 2011, paragraph 349.

officials are performing their functions without essential guarantees for their individual Independence and the independence of the institutions in which they serve. That lack of independence manifests itself in the form of interference by government and non-state actors who would erect *de jure* and *de facto* barriers to deny access to justice to those who seek it. Such interference is a function of a lack of institutional structures able to resist pressures from other branches of government or State institutions; it is also caused by a lack of adequate selection and appointment procedures and of due process guarantees in disciplinary proceedings. The Commission has also observed the persistence of operating and organizational issues in the institutions of justice which weakens their independence, such as their lack of adequate material and logistical resources; other problems are extraneous to the institutions themselves but they nonetheless detract from their independence, such as corruption and lack of protection from the pressure exerted by organized crime.

4. In view of the foregoing, the Inter-American Commission decided to prepare this report, in exercise of its essential function of promoting the observance and defense of human rights in the American States and of the authority given in Article 41 of the American Convention on Human Rights (hereinafter “American Convention”) and Article 58 of its Rules of Procedure. The specific purpose is to identify the obligations that the member states of the Organization of American States (OAS) have undertaken to ensure access to justice through guarantees that must be afforded to justice operators to enable them to discharge their functions independently, while enhancing observance of the standards of international law and identifying certain obstacles still present in some States of the hemisphere.

5. This report builds upon the analyses of the Commission in a number of its earlier reports regarding the guarantees that the States must afford to justice operators so that they are able to perform their essential role in enabling access to justice and guaranteeing due process.<sup>3</sup>

6. The IACHR hopes that the recommendations it makes in this report will be useful to the member states of the Organization and help strengthen the actors and institutions involved in imparting and administering justice; in the particular case of human rights violations, the Commission hopes its recommendations will help end the impunity that persists in many of such cases.

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<sup>3</sup> Among others, IACHR. *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144, Doc. 12, August 10, 2012, paras. 63 to 93; *Annual Report 2011*, Chapter IV. Venezuela, paras. 447 to 475, and Cuba, paras. 211 to 227; *Annual Report 2010*. Chapter IV. Colombia, paras. 220 to 226; *Preliminary Observations of the Inter-American Commission on Human Rights on its visit to Honduras, May 15 to 18, 2010*, OEA/Ser.L/V/II. Doc. 68, June 3, 2010, paras. 77 to 86; *Democracy and human rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paras. 180 to 319; *Annual Report 2009*. Chapter V. *Follow-up Report – Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II.135. Doc. 40, August 7, 2009, paras. 66 to 85; *Observations of the Inter-American Commission on Human Rights on its visit to Haiti in April 2007*. OEA/Ser.L/V/II.131, doc. 36, 2 March 2008, paras. 24 to 30; *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr., October 22, 2002, para. 229, and *Second Report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106. Doc. 59 rev.2, June 2000, paras. 1 to 5.



## B. Method

7. In anticipation of this report, the Commission conducted a number of activities to gather information on justice operators in the region and the principal obstacles they encounter in their work. The IACHR also conducted a number of activities to examine the relevant standards of international law on the subject, so that it could offer recommendations in this report.

8. Accordingly, on January 15, 2013, the Commission issued a questionnaire to the States and civil society, its goal being to compile relevant information in order “to identify the problems that justice operators encounter in their work and to promote the international standards that will provide guidance to the States concerning the independence and impartiality of justice operators.”<sup>4</sup>

9. The IACHR would like to extend a special word of thanks to those States that answered the questionnaire and to the justice operators, non-governmental organizations, individuals and universities who sent their respective responses to the Commission.<sup>5</sup>

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<sup>4</sup> The questionnaire is available at the following link: <http://www.oas.org/en/iachr/defenders/docs/pdf/CuestionarioJan2013.pdf>.

<sup>5</sup> The States that answered the questionnaire prepared by the Commission were the following: Argentina: Permanent Mission of the Argentine Republic to the Organization of American States. Ministry of Foreign Affairs and Worship. Ministry of Justice and Human Rights. Secretariat of Human Rights; Bolivia: Plurinational State of Bolivia. Ministry of Foreign Affairs. Permanent Mission to the Organization of American States. Brazil: Permanent Mission of Brazil to the Organization of American States. Office of the Federal Prosecutor for Citizens’ Rights. Chile: Ministry of Foreign Affairs. Office of the Director for Human Rights. Colombia. Foreign Office. Ministry of Foreign Affairs. El Salvador: Office of the Prosecutor for the Defense of Human Rights. Guatemala: Office of the President. Presidential Human Rights Commission (COPREDEH). Honduras: National Human Rights Commission (CONADEH) and Office of the Attorney General of the Republic. Republic of Honduras. Inter-Institutional Human Rights Group. Mexico: Permanent Mission of Mexico. Secretariat of Foreign Affairs. Office of the Director General for Human Rights and Democracy. Council of the Federal Judiciary; Permanent Mission of Mexico. National Conference of Superior Courts of Mexico which contains the replies from the judicial branches of the states of Aguascalientes, Campeche, Chihuahua, state of Mexico, Guanajuato, Hidalgo, Michoacán, Nuevo León, Oaxaca, Querétaro, Sonora, Tabasco, Yucatán, Zacatecas, and the Federal District. Nicaragua: Permanent Mission of Nicaragua to the Organization of American States. Supreme Court of Justice. Panama: Ministry of Foreign Affairs. Office of the Ombudsperson of the Republic of Panama; and Ministry of Foreign Affairs. Office of the Attorney General of the Nation. Public Prosecutor’s Office. Paraguay: Ministry of Public Defense. Peru: Ministry of Justice and Human Rights. Office of the Vice Minister of Human Rights and Access to Justice. Office of the Director General of Human Rights. Dominican Republic: Permanent Mission of the Dominican Republic to the Organization of American States. Office of the Attorney General of the Republic. The Commission received responses from judges in: Brazil: Associação Nacional do Ministério Público de Contas. Chile: María Francisca Zapata García, Supervisory Judge, Santiago, Chile. Vice President of the National Association of Magistrates in the Chilean Judicial Branch, Jurisdiction and Democracy (J&D) Judges Movement; Álvaro Flores Monardes, Labor Court Judge, Director of the National Association of Magistrates in the Chilean Judicial Branch, Jurisdiction and Democracy (J&D) Judges Movement; Patricio Souza Bejares. Director of the National Association of Magistrates in the Chilean Judicial Branch, Jurisdiction and Democracy Judges Movement. Colombia: Omar Edgar Borja Soto. Member of the Judges and Magistrates Executive Board; Ana Elsa Agudelo Arévalo. Tunja Circuit Administrative Law Judge 4; José Elver Muñoz Barrera. Bogota Circuit Administrative Law Judge 27; Oscar Domingo Quintero Arguello. Bogota Circuit Administrative Law Judge; and Rosse Maire Cepeda Mesa, Leida Ballén, José Elver Muñoz Barrera, Bogota Circuit Administrative Law Judges. Guatemala: Iris Yassmin Barrios Aguilar. Chief Judge, First Sentencing Court for Crimes, Drug Offenses and Crimes against the Environment (High Risk). Mexico: Judge Rosa Celia Pérez González. The Commission also  
Continues...

10. Likewise, in preparation for this report, the IACHR's Rapporteurship on Human Rights Defenders organized two discussion sessions on the subject of the independence of justice operators, to obtain expert input on the standards of international law and relevant comparative law regarding procedures for selection and removal of judges, prosecutors and public defenders and the difficulties encountered with those procedures.<sup>6</sup> The constitutions of the States in the region were also reviewed as were the laws related to the organization and functioning of the Judicial Branch, the Prosecution Services and the Public Defender Services, to get the kind of broad picture necessary to identify trends in the region, both with respect to the obstacles that prevent justice operators from exercising their functions with the necessary independence and impartiality and to identify best practices developed by the States.

11. When preparing this report, the Inter-American Commission also considered information it received during on-site visits, information documented under its petition and case system and information obtained in connection with the precautionary measures it has requested, the public hearings it has held, and its thematic and country reports. It also considered information obtained in connection with the press releases it has issued and as a result of requests seeking information from the States under Article 41

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received replies from nongovernmental organizations and individuals in: Brazil: *Terra de Direitos, Plataforma Dhesca Brazil y Articulación Justiça e Direitos Humanos (JusDh)*; Erli Camargo. Conselheira Nacional do MNDH-SC (*Centro de Direitos Humanos e Cidadania Jr. Jandira Bettoni - CDHC de Lages e Região Serrana*, with cooperation from a number of activist human rights defenders, *Movimiento Nacional de Derechos Humanos de Santa Catarina*). Chile: *Chile Transparente*. Chilean Chapter of Transparency International and attorney Mauricio Duce. Colombia: Centro de Estudios de Derecho Justicia y Sociedad (*DeJuSticia*); Ricardo Alvarado from the NGO *Biopsicosis*; and Isaac Valencia Arias, with the Citizen Oversight mechanism in Bucaramanga. Mexico: Legal Aid for Human Rights (*AsiLegal*). Nicaragua: Cristina Navarro, Director of Development of Casa Alianza Nicaragua; and the Nicaraguan Human Rights Center. Panama: Pro Justice Citizens' Alliance-Panama. Peru: constitutional lawyer Bruno A. Novoa Campos. Dominican Republic: Rosalía Sosa, Executive Director of Citizen Participation. Uruguay: Ana Gabriela Brienza. The Commission received a reply from the Due Process of Law Foundation (DPLF), an international NGO. It also received a reply from the Law School of the Universidad Austral de Argentina. Department of Judicial Law. Masters Degree in *Judiciary and Judicial Law*.

<sup>6</sup> On July 5, 2013, the Rapporteurship on Human Rights conferred with experts to get their input concerning the applicable standards of international law and comparative law concerning the appointment and removal of judges, prosecutors and public defenders, and the obstacles encountered in these processes. The following participated: Jesús Orozco, President of the IACHR and Rapporteur on Human Rights Defenders; Roberto de Figuereido Caldas, Judge on the Inter-American Court of Human Rights (Brazil); Douglass Cassel, an academic from the University of Notre Dame (United States); Leandro Despoy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers (Argentina); Stella Maris Martínez, Solicitor General of the Nation (Argentina); Claudia Paz y Paz, Attorney General (Guatemala); Katya Salazar, Due Process of Law Foundation (United States), Emilio Álvarez Icaza Longoria, Executive Secretary of the Commission; Elizabeth Abi-Mershed, Deputy Executive Secretary of the Commission, and Executive Secretariat specialists Débora Benchoam, Silvia Serrano Guzmán and Jorge Humberto Meza Flores. On July 12, 2013, the Rapporteurship on Human Rights Defenders held a panel discussion with Gabriela Knaul, United Nations Special Rapporteur on the Independence of Judges and Lawyers. Its purpose was to gather information for a report on the "Independence of Justice Operators in the Americas", which the IACHR's Rapporteurship on Human Rights Defenders is currently preparing. Chairing the discussion was Jesús Orozco, President of the IACHR. Apart from the Rapporteur, the following persons participated: Rodrigo Escobar, IACHR Rapporteur for Persons Deprived of Liberty; Catalina Botero Marino, the IACHR's Special Rapporteur for Freedom of Expression; María del Carmen Alanís Figueroa, a Judge on Mexico's Electoral Tribunal; and Executive Secretariat specialist Jorge H. Meza Flores. The topics of discussion were as follows: i) the independence of the Public Defenders Services and Public Prosecution Services; ii) the selection and appointment systems; and iii) the guarantees that apply in proceedings to remove justice operators.

of the American Convention. The IACHR also availed itself of the pronouncements of various international organizations whose mandate is to oversee compliance with international treaties. In this report, special consideration is given to the findings of the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers (hereinafter “the UN Special Rapporteur”) and the United Nations Human Rights Committee. The Commission has also considered the information provided to it by the States and various civil society organizations, and the information that government institutions and the media have made available to the public, taking care to properly check the media sources.

12. Because the Commission received so much information concerning the justice systems’ institutional weaknesses and the harassment and attacks to which justice operators are subjected, it will condense that information to reflect the principal characteristics and trends identified and will reference concrete examples to illustrate the situation. The report does not pretend to be an exhaustive accounting of facts, nor does it discuss each and every event of which the Commission has knowledge. The IACHR believes that the trends identified using a number of examples can provide helpful guidance to the States and to civil society on the most serious patterns of obstruction being committed against justice operators and the challenges they pose.

13. The report was organized to take into account the various positive and negative factors that can influence the independence of justice operators, both individually and institutionally. To that end, in the first chapter the Commission sets out a number of general observations regarding the role of independent justice operators in ensuring access to justice and the relevant instruments of international law on the subject. In the second chapter, the IACHR examines what guarantees the Judicial Branch, prosecution services and public defender services must have to assure their independence at the institutional level to be assured. In the third chapter, the Commission examines the criteria that have to be observed in the processes whereby justice operators are selected and appointed. The fourth chapter discusses some of the essentials that must be present if the independence of justice operators is to be assured through proper conditions of service that allow them to exercise their rights freely. In the sixth chapter, the Commission discusses the guarantees that States must ensure in disciplinary proceedings so as not to adversely affect justice operators independence in the exercise of their functions. In the seventh chapter, the IACHR examines the advisability of having an independent body in charged with the administration and governance of judicial bodies. The report closes with a section devoted to the Commission’s recommendations to the member States of the Organization.

## **I. GENERAL OBSERVATIONS ON THE INDEPENDENCE OF JUSTICE OPERATORS**

### **A. The role of justice operators in ensuring access to justice**

14. The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man (hereinafter “American Declaration”) affirms every person’s right to a simple and prompt recourse against acts that violate any of his or

her rights, and the States' obligation to act with the necessary due diligence to prevent and redress these acts, as well as to investigate, prosecute and punish these acts when they violate criminal law.<sup>7</sup> The Inter-American Court of Human Rights (hereinafter "Inter-American Court") has held that any person whose human rights have been violated has the right "to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention."<sup>8</sup>

15. The Commission has used the concept of justice operators to refer to state officials and employees who play a role in the justice systems and perform functions that are essential to respecting and ensuring the rights to protection and due process. Accordingly, for purposes of this report the IACHR is using the cover term 'justice operators' to refer to judges—who play the paramount role in the determination of rights<sup>9</sup> and to prosecutors and public defenders who, in their respective roles, are part of the process through which the State guarantees access to justice.

16. The Commission must again make the point that judges are the lead actors in ensuring judicial protection of human rights in a democratic State and the due process that must be observed all judicial proceedings.<sup>10</sup> In a democratic system, judges ensure that the acts of other branches of government and public servants in general are consistent with the conventions to which the State is party and with its constitution and laws. Judges also administer justice in disputes between private parties where a person's rights might be at stake.

17. For their part, prosecutors have multiple functions, which include the investigation of crimes, oversight to ensure the lawfulness of investigations, and enforcement of court rulings as representatives of the public interests. These functions are essential to eliminating impunity in cases of human rights violations that are crimes<sup>11</sup> and providing an effective recourse to persons whose rights have been violated. In some countries, prosecutors can even perform eminently jurisdictional functions when determining whether preventive detention is called for, or may even order preventive detention.

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<sup>7</sup> Article XVIII of the American Declaration and articles 8 and 25 of the American Convention provide that every person has the right to a simple and prompt recourse and to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, when he or she believes that his or her rights have been violated.

<sup>8</sup> I/A Court H.R. *Case of Barrios Altos v. Peru*. Judgment of March 14, 2001. Series C No. 75, para. 48.

<sup>9</sup> I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 71.

<sup>10</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, Doc. 4 rev. 1, October 24, 2003, para. 150.

<sup>11</sup> IACHR. *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II. Doc. 34, June 28, 2007, para. 96.

18. Finally, public defenders play a critical role in ensuring that the State complies with its obligation to guarantee due process to any persons affected by the State's exercise of its punitive authority. The Commission recalls that subparagraphs d) and e) of Article 8(2) of the American Convention protect the right of the accused *to defend himself personally or to be assisted by legal counsel of his own choosing, and his inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.*<sup>12</sup> Without assistance of counsel, one is denied an adequate defense.<sup>13</sup> Specifically, without the assistance of a public defender who is an attorney, the accused may be left with no means to prepare and mount a proper defense.<sup>14</sup> In this regard, the Inter-American Court has held that the State has an obligation to provide adequate defense counsel to anyone who would be unable to mount his or her own defense or to engage a private defense attorney.<sup>15</sup> The United Nations Human Rights Committee has observed that States should take steps to ensure free legal assistance for those who do not have the means to pay for the assistance of a defense lawyer.<sup>16</sup> Among these steps, the Committee mentioned introduction of a comprehensive legal aid system for individuals who do not have sufficient means to pay for legal representation.<sup>17</sup> The Office of the United Nations Special Rapporteur has observed that free legal aid should be provided in criminal and civil law cases.<sup>18</sup>

19. Therefore, judges, prosecutors and public defenders each have their unique and discrete functions. However, they are all justice operators who, in performing their respective functions, serve to ensure access to justice by guaranteeing due process and the right to judicial protection. This observation squares with the analyses of the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers has been building since its inception, as it has examined issues affecting the independence and impartiality of judges,<sup>19</sup> public defenders<sup>20</sup>

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<sup>12</sup> Cf. I/A Court H.R. *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 145.

<sup>13</sup> Cf. I/A Court H.R. *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 194.

<sup>14</sup> Cf. I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 83.

<sup>15</sup> Cf. I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 159.

<sup>16</sup> Cf. United Nations. General Assembly. *Report of the Human Rights Committee*. Volume I, A/64/40 (Vol. I), Rwanda, para. 88.18).

<sup>17</sup> Cf. United Nations. General Assembly. *Report of the Human Rights Committee*. Volume I, A/64/40 (Vol. I), Tanzania, 91.21).

<sup>18</sup> United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/8/4, May 13, 2008, para. 23.*

<sup>19</sup> United Nations. Commission on Human Rights, Resolution No. 1994/41 March 4, 1994.

<sup>20</sup> United Nations General Assembly. Human Rights Council. 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, A/HRC/8/4, May 13, 2008, paragraph 42.

and prosecutors,<sup>21</sup> while bearing in mind the role that each of these play in ensuring the right of access to justice.

## **B. Justice operators under international law**

20. In the realm of international law, international organizations have adopted a variety of instruments and pronouncements establishing a set of principles that States must observe to ensure that judges, prosecutors and public defenders are able to properly perform their functions. A number of these instruments, which have been used in preparing this report, are premised on the larger principle that for effective access to justice to be guaranteed, then justice operators must be able to discharge their functions independently.

21. Within the United Nations system, in 1985 the General Assembly established the *United Nations Basic Principles on the Independence of the Judiciary*, which set out the minimum guarantees that must be observed to ensure the independence of the judiciary. These principles have been accepted as an instrument for measuring the independence of the judiciary in a given member state.<sup>22</sup> Since the adoption of the Basic Principles and drawing upon it, a number of universal and regional instruments have been crafted to protect the independence of the judicial branch of government.<sup>23</sup> Several of these have been cited in reports published by the Office of the United Nations Special Rapporteur containing important pronouncements on the subject.<sup>24</sup> In its own thematic

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<sup>21</sup> United Nations General Assembly. Human Rights Council. 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, Gabriela Knaul, A/HRC/20/19, June 7, 2012; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 19; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/8/4, May 13, 2008, para. 41; and Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/4/25, December 18, 2006, para. 24.

<sup>22</sup> The United Nations Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>23</sup> Among the instruments that build upon the Basic Principles, the General Assembly approved Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, which provide that “[a]ll States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.” The United Nations Economic and Social Council approved the Bangalore Principles (2002) which mention the importance of a competent, independent and impartial judiciary to the protection of human rights. At the regional level, the standards for guaranteeing judicial independence are set out in the following instruments: Commonwealth (Latimer House) Principles on the three branches of government; the European Charter on the Statute for Judges (1998) and the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (1995). There are other instruments as well, like the Universal Charter of the Judge and the Statute of the Ibero-American Judge, approved by associations or summits of judges or prosecutors and setting out provisions on the guarantees or principles of the independence and impartiality of justice operators.

<sup>24</sup> The reports of the Office of the United Nations Special Rapporteur on the Independence of Judges and Magistrates may be viewed at: [http://ap.ohchr.org/documents/dpage\\_s.aspx?m=87](http://ap.ohchr.org/documents/dpage_s.aspx?m=87)

reports<sup>25</sup> and within the framework of the individual petition and case system<sup>26</sup> the Commission has established a number of standards based on the principle that the independence of judges must be guaranteed to ensure that victims of human rights violations have an effective access to justice. In its own case law, the Inter-American Court has on several occasions underscored the guarantees that are assured with an independent judiciary.<sup>27</sup>

22. Specific international instruments have also been adopted with respect to prosecutors, such as the *Guidelines on the Role of Prosecutors*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.<sup>28</sup> On the European front, the Consultative Council of European Judges and the Consultative Council of European Prosecutors adopted the Bordeaux Declaration on *Judges and Prosecutors in a Democratic Society*;<sup>29</sup> the Council of Europe's Committee of Ministers

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<sup>25</sup> *Inter alia*, IACHR. *Annual Report 2012. Chapter IV. Cuba, Honduras and Venezuela*. OEA/Ser.L/V/II. Doc. 34, March 5, 2013, paras. 107 to 116, paras. 195 to 234 and paras. 464 to 496, respectively; *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144, Doc. 12, August 10, 2012, paras. 63 to 93; *Second Report on the Situation of Human Rights Defenders*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, paras. 349 to 402; *Annual Report 2011, Chapter IV. Cuba and Venezuela*. OEA/Ser.L/V/II. Doc. 69, December 30, 2011, paras. 211 to 227 and paras. 447 to 475, respectively; *Annual Report 2010. Chapter IV. Colombia, Cuba, Honduras and Venezuela*. OEA/Ser. L/V/II. Doc. 5 corr. 1, March 7, 2011, paras. 220 to 226, 323 to 348, 472 to 482 and 615 to 649, respectively; *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paras. 180 to 319; *Annual Report 2009. Chapter V. Follow-up Report – Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. OEA/Ser.L/V/II.135. Doc. 40, August 7, 2009, paras. 66 to 85; *Annual Report 2008. Chapter IV. Colombia, Cuba, Haiti and Venezuela*. OEA/Ser.L/V/II.134. Doc. 5 rev. 1, February 25, 2009, paras. 134 to 139, 168 to 186, 280 to 283 and 391 to 403, respectively; *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paras. 106 to 121; *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1, December 29, 2003, Chapter I, paras. 15 to 88; *Report on the Situation of Human Rights in Venezuela*. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. October 24, 2003, paras. 153 to 190; *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr., October 22, 2002, para. 229; *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106. Doc. 59 rev.2, June 2000, paras. 1 to 5 and 133 to 149; *Report on the situation of human rights in Mexico*. OEA/Ser.L/V/II.100. Doc. 7 rev. 1, September 24, 1998, Chapter V, paras. 351 to 398; *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96. Doc. 10 rev. 1, April 24, 1997. Chapter III; and IACHR. *Report on the Situation of Human Rights in Haiti*. OEA/Ser.L/V.88. Doc. 10 rev. February 9, 1995, Chapter V, paras. 269 to 280.

<sup>26</sup> See, in this regard, IACHR. Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("*First Court of Administrative Disputes*") (Case 12,489) against the Bolivarian Republic of Venezuela, November 29, 2006; Application to the Inter-American Court of Human Rights in the case of Mercedes Chocrón Chocrón, (Case 12,556) against the Bolivarian Republic of Venezuela, November 25, 2009; Application to the Inter-American Court of Human Rights in the case of María Cristina Reverón Trujillo (Case 12,565) against the Bolivarian Republic of Venezuela, November 9, 2007.

<sup>27</sup> See in this regard, I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71; I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182; I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, and I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227.

<sup>28</sup> *Guidelines on the Role of Prosecutors*. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990 (hereinafter the "*Guidelines on the Rule of Prosecutors*"), Guideline 10.

<sup>29</sup> Consultative Council of European Judges and the Consultative Council of European Prosecutors. *Bordeaux Declaration on Judges and Prosecutors in a Democratic Society*, Strasbourg, December 8, 2009.

adopted a recommendation to the member States on the role of public prosecution in the criminal justice system.<sup>30</sup> The European Commission for Democracy through Law (hereinafter the “Venice Commission”)<sup>31</sup> and the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers<sup>32</sup> have also issued important documents.

23. As for Public Defenders, in Article 8(2), subparagraphs (d) and (e), the American Convention on Human Rights establishes the right of the accused to either mount his own defense or to be assisted by defense counsel of his choosing.<sup>33</sup> The *Basic Principles on the Role of Lawyers*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders<sup>34</sup> contain similar provisions as do the resolutions recently adopted by the General Assembly of the Organization of American States (OAS).<sup>35</sup>

### C. The independence of justice operators

24. Within the inter-American system, the right of access to justice follows from articles 8 and 25 of the American Convention, which set out the state obligations necessary to ensure that any person can seek protection and justice for acts that violate his or her rights. From those state obligations follow certain guarantees that States must afford to the justice operators so as to ensure their independence; with that, the State fulfills its obligation to afford persons access to justice.<sup>36</sup> In *Reverón Trujillo* the Court

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<sup>30</sup> See in this regard, Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the States on the role of Public Prosecution in the criminal justice system. Adopted by the Committee of Ministers on October 6, 2000, at the 724<sup>th</sup> Meeting of Ministers, para. 16.

<sup>31</sup> European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 28.

<sup>32</sup> Cf. United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 26.

<sup>33</sup> Cf. I/A Court H.R. *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010 Series C No. 218, para. 145. The Basic Principles on the Role of Lawyers also provide that: “Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.” Basic Principles on the Role of Lawyers. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 through September 7, 1990, Principle 6.

<sup>34</sup> Basic Principles on the Role of Lawyers. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 through September 7, 1990, Principle 6.

<sup>35</sup> See in this regard, AG/RES. 2656 (XLI-O/11); AG/RES. 2714 (XLII-O/12), and AG/RES. 2801 (XLIII-O/13).

<sup>36</sup> For example, the Inter-American Court has written that the State’s obligations with respect to those facing prosecution create “rights for judges”; for example, the guarantee that they will not be subject to a discretionary removal implies that the disciplinary proceedings and sentencing proceedings in cases involving judges must necessarily respect the guarantees of due process and shall offer those affected an effective remedy.

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wrote that unlike other public officials, judges have certain guarantees due to the independence that the judicial power must have for the sake of those on trial or parties to litigation, which the Court has understood as “essential for the exercise of the judicial function.”<sup>37</sup> Those guarantees are a corollary of the right of access to justice that every person enjoys and, in the case of judges, are “reinforced guarantees” of tenure so as to thereby ensure the necessary independence of the Judicial Branch.<sup>38</sup>

25. In its *Follow-up Report - Access to Justice and Social Inclusion: the road towards strengthening democracy in Bolivia*, the Inter-American Commission discussed how critical the guarantee of independence is to the administration of justice, as it is a *condition sine qua non* for compliance with the standards of due process established by international law.<sup>39</sup> A number of international organizations and entities have underscored how important independent judges, prosecutors and public defenders are to the ability to get justice.<sup>40</sup> With specific reference to the analysis of the guarantees that States must afford to ensure that justice operators are able to perform their functions independently, international law views independence as two dimensional: the first is institutional or

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I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 147.

<sup>37</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67. I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 97.

<sup>38</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67.

<sup>39</sup> IACHR. *Annual Report 2009. Chapter V. Follow-up Report – Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*. OEA/Ser/L/V/II.135. Doc. 40, August 7, 2009, para. 77.

<sup>40</sup> For example, in keeping with the case law of the European Court and the United Nations *Basic Principles on the Independence of the Judiciary*, the Inter-American Court held that “one of the principal purposes of the separation of public powers is to guarantee the independence of judges.” I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 73, and *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Judgment of August 5, 2008. Series C No. 182, para. 55. See also, IACHR, *Democracy and Human Rights in Venezuela*, para. 184. As for prosecutors, the Inter-American Court has written that investigations into violations of human rights must be prompt and thorough; but they must also be independent and impartial. Cf. *Case of Cantoral Huamani and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, paras. 132 and 133. For its part, the Office of the United Nations Rapporteur has singled out the importance of ensuring that prosecutors are able to function independently, autonomously and impartially. Cf. United Nations. Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 26. Concerning public defenders, the United Nations Special Rapporteur on the Independence of Judges and Lawyers has written in general terms that “offices of the public defender should be made independent of the executive branch.” United Nations General Assembly, Report of the Rapporteur on the Independence of Judges and Lawyers, A/HRC/17/30/Add.3, April 18, 2011, para. 73. Within the Organization of American States, in its resolution titled *Guarantees for Access to Justice. The Role of Official Public Defenders*, the General Assembly resolved “[t]o recommend to member states that already provide free legal counsel to take steps to ensure that Official Public Defenders operate independently.” AG/RES. 2656 (XLI-O/11) Guarantees for Access to Justice. The Role of Official Public Defenders, June 7, 2011, operative para. 4.

systemic, while the second is functional, referring to justice operators' individual independence in performing their functions.<sup>41</sup>

26. In the case of the institutional dimension, one of the main factors to be considered is the degree of independence that the judicial branch, as a system, has with respect to the other branches of government so that sufficient guarantees are in place to protect the judicial institution from abuses or unreasonable restrictions on the part of the other branches of government or State institutions. Addressing this aspect of independence, the United Nations Human Rights Committee pointed out, for example, 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.<sup>42</sup>

27. In the case of the functional dimension or individual exercise of judicial functions, one has to examine whether justice operators have the guarantees of independence that will enable them to freely discharge their functions within the institutions of justice in cases they are to decide, prosecute or defend. This dimension involves more than just the procedures and qualifications for the appointment of judges. It also involves the guarantees of their security of tenure until the mandatory retirement age or the expiration of their term of office, where such exists, 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.<sup>43</sup>

28. In exercise of its mandate of promoting the observance and protection of human rights, one of the Commission's priorities is the functioning of the justice systems in the OAS member states and the guarantees in place to ensure their independence both at the institutional and individual levels, which also means clearing away any obstacles obstructing their access to justice.

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<sup>41</sup> The Inter-American Court has described the two aspects of independence as *de jure* and *de facto*, writing that this kind of independence "requires not only hierarchical or institutional independence, but also real independence." I/A Court H.R. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 122.

<sup>42</sup> CCPR/C/GC/32 (footnote 1), paragraph 19 cited in United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, paragraph 18.

<sup>43</sup> CCPR/C/GC/32 (footnote 1), para. 19 cited in United Nations, General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 52.

## II. INDEPENDENCE FROM THE OTHER BRANCHES OF GOVERNMENT OR ORGANS OF THE STATE

29. Independence from the institutional standpoint refers to the relationship between judiciary and the other branches of state power.<sup>44</sup> Where the judiciary is not independent, it is either subordinate to or dependent on other branches of power or institutions unrelated to the justice system.<sup>45</sup> The Commission will examine the parameters established under international law concerning the independence that the judiciary, prosecutors and public defenders must have *vis-à-vis* the other branches and organs of the State from the institutional perspective. The IACHR will also point out some of the risks built into certain organizational models for justice systems.

### A. The Judiciary

30. The principle of the independence of the Judiciary has been recognized as “international custom and general principle of law”<sup>46</sup> and has been established in numerous international treaties.<sup>47</sup> The independence of any body or organ that performs jurisdictional functions<sup>48</sup> is a *condition sine qua non* for the observance of the standards of due process as a human right.<sup>49</sup> The lack of such independence affects exercise of the right of access to justice and creates mistrust and even fear of the courts, which discourages those who would otherwise turn to the courts for justice.<sup>50</sup>

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<sup>44</sup> As observed by the United Nations Rapporteur in connection with the judiciary. Cf. United Nations. Human Rights Commission. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mrs. Gabriela Carina Knaul de Albuquerque e Silva*. A/HRC/14/26, April 9, 2010, paragraph 17.

<sup>45</sup> Cf. I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, paragraph 67.

<sup>46</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 14

<sup>47</sup> The importance of an independent judiciary has been recognized in the following international and regional instruments: Universal Declaration of Human Rights (Article 10); the International Covenant on Civil and Political Rights (Article 14); the 1993 Vienna Declaration and Programme of Action (Para. 27); American Convention on Human Rights (Article 8(1)); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.1); and the African Charter on Human and Peoples’ Rights (Article 7.1). Some more specific international treaties also contain provisions on the independence and impartiality of the courts, such as: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 18.1); the International Convention for the Protection of All Persons from Enforced Disappearance (Article 11.3); the Additional Protocol to the Geneva Conventions (Article 75.4) and the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Article 6.2).

<sup>48</sup> I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 71.

<sup>49</sup> IACHR. *Report on the Situation of Human Rights in Venezuela*. 2003, para. 155. Citing principles 10 and 13 of that international instrument. For its part, the Inter-American Court has held that a judge hearing a case must be not only competent, but independent and impartial as well. I/A Court H.R. *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 273; see also, *Case of Ivcher Bronstein v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 112; and the *Case of the 19 Tradesmen v. Colombia*. Judgment of July 5, 2004. Series C No. 109, para. 167.

<sup>50</sup> United Nations General Assembly. Human Rights Council. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the* Continues...

