

IFES RULE OF LAW WHITE PAPER SERIES

GLOBAL BEST PRACTICES:

Judicial Integrity Standards and Consensus Principles

April 2004

VIOLAINE AUTHEMAN

Editor

KEITH HENDERSON

GLOBAL BEST PRACTICES: *Judicial Integrity Standards and Consensus Principles*

April 2004

VIOLAINE AUTHEMAN

Editor

KEITH HENDERSON



The IFES Rule of Law Series is a collection of papers focused on capturing emerging global best practices and lessons learned on themes related to democratic principles, fundamental human rights and the Rule of Law. This paper was made possible by a grant from the United States Agency for International Development. It reflects the opinions of IFES and should in no way be construed as the official position of the United States Agency for International Development. Any person or organization is welcome to quote from this paper as long as proper citation is made.

GLOBAL BEST PRACTICES JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES

Abstract: International and regional human rights treaties recognize the right to a fair trial by an independent tribunal in the determination of rights and obligations in civil, commercial and administrative matters and in the determination of criminal charges. The right to a fair trial and its core components, including the “reasonable time” requirement and the principle of judicial independence, is now universally accepted. Building upon the declarations of principle of legally binding conventions, international and regional expert guidelines and principles have aimed at fleshing out the specific elements of judicial independence. In addition, international and regional human rights courts and commissions have interpreted the provisions of human rights treaties and shed some light on the minimum standards and components of the right to a fair trial and judicial independence.

IFES has synthesized these various efforts into set of core, consensus principles and best practices that can be used to assess systematically the degree of independence of judiciaries worldwide: the Judicial Integrity Principles [JIP]. In designing the JIP, IFES has chosen a broad definition of the notion of “judicial integrity”. This term covers a wide range of issues related to the independence and accountability of the judiciary, both the institution and the judges as individual decision-makers. IFES has chosen this broad definition of the notion of “judicial integrity” to emphasize the importance of balance the independence and accountability issues and to identify in a systematic way related reforms that need to be undertaken.

**GLOBAL BEST PRACTICES
JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES**

TABLE OF CONTENTS

1. Introduction and Overview	1
2. The Recognition of the Right to a Fair Trial and Judicial Independence: International and Regional Human Rights Treaties	1
3. International, Regional and Domestic Guidelines and Principles Clarifying the Consensus on Judicial Independence	2
a. Governmental Guidelines and Principles	
i. United Nations	
ii. Council of Europe	
iii. African Commission of Human and People’s Rights	
b. Non-Governmental and Inter-Judicial Guidelines and Principles	
i. Pre-UNBP Instruments	
ii. Post-UNBP Instruments	
4. Brief Overview of the Jurisprudential Evolution of the Notion of Judicial Independence	9
a. General Comments on the Right to a Fair Trial	
i. Civil, Commercial, Administrative and Criminal Matters	
ii. Reasonable Time	
iii. Right to an Effective Remedy	
b. Conditions of Independence	
c. Composition of an Independent Tribunal	
i. Notion of Tribunal	
ii. Membership	
d. Institutional and Personal Independence	
e. Military, National Security and Other Special Courts	
f. Judicial Independence and Access to Justice	
g. Enforcement of Court Decisions	
5. Academic and Applied Research on Judicial Independence	16
6. IFES’s Judicial Integrity Principles	17
a. Judicial Independence Guide	
b. IFES’s Judicial Independence Conferences	
c. Key Consensus Principles of Judicial Integrity	
ANNEX I – Overview of the Judicial Integrity Principles Covered in Selected International and Regional Instruments	21
ANNEX II – Bibliography	23
ANNEX III – Basic Principles on the Independence of the Judiciary	25

**GLOBAL BEST PRACTICES
JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES**

1. Introduction and Overview

A number of international and regional human rights instruments mandate “an independent, impartial and competent judiciary”. However, there is no actual definition as to the exact meaning of an independent judiciary. Various guidelines have been set forth internationally in documents drafted by experts, such as the UN Basic Principles on the Independence of the Judiciary. While these documents are not binding on member states, they evidence high-level support for the principle of judicial independence. In addition, international and regional human rights courts and commissions have interpreted the provisions of human rights treaties and shed some light on the minimum standards and components of the right to a fair trial and judicial independence.¹

The following are many of the international and regional, governmental and non-governmental, documents, guidelines and cases, which promote, define and interpret the principle of judicial independence in every region of the world.

2. The Recognition of the Right to a Fair Trial and Judicial Independence: International and Regional Human Rights Treaties

The first mention of the right to a fair trial is to be found in the Universal Declaration of Human Rights² – originally, this declaration was not legally binding; it has however acquired some binding effect, as international customary law as an authoritative interpretation of the human rights provisions of the UN Charter. In its article 10, the UDHR provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

As a general matter, the International Covenant on Civil and Political Rights³ expands and details the rights contained in the UDHR and provides in its article 14(1) that:

“... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

A Third Optional Protocol is currently being drafted and would, *inter alia*, prohibit any derogation from rights protected under article 14 of the ICCPR.

The ICCPR and the human rights conventions listed below recognize the right to a fair trial by an independent tribunal both internationally and regionally and create binding legal obligations for signatories. Member States are therefore required to comply with the principle of a fair trial in criminal trials as well as in civil, commercial and administrative law suits.

1 The UN Human Rights Committee, the Inter-American Human Rights Commission and Court, the European Human Rights Court and the African Human Rights Commission have had to interpret, respectively, article 14(1) of the International Covenant on Civil and Political Rights, articles 8(1) and 27(2) of the American Convention on Human Rights, article 6(1) of the European Convention on Human Rights and articles 7(1) and 26 of the African Charter of Human Rights.

2 *Universal Declaration of Human Rights* [“UDHR”], 12/10/1948, United Nations, G.A. res. 217A(III)

3 *International Covenant on Civil and Political Rights* [“ICCPR”], 12/16/1966, United Nations, GA resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976

IFES Rule of Law Tool

Judicial Independence, an Element of the Right to a Fair Trial and Access to Justice under International and Regional Human Rights Treaties and Obligations of Most Developing, Transition and Developed Countries

- **Universal Declaration of Human Rights [UDHR]**⁴ article 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”;
- **International Covenant on Civil and Political Rights [ICCPR]**⁵ article 14(1): “... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”;
- **European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]**⁶ article 6(1): “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”;
- **Inter-American Convention on Human Rights [IACHR]**⁷ articles 8(1) “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.” and article 27(2) which prohibits any derogation from judicial guarantees;
- **African Charter on Human and People’s Rights [ACHPR]**⁸ articles 7(1) “Every individual shall have the right to have his cause heard. This comprises ... (d) the right to be tried within a reasonable time by an impartial court or tribunal” and 26 “State parties to the present Charter shall have the duty to guarantee the independence of the Courts.”

3. International, Regional and Domestic Guidelines and Principles Clarifying the Consensus on Judicial Independence

The above mentioned conventions obligate their signatories to comply with the right to a fair trial but they do not provide a definition of the exact meaning of the right to a fair trial or of judicial independence nor do they list the minimum necessary components of these rights. Various governmental and non-governmental guidelines have been drafted internationally and regionally by experts to shed some light on the minimum standards of fair trial and judicial independence. Although these documents are not binding, they evidence high-level support for these principles.

