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# The Duties of States under International Law for the Protection of Judges, Prosecutors, and Lawyers





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# The Duties of States under International Law for the Protection of Judges, Prosecutors, and Lawyers

This document is the annex of the report [\*Criminalization of Justice Operators in Guatemala as a strategy to secure impunity\*](#). Special thanks to the international firm *King & Spalding* for researching these international standards.

This analysis summarizes the safeguards of international human rights law for judges<sup>1</sup> and prosecutors, in the face of arbitrary disciplinary proceedings, administrative removals, immunity removal and political trials, criminal proceedings, challenges, and complaints before bar associations, as well as guarantees for the independence of practicing lawyers, even when acting in the capacity of human rights defenders. International law enshrines such safeguards and guarantees, among other things, because of the need for the independence of judges, prosecutors, and lawyers in practice, for the rule of law in a democracy, and for the protection of fundamental rights.

Multiple guarantees derive from judicial independence: [i] to an adequate appointment process, [ii] to tenure, and [iii] to the guarantee against external pressures.<sup>2</sup> This analysis summarizes the second and third guarantees – security in office and freedom of pressure. It does not cover the subject of judicial selection.

In addition to judicial independence, this analysis summarizes the related safeguards, guaranteed by international law for prosecutors and lawyers in practice.

This document is organized as follows: Part I describes the main sources of relevant international standards. Part II presents an overview of the safeguards granted to judges, prosecutors, and lawyers; Part III specifies specific guarantees for judges and prosecutors; and Part IV explains measures impacting the Judiciary, Prosecutors, and practicing lawyers.

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<sup>1</sup> The terms “judges” and “Judges” have different meanings in different legal systems. This analysis uses the word “judge” to include judges and any person exercising the adjudication function by a State. See *Colindres Schonenberg v. El Salvador*, Judgment of February 4, 2019, ¶ 67.

<sup>2</sup> *Rich v. Argentina*, Judgment of September 2, 2019, ¶ 52. Accordingly, Human Rights Committee, General Comment 32, Article 14. *The right to a fair trial and equality before the courts*, UN Doc. CCPR/C/GC/32, 23 August 2007 (“General Comment 32”). Unless otherwise indicated, all the judgments cited in this analysis are of the Inter-American Court of Human Rights.

## Summary

This is a summary of the safeguards of international human rights law for judges and prosecutors in the face of arbitrary disciplinary proceedings, administrative removals, political trials, criminal proceedings, challenges, and complaints to bar associations, as well as guarantees for the independence of practicing lawyers, even when acting in the capacity of human rights defenders.

International law enshrines such safeguards and guarantees, among other considerations, because of the imperiousness of the independence of judges, prosecutors, and lawyers in practice, for the rule of law in a democracy and the protection of fundamental rights. The main warranties are as follows:

- (i) International law recognizes that the independence of judges, prosecutors and practicing lawyers is central to the rule of law in a democracy and indispensable for protecting fundamental rights.
- (ii) The American Convention on Human Rights and the International Covenant on Civil and Political Rights, as authoritatively interpreted in light of related international instruments, are the main sources of international law safeguards for the independence of the judiciary.
- (iii) The independence of the judiciary includes freedom both from external interference and from internal interference by the judicial hierarchy outside lawful channels of appellate review.
- (iv) Judges and prosecutors have rights to freedoms of speech<sup>3</sup>, assembly and association, within limits appropriate to the nature of their office. They are entitled to exercise those rights and to form associations. The permissible extent of their freedom of expression should be determined in the circumstances of each case.
- (v) Judges and prosecutors must be free to carry out their duties on the basis of the facts and the law without being subjected to improper influences, inducements, pressures, threats, or interferences, direct or indirect, or to any inappropriate or unwarranted interference.
- (vi) Judges and prosecutors may be subject to disciplinary sanctions, suspension, or removal from office only for persistent inability to carry out their functions, frequent intemperance, intentional bad conduct in their

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<sup>3</sup> For further information on freedom of speech of justice operators see *Derecho a la Libertad de Expresión de Personas que Imparten Justicia; Protección Internacional – Alcances y Límites*, Cyrus R. Vance Center for International Justice, Lawyers Council for Civil and Economic Rights, New York City Bar, Septiembre 2022: <https://www.vancecenter.org/wp-content/uploads/2022/09/Derecho-a-la-Libertad-de-Expresion-de-personas-que-imparten-justicia.pdf>

- office, conduct that discredits the office, or significant violation of judicial ethics.
- (vii) The grounds for discipline or removal must be defined in advance by law with sufficient clarity and foreseeability to satisfy the principle of legality. Disciplinary and removal decisions must be transparent, with the reasoning that specifies the applicable norms, the relevant misconduct, the reasons why the misconduct violated the norms, and why any sanction is proportionate to the misconduct.
  - (viii) Judges and prosecutors may be administratively terminated only by reason of expiration of their originally prescribed term of office or upon the occurrence of previously stated, objective conditions (such as publication of the results of a competitive examination.)
  - (ix) In all events, judges and prosecutors may be removed or sanctioned only by procedures which comply with due process of law and allow for independent review of the decision.
  - (x) Any sanction of a judge or prosecutor must be proportional to the nature of the misconduct.
  - (xi) States have a duty not to conduct, tolerate, acquiesce in or support recusals, referrals to bar associations, or criminal proceedings which do not have a proper basis in law, or which are brought in bad faith.
  - (xii) States have a duty to refrain from “disguised sanctions” against judges and lawyers. These are actions purportedly brought for administrative or other reasons, but which are in fact intended to interfere with the independence of a judge, of a category of judges, or of the judiciary as a whole.
  - (xiii) States must ensure the existence of an independent legal profession. Practicing lawyers are entitled to exercise their professional responsibilities without being subjected to threats, intimidation, retaliation or improper pressures of any kind.
  - (xiv) Practicing lawyers may be disbarred or professionally sanctioned only on the basis of previously stated grounds; in accord with principles of legality, necessity, and proportionality; and pursuant to due process of law, including the right to secure independent review of any action affecting their rights.
  - (xv) Lawyers acting as human rights defenders are further entitled to all the rights recognized by international instruments and jurisprudence on the rights of human rights defenders.

## I. Main Sources of Applicable International Norms

The main sources of applicable international law are two treaties: the American Convention on Human Rights (“**American Convention**” or “**Convention**”), and the International Covenant on Civil and Political Rights (“**Covenant**”). Because the American Convention is judicially enforceable against States before the Inter-American Court of Human Rights, and the norms of the Convention and Covenant are compatible (indeed, nearly identical), this document focuses on the norms and jurisprudence of the American Convention, while also noting those of the Covenant.

In addition to these two treaties, international law principles and soft law mechanisms confirm the duty of States to protect the independence not only of the judiciary but also of practicing lawyers, including lawyers acting as human rights defenders. While these are not binding, they carry significant persuasive value and are regularly used by the Inter-American Court to interpret the obligations of States Parties under the American Convention.

### The American Convention

The American Convention imposes two general obligations on States Parties: to “respect” human rights, and to “ensure” their free and full exercise by all persons under the State’s jurisdiction, without discrimination. (Article 1.1.) To “respect” human rights, a State must not by its own acts or omissions violate rights.

To “ensure” the enjoyment of rights, a State must exercise due diligence to prevent violations, including violations by private actors, and investigate, punish and remediate violations when they occur.<sup>4</sup> These are obligations of means, not results. So long as States take reasonable measures to ensure the enjoyment of rights, they are not held responsible merely because the measures do not succeed.<sup>5</sup>

The American Convention does not directly impose obligations on non-State actors.<sup>6</sup> However, as noted, it reaches them indirectly, by obligating States to exercise due diligence to protect rights from infringement by non-State actors.