31. In keeping with the *Basic Principles on the Independence of the Judiciary*, at the institutional level “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country”<sup>51</sup> and it is essential that such independence be guaranteed in law at the highest possible level;<sup>52</sup> hence, this principle, “even if guaranteed in the Constitution, must also be given effect at the legislative level.”<sup>53</sup> The Commission believes that the constitutions and national laws must observe such principle<sup>54</sup> and the entire justice system must be organized to guarantee the independence of the judicial branch.<sup>55</sup> As the United Nations Human Rights Committee observed, “a situation where the functions and competences 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.”<sup>56</sup>

32. International law is unequivocal in asserting that the judiciary must be entirely independent of any other branch or organ of the State. However, the Commission notes with concern that one of the most serious risks throughout the region is the absence of acceptance of the principle of separation of powers within the structure of the State; quite the contrary in some States the judiciary is subordinate to the executive. The IACHR has had several occasions to address this matter with respect to Cuba. Article 121 of its Constitution provides that “the courts are a system of state bodies, structured so as to be functionally independent of any other organ and hierarchically subordinate to the National Assembly of the People’s Power and to the Council of State.” In the Commission’s view, the courts’ subordination to the Council of State, which is headed by the Chief of State, means that the judiciary is directly answerable to the executive branch. This subordination to the

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*Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/8/4, May 13, 2008, para. 34.*

<sup>51</sup> The same provision appears in the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (1995), adopted by the Chief Justices of the Supreme Courts of the LAWASIA region and by other judges from Asia and the Pacific, meeting in Beijing in 1995. It was adopted by the LAWASIA Council in 2001, para. 4. Similarly, the European Charter on the Statute for Judges (DAJ/DOC (98)), General Principles, Principle 1(2): “In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.” See also the Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms (2003) and, in particular, the measures recommended to the States, including to “enshrine the independence of the judiciary from the executive and legislative branches, in the constitution and/or laws of each state and observe this principle in practice.”

<sup>52</sup> United Nations General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 21.

<sup>53</sup> United Nations General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 22.

<sup>54</sup> United Nations General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 22.

<sup>55</sup> I/A Court H.R. *Case of Anzaldo Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 125.

<sup>56</sup> United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 19.

executive branch offers no possibility of an independent judicial branch capable of providing guarantees to ensure the exercise and enjoyment of human rights.<sup>57</sup>

33. The Commission observes that some constitutions of the States of the region provide that the branches of government shall mutually collaborate or cooperate.<sup>58</sup> These provisions are ambiguous because it is unclear how that collaboration or cooperation is to materialize; equally unclear is the implication this has for the independence of the judicial branch, especially when the cooperation is to be “harmonious”.<sup>59</sup> A broad or ambiguous formulation of this principle of cooperation or collaboration among the branches of government might suggest that the judicial branch is expected to conform to certain behaviors or adopt certain decisions, or that some of its decisions or actions are expected to conform to the policy of the government in power, for the sake of harmony among the branches of government.

34. The Inter-American Commission insists that the independence of the Judiciary and its clear separation from the other branches of government must be respected and ensured both by the executive and by the legislature,<sup>60</sup> based on the recognition, in law, of the judiciary’s independence, including from interference by other branches of government. This guarantee is established in law through recognition of the principle of separation of powers. In practice, the guarantee of the judiciary’s independence must be assured in a variety of ways, among them the following: the judiciary’s financial independence, in the sense that it must not be made to rely upon the legislature for its budgetary appropriations; prompt tenured appointment, and observance of an appropriate and transparent process of selection and appointment of judges to the high courts; respect for the independence of judges in their deliberations, decisions and the general functioning of the Judiciary; and disciplinary proceedings that offer due process guarantees. The IACHR will examine a number of these issues in this report.

## **B. Public prosecution services**

35. The degree to which public prosecution services are independent of the other branches of government varies among the States of the hemisphere. In some States, public prosecution services function as an independent organ with functional autonomy

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<sup>57</sup> Cf. IACHR. *Annual Report 2011. Chapter IV. Cuba*. OEA/Ser.L/V/II. Doc. 69, December 30, 2011, para. 215. See also, IACHR. *Annual Report 2012. Chapter IV. Cuba*. OEA/Ser.L/V/II. Doc. 34, March 5, 2013, paras. 113 and 114; and *The Situation of Human Rights in Cuba. Seventh Report*, 1983. OEA/Ser.L/V/II.61. Doc.29 rev. 1. Chapter IV, para. 5.

<sup>58</sup> For example, Constitution of Bolivia, Article 12; Constitution of Honduras, Article 4; Constitution of Venezuela, Article 136.

<sup>59</sup> For example, Constitution of Brazil, Article 2; and Constitution of Colombia, Article 113.

<sup>60</sup> Cf. IACHR. *Annual Report 2012. Chapter IV. Cuba*. OEA/Ser.L/V/II. Doc. 34, March 5, 2013, para. 111. See also, Council of Europe, Committee of Ministers. Recommendation No. R (94) 12 on the independence, efficiency and role of judges. Adopted by the Committee of Ministers on 13 October 1994, at the 518th meeting of the Ministers’ Deputies, principle I. 2.b).

and financial Independence.<sup>61</sup> In other States, the prosecution service is part of the judicial branch of government,<sup>62</sup> and in some cases has administrative and budgetary autonomy.<sup>63</sup> In a significant number of States, the prosecution service is part of the executive branch, although the degree of the executive branch's involvement in the running of the prosecution service varies. In some States, the prosecution service is identified with the executive branch<sup>64</sup> or hierarchically subordinate to it.<sup>65</sup> In others, while the prosecution service is, under the constitution, part of the executive branch, the law creating it provides that in the exercise of its functions it shall not be subject to supervision or oversight by any other person or authority.<sup>66</sup> Finally, in still other states, the Prosecution Service is created by the legislative branch and is answerable to it.<sup>67</sup>

36. International law has underscored how important it is that investigations and, on a broader level, any activities associated with the prosecution of crime, be independent and impartial so that crime victims are assured access to justice. The Inter-American Court has emphasized that investigations into human rights violations must be immediate and thorough, but they must be independent and impartial as well.<sup>68</sup> The UN Special Rapporteur has stressed how important it is that prosecutors are able to conduct their own functions independently, autonomously and impartially.<sup>69</sup>

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<sup>61</sup> For example, Constitution of Argentina, Article 120; Constitution of Chile, Article 83; Organic Law of the Office of the Prosecutor General of the Republic of El Salvador, Article 13; Constitution of Guatemala, Article 251 and Decree 40-94, Organic Law of the Public Prosecution Service, Article 1.

<sup>62</sup> For example, Constitution of Colombia, Article 249; Articles 1 and 3 of Law 7442, Organic Law of the Public Prosecution Service of Costa Rica; and Constitution of Suriname, Article 133.

<sup>63</sup> For example, Constitution of Colombia, Article 249; and Articles 1 and 3 of Law 7442, Organic Law of the Public Prosecution Service of Costa Rica.

<sup>64</sup> For example, Act to Establish the Department of Justice, the United States.

<sup>65</sup> For example, Uruguayan Law on the Public Prosecutors Office and Prosecutor, Article 1.

<sup>66</sup> For example, Canada's Act respecting the office of the Director of Public Prosecutions, Article 3, which provides that the Governor in Council shall, on the recommendation of the Attorney General, himself the Minister of Justice, appoint a Director of Public Prosecutions. The prosecution offices of the following countries are part of the executive branch, with an Attorney General or a Director of Prosecutions: Antigua and Barbuda, Constitution, Articles 82 and 87; Barbados, Constitution, Articles 72, 79 and 101; Belize, Constitution, Articles 42 and 50; Dominica, Constitution, Articles 71, 72 and 88; Guyana, Constitution, Articles 112 and 116; and Jamaica, Constitution, Articles 79 and 94. In Mexico, the Prosecutors Office is also part of the executive branch, Organic Law of the Office of the Attorney General of the Republic, published in the Federation's Official Gazette, May 29, 2009, latest amendment published DOF 14-06-2012, Articles 1 and 2.

<sup>67</sup> For example, Constitution of Cuba, Articles 75 and 129.

<sup>68</sup> Cf. *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, paras. 132 and 133. Among other international instruments, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 12; *International Convention for the protection of all persons against enforced disappearance*, Article 12.1; and the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by the United Nations Economic and Social Council in its resolution 1989/65 of May 24, 1989, principle 9.

<sup>69</sup> Cf. United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 26.

37. If prosecution services are subordinate to other organs, their independence may be compromised, both in terms of the effectiveness and thrust of their investigations and their decision to either bring a criminal case or close the investigation; there may also be due process implications. Hence, international law has established a number of general criteria to measure the institutional independence that public prosecution services enjoy, with a view to ensuring that their respective role in guaranteeing access to justice and due process is performed effectively and in accordance with human rights standards.

38. As for the prosecution service's relationship with the Executive Branch, the Commission notes that the United Nations Special Rapporteur has observed that the Public Prosecution Service's autonomy with respect to the Executive Branch must be ensured, since the lack of autonomy can undermine confidence in and the credibility of the authority charged with investigating crimes objectively.<sup>70</sup> The Council of Europe has written that where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that the nature and the scope of the powers of the government with respect to the public prosecution are established by law, and that government exercises its powers in a transparent way and in accordance with international treaties, national laws and general principles of law.<sup>71</sup> Thus, for example, where prosecution services are part of the executive branch, the Council of Europe has recommended that if government gives general instructions, those instructions must be in writing and published in an adequate way. Where the government has the authority to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law.<sup>72</sup> Instructions not to prosecute a specific case should, in principle, be prohibited.<sup>73</sup>

39. Having said this, in countries where the Prosecution Service is attached to the executive branch, even when the subordination to the executive authority may in some

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<sup>70</sup> Cf. United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, April 18, 2011, para. 16, where the Special Rapporteur wrote that: "The Attorney-General of the Republic, who is the head of the Federal Public Prosecution Service, is appointed by the President, and this appointment must then be ratified by the Senate. The fact that the country's prosecution services are not independent of the executive branch of government is a challenge to be overcome by Mexico's federal and state justice systems, inasmuch as this lack of autonomy can erode the credibility of the authority responsible for investigating crimes objectively and undermine confidence in its ability to do so." See also, I/A Court H.R. *Case of Anzualdo Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 138.

<sup>71</sup> Cf. Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the member States on the Role of Public Prosecution in the Criminal Justice System. Adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of Ministers' Deputies, para. 13, a) and b).

<sup>72</sup> Cf. Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the member States on the Role of Public Prosecution in the Criminal Justice System. Adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of Ministers' Deputies, para. 13, c) y d).

<sup>73</sup> Cf. Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the member States on the Role of Public Prosecution in the Criminal Justice System. Adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of Ministers' Deputies, para. 13, f).

states be more in principle than in reality in that the executive branch avoids intervening in individual cases or operational decisions,<sup>74</sup> the Commission is of the view that in cases of human rights violations, the risks that this model pose increase when the Prosecution Service must institute investigations against members of the executive branch, because of the direct or indirect interference that may come from this branch of government.

40. In the *Case of La Cantuta v. Peru*, the Inter-American Commission pointed out that Peru's Truth and Reconciliation Commission found that the Public Prosecutor's Office had "failed to comply with its duty to investigate crimes adequately due to its lack of independence from the Executive."<sup>75</sup> In its country reports, the Commission has observed that when the Public Prosecution Service is subordinate to the Executive and has exclusive authority to bring a criminal action, the result has often been misrepresentations, abuses and manipulation that cannot be resolved through the courts. During its visit to Mexico, the Commission stressed the importance of cultivating the independence, autonomy and impartiality that the Public Prosecutor's Office must have vis-à-vis the Executive.<sup>76</sup>

41. As for the relationship of the prosecution service to the legislative branch, the Commission notes that the *Bordeaux Declaration* specifically states that parliament should not seek "to unduly influence a particular decision taken by public prosecutors in relation to individual cases in order to determine how a prosecution in any particular case should be conducted, or constrain public prosecutors to change their decisions."<sup>77</sup> The Commission is persuaded that given the risks that an independent investigation faces, States must guarantee that the Public Prosecution Services will not be subordinate to parliamentary bodies. As will be discussed in a later section, if the public prosecution services are in any way subordinate to parliament, the latter must not be allowed to attach strings to the prosecution service's budgetary appropriation. As for those legal systems where the prosecutor general is accountable to Parliament, accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out so as avoid undermining independent investigation because of prosecutors opting for the decisions that they believe will be popular with the legislature.<sup>78</sup>

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<sup>74</sup> A/HRC/20/19, para. 27.

<sup>75</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume VIII, General Conclusions, paras. 123-131, available [in Spanish] at: <http://www.cverdad.org.pe/ifinal/index.php> and cited in I/A Court H.R. *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 93.

<sup>76</sup> IACHR, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/II.100. Doc. 7 rev.1, September 24, 1998, para. 372.

<sup>77</sup> Consultative Council of European Judges and the Consultative Council of European Prosecutors. *Bordeaux Declaration on Judges and Prosecutors in a Democratic Society*, Strasbourg, December 8, 2009, para. 26.

<sup>78</sup> European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 42.



42. Finally as for the prosecution service's independence with respect to the judicial branch, the Commission observes that under the *Guidelines on the Role of Prosecutors*, one of the first institutional principles of prosecution services is that "[t]he office of prosecutors shall be strictly separated from judicial functions."<sup>79</sup> In the view of the United Nations Rapporteur, this separation is necessary because prosecutors and judges must be perceived by the general public as performing different roles and functions, as public confidence in the proper functioning of the rule of law is best ensured when every State institution respects each other's sphere of competence. This is essential to uphold public confidence in the principle of equality of arms and the fair administration of justice.<sup>80</sup>

43. The Commission believes that separating the functions of judges from those of prosecutors is most effectively achieved when the prosecution service is institutionally separate from the Judicial Branch. It is important that persons facing trial or on trial be assured that prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges, who will act with independence and never in collusion with the prosecutors themselves or the prosecution service.<sup>81</sup> Therefore, the Commission believes that from the institutional standpoint, justice is best served when the prosecution services are institutionally separate from the judicial branch.

44. Like the United Nations' Special Rapporteur, the Commission must emphasize that the lack of institutional autonomy can erode the credibility of the prosecutorial authority and undermine public confidence in the justice system.<sup>82</sup> To avoid risks to the prosecution service's functional autonomy, it should not be part of any other branch of government; furthermore its autonomy should be guaranteed under the constitution. As it wrote in its *Second Report on the Situation of Human Rights Defenders in the Americas*, the Commission urges the States to guarantee the prosecution services' institutional independence *vis-à-vis* the other branches of government.<sup>83</sup>

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<sup>79</sup> Guidelines on the Role of Prosecutors, Guideline 10.

<sup>80</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 40.

<sup>81</sup> European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 73.

<sup>82</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 26.

<sup>83</sup> IACHR. Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 358.

### C. Public defender services

45. The IACHR observes that a public defense, paid by the State, is a provision in the constitutions of a number of countries of the region.<sup>84</sup> However, some States, like Bolivia, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Trinidad and Tobago and Uruguay, do not formally establish the institution of the public defender service in their constitutions and instead have enacted laws to establish this institution. In some cases, the Public Defender Service is under the Supreme Court<sup>85</sup> or part of the Judicial Branch.<sup>86</sup> In other cases, the Public Defender Service is organized as an independent institution, but continues to be part of or an organ of the judicial branch.<sup>87</sup> In other States, the Public Defender Service is part of the Public Prosecution Service<sup>88</sup> or attached to the Executive Branch.<sup>89</sup> In still other States, the Public Defender Service has been established as an autonomous institution, independent and separate from the judicial organ, the Prosecution Service or the Executive Branch.<sup>90</sup> And in some, the Public Defender Service is an autonomous organ, independent of the Executive Branch, the Judicial Branch and the Public Prosecution Service, but is part of the justice system's judicial function.<sup>91</sup> In a handful of states, the Public Defender Service is institutionally independent.<sup>92</sup>

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<sup>84</sup> For example, Constitution of Brazil, Article 5; Constitution of Bolivia, Article 119; Constitution of Chile, Article 19; Constitution of Colombia, Article 282; Constitution of Ecuador, Article 191; Constitution of El Salvador, Article 12; Constitution of Honduras, Article 83; Constitution of Mexico, Article 17; Constitution of Nicaragua, Article 34; Constitution of Panama, Article 217; Constitution of Paraguay, Article 17; Constitution of Peru, Article 139; Constitution of the Dominican Republic, Article 177; Constitution of Suriname, Article 12; and Constitution of Venezuela, Article 268.

<sup>85</sup> For example, Constitution of Uruguay, Article 259.

<sup>86</sup> For example, Costa Rica, Law No. 7333, Organic Law of the Judiciary, Articles 84, 149 and 150; Nicaragua, Organic Law of the Judicial Branch, Article 211; and Panama, Judicial Code, Article 413.

<sup>87</sup> For example, Mexico, Federal Law on the Public Defender Service, published in the Federation's Official Gazette of May 28, 1998, Article 3; and Paraguay, Law 4423 of 2011, Article 1, on nature and objective.

<sup>88</sup> For example, Argentina, Law 24,946, Articles 2 and 4, which provide that the Public Prosecution Service is composed of the Public Prosecutor's Office and Office of the Public Defender; Constitution of Colombia, Article 282, which states that the Public Defender Service is part of the Ombudsperson's Office, which in turn is part of the Public Prosecution Service, whose function is disciplinary control and protection of human rights and which is separate from the Attorney General's Office; El Salvador, Organic Law of the Office of the Attorney General of the Republic, Articles 7 and 33; and Internal Rules of the Organic Law of the Office of the Prosecutor General, which is part of the Public Prosecution Service and independent of any branch of government.

<sup>89</sup> For example, Law No 2496 of August 4, 2003: Law Establishing the National Public Defense Service of Bolivia, Article 1, which creates the National Public Defense Service under the Ministry of the Presidency; Law No. 27019: Law creating the National Public Defender Service in Peru, Article 1, where the National Public Defender Service is made part of the Ministry of Justice.

<sup>90</sup> For example, Guatemala, Decree 129-97: Public Defender Service Law, Article 1.

<sup>91</sup> For example, Constitution of Ecuador, Article 191, and the 2009 Organic Code of the Judiciary, Article 285; and Venezuela's Organic Law on Public Defense, Article 2.

<sup>92</sup> According to a study done by the *Asociación Interamericana de Defensorías Públicas* [Inter-American Association of Public Defenders] (AIDEF) on the Independence of public defenders offices in Latin America, the following States do not appear to have a public defender service that enjoys institutional independence: Argentina, although the Federal Public Defender's Office is an independent institution, some provincial public defender services are not; in Bolivia, the public defender's office is under the Ministry of the Presidency and Continues...

46. The public defender services guarantee the accused person's "inalienable right to be assisted by counsel provided by the State."<sup>93</sup> With such legal representation, the accused is able to mount a proper defense.<sup>94</sup> Inasmuch as the right of defense is a right that attends every accused person, it would be unacceptable for that defense to be jeopardized by a chain of command or pressure exerted from other quarters, be they other actors or branches of government. This is precisely why a number of institutions of international law have addressed the issue of the independence of public defender services.<sup>95</sup>

47. When the public defender service's place in the broader structure of government has to be determined -i.e., its institutional dimension-, the best course of action to ensure its independence is not to attach it to other organs of justice or branches of government, as this might undermine the objectivity that a public defender must have in proceedings and thereby affect the right to an adequate defense. In the end it would mean that the justice that persons who can afford to retain private counsel would receive would be very different from the justice received by those represented by counsel paid by the State. It would be unacceptable for the Prosecution Service to be able to exert pressure on or instruct the public defender service, since they represent the opposing sides in a

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reportedly created by law but not by a constitutional provision; in Brazil, the public defender service is part of the Ministry of Justice and therefore under the executive branch; in Chile, the public defender service is said to be under the oversight of the President of the Republic, by way of the Ministry of Justice; in Colombia, the public defender service is subordinate to the Ombudsperson's Office; in Costa Rica, the public defender service is part of the judicial branch; in Honduras, the public defender service is under the judicial branch; in Mexico, the public defender service is associated with the judicial branch; in Nicaragua, the public defender service is said to be attached to the judicial branch; in Panama, the public defender service is reportedly part of the judicial organ of government; in Uruguay, the public defender service is said to be part of the judicial branch. The Commission observes that the public defender service in the United States is part of the judicial branch of government.

<sup>93</sup> Cf. I/A Court H.R. *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010 Series C No. 218, para. 145.

<sup>94</sup> Cf. I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, para. 83.

<sup>95</sup> The United Nations Human Rights Committee has observed that the "operational and budgetary independence of the Office of the Public Defender" vis-à-vis other organs of the State must be guaranteed. United Nations. Report of the Human Rights Committee. Volume 1. 97th session (October 12 to 30, 2009), 98th session (March 8 to 26, 2010), 99th session (July 12 to 30, 2010). A/65/40 (Vol. I). Supplement No. (A/65/40). IV. Consideration of reports submitted by States parties under article 40 of the Covenant. Argentina, para. 71.c.20. The Inter-American Court has observed that the right to legal representation is not served by someone who, in the final analysis, will bring the charges, which is the Public Prosecutor's Office. The indictment spells out the charges and the defense answers those charges. Hence, it defies logic to assign the authority to perform functions that are by nature antagonistic to the same person. Cf. I/A Court H.R. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 63. For its part, the Office of the United Nations Special Rapporteur has written that in general terms, "in order to uphold the principle of equality of arms, offices of the public defender should be made independent of the executive branch." United Nations General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/17/30/Add.3, April 18, 2011, para. 73. Within the OAS system, the General Assembly adopted the resolution titled *Guarantees for Access to Justice: the Role of Official Public Defenders*, in which it recommended to the member states that they "take steps to ensure that Official Public Defenders operate independently." AG/RES. 2656 (XLI-O/11) *Guarantees for Access to Justice. The role of official public defenders*, June 7, 2011, operative para. 4.

case. It is also inadvisable for the public defender service to be subordinate to the judicial branch, since a judge will be the one who ultimately decides a case in which a public defender participates.

48. The IACHR welcomes the fact that some States of the region have introduced safeguards to ensure either the operational autonomy of some public defender services or greater independence.<sup>96</sup> However, as it observed in its *Second Report on the Situation of Human Rights Defenders in the Americas*, the institutional autonomy of the offices of the public defender must be guaranteed<sup>97</sup> to avoid the risks that their attachment to another branch or organ of the justice system can create. The Commission is of the view that given the variety of systems present within the region, those States where institutional autonomy is not already guaranteed should take immediate measures to ensure that the public defender services are functionally independent and manage their own budgets, until such time as they can be made fully autonomous.

#### **D. Budget control as a factor in independence**

49. To ensure the institutional independence of the judicial branch, the Public Prosecution Service and the Public Defender Service, they must not be made to rely on other entities or branches of government for funding and management of their budgets and they must have sufficient funds to be able to discharge their functions properly.<sup>98</sup>

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<sup>96</sup> In Argentina, for example, public defenders are functionally autonomous and independent, and may not be subjected to influence or pressure from other branches of government; the only instructions they may be given are those given by the Defender General of the Nation in the exercise of his or her functions. Argentina, Law 24,946, Organic Law of the Public Prosecution Service, Article 5 on technical independence. In Bolivia, the law is that public defenders “have functional autonomy and independence and may not be subjected to influence or pressure from other quarters of the government; they shall only receive general instructions forthcoming from the National Director or District Directors of the Public Defender Service, in exercise of their functions.” Law No. 2496 of August 4, 2003: Law Creating the National Public Defense Service of Bolivia, Article 10. Chilean law provides that every person is entitled to a legal defense in the manner prescribed by law and “no authority or individual may obstruct, restrict or otherwise disturb the conduct of the legal defense counsel, if such counsel has been requested.” In Guatemala, public defenders enjoy technical independence and shall not be subject to any type of restriction, outside influence or pressure. Guatemala. Decree 129-97: Law on the Public Criminal Defense Service, Article 25. In Mexico, any public servant in the employ of the federal prosecution and justice systems shall face liability if he or she engages in any conduct that violates the autonomy and independence of public defenders or legal advisors or engages in any conduct whose effect is to make public defenders or legal advisors in any way subordinate to another person or authority.” Mexico, Federal Law on the Office of the Public Defender, May 28, 1998, Article 38. In Paraguay, the law provides that functional autonomy shall mean that representatives of the Office of the Public Defender perform their functions with Independence, freely and with a sense of responsibility, and that no general or specific instruction from a superior shall affect the judgment of a public defender representing the accused in a case. Paraguay, Law 4423 of 2011, Articles 2 and 3. In Peru, a public defender has a right “to discharge his function independently and without pressure of any kind.” Peru. Public Defense Service Law: Law No. 29360 of May 14, 2009, Article 11, on the rights of a public defender.

<sup>97</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas*. OEA/Ser. L/V/II. Doc .66, December 31, 2011, para. 358, and United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, April 18, 2011, para. 73.

<sup>98</sup> Here the IACHR observes that the *Basic Principles on the Independence of the Judiciary* provides that “[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions” (Principle 7). The *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (“Beijing Statement”)* provides that “[t]he amount allotted should be sufficient to enable each

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Although there is a general understanding of how important it is to endow the judicial branch, the prosecution service and the public defender service with independence in respect of their budgetary appropriations and management of their budgets, the Commission notes with concern that this understanding is not always reflected in the constitutions of the States of the region, not even in the case of the judicial branch. The result is that for all practical purposes, the institutions of justice rely on the executive branch in those States where the executive proposes the budget or on the legislative branch when it has the authority to appropriate and approve a budget. In some States where the prosecution service or public defender service is not institutionally independent, its budgetary appropriation and management of its budget may be in the hands of the institution to which it is attached.

50. Some States do not have laws requiring that a certain percentage of the budget be assigned to the institutions in the justice system. In such cases, the latter's institutional independence faces serious threats, precisely because the decisions regarding their budgets are in the hands of the executive branch, the legislature or other organs of government. They may be forced to negotiate to obtain an adequate budgetary appropriation. Budgetary concerns can also directly affect the conditions under which justice operators serve (see in this regard the chapter on service conditions, *Infra* paragraph 128-145).

51. The IACHR agrees with the observation made by the United Nations Special Rapporteur to the effect that the budget allocated to the judiciary should be adequate to its needs, be assured and revisited from time to time with a view to increasing it, and that a fixed percentage of the GDP be established by law.<sup>99</sup> Even under important domestic economic constraints, the needs of the judiciary and the court system must be accorded a high level of priority in the allocation of resources.<sup>100</sup>

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court to function without an excessive workload." [*Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. Adopted by the Chief Justices of the Supreme Courts of the LAWASIA region and by other judges from Asia and the Pacific, in Beijing in 1995, and adopted by the LAWASIA Council in 2001, principle 37. As for prosecution services, the United Nations Special Rapporteur has observed that self-management of the resources/budget of the prosecution service can be an important aspect of autonomy and independence. United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 72. In the case of public defender services, under the *Basic Principles on the Role of Lawyers*, governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Cf. *Basic Principles on the Role of Lawyers*. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990, principle 3. The United Nations Human Rights Committee expressed its concern at the difficulties that detainees and persons charged with an offence have in gaining access to lawyers, particularly court-appointed lawyers. Although the law provides for the latter, budgetary problems are obstructing the enjoyment of this right. United Nations. Human Rights Committee. Consideration of reports submitted by states parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Georgia, CCPR/CO/74/GEO, April 12, 2002, para. 11.

<sup>99</sup> Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 37.

<sup>100</sup> United Nations General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 37.

52. States must have objective criteria to increase, as necessary, the percentage of the budget to be allocated to the institutions of the justice system, so as to ensure that they always have sufficient resources to perform their functions independently, properly and efficiently.<sup>101</sup> A cut to the budget of the courts, prosecution services or public defender services could obstruct justice, cause unwarranted delays in tenured appointments, and thereby increase the number of staff who are temporary.<sup>102</sup>

53. In the Commission's view, the judicial branch, public prosecution service and public defender service must be able to participate effectively in the preparation of their budgets<sup>103</sup> and in any budget-related deliberations in the legislature.<sup>104</sup> Furthermore, and as the UN Special Rapporteur has recommended, all cuts to the judicial branch's assigned budget must have its consent<sup>105</sup> or the consent of an independent body representing it.<sup>106</sup> Here the IACHR finds that in some States of region, the budgetary appropriation is only changed at the request of the judicial branch<sup>107</sup> whereas in other States the law allows the executive branch to amend the proposed budget presented by the judicial branch, without establishing a procedure to enable it to participate in the process.<sup>108</sup> The Commission is of the view that States must establish a procedure in law enabling the prosecution service, the judiciary and the public defender service to participate in decisions that have a bearing on their budgets.

54. One way to ensure independent management of the budget is for administration of funds to be entrusted directly to the corresponding entity or to a responsible independent body charged with managing and administering those funds.<sup>109</sup> Within the region, although a number of the constitutions give the respective entity the

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<sup>101</sup> See, DeJusticia. *Autonomía presupuestal responsable y transparente. Propuesta para reformar el presupuesto del Sistema Judicial*. Information provided to the Inter-American Commission on Human Rights in response to the questionnaire sent to the States and to civil society to gather information for preparation of the IACHR's report on the situation of justice operators in the Americas, February 2013.

<sup>102</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 381.

<sup>103</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 382; and United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 39.

<sup>104</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Mozambique. A/HRC/17/30/Add.2, April 21, 2011, para. 25.

<sup>105</sup> United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 41.

<sup>106</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Mozambique. A/HRC/17/30/Add.2, April 21, 2011, para. 25.

<sup>107</sup> For example, Organic Law of the Judicial Branch of Nicaragua, Article 86.

<sup>108</sup> For example, the Constitution of Uruguay, Article 220.

<sup>109</sup> IACHR. *Second Report on the situation of human rights defenders in the Americas*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 382; and United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 39.

authority to draw up its own proposed budget and then execute it, this provision does not appear in every State's constitution. In the case of the prosecution service and public defender service, the Commission observes that in some States, management of their budgets is in the hands of the government entity of which they are part, which can encumber their ability to perform their functions independently. According to a study done by the AIDEF, in countries like Chile, Colombia, Honduras, Nicaragua, Panama and Uruguay, because the public defender service is not institutionally independent, it does not have budgetary autonomy and does not manage its own funds.<sup>110</sup>

55. In conclusion, the Commission finds that to strengthen the institutional independence of the judicial branch and of the prosecution service and public defender service, they must be able to rely on stable and sufficient recourses established by law and sufficient to enable them to perform their functions of protecting and guaranteeing the right of access to justice. Their budgets must be periodically revisited with a view to increasing them. There must be a procedure in place to enable the entity concerned to participate in any change or modification to its budget. It must have assurances that it can execute and manage its own budget or that such authority will be vested in the respective organ of government.

### III. SELECTION AND APPOINTMENT PROCEDURES

56. In the Commission's view, a proper selection and appointment process is a condition *sine qua non* for guaranteeing the independence of justice operators.<sup>111</sup> International law has established certain minimum criteria to ensure that the procedures followed in the appointment of justice operators ensure that those selected have the qualifications that will make for a truly independent system that affords access to justice. The Commission believes that if certain basic parameters are not observed, the selection and appointment process might enable the authorities participating in the process to exercise an overly broad margin of discretion, with the result that the persons selected might not be suitable.<sup>112</sup>

57. The Commission shares the view expressed by the United Nations Special Rapporteur that one of the main problems in some countries is that the systems for selecting, appointing or electing justice operators are highly politicized. It often begin with the process by which the highest-ranking members of the justice system are selected, but

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<sup>110</sup> *Asociación Interamericana de Defensorías Públicas, Parámetros de Medición de las Defensas Públicas. Compilación Gráfica de respuestas al cuestionario elaborado por el Comité Ejecutivo de la AIDEF*, 2013.

<sup>111</sup> The case law of the Inter-American Court speaks to the issue of the independence of judges. Cf. I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 156; *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, para. 75. See also, *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 98; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 138.

<sup>112</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 74.

then spreads to appointments in other institutions until the entire judicial apparatus is affected.<sup>113</sup>

58. The IACHR will now address some criteria and principles that must be observed in selection and appointment processes. These should be reflected in the requirements and applied in practice in the procedure and assessment of qualifications for the selection and appointment of justice operators, with a view to ensuring that those selected and appointed will act independently.

#### **A. General conditions of equality and non-discrimination**

59. Article 23(1) of the American Convention provides that every citizen has the right to have access, “under general conditions of equality”, to the public service of his or her country. As the Court has held, the obligation to respect and ensure this right means that “the criteria and processes for appointment, promotion, suspension, and dismissal must be objective and reasonable,” and that “persons do not suffer discrimination in the exercise” of this right.<sup>114</sup> Article 1(1) of the American Convention provides that all persons subject to the jurisdiction of the States parties are entitled to have their rights and freedoms recognized, “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Article II of the American Declaration contains a similar provision, to the effect that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

60. Under the various instruments of international law that apply in the specific case of access to positions as justice operators, a common feature of the processes whereby judges, prosecutors and public defenders are selected and appointed is that there shall be no discrimination and the selection processes must be conducted under general conditions of equality.<sup>115</sup>

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<sup>113</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut*, A/HRC/23/43/Add.4, para. 79.

<sup>114</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 206.

<sup>115</sup> On the matter of judges, the Basic Principles on the Independence of the Judiciary provide that “[i]n the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.” Likewise, the United Nations Guidelines on the Role of Prosecutors provide that “[s]election criteria for prosecutors should embody safeguards against appointments based on partiality or prejudice, without discrimination based on race, colour, gender, sexual orientation, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status.” United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19*, June 7, 2012, para. 53. As for selection criteria, the Basic Principles on the Role of Lawyers provide that governments, professional associations of judges and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued presence in the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that the requirement that a lawyer be a national of the country concerned shall not be considered discriminatory. *Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of*  
Continues...



61. The IACHR is of the view that any law regulating access to public service must guarantee the mechanisms that best assure equal access to posts and positions, while respecting the principle of equality and non-discrimination.<sup>116</sup> The authorities charged with applying those laws must observe those principles and the State must guarantee the institutional and material conditions necessary for those principles to materialize in practice.