4 *Universal Declaration of Human Rights*, 12/10/1948, United Nations, G.A. res. 217A(III)

5 *International Covenant on Civil and Political Rights*, 12/16/1966, United Nations, GA resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976

6 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 11/04/1950, Council of Europe, European Treaty Series no.5, entered into force on March 9, 1953

7 *Inter-American Convention on Human Rights*, 11/22/1969, OAS Treaty Series No.36, 1144 U.N.T.S. 123, *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18, 1978

8 *African Charter on Human and People’s Rights*, 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986

a. Governmental Guidelines and Principles

IFES Rule of Law Tool Governmental Instruments on Judicial Integrity

INTERNATIONAL

UN Basic Principles on the Independence of the Judiciary [UNBP] (1985)

UN Basic Principles on the Role of Lawyers (1990)

UN Guidelines on the Role of Prosecutors (1990)

AFRICA

Recommendation on the Respect and Strengthening of the Independence of the Judiciary (1996)

EUROPE

Recommendation no.R(94)12 on the Independence, Efficiency and Role of Judges (1993)

European Charter on the Status of Judges (1998)

i. United Nations

Under the aegis of the United Nations, a number of recommendations have been adopted to clarify the scope of the notion of judicial independence as guaranteed under the UDHR and the ICCPR. The **UN Basic Principles on the Independence of the Judiciary [UNBP] (1985)**⁹ call on member States to guarantee judicial independence domestically through constitutional or legal provisions and highlight the standards for the independence of the judiciary, including separation of powers, technical competence, judicial qualifications, judicial selection, conditions of service, security of tenure, training, immunity and judicial discipline.

UNBP (1985)

Principle 1 “**The independence of the judiciary** shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

The UNBP are complemented by the UN Basic Principles on the Role of Lawyers (1990)¹⁰ and the UN Guidelines on the Role of Prosecutors (1990)¹¹, which present guidelines related to the rights, duties and responsibilities of lawyers and prosecutors respectively. There is an understanding that the guarantee of judicial independence and fair trials cannot be achieved by setting guidelines applicable to the judiciary and individual judges but rather its fulfillment requires to address the broader legal community.

9 *UN Basic Principles on the Independence of the Judiciary*, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985)

10 *UN Basic Principles on the Role of Lawyers*, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

11 *UN Guidelines on the Role of Prosecutors*, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

ii. Council of Europe

Following the efforts of the United Nations, the Council of Europe has also sought to clarify the scope of judicial independence as guaranteed under the ECHR and defined under the expanding case law of the European Court of Human Rights¹². With **Recommendation no.R(94)12 on the Independence, Efficiency and Role of Judges** (1993)¹³, the Council of Europe attempted to present in a coherent, synthetic manner the set of principles and elements that constitute “judicial independence”. The principles highlighted cover a wide range of issues, including the separation of powers, constitutional guarantees of independence, the jurisdiction of ordinary courts, freedom of expression and association, ethical standards, objective and transparent selection and disciplinary processes and judicial access to information.

Council of Europe Recommendation (1994)

Principle 1 “General Principles on the Independence of Judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.
2. In particular, the following measures should be taken:
 - a. the independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles...
 - b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.
 - c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency...
 - d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.
 - e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case...
 - f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest...
3. 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.”

European Charter on the Status of Judges (1998)¹⁴ was adopted by judges from 13 Western, Central and Eastern European countries as well as representatives of the European Association of Judges and of the European Association of Judges for Democracy and Freedom (MEDEL) under the leadership of the Council of Europe Directorate of Legal Affairs. The Charter defines the key elements to be included in the stature of judges, with a view to “ensuring competence, independence and impartiality” and therefore constitutes

¹² See, *infra*, subsection 4

¹³ *Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 10/13/1993, 518th Meeting of the Ministers’ Deputies, Council of Europe

¹⁴ *European Charter on the Status of Judges*, DAC/DOJ (98) 23, 07/08-10/1998, Strasbourg, Council of Europe

“a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.”

Taking into account the differences between the various national systems, the Charter addresses a number of key issues, including judicial selection, training, security of tenure, judicial career development, liability, remuneration, termination of office and judicial councils. It also calls upon member States to enshrine fundamental principles and guarantees of judicial competence, independence and impartiality in their domestic legal system.

iii. African Commission of Human and People’s Rights

Recalling that justice is a core element of democracy, the African Commission has adopted in 1996 a **Recommendation on the Respect and Strengthening of the Independence of the Judiciary (1996)**¹⁵. The Recommendation calls upon member States to meet certain minimum standards to guarantee the independence of judiciaries in the region, including sufficient resources; adequate working and living conditions for judges; the recognition of universal principles of judicial independence; and a call on governments to eliminate any legislation affecting judicial independence and refrain any act threatening it. The Recommendations also promote the organization of periodic meetings of judges as well as the establishment of information exchange networks.

b. Non-Governmental and Inter-Judicial Guidelines and Principles

Over the past two decades, scores of Guidelines and Principles have been adopted by legal experts and judges in a variety of groups ranging from judges’ and bar associations to international jurist conferences. Some of these instruments are described below to highlight the continuous efforts, in all regions of the world, to define and expand the core elements of judicial independence.

IFES Rule of Law Tool	
Non-Governmental and Inter-Judicial Instruments on Judicial Integrity	
INTERNATIONAL	
“Syracuse Principles” (1981)	
“New Delhi Standards” (1982)	
Montreal Universal Declaration on the Independence of Justice (1983)	
Universal Charter of the Judge (1999)	
The Bangalore Principles of Judicial Conduct (2002)	
ASIA	LATIN AMERICA
“Tokyo Principles” (1982)	Caracas Declaration (1998)
“Beijing Principles” (1995)	
EUROPE	MIDDLE EAST AND NORTH AFRICA
Judges’ Charter in Europe (1993)	“Beirut Declaration” (1999)

15 Recommendation on the Respect and Strengthening of the Independence of the Judiciary, African Commission of Human and People’s Rights, 19th Session, 03/26-04/04/1996, Ouagadougou, Burkina Faso

i. Pre-UNBP Instruments

Before the adoption by the UN of the Basic Principles on the Independence of the Judiciary in 1985, a number of preliminary guidelines and sets of standards had been adopted by various organizations, such as the “**New Delhi Standards**” (1982)¹⁶, the “**Tokyo Principles**” (1982)¹⁷ or the **Montreal Universal Declaration on the Independence of Justice (1983)**¹⁸. The latter was approved by some 130 jurists representing 20 international organizations at the 1st World Conference on the Independence of Justice and addresses issues regarding international and national judges as well as lawyers, jurors and assessors. The Tokyo Principles present the work of the LAWASIA Human Rights Standing Committee to identify principles and conclusions on the independence of the judiciary in the LAWASIA region.

More importantly, a Committee of Experts convened by the International Association of Penal Law, the International Commission of Jurists and the Center for the Independence of Judges and Lawyers drafted the “Syracuse Principles” (1981)¹⁹, which lay much of the ground work for the adoption of the UNBP four years later. These principles address the independence of the judiciary but also, inter alia, the qualification, selection, promotion and discipline of judges; training; working conditions; and administrative and financial arrangements of the judiciary.

“Syracuse Principles” (1981)

Article 2 “**Independence of the judiciary means**

- (1) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and
- (2) That the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.”

ii. Post-UNBP Instruments

Further clarification of the scope and elements of judicial independence, both internationally and regionally, was sought after the adoption of the UNBP in 1985. At the international level, the International Association of Judges²⁰ adopted the Universal Charter of the Judge (1999)²¹, which attempts to highlight core consensus principles applicable to judges worldwide, especially principles governing the impartiality of the judicial decision-making process and the objectivity of the judicial career processes.