In addition to Article 1.1 of the Convention, Article 2 requires States to adopt or maintain “such legislative or other measures as may be necessary to give effect to

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<sup>4</sup> *Velasquez Rodríguez v. Honduras*, Judgment, July 29, 1988, ¶¶ 166, 174; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 183; *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 115 (where harassment appears related to a judge’s judicial actions, the State should undertake an exhaustive search for those whose interests may have been affected, exploring all investigative leads in order to identify those responsible).

<sup>5</sup> *E.g.*, *Velasquez Rodríguez v. Honduras*, Judgment, July 29, 1988, ¶ 175.

<sup>6</sup> *Id.* ¶ 172.

those rights or freedoms.” Mere enactment of laws does not suffice; the laws must also be implemented and applied in such a way as to be effective in practice.<sup>7</sup>

Several Convention articles protect against abusive actions targeting judges and prosecutors. Article 8.1 provides for the independence of judges and for “due guarantees” in any determination of rights, including the rights of judges and prosecutors.<sup>8</sup> Article 8.2 provides specific procedural rights in criminal proceedings, which the Inter-American Court applies to disciplinary proceedings against judges and prosecutors.<sup>9</sup> Article 9 establishes the principle of legality, barring conviction for acts or omissions not made criminal by law at the time of commission. As interpreted by the Inter-American Court, the principle of legality requires a reasonable degree of precision and foreseeability in the grounds for discipline of judges and prosecutors.<sup>10</sup>

Convention Articles 13, 15 and 17, respectively, protect freedoms of expression, assembly and association, including – within limits – the exercise of those freedoms by judges and prosecutors.<sup>11</sup> Article 23.1.c protects the right, under general conditions of equality, to access and remain in public service – including service as judges and prosecutors.<sup>12</sup> Relatedly, at least for prosecutors, Article 26 protects the right to employment stability as part of the right to work.<sup>13</sup> Finally, Article 25.1 guarantees the right to judicial protection by means of effective judicial recourse against violations of rights – including the rights of judges and prosecutors under the Convention.<sup>14</sup>

In interpreting these Convention rights, the Inter-American Court considers other international instruments concerning the independence of judges and prosecutors.<sup>15</sup> These include principally, among others:

- United Nations Basic Principles on the Independence of the Judiciary,<sup>16</sup>
- Bangalore Principles on Judicial Conduct,<sup>17</sup>

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<sup>7</sup> *Id.* ¶ 167.

<sup>8</sup> *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 120 (judges); *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 72 (prosecutors).

<sup>9</sup> *E.g.*, *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 102.

<sup>10</sup> *E.g.*, *id.* ¶¶ 129-35.

<sup>11</sup> *E.g.*, *López Lonév. Honduras*, Judgment, Oct. 5, 2015, ¶¶ 166-68.

<sup>12</sup> *E.g.*, *id.* ¶¶ 193-94 (judges); *Reverón Trujillo v. Venezuela*, Judgment, June 30, 2009, ¶¶ 140-141 (provisional judges); *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 99 (prosecutors).

<sup>13</sup> *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 109.

<sup>14</sup> *E.g.*, *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 100.

<sup>15</sup> *E.g.*, *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 83 (Basic Principles and Principles of Bangalore).

<sup>16</sup> 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; accessible at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<sup>17</sup> Bangalore Principles of Judicial Conduct, drafted at “the second meeting of the Judicial Group on Strengthening Judicial Integrity, held in 2001 in Bangalore, India, at which the chief justices recognized the need for universally acceptable standards of judicial integrity.” See Resolution 2006/23 of the United Nations Economic and Social Council, which “[i]nvit[ed] Member States . . . to take into consideration [said]

- Statute of the Iberoamerican Judge,<sup>18</sup> and
- United Nations Guidelines on the Role of Prosecutors.<sup>19</sup>

Likewise, in interpreting Convention rights, the Inter-American Court often takes into account the jurisprudence of other international human rights bodies.<sup>20</sup> These include:

- The European Court of Human Rights,<sup>21</sup>
- The African Commission and Court of Human and Peoples' Rights,<sup>22</sup>
- The General Comments and case law of the United Nations Human Rights Committee,<sup>23</sup> under the International Covenant on Civil and Political Rights, and
- Reports of the United Nations Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers.<sup>24</sup>

In weighing the protection of judges and prosecutors in light of the independence of the judiciary, the Inter-American Court relies on these other sources to reinforce and provide greater precision to the rights set forth in the Convention. The Court interprets the entire body of instruments on judicial independence as mutually consistent.

Finally, the Inter-American Court has adopted a jurisprudential rule of "control of conventionality," by which it requires national courts to apply the norms of the American Convention as interpreted by the Inter-American Court.<sup>25</sup>

## The Covenant

The relevant provisions of the Covenant are largely parallel, albeit not identical, to those of the American Convention. States Parties to the Covenant are required to respect and to ensure rights, and to adopt or maintain such legislative or other

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Principles." See Resolution 2006/23, available at [https://www.unodc.org/documents/CCPCJ/Crime\\_Resolutions/2000-2009/2006/ECOSOC/Resolution\\_2006-23.pdf](https://www.unodc.org/documents/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf).

<sup>18</sup> Statute of the Iberoamerican Judge, Canary Islands, 2001. Document issued by the General Council of the Spanish Judiciary. Iberoamerican Summit of Presidents of Supreme Courts and Tribunals of Justice, held in Santa Cruz de Tenerife, Canary Islands, Spain, on May 23, 24, and 25, 2001.

<sup>19</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug. to 7 Sept. 1990, cited in *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 73.

<sup>20</sup> *E.g.*, *Casa Nina v. Perú*, Judgment, Nov. 24, 2020, ¶¶ 74-77.

<sup>21</sup> *Id.* ¶ 76.

<sup>22</sup> *Id.* ¶ 77.

<sup>23</sup> *E.g.*, *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 108.

<sup>24</sup> *E.g.*, *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 76, note 84 (citing Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Doc. A/HRC/26/32, Apr. 28, 2014, ¶¶ 84, 87).

<sup>25</sup> *E.g.*, *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 93.



measures as may be necessary to give them effect.<sup>26</sup> States must take positive measures to ensure judicial independence and to guarantee freedom from political influence, by constitutional or statutory provisions.<sup>27</sup> There must be a “fair hearing” before an independent judge in any determination of rights and obligations in a criminal case or suit at law.<sup>28</sup> Additional rights apply in criminal proceedings.<sup>29</sup> The principle of legality is guaranteed,<sup>30</sup> as are the freedoms of expression, assembly and association,<sup>31</sup> and the right of access to public service under general conditions of equality.<sup>32</sup>

There is also a right to an effective and enforceable remedy. Although the remedy may be judicial, administrative or legislative, States undertake to “develop the possibilities of judicial remedy.”<sup>33</sup> To the extent that the Covenant right to judicial remedy is less demanding than the right under the American Convention, States must still comply with the higher standard of the Convention.

The Covenant is administered by the Human Rights Committee (or the “**Committee**”). The Committee’s main sources of jurisprudence are its General Comments,<sup>34</sup> its Concluding Observations on periodic State reports,<sup>35</sup> and its Views on individual complaints filed against those States which accept the individual complaints procedure.<sup>36</sup>

## The UN Human Rights Committee’s Interpretation of the Covenant

The Committee is the body of independent experts responsible for monitoring implementation and for uniform interpretation of the Covenant. States parties to the Covenant submit regular reports to the Committee detailing their implementation practice, to which the Committee responds with Concluding Observations. The Committee issues General Comments to guide State reporting under the Covenant. In addition, for States which accept the complaints jurisdiction, the Committee publishes Views on complaints regarding alleged breaches of a State’s Covenant obligations.