62. The goal of any selection and appointment process must be to appoint applicants based on their merit and professional qualifications, and also to ensure equality of opportunity.<sup>117</sup> Accordingly, States must ensure that persons who have the qualifications are able to compete as equals, even in the case of persons temporarily occupying the positions; a person temporarily in a position, he or she cannot be treated with privileges and advantages or disadvantages.<sup>118</sup>

63. The Commission observes that in some States, the laws regulating access to certain careers may require specific qualifications that are stated in such broad or ambiguous terms as to be construed as conditions affecting equality of opportunity. For example, the United Nations Special Rapporteur received information from Honduras to the effect that requirements like “morality” are ambiguous and may lend themselves to a subjective or discretionary interpretation in such a way as to affect the general conditions of equality for application, improperly excluding certain sectors of the population based on preconceived stereotypes of what might be regarded as “immorality”.<sup>119</sup>

64. The Commission urges the States to review and eliminate provisions in their laws that could result in discrimination against candidates applying for a post within the institutions of justice, those that are clearly discriminatory and those whose wording is so vague or broad that they could lead to *de facto* discrimination. The IACHR is also calling upon the States to take steps to introduce objective criteria in the selection and appointment procedures, and thereby avoid discriminatory practices. It is particularly important that the personnel in charge of these functions be properly trained to be objective when assessing the qualifications or suitability of applicants.

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Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990, UN, Doc. A/CONF.144/28/Rev.1 p. 121 (1990), Principle 10.

<sup>116</sup> Cf. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 195.

<sup>117</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, paragraph 72.

<sup>118</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, paragraph 73; and IACHR. *Second Report on the situation of human rights defenders in the Americas*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, paragraph 361.

<sup>119</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul*, A/HRC/23/43/Add.4, para. 57.

65. The foregoing notwithstanding, the Commission shares the view of the United Nations Special Rapporteur concerning how important it is that the selection criteria and procedures ensure that the composition of the judicial branch, the prosecution services and the public defender services reflect the diversity within society, and particularly strive to ensure that minority or underrepresented groups are properly represented within their ranks, as this is another means to ensure that such groups are guaranteed proper access to justice.<sup>120</sup>

66. In the processes through which justice operators are selected and appointed, one of the major problems in the region is that various sectors of society are not represented in the institutions of the justice system. For example, the Inter-American Commission notes with concern that women are not equally represented in the institutions of justice. The IACHR received information to the effect that women are a minority in the various institutions within the justice system. According to a study done by the United Nations Entity for Gender Equality and the Empowerment of Women, women account for some 27% of judges worldwide; in the case of Latin America and the Caribbean, women have between 30% and 40% of the seats on the bench and represent between 40% and 45% of all prosecutors.<sup>121</sup>

67. As the Commission previously noted in its *Report on Access to Justice for Women Victims of Violence in the Americas*, women's progress within the justice systems of the region has been very slow and with uneven results. There are very few women serving on superior court benches and in the constitutional courts of the countries of the Americas,<sup>122</sup> such that power in this area has become stratified, in a manner that excludes women from the higher court benches.<sup>123</sup>

68. This situation is the product of the discriminatory practices long employed by the organs charged with selecting applicants for the bench. But it is also the result of the absence of the institutional and material factors that would enable women to be free of violence in public service, able to aspire, under general conditions of equality, to seats on the highest court and to the top executive positions in the prosecution service and public defender service.

69. The Commission must underscore how important it is to ensure that women are adequately represented in public office, a fact recognized in international instruments such as the Convention on the Elimination of All Forms of Discrimination

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<sup>120</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut, A/HRC/17/30, April 29, 2011, para. 49. See also, United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 53.

<sup>121</sup> United Nations Entity for Gender Equality and the Empowerment of Women, Progress of the World's Women 2011-2012. In Pursuit of Justice, p. 59.

<sup>122</sup> See IACHR, *Report on Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. Doc.68, January 20, 2007.

<sup>123</sup> See IACHR, *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OEA/Ser. L/V/II., Doc. 79, April 18, 2011, para. 76.

against Women<sup>124</sup> and the Beijing Declaration and Plan of Action.<sup>125</sup> The UN Special Rapporteur has also welcomed the efforts made by international and regional tribunals and courts to include gender representation among their selection criteria.<sup>126</sup>

70. The IACHR concurs with the UN Special Rapporteur's recommendation that States should undertake an assessment of the structure of their judicial branch and its composition, to ensure that women are properly represented and to create the conditions necessary for the realization of gender equality within the judiciary, the public prosecution service and the public defender service and for the judiciary to advance the goal of gender equality.<sup>127</sup> As the United Nations High Commissioner for Human Rights, Navanethem Pillay, observed:

[t]he only way to ensure women's perspectives in the administration of justice, including in judgments delivered by national tribunals, is through women's life experience and therefore through the appointment of women judges who also represent the diversity of society and who are therefore able to tackle judicial issues with fitting sensitivity.<sup>128</sup>

71. The Inter-American Commission believes that an initial step toward achieving gender equality in the distribution of posts for justice operators is that States produce sex-disaggregated data to guide efforts to plan and build sectorial strategies; gender-neutral language should be preferred in the rulings, minutes and briefing notes to avoid reproducing and promoting a male-centered vision of the world.<sup>129</sup> As the UN Special Rapporteur has recommended, another priority concern for the IACHR is that States take steps to inspire confidence in the judicial system and ensure that women's experiences and specific needs are taken into account in all judicial matters and in working conditions, so that women are able to aspire to every position in the justice system.<sup>130</sup>

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<sup>124</sup> Article 7 (b) of the Convention on the Elimination of All Forms of Discrimination against Women recognizes the right of women to "hold public office and perform all public functions at all levels of government."

<sup>125</sup> See *Beijing Declaration and Platform of Action*, Strategic Objective G.1, paragraph 190 a).

<sup>126</sup> See, *inter alia*, Article 14(3) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*; Article 14 of the Rules of Procedure of the European Court of Human Rights, and Article 36.8 a) iii) of the Rome Statute of the International Criminal Court. United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, paragraph 50.

<sup>127</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut, A/HRC/17/30, April 29, 2011, para. 47.

<sup>128</sup> See the statement by Mrs. Navanethem Pillay, United Nations High Commissioner for Human Rights, International Association of Women Judges, Jubilee Biennial Conference, Seoul, May 12, 2010. Cited in: United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 48. The full text of her remarks is available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10039&LangID=E>.

<sup>129</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 53.

<sup>130</sup> Cf. United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 49.

Accordingly, the Commission considers it acceptable for States to adopt quotas to increase women's representation. The IACHR welcomes the fact that some States, like Ecuador, have made parity between men and women a constitutional principle in the membership of the National Court of Justice.<sup>131</sup>

72. The IACHR applauds those States that have guaranteed intercultural representation of the population. The Commission recalls that the State has a duty to adopt all measures necessary to guarantee that indigenous peoples and their members and ethnic groups are able to participate, on an equal footing, so that they, too, can become part of the institutions and organs of the State and participate, directly and in proportion to their population, in the conduct of public affairs, and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention.<sup>132</sup> Here, the Commission appreciates Bolivia's regulation requiring that the membership of the Plurinational Constitutional Tribunal include at least two magistrates who self-identify as belonging to the indigenous *campesino* system.<sup>133</sup>

73. The Inter-American Commission must again underscore how important it is that persons of African descent have access to positions as judges, prosecutors or public defenders. In its *Report on situation of People of African descent in the Americas*, one of the concerns the Commission identified was the underrepresentation of people of African descent in the institutions of justice, especially in higher posts. It therefore recommended to the States that they take proactive measures to ensure their participation in various public services, since their presence in such positions will do much to alter patterns of racism and bring their specific needs to light.<sup>134</sup> The appointment of Afro-descendent judges to the States' highest courts is an important step toward eradicating racism and racial discrimination in the Americas.<sup>135</sup>

74. Finally, the IACHR notes that in their replies to the questionnaire, some States reported measures they have taken to guarantee that other sectors of the population are represented. Guatemala is an example, as its laws make reference to a policy of integration within the Institute of Criminal Public Defense, which is now admitting lawyers from different ethnic groups and taking care to cultivate a gender-based and intercultural approach.<sup>136</sup> The Commission takes an equally favorable view of provisions

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<sup>131</sup> Cf. the Constitution of Ecuador, Article 183.

<sup>132</sup> I/A Court H.R., *Case of Yatama v. Nicaragua*, Judgment of June 23, 2005, Series C No. 127, para. 225.

<sup>133</sup> Article 13 of the Plurinational Constitutional Court Act, Law 027, July 6, 2010.

<sup>134</sup> IACHR, *Report on the Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II doc. 62, December 5, 2011, para. 187 and recommendation 9(a).

<sup>135</sup> IACHR, *IACHR Hails Selection of First Afro-descendant President of Brazil's Supreme Federal Court*, November 29, 2012.

<sup>136</sup> Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, p. 11.

such as those contained in the Argentine legislation that reserves a minimum number of posts for disabled persons who meet the qualifications required.<sup>137</sup>

## B. Selection based on merit and qualifications

75. The goal of any process to select and appoint justice operators must be to select candidates based on personal merit and professional qualifications,<sup>138</sup> taking into account the singular and specific nature of the duties to be performed,<sup>139</sup> in such a way as to ensure equal opportunity,<sup>140</sup> and with no unreasonable advantages or privileges.<sup>141</sup> Where merit is concerned, the persons selected shall be individuals of integrity and ability with appropriate instruction or qualifications in law.<sup>142</sup> As for professional qualifications, the Commission has emphasized that every selection and appointment must be done according to objective and transparent criteria based on proper professional qualifications.<sup>143</sup>

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<sup>137</sup> Cf. Resolution D.G.N. No. 1628/10. Legal Regime for magistrates, officials and employees of the Office of the Public Prosecutor of the Nation, Argentina, Article 29.

<sup>138</sup> IACHR, *Second Report on the Situation of Human Rights Defenders*, December 31, 2011, para. 363. See also, I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72; and United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 19. The Basic Principles provide that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Basic Principles on the Independence of the Judiciary, Principle 10. In this regard, the IACHR has observed that “[i]n addition to the importance of appropriate mechanisms for appointing judges, the right to an independent judiciary requires that the same principles also apply to the appointment of public prosecutors.” See IACHR, *Democracy and Human Rights in Venezuela*, OEA/ Ser. L/II. Doc. 52, December 30, 2009, para. 219. The Venice Commission has written that “[t]he qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place.” See, European Commission for Democracy through Law (Venice Commission). Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service. Adopted by the Venice Commission at its 85<sup>th</sup> plenary session (Venice, 17-18 December 2010), Strasbourg, January 3, 2011, para. 18.

<sup>139</sup> IACHR, *Second Report on the Situation of Human Rights Defenders*, December 31, 2011, para. 363. See also, I/A Court H.R., *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72. See also the Guidelines on the Role of Prosecutors, guideline 1.

<sup>140</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72.

<sup>141</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 73.

<sup>142</sup> Cf. Principle 10 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders, held in Milan August 26 to September 6, 1985, 1985, and confirmed by the General Assembly in resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. This principle also states that a requirement that applicants to positions in the judiciary be nationals of the country concerned shall not be deemed to be discriminatory.

<sup>143</sup> Article 9 of the *Universal Charter of the Judge*, unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999. Available at: <http://www.hipc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf>.

76. Competitive, merit-based competitions can be a suitable means to appoint justice operators on the basis of merit and professional qualifications. Such competitions can consider such aspects as professional instruction and years of experience required for the post, the results of examinations when the anonymity of the examinations is maintained<sup>144</sup> thereby ensuring that justice operators are not selected on the basis of discretionary appointments and that persons who are interested in applying and who meet the requirements are able to do so.<sup>145</sup> Here, the European Court has mentioned that special proficiency tests may be administered to candidates as a way to safeguard their independence.<sup>146</sup>

77. The Inter-American Commission is troubled by the fact that some processes to select and appoint justice operators are not aimed at ensuring that the candidates selected are the most meritorious and with the best professional qualifications; these processes can even be driven by political considerations. As an example, recently the IACHR received information from Peru to the effect that on July 17, 2013, Congress appointed 6 new members of the Constitutional Court by a procedure in which the political parties nominated candidates and the members of Congress then voted for all the candidates in block, without analyzing the credentials of each or making any individual assessments. The local media had aired a tape of conversations among members of political parties, which revealed that the major political parties in Peru had agreed that each party would nominate candidates for these positions, and that all parties would vote in favor of them. The vote taken to select the person for the post of Public Defender, which was also vacant, was also pre-arranged. According to the latest information the Commission has, a number of citizen protests were staged and, as a result, some of the justices selected had reportedly tendered their letters of resignation and a meeting had been convened in Congress to nullify their appointments.<sup>147</sup>

78. To be certain that selection and appointment processes will properly assess both personal merit and professional qualifications under general conditions of equality, objective criteria should be established for an accurate determination. Those criteria should also be embodied in State regulations, so as to ensure that they are observed and are mandatory.

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<sup>144</sup> United Nations. Economic and Social Council. Commission on Human Rights. Report presented by Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers. Addendum. Mission to Brazil. E/CN.4/2005/60/Add.3, February 22, 2005, para. 58.

<sup>145</sup> IACHR. *Second Report on the Situation of Human Rights Defenders*. OEA/Ser.L/V/II. Doc.66, December 31, de 2011, para. 361.

<sup>146</sup> Cf. ECHR. *Galstyan v. Armenia*, 15 November 2007, para. 62.

<sup>147</sup> Portal del Sur, *Vergonzosa Designación de magistrados supremos* [Disgraceful appointment of Justices on the Constitutional Court], July 18, 2013. Available [in Spanish] at: <http://portaldelsur.info/2013/07/vergonzosa-designacion-de-magistrados-supremos/>; Perú 21, *Sesión extraordinaria para anular "repartija del TC", Defensoría y BCR* [Special session to nullify appointments to Constitutional Court, Ombudsman's Office and BCR], Monday, July 22, 2013; Human Rights Watch, *Peru: Ensure Fair Selection of Judges, Ombudsman*, July 23, 2013. Available at: <http://www.hrw.org/news/2013/07/23/peru-ensure-fair-selection-judges-ombudsman>.

### C. Public announcement and transparency

79. To ensure equal access to the posts of justice operators, the IACHR believes it is imperative that an open and equal opportunity be given through widely publicized announcements that are clear and transparent as regards the eligibility requirements for the post in question.<sup>148</sup> Thus, States must publish in advance the vacancy announcements and procedures for applying, the qualifications required, the criteria and the deadlines, so that any person who believes he or she meets the requirements can apply for a post as a prosecutor, a judge or a public defender.<sup>149</sup>

80. In addition to publishing the requirements and procedures, another transparency-related factor is that the selection procedures be open to public scrutiny, which will significantly reduce the degree of discretion exercised by the authorities in charge of the selection and appointment process and the possibility of interference from other quarters. In this way, the candidates' merits and professional qualifications can be more readily identified. These practices are essential when appointing the highest-ranking justice operators, when procedure and selection is in the hands of the executive or legislative branch.

81. To strengthen the independence of the justice operators who will serve in the highest positions within the judiciary, the prosecution service or the public defender service, public hearings or interviews should be held, with adequate advance preparations, where the public, nongovernmental organizations and other interested parties will have an opportunity to see what the selection criteria are, to challenge candidates and express either their concern or support.<sup>150</sup>

82. The Commission welcomes the information that some States reported to the effect that they plan to hold public hearings as part of the process of selecting candidates for the justices on the high courts, and the reports that by law, the list of candidates for the judiciary must be published in newspapers with nationwide circulations,<sup>151</sup> and the reports to the effect that specific regulations require that social

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<sup>148</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 73.

<sup>149</sup> United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 19. See also, United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 30; and the Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, April 18, 2011, para. 23.

<sup>150</sup> Cf. United Nations. Economic and Social Council. Commission on Human Rights. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. Addendum. Preliminary report on the mission to Ecuador. E/CN.4/2005/60/Add.4, March 29, 2005, para. 5; United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 31. See also, United Nations. General Assembly. Human Rights Council. Report of Special Rapporteur Gabriela Knaul, Addendum, Communications to and from governments, A/HRC/14/26/Add.1, 18 June 2010, Guatemala, para. 379, where the Special Rapporteur wrote that the roll-call vote by the deputies and the public interviews with the candidates for seats on the bench, are mechanisms that should be adopted to strengthen transparency in Congress' selection process.

<sup>151</sup> As happens, for example, in El Salvador.

sectors participate in the selection of a public defender. All these are ways to ensure transparency and the opportunity for the public to voice objections.<sup>152</sup> In short, the Commission believes that, as the UN Special Rapporteur observed, mechanisms aimed at greater publicity, participation and transparency lend greater credibility to the integrity and qualifications of the justice operators appointed, and enhances public confidence in the objective of the process.<sup>153</sup>

#### **D. Duration of the appointment**

83. The duration of an appointment as a justice operator is a corollary of his or her independence. An established and sufficiently lengthy term gives the justice operator the sense of job stability needed to perform his or her functions with a sense of independence and autonomy, without succumbing to pressure or having to fear that the appointment still has to be confirmed or ratified.<sup>154</sup>

84. The Inter-American Commission agrees with the observation made by the UN Special Rapporteur to the effect that a short term for judges weakens the judiciary and affects their independence and professional development.<sup>155</sup> Tenured appointments, especially for judges and justices on the high courts, the Prosecutor General and the Public Defender General, do much to strengthen their job stability and, as a result, their independence, as they do not have to concern themselves with re-election.

85. The IACHR believes that a good practice in the case of justice operators is a one-term appointment for a fixed period of time, thereby ensuring tenure in the position for the stipulated time period. However, the Commission has observed a variety of factors in the region that would make this type of appointment difficult. Some of the most common problems in the region, which the IACHR will examine at greater length below, are the following: a) re-election of justice operators; 2) interim or provisional appointments and unregulated appointment and removal, and c) probationary periods.

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<sup>152</sup> Cf. Organic Law of the Public Defender Service of Venezuela, Article 12.

<sup>153</sup> Cf. United Nations. Economic and Social Council. Commission on Human Rights. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. Addendum. Preliminary report on the mission to Ecuador. E/CN.4/2005/60/Add.4, March 29, 2005, para. 5; United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 31. See also, United Nations. General Assembly. Human Rights Council. Report of Special Rapporteur Gabriela Knul, Communications to and from governments, A/HRC/14/26/Add.1, 18 June 2010, Guatemala, para. 379, where the Special Rapporteur wrote that a roll-call vote of the deputies and public interviews with the candidates for seats on the bench, are mechanisms that should be adopted to strengthen transparency in Congress' selection process.

<sup>154</sup> Cf. IACHR. *Second Report on the Situation of Human Rights Defenders*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 364.

<sup>155</sup> United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 54.



## 1. Re-election and ratification

86. One factor contributing to judges' lack of job security is the possibility that in order to remain in their posts they may be subject to confirmation or may even face the prospect of having to be re-elected. The former Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, observed that this practice affects the independence and professional development of judges and is contrary to international standards on the subject.<sup>156</sup>

87. The IACHR believes that the preferable course of action is not to require that justice operators face re-election<sup>157</sup> or ratification, especially when a justice operator's election or ratification may be discretionary.<sup>158</sup> The UN Special Rapporteur observed that the bias could be in favor of justices' automatic re-election in States where re-election is required, unless a disciplinary proceeding in which all the guarantees of a fair trial have been observed has established serious misconduct on the part of a judge.<sup>159</sup>

88. While the margin of discretion in a system requiring a justice operator to run for re-election is problematic, it is also true that a justice operator looking to be re-elected or ratified runs the risk that he or she will behave in a manner to curry favor with the authority in charge of this decision or at least to be perceived as doing so by those facing or standing trial.<sup>160</sup> The Commission also believes that in order to strengthen

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<sup>156</sup> United Nations General Assembly. Human Rights Council. *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, Addendum, Mission to Guatemala A/HRC/11/41/Add.3, October 1, 2009, para. 57.*

<sup>157</sup> This was the recommendation that the United Nations Special Rapporteur made with respect to prosecutors. See United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers. A/HRC/20/19, June 7, 2012, para. 65.*

<sup>158</sup> Systems in which justice operators are re-elected by the legislature are also problematic. In this regard, the IACHR received information from Costa Rica concerning Article 158 of its Constitution, under which the Legislative Branch has the authority to elect the justices on the Supreme Court and then re-elect them to terms for the same number of years. According to the information that the IACHR received on November 15, 2012, Costa Rica's Legislative Assembly decided not to re-elect Fernando Cruz Castro as a justice on the Constitutional Chamber of the Supreme Court. According to what was reported, it was the first time in Costa Rican history that a Supreme Court justice's term was not renewed and the reasons that members of the Assembly gave to the public made reference to decisions taken by the Constitutional Chamber and the legislature's intention to "reinstate the Legislative Assembly as the pre-eminent branch of government" and "to rebuke" the Court for its decisions. See, *La Nación*, November 16, 2012, *Congreso saca a magistrado de Sala IV con histórico voto* [In a historic vote, Congress removes justice from Chamber IV], available [in Spanish] at: <http://www.nacion.com/2012-11-16/ElPais/Congreso-saca-a-magistrado-de-Sala-IV-con-historico-voto.aspx>; *El País.cr*, November 16, 2012, *¡A protesta nacional por destitución de Magistrado Cruz!* [National protest over removal of Justice Cruz], available [in Spanish] at: [http://elpais.cr/frontend/noticia\\_detalle/1/74996](http://elpais.cr/frontend/noticia_detalle/1/74996).

<sup>159</sup> United Nations General Assembly. Human Rights Council. *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, Addendum. Mission to Guatemala, A/HRC/11/41/Add.3, October 1, 2009, para. 110.*

<sup>160</sup> European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 37.

independence, the term for which a justice operator is appointed should not coincide with the changes of government<sup>161</sup> or the terms of the legislature.<sup>162</sup>

## 2. Provisional status of justice operators

89. One of the most frequent problems in the region that undermines the independence of justice operators are provisional appointments, without a predetermined term or established condition, so that they can be removed at any time, even without cause.

90. The Commission believes that where appointments are provisional and for indefinite periods of time, without any guarantees of stability for the justice operator, the latter may well make decisions for the sole purpose of pleasing the authority that determines whether to renew his or her appointment or make the justice operator permanent in his or her post.<sup>163</sup> The free removal of justice operators creates objective doubts about whether they can participate in proceedings independently, without fear of reprisals.<sup>164</sup>

91. Although provisional appointments are very problematic for access to justice, the Commission notes that in some countries of the region, many justice operators function with appointments of this type. In its country reports, the IACHR has pointed to the provisional appointments of justice operators in countries like Bolivia,<sup>165</sup> Peru,<sup>166</sup> and Venezuela.<sup>167</sup> Specifically, in preparing this report, the Commission ascertained, for example, that the lists of appointments and transfers by Venezuela's Judicial Commission of the Supreme Court in 2012, revealed that all appointments in the case of judges were

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<sup>161</sup> See, Presidential Steering Committee for the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of Justice Operators in the Americas," February 2013, p. 5.

<sup>162</sup> Cf. European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 37.

<sup>163</sup> European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 50.

<sup>164</sup> As the Inter-American Court wrote with respect to judges with provisional appointments. Cf. I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 78.

<sup>165</sup> IACHR. *Follow-Up Report – Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II.135. Doc. 40, 7 August 2009, para. 76; and *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II. Doc. 34, June 28, 2007, paras. 81 to 87.

<sup>166</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, June 2, 2000, para. 14.

<sup>167</sup> See, IACHR. *Annual Report 2010, Chapter IV, Venezuela*, para. 621; *Annual Report 2011, Chapter IV, Venezuela*, para. 453.

either temporary (the largest number), short-term or provisional.<sup>168</sup> Concerning the provisional status of prosecutors in Venezuela, in October 2008 its Attorney General acknowledged that

[p]rosecutors whose appointments are provisional are at a disadvantage; their provisional status exposes them to the influence of pressure groups, which would undermine the constitutionality and legality of the justice system. Provisional status in the exercise of public office is contrary to Article 146 of the Constitution of the Bolivarian Republic of Venezuela, which provides that positions in government are career service posts and are won by public competition.<sup>169</sup>

92. Furthermore, the Commission received information on Bolivia indicating that due to the transition from the Judicial Branch to the Judicial Organ, which began in December 2011 with passage of Law 212, the Judicial Transition Act, “all positions are temporary until such time as the judicial career service is introduced.”<sup>170</sup> Finally, the Commission was told that a number of justices on Nicaragua’s Supreme Court have provisional appointments by virtue of a decision by the Executive not to present the respective slates of candidates to the Legislature for election to tenured positions.<sup>171</sup>

93. In the case of justice operators, provisional appointments must be the exception and not the rule.<sup>172</sup> States have an obligation to ensure that justice operators are able to function independently, and should therefore give them stability and tenure in their posts. Although the Commission understands that, in exceptional circumstances, it may be necessary to appoint judges on a temporary basis, such judges must not only be selected by means of an appropriate procedure, they must also enjoy a certain guarantee of tenure in their positions.<sup>173</sup>

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<sup>168</sup> See, Supreme Court of Justice, Executive Board of the Judiciary, at: [www.tsj.gov.ve/designaciones/designaciones\\_lista.asp?ano=2011&mes=1;http://www.tsj.gov.ve/designaciones/designacion.asp?fecha\\_id=1270](http://www.tsj.gov.ve/designaciones/designaciones_lista.asp?ano=2011&mes=1;http://www.tsj.gov.ve/designaciones/designacion.asp?fecha_id=1270); [http://www.tsj.gov.ve/designaciones/designacion.asp?fecha\\_id=1271](http://www.tsj.gov.ve/designaciones/designacion.asp?fecha_id=1271). No tenured judges are listed, at least not on the lists that the Supreme Court published for 2012.

<sup>169</sup> Note from the *Fundación Televisora de la Asamblea Nacional. Inaugurada Escuela Nacional de Fiscales* [National Prosecutors School Opens]. Article from October 6, 2008. Available [in Spanish] at: <http://www.antv.gob.ve/m8/noticiam8.asp?id=14946>. IACHR. *Report on Democracy and Human Rights in Venezuela*. OEA/Ser.L/V/II. Doc. 54, December 30, 2009, para. 266.

<sup>170</sup> Plurinational State of Bolivia. Ministry of Foreign Affairs. Permanent Mission to the Organization of American States. Response to the questionnaire on the situation of justice operators in the Americas, March 7, 2013, p. 13.

<sup>171</sup> Cf. DPLF. *Replies to the questionnaire for preparation of the report on the situation of justice operators in the Americas*, March 2013, p. 2.

<sup>172</sup> I/A Court H.R., *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 107.

<sup>173</sup> IACHR. *Democracy and Human Rights in Venezuela*. OEA/Ser.L/V/II. Doc. 54. December 30, 2009, para. 256.

94. As the Inter-American Court has explained, where provisional judges are concerned, the guarantee of tenure means that they must be able to enjoy all the benefits of tenure until the condition subsequent is deemed to have been met.<sup>174</sup> Therefore, the fact that appointments are provisional should not modify in any manner the safeguards instituted to guarantee that judges perform functions properly, which in the final analysis is in the defendant's best interests.<sup>175</sup> Accordingly, on the question of the provisional status of judges, the Court has held that

... provisional appointments must not extend indefinitely in time, and must be subject to a condition subsequent, such as a predetermined deadline or the holding and completion of a public competitive selection process based on ability and qualifications, or of a public competitive examination, whereby a permanent replacement for the provisional judge is appointed. Provisional appointments must be an exceptional situation, rather than the rule. Thus, when provisional judges act for a long time, or the fact is that most judges are provisional, material hindrances to the independence of the judiciary are generated. Such vulnerable situation of the Judiciary is compounded if no removal from office procedures respectful of the international duties of the States are in place.<sup>176</sup>

95. The principal problem that provisional appointments create for the independence of justice operators is the lack of specificity as to how long the justice operators' provisional status will last, the lack of specific rules explicitly spelling out the duration or condition subsequent of their term, and the job security they enjoy until their provisional appointment ends or the condition subsequent is met. The Commission notes that a number of the judicial career systems contain express regulations providing for interim or provisional appointments. Some countries specify the exact duration of a provisional appointment<sup>177</sup> but other countries do not.<sup>178</sup>

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<sup>174</sup>I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 116.

<sup>175</sup>I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 43.

<sup>176</sup>I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 43. See also, *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 107; *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 118; and IACHR, *Second Report on the Situation of Human Rights Defenders*. OEA/Ser.L/V/II. Doc.66, December 31, de 2011, para. 364.

<sup>177</sup> For example, Chile's Organic Code of the Courts, Article 246 of which provides that: "No seat on the bench shall remain vacant for more than four months, not even in the case of interim appointments. Once that four-month period has passed, the interim judge shall cease to exercise his or her functions, and the President of the Republic shall fill the permanent position." Colombia's Law 270 from 1996 provides the following in its Article 132: "In the event a permanent post becomes vacant, a provisional appointment shall be made until such time as the appointment can be made according to the legally established procedure and shall not last longer than six months, or in the event of a temporary vacancy, when the provisional appointment is not by recommendation or is for more than one month." In the case of an appointment by recommendation, "when the necessities of the service so dictate, the appointing party may, by recommendation and for a period of up to one month –

Continues...

96. The more security and stability that provisional justice operators have the better protected they are from internal and external pressures. If justice operators are uncertain about the duration of their appointments, they will be vulnerable to pressure from various quarters, mainly from those who have the power to decide their fate.<sup>179</sup> The Commission is therefore urging the States to ensure that their laws clearly and carefully regulate the provisional status system with an express guarantee of the stability that justice operators must have in their posts while serving the pre-established term or until the condition subsequent is met. Therefore, during those periods, provisional justice operators should only be removed on disciplinary grounds, following a procedure in which the guarantees of due process are observed.

### 3. Probationary periods

97. The Commission has observed that the laws in some countries provide for a probationary period to determine whether a person will, in the end, be admitted into the judicial career service.<sup>180</sup> Not unlike what happens in the case of provisional status, justice operators required to undergo a probationary period may sometimes be subjected to pressures to take certain decisions or courses of action that serve the interests of the authority upon whom his or her permanent appointment depends, thereby putting his or her independence at risk. The Commission is of the view that once the requirements under the merit-based competition have been met and the examinations passed, justice operators should be permanently appointed to the post for which they were selected, without any probationary period and without being subjected to any other discretionary evaluation that might affect their independence. However, the IACHR concurs with the UN Rapporteur's observation to the effect that if a probationary period is required, it should be short and non-extendable, and a permanent appointment or fixed tenure should be granted thereafter.<sup>181</sup>

### E. The role of political organs

98. It is not up to the Commission to decide which organs should intervene in the procedure for selecting and appointing justice operators, as this is a matter that each State must decide for itself.<sup>182</sup> Nevertheless, the Commission has made clear that the

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...continuation

extendable by another month-, appoint a permanent official or employee. Once that time period has expired, a permanent or provisional appointment shall be made, as the respective rules dictate."

<sup>178</sup> For example, Honduras, Law on the Structure and Authorities of the Courts, Article 89; and Nicaragua, Article 26 of the Judicial Career Service.

<sup>179</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 117.

<sup>180</sup> For example, Colombia, Law 270 of 1996, Article 193; and Honduras, Judicial Career Service Law, Article 23.

<sup>181</sup> Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 56.

<sup>182</sup> IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paras. 180 to 198.

norms for selection and appointment must include adequate safeguards to prevent other branches of government from influencing the independence of justice operators.<sup>183</sup> The Commission will now address the procedures used to select and appoint justice operators, based on the principles and criteria set forth in this chapter.

99. To begin with, the Commission notes that the States of the region use different systems for selecting and appointing justice operators, depending on the type of justice operator to be selected (a judge, public defender or prosecutor) and where the justice operator figures in the hierarchy of the justice system. As a rule, a separate selection system is in place for the heads of the Prosecution or Public Defender Services or for the members of the highest courts.

100. As the United Nations Special Rapporteur has observed, it is difficult to see what benefits accrue from a selection and appointment system where political bodies make the decision, especially in the case of lower-level justice operators.<sup>184</sup> The Commission believes that in these cases public competitions are the best method to avoid discretionary appointments<sup>185</sup> and to ensure that all citizens who meet the requirements set out in law are able to participate in the selection process, under general conditions of equality, and apply for the position they aspire to hold.<sup>186</sup>

101. In the case of the highest ranking justice operators, the Commission observes that the trend in the region is appointment by political bodies. Thus, the legislative/executive branches have a direct hand in appointing the judges on the highest courts. In some countries, only the legislative branch participates,<sup>187</sup> while in others the executive branch plays the larger role.<sup>188</sup> In a number of countries both the legislative and executive branches participate in the selection and appointment process.<sup>189</sup> In several countries, the authority to select and appoint the Attorney General is vested in the legislative branch.<sup>190</sup> Other States leave the selection and appointment of the Attorney General in the hands of the Legislature, but with the Supreme Court and civil society

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<sup>183</sup> IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paras. 180 to 198.

<sup>184</sup> UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 25.

<sup>185</sup> IACHR, *Annual Report 2009. Chapter IV - Venezuela*, para. 479.

<sup>186</sup> IACHR, *Democracy and Human Rights in Venezuela*, para. 217.

<sup>187</sup> For example, Constitution of Costa Rica, Articles 121 and 158; Constitution of Cuba, Article 75; and Constitution of Uruguay, Article 236.