16 Code of Minimum Standards of Judicial Independence, “New Delhi Standards”, New Delhi, India, 1982

17 Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 07/17-18-1982, Tokyo, Japan, LAWASIA Human Rights Standing Committee

18 Universal Declaration on the Independence of Justice, Montreal, Canada, 1983, World Conference on the Independence of Justice

19 Draft Principles on the Independence of the Judiciary, “Syracuse Principles”, 1981 (in collaboration with the International Association of Penal Law)

20 The International Association of Judges brings together national associations of judges from around the world. Currently, it represents 35 European countries, 12 African, 14 Latin American and 8 from the rest of the world. For more information, see <http://www.iaj-uim.org/> Universal Charter of the Judge, 11/17/1999, General Council of the International Association of Judges 21 Universal Charter of the Judge, 11/17/1999, General Council of the International Association of Judges

Universal Charter of the Judge (1999)

Article 1 “Independence

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.”

Article 2 “Status

Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other State powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.”

Another effort with international ambitions has been recently launched under the leadership UN’s Judicial Group on Strengthening Judicial Integrity, which was originally composed of the Chief Justices of a number of countries of the Asia and Africa. The final draft of **The Bangalore Principles of Judicial Conduct (2002)**²² is however the result of several years of drafting and consultations that have involved high-level judges of countries in all regions of the world, from India to the Czech Republic, from Uganda to Germany, from Egypt to Brazil. The Bangalore Code of Conduct focuses on principles of judicial ethics and professional conduct, especially rules of conflict of interest, propriety and financial transparency.

The Bangalore Code (2002)

The Bangalore Code provides, among others, specific rules related to the professional conduct of judges and their financial transparency and propriety, including:

- **Rule 1.15** prohibition to serve as a fiduciary, except for the estate of a family member;
- **Rule 1.16** prohibition on financial and business dealings that would interfere with judicial independence or the appearance thereof, except for personal or family investments;
- **Rule 1.20** prohibition of judicial bribery, whether the beneficiary of the gift or advantage is the judge or a member of his/her family;
- **Rule 1.21** authorized gifts and benefits, subject to law and to any legal requirements of public disclosure;
- **Rule 1.22** authorized compensation and expenses for extra-judicial activities;
- **Rule 1.22a** reasonable amount and proportionality to what a non-judge would receive for the same activities;
- **Rule 1.22b** limitations on reimbursement;
- **Rule 1.23** “A judge shall make such financial disclosures and pay all such taxes as are required by law”.

22 *The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, the Netherlands, 11 / 25-26 / 2002*

In Europe, the European Association of Judges has adopted the **Judges' Charter in Europe (1993)**²³, which recalls that “*the independence of every Judge is unassailable. All national and international authorities must guarantee that independence.*” The Charter aims at defining a certain number of fundamental principles while taking into account the existing differences among European States as a result of differing legal traditions and practices.

In Asia, the “**Beijing Principles**” (1995)²⁴ were adopted at the 6th Conference of Chief Justices of Asia and the Pacific Region. The main objective of the Conference was the promotion of “the administration of justice, the protection of human rights and the maintenance of the rule of law in the region”. To this aim, bearing in mind the Tokyo Principles and Revised Statement, the Chief Justices attempted to draft minimum standards for judicial independence, taking into account national differences. The main recommendations cover a wide range of topics in attempt to identifying consensus principles for the Asia and Pacific region, including judicial appointment, security of tenure, judicial resources and remuneration, court administration and the relationship of the judiciary with the executive.

“Beijing Principles” (1995)

“Judicial Independence...”

3. Independence of the judiciary requires that:

- (a) The Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
- (b) The Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.”

In Latin America, the **Caracas Declaration (1998)**²⁵ was adopted at the 1998 Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts. The Declaration aims at creating a framework for the enforcement of the principles contained in the Declarations of the Ibero-American Heads of States and Governments regarding the administration of justice, thus establishing mechanisms strengthening the judiciaries of Ibero-American States. The main recommendations cover a variety of issues related to judicial independence in Ibero-American States, including judicial independence, formation and training, alternative conflict resolution, and corruption.

Caracas Declaration (1998)

“Autonomy and Independence of the Judicial Power and Cooperation among Public Powers

The Ibero-American Supreme Courts and Tribunals attending this Summit, aware that autonomy and independence of the Judicial Power are essential premises for their effective functioning, formulate the following policies:

- 1. **In order to ensure the judicial independence**, it is necessary to apply and create norms, which ensure the self-government of the judicial power and regulate access to the administration of justice, respect to the judge’s stability, and to the judicial career, as well as permanent training of its administrative and jurisdictional personnel...
- 5. To strengthen the professional vocation of the Judge as guarantor of the independence of the Judicial Power...”

23 *Judges' Charter in Europe*, 03/20/1993, European Association of Judges

24 *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, “Beijing Principles”, 1995, 6th Conference of Chief Justices of Asia and the Pacific Region

25 *Caracas Declaration*, 03/04-06/1998, Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Caracas, Venezuela

In the Middle East, the “**Beirut Declaration**” (1999)²⁶ was the result of the debates of a conference on “The Judiciary in the Arab Region and the Challenges of the 21st Century” hosted by the Lebanese Bar Association in Beirut in June 1999. The Arab Center for the Independence of the Judiciary and the Legal Profession convened the conference to which 110 Arab jurists from 13 Arab States participated. The Declaration called upon Arab States “to include the *UN Basic Principles on the Independence of the Judiciary* into Arab constitutions and laws, and in particular, to penalize any interference in the work of the judiciary...” The main recommendations issued in the Declaration covered issues, including judicial appointment, security of tenure, training, freedom of association and judicial resources.

4. Brief Overview of the Jurisprudential Evolution of the Notion of Judicial Independence

International and regional human rights treaties explicitly provide for some minimum fair trial standards, such as judicial independence, reasonable length of proceedings and public hearing, but the definition, criteria and components of these rights have been laid out in the case law of international and regional courts and commissions.²⁷ The growing body of case law regarding the right to a fair trial and judicial independence identifies a number of key elements and principles applicable in member States, provided that they are fully implemented and enforced domestically.

Regional courts and commissions have begun identifying a wide range of issues, which they deem implicitly covered by the right to a fair trial, such as access to court and the enforcement of judgments. These issues have emerged as principles developed in a second wave of jurisprudence of human rights courts, which aims not only at defining the key components of the rights guaranteed under the human rights treaties but also at identifying the implicit rights necessary to give its full effect to the guarantees of the conventions.

The European Court of Human Rights [“the European Court”] has been the most active in defining the limits and contents of the right to a fair trial and judicial independence and has interpreted extensively the provisions of article 6(1). Its case law covers multiple issues affecting both criminal and civil or commercial trials and has interpreted judicial independence to cover issues ranging from institutional independence to access to justice.²⁸ Generally speaking, the European Court case law may have a significant impact on the interpretation of the right to a fair trial by the Inter-American Court of Human Rights as well as under other international and regional human rights instruments.²⁹

The Inter-American Court of Human Rights [“the Inter-American Court”] has mainly focused on a narrower set of issues in connection with article 8(1) and judicial independence. The key issue analyzed by the court concerns ousting the jurisdiction of the ordinary courts and the use of military courts and/or “faceless” judges to try civilians for crimes of terrorism and treason and the independence of such bodies. In the past, the Inter-American Court has often referred to the European cases as precedent and justification for its rulings. More recently, the Inter-American Court has ventured into new issues affecting judicial independence and access to justice, such as the enforcement of judgments and the cost of proceedings.