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<sup>26</sup> Articles 2.1 and 2.2.

<sup>27</sup> General Comment no. 32.

<sup>28</sup> Article 14.1.

<sup>29</sup> Article 14.2-14.7.

<sup>30</sup> Article 15.

<sup>31</sup> Articles 19, 21 and 22.

<sup>32</sup> Article 25.c.

<sup>33</sup> Article 2.3.

<sup>34</sup> Covenant Article 40.4; see

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

<sup>35</sup> Covenant Article 40.4; see

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5).

<sup>36</sup> First Optional Protocol (1966), Articles 1 and 2.

Committee General Comments, Views and Concluding Observations clarify the meaning and scope of the Covenant. Thus, where a State's practice is inconsistent with the Committee's interpretation of the Covenant, a State has not fully complied with its Treaty obligations.

## Reports of the UN Special Rapporteur on the independence of judges and lawyers

In 1994, given the increasing number of attacks on the independence of judges, lawyers, and court officials, including the weakening safeguards for the judiciary and lawyers as well as the gravity and frequency of human rights violations, the Commission on Human Rights appointed a Special Rapporteur on the independence of judges and lawyers.<sup>37</sup> Over time, that mandate was assumed by the Human Rights Council (with UN General Assembly Resolution 60/251), and continues to be extended since that time. The Special Rapporteur is responsible for issuing general reports regarding, *between others*, disciplinary measures taken against judges,<sup>38</sup> and the rights to freedom of expression, association and peaceful assembly by judges and prosecutors,<sup>39</sup> and also country-specific reporting. The Special Rapporteur's reports provide additional clarity regarding international standards for protecting the judiciary and human rights defenders.

As explained above, the Inter-American Court often takes into account these Reports when interpreting the obligations of States Parties pursuant to the American Convention.<sup>40</sup> Therefore, the following sections also draw on the Special Rapporteur's Reports.

## United Nations Resolutions Protecting the independence of lawyers

The United Nations has adopted resolutions which provide safeguards for the independence of practicing lawyers in general, and of lawyers acting as human rights defenders in particular. The Basic Principles on the Role of Lawyers, adopted in 1990, set forth the basic framework that should be respected and taken into account by Governments to ensure an independent and well-functioning legal profession. The Basic Principles provide guidelines regarding the access to lawyers and legal services, special safeguards in criminal justice matters, freedom of

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<sup>37</sup> Commission on Human Rights, Report on the Fiftieth Session, Mar. 4, 1994.

<sup>38</sup> General Assembly Resolution on the Independence of judges and lawyers, July 17, 2020, UN Doc. A/75/172.

<sup>39</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Apr. 29, 2019, UN Doc. A/HRC/41/48.

<sup>40</sup> *E.g.*, *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 76, note 84, citing Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. UN Doc. A/HRC/26/32, Apr. 28, 2014, ¶¶ 84, 87.

expression and association, and the importance of a professional code of conduct.<sup>41</sup> They affirm that “[l]awyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice,” and that disciplinary proceedings against lawyers shall be impartial, subject to independent review, and conducted in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession.<sup>42</sup>

When lawyers act as human rights defenders, they benefit from additional UN norms. On December 9, 1998, the United Nations General Assembly adopted Resolution 53/144 concerning the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.<sup>43</sup> Consistent with that declaration, the Human Rights Council subsequently adopted its own resolutions affirming the need to protect human rights defenders. On March 24, 2016, the Human Rights Council adopted Resolution 31/32 on protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights.<sup>44</sup> That declaration affirmed that States’ domestic law and administrative provisions should be applied in a way that “enable[s] the work of human rights defenders, including by avoiding any criminalization or stigmatization of the legitimate role and important activities ... of human rights defenders and the communities of which they are a part or on whose behalf they work...”<sup>45</sup> The Human Rights Council further called upon states “to combat impunity by investigating and pursuing accountability for all attacks and threats by State and non-State actors against [human rights defenders]...”<sup>46</sup>

On December 18, 2019, the General Assembly adopted Resolution No. 74.146 which implemented the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environment for human rights defenders and ensuring their protection.<sup>47</sup> Not only did that resolution affirm the importance of human rights defenders’ work,<sup>48</sup> but it

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<sup>41</sup> See Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990, available at <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>.

<sup>42</sup> *Id.* Articles 27-29.

<sup>43</sup> General Assembly Resolution No. 53/144, Fifty-third session, Agenda item 110(b), UN Doc. A/RES/53/144, Mar. 8, 1999.

<sup>44</sup> Human Rights Council, Resolution No. 31/32, UN Doc. A/HRC/RES/31/32, Apr. 20, 2016.

<sup>45</sup> *Id.* Preamble at 2.

<sup>46</sup> *Id.* ¶ 6. On the obligation to protect human rights defenders from the actions of non-State actors, see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/475/01/PDF/N1047501.pdf?OpenElement> ¶¶ 30-41.

<sup>47</sup> General Assembly Resolution No. 74/146, UN Doc. A/RES/74/146, Jan 8, 2020, available at <https://undocs.org/en/A/RES/74/146>.

<sup>48</sup> *Id.* ¶ 16 (The General Assembly “[u]nderlin[ed] the legitimate and valuable role of human rights defenders in mediation efforts and in supporting victims in accessing effective remedies for violations and abuses of their human rights, including economic, social and cultural rights, including for members of

expressed grave concern that “measures, such as laws regulating civil society organizations, are in some instances misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law.”<sup>49</sup> The General Assembly “[u]rge[d] States to promote a safe and enabling environment” and to adopt and implement comprehensive legislation and administrative measures to ensure that “human rights defenders can operate free from hindrance, reprisals and insecurity, ensuring, among other things, the right to take part in the conduct of public affairs and in cultural life, the freedom to seek, receive and impart information and equal access to justice, including to an effective remedy.”<sup>50</sup>

While such resolutions do not themselves create binding obligations on the States, they articulate the combined effect of existing rights under the legally binding norms of the American Convention and the Covenant.<sup>51</sup>

## II. Protections Afforded to Judges, Prosecutors and Lawyers

A State’s treaty obligations and general principles of international law give rise to certain rights and protections that should be afforded to: **(A)** judges and the judiciary; **(B)** prosecutors; and **(C)** practicing lawyers.

### Protections Afforded to Judges and The Judiciary

The independence of the judiciary is widely recognized as a central aspect of the rule of law, a principal goal of the separation of powers in a democracy, and a basic pillar of the guarantees of due process of law. It is indispensable for the protection of fundamental rights.<sup>52</sup> So, too, is the independence of lawyers. As the Human Rights Council has affirmed, an independent legal profession is integral to the judicial system and is a prerequisite for the protection of human rights and the rule of law.<sup>53</sup>

Recognition of this overriding importance of judicial independence undergirds numerous judgments of the Inter-American Court and jurisprudence of the UN Human Rights Committee defending judges and prosecutors from arbitrary actions

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impoverished communities and communities in vulnerable situations and for those belonging to minorities and indigenous peoples”)

<sup>49</sup> *Id.* Preamble at 3.

<sup>50</sup> *Id.* ¶ 4.

<sup>51</sup> *Escaleras Mejía v. Honduras*, Judgment, Sept. 26, 2018, ¶¶ 57-61.

<sup>52</sup> *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 75.