<sup>188</sup> For example, Constitution of Barbados, Article 81; Constitution of Belize, Article 97; Constitution of Canada (Constitution Acts), Articles 96 to 99; Constitution of Guyana, Articles 127 and 128; Constitution of Jamaica, Article 98; and the Constitution of Trinidad and Tobago, Articles 102 to 104.

<sup>189</sup> For example, Constitution of Brazil, Articles 52 and 84; Constitution of Mexico, Article 76, para. VIII, and Article 96; and Constitution of Nicaragua, Articles 150 and 163.

<sup>190</sup> For example, Constitution of Bolivia, Articles 161 and 227; Constitution of Cuba, Article 129; and Constitution of El Salvador, Article 192.

entities participating.<sup>191</sup> In other States, the Legislative Branch makes the selection from slates proposed by the Executive Branch and by the Legislative Branch itself.<sup>192</sup> In still other States, the Executive Branch has preferential authority to make such appointments.<sup>193</sup> In several countries, the Executive Branch makes the appointment, which the Legislative Branch must then either confirm or approve.<sup>194</sup> Depending on the State concerned, the selection and appointment of the person or persons in charge of the Public Defender Service is the function of the Legislative Branch,<sup>195</sup> a combination of the legislative and executive branches,<sup>196</sup> or the executive branch alone.<sup>197</sup>

102. Here, the Commission notes that the practice of having political bodies make appointments is usually justified by claiming “matters of general interest or welfare,” or the legitimacy or support between the executive and legislative branches. However, as the UN Special Rapporteur observed, “in most cases political appointments are not appropriate means to reach those objectives.”<sup>198</sup> The Rapporteur also wrote that even in times of transition from an authoritarian to a democratic system, it is crucial that the population gain confidence in a judicial system administering justice in an independent and impartial manner, free from political considerations.<sup>199</sup>

103. The Inter-American Commission is of the view that a system in which selection and appointment is by the political branches of government puts the independence of justice operators at risk, given the nature of the authorities who select them. The UN Special Rapporteur has observed that the involvement of the legislature in judicial appointments risks their politicization.<sup>200</sup> Time and time again the UN Committee

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<sup>191</sup> For example, Law of the Public Prosecution Service, Decree 228-93 of December 18, 1993, Honduras, Article 22.

<sup>192</sup> For example, Constitution of Nicaragua, Article 138.

<sup>193</sup> For example, Constitution of Antigua and Barbuda, Article 87; Constitution of Dominica, Articles 71 and 88; Constitution of Guyana, Article 112; and Constitution of Trinidad and Tobago, Articles 75 and 76.

<sup>194</sup> For example, Law 24,946, Organic Law of the Public Prosecution Service of Argentina, Article 5; Constitution of Brazil, Article 128.§ 1; Act to Establish the Department of Justice, the United States; Constitution of Panama, Article 161; and Constitution of Mexico, Articles 89 and 102.

<sup>195</sup> For example, Organic Law of the Office of the Attorney General of the Republic of El Salvador, Article 6; Guatemala’s Criminal Defense Public Service Act, Article 10; and Organic Law of the Public Defense Service of Venezuela, Article 11.

<sup>196</sup> For example, Law 24,946 of 2006, Organic Law of the Public Prosecution Service of Argentina, Article 5; Law No. 2496 of August 4, 2003: Law Creating the National Public Defense Service of Bolivia, Article 20; LC 80/94 – Lei Orgânica Nacional da Defensoria Pública, Brazil, Article 6; and Constitution of Colombia, Article 281.

<sup>197</sup> For example, Legal Aid and Advice Act, Republic of Trinidad and Tobago, Article 3.

<sup>198</sup> UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 25.

<sup>199</sup> UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 25.

<sup>200</sup> UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 25.

against Torture<sup>201</sup> and the Human Rights Committee<sup>202</sup> have expressed their concern when the Executive is the one to have the last word. For the IACHR, the same risks of politicization are present when a public defender or attorney general is selected or appointed by a political body, whose appointments may be entirely discretionary, to the exclusion of other considerations.

104. Given the risks involved when the executive and legislative branches make the appointments, the Commission notes that some States have established selection and appointment systems that feature safeguards to reinforce the procedures by circumventing partisan majorities or increasing the transparency of the procedures to make it clear to the public that the candidates selected are the best candidates based on merit and professional qualifications. One such safeguard in the case of the judicial branch, is election by a qualified majority vote of the members of the legislature,<sup>203</sup> which ensures that the justice operator will not be selected by a simple majority vote. Even so, this does not preclude the possibility that there may be a political bargain among the parties concerning the appointments. Another safeguard is the involvement of the National Judiciary Council in the selection process, where it provides the legislature with the lists of candidates for justices on the high courts.<sup>204</sup> This safeguard is further strengthened when the list of candidates has to be published in newspapers with nationwide circulations.<sup>205</sup> Other countries provide for a different kind of safeguard, which is that the Supreme Court itself draws up the list of candidates for seats on the Supreme Court; the President of the Republic then selects the name of the candidate he or she will put forward for Senate approval.<sup>206</sup>

105. As happens in the case of the high courts, some States in the region have also introduced safeguards to avoid jeopardizing the independence of the public prosecution service or public defender service. In the case of the public prosecution service, in countries like Chile it is the President of the Republic who designates the National Prosecutor, with the Senate's approval; in this case, however, the appointment is made from a list presented by the Supreme Court and based on merit.<sup>207</sup> Elsewhere, the list or slate presented to the Executive comes from the Council of the Judiciary.<sup>208</sup> In Costa Rica, the Supreme Court elects the Attorney General.<sup>209</sup> The same is true in Colombia, but the Colombian Supreme Court elects the Attorney General from a slate of candidates

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<sup>201</sup> 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.

<sup>202</sup> CAT/C/UZB/CO/3, para. 19; CCPR/C/79/Add.62, para. 16.

<sup>203</sup> As provided, for example, in the constitutions of Costa Rica, El Salvador and Uruguay.

<sup>204</sup> As the constitutions of El Salvador and Paraguay provide, for example.

<sup>205</sup> As happens in El Salvador, for example.

<sup>206</sup> As with the case of Chile, for example.

<sup>207</sup> Cf. Constitution of Chile, Article 85.

<sup>208</sup> For example, Constitution of Paraguay, Article 269.

<sup>209</sup> Cf. Law 7333: Organic Law of the Judicial Branch of Costa Rica, Article 59.9.



provided by the President of the Republic.<sup>210</sup> As for the public defender services, in various states of the region, the person or persons in charge of the Office of the Public Defender is also selected and appointed on the basis of public competition and merit, without the involvement of either the legislative or executive branch.<sup>211</sup>

106. The Commission welcomes safeguards like those described above. Even so, it feels compelled to reiterate that what matters most in any selection and appointment procedure is that, substantively speaking, the States ensure that these procedures must not and cannot be perceived by the public as being decided on the basis of politics, which would undermine a defendant's belief that justice operators perform their functions independently. To ensure this, certain basic principles must be observed, such as advance publication of the announcements of the selection process, deadlines and procedures; every candidate must be guaranteed an equal opportunity; civil society must be involved and eligibility must be based on merit and professional qualifications. Each of these principles has already been discussed in this report.

107. In a number of States, the risks built into systems where appointments are made by political organs are compounded when they fail to spell out objective selection criteria that will ensure that the justice operators will be persons of integrity and will have the appropriate legal training and qualifications befitting the singular and specific role they will be called upon to perform. As the IACHR has previously noted, this requirement is essential to guaranteeing that the selection will not be on the basis of political motives or reasons, but will instead be based on merit and professional qualifications, and that the citizenry perceives that to be the case. Frequently, the proceedings do not involve properly prepared public hearings or interviews where the public, nongovernmental organizations and other interested parties have an opportunity to apprise themselves of the selection criteria, learn who the candidates are, and express their concerns about a given candidate. This gives the authorities in charge of these processes even greater latitude.

108. Like the United Nations Special Rapporteur, the Commission is recommending that justice operators at all levels should be selected and appointed by an independent body. As the United Nations Human Rights Committee observed, the Commission believes that the States would be best served by establishing a body independent of the government and the administration<sup>212</sup> whose functions would include appointments, promotions and disciplinary action at all levels, as well as reviewing remunerations to ensure that they are commensurate with the justice operators'

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<sup>210</sup> Cf. Constitution of Colombia, Article 249.

<sup>211</sup> For example, Law 24,946 of 2006, the Organic Law of the Public Prosecution Service of Argentina, Articles 5 and 6, whereby the Defender General of the Nation presents the Executive Branch with a list of candidates and the Executive Branch then selects one; that nominee must then win a simple majority of votes of the members of the Senate who are present and voting. The list of candidates is prepared on the basis of a competition and background.

<sup>212</sup> See in this regard, Council of Europe. Recommendation No. R (94) 12 of the Committee of Ministers to the Member States on the Independence, Efficiency and Role of Judges, October 13, 1994, principle I.2.c.

responsibilities and functions.<sup>213</sup> Since this independent body would also have functions and authorities apart from selections and appointments, the Commission will address its functions and characteristics in a section to follow (see *Infra* 239-247).

#### IV. INDEPENDENCE IN THE PERFORMANCE OF ONE'S FUNCTIONS

109. Apart from its institutional dimension, independence has a practical dimension, which is justice operators' individual exercise of their functions and their performance.<sup>214</sup> Here, States are called upon to provide justice operators with the conditions that will enable them to perform their functions independently in all cases they decide, prosecute or defend. The Commission will now turn its attention to some of the conditions and factors that it believes are critical to ensuring, within the institutions of justice, the functional independence of judges, prosecutors and public defenders.

##### A. Election of the chief justice of the Supreme Court and chairpersons of the courts

110. Generally speaking the laws of the States of the Americas vest the chief justices of the high courts with the authority to represent the judicial branch vis-à-vis other branches of government. The functions of the chief justice may include that of organizing the judicial branch and leading the debate among the justices, maintaining order in the court sessions, issuing decisions on the administration and organization of the courts, and other important functions.

111. Because the authorities vested in the chairpersons of the courts play such a decisive role in their functioning and the organization of their work, in order to avoid having "internal judicial hierarchy" run counter to the independence of judges, the United Nations Special Rapporteur recommended that the States consider "introducing a system whereby court chairpersons are elected by the judges of their respective courts."<sup>215</sup>

112. The Commission observes that the constitutions and laws of the States within the region generally recognize that the courts have autonomy to create their chambers, to appoint their chairpersons, establish their terms in office and manner of election.<sup>216</sup> However, although this appears to be the pattern, the constitutions of some

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<sup>213</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*. CCPR/CO/84/TKJ, June 18, 2005, para. 17.

<sup>214</sup> Here, the Inter-American Court highlighted both *de jure* and *de facto* independence, and wrote that this "requires not only hierarchical or institutional independence, but also real independence." I/A Court H.R. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 122.

<sup>215</sup> Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 49.

<sup>216</sup> For example, Bolivia, Law 025 of 2010, Article 39, I, III; Costa Rica, Constitution Article 162; Ecuador, Organic Code of the Judiciary, 2009, Articles 198, 210 and 222; Mexico, Constitution, Article 97; Nicaragua, Law No. 260, July 15, 1998: Organic Law of the Judicial Branch of the Republic of Nicaragua, Article 28; Peru, Organic Law of the Judicial Branch, Article 88; and Uruguay, Law 15,750 of 1985: Organic Law of the Judicial Branch, Articles 53 and 60.

countries require that the chairperson of the court be appointed by other organs of government or by the Council of the Judiciary.

113. This is true in Belize, for example. Under Article 97 of its Constitution, the Chief Justice of the Supreme Court is appointed by the Governor General, after consultation with the Leader of the Opposition.<sup>217</sup> Under the laws of other States, like the Dominican Republic, the election of the Chief Justice of the Constitutional Court and the Supreme Court is the responsibility of the Council of the Judiciary.<sup>218</sup> Article 174 of El Salvador's Constitution provides that the Chief Justice of the Constitutional Chamber of the Supreme Court is also Chief Justice of the Supreme Court and President of the Judicial Organ; he or she is elected by the Legislative Assembly "whenever it is called upon to elect the justices of the Supreme Court."<sup>219</sup>

114. The Commission observes that the selection of the chairperson by other branches or organs of government can mean interference in the courts, affecting the ability of judges to perform their functions independently when a representative elected by other branches of government has the authority to make decisions that will affect the organization and internal workings of the courts. Such risks, which themselves can threaten the independence of the judiciary, are compounded when the selection of the chairperson is a discretionary decision adopted in the absence of objective criteria pre-established by an organ other than the court itself. The Commission therefore considers that the system for selecting the chairpersons of the courts must be in the hands of the justice operators themselves, as this will enhance their ability to function independently.

## **B. Case assignment**

115. The system for assigning cases is another aspect of the internal administration of the prosecution service, public defender service and the courts that affects the independence of justice operators in the performance of their functions and access to justice by persons involved in cases.<sup>220</sup> The United Nations Special Rapporteur

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<sup>217</sup> See, the Constitution of Jamaica, Article 98.

<sup>218</sup> For example, the Constitution of the Dominican Republic, 2010, Article 180, para.: "When appointing justices to the Supreme Court, the National Council of the Judiciary shall determine which of them shall serve as Chief Justice and shall designate a first and second alternate to serve in the place of the Chief Justice in the event of his or her absence or impediment." Article 182: "When forming the Constitutional Court, the National Council of the Judiciary shall determine which of its members shall serve as the chief presiding officer and who shall serve as first and second alternates to replace the chief presiding officer in his or her absence or impediment." Article 183: "When designating the judges and alternates of the Superior Electoral Court, the National Council of the Judiciary shall decide which of them shall serve as chief presiding officer."

<sup>219</sup> Article 315 of the Constitution of Honduras also regulates the involvement of the legislative branch in designating the Chief Justice of the Supreme Court. Article 75 of the Cuban Constitution also gives the Legislative Assembly the authority to appoint the Chief Justice and Deputy Chief Justice of the People's Supreme Court.

<sup>220</sup> With respect to judges, the *Basic Principles on the Independence of the Judiciary* provide that "[t]he assignment of cases to judges within the court to which they belong is an internal matter of judicial administration." Principle 14. See also, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, adopted in Beijing in 1995 by the chief justices of the Supreme Courts of the LAWASIA region and other Asian and Pacific Judges and adopted by the LAWASIA Council in 2001, para. 35: "The  
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has observed that the method of assigning cases within the judiciary is paramount for guaranteeing the independent decision-making of judges.<sup>221</sup> He therefore recommends that a mechanism be established to allocate court cases in an objective manner to prevent manipulation in the allocation of cases.<sup>222</sup>

116. Where the allocation of cases is concerned, some States within the region have a specific rule spelling out procedures and criteria.<sup>223</sup> However, in most States in the region, the rule is generic and makes no specific reference to clear procedures for case assignment and/or objective criteria.<sup>224</sup> In the case of prosecution services and public defender services, the pattern is that the Public Prosecutor's Office or the Office of the Defender General is a hierarchically organized, single command structure in which everyone is required to adhere to the instructions and guidelines issued by the Prosecutor General or Public Defender General. The heads of the institutions and the hierarchical superiors of each justice operator are given certain prerogatives, among them hierarchical control over the assignment of cases and the authority to remove a justice operator from a case and reassign the case. Under the laws of a number of States, there are, nonetheless: i) provisions that expressly guarantee the prosecutor's autonomy, within the framework of the principles of a unified hierarchy;<sup>225</sup> ii) provisions that provide for and regulate the objections that prosecutors can raise with respect to orders or instructions received from

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assignment of cases to judges is a matter of judicial administration ultimate control of which must belong to the chief judicial officer of the relevant court." In the case of prosecutors, the United Nations Special Rapporteur has written that "an independent and impartial case assignment system protects prosecutors from interference from within the prosecution service." United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 80; and Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of the Ministers' Deputies), para. 9. The group of experts that the Commission consulted during preparation of this report agreed on how important it was to be able to assign cases to public defenders or withdraw them to avoid undue pressure or interference and to avoid undermining the defense when a defendant has to switch constantly from one public defender to another.

<sup>221</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 46.

<sup>222</sup> Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 47.

<sup>223</sup> For example, Chile, Organic Law of the Courts, Article 17, on the cases heard by criminal courts. Article 109 of Chile's Organic Law of the Courts also provides that: "Once a case is before the competent court, as determined by law, no supervening cause shall alter that jurisdiction." Article 110 provides that: "Once the competence of a lower court judge to hear a case in first instance has been established in accordance with the law, so too the competence of the superior court that will hear the case in second instance."

<sup>224</sup> For example, Colombia's Law 270 of 1996, Article 36, on the assignment of cases in the Council of State; and Article 63 on the assignment of cases in the Supreme Court, Council of State, Constitutional Court and Superior Council of the Judiciary, where national security issues are at stake or to prevent serious harm to the national treasury, or in the event of serious human rights violations or crimes against humanity, or matters of special social importance; Mexico, Constitution, Article 24; Peru, Organic Law of the Judiciary, Article 18.

<sup>225</sup> For example, Law 24,946, Organic Law of the Public Prosecution Service of Argentina, Article 1, and Law 938 of 2004, Organic Law of the Public Prosecution Service of Colombia, Article 6.

their superiors and/or how far those orders extend;<sup>226</sup> and iii) specific rules on case assignment.<sup>227</sup>

117. In its petition and case system, the Commission has already addressed how a criminal investigation can be adversely affected when the justice operators assigned to the case are changed multiple times, which for all practical purposes makes their status in a case provisional. The Commission wrote that the assignment of multiple investigating prosecutors to the same case has a negative impact on the pursuit of the corresponding investigations, bearing in mind, for instance, the importance of the collection and ongoing assessment of evidence. It said that this situation could therefore have negative repercussions on the rights of victims in criminal proceedings involving human rights violations.<sup>228</sup>

118. For the Inter-American Commission, the absence of a clear regulation, with properly defined procedures and objective criteria for assigning cases and for removing justice operators from cases already underway, works to the advantage of parties or other persons who may be interested in influencing or interfering with the assignment of a particular case or getting a case withdrawn; this includes persons within the judiciary itself, public prosecution services or public defender services. These kinds of discretionary practices can be used as vehicles of corruption, creating objective threats to the independence of justice operators in the performance of their functions and thereby allowing crimes to go unpunished.

119. The IACHR therefore concurs with the observation made by the UN Special Rapporteur to the effect that States must 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, or by assigning cases on the basis of pre-determined court management plans that should feature objective assignment criteria, such as specialization in a particular area.<sup>229</sup> The Inter-American Commission is urging the States to ensure that the respective law be as detailed as possible to prevent manipulation in the allocation of cases.<sup>230</sup>

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<sup>226</sup> For example, Law 24,946, Organic Law of the Public Prosecution Service of Argentina, Article 1; Law 260 of 2012, Organic Law of the Public Prosecution Service of Bolivia, Article 49; and Law 7442, Organic Law of the Public Prosecution Service of Costa Rica, Article 19.

<sup>227</sup> For example, Law 1562 de 2000, Organic Law of the Public Prosecution Service of Paraguay, Article 17.

<sup>228</sup> See in this regard, IACHR, Report No. 171/11 Case 12,724 Allan R. Brewer Carías (Venezuela), November 3, 2011, para. 130. See also, IACHR. *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, para. 229.

<sup>229</sup> United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 80; and Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of the Ministers' Deputies), para. 9.

<sup>230</sup> Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 47. See also, Council of Europe, Committee of Ministers. *Recommendation No. R (94) 12 on the independence, efficiency and* Continues...

### C. Promotions

120. A procedure secured by law<sup>231</sup> for the justice operators' promotion system, in countries where promotion is possible, and that weigh such objective considerations as ability, integrity and experience<sup>232</sup> is of the utmost importance to ensuring that justice operators are able to perform their functions independently. If a judge, prosecutor or public defender can rely on specific and objective criteria to know the requirements for promotion, he or she is relieved of the need to handle cases in a manner calculated to please the authorities upon whom his or her promotion depends, thereby eliminating the risk that the internal procedures under systems in which the promotion decision is discretionary will be corrupted.

121. In countries of the region that have judicial career service laws, the latter tend to regulate the matter of promotions. Some laws establish objective criteria for promotions, which include personal merit, the need of the justice operator and his or her capacity and efficiency. However, not every country's laws set such clearly defined criteria.<sup>233</sup> Some include vague clauses like "as dictated by the service"<sup>234</sup> or "the requirements of the service,"<sup>235</sup> which could actually enable the authorities in charge of promotions to exercise broad discretion. In some cases, the discretion exercised in making appointments may be reinforced by criteria such as "adherence to the doctrine used by the respective court."<sup>236</sup>

122. The Commission is of the view that, like the initial selection and appointment process, promotions should be done by pre-determined procedures that are public, fair and impartial and that contain safeguards against any technique that might favor the interests of specific groups and to the exclusion of any type of discrimination.<sup>237</sup> Promotions must be merit-based and take into account such factors as qualifications,

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*role of judges.* Adopted by the Committee of Ministers on October 13, 1994, at the 518<sup>th</sup> meeting of the Ministers' Deputies, principle 1.2.e).

<sup>231</sup> Cf. United Nations. Human Rights Committee. *General Comment No. 32*, CCPR/C/GC/32, August 23, 2007, paragraph 19.

<sup>232</sup> Basic Principles on the Independence of the Judiciary, Principle 13.

<sup>233</sup> For example, Organic Law of the Judiciary of the Federation, Latest Amendment DOF 14-06-2012, Mexico, Articles 14.XIX; 81.XIX and XXXII; 209.XVII.

<sup>234</sup> For example, Law 270 of 1996, Colombia, Article 134.4; Decree 41-99, Guatemala's Judicial Career Service Act, Article 26.a

<sup>235</sup> For example, Nicaragua's Judicial Career Service Act, Article 37.

<sup>236</sup> See in this regard, *Terra de Direitos, Plataforma Dhesca Brazil y Articulação Justiça e Direitos Humanos (JusDh)*, *Observations in response to the questionnaire from the Inter-American Commission on Human Rights (IACHR) for civil society concerning the situation of justice operators in the Americas*, Curitiba and Brasília, May 15, 2013, p. 5.

<sup>237</sup> Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of the Ministers' Deputies), para. 5.a.

integrity, ability and efficiency.<sup>238</sup> Therefore, a promotion system must be based on objective and known criteria such as professional qualifications, ability, integrity,<sup>239</sup> competence and experience.<sup>240</sup> It should preferably be administered by an independent authority (see in this regard *infra* paras. 240-248).

123. In their replies to the questionnaire, some States from Latin America reported a problem with respect to the promotion of justice operators, which is that the Legislature limits the opportunities that judicial career service members have to be promoted to the highest ranks of the justice system, since membership in the judicial career service is not a requirement for appointment to the highest offices.<sup>241</sup> Because of the effect this has on the lower ranking membership of the high courts, the United Nations Special Rapporteur singled out this problem in the case of countries where justices and judges on the high courts are selected from within the judiciary itself, but independently of the judicial career service.<sup>242</sup>

124. States where the judicial career service does not include the highest-ranking members of the judiciary, public defender service or prosecution service, might consider extending the judicial career service so that it covers every level of the hierarchy, and thereby ensure that promotion to the highest levels is based on objective and technical criteria.<sup>243</sup> The foregoing notwithstanding, another possibility is to induce the organs charged with the selection and promotion process –even if political- to take into consideration the criteria established for the career service, so as to make the selection criteria more transparent, strengthen the independence of the judiciary and further justice operators’ professional development.

#### **D. Transfers**

125. Transferring justice operators from their seats on the bench or from the chambers in which they work can be for a legitimate reason and necessary for the reorganization and efficient management of the judicial branch, the prosecution services or public defender services. However, when such transfers are entirely discretionary, the act of separating a justice operator from the case he or she is hearing or from his or her

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<sup>238</sup> Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 72.

<sup>239</sup> Cf. *Guidelines on the Role of Prosecutors, Guideline 7*.

<sup>240</sup> Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of the Ministers’ Deputies), para. 5.b.

<sup>241</sup> Presidential Steering Committee on the Executive’s Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the “Report on the situation of justice operators in the Americas,” February 2013, p. 4.

<sup>242</sup> United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia*, A/HRC/14/26/Add.2, April 16, 2010, para. 16 [translation ours].

<sup>243</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia, A/HRC/14/26/Add.2, April 16, 2010, para. 88. a. xii).

workplace can be in retaliation for his or decisions. The threat of transfer can become a disincentive to independent performance of one's functions.

126. For example, the Inter-American Commission received information to the effect that one chief justice of a supreme court had ordered that judges in various chambers be transferred to stifle the careers of those who did not vote on decisions of national importance and instead followed the instruction given by the chairperson of the court.<sup>244</sup> The Commission also received information about a judge who had, for all his years of service, specialized in criminal justice, only to be transferred to act as a civil law judge because he had not agreed with the legal opinion of the Chief Justice of the Supreme Court.<sup>245</sup> There were also reports of judges being transferred after adopting sensitive decisions on serious human rights violations;<sup>246</sup> the purpose of the transfer might have been to remove the judges from any case where their decisions might affect the interests of other branches of government.

127. Given situations like those described above, the Commission must emphasize how important it is that transfers of justice operators be done according to public, objective criteria, following a clear, pre-established procedure in which the interests and needs of the justice operator are taken into account.<sup>247</sup> Justice operators facing transfer should be given an opportunity to express their views, their aspirations and their family situation,<sup>248</sup> and to describe their particular area of legal expertise and the strengths

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<sup>244</sup> This information was received confidentiality by the Commission.

<sup>245</sup> El Heraldo.hn, *Cisma en Corte Suprema por rotación de magistrados* [Schism in the Supreme Court over rotation of justices], January 31, 2013. Available [in Spanish] at: <http://www.elheraldo.hn/Secciones-Principales/Pais/Cisma-en-CSJ-por-rotacion-de-magistrados>; La Tribuna, *Henríquez Interiano anuncia impugnación* [Henríquez Interiano announces challenge], January 31, 2013. Available [in Spanish] at: <http://www.latribuna.hn/2013/01/31/henriquez-interiano-anuncia-impugnacion/>; Tiempo, *Rivera Avilés rota a dos magistrados* [Rivera Avilés transfers two justices], January 29, 2013. Available [in Spanish] at: <http://tiempo.hn/portada/noticias/rivera-avilez-rot-a-dos-magistrados>

<sup>246</sup> For example, the Commission learned that the Supreme Court of Uruguay transferred Judge Mariana Mota on February 13, 2013, from her seat on the bench of Criminal Court 7 of Montevideo, to the seat of a civil law judge on Tribunal 1 of Montevideo; the decision did not give the reasons for the transfer. In February 2010, Judge Mariana Mota had convicted Juan María Bordaberry for his participation in the 1973 coup; according to the reports received by the Commission, at the time of her transfer she had 50 cases involving serious human rights violations committed during the dictatorship that ruled Uruguay from 1973 to 1985. See, 02/13/2013, *Polémico traslado de la jueza Mariana Mota de penal a civil* [Controversial transfer of Judge Mariana Mota from the criminal to civil courts], at [in Spanish] <http://www.subrayado.com.uy/site/noticia/21009/polemico-traslado-de-la-jueza-mariana-mota-de-penal-a-civil>; and Aljazeera.com, February 22, 2013. *Uruguay's culture of impunity continues to rear its head. Judge Mariana Mota's transfer shows that the country's culture of impunity for the crimes of dictatorship still endures,* at <http://www.aljazeera.com/indepth/opinion/2013/02/2013219105659440890.html>.

<sup>247</sup> Concerning the material conditions, Article 34 of the Statute of the Ibero-American Judge provides that "Judges must have the human resources, material means and technical support to perform their functions properly. The opinion of judges must be taken into consideration when decisions on the matter are adopted; accordingly, their views must be heard. In particular, judges must have access to the laws, case law and all other resources needed for a prompt and reasoned resolution of litigation and cases." Statute of the Ibero-American Judge, adopted by the VI Ibero-American Summit of Chief Justices of Supreme Courts, held in Santa Cruz de Tenerife, Canary Islands, May 23 through 25, 2001, Article 34.

<sup>248</sup> United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 69. See also, *Report of the Special Rapporteur on the* Continues...



acquired during the course of their careers.<sup>249</sup> Decisions to transfer and rotate justice operators should not be arbitrary; instead, they should adhere to objective criteria. Like the United Nations Special Rapporteur, the Commission believes that justice operators should be given an opportunity to challenge decisions to transfer them or remove them from cases, which should include the right to turn to the courts.<sup>250</sup>

## E. Conditions of Service

128. Adequate remuneration, human and technical resources, ongoing training and security are conditions that are essential to enabling justice operators to perform their functions independently and in order for the cases assigned to them to be prosecuted in court. Proper working conditions also help combat external or internal pressures like corruption.<sup>251</sup> The Commission will now turn its attention to some of the conditions that are critical to ensuring that justice operators are able to perform their functions independently.

### 1. Remuneration

129. Earlier in this report, the IACHR looked at the allocation and management of the budget of the judiciary, prosecution services and public defender services from the institutional perspective (see *supra* paras. 44-50). It will now specifically address the question of individual remuneration and its impact on justice operators' independence. The budget assigned to the institution in general will directly affect the ability to exercise that budget internally and adequately pay the justice operators.

130. A number of international instruments address the issue of justice operators' remuneration. Under the *Basic Principles on the Independence of the Judiciary*, in the case of judges, "adequate remuneration, conditions of service, pensions and the age of retirement" must be secured by law to guarantee their independence.<sup>252</sup> The *Universal Charter of the Judge*, for its part, provides that a judge "must receive sufficient remuneration to secure true economic independence. The remuneration must not depend

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*Independence of Judges and Lawyers*, Gabriela Knaul, Mission to Colombia, A/HRC/14/26/Add.2, April 16, 2010, para. 88, Recommendations, d), where she writes that: "The wishes of the judges and prosecutors should be considered in decisions pertaining to judicial transfers in the country." [translation ours]

<sup>249</sup> Cf. United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 42.

<sup>250</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 42.

<sup>251</sup> As the United Nations Special Rapporteur has pointed out, there are a variety of ways to counter judicial corruption, such as disclosure of personal assets by judicial officials and other persons with significant responsibility in the criminal justice system; control mechanisms at the institutional level to ensure the transparency of operations; the establishment of internal oversight bodies and confidential complaint mechanisms; regular and systematic publication of activity reports, and others. United Nations General Assembly, *Interim report of the Special Rapporteur on the Independence of Judges and Lawyers*, Gabriela Knaul, A/65/274, August 10, 2010 paras. 44, 45.

<sup>252</sup> *Basic Principles on the Independence of the Judiciary*, principle 11.

on the results of the judges' work and must not be reduced during his or her judicial service."<sup>253</sup> The *Guidelines on the Role of Prosecutors* provide that States must take steps to ensure that prosecutors have reasonable conditions of service, including adequate remuneration.<sup>254</sup> In the case of public defenders, under the *Basic Principles on the Role of Lawyers* governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.<sup>255</sup> The United Nations Human Rights Committee observed that the State must ensure appropriate budgetary provisions for an effective system of legal aid;<sup>256</sup> hence, States should ensure that the necessary budgetary allocation and human resources are provided to all legal aid clinics.<sup>257</sup>

131. The Commission is pleased to note that a number of States within the region have established pay scales or grades, a base salary or criteria for setting pay in an objective manner and sufficient to meet the employees' needs. Thus, Canada's Judges Act provides, for example, a salary scale pegged to 100% of the annual salary of the Chief Justice of Canada, and remuneration is to be adequate and take cost-of-living increases into account.<sup>258</sup> The Organic Law of the Judiciary of Uruguay contains similar provisions;<sup>259</sup> in Brazil, the Constitution establishes several principles to regulate remuneration of justices and judges.<sup>260</sup> Other States set out principles, but do not indicate what the baseline figure is or what percentage of that baseline figure a justice operator is to receive.<sup>261</sup>

132. In the case of prosecutors, the IACHR observes that within the region, the countries' laws generally state that prosecutors have a right to receive remuneration

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<sup>253</sup> *Universal Charter of the Judge*, unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999. Article 13.

<sup>254</sup> Cf. *Guidelines on the Role of Prosecutors*, Guideline 6; and Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724<sup>th</sup> Meeting of the Ministers' Deputies), para. 5.d.

<sup>255</sup> Cf. *Basic Principles on the Role of Lawyers*. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990, Principle 3.

<sup>256</sup> United Nations. Human Rights Committee. *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee. Georgia, CCPR/CO/74/GEO*, April 12, 2002, para. 11.

<sup>257</sup> United Nations. Report of the Human Rights Committee. Volume I. 103<sup>rd</sup> session (October 17 to November 4, 2011) and 104<sup>th</sup> session (March 12 to 30, 2012). General Assembly. Official Documents. Sixty-seventh Session. Supplement No. 40 (A/67/40). IV. Consideration of reports submitted by States parties under article 40 of the Covenant and examinations of the situation in States parties in the absence of reports under rule 70 of the rules of procedure. Jamaica, para. 104. C. 24).

<sup>258</sup> See, Judges Act, Article 26.

<sup>259</sup> Organic Law of the Judiciary of Uruguay, Article 85.

<sup>260</sup> Constitution of Brazil, Article 93.

<sup>261</sup> For example, Organic Code on the Role of the Judiciary, 2009, Ecuador, Article 91; Judicial Career Service Act of El Salvador, Articles 29 and 30.

commensurate with the characteristics of their functions and levels of responsibility. Some States also have a detailed regulation on the base salary and the respective salary scales that work from that baseline figure.<sup>262</sup> However, not every State has secured this type of regulation in law and not every State has established clear and objective baseline remunerations.

133. As in the case of the public defender services, in States that have a public defense career service, the career statute guarantees, among other rights, the right to job stability and to receive pay commensurate with the public defender's place on the pay scale or rank established in the career statute.<sup>263</sup> However, although some countries have a clear base salary and a scale of percentages that work down from that base salary,<sup>264</sup> this is not the general rule observed by the Commission in all the States. It has received information indicating that one of the obstacles standing in the way of independent, autonomous and effective performance on the part of the Public Defender Service is the lack of an adequate budget, given its assigned functions and the number of cases that the public defenders have to carry.<sup>265</sup> The foregoing notwithstanding that adequate payment should be guaranteed in States where lawyers are appointed to act as public defenders for specific cases.

134. The Commission is concerned by the information received regarding the inadequacies of the salaries that the law establishes for justice operators and about the low pay, delays in payment of salaries, and difficulties that some States are having in getting to the salary levels established in their domestic laws.<sup>266</sup> According to the information received, some States even acknowledge that poorly paid justice operators is one of the obstacles to their ability to perform their functions independently, free of pressures exerted from external quarters.<sup>267</sup>

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<sup>262</sup> For example, Law 24.946, Organic Law of the Public Prosecution Service of Argentina, Article 12.

<sup>263</sup> Among others, Law 24,946 of 2006, Organic Law of the Public Prosecution Service of Argentina, Articles 12 and 13; Law No. 2496 of August 4, 2003: Law Establishing the National Public Defender Service of Bolivia, Article 18; Organic Law of the Office of the Attorney General of El Salvador, Article 76; Guatemala's Law on the Public Criminal Defense Service, Articles 38 and 39; and Peru's Public Defense Service Law: Law No. 29360 of May 14, 2009, Article 11, on the rights of a public defender.

<sup>264</sup> For example, Law 24.946 of 2006, Organic Law of the Public Prosecution Service of Argentina, Article 12.

<sup>265</sup> Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, p. 5.

<sup>266</sup> The *Red Latinoamericana de Jueces* (REDLAJ) [Network of Latin American Judges] has expressed concern over the serious salary situation in the case of Latin American judges, many of whom, according to REDLAJ, have seen their salaries drop "either in relation to the cost of living in each of their countries or because they are being treated differently from other public officials of equal rank and at the same classification level"; REDLAJ also asserts that "acquired rights are being ignored and constitutional and legal provisions establishing fair and decent pay are being violated." REDLAJ, *Declaración de la Red Latinoamericana de Jueces – REDLAJ - situación de las remuneraciones de los jueces y juezas del Perú* [Declaration of the Network of Latin American Judges – REDLAJ – on the salary situation of Peruvian judges], Lima, December 4, 2012 [translation ours].

<sup>267</sup> See in this regard, Plurinational State of Bolivia. Ministry of Foreign Affairs. Permanent Mission to the Organization of American States. *Response to the questionnaire on the situation of justice operators in the Americas*, March 7, 2013, p. 5.

135. The Commission concurs with the United Nations Special Rapporteur to the effect that in their laws, States should make provision for base salaries to establish the pay levels for the justice operators to be commensurate with their responsibilities and the nature of their functions,<sup>268</sup> thereby avoiding a large salary difference between the various categories.<sup>269</sup> Hence, the criteria for determining pay should be objective and fair.<sup>270</sup> Like the UN Special Rapporteur, the Commission must emphasize how important it is that low wages and delays in payment do not become factors that contribute to corruption in justices systems.<sup>271</sup>

## 2. Technical and human resources

136. Making adequate material and human resources available at the workplaces of justice operators and for the procedures they are called upon to perform, helps them perform their functions effectively and with a greater sense of independence. When justice operators know that they have what they need to perform their functions properly, they will be less prone to pressure or corruption, unlike what happens when they know up front that they would never be able to perform their functions effectively because they lack the technical or human resources they need. Making adequate technical and human resources available also signifies the State's recognition of the important function that justice operators perform, which is a condition *sine qua non* for guaranteeing the right of access to justice to victims of human rights violations.

137. During preparation of this report, the Commission learned of the precarious conditions under which some justice operators in the region function; they have difficulty getting access to computers, the internet, the most recent laws and support from personnel like assistants and technicians, all of which makes it difficult to function adequately and efficiently.<sup>272</sup> In its *Report on the Situation of Human Rights in Jamaica*, the

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<sup>268</sup> Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 75; and Council of Europe, Committee of Ministers, Recommendation No. R (94) 12, on the independence, efficiency and role of judges. Adopted by the Committee of Ministers on October 13, 1994, at the 518<sup>th</sup> meeting of Ministers' Deputies, Principle III.1.b).

<sup>269</sup> See, United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia*, A/HRC/14/26/Add.2, April 16, 2010, para. 88, Recommendations d), which reads as follows: "The great difference between the pay received by judges of first instance, appellate court judges and justices on the high courts must be reduced and be set to reflect their responsibilities and the nature of their functions." [translation ours]

<sup>270</sup> Cf. United Nations. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Mozambique*. A/HRC/17/30/Add.2, April 21, 2011, para. 29.

<sup>271</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, para. 382.

<sup>272</sup> See in this regard, Plurinational State of Bolivia. Ministry of Foreign Affairs. Permanent Mission to the Organization of American States. *Response to the questionnaire on the situation of justice operators in the Americas*, March 7, 2013, p. 19; *Terra de Direitos, Plataforma Dhesca Brazil y Articulação Justiça e Direitos Humanos (JusDh), Observations in response to the questionnaire from the Inter-American Commission on Human Rights (IACHR) for civil society concerning the situation of Justice operators in the Americas*, Curitiba and Brasília, March 15, 2013, p. 6, concerning judges who work in the more remote and/or impoverished municipalities; and

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Commission wrote that during its visit to that country, it had observed that some judges do not have current copies of the legislation in force that they must apply, and that some don't have access to computers or the internet. The Commission was informed of an instance in which a laws that was amended in 2004 was nonetheless applied unchanged until 2005 because judged did not have the amended version of the law available to them.<sup>273</sup> On the occasion of its report on *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, the IACHR received information to the effect that failures and delays in gathering evidence often obstructed the progress of investigations, a problem attributed to a lack of the resources the prosecutors need to do their work properly.<sup>274</sup> In that same report, the Commission noted with concern that only 55% of Bolivia's municipalities have a judge; only 23% have a prosecutor and only 3% have a public defender.<sup>275</sup>

138. The Inter-American Commission is therefore calling upon the States to strengthen their justice operators' ability to perform their functions by providing them with the financial, technical and human resources they need to combat the pattern of impunity evident in many cases, by conducting effective criminal investigations that are then followed by the appropriate judicial action, with public defense services, all in an effort to avert the delays caused by a lack of resources. This means acquiring the technical equipment needed to do chemical and forensic testing and gathering all the evidence needed to solve the facts of a case and provide effective access to justice. States must ensure that there are a sufficient number of justice operators within the national territory, able to get to the remotest rural areas whose inhabitants live in dire poverty.

139. The IACH also notes that for the sake of efficiency, certain functions that justice operators perform require the cooperation of other authorities, as happens when prosecutors ask judges to issue warrants to apprehend or arrest suspects; such orders need to be issued promptly. Prosecutors may also need information on record with the military or police. In situations like these, a lack of effective coordination and cooperation can become an important obstacle to the investigation of crimes or to successfully building cases. The Commission believes that States have an obligation to ensure that effective channels are in place to enable cooperation among prosecutors, judges, public defenders, the police and other institutions that might have in their possession information that is relevant to a case. The goal is to institutionalize cooperation, sharing and access to technical information so that justice operators are able to perform their functions freely and efficiently, thereby ensuring justice in those cases in which they participate.

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*Participación Ciudadana*. Executive Director. *Response to the questionnaire on the situation of justice operators in the Americas*, Dominican Republic, March 2013, p. 3.

<sup>273</sup> IACHR. *Report on the Situation of Human Rights in Jamaica*. OEA/Ser.L/V/II.144. Doc 12, August 10, 2012, para. 89.

<sup>274</sup> IACHR, *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*.OEA/Ser/L/V/II, June 28, 2007, para. 163.

<sup>275</sup> IACHR, *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*.OEA/Ser/L/V/II, June 28, 2007, para. 59.

### 3. Training

140. Proper training is an important factor in ensuring the independence of justice operators.<sup>276</sup> The more professional training a justice operator has, the less vulnerable he or she is to pressure or meddling.<sup>277</sup> Education and training also ensure that the justice operators' decisions effectively and properly satisfy legal requirements. In a number of its judgments, the Inter-American Court has found that the human rights violations attributable to the State were perpetrated by state officials and that the violations were compounded by a situation of widespread impunity. In such cases, the Court has ordered reparations requiring that the States develop and conduct training programs for justice operators. The Court has held that such programs must be ongoing and place particular emphasis on international human rights instruments.<sup>278</sup>

141. Within the region, the Commission observes that the laws of several States recognize the judges' right to receive instruction.<sup>279</sup> The constitutions and laws of a number of States provide for the establishment of Judicial Schools<sup>280</sup> linked to the Judicial Branch or Judiciary or attached to the Councils of the Judiciary, for the purpose of providing instruction and education.<sup>281</sup> Other countries have independent institutions dedicated to the education and instruction of judges.<sup>282</sup> The provisions on instruction and on the creation and operation of the judiciary schools often make reference to the instruction and education to be imparted, sometimes in broad terms, other times in much

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<sup>276</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Carina Knaul de Albuquerque e Silva*. A/HRC/14/26, April 9, 2010, para. 18.

<sup>277</sup> See in this regard, United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Carina Knaul de Albuquerque e Silva*. A/HRC/14/26, April 9, 2010, para. 24.

<sup>278</sup> I/A Court H.R., *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, para. 193; I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006, Series C No.141, para. 210

<sup>279</sup> For example, Law 270 of 1996, Colombia, Article 152; Decree 536 of 1990: Judicial Career Service Act of El Salvador, Article 73; Decree 41-99: Guatemala's Judicial Career Service Act, Article 27; and the Judicial Career Service Act of the Dominican Republic, Article 42.

<sup>280</sup> For example, Chile's Law 19.346 of November 18, 1994, Article 1; Ecuador's Organic Code of the Judicial Service, 2009, Articles 80 and 85; 1999 Decree 536: Law of El Salvador's National Council of the Judiciary, Article 36 et seq. on the Judicial Training Academy, recognized in Article 187 of the Constitution; Decree 41-99: Guatemala's Judicial Career Service Act, Article 12, provides for an Institutional Training Unit; Honduras' Judiciary Council and Judicial Career Service Act, Articles 14 to 21, on the Judiciary Academy; the Constitution of the Dominican Republic, Article 150, which creates the National Judiciary School; and the Constitution of Peru, Article 151, which creates the Judiciary Academy.

<sup>281</sup> For example, Constitution of El Salvador, Article 187, on the Judicial Training School; Nicaragua's Judicial Career Service Act: Law No. 501 of 2004, Article 81, on the Institute of Judicial Training and Documentation; and Colombian Law 270 of 1996, which places Colombia's Judicial Academy under the Administrative Chamber of the Superior Council of the Judiciary.

<sup>282</sup> For example, the National Judicial Institute (NJI) of Canada.

more specific detail, spelling out what the education and instruction must cover.<sup>283</sup> Some laws specifically state that the instruction shall be ongoing.<sup>284</sup>

142. The instruction offered at the judicial schools within the region carries different weights from one State to another. Thus, in some cases, it has a point value in competitions and counts toward an applicant's merits<sup>285</sup> or a justice operator's promotion.<sup>286</sup> Under the laws of other States, it is deemed a prerequisite for service in the judiciary,<sup>287</sup> or for applying for seats on the bench.<sup>288</sup> To make the instruction that judicial schools provide available, some States offer fellowships;<sup>289</sup> some countries can boast of having trained judges and prosecutors.<sup>290</sup> In other States, the judicial schools train judges; prosecutors are trained in a separate institution.<sup>291</sup> Within the region, there are laws recognizing the right of public defenders to be properly trained to perform their

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<sup>283</sup> For example, the 2009 Organic Code of the Judiciary, Ecuador, Article 86; Decree 536 of 1999: El Salvador's National Council of the Judiciary Act, Articles 39 and 42, and Decree 536 of 1990: Judicial Career Service Act, Article 75; Peruvian Constitution, Article 151, and the Organic Law of the Judiciary Academy No. 26335, July 21, 1994, Article 2; and the Constitution of the Dominican Republic, Article 150.

<sup>284</sup> For example, Colombia's Law 270 of 1996, Article 176.

<sup>285</sup> Ecuador's 2009 Organic Code of the Judiciary, Article 80.

<sup>286</sup> Ecuador's 2009 Organic Code of the Judiciary, Article 80; Constitution of Peru, Article 151, and the Organic Law of the Judiciary Academy: Law No. 26335, July 21, 1994, Article 11.

<sup>287</sup> For example, Colombia's Law 270 of 1996, Article 176; Decree 536 from 1999: El Salvador's National Council of the Judiciary Act, Articles 44 and 45; Decree 41-99: Guatemala's Judicial Career Service Act, Articles 18 and 19; and the Judicial Career Service Act of the Dominican Republic, Article 189.

<sup>288</sup> For example, Peru's Organic Law of the Judiciary Academy: Law No. 26335, July 21, 1994, Article 11.

<sup>289</sup> For example, Decree 536 from 1999: El Salvador's National Council of the Judiciary Act, Article 77.

<sup>290</sup> For example, Ecuador's Judiciary Academy and Peru's Judiciary Academy.

<sup>291</sup> For example, Chile's Judicial Academy is geared to train for the judiciary; the Public Prosecution Service Act gives the National Prosecutor the authority to approve training programs for prosecutors; in Colombia, the Judiciary School trains judges and magistrates. Colombia has a separate academy to train prosecutors, which is the School of Criminal Studies and Research, part of the Office of the Attorney General of the Nation; Guatemala has a School of Judicial Studies, and the Organic Law of the Public Prosecution Service provides for the creation of a Training Unit, which will be run by the Council of the Public Prosecution Service; Honduras has a Judicial School created to train officials in the judiciary and a Training Department in the Public Prosecution Service which conducts training activities for prosecutors.

functions;<sup>292</sup> laws that provide that instruction shall be ongoing<sup>293</sup> and that it shall be provided by the judicial schools<sup>294</sup> or by the Public Defender Service.<sup>295</sup>

143. The Commission welcomes the efforts the States have made to provide ongoing instruction for justice operators and to establish judicial schools specifically intended to provide that instruction. Nevertheless, the Commission has received information from some States indicating that scant academic instruction or preparation remains one of the obstacles preventing justice operators from being able to perform their functions independently and properly, which leaves them even more vulnerable to external pressure.<sup>296</sup>

144. Not every law regulating instruction explicitly states whether the instruction is free, whether mechanisms like fellowships are available that would enable all justice operators to get the instruction, or whether the instruction is ongoing. In terms of content, some laws don't even say what emphasis or weight should be given to instruction in international human rights law, and particularly the international standards on the administration of justice. The Commission has observed that some laws within the region make no mention of any measures that will guarantee that working mothers and heads of household will be able to attend the instruction. In her report on Mexico, the UN Special Rapporteur expressed concern that the selection and promotion of women judges "is hindered by the fact that, under existing regulations, candidates are assigned points (which are often a decisive factor in the final selection of candidates) for having taken refresher and specialized courses, and these courses are usually given in the evenings, when it is difficult for female judges who have children to attend."<sup>297</sup>

145. The Commission is therefore recommending that the States take steps to guarantee that training will be accessible to justice operators, men and women alike. That

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<sup>292</sup> For example, Argentina, Resolution D.G.N. No. 1628/10. Legal regime for magistrates, officials and employees of the Public Defender Service, Article 15; and Peru, Public Defender Service Act: Law No. 29360, May 14, 2009, Article 11.

<sup>293</sup> For example, Law 24,946, Organic Law of Argentina's Public Prosecution Service, Article 56, and resolutions on training public defenders available [in Spanish] at: <http://www.mpd.gov.ar/articulo/index/articulo/capacitaciones-para-magistrados-y-funcionarios-2011-2805>; and the Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, pp. 33-34.

<sup>294</sup> For example, Honduras' Office of the National Human Rights Commissioner (CONADEH), "Questionnaire for the states and civil society for preparation of the report on the situation of justice operators in the Americas," February 1, 2013, para. 14.1.

<sup>295</sup> For example, Organic Law of Argentina's Public Prosecution Service, Article 56, and resolutions on training public defenders available [in Spanish] at: <http://www.mpd.gov.ar/articulo/index/articulo/capacitaciones-para-magistrados-y-funcionarios-2011-2805>.

<sup>296</sup> Plurinational State of Bolivia. Ministry of Foreign Affairs. Permanent Mission to the Organization of American States. *Response to the questionnaire on the situation of justice operators in the Americas*, March 7, 2013, p. 5.

<sup>297</sup> United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico A/HRC/17/30/Add.3*, April 18, 2011, para. 9.



training or instruction should place special emphasis on human rights so that all public officials involved in prosecuting cases can properly apply the relevant national and international norms, thereby avoiding acts or omissions that may engage the State's international responsibility. In particular, the Commission recommends that States prioritize the implementation of projects concerning specialized training for judges, prosecutors and public defenders regarding the rights of groups that due to their characteristics require special treatment, such as the rights of indigenous peoples and the rights of children and adolescents<sup>298</sup>, with the ultimate goal that justice operators have a specialized training to enable them to respect the dignity of such groups when they have been victims of human rights violations, give them adequate participation in those processes that may involve them and ensure full access to justice to fully remediate suffered acts, enabling that the acts of violence against them are prevented, investigated and punished under the terms established by international law.

#### 4. Security and protection

146. The State has an obligation to protect the life and personal safety of justice operators, an obligation created by the fact that, under the American Convention and the American Declaration, every person within the jurisdiction of the States of the hemisphere has the right to life and the right to the integrity of one's person. But it is also a prerequisite to guaranteeing due process and judicial protection with respect to investigations into human rights violations. In its case law, the Inter-American Court has held that to prevent human rights violations, "it [is] important that the State provide its judicial officers, prosecutors, investigators and other justice officials with recourse to an adequate security and protection system that takes into account the circumstances of the cases under their jurisdiction and their places of work so that they may perform their duties with due diligence."<sup>299</sup>

147. It is the duty of each State to protect its justice operators from attack, acts of intimidation, threats and harassment, and that it investigate those who violate their rights and effectively punish them. If States fail to guarantee the safety of their justice operators from every type of external pressure, including reprisals directly aimed at attacking their person and family, exercise of the judicial function may be gravely affected and access to justice thwarted.<sup>300</sup>

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<sup>298</sup> For example in the case of children and adolescents, the Inter-American Court of Human Rights has established the importance that all persons intervening in the proceedings, who must discharge their respective duties taking into account both the nature of these, in general, and the best interests of the child vis-à-vis the family, society, and the State itself, specifically. The Court has also established that "[d]ecisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights". I/A Court HR, *Advisory Opinion OC-17/2002*, August 28, 2002. Paragraph.79.

<sup>299</sup> I/A Court H.R. *Case of the La Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 297.

<sup>300</sup> IACHR, *IACHR condemns murder of judge in Honduras*, July 30, 2013, available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/055.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/055.asp)

148. The Commission is pleased to see that a number of States within the region have established provisions concerning the security and protection of judges,<sup>301</sup> magistrates, prosecutors and public defenders.<sup>302</sup> In some countries, the law entitles judges, prosecutors and public defenders to protection as their right, and specialized protection programs are in place.<sup>303</sup>

149. However, the Inter-American Commission is deeply troubled by the fact that the violence practiced against justice operators is relentless in some countries of the region, where the prospect of being murdered, threatened and intimidated continues to be one of the chief obstacles they face in the performance of their functions.<sup>304</sup> As the UN Special Rapporteur observed, what is most serious is that the bulk of these crimes are not properly investigated, much less punished, which only serves to preserve the climate of impunity.<sup>305</sup>

150. Through its Rapporteurship on Human Rights Defenders, the IACHR receives a steady stream of reports on problems of this kind that persist within the region:

151. Thus, for example, it received information from **Argentina** to the effect that in 2011, a number of judges in the provinces of Jujuy and Salta were the victims of threats and intimidation because of their actions against organized crime.<sup>306</sup> In August 2012, Judge Roberto Burad received threats; Judge Burad was on the tribunal that

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<sup>301</sup> For example, Colombia, Statute on the Administration of Justice, Article 152; Guatemala, Judicial Career Service Act, Article 27; Nicaragua, Judicial Career Service Act, Article 40; and Peru, Organic Law of the Judicial Branch, Article 186.

<sup>302</sup> For example, Law No. 2496 of August 4, 2003: Law Creating the National Public Defender Service of Bolivia, Article 18; Organic Law of the Office of the Prosecutor General of the Republic of El Salvador, article 76; and Public Defender Service Act: Law No. 29360, May 14, 2009, Peru, Article 11.

<sup>303</sup> For example, Bolivia, Law 260 of 2012, Organic Law of the Public Prosecution Service, Article 11; Colombia, Law 270 of 1996, Articles 85 and 103; Ecuador, Organic Code of the Judiciary of 2009, Article 295; and Guatemala, Decree 70-96: Law for the protection of suspects and witnesses and persons associated with the criminal justice system.

<sup>304</sup> See, *El mostrador*, May 2, 2012, *Injerencia política e inseguridad son los mayores problemas que enfrentan los jueces en América Latina* [Political interference and insecurity are the major problems facing judges in Latin America], available [in Spanish] at: <http://www.elmostrador.cl/noticias/mundo/2012/05/02/injerencia-politica-e-inseguridad-son-los-mayores-problemas-que-enfrentan-los-jueces-en-america-latina/>

<sup>305</sup> United Nations General Assembly. Human Rights Council. *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, Gabriela Knaul*, A/HRC/14/26/Add.2, April 15, 2010, para. 53 [translation ours].

<sup>306</sup> Among them, the Federal Judge of Jujuy, Carlos Olivera Pastor, the presiding judge of Court No. 2; Judge Julio Leonardo Bavio, the presiding judge of Federal Court No. 1 of Salta; Federal Judge No. 3 of Orán, Raúl Juan Reynoso, and Salta Federal Prosecutor No. 2, Eduardo José Villalba. See: *La Nación*, February 1, 2012, *Cómo el narcotráfico buscó someter a la Justicia argentina* [How drug traffickers sought to control the justice system in Argentina], available [in Spanish] at: <http://www.lanacion.com.ar/1444861-como-el-narcotrafico-busco-someter-a-la-justicia-argentina>; Argenpress, November 25, 2011, *El narcotráfico amenaza a jueces y fiscales federales en Salta* [Drug traffickers threaten federal judges and prosecutors in Salta], available [in Spanish] at: <http://www.argenpress.info/2011/11/argentina-el-narcotrafico-amenaza.html>

prosecuted various crimes against humanity committed in Mendoza under the military dictatorship.<sup>307</sup> Reports were also received concerning public episodes of intimidation against Prosecutor Dante Vega, from Argentina's Special Unit for Crimes against Humanity, who was conducting a number of proceedings against persons responsible for crimes committed in Mendoza under the last dictatorship;<sup>308</sup> there were also reports about the threats received in 2013 by Juan Carlos Vienna, magistrate handling the investigation into the criminal activities of the "Los Monos" gang.<sup>309</sup>

152. With respect to **Brazil**, the IACHR learned of the August 11, 2011 assassination of Judge Patrícia Lourival Acioli in the State of Rio de Janeiro, Brazil. In a number of cases, Judge Acioli had convicted police officers who were the perpetrators of extrajudicial executions.<sup>310</sup> According to the Conselho Nacional de Justiça [National Council of Justice], 150 Brazilian judges were threatened in October 2012;<sup>311</sup> some media outlets reported that in 2012 over 400 judges received death threats made by drug traffickers.<sup>312</sup>

153. In the case of **Colombia**, in the period from 1989 to 2011, 284 justice operators were reportedly murdered; 8 were murdered between January 2010 and March 2011.<sup>313</sup> According to the figures provided by the Judiciary, in the last four years 5 judges

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<sup>307</sup> See, *Página 12*, Wednesday, November 21, 2012, *Represores que se reciclaron* [Oppressors who reinvented themselves], available [in Spanish] at: <http://www.pagina12.com.ar/diario/elpais/1-208256-2012-11-21.html>

<sup>308</sup> Permanent Mission of the Argentine Republic to the Organization of American States. *Documentación referida a la Situación de Operadores de Justicia y Defensores de Derechos Humanos en Mendoza* [Documentation pertaining to the situation of justice operators and human rights defenders in Mendoza], February 28, 2013, p. 7.

<sup>309</sup> La Capital, *Amenazan de muerte al juez Vienna y al ministro Lamberto por su actuación contra el narcotráfico* [Judge Vienna and Minister Lamberto threatened because of actions taken against drug trafficking], June 14, 2013. Available [in Spanish] at: <http://www.lacapital.com.ar/policiales/Amenazan-de-muerte-al-juez-Vienna-y-al-ministro-Lamberto-por-su-actuacion-contra-el-narcotrafico-20130614-0052.html>; Clarín, *Amenazan al juez que investiga a la mayor banda narco de Rosario* [Judge investigating Rosario's largest drug gang threatened], June 15, 2013. Available [in Spanish] at: [http://www.clarin.com/policiales/Amenazan-investiga-mayor-narco-Rosario\\_0\\_938306345.html](http://www.clarin.com/policiales/Amenazan-investiga-mayor-narco-Rosario_0_938306345.html).

<sup>310</sup> Veja, 02/10/2011, *Como a juíza Patrícia Acioli se tornou a inimiga número um da quadrilha do coronel Cláudio* [How Judge Patrícia Acioli became enemy number one of Colonel Cláudio's group], available [in Portuguese] at: <http://veja.abril.com.br/noticia/Brazil/como-a-juiza-patricia-acioli-se-tornou-a-inimiga-numero-um-da-quadrilha-do-coronel-claudio>.

<sup>311</sup> CNJ, *Juizes discutem motivos das ameaças e do desinteresse pela carreira* [Judges discuss reasons behind the threats and disinterest in joining the career]. News, 08/10/2012, available [in Portuguese] at: <http://www.cnj.jus.br/noticias/cnj/21506-juizes-discutem-motivos-das-ameacas-e-do-desinteresse-pela-carreira>

<sup>312</sup> El País, *Más de 400 jueces amenazados en Brazil, y los 190 millones?* [More than 400 judges threatened in Brazil, and the 190 million?], July 28, 2012. Available [in Spanish] at: <http://blogs.elpais.com/vientos-de-Brazil/2012/07/m%C3%A1s-de-400-jueces-amenazados-de-muerte-y-los-otros-190-millones.html>.

<sup>313</sup> Corporación Merits de Solidaridad con los Jueces Colombianos (FASOL), *Banco de datos de víctimas. Acciones violatorias de 1989 a 2011* [Victim Data Bank, Violations between 1989 and 2011, updated as of March 22, 2011. Available [in Spanish] at: <http://www.corpofasol.org/estadisticas.html>.

have reportedly been assassinated.<sup>314</sup> In 2011, the United Nations Special Rapporteur issued a press release to the effect that over 300 justice operators had been assassinated in Colombia in the last 15 years.<sup>315</sup> The following assassinations were brought to the Commission's attention in recent years: the assassinations of criminal court judge Gloria Gaona, in Saravena on March 22, 2011; 8<sup>th</sup> Criminal Court Judge of Medellín, Diego Fernando Escobar Múnera, on April 22, 2010, and the Fusagasugá Sentence Enforcement Judge José Fernando Patiño Leño, on March 22 of that year.<sup>316</sup> The Commission also learned of death threats made against five public defenders in Granada, Meta Department of Colombia, in November 2012, because they were representing members of paramilitary groups.<sup>317</sup> The Commission also learned of the assassination of public defender Alejandro Segundo García Cañavera on July 28, 2012, in Barranquilla.<sup>318</sup>

154. The Commission also received information from **Ecuador** concerning the assassination of prosecutor Ramón Francisco Looor Pincay on June 7, 2013, who was at the time reportedly investigating the murder of a university professor.<sup>319</sup> Information was also received from the **United States** about the murder of Mike McLelland, the district attorney in Kaufman County, Texas, who was found dead, along with his wife, on the outskirts of Forney, Texas, on March 30, 2013, and two months prior to the death of Kaufman County District Attorney Mark Hasse, also in Texas.<sup>320</sup> The Commission received information from

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<sup>314</sup> Diario El País, *En medio de una manifestación sepultan a una jueza asesinada en Arauca* [A judge assassinated in Arauca is buried in the midst of a demonstration], March 24, 2011. Available [in Spanish] at: <http://www.elpais.com.co/elpais/judicial/hoy-cumpliran-exequias-jueza-asesinada-en-saravena-5>; Colombian Commission of Jurists, *Asesinato de jueza que investigaba crimen de niños sacude Colombia* [Murder of judge investigating child crime shakes Colombia], March 23, 2011, available [in Spanish] at: [http://www.coljuristas.org/prensa/2011/afp\\_23-03-2011\\_01.html](http://www.coljuristas.org/prensa/2011/afp_23-03-2011_01.html); El Tiempo, *Jueces han recibido 750 amenazas en cuatro años* [Judges receive 750 threats in four years], March 23, 2011. Available [in Spanish] at: [http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW\\_NOTA\\_INTERIOR-9055660.html](http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-9055660.html).

<sup>315</sup> United Nations. Office of the High Commissioner for Human Rights. *Colombia: UN Office for Human Rights asks for in-depth review of protection programs*. [Translation ours]. Press release, Bogota, March 25, 2011.

<sup>316</sup> See, IACHR. *Annual Report 2010, Chapter IV, Colombia*, para. 224.

<sup>317</sup> See, HSBNoticias.com, 30/Nov/2012, *En el Meta amenazan de muerte defensores públicos* [Public defenders threatened in Meta], available [in Spanish] at: <http://hsbnoticias.com/vernorticia.asp?wplaca=25034>.

<sup>318</sup> See, eluniversal.com.co, July 29, 2012, *Matan a abogado en un centro comercial en Barranquilla* [Lawyer killed at shopping center in Barranquilla], available [in Spanish] at: <http://www.eluniversal.com.co/cartagena/sucesos/matan-abogado-en-un-centro-comercial-en-barranquilla-85716>; and ElPílon.com.co, August 4, 2012, *Defensores públicos del Cesar paralizaron labores para reclamar sus derechos* [Cesar public defenders stage work stoppage to demand their rights], available [in Spanish] at: <http://www.elpilon.com.co/inicio/defensores-publicos-del-cesar-paralizaron-labores-para-reclamar-sus-derechos/>.

<sup>319</sup> El Diario, *Sicario asesina al fiscal Ramón Looor* [Gunman assassinates prosecutor Ramón Looor], June 8, 2013. Available [in Spanish] at: <http://www.eldiario.ec/noticias-manabi-ecuador/268401-sicario-asesina-al-fiscal-ramon-loor/>; La Hora, *Fiscal de cantón Jipijapa Ramón Looor Pincay fue asesinado* [Jipijapa district attorney Ramón Looor Pincay assassinated], June 7, 2013. Available [in Spanish] at: <http://www.lahora.com.ec/index.php/noticias/show/1101518165/-1/Fiscal%20de%20cant%C3%B3n%20Jipijapa%20Ram%C3%B3n%20Looor%20Pincay%20fue%20asesinado.html#.UhhE8bKPXmk>.

<sup>320</sup> Daily News, *Double murder of North Texas prosecutor wife was "targeted attack": official*, March 31, 2013. Available at: <http://www.nydailynews.com/news/crime/north-texas-prosecutor-wife-found-dead-home-article-1.1303863>; Nbcnews.com, *Texas DA was shot 20 times, wife once, federal source says*, April 2, 2011, available at: <http://usnews.nbcnews.com/news/2013/04/02/17571459-texas-da-was-shot-at-20-times-wife->

El Salvador about threats made against Judge Miguel Ángel Barrientos Rosales, First Justice of the Peace of Santa Ana, and about acts of intimidation reportedly committed against Santa Tecla's First Examining Judge, Lic. David Posada Vidaurreta.<sup>321</sup>

155. In Guatemala 7 justice operators were said to have been assassinated in 2009.<sup>322</sup> At least three judges were reported assassinated between 2009 and February 2011,<sup>323</sup> and at least one prosecutor was assassinated in 2011.<sup>324</sup> According to the information received by the Commission, between 2002 and 2012, 640 judges and magistrates were the victims of threats and intimidation, 24 were assaulted, 5 were abducted, and 11 administrators of justice were killed. Of those threats and intimidation, 32 reportedly occurred during the first half of 2012.<sup>325</sup> According to information received from the Guatemalan State, 54 complaints were received for crimes committed against prosecutors in 2010; 57 in 2011 and 61 in 2012.<sup>326</sup> The Guatemalan State also told the Commission that between 2010 and 2013, it had received a total of 124 complaints of crimes committed against public defenders.<sup>327</sup>

156. In the case of Haiti, the IACHR received reports on the death of examining judge Jean Serge Joseph on July 13, 2013; the judge had been investigating a

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[once-federal-source-says?lite](http://news.yahoo.com/fiscal-asesinado-en-texas-en-tercer-caso-similar-21122204.html); YahooNews, fiscal asesinato en Texas [Prosecutor killed in Texas], Available [in Spanish] at: <http://news.yahoo.com/fiscal-asesinado-en-texas-en-tercer-caso-similar-21122204.html>; The New York Times, *Prosecutor Shot to Death in a Town Near Dallas*, January 31, 2013, available at: <http://www.nytimes.com/2013/02/01/us/prosecutor-fatally-shot-in-town-near-dallas.html>.