²⁶ *Recommendations of the First Arab Conference on Justice, “Beirut Declaration”, 06/14-16/1999*, Conference on “The Judiciary in the Arab Region and the Challenges of the 21st Century”, Beirut, Lebanon

²⁷ See, the case law of the UN Human Rights Committee, the Inter-American Human Rights Court and Commission, the European Human Rights Court and the African Human Rights Commission have had to interpret, respectively, article 14(1) of the ICCPR, articles 8(1) and 27(2) of the IACHR, article 6(1) of the ECHR and articles 7(1) and 26 of the ACHPR, including the protection of judicial independence.

²⁸ See, Wilhemina Thomassen, *Elements of Judicial Independence as Defined in the Case-Law of the European Court of Human Rights*

²⁹ The Inter-American Commission and Court of Human Rights have cited the jurisprudence of the European Court in the past within the reasoning of the own decisions. See, *inter alia*, *Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997, Inter-Am. Ct. H.R., Series C No. 30 (1997) and *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, Inter-Am. Ct. H.R., Series C No. 33 (1997).

IFES Rule of Law White Paper Series

White Paper #1, International Standards of Judicial Integrity

The Communications issued by the African Commission of Human Rights [“the African Commission”] focus mainly on issues of access to justice. The Protocol creating an African Court of Human Rights has just recently entered into force. Once the African Court is effectively set up, it will have the potential to play an important role in shaping up the boundaries of the rights guaranteed under the African Convention, including the right to an independent tribunal. Having seen the tendency of the Inter-American Court to refer to European case law in areas in which it had not had an opportunity to rule yet, it will be interesting to see whether the African Court will also choose to build upon the existing case law of other regional courts.

a. General Comments on the Right to a Fair Trial

i. Civil, Commercial, Administrative and Criminal Matters

Treaty provisions affirming the right to a fair trial explicitly refer to proceedings related to the disputes related to civil, commercial and administrative rights as well as the determination of criminal charges. More specifically, the right to a fair trial has been understood as applicable to all court proceedings, regardless of their nature.³⁰

ii. Reasonable Time

In assessing the reasonableness of the length of proceedings, human rights tribunals rely on a carefully-crafted balancing test that takes into account the circumstances of the case by looking into three main elements: (i) the complexity of the cases; (ii) the conduct of the plaintiff; and (iii) the conduct of the competent authorities.³¹ While the European Court was the first to set the criteria to assess the reasonableness of the length of proceedings, both the Inter-American Court and the African Commission follow similar criteria.

The requirement of “reasonable time” applies to all proceedings, regardless of their nature. Moreover, human rights tribunals have ruled that the assessment of the reasonableness of the length of proceedings must be undertaken by looking at proceedings as a whole. In *Neumeister v. Austria*, the European Court held that in criminal cases, the date of departure of the proceedings for the purpose of the assessment of the reasonableness of their length may start running prior to the seisin of the court.³² Similarly, in *Golder v. the United Kingdom*, the European Court has upheld this analysis in civil cases.³³ As for the end of the proceedings, the European Court has repeatedly held that the enforcement phase is an integral part of the proceedings for purposes of the assessment of the reasonableness of their length. The European Court has generally held that enforcement proceedings did not present any particular complexity that could justify the delays under review in the specific cases.³⁴

As a general matter, the more serious the proceedings are, the more diligence is required in complying with the requirement of “reasonable time”. In that regard, the European Court has held that, while only delays attributable to the State may justify a failure to comply with the “reasonable time” requirement, the conduct of the relevant authorities, and especially delays and court inertia, may primarily contribute to the excessive length

30 See, *inter alia*, for the applicability of fair trial provisions to non-judicial dispute resolution bodies, such as professional disciplinary boards, *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgment of June 23, 1981, Eur. Cour H.R., Series A no. 43; *Albert and Le Comte v. Belgium*, Judgment of February 10, 1983, Eur. Cour H.R., Series A no. 58

31 See, *inter alia*, *König v. Germany*, Judgment of June 28, 1978, Eur. Cour H.R., Series A no. 27; *Buchholz v. Germany*, Judgment of May 06, 1981, Eur. Cour H.R., Series A no. 42; *Zimmermann and Steiner v. Switzerland*, Judgment of July 13, 1983, Eur. Cour H.R., Series A no.66; *H v. the United Kingdom*, Judgment of July 8, 1987, Eur. Cour H.R., Series A no. 120; *Union Alimentaria Sansers SA v. Spain*, Judgment of July 7, 1989, Eur. Cour H.R., Series A no.157

32 *Neumeister v. Austria*, Judgment of June 27, 1968, Eur. Cour H.R., Series A no. 8

33 *Golder v. the United Kingdom*, Judgment of February 21, 1975, Eur. Cour H.R., Series A no. 18

34 See, *inter alia*, *Zappia v. Italy*, Judgment of September 26, 1996, Eur. Cour H.R., Reports 1996-IV

of the proceedings. Conversely, it has ruled that the inertia of the plaintiff, in countries in which the impulse of the enforcement process is given by the plaintiff, may free the State of some, if not all, of its responsibility.³⁵

iii. Right to an Effective Remedy

Human rights tribunals are increasingly looking beyond the basic requirements of the right to a fair trial and ruling that violations of core obligations under the right to a fair trial may also constitute violations of the right to an effective remedy (article 13 of the ECHR) or of the right to judicial guarantees (article 25 of the IACHR) or even of the obligations of the State to guarantee judicial independence (article 26 of the ACHPR). These new obligations provide broader grounds for the defense of judicial independence as they are no longer dependant on the fairness of the proceedings but rather provide broader institutional requirements on the State.

The judiciary has a great responsibility in ensuring the creation and permanence of a mechanism enabling “citizens whose human rights are violated ... are assured justice and redress.”³⁶ Not only the judiciary but also lawyers can play an important role in furthering the “level of justice for aggrieved citizens who seek redress for the violation of their human rights.”³⁷ Ultimately, it falls to the State to ensure that the independence and impartiality is guaranteed and protected domestically as well as to respect such independence and impartiality.

The European Court has also been extending its jurisprudence on the length of proceedings by adding to the violation under article 6(1) of the ECHR a violation under article 13 of the ECHR which recognizes the duty of member States to provide, under domestic law, effective remedies for violations of human rights by the State. In *Horvat v. Croatia*, the European Court found that the civil proceedings for repayment of loans had not been concluded within a reasonable time in violation of article 6(1). It went on to find a violation of article 13 “in so far as the applicant has no domestic remedy whereby she could enforce her right to a ‘hearing within a reasonable time’ in either of her cases as guaranteed by Article 6(1).”³⁸

Holding that the lack of effective recourse against the violation of rights guaranteed by the IACHR violates the right to judicial protection of article 25, the Inter-American Court noted, in *Ivcher Bronstein v. Peru*, that recourses are illusory when they are ineffective in practice and such is the case when the judiciary lacks the necessary independence to take an impartial decision.³⁹ This ruling was further clarified in the *Constitutional Court Case* in which the IACHR held that the requirement of a “simple and prompt recourse” mandates not only that the recourse exist in practice, but also that it be available in practice.⁴⁰

The Inter-American Court has also held that domestic legislation may violate the right to an effective remedy by preventing victims from access to such remedy. Indeed, in the *Barrios Altos Case*, the Inter-American Court struck down Peruvian amnesty laws as contrary to the right to an effective remedy for violations of the rights and freedoms guaranteed by article 25 of the IACHR.⁴¹

35 See, *Barbagallo v. Italy*, Judgment of January 24, 1992, Eur. Cour H.R., Series A no.230-I “Clearly, the respondent State cannot be held responsible for the five or so months which Mrs. Barbagallo waited before taking proceedings against Mr. M. and Mrs. C. before the Messina District Court ... or the six or so weeks which she took to renew the summons against Mr. M. ... or again the three months which elapsed before the judgment became final. Far less can the court be criticized for having brought forward by nearly one year, at the parties’ request, the date of the hearing which was to have been held on 15 May, 1990.”