<sup>53</sup> Human Rights Council, Resolution No. 44/9, UN Doc. A/HRC/RES/44/9, July 23, 2020, Preamble at 1.

against them, whether disciplinary in nature,<sup>54</sup> administrative terminations,<sup>55</sup> impeachments,<sup>56</sup> or otherwise.<sup>57</sup> Unlike other public officials, judges have “reinforced guarantees” to protect the necessary independence of the judiciary, which is “essential for the exercise of the judicial function.”<sup>58</sup> In proceedings against judges, fair trial guarantees and the right to judicial protection are interpreted in light of the imperative of judicial independence.<sup>59</sup>

There are three main aspects of judicial independence: an adequate selection process for judges, their security in maintaining their judicial posts, and their freedom from external pressures.<sup>60</sup> (As explained above, this memorandum addresses the second and third aspects – security of tenure and freedom from pressures. It does not address judicial selection, which is outside the scope of the requested advice.)

Article 8.1 of the American Convention does not expressly grant judges the right to judicial independence. Instead, it grants every litigant the right to a hearing before an independent court.<sup>61</sup> However, under Article 1.1 of the Convention, States have a duty to “ensure” the right of litigants to be heard by an independent court. When the State fails to take reasonable measures to ensure judicial independence – for example, by arbitrarily dismissing a judge – the Inter-American Court finds a violation of Article 8.1, even if the violation prejudiced no litigant.<sup>62</sup> In effect, the combination of Articles 8.1 and 1.1 extends the right of judicial independence not only to litigants, but also to judges. Moreover, the Inter-American Court has held that arbitrary dismissal of judges violates Article 8.1 in conjunction with Article 23.1.c, which guarantees their right, under general conditions of equality, to access and remain in public office.<sup>63</sup>

The American Convention does not define the meaning of judicial independence. To define it, the Court looks to more specific instruments as a means to interpret

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<sup>54</sup> *E.g., Apitz Barbera v. Venezuela*, Judgment, Aug. 5, 2008; *Reverón Trujillo v. Venezuela*, Judgment, June 30, 2009; *López Loné v. Honduras*, Judgment, Oct. 5, 2015; *Rico v. Argentina*, Judgment, Sept. 2, 2019; *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020; *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021.

<sup>55</sup> *E.g., Chocrón Chocrón v. Venezuela*, Judgment, July 1, 2011; *Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019; *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020; *Casa Nina v. Peru*, Judgment, Nov. 24, 2020.

<sup>56</sup> *Constitutional Court v. Peru*, Judgment, Jan. 31, 2001, ¶ 75; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013; *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013.

<sup>57</sup> *Véase Apitz Barbera v. Venezuela*, Judgment, Aug. 5, 2008, ¶ 136 (criticizing criminal proceeding against a judge for engaging in a “common practice” not considered illegal in Venezuela).

<sup>58</sup> *Reverón Trujillo v. Venezuela*, Judgment, June 30, 2009, ¶ 67.

<sup>59</sup> *Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019, ¶ 68.

<sup>60</sup> *Rico v. Argentina*, Judgment, Sept. 2, 2019, ¶ 52. Accord, Human Rights Committee, General Comment 32.

<sup>61</sup> Article 8.1 provides: “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.”

<sup>62</sup> *Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019, ¶ 100.

<sup>63</sup> *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013, ¶ 199.

Article 8.1.<sup>64</sup> A leading example is the UN Basic Principles on the Independence of the Judiciary.<sup>65</sup> It provides that judges shall decide cases impartially on the basis of the facts and the law “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>66</sup> It further prohibits “any inappropriate or unwarranted interference with the judicial process...”<sup>67</sup>

In general terms, then, judicial independence means that judges shall not be subjected to improper influences, inducements, pressures, threats or interferences, direct or indirect, or to any inappropriate or unwarranted interference.<sup>68</sup>

The Inter-American Court recognizes that judicial independence has both an external and an internal dimension. Not only must the judicial branch be shielded from undue restrictions by external organs, such as the executive or legislative branches,<sup>69</sup> individual judges must also be protected from undue pressures exerted by higher judicial authorities (outside lawful channels of appellate review).<sup>70</sup> Moreover, where there is an apparent pattern of threats and pressures against the judiciary or a judge, even if not all individual acts of intimidation merit investigation, the pattern should be investigated as a whole.<sup>71</sup>

Under the Covenant, the basic elements of fair trial – including trial before an independent judge – are non-derogable rights. They may not be suspended even in cases of national emergency.<sup>72</sup>

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<sup>64</sup> *E.g., Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 44 (citing UN Basic Principles on the Independence of the Judiciary).

<sup>65</sup> *See* 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 Aug. to 6 Sept. 1985 and endorsed by General Assembly resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx#:~:text=The%20judiciary%20shall%20decide%20matters,quarter%20or%20for%20any%20reason.>

<sup>66</sup> Principle 2.

<sup>67</sup> Principle 4, which states in full: “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.”

<sup>68</sup> The Bangalore Principles, note 16 above, similarly provide that a judge shall exercise the judicial function independently, “free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.” Application 1.1.

<sup>69</sup> *E.g., Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019.

<sup>70</sup> *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 71.

<sup>71</sup> *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 116.

<sup>72</sup> UN Human Rights Committee, General Comment 29, *States of Emergency*, UN Doc.

CCPR/C/21/Rev.1/Add.11, 31 August 2001, ¶ 16: “Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”

In addition to barring threats and pressures, the UN Basic Principles provide positive guarantees. Judges have rights, within limits, to freedom of expression, belief, association and assembly.<sup>73</sup> Any interference with judges, including disciplinary measures, must be provided for by law, serve a legitimate aim, and conform to the strict tests of necessity and proportionality.<sup>74</sup> For example, in *López Lone et al. v. Honduras*, the Inter-American Court recognized that freedom of expression had to be guaranteed even when the information and ideas shared by the judges were considered objectionable by the State.<sup>75</sup> In that case, judges had made statements regarding their opinion on the *coup d'état*. The Inter-American Court recognized that these opinions “are of great public interest and have the highest level of protection under the American Convention,” and therefore the judges who expressed them could not be sanctioned, since “legitimate protection of the principles of judicial independence and impartiality cannot be premised on the notion that a judge must remain silent on public issues.”<sup>76</sup> Further, even where penalties are warranted, such penalties must be proportional. In part this is because, as the Special Rapporteur on the independence of judges and lawyers found, imposing unduly harsh penalties may create a “chilling effect” on the judiciary, and discourage them from participating in debates on legislative reforms affecting the judiciary and its independence in the future.<sup>77</sup>

Judicial terms of office, independence, security, adequate remuneration, conditions of service, pensions and age of retirement must also be “adequately secured by law.”<sup>78</sup> Judges must have “guaranteed tenure” until a mandatory retirement age or the expiry of their term of office.<sup>79</sup> Their promotion should be based on “objective factors, in particular ability, integrity and experience.”<sup>80</sup> They should also “enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”<sup>81</sup>

Under the Basic Principles, judges may be subject to “suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties,”<sup>82</sup> in accordance with “established standards of judicial conduct.”<sup>83</sup> Of critical importance, judges may not be removed or sanctioned for errors committed in good faith or for disagreeing with a particular interpretation of the law.<sup>84</sup>

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<sup>73</sup> Principles 8 and 9.

<sup>74</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, Apr. 29, 2019, UN Doc. A/HRC/41/48, ¶¶ 37-39.

<sup>75</sup> See *id.* ¶ 44 (discussing *López Lone et al. v. Honduras*).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ¶ 46.

<sup>78</sup> UN Basic Principles, Principle 11.

<sup>79</sup> *Id.* Principle 12.

<sup>80</sup> *Id.* Principle 13.

<sup>81</sup> *Id.* Principle 16.

<sup>82</sup> *Id.* Principle 18.

<sup>83</sup> *Id.* Principle 19.