<sup>321</sup> Office of the Prosecutor for Human Rights of El Salvador. *Contribution from the Office of the Prosecutor for the Protection of Human Rights to the "Report on the Situation of Justice Operators in the Americas" being prepared by the Inter-American Commission on Human Rights*, March 2013, p. 12.

<sup>322</sup> United Nations General Assembly. Human Rights Council. *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, A/HRC/11/41 Add. 3*, October 1, 2009, para. 78.

<sup>323</sup> Prensa Libre, *Jueces temen atentados tras asesinatos en Petén* [Judges fear assault after assassinations in Petén], February 16, 2011. Available [in Spanish] at: [http://www.prensalibre.com/noticias/Jueces-temen-atentados-asesinato-Peten\\_0\\_428357185.html](http://www.prensalibre.com/noticias/Jueces-temen-atentados-asesinato-Peten_0_428357185.html).

<sup>324</sup> La Tribuna, *ONU denuncia la muerte de fiscales en Guatemala y Honduras* [UN denounces the murders of prosecutors in Guatemala and Honduras], May 31, 2011. Available [in Spanish] at: <http://www.latribuna.hn/2011/05/31/onu-denuncia-la-muerte-de-fiscales-en-guatemala-y-honduras/>.

<sup>325</sup> See, La Hora, July 25, 2012, *Instituciones del sector justicia reconocen riesgos de jueces, fiscales y abogados. Ante intimidaciones y amenazas, seguridad para los operadores de justicia es fundamental* [Institutions in the justice sector acknowledge that judges, prosecutors and lawyers face the danger of intimidation and threats; the security of justice operators is fundamental], available [in Spanish] at: <http://lahora.com.gt/index.php/nacional/guatemala/reportajes-y-entrevistas/162499-ante-intimidaciones-y-amenazas-seguridad-para-los-operadores-de-justicia-es-fundamental>.

<sup>326</sup> Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, p. 29.

<sup>327</sup> Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, p. 29.

complaint alleging corruption, filed against the wife and son of the President of the Republic.<sup>328</sup> These events were widely reported in the media. In the course of the investigation, Judge Joseph had reportedly summoned high-ranking government officials to appear as witnesses. In response, the President of the Republic had reportedly summoned the judge to a private meeting on July 11, 2013, where the Prime Minister, Minister of Justice and President of the Port-au-Prince Court of First Instance were also present. During the course of the meeting, the judge was ordered to drop the case. According to the information provided, two days later in hospital the judge died from a cerebral hemorrhage. According to the information received, owing to the suspicious circumstances of the judge's death, the Montreal Coroner's Office in Canada asked to conduct an autopsy on Judge Joseph's body on the grounds that he had dual Haitian/Canadian citizenship. The Senate of the Republic reportedly formed a "special committee of inquiry to look into the disturbing death of Judge Jean Serge Joseph." After examining the existing documents and taking statements from 15 persons (including some of those implicated), the Committee presented its report on August 8, 2013, in which it concluded that the judge had died of stress brought on by the pressures exerted by high-ranking government officials; that the Executive Branch had violated the independence of the Judicial Branch; that the President of the Republic, the Prime Minister and the Minister of Justice lied to the Committee and to the Nation when they denied having been present for the meeting of July 11; and that it would be up to the courts to determine each official's degree of responsibility.<sup>329</sup>

157. In **Honduras** the IACHR received information to the effect that the Office of the National Human Rights Commissioner reportedly has a record of 64 legal professionals said to have lost their lives under violent circumstances between January 2010 and July 2013.<sup>330</sup> The IACHR learned of the April 19, 2013 assassination of Orlan Arturo Chávez, a prosecutor with the Money Laundering Unit; of judge Olga Mariné Laguna in 2010,<sup>331</sup> and prosecutor Raúl Reyes Carbajal in 2011.<sup>332</sup> The IACHR also

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<sup>328</sup> Letter received at the Executive Secretariat on August 5, 2013.

<sup>329</sup> *Rapport de la Commission spéciale d'enquête sur la mort troublante du Juge Jean Serge Joseph*. [Report of the Special Inquiry Commission into the disturbing death of Judge Jean Serge Joseph]. Available [in French] at: <http://www.scribd.com/doc/159159176/Rapport-final-de-la-commission-speciale-d%E2%80%99enquete-du-Senat>.

<sup>330</sup> In *Sight Crime*, *El Principal Fiscal Anti lavado de Dinero en Honduras es asesinado* [Honduras' Chief Anti-Drug Laundering Prosecutor assassinated], April 19, 2013, available [in Spanish] at: <http://es.insightcrime.org/noticias-del-dia/el-principal-fiscal-anti-lavado-de-dinero-de-honduras-es-asesinado>; *La Prensa*, *Asesinan en Honduras a fiscal de la unidad de lavado de activos* [Prosecutor with the Money-laundering Unit Assassinated in Honduras], April 19, 2013. Available [in Spanish] at: <http://www.laprensa.hn/Secciones-Principales/Policias/Asesinan-en-Honduras-a-fiscal-de-unidad-de-lavado-de-activos#.UhkGYbKPXmk>.

<sup>331</sup> *El Heraldo*, *Sicarios acribillan a una jueza en la capital hondureña* [Hired gunmen gun down a judge in the Honduran capital], March 4, 2010. Available [in Spanish] at: <http://www.elheraldo.hn/Ssucosos/Ediciones/2010/03/04/Noticias/Sicarios-acribillan-a-una-jueza-en-la-capital-hondurena>.

<sup>332</sup> *La Tribuna*, *ONU denuncia la muerte de fiscales en Guatemala y Honduras* [UN denounces the murders of prosecutors in Guatemala and Honduras], May 31, 2011. Available [in Spanish] at: <http://www.latribuna.hn/2011/05/31/onu-denuncia-la-muerte-de-fiscales-en-guatemala-y-honduras/>.

condemned the assassination of Judge Mireya Efigenia Mendoza Peña on July 30, 2013<sup>333</sup> and obtained information according to which Judge Isaías Romero, who served on Tegucigalpa's Unified Courts, had reportedly fled the country in March 2010 after receiving death threats.<sup>334</sup>

158. The Commission is troubled by the current situation in **Mexico**. As the UN Special Rapporteur wrote in the report on her mission to Mexico, with the escalating violence, often committed by organized crime, the judges, justice operators and legal professionals are unable to act freely because they are reportedly receiving threats, being intimidated, harassed and subjected to other undue pressures.<sup>335</sup> The UN Special Rapporteur expressed concern over the fact that more and more, organized crime is trying to infiltrate and interfere in the institutions of justice through corruption and threats.<sup>336</sup> The information provided by the Federal Council of the Federal Judiciary of Mexico indicates that in 2012, 98 judges and federal magistrates assigned court cases involving crimes against health were provided with special security measures to enable them to continue presiding over their assigned cases.<sup>337</sup>

159. The IACHR was also informed that two judges in **Peru** were assassinated in 2006;<sup>338</sup> one provincial prosecutor in 2007,<sup>339</sup> another in 2010<sup>340</sup> and one more in

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<sup>333</sup> IACHR, *IACHR Condemns Murder of Judge in Honduras*, July 30, 2012. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/055.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/055.asp)

<sup>334</sup> See, La Gente, March 23, 2010, *Juez que juzgó a narcos huye de Honduras por amenazas* [Judge who tried drug traffickers in Honduras flees the country as a result of threats], available [in Spanish] at: <http://www.radiolaprimerisima.com/noticias/73183/juez-que-juzgo-a-narcos-huye-de-honduras-por-amenazas>

<sup>335</sup> *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico*, A/HRC/17/30/Add.3, April 18, 2011, para. 51.

<sup>336</sup> *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico*, A/HRC/17/30/Add.3, April 18, 2011, para. 52.

<sup>337</sup> See, CNN-Mexico, November 7, 2012, *Uno de cada 10 jueces federales vive bajo amenazas del crimen organizado* [One out of every ten federal judges lives under threats from organized crime], available [in Spanish] at: <http://mexico.cnn.com/nacional/2012/11/07/uno-de-cada-10-jueces-federales-vive-bajo-amenazas-del-crimen-organizado>; and AsiLegal. Asistencia legal por los derechos humanos [Legal Aid for Human Rights]. *Situation of justice operators in the Americas. Document to contribute to the report on justice operators in the Americas*, March 2013, p. 17.

<sup>338</sup> La República, *Sicarios asesinan a magistrado en Chimbote* [Gunmen kill magistrate in Chimbote], December 13, 2006. Available [in Spanish] at: <http://www.larepublica.pe/archive/all/larepublica/20061213/pasadas/15/59508>; El Siglo de Torreón, *Asesinan a juez en Lima* [Judge murdered in Lima], July 20, 2006. Available [in Spanish] at: <http://www.elsiglodetorreon.com.mx/noticia/226133.asesinan-a-juez-en-lima.html>.

<sup>339</sup> La República, *Siete ataques armados contra fiscales y jueces en últimos tres años y medio* [Seven armed attacks against prosecutors and judges in last three and a half years], February 7, 2009. Available [in Spanish] at: [http://www.larepublica.pe/pagina\\_impreso.php?pub=larepublica&anho=2009&mes=02&dia=07&pid=1&sec=15&pag=5](http://www.larepublica.pe/pagina_impreso.php?pub=larepublica&anho=2009&mes=02&dia=07&pid=1&sec=15&pag=5).

<sup>340</sup> El Comercio, *En la puerta de la Fiscalía: asesinaron de tres balazos en el pecho a fiscal en Huancavelica* [Prosecutor in Huancavelica killed at the entrance to Prosecution Service, shot three times in the chest], August 11, 2010. Available [in Spanish] at: <http://elcomercio.pe/peru/621874/noticia-huancavelica-asesinaron-fiscal-puerta-fiscalia>.



2012.<sup>341</sup> In the case of **Venezuela**, the IACHR received information about the assassination of a judge in 2007;<sup>342</sup> in 2008 it received information on the assassination of a prosecutor,<sup>343</sup> and another judge assassinated in 2009.<sup>344</sup> The Commission also received information concerning the 2012 assassination of the Chief Judge of the municipality of Jáuregui, Edixon Alberto Olano Jaimes, committed in that municipality.<sup>345</sup> As a result of this assassination, a decision was reportedly made to set up a special committee charged with investigating this crime. As a result of its investigations, two persons were arrested in connection with the case.<sup>346</sup>

160. The Commission notes that many attacks against justice operators are related to the work they do and are intended to instill fear and bring pressure to bear to undermine their impartiality and Independence. In the case of prosecutors, the purpose of the attacks and intimidation tends to be to get prosecutors to discontinue investigations or to render such investigations ineffective; in the case of judges, the purpose of the attacks is to send a message to the effect that their safety will be at risk if their case rulings are independent and impartial; the assassinations of and threats made against public defenders are sometimes committed because they are identified with the persons they represent, which makes them especially vulnerable.<sup>347</sup>

161. The Commission has observed that in general, the attacks on justice operators tend to increase when they are prosecuting cases of great national importance and involving serious human rights violations. In many instances, the assassinations are preceded by threats made not just against the justice operator but his or her family as well. Many of the threats are in writing, published in pamphlets or sent by e-mail. Other forms

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<sup>341</sup> El Comercio, *Chimbote: fiscal fue asesinado por sicarios esta mañana* [Chimbote: prosecutor murdered by gunmen this morning], April 16, 2012. Available [in Spanish] at: <http://elcomercio.pe/peru/1402377/noticia-chimbote-fiscal-provincial-casma-fue-asesinado-esta-manana>; Perú 21. *Fiscal de Casma fue asesinado de 7 balazos* [Casma prosecutor shot seven times and killed], April 17, 2012. Available [in Spanish] at: <http://peru21.pe/2012/04/17/impres/fiscal-casma-fue-asesinado-7-balazos-2020415>

<sup>342</sup> Diario La Voz, *Mataron a Juez en su camioneta* [Judge killed in his pickup], October 13, 2007. Available [in Spanish] at: <http://www.diariolavoz.net/seccion.asp?pid=18&sid=431&notid=239545>.

<sup>343</sup> COFAVIC, *Venezuela: Los defensores y defensoras de derechos humanos bajo la línea de fuego* [Human rights defenders in the line of fire], March 2009, p. 40. Available [in Spanish] at: [http://cofavic.org/images/Informe%20defensores%20COFAVIC\(2\).pdf](http://cofavic.org/images/Informe%20defensores%20COFAVIC(2).pdf).

<sup>344</sup> El UNIVERSAL, *Investigan si crimen de juez en El Cafetal fue un sicariato* [Investigating whether the killing of a judge in El Cafetal was the work of a hired gunmen], October 3, 2009. Available [in Spanish] at: [http://www.eluniversal.com/2009/10/03/sucgc\\_art\\_investigacion-si-crimen\\_1598005.shtml](http://www.eluniversal.com/2009/10/03/sucgc_art_investigacion-si-crimen_1598005.shtml).

<sup>345</sup> Noticiero Digital, *Asesinan a juez en Táchira* [Judge assassinated in Táchira], August 1, 2012. Available [in Spanish] at: <http://www.noticierodigital.com/2012/08/asesinan-a-juez-en-tachira/>;

<sup>346</sup> Globovisión, *Un abogado estaría implicado en asesinato de juez en Tachira* [An attorney implicated in the assassination of a judge in Tachira], August 4, 2013. Available [in Spanish] at: <http://globovision.com/articulo/un-abogado-estaria-implicado-en-asesinato-de-juez-en-tachira>

<sup>347</sup> Presidential Steering Committee on the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of justice operators in the Americas," February 2013, p. 5.



of harassment are used, such as having strange persons follow the intended victim, taking photographs of the home or car, and illegal searches of offices.

162. In situations such as those described above, which may involve the imminent possibility of irreparable harm to life or personal integrity, the Commission has granted precautionary measures in which it has asked the State to take steps to protect the life and personal integrity of the justice operators at risk of irreparable violation of their rights.

163. For example, on June 28, 2013, the Commission granted precautionary measures to protect the life and personal integrity of Iris Yasmín Barrios Aguilar, Patricia Isabel Bustamante García and Pablo Xitumul de Paz, members of the First High-Risk Criminal Trial Court of Guatemala. The Commission's decision was based on the information supplied by the requesting parties to the effect that the judges on the Court would be in danger because they had served as judges in a number of cases involving organized crime, cases against military personnel alleged to be responsible for serious human rights violations like the "Plan de Sánchez" massacre and the "Dos Erres" massacre, and other such cases. The parties requesting the precautionary measures made specific reference to these justice operators' involvement in the case against Mr. José Efraín Ríos Montt, a case that had been widely publicized in the media and that had been very polarizing in Guatemala. The parties requesting the precautionary measures had asserted that anonymous pamphlets had been circulated to discredit the work of these three judges, claiming that their involvement in the case would pose a "threat to peace and stability in the country." Such insinuations could have serious consequences for their lives and personal safety.

164. The Inter-American Commission has also received information to the effect that the intelligence activities conducted against justice operators pose a serious threat to their safety and privacy. Those intelligence-gathering activities are part of a broader scenario involving threats and attacks perpetrated in retaliation for court decisions that affect the interests of certain illegal groups. For example, in the case of Colombia, the Commission is concerned over the situation that occurred in 2007, when it was revealed that the phone lines of the Supreme Court justices had been tapped. The telephone intercepts had occurred in the wake of an important ruling issued by the Supreme Court's Chamber of Criminal Cassation on July 11, 2007, which held that anyone associated with paramilitary or self-defense groups, regardless of their degree of involvement, would be ineligible for any amnesty or pardon, and their extradition would be allowed; the court also held that, as a general rule, they would be ineligible for public service.<sup>348</sup> Some associate justices on the Court received death threats and were subjected to various forms of harassment,<sup>349</sup> such as the Administrative Security Department's tapping of some 1900

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<sup>348</sup> Supreme Court of Colombia, Chamber of Criminal Cassation, Judgment of July 11, 2007, Justices Yesid Ramírez Bastidas and Julio Enrique Socha Salamanca.

<sup>349</sup> According to the information received, both Associate Justices in charge of the investigation into the so-called "parapolitics", Iván Velásquez and María del Rosario González, have been the targets of death threats and acts of harassment. The Commission requested information from the State concerning the security situation of the two justices and ordered precautionary measures to make the two justices' protection arrangements more transparent and effective. IACHR, *Annual Report 2008*. Chapter IV - Colombia, February 25, 2009, para. 137.

telephone calls to Associate Justice Iván Velásque, and the tapping of calls to then Chief Justice of the Supreme Court Francisco Ricaurte and Justices Sigifredo Espinoza, Jaime Arrubla, María del Rosario González and César Julio Valencia Copete.<sup>350</sup>

165. Given the seriousness of the situation, the IACHR is urging the States to pursue an effective prevention and protection policy with respect to justice operators, which would include swift, thorough and diligent investigations of the threats, harassment, attacks and murders of justice operators and incidents when their privacy is violated by illegally tapping or interception of their phone calls. The Commission believes that one of the essential steps is for the States to compile statistics and create a record of incidents in which justice operators are attacked and/or intimidated, in order to be able to identify patterns and the sources of the threats, and from there offer suitable and effective protective measures.

166. In its *Second Report on the Situation of Human Rights Defenders in the Americas*, the Commission discussed the guidelines that the national mechanisms of protection have to observe. The protection programs should be part of a national human rights plan undertaken as a priority policy in all institutional decision-making bodies, both at the central and local levels. The Commission commends those States that have established protection programs secured by law and premised on the principle that the measures that are best suited and most effective in protecting the beneficiaries must be negotiated in concert with them, and take into consideration their individual circumstances.<sup>351</sup>

167. An assault against a justice operator because of his or her functions is a particularly serious matter, not just because it is assault upon a justice operator's person but also because it has the effect of intimidating and instilling fear, which can spread to other justice operators. The risk is that cases involving human rights violations could go unpunished and the citizenry's confidence in the institutions of the State charged with administering and delivering justice could be undermined.<sup>352</sup>

## **F. Freedom of expression**

168. Freedom of thought and expression is protected under Article IV of the American Declaration and Article 13 of the American Convention. It is a two-dimensional right. The individual dimension of this freedom is the right of every person to seek, impart and receive ideas and information; the collective or social dimension is the right of society

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<sup>350</sup> The IACHR continued to receive information about threats and acts of harassment targeted at Justices Iván Velásquez, María del Rosario González and César Julio Valencia Copete, while a precautionary measure the Commission granted to protect their lives and personal safety was still in effect. Finally, in July 2013, the IACHR lifted the precautionary measures ordered for Justices María del Rosario González and Cesar Julio Valencia Copete when it failed to receive up-to-date information on the threat to them.

<sup>351</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, December 31, de 2011, paras. 481 *et seq.*

<sup>352</sup> Cf., *mutatis mutandi*, I/A Court H.R. *Case of the La Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, paras. 79 to 81.

to seek and receive any information, to know the ideas and thoughts of others and to be well informed.<sup>353</sup>

169. Freedom of expression is the right of *every person*, under conditions of equality and without discrimination of any kind or any grounds. As the case law has held, ownership of the right to freedom of expression cannot be confined to a specific profession or group of persons, or to the realm of freedom of the press.<sup>354</sup> The broad perspective adopted in the American Convention includes public officials and –within this group- justice operators.

170. Freedom of expression is not an absolute right. Article 13(2) of the Convention prohibits prior censorship; however, in exceptional cases, it allows the subsequent imposition of liability to the extent necessary to respect the rights and reputations of others and national security. However such imposition of liability should not be a direct or indirect means to impose censorship. Any subsequent imposition of liability imposed as a result of the exercise of the right to freedom of expression that does not satisfy the requirements set forth in Article 13(2) of the American Convention is a violation of it. Those requirements are as follows: (1) that the limitation is defined in clear and precise terms through a formal and material law; (2) that the limitation is geared to accomplishing the objectives authorized by the American Convention, and (3) that the limitation is strictly necessary in a democratic society and suitable to achieve the end sought and strictly proportional to that end.

171. According to inter-American case law, exercise of the right to freedom of expression by public officials has certain connotations and specific characteristics.<sup>355</sup> The Court has written, for example, that freedom of expression plays a vital role in a democratic society, so much so that it is not only legitimate, but on occasions it is a duty of state authorities to issue statements with regard to matters of public interest. In other words, under certain circumstances, exercise of freedom of expression is not just a right, but a duty as well.<sup>356</sup> In the words of the Court, “[t]he Court has repeatedly insisted on the importance of freedom of expression in any democratic society, particularly in connection

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<sup>353</sup> IACHR, *Annual Report of the Rapporteurship for Freedom of Expression 2009*, December 2009, p. 239. See also, I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 53; I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006. Series C No. 151, para. 75.

<sup>354</sup> I/A Court H.R. *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009 Series C No. 193, para. 114. (where the Court held that “[t]he American Convention guarantees this right to every individual, irrespective of any other consideration; so, such guarantee should not be limited to a given profession or group of individuals. Freedom of expression is an essential element of the freedom of the press, although they are not synonymous and exercise of the first does not condition exercise of the second. The instant case involves a lawyer who claims protection under Article 13 of the Convention.”).

<sup>355</sup> See IACHR, *Report of the Special Rapporteur for Freedom of Expression 2009*, OEA/Ser.L/V/II.Doc. 51, December 30, 2009, Chapter III, paras. 202 et seq.

<sup>356</sup> I/A Court H.R. *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 139; I/A Court H.R. *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 151.

with public-interest matters.[...] Accordingly, making a statement on public-interest matters is not only legitimate but, at times, it is also a duty of the state authorities.”<sup>357</sup>

172. As public officials, judges, prosecutors and public defenders enjoy a right of freedom of expression that is quite broad, as this right is necessary to explain to society, for example, certain aspects of national interest and relevance. However, this right is subject to special restrictions related to the guarantees that justice operators must provide in the cases assigned to them. The United Nations Basic Principles on the Independence of the Judiciary recognize that the members of the judiciary are entitled to freedom of expression, provided that in exercising that right, they “shall always conduct themselves in a manner so as to preserve the dignity of their office and the impartiality and the independence of the judiciary” including “professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.”<sup>358</sup>

173. The general principle is that judges enjoy the right to freedom of expression like other citizens, but this right may be restricted if it affects the *independence and impartiality* that they must have in the cases in which they participate. These principles are recognized in a number of international treaties and statements of principles<sup>359</sup> and are essential to ensuring the proper functioning of a democratic system.<sup>360</sup>

174. Therefore, the analysis to characterize a justice operator’s statements requires a careful examination to check for compliance with the principle of legal reservation, to confirm whether the limitation is to achieve some imperative objectives authorized by the Convention and that the limitation is strictly necessary in a democratic society to achieve the urgent ends sought, that it is suitable to achieving those ends and strictly proportional to the ends sought.

175. Some disciplinary cases in the region are based on charges couched in sweeping terms such as “violating the dignity of the office,” the prohibition “of public intervention” on the part of justice operators, or “the commission of public acts” that

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<sup>357</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

<sup>358</sup> Principle 8 of the United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, August 26 to September 6, 1985, confirmed by the General Assembly in its resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985.

<sup>359</sup> See in this regard, the United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, August 26 to September 6, 1985, confirmed by the General Assembly in its resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985; the Bangalore Principles of Judicial Conduct; the International Covenant on Civil and Political Rights (Article 14); the Statute of the Ibero-American Judge, adopted by the VI Ibero-American Summit of the Chief Justices of the Supreme Courts, held in Santa Cruz de Tenerife, the Canary Islands, Spain, May 23-25, 2001; the American Convention on Human Rights (articles 8, 59 and 71); the European Convention on Human Rights (Article 6), and others.

<sup>360</sup> Cf. Barak, Aharon, *The Judge in a Democracy*, p. 76 (2006).

undermine “national security, public order or public health and morals.” Such charges are so ambiguous that they allow for an excessive margin of discretion and, because they do not comply with the principle of freedom from *ex post facto* law, are used to unduly penalize justice operators’ exercise of free speech.

176. Thus, in examining a case involving the limitation of freedom of expression necessary in a democratic society, in the case of *Kudeshkina v. Russia*, the European Court held that the removal of a judge for having made public statements criticizing the judicial branch’s lack of independence, was a violation of the right to freedom of expression recognized in Article 10 of the European Convention on Human Rights. The Court reasoned that “issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10 [of the European Convention on Human Rights].”<sup>361</sup> While the European Court acknowledged that judges must be particularly observant in those cases where the independence and impartiality of the justice system might be impugned, it also reasoned that the mere fact that a given matter has political implications “is not by itself sufficient to prevent a judge from making any statement on the matter.”<sup>362</sup>

177. The Commission is urging the States to ensure justice operators’ right of free speech through disciplinary regimes that do not unlawfully punish their exercise of that right. Measures must be taken to ensure that both in law and in practice, the authorities charged with conducting disciplinary proceedings conform to the inter-American standards on free speech.

## G. Freedom of association

178. Freedom of association is recognized in Article 16<sup>363</sup> of the American Convention and Article XXII<sup>364</sup> of the American Declaration of the Rights and Duties of Man. The Court has written that Article 16(1) of the Convention establishes that “those who are protected by the Convention not only have the right and freedom to associate freely with other persons, without the interference of the public authorities limiting or obstructing the

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<sup>361</sup> European Court of Human Rights, *Case of Kudeshkina v. Russia*, judgment of February 26, 2009, para. 86.

<sup>362</sup> European Court of Human Rights, *Case of Kudeshkina v. Russia*, judgment of February 26, 2009, para. 95. See also, European Court of Human Rights, *Case of Wille v. Lichtenstein*, judgment of October 28, 1999, in which the Court held that constitutional issues always have political implications, but that element alone should not prevent judges from making any statement on such matters.

<sup>363</sup> “1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.”

<sup>364</sup> “Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social cultural, professional, labor union or other nature.”

exercise of the respective right, which thus represents a right of each individual; but they also enjoy the right and freedom to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose.”<sup>365</sup>

179. The right of association of justice operators has been widely recognized in international instruments. For example, the *Basic Principles on the Independence of the Judiciary* provide that “[j]udges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.”<sup>366</sup> The *Guidelines on the Role of Prosecutors* provide that prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.<sup>367</sup> Also, the *Basic Principles of Public Defense* provide that public defenders have the right to freedom of association.<sup>368</sup>

180. The Commission observes that within the region, recognition of justice operators’ right to freedom of association varies. Some States recognize the right of association and the right to collective bargaining. Haiti, for example, guarantees judges’ freedom of association and their right of assembly, except in the case of political demonstrations. Its laws provide that judges may organize to assert their demands, although their demonstrations are not to disrupt the continuity of the justice service.<sup>369</sup> Honduras, too, recognizes that judges have the right to form associations for the purpose of defending judicial independence, representing their interests and promoting their professional training.<sup>370</sup> Uruguay’s laws provide that the Law on Collective Bargaining in labor relations within the public sector also applies to the Judiciary and to the Court of Administrative Disputes, and thus recognizes the right to collective bargaining. The same law regulates the bargaining table.<sup>371</sup>

181. Having said this, the Commission notes with concern that in some countries the right of association is either prohibited or absolutely restricted. Thus, for example, the Constitution of Venezuela provides that “judges shall not associate amongst themselves”; the Constitution of Peru states that “judges and prosecutors are prohibited

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<sup>365</sup> I/A Court H.R. *Case of Huilca Tecse v. Peru*. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, para. 69. See also, *Case of Cantoral Huamani and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 144.

<sup>366</sup> *Basic Principles on the Independence of the Judiciary*, principle 9.

<sup>367</sup> *Guidelines on the Role of Prosecutors*, Guideline 9. See also, Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the States on the role of Public Prosecution in the criminal justice system. Adopted by the Committee of Ministers on October 6, 2000, at the 724<sup>th</sup> Meeting of Ministers, para. 6.

<sup>368</sup> *Proclama de Principios Básicos de la Defensa Pública* [Statement of the Basic Principles of Public Defense]. First Inter-American Congress of Public Defenders’ Offices, held in San José, Costa Rica, October 23 to 26, 2002. 2. Rights and duties, rights 5. [translation ours].

<sup>369</sup> Cf. August 2, 2007 Law on the Statute of the Judiciary, Articles 54 and 55.

<sup>370</sup> Law of the Judiciary and Judicial Career Service, Article 58.

<sup>371</sup> Cf. Law 18,508, of June 17, 2009, Article 8.

from participating in politics, from forming or joining unions or declaring themselves to be on strike.”<sup>372</sup> In the Commission’s view, such rules could be problematic for justice operators’ freedom of association.

182. The Commission must again make the point that justice operators’ exercise of their right to freedom of association, both nationally and across borders, enables them to collectively defend their rights in the debates surrounding their functions and legal status, while also requiring that their ability to perform their functions independently be safeguarded.<sup>373</sup> Therefore, exercise of this right may be subject to such restrictions as are established by law, have a legitimate purpose and are, ultimately, necessary in a democratic society.<sup>374</sup> As observed in the commentary on the exercise of freedom of expression, while the independence and impartiality that justice operators must have to perform their functions are critical considerations with respect to their participation in a political party, absolute restrictions on this right would be incompatible with the Convention; each restriction must be examined in the context of restrictions that are permissible under inter-American standards.

183. The Commission is therefore urging the States that absolutely or unlawfully prohibit the exercise of this right to eliminate the rules that prevent it from being effectively enjoyed and ensure that, in general, any limitations imposed on this right are consistent with the standards of international law.

## V. SEPARATION FROM OFFICE AND THE DISCIPLINARY SYSTEM

184. Time and time again the Inter-American Court has held that judges must enjoy tenure, which means a right to know that they are secure in their posts and have “reinforced guarantees” of tenure to ensure the necessary independence of the Judicial Branch<sup>375</sup> and justice in the cases over which they preside.<sup>376</sup>

185. The Basic Principles state that “[t]he term of office of judges shall be adequately secured by law”<sup>377</sup> and that “[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”<sup>378</sup> The Basic Principles also state that judges “shall be subject to

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<sup>372</sup> Constitution of Venezuela, Article 256; Constitution of Peru, Article 153.

<sup>373</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, paragraph 45.

<sup>374</sup> I/A Court H.R. *Case of Escher et al. v. Brazil*. Judgment of July 6, 2009. Series C No. 200, para. 173.

<sup>375</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67.

<sup>376</sup> IACHR, *Application to the Inter-American Court of Human Rights in the Case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz (First Court of Administrative Disputes) v. Venezuela*, Case 12.489, November 29, 2006, para. 85.

<sup>377</sup> Cf. Principle 11 of the Basic Principles of the United Nations, *supra* note 65.

<sup>378</sup> Cf. Principle 12 of the Basic Principles of the United Nations, *supra* note 65.

suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.”<sup>379</sup>

186. Therefore, under the applicable international law on the subject of the irremovability of judges, the latter may only be removed under two different types of circumstances: i) circumstances that are commensurate with the guarantee of irremovability and are dictated by the term of office, period of appointment, or mandatory retirement age; and ii) circumstances related to the judge’s fitness for office, i.e., through the disciplinary system.<sup>380</sup> In this report, the Commission has already examined the first set of circumstances. In this section, the Commission will look at separation via the disciplinary system.

187. The Court has analyzed the arbitrary separation of judges in office in light of Article 8.1 in conjunction with Article 23.1.c of American Convention. In this regard, the Court states:

The Court deems that: i) respect for judicial guarantees implies respect for the independence of the judiciary), ii) the dimensions of judicial independence results in the individual right of the judge that his removal from office obeys solely to the grounds permitted, either through a process that meets fair trial or because the term or period of appointment has been fulfilled, and iii) when the tenure of judges in office is arbitrarily affected, the right to judicial independence enshrined in Article 8.1 of the American Convention is also affected, in conjunction with the right to enter and remain on general terms of equality in public office, established in Article 23.1 of the American Convention.<sup>381</sup>

188. The Court has written that the guarantee that judges enjoy that they shall not be subject to discretionary removal, means that disciplinary proceedings involving judges must observe the guarantees of due process and offer judges undergoing a disciplinary process an effective recourse.<sup>382</sup> The guarantees of due process are a corollary of the States’ obligations with respect to the independence of the judiciary, and follow from the effect that disciplinary action can have on a judge’s independence.<sup>383</sup> Therefore,

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<sup>379</sup> Principle 18 of the UN’s *Basic Principles on the Independence of the Judiciary* (1985).

<sup>380</sup> IACHR, *Final written observations, Case 12,600 Quintana Coello et al. (Justices of the Supreme Court) v. Ecuador*, March 4, 2013. See also the expert paper by Param Cumaraswamy in Case 12,600 *Hugo Quintana Coello et al.* with respect to Ecuador, January 29, 2013.

<sup>381</sup> I/A Court H.R. *Case of the Supreme Court of Justice (Quintana Coello et al.. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 197, para. 155* (translation by the Commission).

<sup>382</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 147.*

<sup>383</sup> In its petition and case system, the Commission has written that according to the case law of the Inter-American Court, freedom from *ex post facto* laws and the guarantees of due process apply not only to criminal matters, but also to administrative sanctions. IACHR, Case 12,600, *Hugo Quintana Coello et al (Supreme Court of Justice) with respect to Ecuador (Merits)*, August 2, 2011, para. 100.



those guarantees “apply regardless of the name given to the domestic proceedings whereby judges are relieved of duties, be it termination, dismissal, or removal.”<sup>384</sup> A number of international instruments and regional associations have made specific reference to the guarantees that judges enjoy in disciplinary proceedings.<sup>385</sup>

189. The Commission’s view is that like judges, prosecutors and public defenders should be given a certain degree of tenure or fixed tenure in their positions because of the fundamental role they play in the justice system. The Commission has already had occasion to observe that the stability of prosecutors in their positions is indispensable to guarantee their independence from political changes or changes in government.<sup>386</sup> That stability, ensured by a proper appointment system and a disciplinary system that ensures all the applicable guarantees, will prevent a prosecutor from being

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<sup>384</sup> IACHR, *Case 12,600, Hugo Quintana Coello et al. (Supreme Court of Justice) with respect to Ecuador (Merits)*, August 2, 2011, para. 108.

<sup>385</sup> See, in this regard, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provide that “[j]udicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings” and “[t]he procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.” Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003. See Principle A, para. 4 (q) and (r). The Statute of the Ibero-American Judge provides that proceedings to remove judges must “observe due process and, in particular, the right to a hearing, the right of defense, the right to adversarial proceedings and the right to the appropriate legal remedies.” Statute of the Ibero-American Judge, approved at the VI Ibero-American Summit of Chief Justices of the Supreme Courts, held in Santa Cruz de Tenerife, the Canary Islands, Spain, May 23-25, 2001, Article 14 (translation ours); the Beijing Statement of Principles of the Independence of the Judiciary provide that “[i]n any event, the judge who is sought to be removed must have the right to a fair hearing.” Principle 26 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, adopted in Beijing by the Chief Justices of the Supreme Courts of the LAWASIA Region and by other Judges of Asia and the Pacific, 1995, and endorsed by the LAWASIA Council in 2001. The Commonwealth (Latimer House) Principles on the three branches of government provide that “[i]n cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.” See Annex, Parliamentary Supremacy, Judicial Independence, VI. Accountability Mechanisms. Commonwealth (Latimer House) Principles on the Three Branches of Government, Parliamentary Supremacy and Judicial Independence, adopted on June 19, 1998, at a meeting of the Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates’ and Judges’ Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association. The European Charter on the Statute for Judge provides that: “The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision [...] pronouncing a sanction [...] is open to an appeal to a higher judicial authority.” European Charter on the Statute for Judges and Explanatory Memorandum (DAJ/DOC)98 drawn up by a multilateral meeting on the Statute for judges in Europe, organized by the Council of Europe and held on July 8 and 10, 1998.

<sup>386</sup> IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L./V/II. Doc. 54, December 30, 2009, para. 229.

arbitrarily separated from service for having taken an unpopular decision.<sup>387</sup> Similarly, the stability of public defenders in the cases they are defending is a corollary of the State's obligation to ensure the right to adequate defense in a case in all its stages.<sup>388</sup>

190. Given the risks posed by unfettered removal of justice operators within the justice system, and the nature of the sanctions imposed in disciplinary proceedings, any proceedings conducted to discipline them because of their conduct must observe the principle of freedom from *ex facto law* and the guarantees of due process. This conclusion is consistent with the relevant instruments of international law on this subject. Both the United Nations Guidelines on the Role of Prosecutors and the Venice Commission have provided that disciplinary systems for prosecutors should afford guarantees, such as the principle of freedom from *ex post facto laws*, the right to a prior hearing and review of the decision to discipline.<sup>389</sup> Under the United Nations Basic Principles on the Role of Lawyers, public defenders shall have, among other guarantees, "the right to a fair hearing," "shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court" and shall be entitled to "an independent judicial review."<sup>390</sup>

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<sup>387</sup> Cf. European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 18.

<sup>388</sup> I/A Court H.R. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009, para. 29.

<sup>389</sup> Guideline 21 provides that: "Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review." For its part, the Venice Commission has observed that "in disciplinary cases, disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. An appeal to a court against disciplinary sanctions should be available." European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 52.

<sup>390</sup> Here, the *Basic Principles on the Role of Lawyers*, approved by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, provide that:

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

Continues...

191. The Commission will now turn its attention to the content of the guarantees that must be observed in disciplinary proceedings.

**A. The independence, competence and impartiality of the disciplinary authority**

192. The laws of the States differ with respect to the nature of the authorities charged with presiding over disciplinary proceedings. In some States, in cases involving judges, the Supreme Court retains government functions, which it shares with a Council of the Judiciary;<sup>391</sup> other States have created a Council of the Judiciary functioning as an autonomous organ of government with disciplinary authorities and, in some cases, independent of the organs of the Judicial Branch.<sup>392</sup> Other States have created a Judicial Commission which, in partnership with the Government, performs functions related to appointments and disciplinary matters.<sup>393</sup> In a number of the countries of the region, disciplinary proceedings involving members of the high courts are conducted by members of parliament through so-called “impeachment.”

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...continuation

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

<sup>391</sup> Examples include the Constitution of Costa Rica, Article 156, and Law 7333: the Organic Law of the Judiciary, Articles 48, 59, 60 and 67; and the Constitution of El Salvador, Article 187, which creates the National Council of the Judiciary as an independent institution; under Article 182, however, the Supreme Court remains vested with various governance functions, such as appointments and disciplinary action.

<sup>392</sup> Among the countries that have created a Council of the Judiciary are the following: Argentina, which in Article 114 of its Constitution establishes a Council of the Judiciary as a permanent body of the Judicial Branch; Bolivia, which in Article 193 of its Constitution creates the Council of the Judiciary as a body charged with the disciplinary system in the courts of ordinary jurisdiction, the agro-environmental courts and the courts of specialized jurisdiction such as control and auditing of administrative and financial management, and policy-making; Brazil, which in Article 103-B of its Constitution creates the National Council of Justice; Canada, whose Judges Act created the Canadian Judicial Council as a federal body whose mission is to promote efficiency, uniformity and responsibility within the judiciary, to improve the quality of the justice service in Canada’s high courts and to review any complaint against the judges serving on those court (Cf. Judges Act, Articles 59 and 60); Colombia, which in Article 254 of its Constitution provides for the creation of a Superior Council of the Judiciary; Honduras, which has a Council of the Judiciary and Judicial Career Service as “a constitutional organ of the Judicial Branch that enjoys autonomy and operational and administrative independence.” Law on the Council of the Judiciary and Judicial Career Service, December 2011, Article 2; Paraguay, which in Article 262 of its Constitution created the Council of the Judiciary as an autonomous organ; Peru, where Article 150 of the Constitution creates the National Council of the Judiciary as an independent organ charged with selection and appointment of judges and prosecutors, except for those elected by popular vote; and the Dominican Republic, where Article 156 of its Constitution creates the Council of the Judicial Branch as a “permanent organ of administration and discipline in the Judicial Branch.”

<sup>393</sup> Barbados, for example, which creates and regulates the Judicial and Legal Service Commission in articles 89 and 92 to 95 of its Constitution; Jamaica, which creates and regulates the Judicial Service Commission in Articles 111 to 113 of its Constitution, and Trinidad and Tobago, which creates the Legal Service Commission for Trinidad and Tobago in Article 110 of its Constitution.

193. In the case of prosecutors, in a number of countries of the region disciplinary authority is vested in the Office of the Attorney General<sup>394</sup> or the Prosecution Service's internal disciplinary body.<sup>395</sup> There are States where this authority is vested in the Supreme Court,<sup>396</sup> an independent entity in the Judicial Branch<sup>397</sup> or in the Administration, with advisory assistance from the Judicial and Legal Services Commission.<sup>398</sup> In the case of public defenders, there are States where the disciplinary system is applied by the Defender General directly,<sup>399</sup> or by administrative units within the Public Defender Service.<sup>400</sup> In some States, however, the disciplinary system is administered by other organs of government, such as the Councils of the Judiciary,<sup>401</sup> the Supreme Courts<sup>402</sup> or even by the Office of the Attorney General of the Republic.<sup>403</sup> In some States, cases involving disciplinary measures not as serious as removal or dismissal can be handled by the Defender General. However, in those cases that might call for stiffer disciplinary measures, such as removal, the file must be referred to a Trial Court.<sup>404</sup>

194. While the picture in the region varies from country to country, the authorities that handle disciplinary proceedings must always ensure the guarantees of independence, competence and impartiality, as this is a materially jurisdictional function

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<sup>394</sup> For example, Constitution of Chile, Article 91; Nicaragua's Law 346: Organic Law of the Public Prosecution Service. Approved on May 2, 2000. Published in *La Gaceta* No. 196 of October 17, 2000; Venezuela's Organic Law on the Public Prosecution Service, 2007, Article 25.

<sup>395</sup> For example, Law 1 of January 6, 2009, which institutes the Career Service within the Public Prosecution Service and repeals provisions of Panama's Judicial Code, articles 62 and 63.

<sup>396</sup> For example, Law 7333, Organic Law of the Judiciary, Costa Rica, Article 182.

<sup>397</sup> For example, Law 1562 of 2000, Organic Law of the Public Prosecution Service of Paraguay, Article 83.

<sup>398</sup> For example, Constitution of Antigua y Barbuda, Article 103.

<sup>399</sup> Venezuela. Organic Law of the Public Defense, published in *Gaceta Oficial* No.379965, August 5, 2004, article 29.19

<sup>400</sup> Thus, for example, according to what Chile's Public Criminal Defender Service told the AIDEF, discipline is handled through national and regional legal advisory services units.

<sup>401</sup> Thus, for example, according to what Colombia's Public Defender Service told the Inter-American Association of Public Defender Services (AIDEF), the competent organ to conduct a disciplinary inquiry in cases involving public defenders is the Council of the Judiciary. Also, in Ecuador, the public defender service is an autonomous organ of the Judicial Service, which means that the competent body for disciplinary cases is the Council of the Judiciary.

<sup>402</sup> Thus, for example, according to what Nicaragua's Public Defender Service told the Inter-American Association of Public Defender Services (AIDEF), the disciplinary system is enforced by the National Council of Judicial Administration and Career Service of the Supreme Court of Justice, composed of the Chief Justice and three associate justices.

<sup>403</sup> According to what El Salvador told the Inter-American Association of Public Defender Services (AIDEF), disciplinary matters involving public defenders would be handled by the human resources unit of the Office of the Attorney General of the Republic, following the guidelines established in the Organic Law of the Attorney General's Office and its regulations.

<sup>404</sup> For example, in Argentina, Article 16 of the Organic Law of the Public Prosecution Service (Law 24.946).

and a condition *sine qua non* of due process, regardless of whether the disciplinary authority is a formal court.

195. In any proceeding, every person has the right to a hearing by a competent, independent and impartial judge. This is an essential element of due process recognized in Article 8(1) of the American Convention and Article XXVI of the American Declaration of the Rights and Duties of Man. Those guarantees must be observed by any organ of the State that exercises materially jurisdictional functions, in other words, by any public authority, be it administrative, legislative or judicial, whose decisions determine what a person's rights or interests are.<sup>405</sup>

196. In the specific case of the guarantee of independence, the Inter-American Court has written that the following guarantees are derived from judicial independence: an adequate appointment process, tenure in the position, and the guarantee against external pressures.<sup>406</sup> Those guarantees must materialize in the form of a disciplinary system in which the authorities charged with taking cognizance of disciplinary matters and determining the disciplinary measure called for are not subjected to "possible undue limitations in the exercise of their functions";<sup>407</sup> the system must also inspire confidence in the justice operator facing a disciplinary proceeding. The guarantee of competence means the right to be judged by the respective authorities according to pre-established procedures, as a means to ensure that the State does not invent authorities that will not adhere to the duly established procedural rules and that serve in place of the authority in which that competence is normally vested.<sup>408</sup> This requirement is met, for example, when the disciplinary competence of the authority so empowered is based on a norm that is the product of a law, or originates from a pre-existing statute enacted by the Constitutional Assembly.<sup>409</sup>

197. For a disciplinary authority to have institutional independence, other branches or organs of government cannot interfere in the disciplinary proceedings, so that the disciplinary authority is able to act independently. Thus, for example, in those models in which the institutional independence of the organ charged with enforcing the disciplinary regime is secured by law, so that it is not attached to or hierarchically dependent on any other authority, either operationally or in terms of budget, the guarantee of independence is reinforced. This is obvious in those States that have a Council

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<sup>405</sup> I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

<sup>406</sup> Cf. I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 70; and I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 98.

<sup>407</sup> I/A Court H.R. *Case of Apitz Barbera et al. («First Court of Administrative Disputes») v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 55.

<sup>408</sup> I/A Court H.R. *Case of Apitz Barbera et al. («First Court of Administrative Disputes») v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 50.

<sup>409</sup> I/A Court H.R. *Case of Apitz Barbera et al. («First Court of Administrative Disputes») v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 53.

of the Judiciary with adequate guarantees of its own independence to take cognizance of disciplinary proceedings involving judges.

198. However, in some institutions of justice, justice operators do not have institutional independence, and disciplinary control is hierarchically administered. In principle, a hierarchically structured disciplinary system does not *per se* pose a problem in terms of guaranteeing independence in the disciplinary proceedings that justice operators may face. However, when the Attorney General answers to the Executive Branch or the Public Defender Service answers to the judicial branch or to the Prosecution Service, and they are the authorities who can exercise pressure on the authority vested with disciplinary oversight, the threats to independence increase. Hence, in situations such as those described above, the disciplinary proceeding must adhere to the principle of freedom from *ex post facto* law and the right of defense, and the disciplinary authority must take care to ensure that it has informed the justice operator facing disciplinary measures of the grounds for the disciplinary action, among other guarantees of due process. However, in the exercise of this materially jurisdictional function, the disciplinary authority must also have guarantees to ensure its independence in the performance of its functions.

199. For example it is important that the Prosecutor General who exercises disciplinary functions over other prosecutors is not subject to removal at the discretion of the executive branch, in retaliation for his or her refusal to remove a prosecutor, even when the prosecution service is under the executive branch. This is very important when the prosecution service conducts investigations targeting the executive branch itself. In those States where the Public Defender Service is under the Prosecution Service, any disciplinary control exercised by the Prosecutor General over members of the public defender service because of opposing interests in the outcome of a specific case, can become a problem in terms of guaranteeing independence. The Commission is therefore recommending that control be exercised by an independent authority or by someone who is a member of the public defender service.

200. The guarantee of the disciplinary authority's impartiality requires that said authority approach the facts of the case objectively, without any preconceived notions or bias, and that it offer sufficient objective guarantees to dispel any doubt that the accused or the community might harbor with respect to the absence of impartiality.<sup>410</sup> The European Court has written that personal or subjective impartiality is to be presumed unless there is proof to the contrary.<sup>411</sup> For its part, the so-called objective approach consists of determining whether the authority that performed the jurisdictional functions

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<sup>410</sup> I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") V. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56; *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, para. 73.

<sup>411</sup> Cf. ECHR, *Case of Piersack vs. Belgium*, Judgment of 1 October 1982, parrs. 30-32; *Case of Dakaras v. Lithuania*, no. 42095/98 (Sect. 3) (bil.), ECHR 2000-X – (10.10.00), § 30.

offered guarantees sufficient to preclude any legitimate doubt or suspicions as to the authority's prejudice or bias.<sup>412</sup>

201. There are a number of resolutions adopted by international bodies that have found that the principle of impartiality was violated in disciplinary proceedings conducted to dismiss judges. On its visit to the Democratic Republic of the Congo, the United Nations Human Rights Committee concluded that the principle of impartiality had been violated when, before a case challenging the dismissals of judges had even been heard, the Chief Justice of the Supreme Court publicly declared his support for the judges' dismissal, which had been done by Presidential Decree.<sup>413</sup> In the case of *Harabin v. Slovakia* the European Court of Human Rights held that the guarantee of impartiality had been violated when a court that applied a disciplinary measure had among its members judges who had been excluded from earlier cases involving the applicant on the grounds of their lack of impartiality and in respect of whose alleged lack of impartiality the Constitutional Court failed to convincingly dissipate doubts which could be held to be objectively justified.<sup>414</sup> Likewise, in the case of *Olújić v. Croatia* the European Court held that the guarantee of impartiality had been violated by the fact that certain judges on the National Judicial Council made public statements against a judge facing disciplinary proceedings, such as the fact that they had voted against the applicant's appointment; that he had engaged in indecent activities in which he had used his personal influence and contacts and that he had neither experience nor knowledge.<sup>415</sup> In the *Case of Apitz Barbera et al. (First Court of Administrative Disputes)*, the Inter-American Court found that the guarantee of impartiality was affected in a case involving the dismissal of judges because the disciplinary system did not allow judges to be challenged; judges could only disqualify themselves. The Inter-American Court held that the State had an obligation to guarantee the disciplinary body's impartiality by allowing, *inter alia*, the members of the disciplinary body to be challenged.<sup>416</sup>

202. Given these considerations, the IACHR is concerned that political control of justice operators' activities based on discretionary and politically motivated criteria is, by its very nature, inimical to the guarantees of independence and impartiality that, under international law, must be observed in disciplinary proceedings. Here, the Commission must point out that the disciplinary control exercised by legislative bodies in "impeachment" proceedings poses a threat to the guarantees of independence and impartiality. States that vest their legislatures with that authority must ascertain, on a case-by-case basis, whether that political body affords the necessary guarantees to

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<sup>412</sup> Cf. *Piersack v. Belgium*, Judgement of 1 October 1982, Series A no. 53, and *De Cubber v. Belgium*, Judgment of 26 October 1984, Series A no. 86.

<sup>413</sup> United Nations. Human Rights Committee. Human Rights Committee. *Communication No. 933/2000: Democratic Republic of the Congo*, CCPR/C/78/D/933/2000, September 19, 2003.

<sup>414</sup> Cf. ECHR, *Harabin v. Slovakia*, judgement of 20 November 2012 (Sect. 3) (*Application no. 58688/11*).

<sup>415</sup> Cf. ECHR, *Olújić v. Croatia*, judgement of 5 February 2009 (Sect.1) (*Application no. 22330/05*).

<sup>416</sup> I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, paras. 59-67, 253

exercise the kind of legal oversight that does not compromise the principle of judicial independence.<sup>417</sup>

203. A number of countries of the region exclude members of the high courts from the judicial career service; their constitutions vest the Legislative Branch with oversight authority. The following countries' constitutions contain "impeachment" clauses: Argentina; Bolivia; Chile; Colombia; Mexico; Panama; Paraguay; Peru; and Uruguay. In States like these, apart from the threat to the independence of the judiciary by the fact that justice operators can be disciplined by a branch of government that is essentially political in nature, many of the grounds for impeachment are stated in broad and vague language and may become problematic for observance of the principle of freedom from *ex post facto* law. The grounds include such things as "poor performance of functions",<sup>418</sup> "notable dereliction of duty,"<sup>419</sup> "crimes committed in office or in the exercise of one's functions,"<sup>420</sup> "crimes of responsibility,"<sup>421</sup> "Treason, Bribery, or other high Crimes and Misdemeanors,"<sup>422</sup> "acts performed in the performance of one's function that are detrimental to the functioning of government,"<sup>423</sup> "the commission of common crimes"<sup>424</sup> or "serious crimes,"<sup>425</sup> "a violation of the Constitution"<sup>426</sup> or "when there are constitutional grounds" or "conduct unbecoming the office."<sup>427</sup> In some States where impeachment is allowed, the right to be heard and to exercise an adequate defense are not guaranteed, nor is the right to a review of the decision.

204. Apart from the fact that impeachment proceedings do not guarantee the principle of freedom from *ex post facto* law and do not afford the guarantees of due process, vesting the legislative branch with the authority to remove justice operators from their posts is at variance with the guarantee of independence that justice operators must have, without having to fear disciplinary action by other branches of government. The Commission therefore considers that because impeachment represents such a threat, in

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<sup>417</sup> IACHR, *Final observations in Case 12,597 Camba Campos et al. (Associate Justices on the Constitutional Court) v. Ecuador*, para. 20. Given how important it is to reduce the influence that political organs of government have in determining the membership of the Councils of the Judiciary and the need to ensure the necessary level of judicial independence. United Nations, Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 60

<sup>418</sup> Cf. the Constitution of Argentina, Article 53; the Constitution of Paraguay, Article 225.

<sup>419</sup> For example, Article 52.2.c) of the Constitution of Chile.

<sup>420</sup> For example, Article 53 of the Constitution of Argentina; Articles 159 and 160 of the Constitution of Bolivia; Article 225 of the Constitution of Paraguay, and Article 99 of the Constitution of Peru.

<sup>421</sup> For example, the Constitution of Brazil, Article 52.

<sup>422</sup> For example, the Constitution of the United States, Article II.4.

<sup>423</sup> For example, the Constitution of Panama, Article 160.

<sup>424</sup> For example, the Constitution of Paraguay Article 225.

<sup>425</sup> For example, the Constitution of Uruguay, Articles 93 and 102.

<sup>426</sup> For example, the Constitution of Uruguay, Article 93.

<sup>427</sup> For example, the Constitution of Colombia, Articles 175 and 178.



those States where it is permitted there must be assurances that the oversight will not be political but rather juridical and based on grounds that comply with the principle of freedom from *ex post facto* laws and procedures that afford the necessary guarantees, including review of the decision and measures to prevent it from being used for political, social or economic ends.

205. The Commission is of the view that the use of impeachment in the case of justice operators should be gradually eliminated in the region, as impeachment poses a significant threat to judicial independence. Historically speaking, impeachment has been used as a tool in some States, whereby the legislature or parliament exercises control, especially of the highest courts, at times when the courts are deciding cases of enormous national import, such as the human rights violations committed by heads of state or the constitutionality of acts taken by the executive or legislative branch. The parties in power, or ruling parties, should not be in a position to affect justice operators' independence.

## **B. Principle of freedom from *ex post facto* laws**

206. The principle of freedom from *ex post facto* laws, or principle of legality, is recognized in Article 9 of the American Convention and is one of the pre-eminent principles governing the conduct of all organs of the State in their respective areas of competence, particularly in the exercise of punitive authority.<sup>428</sup> By virtue of the principle of legality, the definition of an act as unlawful and the determination of its legal effects must precede the conduct of the subject regarded as the offender.<sup>429</sup> The principle requires a clear definition of the punishable conduct and its distinctive elements, so as to distinguish that conduct from non-punishable behaviors.<sup>430</sup>

207. In the specific case of disciplinary proceedings, the Commission has underscored the fact that there must be "clear rules on the grounds and procedure for removing judges from office;"<sup>431</sup> "[i]n addition to fueling doubts about the independence of the judiciary," the absence of such rules "can lead to arbitrary abuses of power, with direct repercussions for the rights of due process and of freedom from *ex post facto* laws."<sup>432</sup> Given the importance of the principle of freedom from *ex post facto* laws in

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<sup>428</sup> I/A Court H.R. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111. Para. 176. Citing: I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 107.

<sup>429</sup> I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 106. Citing. *Eur. Court H.R., Ezelin judgement of 26 April 1991, Series A no. 202*, para. 45; and *Eur. Court H.R. Müller and Others, judgement of 24 May 1988, Serie A no. 133*, para. 29.

<sup>430</sup> Cf. I/A Court H.R. *Case of Usón Ramírez v Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55 and Cf. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 105-107.

<sup>431</sup> IACHR, *Case 12,600, Hugo Quintana Coello et al. (Supreme Court) with respect to Ecuador (Merits)*, August 2, 2011, para. 95.

<sup>432</sup> IACHR, *Case 12,600, Hugo Quintana Coello et al. (Supreme Court) with respect to Ecuador (Merits)*, August 2, 2011, para. 95.

proceedings in which a judge can be removed from his or her post, international law has set certain requirements that disciplinary proceedings must meet.

208. The law must give detailed guidance on the infractions by judges that trigger disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.<sup>433</sup> In *Maestri v. Italy*, the European Court wrote that the principle of legality requires not only that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>434</sup> As the Inter-American Court has held, “[i]n the disciplinary sphere, it is essential to indicate the violation precisely and to submit arguments that allow it to be concluded that the comments provide sufficient grounds to justify removing a judge from a post.”<sup>435</sup>

209. The *jurisprudence constante* of the Inter-American Court has been that grounds for sanctions must be previously established in law, both from the formal and from the material standpoint, and stated as clearly and precisely as possible.<sup>436</sup> The Court has held that vague or ambiguous provisions that give broad discretionary powers to the authorities are incompatible with the American Convention, because they can be used as the basis for potentially arbitrary acts that are tantamount to prior censorship or that establish disproportionate liabilities for the expression of protected speech.<sup>437</sup>

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<sup>433</sup> United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, *Leandro Despouy*, A/HRC/11/41, March 24, 2009, para. 57. Also, the *Universal Charter of the Judge* provides that “Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.” Article 11 of the *Universal Charter of the Judge*, unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999.

<sup>434</sup> ECHR. *Case of Maestri v. Italy (Application no. 3974/98)*. Judgment. Strasbourg, 17 February 2004, p. 30.

<sup>435</sup> I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 120.

<sup>436</sup> I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*. Advisory Opinion OC-5/85. Series A No. 5, paras. 39-40; I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 79; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 120; I/A Court H.R., *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 117; IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title IV. OEA/Ser. L/V/II.88. doc. 9 rev., February 17, 1995; IACHR. Report No. 11/96. Case No. 11,230. *Francisco Martorell*. Chile. May 3, 1996, para. 55; IACHR. Arguments to the Inter-American Court of Human Rights in the case of *Ricardo Canese v. Paraguay*. Transcribed at: I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 72. a).

<sup>437</sup> See, IACHR, *Report of the Office of the Special Rapporteur for Freedom of Expression 2009*, OEA/Ser.L/V/II.Doc. 51, December 30, 2009, Chapter III, para. 70.

210. The greater the restriction on a human right, the more precise and clear the provisions establishing that restriction must be.<sup>438</sup> Thus, the limitations imposed under criminal law are subjected to the strictest test of legality, and must therefore comply with the requirements established in Article 9 of the Convention,<sup>439</sup> under which “[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed.” The same is true with the restrictions imposed via administrative disciplinary proceedings, particularly when they can lead to serious disciplinary measures such as dismissal. The Inter-American Court has written that Article 9 applies to such proceedings since, like criminal penalties, administrative disciplinary measures are an expression of the State’s punitive authority and can seriously harm or alter a person’s rights or deprive said person of his or her rights.<sup>440</sup>

211. Laws that establish administrative disciplinary measures such as dismissal must be subjected to the strictest test of legality. Such laws not only provide for extremely serious penalties and curtail the exercise of rights, but also create an exception to the principle of judicial stability and can compromise the principles of judicial independence and autonomy.

212. For their independence and impartiality to be guaranteed, judges must enjoy tenure in their posts so long as their conduct is above reproach. These are the underlying principles of the separation of powers and of the judicial branch’s independence and autonomy. The United Nations Special Rapporteur on the Independence of Judges and Lawyers wrote that 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.”<sup>441</sup> Principle 12 of the *Basic Principles on the Independence of the Judiciary* provides that: “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

213. From this standpoint, the grounds for removal of judges established by constitutional law may be set out in more or less general and abstract terms, given the nature of constitutional clauses. However, when embodied in a disciplinary system, those constitutional clauses must be restated in very precise terms that clearly establish what the prohibited behaviors are.<sup>442</sup> As the Inter-American Court wrote in its judgment on a case in

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<sup>438</sup> Cf. I/A Court H.R. *Case of Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, para. 59 *et seq.*

<sup>439</sup> Cf. I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 105-108.

<sup>440</sup> Cf. I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 106 and 108.

<sup>441</sup> United Nations, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, March 24, 2009, para. 57.

<sup>442</sup> Cf. I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55.

which the principle of strict legality also should have been applied, this means establishing a clear definition of the punishable conduct and its elements, so as to distinguish that conduct from non-punishable behaviors.<sup>443</sup> This is essential to enable judges to steer their behavior according to an established legal system.<sup>444</sup> Vague and broad disciplinary systems that give an unacceptable margin of discretion to the authorities charged with conducting proceedings in which magistrates and judges are tried, are incompatible with the American Convention.<sup>445</sup> The United Nations Special Rapporteur on the Independence of Judges and Lawyers has written that “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.”<sup>446</sup>

214. One of the main problems the Commission has observed in the region is that some grounds for disciplinary action are stated in such broad and ambiguous terms that the authorities in charge of the proceedings can interpret them as they see fit. The Commission observes that in the case of judges, for example, there are grounds such as “offending the dignity of the Judicial Branch”; “making disrespectful remarks”; “performing highly immoral acts during office hours” or “engaging in bad behavior or misconduct” or “any other activity that constitutes inappropriate personal or professional conduct.” In the case of prosecutors and public defenders, some laws list the following as serious misconduct: “flagrantly immoral acts,” “indecent acts” or “offending one’s superiors,” “violating or harming public ethics and administrative morality,” “promoting or inducing anarchy,” or “disorderly or improper conduct that undermines the institution’s prestige.” Such grounds create uncertainty and unpredictability as to the conduct being disciplined and are contrary to the principle of legality.

215. Apart from the vague and ambiguous grounds that the Commission found, some disciplinary systems establish grounds for disciplinary action that unduly restrict the justice operators’ rights. The Commission notes, for example, that in a number of States, “supporting, organizing or being an activist in work stoppages in the justice service” or making statements concerning “acts of public interest” are counted as serious misconduct that can result in dismissal. Such grounds for disciplinary action may violate the justice operators’ right to freedom of association and freedom of expression (see *supra* paras. 168-183).

216. The Commission must again make the point that under international law the grounds for disciplinary investigations and sanctions imposed on a judge should never

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<sup>443</sup> Cf. I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55 and Cf. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 105-107.

<sup>444</sup> Cf. I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 106 and 108.

<sup>445</sup> Cf. I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, paras. 43 and 44.

<sup>446</sup> United Nations, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, March 24, 2009, para. 57.

be a legal opinion or judgment he or she wrote in a decision.<sup>447</sup> It is important to understand that there are, on the one hand, the remedies of appeal, cassation, review, removal of cases to a higher court or the like, which are aimed at verifying that a lower court's decisions are correct; but on the other, there is disciplinary oversight, which is intended to assess the conduct, suitability, and performance of the judge as a public official.<sup>448</sup> The distinction between these two types of procedure is essential to guaranteeing independence, such that a superior's disagreement with an interpretation must, under no circumstances, become grounds for seeking disciplinary measures.

217. Under international law, the penalty of suspension or removal must be applied only in the case of the most serious misconduct. As the Council of Europe recommended with respect to disciplinary offences, the disciplinary measures should become stricter as the seriousness of the offence increases, and can include removal of cases from a judge, assigning the judge other tasks, economic sanctions and suspension.<sup>449</sup> In keeping with the principle of freedom from *ex post facto* laws, the Commission must again point out that the disciplinary system must be established by pre-existing law and be predictable as regards the procedures to be followed and the authorities in charge of its enforcement.<sup>450</sup> In the case of *Kudeshkina v. Russia*, the European Court held, for example, that the removal of a judge for criticizing the judiciary's lack of independence "was undoubtedly a severe penalty [...]. Moreover, it could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of judicial office."<sup>451</sup>

218. Summarizing, a disciplinary system must be compatible with the standards of international law as regards the principle of freedom from *ex post facto* laws both in the grounds for disciplinary action, in the penalties applied and the procedure followed. Under its petition and case system, the Commission has held that the absence of clear rules on the grounds for and procedure followed when removing judges from office can lead to abuses of power, with direct repercussions for the rights of due process and freedom from *ex post facto* laws, all in violation of the American Convention.<sup>452</sup>

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<sup>447</sup> IACHR. Second Report on the Situation of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 66, December 31, 2011, para. 376. See also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003, Principle A, numeral 4, para. n (2).

<sup>448</sup> Cf. I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 86.

<sup>449</sup> Council of Europe. Recommendation No. R (94) 12 of the Committee of Ministers to the States on the Independence, Efficiency and Role of Judges, adopted October 13, 1994, at the 518th meeting of Ministers' Deputies, principle VI.1.

<sup>450</sup> I/ACHR, *Case 12.600 Hugo Quintana Coello et Al. (Supreme Court of Justice) respect Ecuador (Merits)*, August 2, 2011, paragraph. 100.

<sup>451</sup> *Case of Kudeshkina v. Russia*, Judgement of February 26, 2009, para. 98.

<sup>452</sup> IACHR, *Case 12,600. Hugo Quintana Coello et al. (Supreme Court) with respect to Ecuador (Merits)*, August 2, 2011, para. 95.

### C. Adequate defense

219. The Inter-American Court has written that under Article 8 of the Convention, the right to an adequate defense is part of due process and for that right to be observed, a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants<sup>453</sup> and must be fully informed of the charges against him.<sup>454</sup>

220. In the specific case of disciplinary proceedings against justice operators, various instruments of international law uphold justice operators' right to be heard in disciplinary proceedings and to exercise their right of defense. In keeping with the *Basic Principles*, the Inter-American Court has written that the authority conducting the disciplinary proceeding must conduct itself according to the procedure established for the purpose and allow the justice operator to exercise his or her right of defense.<sup>455</sup> The Venice Commission has recognized that prosecutors are entitled to be heard in adversarial proceedings.<sup>456</sup> The *Basic Principles on the Role of Lawyers*, which also apply to public defenders, provide that "[c]harges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice."<sup>457</sup>

221. As for the content of this right, the European Court has written that "the judge whose office is at stake must be afforded a reasonable opportunity to present his or her case - including his or her evidence - under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the authorities bringing those proceedings against a judge."<sup>458</sup> Likewise, in the case of the *Constitutional Court v. Peru*, the Inter-American Court held that some of the factors that need to be examined to determine whether dismissed judges have been given an opportunity to defend themselves include the question of whether they had complete and timely knowledge of the charges filed them, whether they had proper access to the probative material, whether the period granted for

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<sup>453</sup> I/A Court H.R. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 117.

<sup>454</sup> See Section VI. Accountability Mechanisms, in the Commonwealth (Latimer House) Principles on the Three Branches of Government. Parliamentary Supremacy and Judicial Independence, adopted on June 19, 1998, at a meeting of representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association.

<sup>455</sup> Cf. I/A Court H.R., *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 74, paras. 73 and 74.

<sup>456</sup> Cf. European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 52.

<sup>457</sup> *Basic Principles on the Role of Lawyers*. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August 27 to September 7, 1990, principle 27.

<sup>458</sup> Cf. ECHR, *Olújić v. Croatia*, judgment of 5 February 2009 (Sect.1) (Application no. 22330/05). §78

exercising their defense was adequate –since as accused persons they have the right to examine the case and evidence- and the question of whether they were allowed to cross-examine the witnesses whose testimony was the basis of the impeachment proceeding.<sup>459</sup> The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice.<sup>460</sup> This right is echoed in the Commonwealth (Latimer House) Principles on the Three Branches of Government<sup>461</sup> and in the Principles on the Role of Lawyers, which also apply to public defenders.<sup>462</sup>

222. The Inter-American Commission is troubled by the fact that various situations have arisen in the region where justice operators have not been given a hearing and have not been permitted to prepare and mount a proper defense. It has observed that this when the legislative branch removes a justice operator from his or her post without calling the operator involved to exercise his or her right of defense,<sup>463</sup> or when the act of removal is done through summary proceedings<sup>464</sup> or when the State's law provides that the justice operator shall represent himself or herself directly, without other legal representation.<sup>465</sup>

223. The Commission is therefore urging the States to ensure that their laws regulate disciplinary proceedings in such a way as to ensure that justice operators have the

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<sup>459</sup> I/A Court H.R.. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, paras. 81-83.

<sup>460</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003. See Section A. General Principles Applicable to All Legal Proceedings. A.r) Independent Tribunal.

<sup>461</sup> See Section VI. Accountability Mechanisms, in the Commonwealth (Latimer House) Principles on the Three Branches of Government. Parliamentary Supremacy and Judicial Independence, adopted on June 19, 1998, at a meeting of representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association.

<sup>462</sup> *Basic Principles on the Role of Lawyers*. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August 27 to September 7, 1990, principle 27.

<sup>463</sup> For example, according to the information received by the Inter-American Commission on Human Rights (IACHR), in the early morning hours of December 12, the National Congress dismissed four of the five justices on the bench of the Supreme Court's Constitutional Chamber. The information the Commission received suggests that the dismissal was because of the votes the justices cast on a judgment that declared unconstitutional a law that authorized, for a six-month period, special measures to purge the Police. During the debate that ended with the justices' dismissal, the Congress was reportedly surrounded by military and police forces and the justices were not summoned to defend themselves. See IACHR, *In View of Situation in Honduras, IACHR Stresses Importance of Principle of Independence of the Judiciary*, January 3, 2012.

<sup>464</sup> IACHR, *Case 12,600, Hugo Quintana Coello et al. (Supreme Court of Justice) v. Ecuador (Merits)*, August 2, 2011.

<sup>465</sup> For example, Organic Law of the Office of the Prosecutor General of the Republic, El Salvador, Article 64.

opportunity and means to prepare an adequate defense, in keeping with the principles of international law.

#### D. Duty to state grounds

224. The duty to state grounds is one of the guarantees of due process included in Article 8(1) to safeguard the right to due process.<sup>466</sup> The Inter-American Court has written that “[t]he grounds are the exteriorization of the reasoned justification that allows a conclusion to be reached.”<sup>467</sup> Every person has the right to expect that decisions adopted by domestic bodies that could affect his or her human rights or interests will be duly substantiated; otherwise, they would be arbitrary decisions.<sup>468</sup> That obligation “to found decisions is a guarantee related to the correct administration of justice, which protects the right of the people to be tried for the reasons established by law and grants credibility to judicial decisions in a democratic society.”<sup>469</sup>

225. A reasoned decision serves a twofold purpose: it shows to the parties that they have been heard and, when the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body.<sup>470</sup> As the Inter-American Court held, in the disciplinary proceedings “it is essential to indicate the violation precisely and to submit arguments that allow it to be concluded that the comments provide sufficiently grounds to justify removing a judge from a post.”<sup>471</sup> The requirement that sufficient grounds for a decision be given is highly relevant since the purpose of disciplinary oversight is to assess a public official’s or civil servant’s conduct, qualifications and performance. The statement of the grounds for a decision or its reasoning is the appropriate place to examine the severity of the conduct attributed to the person in question and whether the disciplinary measure is proportionate to that conduct.<sup>472</sup>

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<sup>466</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 78.

<sup>467</sup> I/A Court H.R., *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 107.

<sup>468</sup> I/A Court H.R. *Case of Yatama V. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, para. 152. The Inter-American Court based its ruling on this point on the following cases of the European Court: *García Ruiz v. Spain* [GC], No. 30544/96, § 26, ECHR 1999-I; and *H. v. Belgium*, Judgment of 30 November 1987, Series A No. 127-B, para. 53. The European Court has also written that judges must adequately explain the reasons for the decisions they take. See European Court of Human Rights, *Hadjianastasiou v. Greece*, Judgment of 16 December 1992.

<sup>469</sup> I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 118.

<sup>470</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 78.

<sup>471</sup> I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 120.

<sup>472</sup> I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 120.



226. A critical aspect to consider in the decisions ordering disciplinary measures against justice operators is that “the ground for disciplinary investigations and sanctions imposed” on justice operators “should never be the legal judgment developed in a decision”<sup>473</sup> Therefore, the Commission must repeat that in those States where inexcusable judicial error are, by statute, grounds for disciplinary action, the disciplinary authority has an obligation to explain, in a proper statement of grounds, the seriousness of the conduct and the proportionality of the disciplinary measure.<sup>474</sup> This kind of review requires an autonomous statement of grounds or reasons to show that in fact a disciplinary offense has been committed as a result of an inexcusable judicial error that disqualifies the justice operator for the performance of his or her functions.<sup>475</sup> A proper statement of grounds or reasons ensures that the reviewing body will not penalize judges for well reasoned and well founded legal decisions, even if different from the decisions supported by the reviewing body<sup>476</sup> or that prosecutors and public defenders will not be penalized for a legal position that might be different from that of their superiors.

227. The duty to state grounds takes on special importance in those disciplinary systems in which the institution is structured in such a way as to pose a risk to the independence of the authorities charged with enforcing the disciplinary systems, such as those operated by other branches or organs of government. For example, in those cases in which the Office of Attorney General is under the Executive Branch, the Attorney General has disciplinary authorities and must state adequate grounds for a decision ordering a disciplinary measure against a prosecutor of inferior rank, so that the decision will not be or seen to be arbitrary and so that it dispels any question as to whether his or her action was impartial and independent vis-à-vis the Chief Executive.

#### **1. Duty to state legal grounds or reasons as a guarantee against implicit sanctions**

228. The statement of reasons or grounds carries significant weight when gauging the impartiality of an authority charged with ordering and enforcing sanctions<sup>477</sup> if

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<sup>473</sup> IACHR. *Second Report on the situation of human rights defenders in the Americas*. OEA/Ser.L/V/II. Doc. 66, December 31, de 2011, para. 376. See also, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003, Principle A, number 4, subpara. n (2).

<sup>474</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 86.

<sup>475</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 86.

<sup>476</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 90.

<sup>477</sup> In this regard, the Commission has written that there is a relationship between the impartiality that must be guaranteed in all judicial proceedings under Article 8(1) of the American Convention, and the use of discriminatory prejudices to justify a decision. See IACHR, *Application in the Case of Karen Atala and Daughters against the State of Chile, Case 12.502*, December 17, 2010.

measures are ordered that are not *per se* disciplinary in nature but become a means to retaliate against a justice operator for his or her actions. Examples might be the sanctions implied when a judge is not confirmed in his or her post following a probationary period, or when the appointment of a provisional judge or prosecutor is not renewed without stating the reasons why.

229. The Commission is aware that there are instances where justice operators are separated from service without knowing whether it was a consequence of the passage of time, retirement or forced retirement, or an exercise of the State's punitive authority, thereby necessitating an examination based on the parties' arguments and the facts of the case.

230. The Commission has observed that at times, decisions that are formally valid are not used as legitimate resources in the administration of justice; instead, they are used to accomplish unstated ends that are not obvious at first sight, and are intended to be an "implicit" sanction, serving a purpose other than the purpose prescribed by law.<sup>478</sup> The Commission has written that when legal procedures are used to conceal an illegal practice,<sup>479</sup> indicia or presumptions are of particular importance in a complaint alleging a misuse of power.<sup>480</sup> The Inter-American Court has written the following:

The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.<sup>481</sup>

231. Accordingly, where there is a question as to the reason for a separation – completion of the term or condition of service or separation on disciplinary grounds – circumstantial evidence has to be examined to establish a possible causal relationship between that circumstantial evidence, the act that has the appearance of legality and the justice operator's separation from his or her post. In cases of this type, the circumstantial evidence must be examined to determine whether the elements that suggest the existence of an implicit sanction are objective in nature and prove that the real intent of a public authority by the action taken was not what it appeared to be.

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<sup>478</sup> Cf. IACHR. Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("*First Court of Administrative Disputes*") (Case 12,489) against the Bolivarian Republic of Venezuela, November 29, 2006, para. 124.

<sup>479</sup> IACHR. Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("*First Court of Administrative Disputes*") (Case 12,489) against the Bolivarian Republic of Venezuela, November 29, 2006, para. 129.

<sup>480</sup> IACHR. Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("*First Court of Administrative Disputes*") (Case 12,489) against the Bolivarian Republic of Venezuela, November 29, 2006, para. 129.

<sup>481</sup> I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 130.

232. The European Court of Human Rights has approached issues of this type through Article 18 of the European Convention on Human Rights, to determine whether under the European Convention a restriction on a right constitutes a misuse of power and is imposed for a purpose other than its intended purpose. In the case of *Gusinskiy v. Russia* the Court wrote that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also as a bargaining strategy, to get him to sell his business to the State.<sup>482</sup> In the case of *Cebotari v. Moldova* the Court held that Article 18 of the Convention had been violated; the Government failed to convince the Court that there was a reasonable suspicion that the applicant had committed a crime, as the real objective of the criminal case and the applicant's detention was to exert pressure to persuade Oferta Plus to abandon its application before the Court. Lastly in *Lutsenko v. Ukraine* the European Court found that the restriction of the applicant's liberty authorized under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons, having to do with the prosecuting authorities' intention to punish the applicant for publicly disagreeing with the accusations against him and for asserting his innocence.<sup>483</sup>

233. The European Court has held that although the whole structure of the European Convention rests on the general assumption that public authorities in the member States act in good faith, any public policy or individual may have a "hidden agenda", and "the presumption of good faith is rebuttable." The Commission agrees with the European Court that the mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove a human rights violation or that Article 18 was breached. Furthermore, high political status does not grant immunity. A higher standard of evidence is required.<sup>484</sup>

234. The Commission believes that in cases where separation from service may be an implied sanction wrapped in the guise of the law, the reason for the separation must be examined to determine whether it constituted a misuse of power calculated to punish a justice operator for some action or decision he or she took. Hence, the justice operator must have the right to a review. A proper, well reasoned statement of the grounds for separation is required to dispel any doubts as to whether there was any misuse of power.

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<sup>482</sup> European Court of Human Rights, *Case of Gusinskiy v. Russia*, Judgment of May 19, 2004, paras. 71-78.

<sup>483</sup> European Court of Human Rights, *Case of Lutsenko v. Ukraine*, Judgment of July 3, 2012, paras. 100-110.

<sup>484</sup> European Court of Human Rights, *Case of Lutsenko v. Ukraine*, Judgment of July 3, 2012, paras. 100-110.

## E. Right of review

235. The right to a review of a ruling in a disciplinary proceeding is recognized in the *Basic Principles on the Independence of the Judiciary* and in the *Guidelines on the Role of Prosecutors*<sup>485</sup> and the *Basic Principles on the Role of Lawyers*, which also apply to public defenders.<sup>486</sup> As the UN Special Rapporteur has explained, “any disciplinary or administrative decision that has an impact on the status of judges reviewed by an independent judicial body.”<sup>487</sup> Where this guarantee is concerned, the Commission observes that in its discussion of disciplinary proceedings involving judges, the European Charter on the Statute for Judges specifically states that “[t]he decision [...] pronouncing a sanction [...] is open to an appeal to a higher judicial authority.”<sup>488</sup> The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that in disciplinary proceedings, judges shall have the right “to an independent review of decisions of disciplinary, suspension or removal proceedings.”<sup>489</sup>

236. In the specific case of the American Convention, the right to appeal a judgment is part of due process of law, as established in Article 8(2)(h) of the Convention.<sup>490</sup> As the Court has written, the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party’s interests.<sup>491</sup> Therefore, in the Commission’s view, the phase for review of a disciplinary decision is part of the disciplinary process that must be observed in order to actually dismiss a justice operator. As the Inter-American Court has held, in the rules that States develop in their respective appeals systems, they must ensure that this remedy against a conviction respects the minimum procedural guarantees that, under Article 8 of the Convention, are

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<sup>485</sup> Cf. *Guidelines on the Role of Prosecutors*, Guideline 24.

<sup>486</sup> *Basic Principles on the Role of Lawyers*. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, principle 28.

<sup>487</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, April 18, 2011, para. 14. See also, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Communications to and from governments, A/HRC/17/30/Add.1, May 19, 2011, Bolivia, para. 120.

<sup>488</sup> European Charter on the Statute for Judges and Explanatory Memorandum (DAJ/DOC)98) drawn up by a multilateral meeting on the Statute for judges in Europe, organized by the Council of Europe and held on July 8 and 10, 1998.

<sup>489</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003. See Principle A, para. 4(q) and (r).

<sup>490</sup> I/A Court H.R. *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004, Series C No. 107, para. 158.

<sup>491</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 158, and *Case of Mohamed v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012. Series C No. 255, para. 97.

relevant and necessary to decide the grievances claimed by the appellant.<sup>492</sup> As for the scope of an appeal to review a judgment, the Court has written that what matters most is that the appeal guarantee the possibility of a review of the facts and of the law invoked to support the decision being appealed.<sup>493</sup> Accordingly, it wrote the following:

This means that it must be able to analyze the facts, evidence and law on which the contested judgment was based, because, in jurisdictional activities, interdependence exists between the determination of the facts and the application of the law, so that an erroneous determination of the facts entails an incorrect application of the law. Consequently, the grounds for the admissibility of the appeal should make an extensive control of the contested sentence possible.<sup>494</sup>

237. Apart from the right to appeal a conviction, the American Convention provides that States must offer an adequate and effective recourse to all persons subject to their jurisdiction, for protection against acts that violate their fundamental rights. This right is protected under Article 25 of the Convention and “is one of the fundamental pillars” of States in a democratic society.<sup>495</sup> As for the scope of the right to judicial protection, both the Commission and the Court have reiterated that judicial protection applies not just to the rights contained in the Convention, but also to the rights recognized by the Constitution or law of the State concerned.<sup>496</sup> The Court has written that “for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”<sup>497</sup>

238. The Commission therefore considers that in their disciplinary systems, States must provide a possibility to have a decision reviewed by a higher body, which will examine the facts of the case and the law, in order to assure a suitable and effective

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<sup>492</sup> I/A Court H.R., *Case of Mendoza et al. v. Argentina*, Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013. Series C No. 260, para. 246.

<sup>493</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 165.

<sup>494</sup> I/A Court H.R. *Case of Mendoza et al. v. Argentina*. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013. Series C No. 260, para. 245.

<sup>495</sup> I/A Court H.R. *Case of Castillo Páez v. Peru*. Judgment of November 3, 1997. Series C No. 34, para. 82; *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 131, and *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 183, para. 78.

<sup>496</sup> I/A Court H.R. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*. Judgment of November 24, 2006. Series C No. 158, para. 122; *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006. Series C No. 151, para. 128; and *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, para. 167. See also, IACHR. Application to the Inter-American Court of Human Rights, Case of the Union of Employees, Professionals, and Technicians of the Lima Water and Sewerage Service Company v. Peru. January 16, 2010. Para. 57.

<sup>497</sup> I/A Court H.R. OC-9/87. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), para. 24; and I/A Court H.R. Case of the “Five Pensioners” v. Peru. Judgment of February 28, 2003. Series C No. 98, para. 136.

judicial recourse against possible violations of rights that happened during the disciplinary process.

239. The Commission notes with concern that under the laws of some States, the decision of the disciplinary body is final or not subject to appeal.<sup>498</sup> In other States, an appeal can be filed seeking a review of possible violations of rights committed during the process, but not a review of the conviction itself. The Commission also observed that in some States, the decision resulting from impeachment proceedings is not subject to review; then, too, it may happen that the disciplinary oversight of superiors is also not subject to review where administrative or discretionary matters are concerned.<sup>499</sup> The Commission is urging States that have such systems to adapt the process for appealing disciplinary decisions to conform to the standards described in the preceding paragraphs of this chapter.

## VI. THE ORGANS OF GOVERNANCE AND ADMINISTRATION OF JUSTICE OPERATORS

240. In this report, the Commission has discussed the guarantees that States must afford both in the procedures to select and appoint justice operators and while they are in their posts, and the procedures established to discipline them for misconduct. As the Commission has pointed out, those guarantees can be traced to the rules of international law under which States must guarantee access to justice to persons subject to their jurisdiction who believe their rights have been violated.

241. Like the United Nations Special Rapporteur, the Commission is of the view that the guarantees and authorities given to the organ of government and administration may significantly reduce the threat to the independence of justice operators.<sup>500</sup> Therefore, as the UN Special Rapporteur<sup>501</sup> and the Venice Commission<sup>502</sup>

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<sup>498</sup> For example, Organic Law of the Office of the Attorney General of the Republic, published in the Official Gazette of the Federation on May 29, 2009, Latest amendment published DOF 14-06-2012, Article 47; Law 1562 of 2000, Organic Law of the Public Prosecution Service of Paraguay, Article 86. In Honduras, Article 31 of the rules of the Judicial Career Service establish that “no remedy, ordinary or extraordinary, may be used to challenge the Council’s final decisions.”

<sup>499</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 61.*

<sup>500</sup> United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 98.*

<sup>501</sup> For example, the Judicial and Legal Service Commission of Barbados; the Superior Council of the Judicial Branch of Costa Rica; the Superior Council of the Judicial Branch of Haiti; the Council of the Judiciary and Judicial Career Service of Honduras; the Council of the Federal Judiciary, Mexico; and the Judicial and Legal Service Commission of Trinidad and Tobago.

<sup>502</sup> The European Commission for Democracy through Law (Venice Commission) has observed that “there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion where there are sufficient grounds for dismissal.” The Commission has also considered the creation of “prosecutorial councils” with a balanced membership –prosecutors, lawyers and civil society- independent of other organs of the State and having disciplinary functions. See European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service. Adopted* Continues...

have recommended, the Commission believes that States should promote the creation of an independent body charged with governance and administration, which would include the selection and appointment process and the disciplinary system for the institutions of justice (the Prosecution Service, Public Defender Service and the courts). It would institutionally separate from the executive and legislative branches, as this would provide an added guarantee of the justice system's independence from these branches of government. It would also be separate from the Supreme Court and courts.

242. No provision in international law requires the creation of such a body. Nevertheless, there are countries that have adopted this practice by establishing councils of the judiciary, which serve to reduce and ultimately eliminate the risks created by interference from other models of the legislative, executive or judicial branches. The Commission will now look at some of the guidelines to be followed in the organs for administration and governance of the institutions of justice, which can strengthen the independence of justice operators.

243. First, with respect to its functions, the Commission believes that such an independent body should be charged with administration, selection, appointment and the disciplinary system. The Commission is of the view that the institutional independence of this body will better safeguard the guarantees that apply in those procedures. That authority and its specific scope must first be secured in law.<sup>503</sup>

244. As for its composition, like the United Nations Special Rapporteur the IACHR believes that the composition of such a body "should be genuinely plural," "with legislators, lawyers, academicians and other interested parties being represented in a balanced way."<sup>504</sup> If the composition of the body is genuinely plural, then the highest-ranking justice operators it selects will have the imprimature of government institutions, which is an essential ingredient if they are to be able to perform their functions properly. In any event, most of its members should come from the institution in which the justice operators involved function, with a view to avoiding outside political or other interference<sup>505</sup> and ensuring its independence.<sup>506</sup>

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...continuation

by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 39.

<sup>503</sup> For example, the Judicial and Legal Service Commission of Barbados; the Superior Council of the Judicial Branch of Costa Rica; the Superior Council of the Judicial Branch of Haiti; the Council of the Judiciary and Judicial Career Service of Honduras; the Council of the Federal Judiciary, Mexico; and the Judicial and Legal Service Commission of Trinidad and Tobago.

<sup>504</sup> Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 27. See also, United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 27.

<sup>505</sup> Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 28. See, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia, A/HRC/14/26/Add.2, April 16, 2010, para. 88, Recommendations, where it states that: "A review should be undertaken of the system used to appoint members of the Disciplinary Chamber of the Superior Council of the Continues...

245. As the UN Special Rapporteur observed, 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.<sup>507</sup> Therefore, in order to ensure that such a body is apt to select, in an objective, fair and independent manner, the persons directly linked with the respective institution of justice, it must have a substantial say with respect to selecting and appointing its members. Such appointments must be done according to a fair and transparent procedure.<sup>508</sup> The Commission notes that the European Court has written that given the importance of reducing the influence of the political organs of the government on the composition of the councils of the judiciary, a majority of the council’s members should come from the judicial branch and be elected by the judges themselves.<sup>509</sup> The Special Rapporteur has underscored how important it is that justice operators are satisfied with the way in which members of the body that manages their careers are selected and that decisions are not based on political considerations.<sup>510</sup>

246. Finally, the president or chair of this body must not be the Chief Justice of the Supreme Court, as happens in various States of the region in the case of the organs of governance of the judicial branch,<sup>511</sup> nor should they be the Prosecutor or Defender General. This is an important measure to avoid combining the functions assigned to justice operators with the governance and disciplinary functions, as this could affect their independence and the independent and autonomous exercise of assigned functions. Here, the United Nations Special Rapporteur has recommended that the presiding officer of the Council of the Judiciary not be the Chief Justice or President of the Supreme Court.<sup>512</sup>

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...continuation

Judiciary, thereby ensuring that career personnel are in the majority and that justices, judges, attorneys and academics play a substantive role.” [Translation ours]

<sup>506</sup> Cf. Council of Europe. Recommendation No. R (94) 12 of the Committee of Ministers to the States on the Independence, Efficiency and Role of Judges, October 13, 1994, principle I. 2.c).

<sup>507</sup> UN General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HGRC/11/41, March 24, 2009, para. 28. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/125/66/PDF/G0912566.pdf?OpenElement>

<sup>508</sup> Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 29.

<sup>509</sup> ECHR. *Case of Oleksandr Volkov v. Ukraine*. (Application no. 21722/11). Judgment (Merits). Strasbourg, 9 January 2013, para. 112.

<sup>510</sup> United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 31.

<sup>511</sup> For example, the Judicial and Legal Service Commission of Barbados; the Superior Council of the Judicial Branch of Costa Rica; the Superior Council of the Judicial Branch of Haiti; the Council of the Judiciary and Judicial Career Service of Honduras; the Council of the Federal Judiciary, Mexico; and the Judicial and Legal Service Commission of Trinidad and Tobago.

<sup>512</sup> Among the Recommendations made by the Special Rapporteur on the Independent of Judges and Lawyers is that “The Council of the Judiciary should be presided over by someone other than the Chief Justice of the Supreme Court.” See UN General Assembly, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/17/30/Add.3, April 18, 2011. Recommendation 94 i). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/129/33/PDF/G1112933.pdf?OpenElement>.



247. The IACHR commends the fact that some States have already established a Council of the Judiciary, which functions as an autonomous organ of governance with appointment-related and disciplinary authority; in some States it is independent of the Judicial Branch.<sup>513</sup> The Commission also observes that some States do have administrative and disciplinary councils for the Public Defender Service,<sup>514</sup> and that Councils of the Prosecution Service do exist under comparative law.<sup>515</sup>

248. The presence of independent bodies charged with the administration and governance of the judiciary is a best practice to strengthen its independence in the States. The Commission is therefore urging those States that do not have such bodies to create them and endow them with the guarantees that enable them to perform each of their assigned functions independently, in the manner prescribed by international law and the standards set out by the Commission in this report.

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<sup>513</sup> Among the various countries that have created a Council of the Judiciary are the following: Argentina, which in Article 114 of its Constitution establishes a Council of the Judiciary as a permanent organ of the Judicial Branch; Bolivia, which in Article 193 of its Constitution creates the Council of the Judiciary as the organ charged with the disciplinary system for courts of ordinary jurisdiction, the agro-environmental courts and the courts of specialized jurisdiction such as control and auditing of administrative and financial management, and policy-making; Brazil, which in Article 103-B of its Constitution creates the National Council of Justice; Canada, whose Judges Act created the Canadian Judicial Council as a federal body whose mission is to promote efficiency, uniformity and responsibility within the judiciary, to improve the quality of the justice service in Canada's high courts and to review any complaint against the judges serving on those court (Cf. Judges Act, Articles 59 and 60); Colombia, which in Article 254 of its Constitution provides for the creation of a Superior Council of the Judiciary; Honduras, which has a Council of the Judiciary and Judicial Career Service as "a constitutional organ of the Judicial Branch that enjoys autonomy and operational and administrative independence." Law on the Council of the Judiciary and Judicial Career Service, December 2011, Article 2; Paraguay, which in Article 262 of its Constitution, created the Council of the Judiciary as an autonomous organ; Peru, where Article 150 of the Constitution creates the National Council of the Judiciary as an independent organ charged with selection and appointment of judges and prosecutors, except for those elected by popular vote; and the Dominican Republic, where Article 156 of its Constitution creates the Council of the Judicial Branch as a "permanent organ of administration and discipline in the Judicial Branch."

<sup>514</sup> For example, the Dominican Republic has the Councils of the Public Defender Service, which perform appellate functions with respect to the administrative penalties imposed by the Defender General. Article 15 et seq. of Law No. 277-04e creates the National Public Defender Service. G. O. 10290.

<sup>515</sup> The Venice Commission mentioned the specialized prosecutorial councils in Bosnia and Herzegovina, Moldova (CDL(2008)055 ), Montenegro (CDL(2008)023), Serbia (CDL(2009)103) and "the Former Yugoslav Republic of Macedonia" (CDL(2007)023); France, Italy and Turkey (CDL(2010)125) have judicial councils, which are also competent for prosecutors (however, with a separate chamber for prosecutors in France; see also footnote 7). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 64.

## VII. RECOMMENDATIONS

249. Based on the analysis done in this report, on the information it contains and the conclusions reached in each section and the previous chapter, all with view to strengthening the independence, autonomy and impartiality of the justice operators in the countries of the region,

THE INTER-AMERICAN HUMAN RIGHTS COMMISSION RECOMMENDS THE AMERICAN STATES:

### A. On the Independence from other authorities or bodies of the State.

1. Establish on a Constitutional level, in those States where it is still not guaranteed, the separation of powers, consecrating with clarity that the judiciary is independent of the executive and the legislature, and that it is not subordinate to any of these powers.
2. In States where the prosecution depends on the Executive or the Judiciary, to adopt measures to ensure its institutional independence and meanwhile ensure functional independence in managing its budget.
3. In States where the Public Defender is subordinate to the Executive, the Prosecution or the Judiciary, to adopt measures to ensure their institutional independence, while ensuring their functional independence and the management of its budget.
4. Include in their Constitutions or laws guarantees for stable and sufficient resources for the Judiciary, the Attorney General and the Public Defender, enabling it to have stable and sufficient resources to meet independently, appropriately and efficiently to their functions. The Commission recommends that there should be periodic reviews of such amounts based on objective criteria that allow increase it when necessary. The Commission considers that the decisions related to the reduction or increase of the respective budget of the Prosecution, Public Defender or the Judiciary should ensure the participation of such entities.
5. Ensure the provision of financial, technical and human resources sufficient and adequate to ensure that judges, prosecutors and public defenders can effectively perform their respective roles in the access to justice, so that no delays are incurred due to lack of resources. This involves the acquisition of technical equipment to perform all required tests to investigate the facts of cases, and to ensure adequate coverage in the country, so that justice operators have the capacity access areas even in those of extreme poverty.

**B. On the selection and appointment processes**

6. Establish in its regulatory framework a selection and appointment processes that has the purpose to select and designate justice operators based on merit and professional skills . Such processes should establish objective criteria for selection and appointment to have predictable requirements and procedures for anyone wishing to participate. Furthermore, States must ensure equality and non-discrimination in the access to public functions as adequate representation of gender, ethnic groups and minorities in the Judiciary, the Prosecution and Public Defender. The Commission considers that a merit based selection process providing methods such as exams, allows these institutions to assess objectively and to qualify the professional capacity and the merits of the candidates for office. The Commission recommends that such processes are preferably administered by an independent body on the terms described in Chapter VII of the report. Furthermore, in order to strengthen the independence of the operator of justice that serve on the highest positions within the Judiciary, Prosecution or Public Defense, the Commission believes that hearings or public interviews, properly prepared, in which citizens, non-governmental organizations and other stakeholders have the opportunity to meet the selection criteria, and to challenge the candidates and express their concerns or support.
7. Review and eliminate all rules that could result in a discrimination against those candidates aiming for a position in any of the institutions of Justice, both those that clearly establish discrimination as those that for vagueness or broadness can generate situations of discrimination *de facto*.
8. Adopt legislative measures to ensure the proper appointment of justice operators. This implies ensuring a predefined and sufficient duration to enable operators of justice to have the stability necessary for independence and autonomy with their work.
9. Accurately set periods of appointments or conditions to those justice operators which are subjects to provisional periods, as to guarantee that such the stability of such periods avoiding free removal. The Commission reiterates that the provisional appointment of justice operators should be an exceptional situation.

**C. On the Independence in the exercise of functions**

10. Adopt legal measures to ensure that the Legislature or the Executive does not have the power to appoint the President of High Courts or appoint Judges comprising the chambers of the courts or tribunals, in order to

ensure that the courts themselves are entitled of such power, in order to strengthen the internal independence of the Judiciary.

11. Establish a mechanism for assigning cases by objective criteria, for example, through assignment by lot, automatic distribution system according an alphabetical order or based on specialization of justice operators. These criteria should be public and be sufficiently determined to avoid manipulations of the assignments of cases.
12. Where systems include the possibility of promotion, establish predictable procedures as objective criteria for the promotion of justice operators considering the merits and professional capacity of such operators.
13. Establish predictable procedures and public criteria for transferring of post or workplace of justice operators. Such procedures should include a space for acknowledging the opinions, needs and special situation of those justice operators involved.
14. Ensure that national legislation comprises appropriate wage bases that allow justice operators to receive salaries accordantly with their responsibilities. The Commission considers that the appropriate compensation for judicial officers helps prevent internal and external pressures.
15. Ensure ongoing training for justice operators. States should ensure that such training is accessible and that the content includes areas related to human rights and treatment of victims, especially those justice operators who are associated with criminal proceedings.
16. Ensure the existence of effective channels of cooperation between prosecutors, judges, public defenders, police officers and other institutions that may be in possession of information relevant to a case, so that this cooperation, access and exchange of technical information may be institutionalized, so they can perform their duties freely and efficiently, ensuring access to justice.
17. Protect justice operators when their lives and personal integrity are at risk, adopting an effective and comprehensive prevention strategy, in order to prevent attacks, assaults and harassment against them. This requires appropriate funding and political support to institutions and programs in charged of such protection.
18. In countries where attacks against justice operators are more systematic and numerous, States must make available all resources necessary and appropriate to prevent any harm to their life and physical integrity, ensuring their impartiality. The Commission considers that specialized protection programs can provide these States to fulfill their obligation to

protect by allowing closer and specific knowledge of the particular situation of the operator at risk and consequently, providing an intervention that is appropriate, specialized, and proportional to the risk.

19. Conduct thorough and independent investigations into the attacks on justice operators, punishing the perpetrators and masterminds of such attacks. The Commission considers it appropriate that States should establish specialized units with the necessary resources and training, as well as specific research protocols, so it may act in a coordinated way and respond with the due diligence that is required.
20. Guarantee the exercise of freedom of expression and association of justice operators by ensuring that disciplinary regimes do not sanction illegitimately such rights in the terms described in this report.

**D. On removal from office and disciplinary regime.**

21. Ensure the enjoyment of the guarantees of due process in those disciplinary processes brought against justice operators.
22. Ensure the rule of law in disciplinary grounds used to sanction justice operators. In this regard, the conduct that may result in the imposition of disciplinary measures need to be specified in detail, including the seriousness of the offense and the type of disciplinary action to be applied. States should refrain from establishing disciplinary grounds on actions related to the trial or legal test developed by justice operators in their decisions.
23. Ensure that disciplinary procedures provide the possibility of justice operators to adequately prepare a defense of their rights effectively and on conditions of equality
24. Ensure that decisions on disciplinary proceedings are motivated and therefore, include an assessment of the conduct that the justice operator committed on disciplinary grounds, as the development of arguments to analyze the severity of the conduct alleged and proportionality of the sanction.
25. Ensure that the disciplinary proceedings brought against justice operators, have the possibility to appeal the judgment to a superior body, so it may undertake a review of issues of fact and law, ensuring adequate and effective legal remedies.

**E. About the organs of government and administration.**

26. The Commission considers that, in countries where they do not exist, it would be convenient to create a independent body of government and administration of justice (Prosecution, Public Defender and the Judiciary), which have the functions of the selection, appointment, promotion and transfers and disciplinary measures on justice operators at all levels, in the terms presented by the Commission in this report.