36 *United Nations Human Rights Instruments and Criminal Justice Standards* by Adedokun A. Adeyemi, in *The Protection of Human Rights in African Criminal Proceedings*, M. Cherif Bassouni and Ziyad Motala editors 1995

37 *United Nations Human Rights Instruments and Criminal Justice Standards* by Adedokun A. Adeyemi, in *The Protection of Human Rights in African Criminal Proceedings*, M. Cherif Bassouni and Ziyad Motala editors 1995

38 *Horvat v. Croatia*, Judgment of July 26, 2001, Eur. Cour H.R.,

39 *Ivcher Bronstein v. Peru*, Inter-Am. CHR, Judgment of February 6, 2001, Series C no.74

40 *Constitutional Court Case (Peru)*, Judgment of January 31, 2001, Inter-Am. Ct. H.R., Series C no. 71

41 *Barrios Altos Case (Peru)*, Judgment of March 14, 2001, Inter-Am. Ct. H.R., Series C no.75

In a similar spirit, the African Commission has held that ousting the jurisdiction of ordinary courts violated the obligation of the States to guarantee the independence of the judiciary and to protect the courts which are the national institutions protecting the rights guaranteed by the African Charter.⁴²

b. Conditions of Independence

Requirement of impartiality and independence means that courts must decide cases exclusively on the basis of facts and in accordance with the law. Moreover, it must refrain from prejudging the case, due to either personal convictions or outside influences. The most problematic pressure group is probably the media. Indeed, through extensive coverage of investigations and criminal trials the media may exceed its informative role. Media justice must be prevented because it undermines principles such as the presumption of innocence or the impartiality of the tribunal, which are at the core of the justice system.

The European Court will look at both the subjective personal independence of the judge and the objective institutional independence of the judiciary.⁴³ In doing so, the European Court has set a number of criteria for the assessment of the independence of courts. These criteria are now universally accepted standards of judicial independence for purposes of compliance with the requirements of the right to a fair trial. In *Campbell and Fell v. the United Kingdom*, the European Court summarizes the three core criteria of independence: (i) manner of appointment and length of tenure of members, (ii) guarantees against outside pressures and (iii) the appearance of independence.⁴⁴

c. Composition of an Independent Tribunal

i. Notion of Tribunal

The European Court has defined the notion of tribunal as a “body exercising judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner.”⁴⁵ The central requirement is that the tribunal be established by law. The creation of the tribunal by law includes the idea that it has been given a certain number of powers, which in turn is linked to the concept of competence. Indeed, the tribunal must be competent to judge the matter at issue, which requires that its jurisdiction over such matter has been recognized by law.

ii. Membership

Challenges to the independence of tribunals have often derived from their composition, and especially the inclusion of members of the executive. For example, the European Court has repeatedly challenged the composition of National Security Courts as a violation of the principle of judicial independence due to the inclusion of members of the executive.⁴⁶

⁴² *Civil Liberties Organization v. Nigeria*, African Comm. Hum & Peoples’ Rights, Comm. No.129/94

⁴³ *Piersack v. Belgium*, Judgment of October 1, 1982, Eur. Cour H.R., Series A no. 53

⁴⁴ *Campbell and Fell v. the United Kingdom*, Judgment of June 24, 1984, Eur. Cour H.R., Series A no. 80 “In determining whether a body can be considered to be ‘independent’ – notably of the executive and of the parties to the case (see, *inter alia*, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 06/23/1981, Eur. Cour H.R., Series A no.43) – the [European Court of Human Rights] has had regard to the manner of appointment of its members and the duration of their term of office (see, *inter alia*, *idem*), the existence of guarantees against outside pressures (see, *inter alia*, *Piersack v. Belgium*, judgment of 10/01/1982, Eur. Cour H.R., Series A no. 53) and the question whether the body presents an appearance of independence (see, *inter alia*, *Delcourt v. Belgium*, judgment of 01/17/1970, Eur. Cour H.R., Series A no. 11).”

⁴⁵ See, *inter alia*, *Stamek v. Austria*, judgment of October 22, 1984, Eur. Cour H.R., Series A no.84: “For the purposes of Article 6 ... it comes within the concept of a ‘tribunal’ in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.”

⁴⁶ See, constant jurisprudence against Turkey, for example *Incal v. Turkey*, Judgment of June 09, 1998, ECHR Reports 1998-IV

The European Court notes that the independence of each member of a tribunal should be presumed unless there is proof to the contrary. Further, in *Ringeisen v. Austria*, the European Court held that the mixed membership of the tribunal, judges and civil servants, the Chairman of which was a judge, provides clear assurance of the independence and impartiality of the tribunal. The method of election or the professional affiliation of some members of the tribunal is not sufficient in itself to bear out a charge of lack of independence.⁴⁷ Similar judgments have been rendered in subsequent cases regarding mixed memberships of judges and members of professional orders.⁴⁸

The Inter-American Court has had to address the issue of whether the composition of the tribunal affects judicial independence primarily in the context of military tribunals, which will be discussed in-depth in a later subsection. In *Cantoral Benavides v. Peru*, the Inter-American Court also ruled that trials run by “faceless judges” in cases of terrorism and treason lack the independence and impartiality required under article 8(1) of the IACHR.⁴⁹

The African Commission has had the opportunity to address the impartiality of tribunals and their composition, mostly indirectly, in a few cases. In *Constitutional Rights Project v. Nigeria*, the African Commission upheld a challenge to the independence of a court mainly composed of members of the executive. It held that the presence of members of the executive on the tribunal created the appearance, if not the reality, of a lack of independence and impartiality. The appearance of lack of independence in itself constitutes a violation of article 7.⁵⁰

In *Civil Liberties Organization v. Nigeria*, the African Commission reviewed a challenge to the bar association’s disciplinary body which was mainly composed of members of the executive. Noting that it violated the freedom of association, the Commission also affirmed that the “interference with the free association of the Nigerian Bar Association is inconsistent with the preamble of the African Charter in conjunction with UN Basic Principles on the Independence of the Judiciary”.⁵¹

d. Institutional and Personal Independence

In assessing whether the conditions of independence are met, the European Court focuses on the judiciary’s relation with the other State powers, with the politicians, with the mass media and with the parties to the litigation. The institutional independence of the judiciary and the personal independence of the judge in a given case depend on the relationship of the judiciary and specific court with a number of actors, including: (i) the other branches of government, especially the executive; (ii) the parties; and (iii) the media. Similar approaches have been taken by the Inter-American Court and the African Commission.