<sup>84</sup> *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 76, note 84 (citing Human Rights Council: Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut. UN Doc. A/HRC/26/32, Apr. 28, 2014, ¶¶ 84, 87). Criminal charges may nonetheless be brought against judges in

Similarly, under Article 14 of the Statute of the Iberoamerican Judge, judges can be suspended or separated only for reasons of “physical or mental handicap, negative evaluation of their professional duty in the cases where the law so provides, or criminal or disciplinary responsibility, by the bodies legally established through procedures that guarantee the respect of due process.”<sup>85</sup>

Finally, disciplinary, suspension or removal proceedings must provide for a fair hearing and independent review.<sup>86</sup> The Inter-American Court considers that the guarantees of Article 8 of the Convention apply not only to judicial proceedings, but also to any proceeding in which an action by the State can affect rights.<sup>87</sup>

In evaluating whether a State violates judicial independence, the Inter-American Court considers not only international law but also national law. The Court does not serve as a “fourth instance” of judicial review of national court decisions; nor does it review the weighing of evidence by national authorities. However, it analyses the compatibility of internal processes with the American Convention, finding violations when national judicial resolutions are “manifestly arbitrary.”<sup>88</sup>

## Protections Afforded to Prosecutors

The Inter-American Court has held that the guarantees of adequate selection, security of tenure, and freedom from external pressures apply not only to judges but also to prosecutors. Otherwise, the independence and objectivity of investigations and of positions taken by prosecutors before judges could be at risk. If prosecutors were not assured security of tenure, or could be vulnerable to retaliation for their decisions, the right to be heard by an independent tribunal, guaranteed by Article 8.1 of the American Convention, would be violated.<sup>89</sup>

In reaching this interpretation, the Court takes account of the UN Guidelines on the Role of Prosecutors, which provide that prosecutors may exercise their functions “without intimidation, hindrance, harassment, improper interference or unjustified

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many countries, including Guatemala, for *prevaricato*, an intentional disregard of the law. However, *prevaricato* requires proof that the judge has not acted in good faith. A case challenging a criminal conviction for *prevaricato* has reportedly been found admissible and is now pending before the UN Human Rights Committee. *Garzón v. Spain*, as reported in *Garzón v. Spain: UNHRC declares the case admissible*, Feb. 6, 2020, available at <https://www.rightsinpractice.org/new-blog/2020/2/6/garzn-v-spain-case-before-unhrc-declared-admissible>.

<sup>85</sup> Report of the Special Rapporteur on the independence of judges and lawyers, 28 Apr. 2014, UN Doc. A/HRC/26/32. In interpreting the standards for judicial independence required under the American Convention, the Inter-American Court has referenced the Statute of the Iberoamerican Judge. *E.g.*, *Urutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶¶ 107, 110, 131.

<sup>86</sup> Principles 17 and 20.

<sup>87</sup> *Constitutional Court v. Peru*, Judgment, Jan. 31, 2001, ¶ 69.

<sup>88</sup> *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶ 18.

<sup>89</sup> *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 72 (citing *Valencia Hinojosa et al. v. Ecuador. Preliminary Determinations, Merits, Reparations and Costs*. Judgment, Nov. 29, 2016. Series C No. 327, ¶¶ 110, 119); *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶¶ 88-95.



risk of or unjustified exposure to civil, penal or other liability.”<sup>90</sup> Indeed, as the Special Rapporteur found, “[p]rosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary.”<sup>91</sup>

## Protections Afforded to Lawyers

Practicing lawyers, too, have rights to be free from harassment and to exercise their professional rights and duties under the United Nations Basic Principles on the Role of Lawyers.<sup>92</sup> In accordance with Articles 16 and 18 of the Basic Principles, as well as Article 14 of the Covenant, States should take measures to prevent the harassment of lawyers as well as attempts to impede or interfere on improper grounds with their defense of clients. In cases and matters where lawyers defend human rights, they also qualify as human rights defenders,<sup>93</sup> and are accordingly entitled to promote and protect human rights under the United Nations Declaration on Human Rights Defenders.<sup>94</sup> In addition, they have the same human rights as other persons, under the American Convention and the Covenant, to freedoms of speech, assembly, and association, and rights to due process, the principle of legality, and judicial protection.

## III. Protections for Judges and Prosecutors

### Grounds for Disciplinary Sanctions

In view of the importance of judicial independence, judges may be removed, before the expiration of their terms or before previously stated conditions are realized, only for serious disciplinary violations or proven incompetence.<sup>95</sup> Criteria for suspension or removal of judges must be provided in advance of any conduct

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<sup>90</sup> *Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶ 73 (citing UN Guidelines on the Role of Prosecutors, ¶ 4).

<sup>91</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, ¶ 93.

<sup>92</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27 to Sept. 7, 1990, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

<sup>93</sup> *Gómez Virula v. Guatemala*, Judgment, Nov. 21, 2019, ¶ 129.

<sup>94</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>.

<sup>95</sup> *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶¶ 72, 75.

subject to such discipline,<sup>96</sup> must be “objective and reasonable,”<sup>97</sup> and must be applied without discrimination.<sup>98</sup> The Inter-American Court has cited with approval the view of the UN Special Rapporteur for the Independence of Judges and Lawyers that judges may be subject to disciplinary sanctions, suspension or removal from office, only for persistent inability to carry out their functions, frequent intemperance, intentional bad conduct in the judicial office, conduct which discredits the office, or significant violation of judicial ethics.<sup>99</sup>

Even so, the Inter-American Court and the UN Special Rapporteur warn that disciplinary grounds stated in such general terms as bringing “discredit” to the judicial office or ignoring judicial “ethics” run the risk of undermining judicial independence.<sup>100</sup> In analyzing sanctions based on such general terms, the Inter-American Court applies the principle of legality under article 9 of the Convention to disciplinary proceedings. However, the scope of the principle of legality varies with the subject matter; the degree of precision required in a disciplinary proceeding can differ from that required in a criminal proceeding.<sup>101</sup>

In the absence of clear criteria in the norm to guide the adjudication of sanctions, the Court requires the reasoning by which sanctions are imposed to be especially clear in stating the facts of alleged misconduct or incompetence, identifying the particular norms violated, and explaining the reasons why the facts violate the norms.<sup>102</sup> Any resulting sanctions must not only be justified, but proportional to the misconduct.<sup>103</sup>

The Human Rights Committee’s jurisprudence similarly affirms the importance of clear procedures for disciplinary action against judges. It has found that States should establish clear procedures and objective criteria for the “suspension and dismissal of the members of the judiciary and for disciplinary sanctions against them” in order to safeguard the independence of the judiciary.<sup>104</sup> Unreasonable and arbitrary dismissal procedures may infringe on judges’ right of access to public service in their country and thus constitute an attack on the independence of the

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<sup>96</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 85; UN Basic Principle 19.

<sup>97</sup> *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶ 135.

<sup>98</sup> *Id.*

<sup>99</sup> *Cordero Bernal v. Perú*, Judgment, Feb. 16, 2021, ¶ 76, citing Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut. UN Doc. A/HRC/26/32, Apr. 28, 2014, ¶¶ 84, 87.

<sup>100</sup> *Id.* See also Inter-American Commission on Human Rights, Communication No. 127/21, *IACHR Refers Case on Peru to the Inter-American Court*, May 19, 2021 (discussing *Cajahuanca Vásquez v. Peru*, Case 13.256 (the judge “incurred in acts that, without being a crime, compromise the dignity of the position of President of the Superior Court, demeaning in the public opinion”)).

<sup>101</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 129.

<sup>102</sup> *Cordero Bernal v. Peru*, Judgment, Feb. 16, 2021, ¶¶ 78, 84;

<sup>103</sup> *Id.* ¶ 82. See also Inter-American Commission on Human Rights, Communication No. 127/21, *IACHR Refers Case on Peru to the Inter-American Court*, May 19, 2021 (discussing *Cajahuanca Vásquez v. Peru*, Case 13.256 (disproportionate sanction of a judge)).

<sup>104</sup> *Gabriel Osío Zamora v. Venezuela*, HRC, Communication No. 2203/2012, UN Doc.

CCPR/C/121/D/2203/2012, Feb. 1, 2018, ¶ 9.2 (noting that the lack of guaranteed tenure for provisional judges in Venezuela, and in particular the lack of guarantees protecting them from discretionary removal, violated Article 14.(2) of the Covenant).

judiciary in violation of Articles 25(c) and 14.(1) of the Convention.<sup>105</sup> This is because when judges face retribution for unfavorable judgments against private parties or State actors, judicial independence is undermined.<sup>106</sup>

The Inter-American Court is also prepared to consider whether dismissals of judges are based, not on the legal grounds asserted to justify them, but in reality, on political or other extraneous grounds. Even though the actions of public officials are generally assumed to be lawful and in good faith, this presumption can be rebutted by evidence proving that dismissals were politically motivated.<sup>107</sup>

The Court's readiness to look beyond the purported reasons for sanctions of judges to the real reasons is consistent with a separate category denounced by the UN Special Rapporteur as "disguised sanctions."<sup>108</sup> These measures are not and do not purport to be lawful sanctions for judicial misconduct. They involve other actions, which may range from moving a judge to a small office or remote location; to administrative uncertainty regarding a judge's financial compensation or length of tenure; to serious and continuous threats.<sup>109</sup> Whatever their particular form, they are intended to intimidate, harass or otherwise interfere with judicial independence.<sup>110</sup> They may be directed at individual judges, categories of judges (such as constitutional court judges), or the judiciary as a whole.<sup>111</sup> "Judges who deal with cases that have high political or social impact (e.g., anti-corruption, organized crime, human rights violations perpetrated by State officials) are

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<sup>105</sup> Human Rights Committee, General Comment No. 32, : *Right to equality before courts and tribunals and to a fair trial (article 14)*, U.N. Doc. CCPR/C/GC/32 (2007), ¶ 64 ("Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law."); see also *Soratha Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, UN Doc. CCPR/C/93/D/1376/2005, July 24, 2008, ¶ 7.3 (concluding a judicial dismissal procedure to be both arbitrary and unreasonable in violation of Article 25(c) based on a failure to provide the dismissed judge with all documentation necessary to ensure that he had a fair hearing, and in particular, the failure to inform him of the reasoning behind the Committee of Inquiry's guilty verdict, which formed the basis of his dismissal); *Pastukhov v. Belarus*, Communication No. 814/1998, UN Doc. CCPR/C/78/D/814/1998, Aug. 5, 2003, ¶ 7.3 (finding that a judge's dismissal by the executive branch several years before the expiry of the term for which he had been appointed, in combination with a lack of available and effective judicial protections to contest his dismissal, amounted to a violation of Article 25(c)); *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, Communication No. 933/2000, U.N. Doc. CCPR/C/78/D/933/2000 (2003), July 31, 2003, ¶ 5.2 (finding the dismissal of a group of judges to constitute a violation of Articles 14.(1) and 25.(c) because it did not conform with the established legal procedures and safeguards which they were entitled in their capacity as judges and there were insufficient circumstances to justify a derogation from State Party's obligations under the Article 14 of the Covenant).

<sup>106</sup> *Vladislav Kovalev et al. v. Belarus*, HRC Communication No. 2120/2011, UN Doc. CCPR/C/106/D/2120/2011, Nov. 27, 2012, ¶¶ 3.4, 11.7 (finding that an "atmosphere of fear" and "situation of intimidation surrounding the trial" indicated "pressure exercised on the court" in violation of Article 14.(1) of the Covenant).

<sup>107</sup> *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013, ¶¶ 210, 219; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 177.

<sup>108</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/175/72, July 17, 2020, ¶¶ 53-71.

<sup>109</sup> *Id.* ¶¶ 53, 57, 59.

<sup>110</sup> *Id.* ¶ 56.

<sup>111</sup> *Id.* ¶ 59.

particularly exposed to these sanctions.”<sup>112</sup> Where the requisite intent is shown, disguised sanctions are plainly inconsistent with a State’s duty to ensure judicial independence.

In view of the important functions of prosecutors in the administration of justice, the Inter-American Court has held that they enjoy protections equivalent to those of judges against discipline or removal. Their independence from political pressures, from improper hindrance of their functions, and from retaliation, “demands a guarantee of stability and a fixed term in the position.”<sup>113</sup> Accordingly, “in an equivalent application of the mechanisms of protection acknowledged for judges,” any removals of prosecutors “(i) ... must obey exclusively to the causes permitted, either through a proceeding that complies with the right to a fair trial or because the condition or time period for which the position was appointed has expired; [and] (ii) ... prosecutors may only be removed for grave disciplinary offenses or incapacity.”<sup>114</sup>

## Impeachment by Legislative Bodies

The guarantees of the American Convention apply to all organs of a State, including the legislature.<sup>115</sup> The due process protections of Article 8 of the Convention apply, not only in judicial proceedings, but in any proceeding by which persons must defend themselves from State actions affecting their rights under the Convention.<sup>116</sup> A legislative process of impeachment must not only respect due process of law, but must also be conducted in a manner that is independent and impartial.<sup>117</sup>

The Inter-American Court has found that impeachments by legislatures violated the Convention rights of constitutional court judges in Perú,<sup>118</sup> constitutional court judges in Ecuador,<sup>119</sup> and Supreme Court judges in Ecuador.<sup>120</sup> In the latter two cases, the Court recognized that the legislature’s ostensible legal grounds for impeachment or removal were in fact politically motivated, thus rebutting the ordinary presumption of good faith, and violating the Convention.<sup>121</sup>

While the Court has not yet had occasion to address impeachment of prosecutors, the same principles would apply, in view of the Court’s jurisprudence that

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<sup>112</sup> *Id.*

<sup>113</sup> *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶¶ 96; *accord, Casa Nina v. Peru*, Judgment, Nov. 24, 2020, ¶¶ 80, 83.

<sup>114</sup> *Id.*

<sup>115</sup> *Constitutional Court v. Peru*, Judgment, Jan. 31, 2001, ¶ 68.

<sup>116</sup> *Id.* ¶ 69.

<sup>117</sup> *Id.* ¶ 84.

<sup>118</sup> *Id.*

<sup>119</sup> *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013.

<sup>120</sup> *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013.

<sup>121</sup> *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013, ¶¶ 210, 219; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 177.

prosecutors enjoy “protections equivalent to those of judges against discipline or removal.”<sup>122</sup>

## Administrative Terminations

Judges and prosecutors are sometimes terminated, not for disciplinary reasons, but administratively because their appointments have limited terms, or are provisional pending certain events. Even so, until their terms expire by set terms or by previously set conditions, temporary judges and prosecutors have equal rights to remain in office as their permanent counterparts, except, of course, they have no right to remain permanently.<sup>123</sup> They have the right to remain in office under general conditions of equality.<sup>124</sup> To be terminated, certain conditions must be met. They may be terminated for previously stated reasons, such as when their appointment term expires, or when previously stated conditions for their removal materialize (such as publication of the results of a competitive examination).<sup>125</sup>

However, the previously stated conditions for termination must be clear.<sup>126</sup> A condition such as the “necessities of good service” is too vague and is not sufficiently foreseeable.<sup>127</sup> So, too, a ground for termination such as unspecified “observations” is not clear enough.<sup>128</sup> In addition, Article 8.1 of the American Convention requires that an administrative termination be done by a body authorized by law to do so,<sup>129</sup> and by a previously established procedure.<sup>130</sup> Finally, in order not to be arbitrary, the termination must be duly reasoned, indicating the facts, reasons and applicable norms.<sup>131</sup> (These considerations are paralleled in Committee jurisprudence regarding disciplinary measures against judges discussed above.)

## Due Process for Discipline or Removal

The due process standards for dismissals or removals of judges and prosecutors must be analyzed in light of the standards for judicial independence.<sup>132</sup> Accordingly, the standard of reasoning required for discipline of a judge is even higher than that for other disciplinary proceedings.<sup>133</sup> Whether for disciplinary dismissals or for

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<sup>122</sup> *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶¶ 96.

<sup>123</sup> *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶¶ 104, 105.

<sup>124</sup> *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶¶ 115, 117.

<sup>125</sup> *Id.* ¶ 99.

<sup>126</sup> *Id.* ¶ 103.

<sup>127</sup> *Id.* ¶¶ 109, 110.

<sup>128</sup> *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶¶ 116, 121, 122.

<sup>129</sup> *Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019, ¶ 87.

<sup>130</sup> *Id.* ¶ 90.

<sup>131</sup> *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶¶ 106, 107.

<sup>132</sup> *López Loné v. Honduras*, Judgment, Oct. 5, 2015, ¶ 190.

<sup>133</sup> *Id.* ¶ 267.

administrative terminations, the procedure utilized must satisfy due process of law and must allow an effective recourse to challenge the termination.<sup>134</sup> Likewise, “all proceedings against prosecutors must be according to fair procedures that guarantee objectivity and impartiality according to the Constitution or law, given that free dismissal of prosecutors promotes an objective doubt regarding the actual possibility to perform their duties without the fear of retaliation.”<sup>135</sup>

Due process of law, in addition to the procedural rights set forth in article 8 of the American Convention,<sup>136</sup> includes the totality of procedural requirements that should be observed in order to enable a person adequately to defend herself against a State action affecting her rights.<sup>137</sup> These include, in particular, the right to a hearing, a defense, an adversary process, and the legal recourses to implement them.<sup>138</sup> Depending on the nature and scope of the issues in the case, the guarantees of Article 8.2 apply on a case-by-case basis.<sup>139</sup> In all cases the judge must be advised of the conduct for which she is being disciplined.<sup>140</sup> An effective recourse against termination must meet the requirements of Article 25.1 of the Convention,<sup>141</sup> namely that they be simple and prompt, or otherwise effective, and allow for full review.<sup>142</sup>

The disciplinary body must be impartial.<sup>143</sup> However, it need not consist exclusively of members of the judiciary. It may include practicing lawyers as well as members of the legislature. Political trials of judges are not *per se* contrary to the American Convention, so long as the procedural guarantees of Article 8 are respected, and there are criteria which limit the discretion of the adjudicators, with a view to safeguarding the independence of the judiciary.<sup>144</sup> For example, the Inter-American Court upheld the disciplinary dismissal of a judge, and his disqualification for future judicial service, decided by a disciplinary tribunal which included members of the legislative branch, all of whom were lawyers, as a minority of the tribunal; where the permissible grounds for discipline were stated in advance and were exclusive, clear and objective; and where the accused judge had the right to a lawyer and to present a defense.<sup>145</sup>

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<sup>134</sup> *Id.* ¶¶ 96, 140, 146; *Colindres Schonenberg v. El Salvador*, Judgment, Feb. 4, 2019, ¶¶ 69, 110; *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶ 99.

<sup>135</sup> *Martínez Esquivia v. Colombia*, Judgment, Oct. 6, 2020, ¶ 96.

<sup>136</sup> *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶ 115.

<sup>137</sup> *Rico v. Argentina*, Judgment, Sept. 2, 2019, ¶ 49.

<sup>138</sup> *Cordero Bernal v. Perú*, Judgment, Feb. 16, 2021, ¶ 73.

<sup>139</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 102.

<sup>140</sup> *Id.* ¶ 113.

<sup>141</sup> *Chocrón Chocron v. Venezuela*, Judgment, July 1, 2011, ¶ 127.

<sup>142</sup> See Inter-American Commission on Human Rights, Communication No. 127/21, *IACHR Refers Case on Peru to the Inter-American Court*, May 19, 2021, discussing *Cajahuanca Vásquez v. Peru*, Case 13.256.

<sup>143</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, ¶ 118.

<sup>144</sup> *Rico v. Argentina*, Judgment, Sept. 2, 2019, ¶ 57.

<sup>145</sup> *Id.* ¶¶ 61-66.

## Rights of Judges and Prosecutors to Freedom of Expression

Special considerations apply when discipline is based on the exercise of freedom of expression. Judges are entitled to freedom of expression, assembly and association. These freedoms, “taken as a whole, make the democratic process possible.”<sup>146</sup> Freedom of expression, “particularly in matters of public interest, ‘is a cornerstone of the very existence of a democratic society.’”<sup>147</sup> Freedom of assembly “is a basic right in a democratic society and should not be interpreted restrictively.”<sup>148</sup> The freedom to associate with other persons protects associations of judges as well as persons who occupy leadership positions in such associations.<sup>149</sup>

However, because of the nature of the judicial office, the exercise of these rights by judges may be subject to limits not applicable to other persons or officials.<sup>150</sup> Whether a particular expression merits protection must be analyzed in the context of each concrete case, taking into account the content and circumstances of the statement.<sup>151</sup>

For example, a judge who criticizes the judiciary in a privately submitted academic paper is less likely to discredit the judiciary than one who proclaims a public denunciation.<sup>152</sup> A general critique may be less sanctionable than criticism of the decision in a particular case.<sup>153</sup> In any event, to prohibit judges from criticizing their superiors in the judiciary, or to require judges to obtain authorization from superior judges prior to expressing criticism, bespeaks a “hierarchical” model which violates the internal dimension of judicial independence.<sup>154</sup>

In addition, there is a regional consensus in the Americas on the necessity of restricting the participation of judges in partisan political activities. However, that restriction should not be broadly interpreted.<sup>155</sup> There are exceptions; for example, judges should be able to defend democracy by denouncing *coup d’etats*.<sup>156</sup>

Not only judges but also prosecutors, within limits, have rights of freedom of expression. The UN Guidelines on the Role of Prosecutors acknowledge that “prosecutors, like other citizens, are “entitled to freedom of expression, belief, association and assembly.”<sup>157</sup> While prosecutors should conduct themselves “in accordance with the law and the recognized standards and ethics of their

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<sup>146</sup> *López Loné v. Honduras*, Judgment, Oct. 5, 2015, ¶ 160.

<sup>147</sup> *Id.* ¶ 165.

<sup>148</sup> *Id.* ¶ 167.

<sup>149</sup> *Id.* ¶¶ 185-86.

<sup>150</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020 ¶ 82.

<sup>151</sup> *Id.* ¶ 84.

<sup>152</sup> *Id.* ¶ 89.

<sup>153</sup> *Id.* ¶ 89.

<sup>154</sup> *Id.* ¶ 138.

<sup>155</sup> *López Loné v. Honduras*, Judgment, Oct. 5, 2015 ¶ 172.

<sup>156</sup> *Id.* ¶ 174.

<sup>157</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, Apr. 29, 2019, UN Doc. A/HRC/41/48, at 5.

profession,” they are not precluded from joining or forming local, national or international organizations, or other professional associations that represent their interests or promote their professional training.<sup>158</sup> These protections ensure that disciplinary measures are not imposed on prosecutors indirectly through their membership in certain associations.