Regarding the relationship between the judiciary and the executive, in *Beaumartin v. France*, the plaintiff challenged the independence of administrative tribunals based on the exclusive power of the Minister of Foreign Affairs to interpret treaties. The European Court held that the tribunal was not independent because of its obligation to request interpretations of international treaties from the executive.⁵²

47 *Ringeisen v. Austria*, Judgment of July 16, 1971, Eur. Cour H.R., Series A no. 13

48 See, *inter alia*, *Le Comptie, Van Leuven and De Meyere v. Belgium*, Judgment of June 23, 1981, Eur. Cour H.R., Series A no. 43

49 *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R., Series C no.69

50 *Constitutional Rights Project v. Nigeria*, African Comm. Hum & Peoples’ Rights, Comm. No.60/91: “Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality.”

51 *Civil Liberties Organizations v. Nigeria*, African Comm. Hum & Peoples’ Rights, Comm. No.101/93

52 *Beaumartin v. France*, Judgment of November 24, 1994, Eur. Cour H.R., Series A no.296-B

Regarding the relationship between the judiciary and the media, in *The Sunday Times v. the United Kingdom*, the European Court held certain restrictions on freedom of expression and the freedom of the press may be justified to maintain the authority of the judiciary.⁵³

e. Military, National Security and Other Special Courts

Many cases before the European Court, the Inter-American Court and the African Commission raise the issue of whether special courts, including military and national security courts, meet the test of independence under the right to a fair trial. While the bulk of the cases described here address the issue of the independence of military and national security tribunals, the independence of other special courts and tribunals has been challenged under human rights treaties, as evidenced by some of the case law of the African Commission.

The European Court has repeatedly ruled that the use of military or national security courts to try civilians violated the principle of judicial independence. This continuous case law has been strengthened in recent years by series of cases against Turkey where the government has used national security courts to try civilians under anti-terrorism legislation.⁵⁴

In *Loayza Tamayo v. Peru*, the Inter-American Court held that the use of special military courts to try civilians violated the principle of judicial independence. “Military tribunals, composed of military personnel nominated by the Executive and subject to military discipline who are entrusted with a function which specifically belongs to the Judiciary, given jurisdiction to judge not only military personnel by also civilians, which render decisions, as in the present case without motivation, do not meet the standards of independence and impartiality required by article 8(1) as elements essential to the due process of law.”⁵⁵

In *Castillo Petruzzi v. Peru*, the Inter-American Court noted that the use of military courts to try civilians constitutes a transfer of jurisdiction from civilian courts to military courts, precluding the “competent, independent and impartial tribunal previously established by law ... from hearing these cases”. Additionally, military courts do not meet “the requirements implicit in the guarantees of independence and impartiality that article 8(1) ... recognizes as essentials of due process of law”, essentially because their composition and jurisdiction makes them subordinate to the executive.⁵⁶

The African Commission has had to address the issue of the ousting of the jurisdiction of ordinary courts and its impact on judicial independence in the context of some cases against Nigeria. In *Constitutional Rights Project v. Nigeria*, the African Commission held that the transfer of jurisdiction from ordinary courts to Robbery and Firearms Tribunals mainly composed of members of the executive constituted a violation of the principle of judicial independence.⁵⁷ In *Civil Liberties Organization v. Nigeria*, the African Commission came to the same conclusion regarding the disciplinary body of the Bar Association, which was mainly composed of members of the executive.⁵⁸ Moreover, in *Civil Liberties Organization v. Nigeria*, the African Commission held that “ousting the jurisdiction of the courts in Nigeria to adjudicate the legality of any decree threatens the independence of the judiciary”.⁵⁹

53 *The Sunday Times v. the United Kingdom*, Judgment of November 26, 1991, Eur. Cour H.R., Series A no. 217

54 See, *inter alia*, *Incal v. Turkey*, Judgment of June 09, 1998, ECHR Reports 1998-IV

55 *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, Inter-Am. Ct. H.R., Series C no.33

56 *Castillo Petruzzi v. Peru*, Judgment of May 30, 1999, Inter-Am. Ct. H.R., Series C no.52

57 *Constitutional Rights Project v. Nigeria*, African Comm. Hum & Peoples' Rights, Comm. No.60/91

58 *Civil Liberties Organization v. Nigeria*, African Comm. Hum & Peoples' Rights, Comm. No.101/93

59 *Civil Liberties Organization v. Nigeria*, African Comm. Hum & Peoples' Rights, Comm. No.129/94

f. Judicial Independence and Access to Justice

As a general matter, regional human rights tribunals have held that the right to access to justice is an inherent element of the protection of the right to a fair trial guaranteed under international and regional human rights treaties. Indeed, in *Golder v. the United Kingdom*, the European Court analyzed the right to a fair trial in the context of international human rights law and concluded that “Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect only.”⁶⁰

In *Fayed v. the United Kingdom*, the European Court held that unrestrained ousting of jurisdiction of civil courts violated principles of access to justice under article 6(1) of the ECHR. Indeed, it held that “it would not be consistent with the rule of law in a democratic society or with the basic principle underlying article 6(1) ... if, for example, a State could, without restraint or control by the ECHR enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.”⁶¹

However, the State may place legitimate limitations on access to court. In *Al-Adsani v. the United Kingdom*, the European Court provides a two pronged test for assessing the admissibility of limits to access to court. The two cumulative conditions are (1) legitimate aim of the limitation and (2) the means are reasonably proportionate to the aim. Moreover, the European Court held that the immunity of a sovereign State constitutes such a legitimate limitation.⁶²

In *Bámaca Velásquez v. Guatemala*, the Inter-American Court ruled that the lack of access to a simple recourse before a competent, independent and impartial court constitutes a violation of article 8(1).⁶³

The recognition by the African Commission of violations of article 7 in connection with the right of access to justice has arisen primarily in connection with the lack of opportunity to challenge decisions before a competent judicial authority. In a number of decisions rendered against several African countries, including Angola, Rwanda and Zambia, the African Commission has held that the lack of opportunity to challenge the regularity and legality of decisions of expulsion or detention before a competent national judicial authority constituted a violation of article 7 of the Convention.⁶⁴

In *Constitutional Rights Project v. Nigeria*, the African Commission held that the prohibition of judicial review of Robbery and Firearms Tribunals and lack of judicial appeals for their judgments deprived the parties of access to justice.⁶⁵ In *Civil Liberties Organization v. Nigeria*, the African Commission ruled that the prohibition of litigation infringed on the right to appeal to ordinary courts.⁶⁶

60 *Golder v. the United Kingdom*, Judgment of February 21, 1975, Eur. Cour H.R., Series A no. 18

61 *Fayed v. the United Kingdom*, Judgment of September 21, 1994, Eur. Cour H.R., Series A no.294-B

62 *Al-Adsani v. the United Kingdom*, Judgment of November 21, 2001, Eur. Cour H.R., Reports 2001-XI

63 *Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am. Ct. H.R., Series C no.70

64 See, *inter alia*, *Organisation Mondiale Contre la Torture v. Rwanda*, African Comm. Hum & Peoples’ Rights, Comm. No.27/89, 46/91, 49/91, 99/93; *Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia*, African Comm. Hum & Peoples’ Rights, Comm. No. 71/92; and *Fédération Internationale des Ligues des Droits de l’Homme v. Angola*, African Comm. Hum. & Peoples’ Rights, Comm. No.159/96.

65 *Constitutional Rights Project v. Nigeria*, African Comm. Hum & Peoples’ Rights, Comm. No.60/91

66 *Civil Liberties Organization v. Nigeria*, African Comm. Hum & Peoples’ Rights, Comm. No.101/93

g. Enforcement of Court Decisions

The case law of the European Court has been evolving towards a broader recognition of enforcement requirements and principles under article 6(1) of the ECHR and the right to a fair trial. In *Hornsby v. Greece* (1997), the European Court linked the enforcement of judgments to the right to court or to effective judicial protection of civil rights as guaranteed by the right to a fair trial under article 6(1) of the ECHR.⁶⁷

The reasoning of the decision regarding the applicability of article 6(1) of the ECHR shows that enforcement proceedings are an integral part of the trial not only in terms of length of proceedings but also in terms of access to justice and of assessing the effectiveness of the fair trial guarantees of the ECHR.

The European Court has also been extending its jurisprudence on the length of proceedings by adding to the violation under article 6(1) of the ECHR a violation under article 13 of the ECHR which recognizes the right to an effective remedy for violations of human rights by the State. In *Horvat v. Croatia*, the European Court found that the civil proceedings for repayment of loans had not been concluded within a reasonable time in violation of article 6(1). It went on to find a violation of article 13 “in so far as the applicant has no domestic remedy whereby she could enforce her right to a ‘hearing within a reasonable time’ in either of her cases as guaranteed by Article 6(1).”⁶⁸

Similarly, in its first case on the enforcement of court judgments, the Inter-American Court accepted the argument of Inter-American Commission that the Peruvian State had violated the right to judicial protection under article 25 of the Inter-American Convention by failing to comply with final Supreme Court judgments ordering the payment of an adjusted pension to the plaintiffs and Constitutional Court judgment ordering the State to comply with the Supreme Court judgments. The case at issue, “*Cinco Pensionistas v. Peru*,” held that the failure of the State to enforce judgments against it for eight years had deprived the plaintiffs of their right to an effective remedy before a competent tribunal for protection against acts violating their “fundamental rights recognized by the Constitution or laws of the State and by [the Inter-American] Convention”.⁶⁹

5. Academic and Applied Research on Judicial Independence

A summary review of the most recent academic and applied research on judicial independence worldwide has enabled us to identify a common approach to judicial independence that follows with increasing rigor emerging international and regional standards.⁷⁰ Interesting comprehensive analytical work has been undertaken by Amnesty International and the Lawyer’s Committee for Human Rights on broader human rights and fair trial issues, some aspects of which are directly related to judicial independence and access to justice.

The **Amnesty International Fair Trials Manual (1999)**⁷¹ provides summary analysis of the components of the right to a fair trial under the various international and regional human rights treaties and case law. It notes that judicial independence is an essential element of a fair trial, meaning that “decision-makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law,

67 *Hornsby v. Greece*, Judgment of March 19, 1997, Eur. Cour H.R., Reports 1997-II

68 *Horvat v. Croatia*, Judgment of July 26, 2001, Eur. Cour H.R.,

69 “*Cinco Pensionistas v. Perú*,” Judgment of February 28, 2003, Inter-Am. Ct. H.R., Series C No. 98 (2003)

70 See, for example, *Comprehensive Legal and Judicial Development – Toward an Agenda for a Just and Equitable Society in the 21st Century (Proceedings of a Global Conference)*, World Bank, June 5-7, 2000, Washington, DC; *Judicial Independence in the Age of Democracy – Critical Perspectives from around the World*, Peter Russell et David M. O’Brien, University of Virginia Press (2001); and *Monitoring the EU Accession Process – Judicial Independence (2001 Country Reports)*, Open Society Institute (2001).

71 First published December 1998, AI Index: POL 30/02/98; available on the Amnesty International website at <http://www.amnesty.org/ailib/intcam/fairtrial/fairtrial.htm>

without any interference, pressure or improper influence from any branch of government or elsewhere.”

Similarly, the **Lawyers Committee for Human Rights Fair Trial Guide (2000)**⁷² discusses broad fair trial issues and notes that judicial independence “presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch. The Basic Principles on the Judiciary set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical safeguard of independence include the specification of qualifications necessary for judicial appointment, the terms of appointment, the need for guaranteed tenure, the requirement of efficient, fair and independent disciplinary proceedings regarding judges, and the duty of every State to provide adequate resources to enable the judiciary to properly perform its functions (for example adequate salaries and training). Depending on the circumstances of the case, a court’s independence may also be assessed on the basis of its relationship with prominent social groups such as political parties, the media and various lobbies.”

6. IFES’s Judicial Integrity Principles

a. Judicial Independence Guide

Starting in the late 1990s, IFES and USAID partnered on a first-of-a-kind multi-year global research project that focused exclusively on issues pertaining to judicial independence. A comprehensive analytical document, Guidance for Promoting Judicial Independence and Impartiality (“Judicial Independence Guide”), was published in November 2001.⁷³ The main objective of the Judicial Independence Guide is to identify, organize, and strategically assess the array of judicial independence issues and to share lessons learned and programming experiences with donors, reformers and civil society around the globe. The Judicial Independence Guide contains consensus findings, lessons learned, and comparative information gleaned from global surveys, thematic papers, roundtables and the contributions of numerous pro bono advisors. As highlighted in the Judicial Independence Guide, transparency reforms, if collectively and strategically undertaken, are among the most important reforms because they promote public participation, open government, access to information, efficiency, and higher quality decision-making.

b. IFES’s Judicial Independence Conferences

The creation of communication channels and networks for debate and dialogue within the judiciary as well as between the judiciary and the other powers of the State and civil society is a critical element for the success of democratic reforms. The three constitutional powers and the broader societal forces must be engaged in the reform process as they are likely to provide support to the democratic reform process.

The organization of strategic conferences and workshops bringing together judges, legal professionals and civil society representatives may help increase cross-border information exchanges, stimulate reform and national debates on judicial independence and enable a stronger commitment of civil society in support of the judiciary. As an example, IFES has organized a series of regional and country conferences and workshop in an effort to roll out information and tools presented in the Judicial Independence Guide. Such conferences and workshops have now been held or are being planned in Peru (2001), Central America (Honduras, 2002), Southern Africa (Malawi, 2003), the Middle East (Egypt, 2003), Francophone West Africa (Benin, 2004), and Indonesia (2004).

⁷² *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, Lawyers Committee for Human Rights, March 2000; available on the LCHR website at <http://www.lchr.org/pubs/fairtrial.htm>

⁷³ IFES/USAID, *Guidance for Promoting Judicial Independence and Impartiality*, USAID Technical Publication Series, 2001; available on the IFES website, in English, French, Spanish and Arabic, at http://www.ifes.org/rule_of_law/description.html

IFES Rule of Law Tools: Priority Issues and Key Recommendations of the Declarations Adopted by the Participants of IFES's Judicial Independence Conferences

Agreement of the Three Branches of Government of Honduras to Strengthen Judicial Independence and Impartiality, 04/10/2002, Regional Conference on "Promoting Judicial Independence and Impartiality", Tegucigalpa, Honduras

The Honduras Agreement was signed by the three branches of the State of Honduras and called for support for key priority issues including:

- Adequate budgetary resources;
- Recognizing the need for legal reform;
- Objective and transparent judicial evaluation; and
- Implementing a judicial independence strategy.

Blantyre Rule of Law / Separation of Powers Communiqué, 01/31/2003, IFES Rule of Law / Separation of Powers Conference, Blantyre, Malawi

The main conclusions and recommendations of the Malawi Communiqué, which was certified by the Hon. Leonard Unyondo, Chief Justice of the Supreme Court of Malawi, include:

- Building a coalition to promote and support judicial independence and the Rule of Law;
- Promoting a commitment by the three branches of the State;
- Ensuring participation of civil society and the media;
- Adopting country and regional monitoring and reporting mechanisms;
- Achieving an objective judicial selection process and security of tenure; and
- Guaranteeing the fair and effective enforcement of judgments.