## Abusive Recusals of Judges

In general, motions to recuse judges are part of the ordinary functioning of the judiciary and cannot be considered as acts of intimidation.<sup>159</sup> As stated by the United Nations Human Rights Committee, “[w]here the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of Article 14” of the Covenant.<sup>160</sup>

However, as Judge Pazmiño recently cautioned in a concurring Inter-American Court opinion, not directly addressing recusals but broad enough to cover them, the Court should remain alert for cases in which there is an appearance of legality, but which upon full analysis of the context and evidence, show a clear motivation and components of censorship which violate the principle of equality.<sup>161</sup>

A State’s responsibility for an abusive recusal depends in part on who requests the recusal. If the requesting party is a State agent, such as a prosecutor, the recusal request must be consistent with the State duty under Article 1.1 of the American Convention to “respect” human rights. It meets that responsibility only if it is made on lawful grounds and in good faith.<sup>162</sup> Proof of bad faith, on the other hand, may show that the recusal request violates the Convention.<sup>163</sup>

In contrast, if the recusal motion is made by a non-State actor, such as a private attorney, the State meets its duty to “ensure” protection of human rights unless the State acquiesced in, tolerated, or even encouraged a recusal request lacking legal grounds or made in bad faith, or the State failed to act with due diligence to prevent or respond to the abusive request.<sup>164</sup>

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<sup>158</sup> *Id.* See also Statute of the Iberoamerican Judge, Arts. 3 and 36, recognizing the “legitimate right to the freedom of expression and information” and the right to form professional associations “apart from exceptions established by the Constitution or legislation of each country.”

<sup>159</sup> *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 85.

<sup>160</sup> *Karttunen v. Finland*, Communication No. 387/1989, UN Doc. CCPR/C/46/D/387/1989 (Nov. 5, 1992), ¶ 7.2.

<sup>161</sup> *Urrutia Laubreaux v. Chile*, Judgment, Aug. 27, 2020, Concurring Opinion of Juez Pazmiño, ¶ 9.

<sup>162</sup> *Cf. Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013, ¶¶ 210, 219; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 177.

<sup>163</sup> *Id.*

<sup>164</sup> See *Velasquez Rodríguez v. Honduras*, Judgment, July 29, 1988, ¶¶ 172-173.



## IV. Measures Impacting the Judiciary, Prosecutors, and practicing lawyers.

### Unwarranted Criminal Proceedings and Investigations

Criminal proceedings against a judge, prosecutor or practicing lawyer, if brought by a State prosecutor or investigating judge, are subject to the State's duty to respect human rights in its own actions. While State actions are presumed to be lawful and in good faith, that presumption can be rebutted by evidence proving that a criminal charge or prosecution is politically motivated.<sup>165</sup>

States may not interfere in the private life of lawyers, including, *inter alia*, improper searches of their domicile or workplace.<sup>166</sup> This is true whether or not the raid or search is conducted by authorities with or without a court order.<sup>167</sup> Similarly, States should not intercept human rights defenders' correspondence, telephone and electronic communications.<sup>168</sup>

States also have an obligation to avoid using domestic criminal legislation in a way that harasses or punishes human rights defenders. For example, as the Inter-American Commission on Human Rights observed in its Report on the Situation of Human Rights Defenders in Peru and in Case No. 11.658 *Luis Antonio Galindo Cardenas and family v Peru*, States should not use legislation aimed at defending against terrorism to prevent lawyers defending individuals accused of terrorism from carrying out their professional duties.<sup>169</sup> Such measures are inconsistent with States' duty to protect everyone who engages in the defense of human rights from "any ... pressure or other arbitrary action."<sup>170</sup>

Even where measures taken against judges, prosecutors or practicing lawyers are undertaken by non-State actors, the State may nonetheless be responsible. For

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<sup>165</sup> *Constitutional Court v. Ecuador*, Judgment, Aug. 28, 2013, ¶¶ 210, 219; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 177.

<sup>166</sup> Second report on the Situation of Human Rights Defenders in the Americas, Inter American Commission on Human Rights, OEA/Ser.L/V/II, Doc. 66, Dec. 31, 2011, ¶¶ 65-67, *available at* <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

<sup>167</sup> *Id.* ¶¶ 68-69.

<sup>168</sup> *Id.* ¶ 70.

<sup>169</sup> Inter American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OEA/Ser.L/V/II, Doc. 49/15, Dec. 31, 2015, ¶¶ 153-155, *available at* <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>.

<sup>170</sup> Article 12.2 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, March 1999, *available at*: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.res.53.144.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.res.53.144.en); *see also* Second report on the Situation of Human Rights Defenders in the Americas, Inter American Commission on Human Rights, OEA/Ser.L/V/II, Doc. 66, Dec. 31, 2011, ¶ 77, *available at* <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>; Inter American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OEA/Ser.L/V/II, Doc. 49/15, Dec. 31, 2015, ¶¶ 14-15, 43, *available at* <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>.

example, where judges, prosecutors or lawyers receive death threats, the relevant State authority bears responsibility to investigate these acts and to provide protection as necessary. Where such measures are not undertaken, the State may be in breach of its international obligations.<sup>171</sup>

The Human Rights Committee has emphasized that judges should not be held criminally liable for issuing “unjust judgments.”<sup>172</sup> The Special Rapporteur has similarly stated that judges must enjoy some degree of immunity from criminal liability in order to safeguard judicial independence, although “immunity should never be applied to cases of serious crime, including accusations of corruption.”<sup>173</sup>

The Universal Charter of the Judge, approved by the International Association of Judges, also confirms that criminal action against a judge, including arrest, should only be permitted under circumstances which ensure that their independence cannot be influenced.<sup>174</sup>

## Abusive Complaints to Bar Associations

Much the same can be said of complaints to bar associations as was said in regard to recusal requests in Part III.F above. Ordinarily, complaints to bar associations for breach of rules governing professional conduct are part of the ordinary and proper functioning of a system of justice. However, requests made with no basis in rules of professional conduct, or made in bad faith, violate the State’s duty to “respect” human rights if they are made by a State agent,<sup>175</sup> or the State’s duty to “ensure” human rights, if the complaint is made by a private actor with the State’s acquiescence, tolerance, support, or lack of due diligence to prevent or respond to an abusive referral.<sup>176</sup>

Under the Covenant, the right to a fair hearing under Article 14 is violated when an abusive complaint against a lawyer results in disbarment.<sup>177</sup> Generally, disbarment should be imposed only in the “most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer.”<sup>178</sup>

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<sup>171</sup> *Villaseñor Velarde v. Guatemala*, Judgment, Feb. 5, 2019, ¶ 102.

<sup>172</sup> Human Rights Committee, Concluding Observations on the Report Submitted by the Democratic People’s Republic of Korea Under Article 40 of the Covenant, U.N. Doc. CCPR/CO/72/PRK (2001), ¶ 8.

<sup>173</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Apr. 28, 2014, UN Doc. A/HRC/26/32, ¶ 52.

<sup>174</sup> Adopted by the IAJ Central Council in Taiwan on November 17, 1999, updated November 14, 2017, Article 7-2.

<sup>175</sup> *Cf. Constitutional Court v. Ecuador*, Judgment, Nov. 28, 2013, ¶¶ 210 and 219; *Supreme Court of Justice v. Ecuador*, Judgment, Aug. 23, 2013, ¶ 177.

<sup>176</sup> *See Velasquez Rodríguez v. Honduras*, Judgment, July 29, 1988, ¶¶ 172 and 173.

<sup>177</sup> *See Sannikov v. Belarus*, Communication No. 2212/2012, UN Doc. CCPR/C/122/D/2212/2012 (Apr. 6, 2018), ¶ 6.7. (noting that the complainant’s lawyer was disbarred after complaining about the “horrendous” conditions in which his client was held in violation of Article 14.b.3 and 14.1).

<sup>178</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Sept. 5, 2018, UN Doc. A/73/365, ¶¶ 73, 115.