Cairo Declaration on Judicial Independence, 02/24/2003, The Second Arab Justice Conference "Supporting and Advancing Judicial Independence", Cairo, Egypt

The main conclusions and recommendations of the Cairo Declaration include:

- Building a coalition to promote and support judicial independence;
- Promoting a commitment by the three branches of the State;
- Ensuring participation of civil society;
- Adopting a code of conduct for judges;
- Increasing transparency in the judicial career and its rules;
- Promoting judicial training; and
- Guaranteeing the fair and effective enforcement of judgments.

Declaration of Cotonou on the Separation of Powers and the Rule of Law in the AOA-HJF [West African Association of Francophone Supreme Courts] Sub Region, 01/15/2003, IFES Rule of Law / Separation of Powers Conference, Cotonou, Benin

The main conclusions and recommendations of the Cotonou Declaration, which was certified by the Hon. Saliou Aboudou, Chief Justice of the Supreme Court of Benin, include:

- Increasing collaboration among the three branches of the State;
- Working on key areas to strengthen judicial independence and efficiency, such as: (i) prosecutorial independence; (ii) budgetary and administrative autonomy; (iii) independent Judicial Council; (iv) ethics rules for all stakeholders of the justice sector; (v) improvement and rationalization of legal education and training; (vi) information exchange networks; (vii) access to justice for citizens; and (viii) fair and effective enforcement of judgments;
- Strengthening the capacity of all Democratic and Rule of Law Institutions;
- Educating and training citizens and stakeholders of the justice sector;
- Establishing a monitoring and assessment mechanism for the implementation of the Declaration; and
- Entrusting the AOA-HJF with the implementation of the Declaration

Debates in the above-mentioned conferences and workshops have facilitated dialogue on a number of issues related to judicial independence and the Rule of law, including the processes of the judicial career; the obstacles, sources and forms of interference with judicial independence; corruption; Judicial Councils; the enforcement of court judgments; and the rule of civil society.

c. Key Consensus Principles of Judicial Integrity

Based on the Judicial Independence Guide and subsequent research, including the research presented in this White Paper, IFES has sought to present in summary form the key, consensus principles of judicial independence as derived from regional and international standards. An in-depth analysis of the international and regional human rights treaties, governmental and non-governmental guidelines, standards and principles led to the identification of 18 core principles, the Judicial Integrity Principles, or JIP. To further identify consensus principles and trends, IFES also examined a number of relevant academic and applied research studies, including the work of the Open Society Institute to monitor judicial independence, judicial capacity and anticorruption policy in EU accession countries, the Millennium Challenge Account “Ruling Justly and Anticorruption Principles” and work by individuals such as Judge Sandra Oxner of Canada. For purposes of the JIP, the notion of “judicial integrity” is defined broadly to include judicial independence, judicial transparency, judicial accountability, judicial ethics and the enforcement of judgments.

IFES Rule of Law Tools: Judicial Integrity Principles, JIP

- JIP.1** Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice
- JIP.2** Institutional and personal/decisional independence of judges
- JIP.3** Clear and effective jurisdiction of ordinary courts and judicial review powers
- JIP.4** Adequate judicial resources and salaries
- JIP.5** Adequate training and continuing legal education
- JIP.6** Security of tenure
- JIP.7** Fair and effective enforcement of judgments
- JIP.8** Judicial freedom of expression and association
- JIP.9** Adequate qualification and objective and transparent selection and appointment process
- JIP.10** Objective and transparent processes of the judicial career (promotion and transfer processes)
- JIP.11** Objective, transparent, fair and effective disciplinary process
- JIP.12** Objective and transparent court administration and judicial processes
- JIP.13** Judicial access to legal and judicial information
- JIP.14** Public access to legal and judicial information
- JIP.15** Limited judicial immunity from civil and criminal suit
- JIP.16** Conflict of interest rules
- JIP.17** Income and asset disclosure
- JIP.18** High standards of judicial conduct and rules of judicial ethics

ANNEX I – OVERVIEW OF THE JUDICIAL INTEGRITY PRINCIPLES COVERED IN SELECTED INTERNATIONAL AND REGIONAL INSTRUMENTS

This table presents the overlap between IFES’s Judicial Integrity Principles and a number of selected international regional human rights treaties and judicial independence guidelines and standards.

	HRT/Ct	UNBP	COE.R	UCJ	ECSJ	JCE	Beijing	Caracas	Beirut
JIP.1									
JIP.2									
JIP.3									
JIP.4									
JIP.5									
JIP.6									
JIP.7									
JIP.8									
JIP.9									
JIP.10									
JIP.11									
JIP.12									
JIP.13									
JIP.14									
JIP.15									
JIP.16									
JIP.17									
JIP.18									

For purposes of this summary table, the following documents have been included: (i) regional and international human rights treaties and case law of corresponding human right courts [HRT/Ct]; (ii) United Nations Basic Principles on the Independence of the Judiciary [UNBP]; (iii) Council of Europe Recommendation no. R(94)12 on the Independence, Efficiency and Role of Judges [COE.R]; (iv) Universal Charter of the Judge [UCJ]; (v) European Charter on the Status of Judges [ECSJ]; (vi) Judges’ Charter in Europe [JCE]; (vii) Statement of Principles of the Independence of the Judiciary in the LAWASIA Region [Beijing]; (viii) Caracas Declaration of Presidents of Ibero-American Supreme Justice Tribunals and Courts [Caracas]; and (ix) Recommendations of the First Arab Conference on Justice [Beirut].

ANNEX II – SELECTED BIBLIOGRAPHY

International and Regional Standards and Principles

Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53

Universal Charter of the Judge, 1999, International Association of Judges

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 08/19/1995, Beijing, China, 6th Conference of the Chief Justices of Asia and the Pacific

Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 1993, 518th Meeting of the Ministers' Deputies, Council of Europe, Strasbourg, France

European Charter on the Status of Judges, 07/08-10/1998, Council of Europe, Strasbourg, France

Global Framework Action Plan for Judges in Europe, 2001, Appendix 11, 740th Meeting of the Ministers' Deputies, Council of Europe, Strasbourg, France

Articles, Books and Background Papers

AMNESTY INTERNATIONAL. 1998. Fair Trials Manual. AI Index: POL
See, <http://www.amnesty.org/ailib/intcam/fairtrial/fairtri.htm>

AMERICAN UNIVERSITY/IDB. 2001. The International Dimension of Human Rights: A Guide for Application in Domestic Law. IDB Publications Series. IDB: Washington, DC.

CUMARASWAMY, Dato' Param. 1998. International and Regional standards for the Protection of Judicial Independence. Commonwealth Judicial Journal, Com. Jud. J. 1998, 12(4), 9-19.

IFES/USAID. 2001. Guidance for Promoting Judicial Independence and Impartiality. USAID Technical Publication Series. USAID: Washington, DC.
See, http://www.ifes.org/rule_of_law/description.html in Arabic, English, French and Spanish.

LCHR. 2000. What is a Fair Trial? A Basic Guide to Legal Standards and Practice. Lawyers Committee for Human Rights. See, <http://www.lchr.org/pubs/fairtrial.htm>

ANNEX III – BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

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 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

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

IFES Rule of Law White Paper Series

White Paper #1, International Standards of Judicial Integrity

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

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

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges 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.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. 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.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial

administration. Professional secrecy and immunity

15. The judiciary shall be bound by 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.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

© Copyright 1997 - 2000

**Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland**