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# The role of the Universal Periodic Review in advancing human rights in the administration of justice

March 2016

A report of the International Bar Association's  
Human Rights Institute (IBAHRI) United Nations Programme  
Supported by the IBAHRI Charitable Trust

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## **Acknowledgements**

This report was written by Dr Helene Ramos Dos Santos, IBAHRI Senior Fellow Consultant. The writing, development and publication of this report were overseen and supported by Shirley Pouget, Senior Programme Lawyer. IBAHRI Director Phillip Tahmindjis, Principal Programme Lawyer Alex Wilks and Programme Lawyers Chara de Lacey and Nadia Hardman have collectively contributed to editing the report. The IBAHRI would also like to thank the following interns and research assistant for their assistance in compiling research data and sections of this report: Yannic Kortgen, Jaka Kukavica, Cecilia Barral Diego and Delphine Canneau. Finally, the IBAHRI would like to thank all individuals and stakeholders who consulted with the IBAHRI Senior Fellow Consultant via telephone or face-to-face interviews and questionnaire.

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# List of Acronyms

BAA	Bar Association of the Republic of Azerbaijan
CTA	call to action
EEG	Eastern European Group
GRULAC	Latin American and Caribbean Group (Group of Latin America and Caribbean Countries)
HRC	Human Rights Council
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
LGBTI	Lesbian, Gay, Bisexual, Transgender/transsexual and Intersex
LSM	Law Society of Malawi
LSS	Law Society of Swaziland
LSZ	Law Society of Zimbabwe
MDG(s)	Millennium Development Goal(s)
NJP	National Justice Programme
OECD	Organisation for Economic Co-operation and Development
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
Rec	Recommendation

SDG(s)	Sustainable Development Goal(s)
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCT	United Nations Country Teams
UPR	Universal Periodic Review
WEOG	Western European and Others Group
WJP	World Justice Project
ZWLA	Zimbabwe Women Lawyers Association
ZLHR	Zimbabwe Lawyers for Human Rights

# About the IBAHRI United Nations Programme

Established in 1947, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 80,000 individual lawyers and 190 bar associations and law societies spanning all continents.

Created in 1995, the International Bar Association's Human Rights Institute (IBAHRI) provides human rights training and technical assistance for legal practitioners and institutions, building their capacity to promote and protect human rights effectively under a just rule of law. A leading institution in international fact-finding, the IBAHRI produces expert reports with key recommendations, delivering timely and reliable information on human rights and the legal profession. The IBAHRI supports lawyers and judges who are arbitrarily harassed, intimidated or arrested through advocacy and trial monitoring. A focus on pertinent human rights issues, including the abolition of the death penalty, poverty and LGBTI rights forms the basis of targeted capacity-building and advocacy projects.

## Programme overview

On 20 November 2014, the IBAHRI launched its United Nations (UN) Programme, focused on UN recommendations relating to the independence of the judiciary and the legal profession. The programme comprises three complementary components:

1. *Advocacy*. To advocate for the advancement of human rights in the administration of justice, focusing on UN human rights mechanisms in Geneva.
2. *Capacity-building*. To train lawyers, judges and bar associations to engage with UN human rights mechanisms, on issues related to their professional independence.
3. *Research and analysis*. To inform state policies on, and implementation of, UN recommendations relating to the independence of the judiciary and legal profession.

## Programme rationale

Lawyers are at the forefront of the defence for the protection of human rights. Without an independent legal profession, victims of human rights violations are not able to exercise their right to redress. The effective implementation of UN recommendations relating to the independence of the judiciary and legal profession is therefore at the heart of the promotion and protection of human rights.

Lawyers, judges and bar associations have a vital role to play in ensuring their professional independence, and UN human rights mechanisms provide effective and accessible tools to promote relevant policies and their implementation on the ground.

As part of the world's leading organisation of international legal practitioners, bar associations and law societies, the IBAHRI is ideally placed to engage the global legal profession with such mechanisms and to advocate for the advancement of human rights and the independence of the legal profession.

# Foreword

Through implementation of its varied recommendations, the Universal Periodic Review (UPR) has great potential in bringing about positive change in the human rights situation on the ground. Together with recommendations from other human rights mechanisms, it can create a framework of national engagement for follow-up and implementation purposes, can foster dialogue between the state and all stakeholders in that process and can lead to important advances in the field of human rights. This impact can equally be felt in the area of administration of justice, if the mechanism were to be used effectively to foster a dialogue between states and the legal community. The IBAHRI report usefully guides recommending states, states undergoing review and legal professionals towards that objective, with key reflections in order to make the best use of the potential of the UPR in advancing human rights in the field of administration of justice.

Such a thematic focus in reviewing the work carried out broadly under the umbrella of the UPR is immensely useful. It enables expert and targeted analysis and guidance, which can only lead to strengthened recommendations and better implementation. This is inevitably of great value to all states in such peer review processes.

The report highlights the crucial relevance of involving all relevant stakeholders, including those that have been less engaged to date, such as the judiciary, bar associations, lawyers and the broader legal community, in the UPR process for better assessments and implementation, and as a result, strengthened state engagement in the UPR. It reminds us all of the importance of continued training for lawyers and judges on international human rights law standards, and of the meaningful contribution that they can make not only to better adjudication in line with international standards, but also broadly to law reform in their respective countries.

No doubt recommendations are a key outcome of the UPR process, and their proper formulation is of paramount importance. This would include not only effective use of the appropriate international standards in their elaboration, but also recommendations that address head-on the challenges that actors of the court system might face in protecting human rights. Formulations can run the gambit touching on the institutional human rights framework involving the court systems and the independence of the judiciary, to concrete fair trial considerations, all the way to substantive calls on effective protection of the rights through legislative reform and effective adjudication with equal access to all. Involving and engaging the legal community in the process can only strengthen the outcomes.

Through the analysis in this report, states are encouraged to reflect on ways in which such key considerations may better be reflected through specific and measurable recommendations that touch on both what the states under review should achieve, as well as on how such changes might best be pursued by involving legal professionals.

The report thus provides important insight on the need for more effective implementation of the standards concerned in the recommendations. It calls for a greater focus on assessing the impact on the realisation of human rights in the country and in particular in the field of



administration of justice, as well on the best means to carry out such an assessment. It highlights some positive evolving practices in the context of the UPR and the field of administration of justice, and further encourages all in this path. With this guidance, and strengthened dialogue and engagement of the broader legal community, the UPR mechanism will be better placed to meet its full potential of improving the human rights situation on the ground and, importantly, in the field of administration of justice.

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# Executive Summary

The international environment has evolved and old and new human rights mechanisms now face the challenge of complementing one another. At the same time, the renewed international agenda defined by the 2015 Sustainable Development Goals incorporates human rights, and ‘access to justice for all’ is a goal in itself under Goal 16.<sup>1</sup> As a result, the work of international human rights mechanisms will be, even more than before, complementary to the monitoring undertaken by the United Nations (UN) development agencies.

In this context, the contribution of the Universal Periodic Review (UPR) could be unique. The UPR has indeed opened up the international human rights system to non-state actors in an unprecedented manner. It is as such a *sui generis* human rights mechanism, where the involvement of the primary stakeholders constitutes the best guarantee of impact on the ground.

This report addresses, at the level of the UPR, two interrelated issues, namely the involvement of legal professionals in UN human rights mechanisms and reference to legal professionals in international recommendations. The report advocates for the involvement of legal professionals at the UPR as a key condition in fostering the impact of the process on the administration of justice. The report identifies a number of challenges that need to be addressed for the UPR to realise its full potential.

Recommending states face major challenges, not least of giving necessary attention to legal professionals, in accordance with their role and the specific protection recognised for them in international law. The role of legal professionals in the protection of human rights, and their need for specific protection, were put as key priorities on the international human rights agenda three decades ago. While the Special Rapporteur on the independence of judges and lawyers has evidenced over 20 years the need for further compliance with the UN Basic Principles on the Role of Lawyers, the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on the Role of Prosecutors (collectively, the ‘UN Basic Principles and Guidelines’), the UPR recommendations until now have barely mentioned the specific status and need for protection of legal professionals.

The main challenge facing recommending states is to draft specific and action-orientated recommendations that pinpoint specific shortcomings in the justice system, borrow the agreed international human rights language and build upon the current international human rights framework. Only a few states have so far referred to the UN Basic Principles and Guidelines. Similarly, only a few states have echoed the recommendations and good practices identified by the Special Rapporteurs in the administration of justice. The rights to freedom of expression, assembly and association for legal professionals are key conditions for the independence of justice systems, but have almost never been addressed. Professional organisations of lawyers – bar associations or law societies – have rarely been mentioned, while they should be counted among the primary institutions of the country charged with the protection of human rights. These organisations should be entrusted with the role of ensuring the protection and education of lawyers in order to promote the rule of law and an independent court system. The involvement of lawyers in law reform and the fight

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<sup>1</sup> Under Goal 16, states envision to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’ as the backbone of national human rights systems.

against impunity has never been addressed, even though it could facilitate informed legal debates, sustainable democratic change and consistency within legal systems.

For the UPR to be counted among human rights mechanisms, UPR recommendations must be guided by the core human rights principles of non-discrimination, participation, access to information and accountability. This is true for all governance sectors, including the administration of justice. Thus the Special Rapporteur on the independence of judges and lawyers has recommended that the judiciary should be appointed in a participatory and transparent manner; it should be representative of the minorities in the country; and it should integrate a gender-based approach. Specific recommendations that depart from the international human rights framework lose their potential of impact. Specific recommendations can only trigger change if the legal and policy environment, where they are implemented, actively enables the enjoyment of human rights. A recommendation to train legal professionals in human rights, or appoint judges in an objective and transparent manner, will only be meaningful if the state is also being asked more broadly to comply with the UN Basic Principles and Guidelines and other relevant international human rights instruments.

The main challenge facing states under review is to develop a monitoring system that focuses on the impact of the measures they implement in the justice system on the realisation of human rights in the country, and to support a self-performance assessment process by the legal professions. Out of a sample of specific, action-orientated recommendations, the IBAHRI found no information on the implementation of almost 40 per cent of them, and that the monitoring most often found addressed the measures implemented, rather than the actual impact on the administration of justice or access to justice. The absence of implementation or reporting guidelines on the administration of justice is a problem that goes beyond the UPR. Notwithstanding the UN Rule of Law Indicators, there is currently no UN monitoring system measuring adherence to international standards on the independence of justice. The IBAHRI therefore encourages states to use the United Nations Rule of Law Indicators and set up a monitoring system based on the UN Basic Principles and Guidelines to monitor progress in realising access to justice for all, as targeted by Sustainable Development Goal 16 adopted by all UN Member States in September 2015.

Once international recommendations are lifted to the level of protection spelled out in international standards as currently interpreted by the other human rights mechanisms, the UPR will be able to play its role and foster exchanges on good practice. In that respect, international organisations of legal professionals also share a responsibility in the development of good practices. In 2009, Special Rapporteur Leandro Despouy encouraged the Human Rights Council (HRC) to ‘draw on the contributions and experience of national and international jurists’ organizations established to defend judicial independence’.<sup>2</sup> Good practices in key areas such as training programmes, the protection of legal professionals and the fight against corruption within the justice system will be among the main issues to address in order to foster human rights in the administration of justice. Training material and education programmes are at the core of the activities of many international organisations of legal professionals and there are lessons to be learned from this wide experience. The IBAHRI will soon release a manual compiling current practice in the establishment and functioning of professional organisations

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2 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/HRC/4/25, 2.

of lawyers. Further guidance is currently being developed, especially by the IBAHRI and the International Commission of Jurists (ICJ), on judicial accountability and judicial integrity. The IBAHRI is committed to foster the involvement of lawyers in UN human rights mechanisms and in monitoring the independence of judges, lawyers and prosecutors at country level. It is also committed to fostering exchanges between lawyers' organisations to encourage the development of good practices.

In light of the findings presented in this report, the IBAHRI makes the following recommendations with a view to improving the UPR mechanism and ensuring that relevant stakeholders and appropriate standards inform that process and states' recommendations.

## **To recommending states**

1. When assessing a state's human rights situation, pay specific attention to the information coming from lawyers' associations.
2. Consider the separation of powers and the independence of legal professionals as priority issues to be addressed at the UPR as a necessary requisite for the protection of all human rights.
3. When making recommendations, refer to the UN Basic Principles and Guidelines and prior recommendations and good practices in the administration of justice as identified by international human rights mechanisms, especially the Special Rapporteur on the independence of judges and lawyers.
4. Call for judges, prosecutors and lawyers to be recognised as subjects of specific protection measures to ensure that they carry out their professional duties without any external or internal interference.
5. Call for the administration of justice to be transparent, accessible to all (through the provision of legal aid where necessary), participatory and representative of the population it serves as a requirement to ensure access to justice by vulnerable groups.
6. Call for the state under review to allocate material and financial resources to the justice system, and ensure that the judiciary be given an active involvement in the preparation of its budget and enjoy autonomy in the allocation of its resources, while remaining accountable to the other branches of power for any misuse.
7. Call for a national independent, self-governed and self-regulatory bar association to be the primary institution charged with protecting the legal profession and fostering lawyers' engagement in the protection of the rule of law and human rights.
8. Call for the legal community to receive continuous legal training on key human rights issues encountered in the country, following the recommendations of the Special Rapporteur in the 2010 annual report 14/26, *and* to be involved in law reform, especially in the revision of criminal legislation.
9. Call for the independence of prosecutors and the respect of international human rights standards in the fight against impunity and terrorism.
10. Cooperate with the state under review to implement the UPR recommendations.

## **To states under review**

11. Involve the judiciary and professional organisations of lawyers in the implementation and monitoring of international human rights recommendations, including the UPR recommendations, especially relating to the administration of justice and legal reforms.
12. Use the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors as benchmarks for the implementation of the UPR recommendations relating to the administration of justice.
13. Refer to landmark cases of the highest judicial instances concerning human rights held in your country, while reporting to the UPR.

## **To lawyers and lawyers' associations**

14. Use the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors and the recommendations of the Special Rapporteur in order to monitor the independence of judges and lawyers in the country.
15. Monitor the independence of the judiciary and independence of lawyers and prosecutors in their country and take part in the UPR process.
16. Foster exchanges on human rights issues and related case law between national bar associations and members of the judiciary, especially between countries receiving similar recommendations at the UPR.

## **To the Office of the High Commissioner for Human Rights**

17. Disseminate the United Nations Rule of Law Indicators in order to assist states and non-governmental organisations (NGOs) in the monitoring of human rights in the administration of justice.
18. Foster the use of reporting guidelines at the UPR by states and NGOs.



# **Chapter One**

## **Introduction**

## 1.1 The role of the Universal Periodic Review in advancing human rights in the administration of justice: definitions and context

Between 2009 and 2013, bilateral development aid disbursed to foster legal and judicial developments amounted to more than US\$12.8bn.<sup>3</sup> This is one of the main budget lines in all sectors.<sup>4</sup> In itself this constitutes the most tangible evidence of the importance attributed to the justice system's role in backing any sustainable development. Paradoxically until 2015, the Millennium Development Goals (MDGs) – a series of time-bound targets adopted for 15 years by the United Nations in 2000 to fight poverty and foster development – retained a 'narrow economic perspective of development', excluding both human rights and justice.<sup>5</sup>

Looking at the interplay between access to justice and human rights protection, the emphasis of the role of the legal professionals<sup>6</sup> is the result of a process that took place in the course of the 1980s.<sup>7</sup> The independence of lawyers then received a separate treatment next to the independence of the judiciary and the role of prosecutors, as key preconditions to the right to a fair trial. A number of guidelines were consecutively developed. The 1993 Vienna Conference<sup>8</sup> placed the institutionalisation of human rights at international and national levels at the core of the Plan of Action states were then committing to. Legal professionals were put at the frontline of the protection of human rights. The Vienna Declaration and Programme of Action recognised that '(t)he administration of justice, including law enforcement and prosecutorial agencies and, *especially, an independent judiciary and legal profession in full conformity with applicable standards* contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development' (emphasis added).<sup>9</sup>

Since then the international human rights system has continued to evolve. The Universal Periodic Review (UPR), created in 2007, provides a peer-to-peer review mechanism of states' human rights performance. Complementary to expert bodies, such as treaty bodies and special procedures,

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3 OECD Aid Data extracted from <http://stats.oecd.org> (Sector: 'legal and judicial development' (15130)).

4 OECD, *Development assistance flows for governance and peace* (OECD 2014), 8.

5 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2014) UN Doc A/69/294, 2.

6 'Legal professionals' or 'legal professions' in this report refers to 'judges, lawyers and prosecutor'. 'Lawyers' or the 'legal profession' refers to 'the body of lawyers qualified and licensed to practice law in a jurisdiction or before a tribunal, collectively, or any organised subset thereof, and who are subject to regulation by a legally constituted professional body or governmental authority'. (IBA, *International Principles on Conduct for the Legal Profession* (2011), 34. See also for a definition of lawyers, in the 'Draft Universal Declaration on the Independence of Justice' ('Singhvi Declaration'), reproduced in ICJ, *International principles on the independence and accountability of judges, lawyers and prosecutors. A practitioners guide* (International Commission of Jurists, 2nd edn, 2007), 107: 'a person qualified and authorized to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters.'

7 Phon Van Den Biesen, 'Building on basic principles. Introductory observations', *Building on basic principles, 25 Years, Lawyers for Lawyers* (Stichting NJCM-Boekerij 52, 15 April 2011), 2.

8 World Conference on Human Rights, 14–25 June 1993, Vienna, Austria.

9 Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23, adopted by the World Conference on Human Rights, para 27.



this intergovernmental mechanism has been designed to provide international human rights recommendations with political traction.

The Sustainable Development Goals (SDGs) – which were adopted in September 2015 and now define states’ international objectives for the next 15 years in the development arena – include access to justice under Goal 16. Under Goal 16 states envision to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. Among the targets of this goal are to ‘promote the rule of law at the national and international levels’ and ‘substantially reduce corruption and bribery in all its forms’. These are absolutely crucial elements for creating the legal order that is a prerequisite for achieving all the other goals.<sup>10</sup> For the first time, access to justice at country level will therefore be monitored at the international level by the United Nations (UN). Unlike their predecessors – the MDGs – the SDGs make reference to human rights. In light of this renewed international agenda, the UPR will constitute a unique complementary process where states, in an interactive dialogue, share progress realised to provide access to justice to all, in accordance with human rights principles.

It is in that context that this report aims to assess, on the one hand, the extent to which the UPR has, to date, assisted in advancing human rights in the administration of justice, and on the other, the level of participation of the legal community in that process. The IBAHRI believes that the legal community, as main guarantor of human rights on the ground, has a key role to play in the UPR in order to strengthen human rights in the administration of justice, and consecutively the realisation of all human rights.

### *Human rights in the administration of justice*

The ‘administration of justice’ in the present report refers to the court system and its main actors, that is, judges, prosecutors and lawyers, in their mission to ensure the rule of law and protect human rights. The judiciary ensures that the conduct of the executive and administrative branches is consistent with previously enacted laws, with human rights and with the constitution. Prosecutors play a key role in protecting society from a culture of impunity, and function as gatekeepers to the judiciary. Finally, a strong, independent and competent legal profession is fundamental to guaranteeing citizens’ access to independent, skilled and confidential legal advice and protecting citizens’ rights and freedom under the rule of law.

As mentioned above, in the course of the 1980s, the independence of judges, lawyers and prosecutors received a separate treatment as key preconditions to the right to a fair trial, protected by Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Since then a number of standards elaborated on each of the principles. The building block of the independence of justice lies in the 1985 Basic Principles on the Independence of the Judiciary,<sup>11</sup> the 1990 Basic Principles

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10 Hans Corell, ‘The Independence of the Legal Profession and Bar Associations: International Perspectives’, Presentation at the Conference ‘The Independence of the Legal Profession and Bar Associations: International Perspectives’ (26 July 2015, Tehran), available at [www.havc.se/res/SelectedMaterial/20150726thebarandtheruleoflaw.pdf](http://www.havc.se/res/SelectedMaterial/20150726thebarandtheruleoflaw.pdf). This and all other URLs last accessed 26 February 2016.

11 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, available at [www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx).

on the Role of Lawyers,<sup>12</sup> the 1990 Guidelines on the Role of Prosecutors,<sup>13</sup> the 1999 Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors and the 2002 Bangalore Principles for Judicial Conduct.

At the core of the independence of legal professionals is the recognition that judges, prosecutors and lawyers must carry out their professional duties without any external or internal interference and must be protected, in law and in practice, from attacks, harassment and persecution. The legal professionals (also referred as ‘the legal community’ thereafter) are protected as guarantors of the rule of law and human rights. They are in turn accountable to the people for enhancing human rights, and maintaining the highest level of integrity, in accordance with national and international law and ethical standards.

The institutionalisation and specific role and attributes of each legal profession trigger distinct rights and duties. As stated by Rapporteur Singhvi in 1985 and reiterated by Special Rapporteur Despouy in 2004,

‘[t]he duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the executive or legislative or even by the judiciary as well as by others... Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference.’<sup>14</sup>

As to prosecutors, their relationship with the executive power can differ drastically from one system to another, insofar as they can be an integral part of that power, or completely independent from both the judiciary and executives branches. The Basic Principles and Guidelines purport however to establish an adequate system of checks and balances, notwithstanding differences among systems.

UN human rights protection mechanisms, namely the special procedures, treaty bodies and the UPR, play a key role in monitoring the implementation of human rights by states in the administration of justice. They provide states with guidance as to the implementation of these standards in order to enhance the independence of the judiciary and increase access to justice on the ground. The

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12 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990, available at [www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx).

13 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 [www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx).

14 ‘Study on the independence and impartiality of the judiciary, jurors, assessors and the independence of lawyers prepared by L.M. Singhvi Special Rapporteur’ (1985) UN Doc E/CN.4/Sub.2/1985/18 and Add.1-6, para 81; UNCHR, ‘Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy’ (2003) UN Doc E/CN.4/2004/60, para 48.

effective implementation of UN recommendations relating to the independence of the judiciary and legal profession is therefore at the heart of the promotion and protection of human rights.

### *Universal Periodic Review*

The Universal Periodic Review (UPR) was created in 2006<sup>15</sup> by the UN to ‘complement’<sup>16</sup> pre-existing human rights mechanisms in order to improve state adherence to and encourage the fulfilment of human rights obligations through the implementation of recommendations. The UPR – currently undergoing its second cycle – is an intergovernmental process and the recommendations accepted by states on this occasion are tantamount to political commitments, that is, commitments taken by the executive as its initiative and as to its own action. It is as such a *sui generis* UN human rights mechanism with several characteristic attributes presented below.

First, the UPR operates as a peer-review assessment, driven by states, ensuring that all countries are reviewed, assessed and reported on an equal footing, notwithstanding political weight or any presumption of championing human rights. While the treaty bodies may only scrutinise human rights records of states that are parties to the relevant treaty, the UPR subjects every member of the UN to the universal review. Up until now, almost every state has presented a report and thereby recognised and reaffirmed the legitimacy of the UPR process. What is more, in some cases the UPR does not merely ‘complement’ other mechanisms, as stated in Resolution 5/1,<sup>17</sup> but is the only dialogue on human rights the state is taking part in at the international level. Maintaining the willingness of UN Member States to cooperate with this mechanism is therefore a matter of utmost importance.

Then, the UPR constitutes the widest existing information-gathering process in the area of human rights. By involving a distinctly wide array of actors, the mechanism produces a large dataset of human rights compliance records of the involved states. It is framed by human rights information gathered by states, civil society, treaty bodies and UN specialised agencies. The information gathered is easily accessible to everyone through the Office of the High Commissioner for Human Rights (OHCHR) website. It is the first time that information coming from UN human rights mechanisms and development agencies can be used in a consolidated manner.<sup>18</sup> This unicity of the ‘interactive dialogue’<sup>19</sup> constitutes a unique opportunity to discuss key human rights issue in all countries in a truly universal forum.

Finally, in sharp contrast to other human rights mechanisms, which mostly limit dialogue to between states and independent experts, the UPR provides human rights issues with unprecedented visibility. Its outcome-orientated recommendations reach an extremely wide audience, including the highest levels of government. The process is transparent and debates are broadcasted, making inter-state dialogues subject to review by their citizens.

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15 UNGA, ‘Human Rights Council’ (15 March 2006) UN Doc A/RES/60/251.

16 UNHRC, ‘Institution-building of the United Nations Human Rights Council’ (18 June 2007) UN Doc A/HRC/RES/5/1, para 3(f).

17 *Ibid.*

18 *Ibid.*

19 UNGA, ‘Human Rights Council’ (15 March 2006) UN Doc A/RES/60/251, para e.

It is still too early to reach conclusions as to the full impact of the UPR mechanism on the global situation of human rights. The 2014 UPR Info report, *Beyond promises*, notes that there has been increased engagement of UPR stakeholders over the course of the first cycle, although engagement – particularly with reference to recommendations’ follow-up – is still lacking.<sup>20</sup> The UPR has gained significant political traction, with recommendations reaching the line of ministers. The OHCHR, the Organisation Internationale de la Francophonie (OIF) and the Commonwealth Secretariat, among others, actively support states at different steps of the process. On the NGO front, much has been done to foster civil society participation and linkages between NGOs and states.

The UPR recommendations’ implementation, however, is the most critical and important step in the process, correlating directly to the ultimate goal of improving the human rights situation in every country. In this regard, the UPR Info report indicates that approximately 49 per cent of all commented first-cycle recommendations were not implemented more than two-and-a-half years after the first cycle (mid-term). With ‘justice’ representing one of the top five non-implemented categories,<sup>21</sup> there is cause for alarm at the effectiveness and practicality of UPR recommendations as well as their impact on improving access to justice and strengthening the independence of legal systems across the globe.

## 1.2 Terms of reference

The terms of reference of the report are:

1. to examine the relevance of UPR recommendations in relation to the judiciary and the legal profession;
2. to assess the involvement of the legal profession in the UPR process and identify opportunities for the legal profession to be further involved; and
3. to publish the report indicating the findings of the research and making recommendations.

## 1.3 Research and consultation methodology

The methodology used in defining the terms of reference for the research project included a dual process of expert research and consultation. The Geneva-based IBAHRI Senior Fellow gathered, reviewed and analysed current reports and documentation related to the UPR and the protection of the independence of the judiciary by human rights protection mechanisms. She also engaged in consultation with approximately 30 civil society organisations, diplomatic missions and intergovernmental organisations present in Geneva.

From September 2014 to June 2015 a number of bilateral interviews were conducted with states’ representatives in Geneva. Among the consulted states were the 20 countries that made the most recommendations on the judiciary through the UPR.

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20 UPR Info, *Beyond promises: The impact of the UPR on the ground* (UPR Info 2014), 5. Available at: [www.upr-info.org/sites/default/files/general-Doc.ument/pdf/2014\\_beyond\\_promises.pdf](http://www.upr-info.org/sites/default/files/general-Doc.ument/pdf/2014_beyond_promises.pdf).

21 *Ibid*, 30–31.

The objective of the consultations was to understand, first, states' agenda and strategy on the independence of the judiciary at the UN and, then, the importance given to the UPR to adapt the judiciary system.

A questionnaire was developed as a starting point for interviews and consultation meetings with states' in-country contact points. Four out of the ten countries under scrutiny in the report provided information on the in-country UPR process. A number of in-country consultations were organised to obtain further information and inputs from lawyers and other stakeholders as to their involvement in the UPR and the impact of the IBAHRI recommendations, on the one hand, and recommendations of the UPR process, on the other hand.

## 1.4 Scope and limitations of the report

### *Thematic scope: key assessment areas and international standards in the administration of justice*

The overriding principles of justice, namely the principles of independence of judges, lawyers and prosecutors, and principle of a fair trial, postulate 'individual attributes as well as institutional conditions',<sup>22</sup> the absence of which leads to a 'denial of justice and makes the credibility of the judicial process dubious'.<sup>23</sup>

The list of these individual attributes and institution conditions has been developed under the aegis of the UN Office on Drugs and Crime by means of the UN Basic Principles and Guidelines. The Human Rights Committee then clarified in its General Comment No 32 the content of Article 14 of the ICCPR on the right to a fair trial. The Human Rights Council in recent resolutions reassessed a number of these attributes and conditions.<sup>24</sup> None of these instruments is legally binding per se. They however all contribute, with a lesser or greater authoritative force, to interpret states' obligations under Article 14 of the ICCPR on the right to a fair trial. In addition, international organisations of legal professionals, like the International Bar Association,<sup>25</sup> the International Association of Judges<sup>26</sup> and the International Association of Prosecutors,<sup>27</sup> have adopted professional standards, which reiterate and develop the standards spelt out at the level of the UN.<sup>28</sup>

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22 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2003) UN Doc E/CN.4/2004/60, para 65.

23 *Ibid.*

24 See in particular UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41 (on the independence of judges); UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181 (on the independence of lawyers); and UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2012) UN Doc A/HRC/20/19 (independence of prosecutors).

25 See in particular the IBA Standards for the Independence of the Legal Profession (1990) and the IBA International Principles on Conduct for the Legal Profession (2011).

26 International Association of Judges, *the Universal Charter of the Judge* (1999).

27 International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors* (1999).

28 See also Judicial Group on Strengthening Judicial Integrity, *The Bangalore Draft Code of Judicial Conduct* (2001), as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002.

The Special Rapporteur on the independence of judges and lawyers contributes to the unity of the human rights system by interpreting all these international instruments, in light of the recommendations of international and regional human rights mechanisms and country practice.<sup>29</sup>

In order to assess ways in which the UPR has so far advanced human rights in the administration of justice, the UPR recommendations were classified following the main list of attributes and conditions related to the independence of judges, lawyers and prosecutors respectively, and taking into account the terminology used in the UPR recommendations.

Regarding the independence of the judiciary, the recommendations addressing the independence, impartiality and/or efficiency of the judiciary system or the non-interference with the judicial process in general terms were classified as addressing the independence of the judiciary in general terms. Recommendations calling for the separation of powers between the legislature, the executive and the judiciary branches were included in the analysis insofar as it constitutes ‘the bedrock upon which the requirement of judicial independence and impartiality are founded’.<sup>30</sup>

Specific recommendations were clustered around the following individual attributes and institutional conditions to the independence of judges: appointment process of judges and composition of the judiciary; the disciplinary process against judges; training of judges in human rights; security of tenure of judges; adequate financing, material and human resources of the judiciary; protection measures concerning judges; courts’ competences (including the issue of special courts and the oversight of the judiciary over administrative and security authorities) and transparency in the set-up and functioning of the court system. Some UPR recommendations also addressed the ‘fight against corruption’ within the judiciary and the adoption of ‘code of ethics’ for the judiciary, and these topics were added to the list.

Table 1 provides a list of topics on the independence of judges and the main international standards related thereto outlined in the Basic Principles on the Independence of the Judiciary and the recommendations of the Special Rapporteur on the independence of judges and lawyers.

**Table 1: List of topics for recommendations addressing the independence of judges and lawyers**

<b>Key topics (independence of judges)</b>	<b>Basic Principles on the Independence of the Judiciary</b>
	<i>With some of the main recommendations of the Special Rapporteur on the independence of judges and lawyers (in italics)</i>
<b>Independence of judges (general principle)</b>	‘The independence of the judiciary should 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.’ <sup>31</sup>
<b>Impartiality of judges (general principle)</b>	‘The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions [...]’. <sup>32</sup>

29 UNHRC, ‘Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers’ (19 June 2013) UN Doc A/HRC/RES/23/6. UNHRC, ‘Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers’ (2 July 2015) UN Doc A/HRC/RES/29/6.

30 UNCHR, ‘Report of the Special Rapporteur on the independence of judges and lawyers’ (1995) UN Doc E/CN.4/1995/39, para 55.

31 Basic Principles on the Independence of the Judiciary, Principle 1.

32 *Ibid*, Principle 2.

<b>Appointment process of judges and composition of judges</b>	<p>'Persons selected for judicial offices 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 [...].'<sup>33</sup></p> <p><i>Member States should 'consider establishing an independent body in charge of the selection of judges, which should have a plural and balanced composition, and avoid politicization by giving judges a substantial say'.<sup>34</sup> 'Special temporary measures can be adopted and implemented to achieve greater representation for women and ethnic minorities until fair balance has been achieved.'<sup>35</sup></i></p>
<b>Disciplinary process against judges</b>	<p>'Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.'<sup>36</sup> 'All disciplinary, suspension or removal of judges shall be determined in accordance with established standards of judicial conduct.'<sup>37</sup> 'Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.'<sup>38</sup></p> <p><i>'Disciplinary measures to be adopted must be in proportionality to the gravity of the infraction committed by the judge.'<sup>39</sup> '[T]he procedures before such a body must be in compliance with the due process and fair trial guarantees.'<sup>40</sup></i></p>
<b>Training of judges in human rights</b>	<p>'Persons selected for judicial offices shall be individuals of integrity and ability with appropriate training or qualifications in law [...].'<sup>41</sup></p> <p><i>'States should give priority to strengthening judicial systems, particularly through continuous education in international human rights law for judges, prosecutors, public defenders and lawyers.'<sup>42</sup></i></p>
<b>Adequate financing, material and human resources</b>	<p>'It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.'<sup>43</sup></p> <p><i>'The judiciary [should] be given active involvement in the preparation of its budget.' 'The administration of funds allocated to the court system [should] be entrusted directly to the judiciary or an independent body responsible for the judiciary.'<sup>44</sup> Judges should be remunerated 'with due regard for the responsibilities and the nature of their office'.<sup>45</sup></i></p>
<b>Security of tenure of judges</b>	<p>'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.'<sup>46</sup> '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.'<sup>47</sup> 'Promotions of judges [...] should be based on objective factors, in particular ability, integrity and experience.'<sup>48</sup></p>

33 *Ibid*, Principle 10.

34 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 97.

35 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 34.

36 Basic Principles on the Independence of the Judiciary, Principle 18.

37 *Ibid*, Principle 19.

38 *Ibid*, Principle 20.

39 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 58.

40 *Ibid*, para 61.

41 Basic Principles on the Independence of the Judiciary, Principle 10.

42 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/HRC/14/26, para 99(e).

43 Basic Principles on the Independence of the Judiciary, Principle 7.

44 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 101.

45 *Ibid*, para 75.

46 Basic Principles on the Independence of the Judiciary, Principle 11.

47 *Ibid*, Principle 12.

48 *Ibid*, Principle 13.

<b>Fundamental freedoms of judges</b>	<p>'In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association or 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.'<sup>49</sup></p> <p><i>'The establishment of a judges' association [should] be supported by Member States on account of its importance as guarantor of an independent judiciary.'</i><sup>50</sup></p>
<b>Protection measures concerning judges</b>	<p>States shall put in place the necessary safeguards to ensure that judges can fulfil their mission and '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'.<sup>51</sup></p> <p><i>'Allegation of improper interference [should] be inquired be independent and impartial investigations in a thorough and prompt manner.'</i><sup>52</sup></p>
<b>Courts' competences</b>	<p>'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.'<sup>53</sup> '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 of ordinary tribunals.'<sup>54</sup> There shall be no interference with the judicial process, other than judicial review.<sup>55</sup></p>
<b>Transparency in the set-up and function of the court system</b>	<p><i>'Selection and appointment procedures [should] be transparent and public access to relevant records be ensured.'</i><sup>56</sup> <i>'Decisions related to disciplinary measures against judges should be made public.'</i><sup>57</sup></p>

Recommendations addressing the military or juvenile justice systems were respectively compiled under the tag 'military justice' and 'juvenile justice'. Most of the recommendations addressing military justice revolve around cases of civilians and human right cases brought to military courts, or judges appointed by the military. The issues addressed under 'juvenile justice' cover a wide spectrum of issues, from specific criminal sanctions to specific courts and detention conditions.

The recommendations addressing the independence of prosecutors were tagged using the list of topics in Table 2.

49 *Ibid*, Principle 8.

50 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 102.

51 Basic Principles on the Independence of the Judiciary, Principle 2.

52 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 51.

53 Basic Principles on the Independence of the Judiciary, Principle 3.

54 *Ibid*, Principle 5.

55 *Ibid*, Principle 4.

56 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 97.

57 *Ibid*.



**Table 2: List of topics for recommendations addressing independence of prosecutors**

Key topics (independence of prosecutors)	Guidelines on the role of prosecutors <i>With some of the main recommendations of the Special Rapporteur on the independence of judges and lawyers (in italics)</i>
<b>Appointment process and composition of the prosecuting services</b>	The access to the profession and the promotion of prosecutors shall be based on objective criteria, such as ability, integrity and experience, and be free from discrimination and political interference. <sup>58</sup>
<b>Disciplinary process</b>	'Disciplinary offenses of prosecutors shall be based on law or lawful regulations [...].' <sup>59</sup> 'Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision [...].' <sup>60</sup> <i>'The prosecutors should have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary actions.'</i> <sup>61</sup>
<b>Training of prosecutors in human rights</b>	<i>'Prosecutors should receive adequate training both on initial appointment and periodically throughout their career. Training should mandatorily include regional and international human rights norms and standards. Training on the gender-sensitive handling of cases should also be provided.'</i> <sup>62</sup> <i>'The training of prosecutors should be paid by the state as an important incentive to their qualification.'</i> <sup>63</sup>
<b>Adequate financing, material and human resources of prosecuting services and security of tenure of prosecutors</b>	'Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension, and age of retirement shall be set out by law or published rules or regulations.' <sup>64</sup> <i>'The appointment and selection process of the Prosecutor General should be carried out in such a way as to gain public confidence and the respect of the judiciary and the legal profession.'</i> <sup>65</sup>
<b>Prosecution guidelines</b>	'In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.' <sup>66</sup>
<b>Fundamental freedoms of prosecutors</b>	Prosecutors are free to associate, assemble, express their opinion, and have a fair trial. <sup>67</sup>
<b>Protection measures for prosecutors</b>	'States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.' <sup>68</sup> <i>States should ensure the personal safety of prosecutors and their families. Any act of violence [...] against prosecutors and/or their families should be duly investigated.'</i> <sup>69</sup>

Similarly, the recommendations addressing the independence of lawyers were tagged using the list of issues in Table 3.

58 Guidelines on the Role of Prosecutors, Guidelines 1–2 and 7.

59 *Ibid*, Guideline 21.

60 *Ibid*, Guideline 22.

61 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2012) UN Doc A/HRC/20/19, para 114.

62 *Ibid*, para 124.

63 *Ibid*, para 126.

64 Guidelines on the Role of Prosecutors, Guideline 6.

65 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2012) UN Doc A/HRC/20/19 (Independence of prosecutors), para 109.

66 Guidelines on the Role of Prosecutors, Guideline 17.

67 *Ibid*, Guidelines 21–22. See also UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2012) UN Doc A/HRC/20/19, para 81.

68 Guidelines on the Role of Prosecutors, Guideline 4.

69 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2012) UN Doc A/HRC/20/19, para 118.

**Table 3: List of topics for recommendations addressing independence of lawyers**

Key topics (independence of the legal profession)	Basic Principles on the Role of Lawyers <i>With some of the main recommendations of the Special Rapporteur on the independence of judges and lawyers (in italics)</i>
<b>Independence of the legal profession (General principle)</b>	<i>'Legislation regulating the role and activities of lawyers and the legal profession [should] be developed, adopted and implemented in accordance with international standards; such legislation should enhance the independence, self-regulation and integrity of the legal profession; in the process leading to the legislation's adoption, the legal profession should be effectively consulted at all relevant stages of the legislation process.'</i> <sup>70</sup>
<b>Access to the legal profession</b>	'Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.' <sup>71</sup>  <i>'In those Member States where the admission to the legal profession is conducted or controlled by the authorities, such responsibility should be gradually transferred to the legal profession itself within a determined time frame.'</i> <sup>72</sup> <i>'In those Member States where there is a re-licensing or re-registration requirement for lawyers to continue practicing, that scheme be discontinued.'</i> <sup>73</sup>
<b>Composition of the legal profession</b>	'In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.' <sup>74</sup>  <i>'Lawyers' associations strive to ensure a pluralistic membership of their executive bodies in order to prevent political or any other third-party interference.'</i> <sup>75</sup>
<b>Disciplinary process of lawyers</b>	'Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.' <sup>76</sup>
<b>Training of lawyers in human rights</b>	'Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.' <sup>77</sup>  <i>'Legal professions should adopt a uniform and mandatory scheme of continuing legal education for lawyers, which should also include training on ethical rules, rule of law issues and international and human rights standards, including the Basic Principles on the Role of Lawyers.'</i> <sup>78</sup>

70 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 105(c).

71 Basic Principles on the Role of Lawyers, Principle 10.

72 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/64/181, para 105(c).

73 *Ibid*, para 105(f).

74 Basic Principles on the Role of Lawyers, Principle 11.

75 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 112(a).

76 Basic Principles on the Role of Lawyers, Principle 28.

77 *Ibid*, Principle 9.

78 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 112(d).

<b>Promotion of the ethics of the profession</b>	<p>'Codes of professional conduct for lawyers shall be established by the legal profession[...]'<sup>79</sup></p> <p><i>'A unified ethical code, applicable to all lawyers in the respective country should preferably be drafted by associations of lawyers themselves; in the event that they are established by law, the legal profession must be effectively consulted at all relevant stages of the legislating process'</i><sup>80</sup></p>
<b>Fundamental freedoms of lawyers</b>	<p>'Lawyers [...] are entitled to freedom of expression, belief, association, and assembly.'<sup>81</sup></p> <p><i>'Member States recognize that freedom of expression and association of lawyers constitute essential requirements for the proper and independent functioning of the legal profession and must be established and guaranteed by law and in practice.'</i><sup>82</sup> <i>'Lawyers' voices have particular important weight concerning matters related to the administration of justice.'</i><sup>83</sup> <i>'Member States refrain from preventing lawyers from taking part in conferences, training sessions or similar events related to human rights and the legal system, conducted both within and outside the country; Member States should support such initiatives.'</i><sup>84</sup></p>
<b>Professional organisations of lawyers</b>	<p>'Lawyers shall be entitled to form and join an independent, self-governing and self-regulated professional association of lawyers, the executive body of which shall be elected by its members and shall exercise its functions without external interference.'<sup>85</sup></p>
<b>Protection measures for lawyers</b>	<p>'Governments shall ensure that lawyers (a) are able to perform their professional functions without intimidation, hindrance, harassment or improper interference, (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with [...] sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'<sup>86</sup> 'Where the security of lawyers is threatened as a result of discharging their function, [lawyers] shall be adequately safeguarded by the authorities.'<sup>87</sup> 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.'<sup>88</sup> 'Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in in their professional appearances before a court, tribunal or other legal or administrative authority.'<sup>89</sup></p>
<b>Access to information by lawyers</b>	<p>'It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.'<sup>90</sup></p> <p><i>'[L]egislation should be adopted and implemented to guarantee full access to appropriate information, files and documents in the possession or control of the authorities; such access should already be accorded at the investigative stage in order to allow for the preparation of an adequate defence; appropriate information should include all materials that are exculpatory or that the prosecution plans to offer in court against the accused.'</i><sup>91</sup></p>

79 Basic Principles on the Role of Lawyers, Principle 26.

80 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 106(a).

81 Basic Principles on the Role of Lawyers, Principle 23.

82 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 111(a).

83 *Ibid*, para 111(b).

84 *Ibid*, para 111(c).

85 Basic Principles on the Role of Lawyers, Principles 24 and 25.

86 *Ibid*, Principle 16.

87 *Ibid*, Principle 17.

88 *Ibid*, Principle 18.

89 *Ibid*, Principle 20.

90 *Ibid*, Principle 21.

91 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 109.

<b>Confidentiality</b>	<p>'Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'<sup>92</sup></p> <p><i>'In cases where the client is detained additional measures need to be adopted in order to guarantee a direct and confidential communication of the client with legal counsel.'</i><sup>93</sup></p> <p><i>Lawyers' files and documents should be protected from seizure or inspection by law and in practice and their electronic communications should not be intercepted.'</i><sup>94</sup></p>
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Finally recommendations concerning fair trial guarantees were also compiled, given the clear interlinkage with the independence of the judiciary. These guarantees were broken down into the following component rights:

- the right to an effective remedy;
- the right to legal advice and representation;
- the right to a public hearing;
- the right to legal aid;
- the right to adequate time and facilities for the preparation of a defence;
- the right to be heard;
- the principle *ne bis in idem*;
- the non-retroactivity of measures;
- the presumption of innocence; and
- the right to silence.

### *Geographical scope*

Chapter Three provides an overview of the UPR recommendations relating to the administration of justice made by 149 states to 193 states. Chapter Four focuses on ten jurisdictions, where the IBAHRI has undertaken a fact-finding mission out of which reports containing findings and recommendations have been published and/or capacity-building programmes implemented. The sample of countries reflects as much as possible a geographical balance: Africa (5), Asia (1), Eastern European Group (EEG) (2) and the Latin American and Caribbean Group (GRULAC) (2).

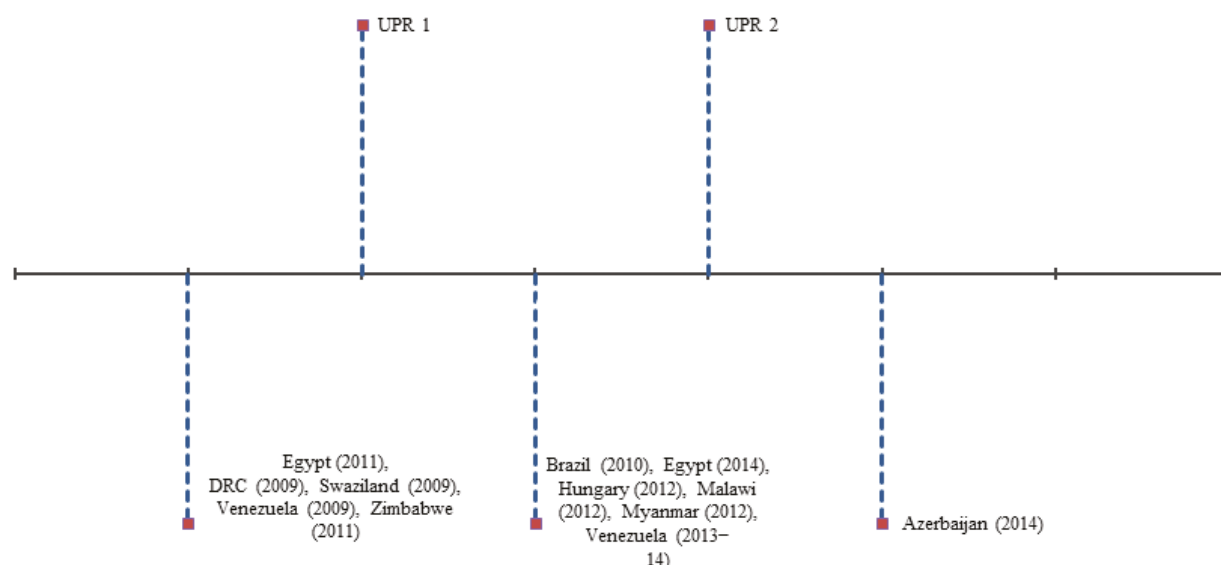
Figure 1 provides a timeline showing for each country under study the occurrence of the IBAHRI fact-finding mission with respect to its first (UPR 1) and second (UPR 2) review at the HRC. Each country is reviewed every four-and-a-half years.

92 Basic Principles on the Role of Lawyers, Principle 22.

93 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/64/181, para 110(a).

94 *Ibid.*, para 110(b).

**Figure 1: Timeline – IBAHRI fact-finding missions/UPR**



(x) = year the IBAHRI fact-finding mission was undertaken

For example, Egypt (2011): the IBAHRI conducted a first fact-finding mission in 2011 before the first review of the country by the HRC. Egypt (2014): the IBAHRI conducted a second fact-finding mission in 2014 between the first and second review of the country at the HRC.

### *Limitations*

Countries under scrutiny in the report were selected on the basis of the country work undertaken by the IBAHRI in recent years. In the absence of a fact-finding mission recently conducted in the Western European and Others Group (WEOG), no case study could be presented from this region.

Furthermore, each country case is presented on the basis of the interviews the IBAHRI was able to conduct in a limited amount of time. The amount of information that was accessible to the IBAHRI varied from one country to another.

The study covers the first 19 sessions of the Human Rights Council. It covers the First UPR Cycle (2008–2012) and part of the Second Cycle (2012–2016). This indicates that, over the period considered (2008–2014), some of the countries have been reviewed twice, while some have only been reviewed once. This must be taken into account, while interpreting the statistics by region.

## **1.5 Structure of the report**

The report addresses the potential of the UPR in advancing the international legal framework of human rights in the administration of justice (Chapter Two) and supporting states' efforts in implementing in practice human rights in the administration of justice (Chapters Three and Four).

Chapter Two provides background information to the thematic and the extent to which it has evolved at the international level. It assesses in particular the role the Special Rapporteur on the independence of judges and lawyers has played in consolidating the unity of the human rights framework governing the administration of justice in a complex normative and institutional framework. Against this backdrop it assesses the potential of the UPR in raising the profile of the UN Basic Principles and Guidelines, and fostering the dialogue on human rights between the legal community and states.

Chapter Three provides an overview of the UPR recommendations in relation to the administration of justice. It provides disaggregated statistics as to the number, specificity, focus and – to a limited extent – implementation of these recommendations.

Chapter Four scrutinises the UPR process in ten countries and assesses both the involvement of lawyers in the process and the relevance of the UPR recommendations in the administration of justice in light of the recommendations made by expert organisations, including the IBAHRI.

## **Chapter Two**

# **The 'Administration of Justice' in the International Human Rights System**

One does not have to go far back in history to observe the rapid pace at which the international arena has been changing. Unprecedented levels of economic cooperation and the creation of ever-closer constitutional entities to bolster political coordination and cooperation between nations are emblematic of the developments the international community has witnessed since the 1950s. International human rights law is no exception to these processes. Quite the contrary, owing to the moral and human devastation of the foregone century, human rights have been one of the foremost *raison d'être* for concerted efforts of states to create a system of international norms that would prevent such atrocities from reoccurring in the future and grant every individual the dignity intrinsic to human existence.

To achieve that goal, the advancement of merely substantive human rights is insufficient. Freedom of expression, freedom of association, freedom of religion, the prohibition of torture and other substantive rights are bound to remain a dead letter if they cannot be adequately enforced and protected. Proper administration of justice – independence of judges, lawyers and prosecutors, and fair trial rights – is tantamount to substantive human rights and is the main way to claim and enforce all other rights.

At the time the UPR started off with its first session in April 2008, the international normative framework governing the administration of justice was already particularly complex. Among a growing number of human rights mechanisms, such as treaty bodies and special procedures, the Special Rapporteur on the independence of judges and lawyers, has, since 1994, played a key role in ensuring the unity of the system and interpreting the large amount of international standards governing the sector. It is in this context that this chapter aims, first, to outline the existing international human rights mechanisms interpreting the international legal framework of the administration of justice and, secondly, to discuss ways the UPR can strengthen the international human rights system in this specific area.

## 2.1 The unity of the system, the diversity of mechanisms

The international human rights system has been changing and evolving constantly, be it through the adoption of new human rights instruments, binding or non-binding, or through the creation of new mechanisms charged with interpreting and monitoring the international human rights framework.

To this day, ten treaty bodies<sup>95</sup> and three main regional mechanisms<sup>96</sup> have been put into place to review the States Parties' obligations in light of the specific human rights treaty they monitor. All general

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95 There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties: the Human Rights Committee (CCPR); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT); the Subcommittee on Prevention of Torture (SPT); the Committee on the Rights of the Child (CRC); the Committee on Migrant Workers (CMW); the Committee on the Rights of Persons with Disabilities (CRPD); and the Committee on Enforced Disappearances (CED).

96 In Africa, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights monitor compliance with the African Charter on Human and Peoples' Rights. In the Americas, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights monitor compliance with the American Convention on Human Rights. In Europe, the European Court of Human Rights monitors compliance with the European Convention on Human Rights.



universal and regional human rights instruments guarantee the right to a fair hearing in judicial proceedings before an independent and impartial court or tribunal.<sup>97</sup>

In addition, when significant human rights concerns arise in a specific country or in relation to a specific issue, the HRC (formerly the Commission on Human Rights) has the power to create a ‘Special Procedure’, with the aim of monitoring the implementation of human rights in relation to this specific issue.<sup>98</sup> It was under this jurisdiction of the then Commission on Human Rights that the Special Rapporteur on the independence of judges and lawyers (the ‘Special Rapporteur’) was established in 1994 and the first expert appointed. The Commission was greatly concerned at the frequency of attacks on judges, lawyers and court officials, as well as the link, then just evidenced, between these attacks, on one hand, and the gravity and frequency of human rights violations in the country, on the other.<sup>99</sup> The mandate of the Special Rapporteur then complemented the Working Group on Arbitrary Detention, which had been established in 1991. With the rise of regional and international justice mechanisms and new challenges facing human rights, two thematic mandates were created in 2005<sup>100</sup> and 2011, addressing counterterrorism and transitional justice respectively. These mandates increased the number of mechanisms contributing to the monitoring of human rights in the administration of justice. At the same time, the responsibility to ensure the unity of the international framework on the administration of justice rests primarily with the Special Rapporteur.

The mandate given to the Special Rapporteur is threefold. She/he is competent to receive individual complaints and ‘inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon’.<sup>101</sup> Through country visits, she/he ‘identif[ies] and record[s] not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make[s] concrete recommendations including the provision of advisory services or technical assistance when they are requested by the state concerned’.<sup>102</sup> Finally, by the means of annual thematic reports, she/he ‘stud[ies], for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers’.<sup>103</sup>

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97 ICJ, *International principles on the independence and accountability of judges, lawyers and prosecutors. A practitioners guide* (International Commission of Jurists, 2nd edn edition, 2007), 5. See, in particular, ICCPR, Art 14; CMW, Art 18(1); American Convention on Human Rights, Art 8(1); African Charter on Human and Peoples’ Rights, Art 7(1); European Convention on Human Rights, Art 6; Arab Charter on Human Rights, Arts 7 and 16.

98 A special procedure can either be formed as a Working Group operating within the given mandate, or as an individual with a Special Rapporteur or an Independent Expert operating within their mandate. As at 27 March 2015, there are 41 thematic and 14 country mandates. For further information, see the website of the special procedures of the HRC: [www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx).

99 Evidence was presented in UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the independence of the judiciary and the protection of practising lawyers of the Special Rapporteur, Louis Joinet* (1993) UN Doc E/CN.4/Sub.2/1993/25 and Add.1.

100 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2005) UN Doc E/CN.4/2005/60, para 65: ‘[...] The Commission should envisage a special procedure for supervising the compatibility of ongoing or planned counter-terrorism or security measures with the current rules of international law.’

101 UNCHR, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers* Res 41/1994 (4 March 1994) UN Doc E/CN.4/1994/132.

102 *Ibid.*

103 *Ibid.*

The scope of the Special Rapporteur's mandate is spread across the spectrum as it covers both the protection of the actors of the justice system, especially judges, lawyers and prosecutors, as well as the institutional context in which justice is administered. This puts the Special Rapporteur in a position in which she/he is able to monitor the separation of powers and the rule of law as key prerequisites for the proper administration of justice. As a result of this broad mandate, the Special Rapporteur has operated since 1994 in a complex and evolving normative framework. In addition to the Universal Declaration on Human Rights (UDHR) and the nine core human rights treaties, the international legal framework of the administration of justice currently encompasses several sets of standards. As an illustration, the Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) are just a few of the international instruments relevant in the field.<sup>104</sup> These instruments differ not only in substance, but also by their legal nature as they range from binding treaties to non-binding standards, guidelines and declarations.

In a complex international normative and institutional framework the Special Rapporteur has contributed to the unity of the international human rights system in the area of the administration of justice in two major ways. First, the Special Rapporteur has contributed to unify binding and non-binding instruments into one body of norms governing the administration of justice. Indeed, the Special Rapporteur has interpreted the binding provisions of the ICCPR and the non-binding standards of the UN Basic Principles and Guidelines jointly and on an equal footing in her/his thematic reports and country reports. So did other human rights mechanisms to some extent. In 2004, the Special Rapporteur therefore noted that 'the 1985 UN Basic Principles on the independence of the judiciary have become a common reference source for international human rights bodies and procedures'.<sup>105</sup> This means that *soft* law is not to be brushed aside as lesser, but should rather be regarded as complementary to the binding treaties with particular regard given to its normative value, as well as its role of informing

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104 The main international instruments relevant to the administration of justice are: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Basic Principles on the Role of Lawyers; the Basic Principles on the Independence of the Judiciary; the Guidelines on the Role of Prosecutors; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) Guidelines for Action on Children in the Criminal Justice System; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); the Basic Principles and Guidelines on the Right to a Remedy and Reparation; the Principles Governing the Administration of Justice Through Military Tribunals (2011); the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; the United Nations Convention against Corruption; and the Bangalore principles of judicial conduct.

105 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2004) UN Doc E/CN.4/2004/60, para 71.

the construction of binding international norms.<sup>106</sup> Secondly, the mandate has proved to be instrumental in bridging the gap between the institutional aspect of administration of justice – the judicial system, addressed by the Basic Principles and Guidelines – and individuals, whose right to sound and fair administration of justice by the judicial system is protected by, *inter alia*, Article 14 of the ICCPR. Indeed, during his time as the Special Rapporteur, Leandro Despouy called for states to establish transparent and participatory processes for the appointment of judges, as well as transparency in disciplinary measures and judicial practice.<sup>107</sup> He also highlighted the need for the courts and the legal profession to be made more representative of the population they serve.<sup>108</sup> Mr Despouy's successor, Gabriela Knaul, continued his efforts to improve individuals' access to justice and bring them closer to the inner workings of the judicial system. In order to draw states' attention on the need to ensure that the most vulnerable groups have access to justice, she confirmed a broad definition of the right to legal aid in both criminal and non-criminal cases.<sup>109</sup> She also highlighted the need for the judiciary to be trained on human rights law, especially with respect to the key human rights issues occurring in the country.<sup>110</sup> All these endeavours not only contribute to bringing justice closer to the people, but they are also a testament to the impact and importance of the composition, training and accessibility of the judiciary for the protection of the substantive human rights of individuals.

These developments in international law are undoubtedly laudable for strengthening human rights in the administration of justice. However, challenges remain and some could be significantly addressed through the new dynamic encouraged by the UPR. First, in an ever-evolving international framework governing the administration of justice, more awareness-raising is needed for the domestication of the UN Basic Principles and Guidelines to take place. Then the role attributable to the legal profession in the protection of human rights and the correlated need for the protection of those legal professionals has remained largely overlooked at the international level. Most notably, too little attention has been paid so far to the role of professional organisations of lawyers in enhancing the capacities and protection of their members tasked with upholding human rights and the rule of law.

The next section considers to what extent the UPR has the potential to address both shortcomings, namely states' awareness about, and actual use of, international standards and the involvement of legal professionals.

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106 Human Rights Committee, 'General Comment n 32, Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) UN Doc CCPR/C/GC/32.

107 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, paras 18, 33 and 63.

108 See, in particular, UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/62/207, paras 21 and 23.

109 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2013) UN Doc A/HRC/23/43, para 101. The Special Rapporteur identified, among existing legal aid schemes, good practices like a nationwide network of paralegal services with standardised training curricula or professional development, where there is a shortage of qualified lawyers.

110 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/HRC/14/26.

## 2.2 The Universal Periodic Review: from commitment to compliance?

Until the introduction of the UPR, the international human rights framework had been systematically centred on experts acting in their personal capacity as Special Rapporteurs, independent experts or members of working groups.<sup>111</sup> Such a system has been described as lacking ‘a division of labour between expert and political and expert bodies’.<sup>112</sup> Arguably, the introduction of the UPR in the international human rights framework amounted to the introduction of a ‘missing political component’ into the UN human rights system. This view had been shared by the then Secretary-General Kofi Annan, who opined that the peer review process would remake and restructure all that was imprecise and incomplete in UN scrutiny and coverage of human rights performance by countries.<sup>113</sup> The UPR would then correspond to ‘a grand vision for pulling together all the findings of the numerous UN treaty bodies, special procedures and other mechanisms created in the past 10 to 30 years or so to implement, with a country-specific focus, the human rights norms the United Nations has drafted and adopted’.<sup>114</sup>

As presented in the introduction, the UPR recommendations are tantamount to commitments taken by the executive and are not legally binding. However, the complementary value of the UPR process to the other UN human rights mechanism primarily lies in its three major contributions: the vast dataset the UPR gathers; its transparent and participatory process; and its universality. Building on these key features, the following sections discuss the potential of the UPR to raise the profile of the UN Basic Principles and Guidelines, as well as re-establish and foster a dialogue between the legal community and states in the pursuance of an independent administration of justice upholding the rule of law and human rights.

### *The value of repetition in international law*

The UPR’s key and foremost feature lies in the fact that it places states as the primary actors in the process of the human rights monitoring of their peers. It is also an autonomous mechanism through which states, by referring to international norms and recommendations, thoroughly familiarise themselves with their provisions. This puts them in a position where they are able to facilitate the implementation of the said norms both domestically and internationally.

During the UPR process, states are entitled to refer to a wide range of human rights instruments not only to legally binding treaties, but also to non-binding standards, including the UN Basic Principles and Guidelines. Pursuant to Resolution 5.1, which established the UPR process, states may review other states’ human rights record ‘on the basis of (a) the Charter of the United Nations; (b) the Universal Declaration of Human Rights; (c) human rights instruments to which a state is party; (d) voluntary pledges and commitments made by states, including those undertaken when presenting

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111 Manfred Nowak, ‘The Need for a World Court of Human Rights’ (2007) 7(1) *Human Rights Law Review*, 252.

112 *Ibid.*

113 Felice Gaer, ‘A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System’ (2007) 7(1) *Human Rights Law Review*, 109–139, 113. See Kofi Annan (2004) Addendum to ‘In larger freedom, Human Rights Council: Explanatory note by the Secretary-General’, 23 May 2005, UN Doc A/59/2005/Add.1.

114 Felice Gaer, ‘A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System’ (2007) 7(1) *Human Rights Law Review*, 109–139, 113.

their candidatures for election to the Human Rights Council; and (e) applicable international humanitarian law'.<sup>115</sup>

In practice, states only rarely explicitly point to the legal grounds of their recommendations. When states have rooted their recommendation into a specific instrument, however, they have referred not only to binding treaties, but also to a number of soft law instruments, such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials or the Bangkok Rules on women in detention.<sup>116</sup> In some cases, they have mentioned and based their comments on reports of other specialised agencies within the UN system, such as the ILO or UNICEF. They have also commented on the progress of the state under review in achieving MDGs, as well as their practice vis-à-vis the International Committee of the Red Cross.

The IBAHRI estimates that slightly more than ten states have referred at the UPR to the UN Basic Principles and Guidelines. More frequently, states refer to 'international law' or 'international standards' more generally and call for the state under review to act 'in compliance with international standards'. Such general recommendations are at risk of limiting the ability of the UPR process to fulfil its potential of consolidating and reinforcing international norms, including those pertaining to the administration of justice. It is through a continuous and repetitive referencing to a particular norm that the UPR can create a ripple effect in two ways. First, the UPR gives specific norms and standards a political echo. The more states refer to various human rights instruments in making recommendations, the greater the possibility that the substance of these standards will be applied and implemented in countries' justice systems. Similarly, the UPR has a strong potential to consolidate the recommendations and good practices identified by the states and the UN special procedures.<sup>117</sup> Secondly, the ripple effect of the UPR might also have a limited effect on the development and consolidation of international customary norms. Customary international law is a source of international law emerging from consensus among states exhibited both by widespread conduct (states' practice) and a discernible sense of obligation (states' *opinio juris*).<sup>118</sup> If a significant number of states refer to the same international norm continuously over a longer period of time in their recommendations, if those recommendations have close to a perfect acceptance rate, if they are indeed implemented by the state under review and if the next cycles of the UPR do not change the dynamics established, 'the national reports on the situation of human rights in the country would be excellent and unprecedented primary sources to gauge the state's *opinio juris* on human rights'.<sup>119</sup> Such a process could further consolidate the complex interplay of various international instruments in the field of administration of justice.

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115 UNHRC, *Institution-building of the United Nations Human Rights Council* (18 June 2007 HRC) UN Doc A/HRC/RES/5/1, para 1.

116 The Bangkok Rules, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary.

117 UNHRC, *Institution-building of the United Nations Human Rights Council* (18 June 2007 HRC) UN Doc A/HRC/RES/5/1, para (4d).

118 For a definition of customary international law as a source of international law see, in particular, the Statute of the International Court of Justice, and ICJ, Continental Shelf case (*Libyan Arab Jamahiriya v Malta*), judgment, 3 June 1985, ICJ Reports 1985, 29–30, para 27.

119 Elvira Domínguez Redondo, 'The Universal Periodic Review – Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review*, 34.

It is for the foregoing reasons that the IBAHRI strongly encourages a more widespread use of recommendations that more explicitly refer to existing human rights instruments, particularly the UN Basic Principles and Guidelines. The IBAHRI also encourages recommending states to push for an evolving interpretation of the texts and refer to the recommendations of the Special Rapporteur. For example, a few recommendations called for the justice system to be participatory or representative of the people they serve. These features were recently developed by the Special Rapporteur, as mentioned above.

### *Fostering the dialogue between states and the legal community on human rights*

Another unique feature of the UPR lies in its multi-stakeholders and participatory approach. Among the stakeholders to be involved in the process, the UPR Guidelines for submissions includes ‘inter alia, NGOs, national human rights institutions, human rights defenders, academic institutions and research institutes, regional organizations, as well as civil society representatives’.<sup>120</sup> This inclusive approach is a key asset of the mechanism, as involving the right stakeholders in the process is likely to create greater impact, compliance and monitoring. The UPR Guidelines do not explicitly mention legal professionals, for example, judges, prosecutors or lawyers, among the actors to involve in the UPR process. However, the growing involvement of parliamentarians<sup>121</sup> and national human rights institutions in the UPR reveals the evolving nature of the mechanism, in which more and more actors are getting involved.<sup>122</sup>

On several occasions during his mandate, Special Rapporteur Leandro Despouy recommended that the HRC ‘draw on the contributions and experience of *national and international jurists’ organizations established to defend judicial independence*’ (emphasis added).<sup>123</sup> That recommendation should resonate even more at the level of the UPR, where it is estimated that 60 per cent of the UPR recommendations imply legislative changes,<sup>124</sup> and where recommendations related to justice are poorly implemented.<sup>125</sup> Legal professionals’ first-hand knowledge of the legal system<sup>126</sup> and specific

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120 Universal Periodic Review: information and guidelines for relevant stakeholders’ written submissions. UNHRC, *Institution-building of the United Nations Human Rights Council* (18 June 2007) UN Doc A/HRC/RES/5/1, para 3(m).

121 Despite the huge concerns it raised at the beginning, the participation of parliamentarians has received states’ support through 2014 HRC Resolution 26/L.21. HRC 26/L.21 (23 June 2014) UN Doc A/HRC/26/L.21, para 1. The HRC ‘[e]ncourages States, in accordance with their national legislation, to promote the involvement of parliaments in all stages of the universal periodic review reporting process, in particular through the inclusion of the national parliament as a relevant stakeholder in the consultation process of the national report and in the implementation of recommendations, and to report on such involvement in their national report and voluntary mid-term reports or during the interactive dialogue session of the universal periodic review’.

122 Felix Kirchmeier, ‘The Role of Parliaments in the UPR’ (Friedrich Ebert Stiftung, 2009). Available at [www.upr-info.org/sites/default/files/general-Doc.ument/pdf/report\\_role\\_of\\_parliaments\\_16-9-09.pdf](http://www.upr-info.org/sites/default/files/general-Doc.ument/pdf/report_role_of_parliaments_16-9-09.pdf).

123 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/HRC/4/25.

124 Inter-Parliamentary Union, ‘Réunion-débat tenue en 2013 par le Conseil des droits de l’homme concernant les parlements et L’Examen périodique universel: Au terme de deux années, quel bilan peut-on dresser de la participation parlementaire à ce processus?’ Side event organised by the Inter-Parliamentary Union, 29th session of the Human Rights Council (22 June 2015).

125 UPR Info, *Beyond promises: The impact of the UPR on the ground* (UPR Info 2014), 26 and 31. Available at [www.upr-info.org/sites/default/files/general-Doc.ument/pdf/2014\\_beyond\\_promises.pdf](http://www.upr-info.org/sites/default/files/general-Doc.ument/pdf/2014_beyond_promises.pdf).

126 Phillip Tahmindjis, ‘The role of bar associations in promoting the substance as well as the enforceability of the UN Basic Principles on the role of lawyers’ in *Building on basic principles, 25 Years, Lawyers for Lawyers* (Stichting NJCM-Boekerij 52, 15 April 2011), 35.

responsibility to uphold national and international human rights standards<sup>127</sup> would justify their involvement in a more systematic manner. This raises the issue of the involvement of the legal community in order to give teeth to the UPR process, especially in the drafting, implementation and monitoring of these recommendations. This requires distinguishing between, on the one hand, the judiciary, as a branch of the state and, on the other hand, the legal profession, with a particular focus on bar associations.

Looking at the role of the judiciary at the UPR requires preliminary considerations on the nature of the UPR. As mentioned in Chapter One, the UPR is an intergovernmental process and the recommendations accepted by states on this occasion are tantamount to political commitments, that is, a commitment taken by the executive at its initiative and as to its own action. However, when a state submits its national report to the HRC, the report is submitted on behalf of the three branches – executive, legislative and judicial – of the state, like before any human rights mechanisms.<sup>128</sup> The presence of members of the judiciary in the delegation presenting the national report is left at the discretion of each state under review. In practice, some delegations did encompass representatives from the judiciary.

A number of lawyers interviewed by the IBAHRI shared the expectation that the UPR provides an opportunity to shed light on the role of the judiciary as to its work in enhancing human rights. As developed by the Special Rapporteur, this work can be reflected by a list of procedures and judicial acts.<sup>129</sup> In that respect, the IBAHRI encourages that the landmark cases of the highest judicial instances concerning human rights be reported in the national report submitted by the states under review to the HRC. For instance in Brazil, some assistants of the Supreme Court took part in the public consultation organised in preparation for the UPR and provided information about two landmark cases of the Supreme Court on the protection of indigenous peoples' land rights and same-sex marriage. The two cases were then included in the national report and referred to during the presentation of the report at the HRC.<sup>130</sup>

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127 HRC, 'The Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (2 July 2015) UN Doc A/HRC/RES/29/06, preamble. UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/HRC/14/26, para 22.

128 This interpretation would align with the General Comment n 31 of the Human Rights Committee, which provides that the obligations of the ICCPR are 'binding on every State Party as a whole' and specified that '[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party'. Human Rights Committee, 'General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 4.

129 See UNCHR, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy' (2004) UN Doc E/CN.4/2004/60, para 31. The Special Rapporteur lists: '(a) The various judicial procedures for the protection of individual or collective rights; (b) Criminal judicial procedure, which guarantees the proper administration of justice in conformity with international standards for a fair and equitable trial and also the rights of those brought to trial, victims and eligible claimants; (c) Prosecution, judgment and punishment of those responsible for human rights violations; (d) Monitoring of the conformity with international human rights law of domestic standards and executive acts, generally by means of procedures for the revision or monitoring (direct or indirect, through action or as exceptions) of the constitutionality and legality of such standards and acts; (e) Elaboration of a body of case law that incorporates international standards for the administration of justice and human rights and clarifies the scope and content of human rights and fundamental freedoms and the obligations of the authorities.'

130 UNHRC, 'National report submitted in accordance with para 5 of the annex to HRC Resolution 16/21-Brazil' (7 March 2012) UN Doc A/HRC/WG.6/13/BRA/1, para 37.

The IBAHRI also suggests that the judiciary be informed about the UPR outcomes, and be meaningfully consulted concerning the implementation of UPR recommendations, especially those addressing law reforms and the administration of justice. In that respect, the OIF Guide on the UPR recommends that ‘judges, magistrates and prosecutors are to be informed of the UPR process and involved in the relevant recommendations’.<sup>131</sup>

As highlighted in the interviews conducted by the IBAHRI, another reason to involve judges in the UPR process was that judges often need a greater understanding of the international legal basis upon which, and the context in which, international legal standards are adopted, as well as the international human rights commitments of the country. As described by the Special Rapporteur, ‘judges, when considering and deciding a case, first and foremost tend to turn to domestic legislation’.<sup>132</sup> Furthermore, in many countries, judges are not sufficiently equipped to address issues where human rights are challenged, since, for example in many cases, human rights have not been taught at university until relatively recently. In the words of the professionals interviewed, judges need to see ‘the practical use of human rights’. Similarly, judges must ‘be aware of, and apply, international human rights principles and standards in the cases before them’.

Turning to lawyers, it is similarly their duty to uphold human rights and the rule of law that justifies their involvement in the UPR process. Principle 14 of the Basic Principles on the Role of Lawyers explicitly states that ‘(l)awyers in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law’. Then Principle 25 states that ‘professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services’, which might include making suggestions for law reform.<sup>133</sup> In practice, the Special Rapporteur noted that ‘lawyers... primarily rely on the national legal framework, when advising and representing their clients’.<sup>134</sup> In addition, lawyers’ engagement in human rights monitoring varies greatly from one country to another. For lawyers who become involved with an NGO protecting human rights, whether they retain their private practice in part or not, human rights monitoring is their main focus. Conversely, for most private lawyers, if they engage in advocacy activities, their main focus is the enhancement of the rule of law and the independence of the legal profession. However, as noted by Carlos Ayala, Former President of the Inter-American Commission on Human Rights, during this assessment, ‘lawyers paradoxically have engaged poorly with human rights monitoring. Only in places where the rule of law has been seriously damaged, like in Venezuela, have lawyers become aware of the necessity to engage and take action’. Thus there are well-known examples from history, such as in Argentina and Brazil during the dictatorships, or South Africa under apartheid,<sup>135</sup> where the national bar association played a prominent role in standing up for human rights. More recently, the Bar Association of Sri Lanka has been highly instrumental in taking a similarly robust stance against the excesses of the former government, particularly regarding the impeachment of the Chief Justice.

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131 OIF, *Examen Periodique Universel* (2013, OIF), 61.

132 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/HRC/14/26, para 21.

133 Tahmindjis, see n 126 above, 31.

134 *Ibid.*

135 Jeremy Gauntlett, *The role of Bar Associations in fostering the rule of law* (Consultus, September 1999), 32–36.



Associations of legal professionals should indeed constitute a strategic driver for the mobilisation of their members in the promotion of the role of law and human rights.<sup>136</sup> The ‘importance of bar associations, professional associations of judges and prosecutors, and non-governmental organizations working in defence of the principle of the independence of judges and lawyers’ was recently reassessed by the Human Rights Council in its Resolution 29/6.<sup>137</sup>

In the case of lawyers, the Basic Principles on the Role of Lawyers clearly recognise that ‘professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest.’<sup>138</sup> The primary mission professional organisations are usually entrusted with is that of promoting and protecting the role of their members in enhancing the rule of law.<sup>139</sup> As such they have a special role in pressing for the independence of the courts, as well as the independence of lawyers. Statutorily, the IBA/OSISA book *Benchmarking Bar Associations* notes ‘a common theme running through the visions and objectives of Bars throughout the world that is to promote democratic principles such as the rule of law and human rights and uphold justice and the integrity of the legal profession’.<sup>140</sup> In theory, bars<sup>141</sup> are strategically placed to ‘take the lead in transforming society, through, for example, advocacy, participation in law reform and public interest litigation’.<sup>142</sup> Unfortunately, in many parts of the world, the practice is less promising than the statutes of the respective institution aspired to. In that sense, the OSISA/IBA book *Benchmarking Bar Associations*, which focuses on the southern African region, notes that bars ‘often suffer from a lack of resources and experience, as well as a lack of will’.<sup>143</sup>

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136 On the role of bar associations, and principles governing them, see IBA, ‘Standards for the Independence of the Legal Profession’ (1990). See also Phillip Tahmindjis, ‘The relationship between bar associations and the states and its institutions’. Presentation at the Conference ‘The Independence of the Legal Profession and Bar Associations: International Perspectives’ (26 July 2015, Tehran).

137 UNHRC, ‘Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers’ (2 July 2015), UN Doc A/HRC/RES/29/6, preamble.

138 For more on this, see Tahmindjis, n 126 above, 29.

139 See in particular IBA, Standards for the Independence of the Legal Profession (1990), para 18 states among the functions of the lawyers’ association ‘a) to promote and uphold the cause of justice, without fear or favour; b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession [...]; d) to protect and defend the dignity and independence of the judiciary [...]’.

140 OSISA/IBA, *Benchmarking Bar Associations* (OSISA/IBA 2009), 7. Thus national bar associations must ‘uphold the cause of justice without regard to its own interests or that of its members’, ‘regulate the legal profession and provide for effective control of the professional conduct of practitioners’, ‘initiate and promote reforms and improvements in any branch of the law’, ‘assist government and the courts in all matters affecting legislation and the administration and practice of law’ or ‘provide and promote legal aid’.

141 A ‘bar’ is here defined as ‘an officially recognised professional organisation consisting of members of the legal profession that is dedicated to serving its members in a representative capacity to maintain the practice of law as profession, and, in many countries possessing regulatory authority over the bar in its jurisdiction. Membership in the bar may be compulsory or voluntary’. IBA, International Principles on Conduct for the Legal Profession (IBA 2011), 33.

142 OSISA/IBA, *Benchmarking Bar Associations* (OSISA/IBA 2009), 175.

143 *Ibid.*

At the international level, while the protection of lawyers has been brought to the attention of treaty bodies with increasing frequency, specific recommendations concerning organisations of lawyers have seemingly remained limited.<sup>144</sup>

The IBAHRI calls for more regard to be had for the independence and general conditions in which professional organisations of legal professionals are operating worldwide. Professional organisations of lawyers should play a strategic role in strengthening lawyers' capacities in engaging in human rights. A collaboration between national human rights institutions (NHRIs) and professional organisations of lawyers – bar associations or law societies – could constitute an avenue to foster the involvement of the professional organisations in human rights monitoring processes. This collaboration could draw inspiration from the 2012 Belgrade Principles on the relationship between NHRIs and Parliaments purporting to set up cooperation between Parliaments and NHRIs in their work with international human rights mechanisms, such as the UPR.

### *Peer-to-peer dialogue: a powerful driver for international exchange on good practices*

The UPR brings into play a dynamic of experience-sharing and inter-state cooperation triggered by mutual recommendations. This can take different forms. In the context of the ten-country study undertaken in Chapter Four, bilateral cooperation revolving to the UPR could be evidenced in Brazil and Myanmar. In addition, the benefits of regional meetings to share knowledge, such as those the Commonwealth Secretariat organised, were brought to the attention of the IBAHRI, during this assessment work.

By bringing a number of actors together, the UPR has the potential to serve as a catalyser and foster parallel peer-to-peer dialogues. This can primarily be observed in relation to civil society organisations, where growing synergy between local and international organisations has been witnessed at the UPR.<sup>145</sup>

This is also true for parliamentarians, whose role in the UPR has been progressively given full recognition. In order to raise awareness among parliamentarians about their potential role in the UPR, the Inter-Parliamentary Union (IPU) organised a series of regional meetings from 2012 to 2015. These meetings were also taken as an opportunity to address the regional challenges facing parliamentarians.

Similar initiatives could be replicated within the legal community – involving lawyers' associations from a number of countries discussing not only their participation in the UPR process, but also specific recommendations addressed to them. This implies, however, that the legal profession decides actively to participate in the process. In that respect, national, regional and international professional associations can be strategic in fostering a dialogue within the legal community. The IBA, like other regional and international associations, provides a forum for legal practitioners and bar associations to share expertise and best practices and foster cooperation. Thus a peer-to-peer dialogue already exists that helps to develop best practices for the legal profession to advance the rule of law and human rights.

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144 See, for instance, the limited number of recommendations obtained through a keyword search in the Universal Human Rights Index for the word 'bar' (40) and 'lawyers' association' (16) amongst the recommendations of all the treaty bodies. A comprehensive overview would however require further research.

145 Lawrence C Moss, 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) 2 *Journal of Human Rights Practice*, 122.

## 2.3 Conclusions of Chapter Two

Chapter Two outlined the current international system of protection of human rights in the administration of justice in order to assess the role the UPR could play in raising the profile of human rights in this area. For the reasons summarised below, the IBAHRI concludes that the UPR has the potential to foster an effective, ongoing interchange by strengthening the cooperation and dialogue between governments and the legal community. On the one hand, states are in the driving seat in relation to enhancing the implementation of international standards in the administration of justice. On the other hand, the legal community can play a strategic role in the implementation of these recommendations, especially those concerning law reforms and the administration of justice.

### *From international human rights recommendations to political commitments*

In an increasingly complex international system, the role of the Special Rapporteur on the independence of judges and lawyers is key to consolidating the interpretation of the large number of standards governing the administration of justice and building the unity of the system. First, the Special Rapporteur and the treaty bodies, by referring jointly to the UN Basic Principles and Guidelines, and Article 14 of the ICCPR, unified these instruments into one body of norms the states must observe in the administration of justice. The Special Rapporteur also consolidates the jurisprudence and recommendations of treaty bodies, as well as other special procedures, such as the recently established Special Rapporteurs on counterterrorism and transitional justice. At the same time, the Special Rapporteur monitors progress and guides states in the implementation of international standards, by identifying good and bad practices.

The UPR is often presented as the political counterpart of the legal expert bodies of the UN system, in charge of facilitating the recommendations of other mechanisms. It is this unique forum where states, rather than expert bodies, review the human rights situation of their peers. In order to make recommendations to foster human rights on the ground, states are expected to use and refer to international norms and good practices identified by special procedures. Following ‘a-learning-by-doing’ approach, the UPR has the potential to foster the appropriation by states of international standards, like those governing human rights in the administration of justice. It may also create a ripple effect, which might help facilitate the creation of customary rules, through the repetition of similar recommendations by a number of states over time. The IBAHRI observes that the UPR constitutes an avenue to enhance standards and create new ones. It also has the potential to consolidate a consensus over missing elements in the current international human rights framework. This could be the case in the recognition of the role of national bar associations in maintaining the rule of law and protecting the necessary independence of lawyers and promoting law reform not only in making submissions to government but also in contributing to the education of civil society.

### *From political commitments to legal implementation*

Since the UPR is an intergovernmental process, the UPR recommendations are tantamount to political commitments, directed as such at the executive.

At the same time, the participation of the relevant stakeholders in the implementation of the recommendations is key to ensure compliance and monitoring. Strengthening the institutional human rights framework of a country is a key requisite for enhancing human rights on the ground. The legal community can also play a key role, first and foremost, in the implementation of the recommendations touching aspects of the justice system, the fight against impunity and access to justice. The legal community should also inform law reform and ensure that the legal framework aligns with the constitution and the international legal obligations of the country. An independent and well-trained legal profession is necessary to ensure that democratic changes are sustainable. In others words, if bringing human rights in the intergovernmental arena fosters political will, the involvement of legal experts and practitioners fosters compliance on the ground.

In light of the above, the IBAHRI recommends that:

- states under review to involve the judiciary and professional organisations of lawyers in the implementation and monitoring of international human rights recommendations, including the UPR recommendations, especially relating to the administration of justice and legal reforms. The IBAHRI also recommends states under review to refer to the landmark cases of the highest judicial instances concerning human rights held in their country, while reporting to the UPR;
- states pay specific attention to the information coming from lawyers' associations on the status of human rights in the administration of justice, when assessing a state's human rights situation. The IBAHRI also recommends these states to foster the establishment of a national independent, self-governed and self-regulatory bar association to be the primary institution charged with protecting the legal profession and fostering lawyers' engagement in the protection of the rule of law and human rights; and that
- lawyers and lawyers' associations to engage actively in monitoring the independence of judges, lawyers and prosecutors with the HRC, and take part in the UPR process. The IBAHRI also encourages further exchanges on human rights issues and related case law between national bar associations and members of the judiciary, especially between countries receiving similar recommendations at the UPR.

## **Chapter Three**

# **The 'Administration of Justice' in the UPR Recommendations: Quantitative and Qualitative Insights**

The UPR was originally established as an ‘action-orientated’ process,<sup>146</sup> which would generate concrete solutions to a specific problem and be dedicated to improving human rights on the ground.<sup>147</sup> To determine whether these standards have been upheld, Chapter Three provides an overview of the about 1,300 recommendations relating to the independence of judges, lawyers and prosecutors, which were made by 133 states over the first 19 sessions of the UPR. The total number of recommendations made during this period, from 2008 to 2014, was 38,298.

More specifically, the following paragraphs discuss:

- human rights issues in the administration of justice that were addressed in states’ recommendations, and those that were not;
- the progressiveness and action-orientation of recommendations relating to the administration of justice from a human rights-based approach; and
- the level of cooperation by the states in accepting and implementing recommendations relating to the administration of justice.

### 3.1 Methodology

Recommendations addressing specifically the independence of judges, lawyers and prosecutors, and guarantees of a fair trial were compiled using the UPR Info’s database. Using the ‘search-by-issue’ and the ‘keyword search’ functions, recommendations tagged with ‘justice’, ‘impunity’ and ‘human rights violations by states agents’, and those containing the keywords ‘judge’, ‘lawyer’, ‘legal counsel/profession/representation’, ‘judicial’, ‘judiciary’ and/or ‘bar association/council’ were identified. The dataset obtained was classified by issue using the list of issues related to the ‘administration of justice’ identified in Chapter One.

In order to have a more global overview of the recommendations relating to the criminal justice system, two additional issues were identified. First, ‘criminal law’ encompasses recommendations that called for a revision of criminal legislation regarding offences and criminal sanctions. Secondly, ‘fight against impunity’ includes recommendations calling a state to ‘prosecute and/or investigate’ egregious crimes or ‘cooperate with the International Criminal Court’.

Initially, a total of 6,233 of recommendations were obtained and categorised in the described manner, 770 of which were excluded from the dataset as they fell outside the scope of this report. Most of the excluded recommendations addressed the principle of legal certainty, the police, conditions of detention, human rights education programmes in general or transitional justice. Ultimately, 5,463 recommendations were retained and analysed. Some recommendations called for more than one action. As a result, each recommendation was disaggregated into ‘calls to action’ (CTA). The final dataset included 6,637 CTAs with 2,414 relating to the administration of justice, 2,561 to criminal law and 1,662 to the fight against impunity.

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146 UNHRC, *Institution-building of the United Nations Human Rights Council* (18 June 2007) UN Doc A/HRC/RES/5/1, para 3(d).

147 *Ibid*, paras 3 and 4(a).

## 3.2 Findings

### *The administration of justice: a question of priority?*

The UPR Info database ranks ‘justice’ as the fourth-most-common issue referred to by UPR recommendations, with 7.7 per cent of the total number of UPR recommendations. These recommendations are also among the recommendations that are the less implemented.<sup>148</sup> Considering the role legal professionals can play to invert this trend, the IBAHRI assesses here attention made to legal professionals in the UPR recommendations.

As mentioned in Chapter One, the role of legal professionals in the protection of human rights, and their need for specific protection, were identified as key priorities for the protection of human rights three decades ago. The administration of justice and the independence of legal professionals constitute the backbone of the human rights system as a whole. While the Special Rapporteur on the independence of judges and lawyers has evidenced for over 20 years the need for further compliance with the UN Basic Principles and Guidelines, the findings presented below reveal that more awareness-raising is necessary in relation to these standards.

#### LEGAL PROFESSIONALS AND HUMAN RIGHTS PROTECTION: THE MISSING LINK

Figures 2 and 3 present the global number of UPR recommendations addressing the administration of justice (Figure 2) and how the independence of lawyers, judges and prosecutors – including in the specific cases of the military and juvenile justice systems – and the guarantees of a fair trial rank compared to other topics raised at the UPR (Figure 3).

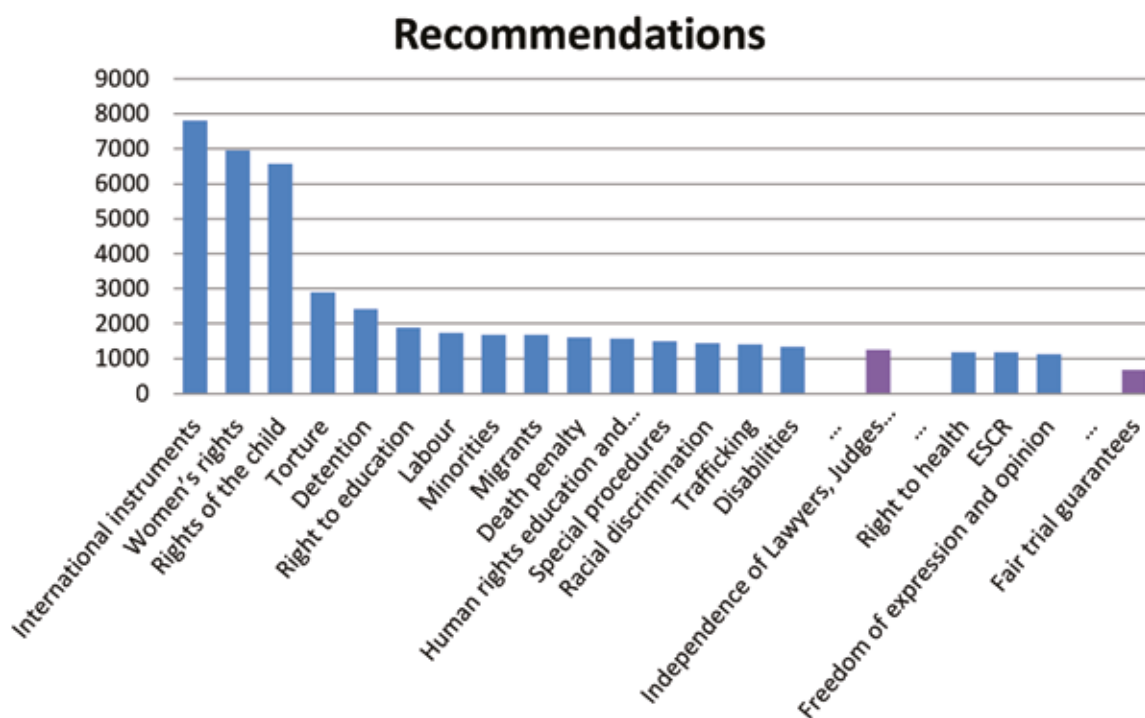
Under the classification described above, 273 recommendations were found addressing ‘justice’ in general terms, without referencing the independence or impartiality of the system as well. A total of 1,256 recommendations – that is, slightly more than three per cent of the total number of recommendations – addressed the independence of judges, including military and juvenile justice systems, and the independence of lawyers and prosecutors. Then 684 recommendations were identified relating to guarantees of fair trial, that is, slightly less than two per cent of all UPR recommendations.

**Figure 2: Global number of UPR recommendations relating to the administration of justice by topic (over the first 19 UPR sessions, 2008–2014)**

Topic	All regions	All regions (per cent)
Justice (general)	273	0.71
Independence of the judiciary	838	2.19
Juvenile justice	185	0.48
Military justice	44	0.11
Independence of prosecutors	117	0.31
Independence of the legal profession	72	0.19
Fair trial guarantees	684	1.79
Others	36,085	94.22

148 UPR Info, *Beyond promises: The impact of the UPR on the ground* (UPR Info 2014), 31.

**Figure 3: Number of UPR recommendations by topic (over the first 19 sessions of the UPR, 2008–2014)**



**Source: UPR Info statistics (blue)/IBAHRI classification of recommendations (purple)**

While the UPR could, in theory, cover the entire spectrum of human rights, states in practice focus on a few issues and have rarely been making more than five recommendations. The speaking time allotted to any given state for its statement during the interactive dialogue is also limited to less than two minutes. The overall picture of topics raised at the UPR is undoubtedly affected by these considerations. The identification of priority issues by states will most likely become more and more stringent as a number of states have recently decided to exercise self-restraint and limit themselves to two recommendations. This development is currently taking place in order to avoid the quantity of recommendations, which has been increasing between the 1st and 19th session (see Figure 4 below), coming at the expense of their implementation and monitoring.

Despite a necessary priority setting, the fact that only three per cent of all UPR recommendations refer to the court system and legal practitioners is a source of concern for the IBAHRI, for the two main reasons presented below.

First, the administration of justice has an impact on the realisation of all human rights. Even if recommendations pertaining to the court system or the independence of judges, lawyers and prosecutors address these issues as an end in itself, they de facto relate to and affect a broad scope of human rights issues listed above. That is because the legal community has an important role in protecting the population from abusive practices of the executive or the military, as well as in facilitating law reform, particularly in the field of criminal law. In light of this, the fact that 95 per cent of recommendations fail to address the challenges facing the legal profession or the judicial protection of human rights remains striking. The IBAHRI is concerned that the UPR process



addresses human rights issues by focusing on ‘what’ to achieve, rather than ‘how’ to achieve it. As a consequence, too few linkages are made between the protection of human rights and the role of lawyers and the legal profession in general. The existence of specialised courts, the training of the legal professions in human rights, the representativeness of the judiciary or the involvement of lawyers in legislative reforms need to be acknowledged as integral components of human rights protection. Furthermore, despite the primary role they should play in the protection of human rights, the consideration given by states to national professional organisations of lawyers pales in comparison to the attention received by national human rights institutions (around eight per cent of the issues addressed in the recent sessions<sup>149</sup>).

Secondly, since the creation of its mandate in 1994, the office of the Special Rapporteur on the independence of judges and lawyers has been demonstrating the nexus existing between violations of human rights and attacks on the legal professionals.<sup>150</sup> As presented by Figures 2 and 3 above, recommending states have done little to follow the Special Rapporteur’s lead and diminish the discrepancy between the attention afforded to the protection of the independence of legal professionals as opposed to violations of human rights in general. Case studies presented in Chapter Four corroborate this assessment. They demonstrate that in eight out of ten countries that face major challenges in administering justice, issues relating to legal professionals were not identified as a priority and received little or very general recommendations in the UPR process.

Finally, the IBAHRI notes with concern that the number of CTAs/recommendations addressing the independence of judges, lawyers and prosecutors has been decreasing since the 7th session of the UPR, while the total number of UPR recommendations has been increasing continuously (see Figure 4). Reasons for this could have been sought in the increasing range of topics that are being discussed in the UPR process. This would have explained the overall increase in the number of recommendations, while the number of recommendations addressing one particular topic, that is, the independence of legal profession, was relatively constant. However, a similar comparison looking at recommendations on fair trial rights shows that those follow the increasing trend of the total number of UPR recommendations. Another possible explanation is that recommending states may tend primarily to address fair trial rights and the fight against impunity, rather than the independence of legal professionals.

#### LAWYER: A SPECIAL STAKEHOLDER RECEIVING LITTLE ATTENTION

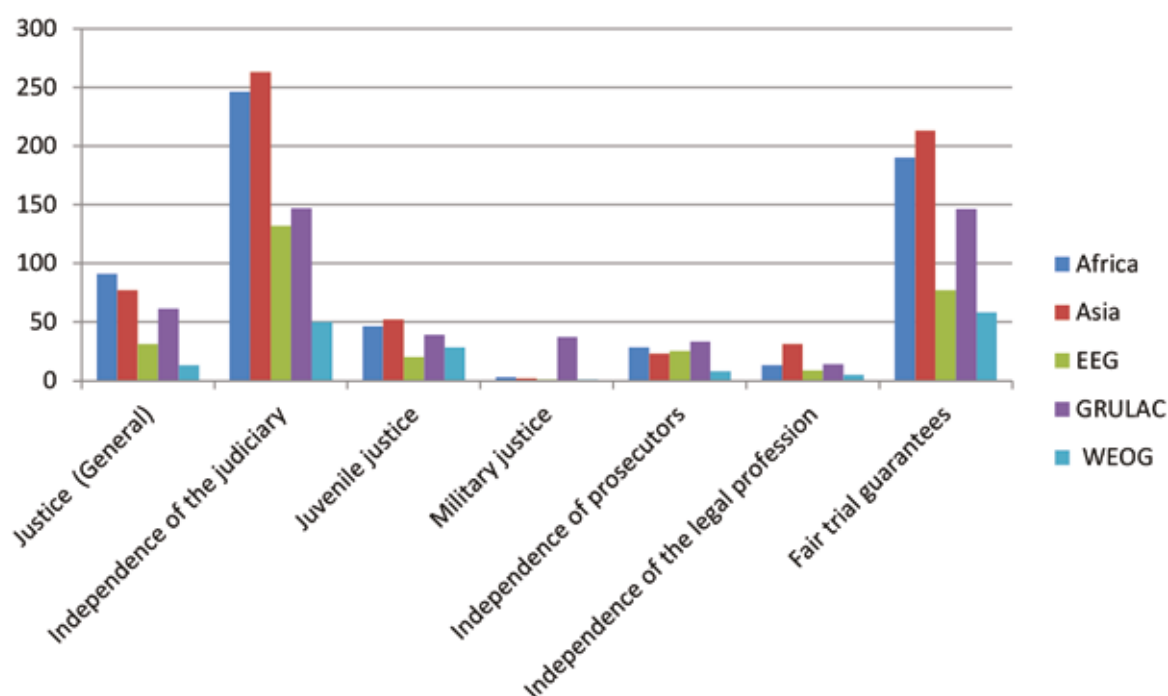
In quantitative terms, the largest number of recommendations concerning the administration of justice was received by Asia (584) and Africa (526). It should be noted, however, that the two regions also received the greatest number of recommendations overall, with 11,854 and 10,564 recommendations respectively over the period considered. It therefore appears more appropriate to consider the recommendations relating to the administration of justice in relative rather than absolute terms. The GRULAC and the EEG present the highest percentage, with 416 recommendations for a total of 4,230 recommendations and 264 recommendations for 6,200 recommendations respectively. These groups are followed by Africa (526 recommendations for 10,564 recommendations), Asia (584 recommendations for 11,854 recommendations) and the WEOG (150 recommendations for 5,450 recommendations).

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149 See UPR Info statistics, available at [www.upr-info.org](http://www.upr-info.org).

150 See ‘Independence of the legal profession’ below.

**Figure 4: Number of recommendations relating to the administration of justice by topic and by region (over the first 19 UPR sessions)**



The IBAHRI observes that while the number of recommendations varies significantly among regions, the concerns expressed by recommending states pertaining to the general justice systems of their peers are, in broad terms similar (see Figure 5 above). Conversely, while the need for a specialised juvenile justice system<sup>151</sup> attracted recommendations in all the regions, issues related to military justice were mostly addressed to the Latin American and Caribbean Region (GRULAC).

Within the administration of justice, for each region the ratio of recommendations addressing the independence of the judiciary and guarantees of a fair trial tends to be the same. In the EEG, however, the independence of the judiciary is addressed twice more than guarantees of a fair trial. Concerns regarding states in transition in Eastern and Central Europe were also pointed out by the Special Rapporteur a decade ago.<sup>152</sup> This may find some consonance in the UPR recommendations today and may partly explain the particular attention given to the independence of the judiciary, even before guarantees of a fair trial, and criminal law issues.

The IBAHRI notes with concern that the percentage of recommendations addressing the independence of lawyers is marginal in all regions. Looking at the 72 recommendations

<sup>151</sup> Recommendations on juvenile justice addressed in particular appropriate sentences and procedural rules, adequate facilities separated from adults, human rights trainings for the stakeholders of the juvenile justice system, the creation of special courts, free legal representation for children migrants, etc.

<sup>152</sup> UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2004) UN Doc E/CN.4/2004/60, 11 under para 26.

referring to lawyers, the IBAHRI concludes that lawyers are not perceived as subjects in need of specific protection. In some cases, they are incidentally addressed in recommendations calling on states to ensure legal counsel. On the basis of interviews conducted with state delegates, it appears that some recommending states assimilate lawyers to human rights defenders and implicitly include them in their recommendations that refer to human rights defenders. However, because lawyers are entrusted with a special responsibility to ensure access to justice and inform the population about the law, they also need to be given appropriate protection in exercising their duties. The Basic Principles on the Role of Lawyers spells out the need for protection of lawyers, as well as the rights and duties of the legal profession (see Chapter One: Introduction, under ‘Thematic scope’).

As mentioned previously, the role of professional organisations of legal professionals is key to ensure the protection, human rights education and ethics of the legal profession. Regrettably, professional organisations of lawyers were barely mentioned until recently. For instance, Hungary called upon Ukraine for the ‘adoption of a law on the bar association that recognizes the right of the bar to self-government and guarantees proper representativeness by regular elections and regional representation’. The Netherlands also called upon Maldives to ‘actively support the establishment of an independent bar association’. As lawyers’ organisations are getting more engaged in the UPR, more recommendations have recently been made that address bar associations, for example in Iran and Myanmar.

#### KEEPING UP THE FIGHT AGAINST IMPUNITY AND TERRORISM IN A HUMAN RIGHTS FRAMEWORK

The IBAHRI is concerned by the discrepancy between the strong signal sent by recommending states to fight impunity and terrorism and the few references to the protection of human rights in that context. On the one hand, recommending states have addressed the problem of military and special courts, especially in the GRULAC, and reassessed the principle that civilians and human rights cases cannot be heard by a military or security court. On the other, the UPR recommendations only refer to the independence of prosecutors 126 times, while 1,662 recommendations call upon states to prosecute and investigate human rights violations. At the beginning of the Millennium, the fight against terrorism was highlighted by the Special Rapporteur on the independence of judges and lawyers as a major threat to individuals’ security and the independence of the judiciary. The Council of Europe has also flagged up the abusive powers given to prosecuting services as one of the major issues in the European region.<sup>153</sup>

Furthermore, neither lawyers nor professional organisations were mentioned in recommendations relating to criminal law reforms. The IBAHRI identified 2,561 CTAs relating to the revision of criminal law, most of which concern the abolition of the death penalty, the decriminalisation of same-sex relationships or freedom of expression, or the criminalisation of torture or gender-based violence. Some of these recommendations challenge specific legal definitions (eg, the criminalisation of torture), while some require major changes in the legal culture (eg, abolition of the death penalty). In both situations, the legal community can contribute in fostering law reform through bolstering and engaging in legal debates. They also

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153 Council of Europe, *State of democracy, human rights and the rule of law in Europe* (Council of Europe 2014), 23.

play a key role in interpreting the law *de lege ferenda*, leading for instance to abandon capital punishment de facto, despite existing legal provisions.

#### THE NEED TO INCREASE THE MOMENTUM

The IBAHRI observes that the main donors on projects relating to legal and judicial developments are more likely to make recommendations regarding the administration of justice (see Figure 6). Donor countries in specific areas are strategically placed and enjoy access to sufficient information that enable them to make action-based and progressive recommendations, as well as to assist the country under review in their implementation phase.

In their interviews with the IBAHRI, most of the main recommending states highlighted that the administration of justice had not been raised as a predefined priority issue at the UPR. Rather, they made recommendations on the administration of justice based on a case-by-case assessment of the human rights issues in the country at the time of the review. They also recognised the far-reaching nature of the administration of justice in the protection of human rights.

Other states in the ranking presented below have a clear political agenda, and are lead countries, on the topics of the ‘independence of judges and lawyers’ (Hungary, Australia and Mexico) or the ‘administration of justice’ (Austria) at the level of the HRC.

**Figure 5: Top 15 recommending states on the independence of judges, lawyers and prosecutors and the respective amount of official development assistance (ODA) spent in the ‘legal and judicial development’ sector**

Top 15 recommending states on the independence of judges, lawyers and prosecutors	Number of UPR recommendations on the independence of judges, lawyers and prosecutors (Source: IBAHRI classification)	ODA spent in ‘legal and judicial development’ (millions of US\$) between 2009 and 2013 (Source: OECD)
United States of America	68	8,735.9
Canada	67	196.2
Czech Republic	49	1.5
United Kingdom	48	231.1
Netherlands	47	183.2
Spain	44	83.5
Germany	43	683.5
Switzerland	37	66.3
Austria	37	33.8
Australia	35	1,011.9
Norway	32	232.5
Sweden	30	166.8
Hungary	27	n/a
Uruguay	26	n/a
Mexico	26	n/a

Source: OECD data/IBAHRI classification of recommendations

## Key issues at a glance

UPR recommendations reflect how states are *viewed* by those who choose to comment on their human rights performance. As a result, the UPR process can provide a picture of the main challenges facing administration of justice worldwide, regionally and nationally. The following paragraphs consider the recommendations concerning the independence of judges (838), lawyers (72) and prosecutors (117), not related to the specific cases of military or juvenile justice.

As presented in Chapter One, the classification of the recommendations was made using a list of topics building on the UN Basic Principles and Guidelines, General Comment No 32 of the Human Rights Committee and the reports of the Special Rapporteur. Among these topics, some are more general, such as transparency, corruption and material and human resources. Other topics are more specific and tackle the training of the legal profession, the appointment to and composition of the profession, the ethics of the profession, the competences of the court and the creation or dismantlement of a court.

The IBAHRI notes that the great majority of the recommendations call upon the state under review to *train* judges, lawyers and prosecutors on human rights (231 CTAs). This issue is addressed in a separate paragraph, after looking at the specific issues related to the independence of judges, lawyers and prosecutors successively.

### INDEPENDENCE OF THE JUDICIARY

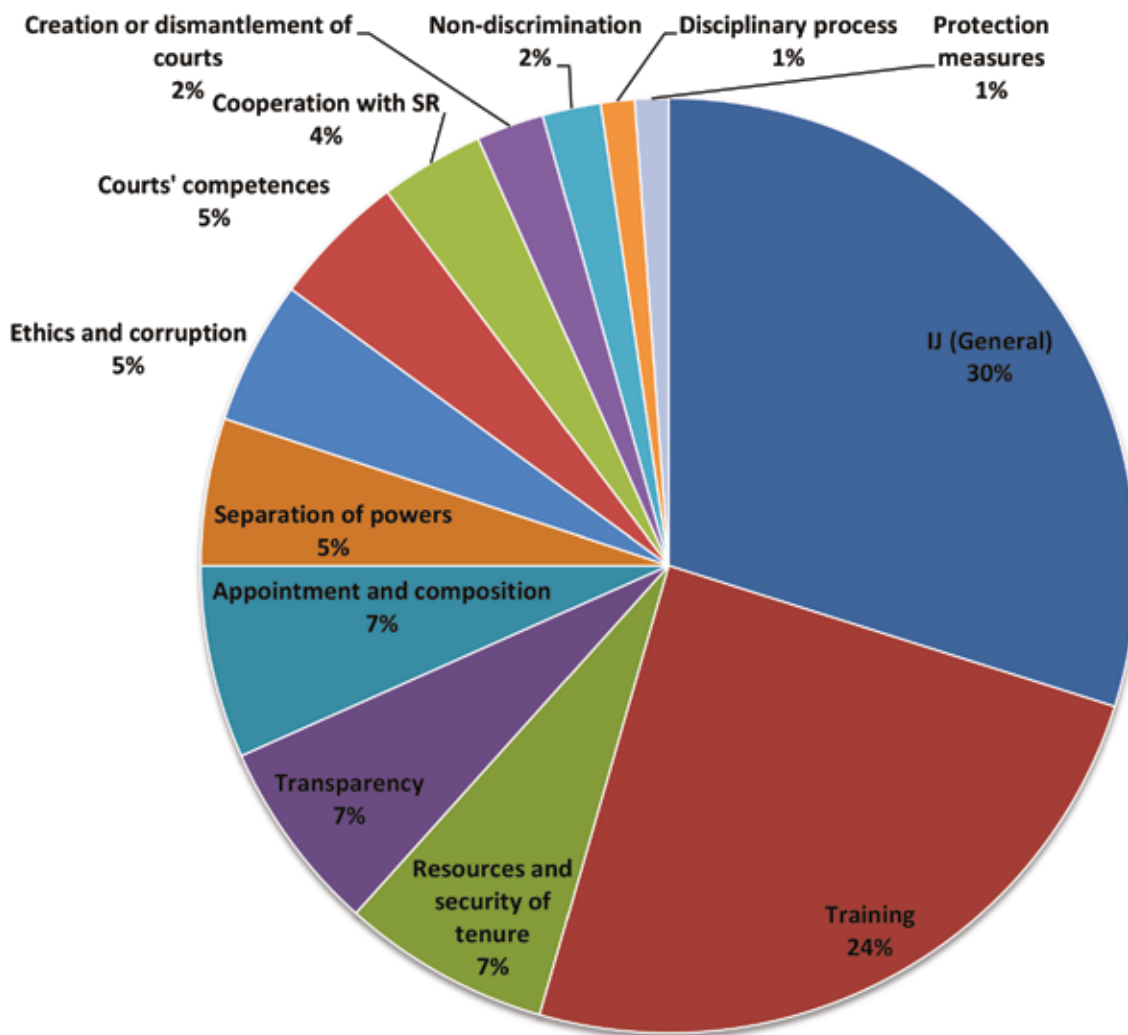
A global overview of the recommendations relating to the independence of the judiciary reveals that a number of key concerns raised by the Special Rapporteur are not sufficiently addressed at the UPR. This is corroborated by a regional overview of the UPR recommendations: the limited number of specific recommendations and the limited number of countries addressed in that respect does not exhaust the major challenges encountered in the regions.

### GLOBAL OVERVIEW OF ISSUES

The IBAHRI observes that among the 838 recommendations addressing the independence of the judiciary (military and juvenile justice systems excluded), one-third of the recommendations addressed, either through general or specific prescriptions, the ‘separation of powers’ (48 CTAs), or the ‘independence’, ‘impartiality’, ‘efficiency’ and/or ‘accountability’ of the judiciary (282 CTAs).

The remaining recommendations addressed, in the proportion identified in the graph below, the appointment and composition of the judiciary, transparency of the court system, resources and security of tenure, ethics and the fight against corruption, courts’ competences, cooperation with the Special Rapporteur, creation or dismantlement of courts, protection measures, disciplinary process, non-discrimination and equal access to justice.

**Figure 6: Classification by issue of the UPR calls to action (CTAs) relating to the independence of the judiciary (IJ) (over the 19 first UPR sessions)**



Between 2008 and 2014, the number of communications issued by the Special Rapporteur on the independence of judges and lawyers can be estimated to almost 600, addressing more than 100 different countries. Communications issued addressed a wide array of violations of the independence of the justice system from cases of arbitrary sanctions and physical attacks against legal professionals to the creation of special courts for expedited trials.

Concerns and recommendations expressed by states at the UPR during the same period did not reflect the scale of the problem. Over this period, only 40 countries received a fair signal – more often in general rather than specific terms – about shortcomings in their justice system, at the UPR.

On the one hand, the IBAHRI observes that some of the most recurring problems identified by the Special Rapporteur in the annual reports are corroborated by the UPR recommendations, albeit on a lesser scale. Thus, besides the training of legal professionals, primary sources of the concerns expressed at the UPR regard: the material, financial and human resources available to the administration of justice (68 CTAs); the transparency of the court system (63 CTAs); and the composition of the judiciary and the judicial appointment process (63 CTAs).

All three issues have been given special attention by the Special Rapporteur. They were also highlighted in the 2014 IBAHRI thematic paper *The Independence of the Judiciary: some recent problems*. The IBAHRI paper sheds light on a number of instances of direct and indirect interferences by the executive in the judiciary occurring worldwide, among them measures as direct as the removal of judges. As described in the paper, other practises include overseeing the appointment process, appointing ‘contract judges’ – or more subtly appointing judges from the prosecution services, who would supposedly have positive attitudes towards the prosecution. Transparency was also given particular importance in the report, insofar as tackling the root cause of the deficiencies of the justice system depends on how transparent the system is.<sup>154</sup> Finally, the IBAHRI report refers to cases of financial starvation of the judicial branch, infringing states’ duty to provide the judiciary with the necessary human, financial, and material resources.<sup>155</sup> In response to this and in relation to the problem of judicial corruption,<sup>156</sup> in 2009 the Special Rapporteur recommended that a fixed percentage of the national budget be allocated to the judiciary. He also stated that in the event of an economic crisis, priority must be given to the justice sector.<sup>157</sup>

The need to fight corruption has been addressed in about 40 recommendations, although in very general terms. None of them can give way to specific actions to undertake. These recommendations must be read along with recommendations calling for the ‘accountability’ and ‘integrity’ of the judiciary. The work the IBA Legal Policy & Research Unit is currently doing as part of its Judicial Integrity Initiative reveals the reasons corruption occurs in judicial systems is complex and involves a number of stakeholders. Results to date suggests that while the judiciary is often poorly resourced, the lack of accountability means that many working within judicial systems often abuse their position knowing there is little oversight of their actions. As such, there is a need to combine strengthening capacity and the strengthening integrity of judicial systems.

On the other hand, the IBAHRI notes among issues that have failed to attract many recommendations at the UPR: the security of tenure, the protection of legal professionals in the fulfilment of their missions and the protection of the freedom of association, expression and assembly of judges.

The infringement of the security of tenure of judges and cases of abusive disciplinary sanctions against judges has been denounced in a few cases, such as Fiji, Honduras and Pakistan. Fiji was called upon by the United States to ‘immediately restore’ the judges, magistrates and other judicial officers removed by President Iloilo on 10 April 2009. The Special Rapporteur has addressed the issue a number of times since the beginning of the UPR process.<sup>158</sup> It is the IBAHRI’s wish that such shortcomings in the justice system of a country are not ignored or forgotten too easily.

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154 Geoffrey Robertson, *Judicial independence: some recent problems* (IBAHRI 2014), 10.

155 Basic Principles on the independence of the judiciary, Principle 7.

156 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2004) UN Doc E/CN.4/2004/60, para 39.

157 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 37.

158 See, for instance, communications sent between 2010 and 2015 about disciplinary measures against lawyers or the infringement of security of tenure, to Panama, Bolivia, Swaziland, Mauritania, El Salvador, Honduras, Sri Lanka, Papua New Guinea, Costa Rica, Nauru, Hungary, Sri Lanka, Peru and Maldives.

The need for protection of judges has been raised in the case of seven countries in particular.<sup>159</sup> The Special Rapporteur has repeatedly highlighted with concern that authorities do not always provide sufficient protection or a clear condemnation of criminal activities against judges and lawyers.<sup>160</sup>

The Rapporteur thus reiterated the state's obligation to investigate cases involving the violation of judges' human rights. Communications issued by the Special Rapporteur evidence here again that judges are in fact subjected to pressure, intimidation, death threats or actual assassination attempts because of their role in investigating the involvement of politicians or other well-connected figures in assassinations or other serious human rights violations.<sup>161</sup> Confronted with such risks arising from their beliefs or activities, those who work in the judicial system are quite often forced to resign, move to another town, or go underground or into exile. The threats may also extend to family members.<sup>162</sup>

Finally, the fundamental freedoms of judges to associate, assemble and express their opinion have not been explicitly mentioned. Special Rapporteur Leandro Despouy noted in his reports the importance of the participation of judges in debates concerning their functions and status as well as general legal debates.<sup>163</sup> He consecutively encouraged Member States to support the establishment of associations of judges considering their importance for the independence of the profession.<sup>164</sup>

### Key issues by region

This section attempts to identify the main human rights challenges facing the justice systems by region. Considering the limited amount of specific recommendations in this sector, and the limited number of states receiving specific recommendations, only those recommendations that are addressed to a relatively significant number of states in the region should be taken into account for this exercise. As mentioned above, during the period considered, about 40 countries<sup>165</sup> received at the UPR a fair signal – in general or specific terms – of shortcomings in their justice system. The findings presented below remain therefore a general indication, rather than a specific indicator.

The regional picture of the main challenges facing the justice systems is compared to the indicators provided by the World Justice Project (WJP) rule of law indicators. The WJP is one of the broadest ranking methods based on the perception of a wide range of stakeholders about states' performance in criminal and civil justice systems. Launched in 2012, the WJP Rule of Law Index covered 99 states, in 2014.

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159 Egypt, Iraq, Guatemala, Honduras, Sri Lanka, Brazil and Afghanistan.

160 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/HRC/4/25, para 15.

161 See, in particular, the communications sent by the Special Rapporteur between 2010 and 2015 to Argentina, Turkey, Brazil and Algeria.

162 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/HRC/4/25, para 15.

163 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 45.

164 *Ibid*, para 102.

165 Cambodia, Fiji, Ukraine, Democratic Republic of Congo, Burundi, Honduras, Afghanistan, Venezuela, Mexico, Albania, Nicaragua, Russian Federation, Bolivia, Tunisia, China, DPR Korea, Armenia, Croatia, Sudan, Montenegro, Equatorial Guinea, Jordan, Timor-Leste, Cuba, Iraq, Guinea, Iran, Saudi Arabia, Chad, Serbia, Liberia, Kenya, Cote d'Ivoire, Guatemala, Brazil, Slovakia, Republic of Congo, Malaysia, Maldives, Egypt and Ecuador received more than ten recommendations on the independence of judges, lawyers and prosecutors.



In the EEG, the main concern expressed was the issue of transparency (13 per cent), followed by the problem of corruption (eight per cent) and the objectivity in the appointment process and composition (eight per cent). This gives consonance to the 2014 WJP Rule of Law Index, which identifies corruption, the lack of judicial independence and undue influence of private interests in all branches of government as key challenges facing the region.<sup>166</sup> In its 2014 *State of democracy, human rights and the rule of law in Europe*, the Council of Europe – which encompasses both countries from the WEOG and the EEG region – highlighted as key challenges the executive interference in the functioning of the judiciary, the issue of judicial corruption, the lack of trust in the judiciary, the excessive length of proceedings and the chronic non-enforcement of judicial decisions.<sup>167</sup>

In the GRULAC, the appointment process and composition of the judiciary (13 per cent) and the lack of transparency in courts (nine per cent) and the lack of material and human resources (nine per cent) were the main issues addressed. In its 2013 regional report, the Special Rapporteur highlighted similar concerns, that is, the appointment and disciplinary processes concerning the judiciary, and the transparency of the functioning of the system.<sup>168</sup> The 2014 WJP Rule of Law Index highlighted corruption as the main problem, and portrayed the criminal justice systems of the region as the ‘least effective in the world’.<sup>169</sup>

In Africa, material and financial resources (13 per cent) was the main issue addressed, before the separation of powers (six per cent) and the creation and dismantlement of a court (six per cent). The 2014 WJP Rule of Law Index describes the justice system in Africa as inaccessible to ‘the ordinary citizen’.<sup>170</sup>

In Asia, a number of issues were addressed to a similar extent, including the appointment and composition of the judiciary (six per cent), the courts’ competences (six per cent) and the transparency of the justice system (six per cent). The WJP notes that Asia has a crime rate inferior to the other regions. The main problems identified lie in corruption prevalent in all branches of the government.<sup>171</sup>

Finally, considering the very limited amount of specific recommendations addressed to a limited amount of WEOG countries on issues other than training, it is rather difficult to identify regional challenges on the basis of the UPR. It however appears that recommendations relating to the administration of justice tend to prevent racial discrimination. The 2014 WJP Rule of Law Index<sup>172</sup> identified access to justice by marginalised segments of the population as one of the key problems in Western Europe and North America.

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166 World Justice Project, Rule of Law Index (World Justice Project 2014), 37.

167 Council of Europe, *State of democracy, human rights and the rule of law in Europe* (Council of Europe 2014), 22–23.

168 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul on the Regional Consultation on the Independence of the Judiciary in Central America* (2 April 2013), UN Doc A/HRC/23/43/Add.4, paras 21–22.

169 World Justice Project, Rule of Law Index (World Justice Project 2014), 38.

170 *Ibid.*, 41.

171 *Ibid.*, 40.

172 *Ibid.*, 42.

The interlinkages between criminal and military justice systems have received renewed attention with the fight against terrorism. In 2012, the Special Rapporteur, Gabriela Knaul, dedicated a report to the principle of independence of prosecutors and reassessed their autonomy from the courts and the police. She also reiterated that when an offence committed amounts to a human rights violation or when the matter involves a civilian, the case must be referred to a civilian jurisdiction.<sup>173</sup> In the same context of the fight against terrorism, the Council of Europe highlighted that in a number of countries in the European region, public prosecutors exercise powers that are too broad and lack transparency. The Council spelled out that prosecutors should have the right and obligation to refuse instructions on whether or not to prosecute. In the courtroom, the prosecutor should be physically separated from the judge or judicial panel, and ideally should sit at the same level as the other parties to the proceedings.<sup>174</sup>

As previously mentioned, the IBAHRI observes that only 126 recommendations refer to due process or the independence of the prosecution, while 1,662 recommendations call upon states to ‘effectively investigate’ and/or ‘prosecute’. These recommendations, however, contain no reference to human rights guarantees in the investigation or prosecution process.

Looking at the classification of the recommendations by issue presented in Figure 8, the IBAHRI also observes that when the independence of the prosecuting service is addressed, a large proportion of recommendations are general and call merely for the service to be independent and/or impartial (55 CTAs). Specific recommendations tackle:

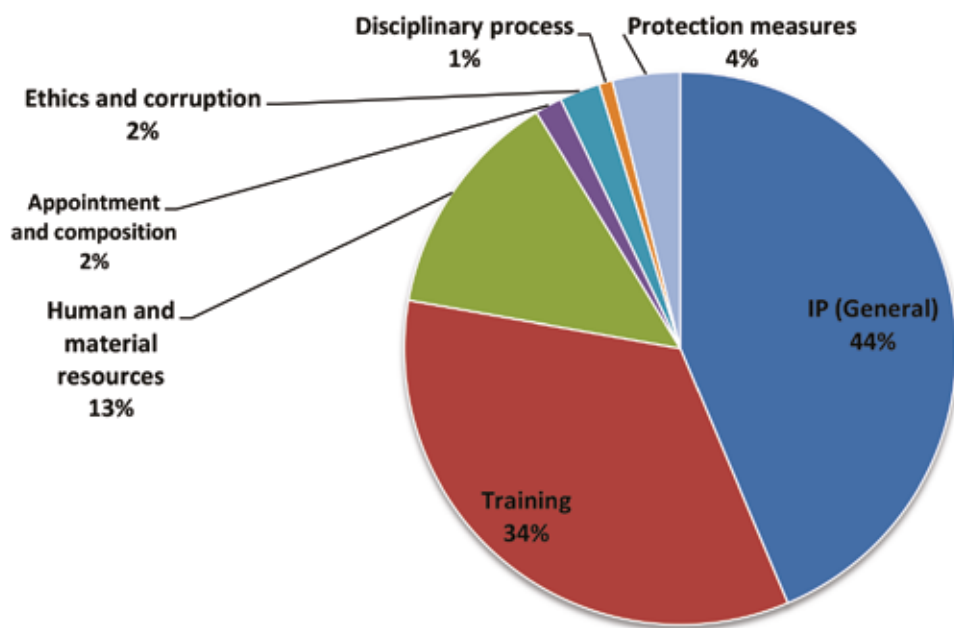
- the training of prosecutors (43 CTAs);
- the prosecuting services’ human and financial resources (17 CTAs);
- the protection of prosecutors from threats (five CTAs);
- the ethics of the profession and corruption in the prosecuting service (three CTAs);
- the composition and appointment process of the prosecutors (two CTAs); and
- the disciplinary process (one CTA).

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173 UNHRC, ‘Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul’ (7 June 2012) UN Doc A/HRC/20/19, para 107.

174 Council of Europe, *State of democracy, human rights and the rule of law in Europe* (Council of Europe 2014), 23.

**Figure 7: Classification by issue of the UPR calls to action relating to the independence of the prosecutors (IP) (over the 19 first UPR sessions)**



#### INDEPENDENCE OF LAWYERS

The 1990 Basic Principles on the Role of Lawyers spell out the core factors guaranteeing the independence of the legal profession. This rests on two principles. First, the state and the legal profession share a joint responsibility to provide access to justice. Secondly, the legal profession should be self-governed and self-regulated.

The two components are set out in Principle 25 of the Basic Principles as follows:

‘[p]rofessional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.’<sup>175</sup>

Even though the legal profession is not part of the state apparatus, it fulfils a mission of public interest. Building upon the Basic Principles, in 2009 the Special Rapporteur in his report to the Human Rights Commission conferred upon states ‘the duty... to *support* the establishment and work of professional associations of lawyers *without interfering* in these processes’<sup>176</sup> (emphasis added). In other words, lawyers must ‘enjoy an official status, without being state-controlled’.<sup>177</sup>

Furthermore, states must respect attorney-client privilege (Principle 22) and ensure that lawyers are able to perform their professional functions without threat or interference (Principle 16) or being identified with their clients’ causes (Principle 18). States must also ensure that lawyers receive appropriate training (Principle 9) and can freely associate, assemble and express their opinion in public debate (Principles 23 and 24).

<sup>175</sup> Basic Principles on the Role of Lawyers, Principle 25.

<sup>176</sup> UNGA, ‘Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy’ (2009) UN Doc A/64/181, para 21.

<sup>177</sup> *Ibid* para 23.

The IBAHRI notes that in most developed legal systems, an overarching legal framework exists within which lawyers are able to discharge their functions freely and independently, and establish a professional association to represent their interests. Laws regulating the legal profession tend to cover common topics, such as admission to practice and continuing legal education requirements, professional self-regulation and independence, and disciplinary mechanisms.<sup>178</sup> On the other side of the spectrum, state-controlled associations of lawyers with compulsory membership, their lack of independence and inaction in cases where their members are threatened, as well as the pressures they impose on their members, have been highlighted by the Special Rapporteur and international organisations, including the IBA.

To date, the number of attacks on lawyers and members of the judiciary has constituted an unfortunate indicator of a country's human rights situation.<sup>179</sup> A significant number of communications directed to states by the Special Rapporteur demonstrate that lawyers in need of protection are not an infrequent occurrence. A closer look at the communications received by the Special Rapporteur since 2004 reveals that, on average, more than 20 per cent of those can be classified as pertaining to threats to lawyers, which includes acts of interference in the discharge of their professional functions.<sup>180</sup> In more than ten per cent of the communications, a lack of access to a lawyer is alleged. This is often observed in detention centres. Other communications relate to proceedings against lawyers involving civil, criminal and disciplinary proceedings, restriction on lawyers' freedom of expression, and the disbarment of lawyers.<sup>181</sup> These violations are mostly the results of lawyers being identified with their clients' causes, particularly in politically sensitive cases.

In light of Figure 8 below, the UPR clearly lags behind in addressing the challenges faced by the legal profession, which consequently has an impact on the protection of all human rights. While access to legal representation is frequently addressed in all the regions, the legal profession is mentioned only rarely (72 recommendations). Besides general recommendations that mostly call for an independent legal profession (16 CTAs), specific recommendations concern mainly the *training* of the legal profession on human rights (37 CTAs). The respect for and protection of lawyers to enable them freely to carry out their activities remain too low (15 CTAs). For example, Finland and Canada both recommended to China to guarantee access to prompt and effective investigation by an independent and impartial body of allegations of violence and intimidations impeding the work of lawyers. Only a few recommendations addressed the freedom of association of lawyers and the role of professional associations of lawyers.

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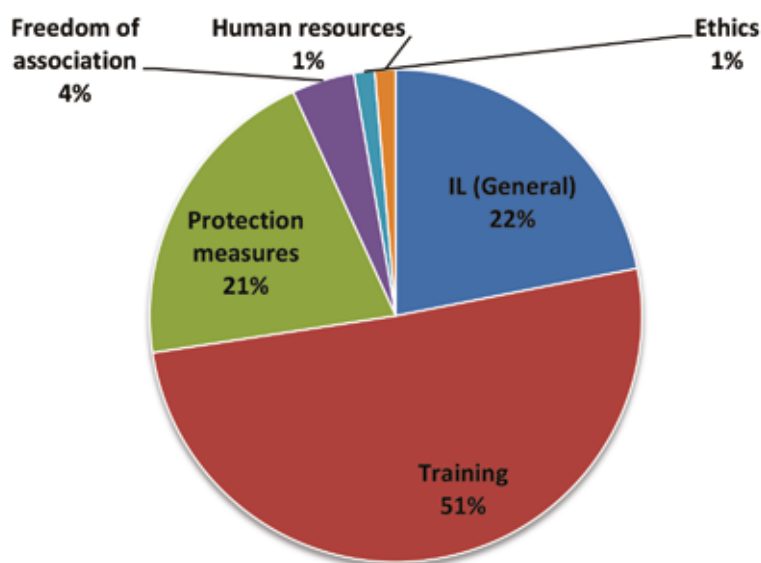
178 The system of regulation should be clearly set out in law and provide objective standards for the arbitration of disputes regarding the discharge of a lawyer's functions or the exercise of government authority over lawyers. A system of regulation that is fair and efficient protects: the public, as users of legal services; lawyers, as independent professionals; and the government, as guardians of justice accountable to citizens. Owing to their role in upholding the rule of law and human rights and providing access to justice, it appears that bar associations are recognised by law, thereby ensuring that their status, objectives and functions are clear to all. The recognition of this in legislation further ensures that the duties and responsibilities of a bar association can be enforced if necessary.

179 See also the annual report of the Observatoire mondial des violations des droits de la défense et des droits des avocats dans le monde, which reported in its 2015 report the imprisonment, killing, harassment and violations of more than 200 lawyers around the world in 2014.

180 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2007) UN Doc A/HRC/4/25, para 17.

181 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2004) UN Doc E/CN.4/2004/60, para 49. These may range from harassment, intimidation or threats to assault, including physical violence and murder, to arbitrary arrest and detention, restrictions on their freedom of movement, or economic or other sanctions for measures they have taken in accordance with recognised professional obligations, standards and ethics.

**Figure 8: Classification by issue of the UPR calls to action relating to the independence of the legal profession (IL) (over the 19 first UPR sessions)**



The IBAHRI concludes that lawyers are not sufficiently identified as subjects in need of protection at the UPR. Strengthening the national institutional framework is a prerequisite for accomplishing real progress in the protection of human rights. Along these lines, the IBAHRI wishes to reassess the role of lawyers in protecting human rights, and the role of professional associations of lawyers as unique institutions, whose role is to protect lawyers and strengthen their capacity to protect the rule of law.

#### A RELATED ISSUE: THE IMPORTANCE OF CONTINUING HUMAN RIGHTS EDUCATION FOR LEGAL PROFESSIONALS

Pursuant to the Basic Principles on the Role of Lawyers,<sup>182</sup> the state must provide lawyers with legal education and training. In 2003, the Commission on Human Rights<sup>183</sup> stressed the need for judges, lawyers and assessors throughout the world to receive, in addition to legal training, training in international and regional human rights standards, including the Basic Principles on the Independence of the Judiciary. The objective expressed was ‘to inculcate the values of independence and impartiality and prevent corruption within the judiciary’.<sup>184</sup> Seven years later, Gabriella Knaul, the then recently appointed Special Rapporteur, noted with concern the ‘considerable gap between the continuing human rights legal education offered to judicial actors and the outcomes obtained with regard to the application of international human rights law in specific cases’.<sup>185</sup> On this occasion, the Rapporteur reiterated that ‘judges and lawyers are called upon to uphold not only the domestic law, but also international human rights standards’ and consequently ‘are required to be aware

182 Basic Principles on the Role of lawyers, Principle 9.

183 UNCHR, ‘Resolution on the United Nations Decade for Human Rights Education’ (25 April 2003) UN Doc 2003/70.

184 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2004) UN Doc E/CN.4/2004/60, para 42.

185 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/65/274, para 48.

of, and apply, international human rights principles and standards in the cases before them'.<sup>186</sup> Following a worldwide survey on education programmes, the Special Rapporteur made a series of recommendations to guide states in their endeavours.

The concerns of the Special Rapporteur find consonance at the UPR, with training representing the highest percentage of the recommendations addressing the judiciary, prosecutors and lawyers.

Current recommendations refer to a wide range of measures, from broad human rights education programmes to the training of security forces, law enforcement officers, the judiciary, counsel or prosecutors. In a great number of cases, training is recommended in a specific area of international human rights law. Thus training on the rights of women, gender equality and gender-based violence and children's rights can be found in all regions. Training on sexual minorities' rights is almost absent from the recommendations addressed to African countries (there has only been one from the Czech Republic to Equatorial Guinea over the period considered), while all other regions have been called upon in that respect. Training on indigenous' rights in Latin America and on hate speech and migrants in Eastern Europe has also been recommended.

Training on sensitive issues is key to ensuring access to justice, in particular of vulnerable people, as well as to strengthening the legal profession in their endeavours to enhance human rights. However, training will often not be enough, and correlated protection measures for lawyers, judges and prosecutors would be needed. Indeed, as noted by the Special Rapporteur, '(e)xperience shows that those who work in the judicial system are particularly at risk of such attacks if they are prominent defenders of human rights'.<sup>187</sup> Particularly at threat are lawyers representing victims of enforced disappearance or extrajudicial executions, as well as those who specialise in sensitive fields such as terrorism, corruption, organised crime, people trafficking, land ownership, protection of the environment and natural resources, advocacy for vulnerable groups such as indigenous peoples, ethnic, linguistic, religious or cultural minorities, women who are victims of violence or discrimination, political opponents and those who oppose war or campaign for their region's independence.

Recommendations on training are most often specific insofar as they call for training on specific issues. However, they usually give the state under review discretion to decide upon the organisation, scope and length of the training. The Special Rapporteur has spelled out a number of recommendations that are instrumental in the implementation of a training programme (see below 'Integration of human rights principles and good practices'). This clearly raises the questions of the drafting and implementation of the UPR recommendations, which are considered below.

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186 UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul (2010) UN Doc A/HRC/14/26, para 22.

187 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy (2007) UN Doc A/HRC/4/25, para 15.

## *Making human rights-based and action-orientated recommendations: a too-often-encountered challenge*

The overarching goal of the UPR process is to advance human rights on the ground. In order to achieve that, recommendations must be ‘action-orientated’, as held in the HRC Resolution establishing the UPR. The IBAHRI considers it to be of foremost importance that recommendations are also based on human rights, as defined below.

To be action-orientated, recommendations must contain a prescription, the implementation of which is measurable. Looking at states’ practice over time, a distinction can be drawn between *programmatic* and *action-orientated* recommendations. Programmatic recommendations spell out broad objectives to be achieved by states under review, whereas action-orientated recommendations call for a specific measure to be implemented.

A human rights-based recommendation identifies the rights-holders and their entitlements and the duty-bearers and their obligations. The objective of the recommendation must contribute to realise the core human rights principles of non-discrimination (and focus on vulnerable groups), participation of rights-holders to democratic institutions and development models, access to information on public institutions and accountability of public institutions. The level of protection it is calling for is expected to be at least the same as the one set out at the international level.<sup>188</sup> In order to achieve this, recommendations are expected to use the conventional language of international human rights law, and build on the legacy and development of international human rights law standards. Referring to the UN Guidelines, human rights instruments and prior recommendations of other human rights mechanisms provides recommendations with specific content and the context in which the implementation is to take place. These standards present useful benchmarks for monitoring the implementation of the recommendations. The same applies to good practices identified by the Special Rapporteurs, which constitute a commendable source from which to draw recommendations. The need to apply a human rights-based approach to UPR recommendations has been raised before.<sup>189</sup> The call is reiterated here and exemplified in the case of administration of justice.

The following paragraphs successively address key factors for developing action-orientated and human rights-based recommendations. An overview of the recommendations, which are more progressive and relate to the independence of judges, lawyers and prosecutors, is then presented.

### ACTION-ORIENTATED VS PROGRAMMATIC RECOMMENDATIONS

Among the recommendations addressing administration of justice, the IBAHRI observes the following. More than one-third of recommendations that address independence, impartiality, (1) or efficiency (2) of the judiciary, either as an end in itself *or* as a means to ensure access to justice *or*

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188 UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2005) UN Doc E/CN.4/2005/60, para 69.

189 UNFPA, *From commitment to action on sexual and reproductive health rights* (UNFPA 2014), 21.

combat impunity, are programmatic. These recommendations also address corruption and the need to strengthen the capacity of the judiciary in general terms.

eg (1) ‘Take concrete measures to ensure that judges exercise their profession in full impartiality’

eg (2) ‘Continue its reforms of the judicial system to improve the quality and efficiency of case handling in the courts’ (Rwanda to Russian Federation)

Conversely, action-orientated recommendations relate to the constitutional, legal, policy, human resources or budgetary framework of the independence of judges, lawyers and prosecutors. They also refer to implementation or monitoring of measures related to these issues, or to some specific factors, such as appointment processes or security of tenure. The action-orientation of the recommendations manifests itself in that a right or a principle to be realised is sufficiently concrete to be implementable and monitored (1), or the action to be undertaken is specifically mentioned (2):

eg (1) ‘Ensure access to legal representation to all detainees’

eg (2) ‘Guarantee through legislative measures’ ‘Investigate allegation of executive branch interference in the judiciary’ ‘Integrate in law/in the constitution’ ‘Train judicial officers’

Some recommendations contain one or more elements that make a call for action more specific and thereby subject its implementation to easier monitoring and international scrutiny. Some recommendations, for instance, mention the geographical areas concerned, for example, ‘realising access to justice in rural areas’. Others call for adoption of a law or recommend that the release of prisoners should take place ‘immediately’. In general, however, the timeline for the objective to be achieved is rarely mentioned. The NGO UPR Info developed a guide<sup>190</sup> for recommending states on how to draft specific, measurable, actionable, realistic and time-bound (SMART) recommendations, so as to ensure that these recommendations encompass a clear prescription.

In order to have an impact on human rights on the ground, the drafting of the recommendations must also follow the criteria presented in the following sections.

#### FOCUS ON THE RIGHT-HOLDERS, DUTY-BEARERS AND RELEVANT STAKEHOLDERS

Theoretical approaches to human rights put the individual as a right-holder to the forefront of the human rights discourse. The second relevant category in theory of human rights – duty-bearers – is, as a result, often pushed aside and ignored in the public and theoretical discourse. Similarly, states tend to focus on the ‘what’ to reach, rather than the ‘how’. Moving away from this paradigm and beginning to involve these key stakeholders can increase the possibility for the recommendations to resonate and have a greater impact on the ground. This can only be achieved if individuals, such as lawyers, prosecutors and judges, who support and constitute the institutional human rights framework, are at the forefront of the protection of human rights, with specific rights, protections and duties attached to their capacity. In other words, UPR recommendations should address not only those in need of justice, but also those responsible for providing access to justice and protecting the rule of law.

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190 UPR Info, *A Guide for recommending States at the UPR* (UPR Info 2015).



Looking at rights-holders, around ten per cent of the recommendations made by states relating to the administration of justice were identified as addressing the demand for justice of a specific vulnerable group, such as women victims of violence, migrants or persons in detention. In international human rights law, the issue of vulnerability is always external to the person. Vulnerable groups are defined in a given context on economic, cultural, religious, geographical (urban/rural) and social (gender, age) grounds, or on the basis of the dependence of the persons on a state institution (eg, schools, hospitals, prisons, refugee camps, markets, and public institutions). The groups that are most likely to have their rights violated due to their vulnerability are also most likely to be in a weaker position in accessing justice.

Some recommendations indeed overcame the above paradigm and focused on the individual actors that constitute the justice system. They called for the training of lawyers and judges on sexual minorities’, migrants’ or women’s rights. Such recommendations are key to strengthening the legal professions’ capacities in enhancing the rights of those who are persecuted. For instance, in some countries that criminalise same-sex relationships, only few lawyers are able and willing to take the risk of representing those in need of legal counsel as defending a gay person can be a life-threatening issue. Ensuring, through education, that lawyers are legally equipped to address such human rights issues or politically sensitive topics significantly strengthens the role of the legal community in enhancing human rights in the country.

Similarly, the representation of women and social minorities in the judiciary is a constitutive element of the protection of women’s and minorities’ rights. In light of this, the IBAHRI identified 22 CTAs recommending the presence of women or of minorities in the judiciary.

The IBAHRI encourages the trend that is still emerging at the UPR, which is to bridge the gap between ‘protection of human rights’ and ‘protection of those who protect’, as illustrated in the Figure 10.

**Figure 9: Interlinking the realisation of human rights and their protection by the legal professions in the UPR recommendations**

'Ensure access to justice for women victims of violence'	➔	'Ensure access to justice for women victims of violence, and train judges, lawyers and prosecutors on women’s rights’ 'Ensure access to justice for women victims of violence and ensure a fair representation of women in the judiciary’
'Revise the national law in order to bring it into conformity with international human rights law’	➔	'Revise the national law in order to bring it into conformity with human rights, in consultation with civil society and the legal community’
'Decriminalise same-sex relationships’	➔	'Train judges, lawyers and prosecutors on sexual minorities’ rights’
'Abolish death penalty’	➔	'Run training for lawyers on capital defence, strategic abolitionist advocacy’ 'Run training for judges in international standards on the death penalty and the prohibition of inhuman, cruel and degrading treatments’

## REFERENCE TO UN GUIDELINES AND OTHER BENCHMARKS

Notwithstanding a limited number of recommendations that can be implemented *directly* (1), most recommendations will require a state to achieve a certain result but leave them free to choose how to do so. In order to ensure greater impact on human rights on the ground, recommending states are encouraged to refer to standards defined and developed by Special Rapporteur (2) and explicitly mention the relevant international standards (3). These instruments provide key benchmarks for the implementation of the recommendations. In addition to international standards, regional standards have been used by states (4):

eg (1) ‘Release all detainees...’

eg (2) ‘The appointment of judges must be based on objective and merit-based criteria, and an autonomous appointing body must be considered as the best option as recommended by the Special Rapporteur’

eg (3) ‘Government’s efforts to ensure quality service delivery in the justice sector also include measures to strengthen the independence of the judiciary in line with the United Nations Basic Principles on the Independence of the Judiciary’ (Ghana to Gambia)

eg (3) ‘Implement the United Nations Basic Principles on the Independence of the Judiciary and the Role of Lawyers’ (Maldives to Fiji)

eg (4) ‘Take concrete steps to improve the objectivity and independence of the criminal justice system by incorporating the recommendations of the Venice Commission, implementing the judgments of the European Court of Human Rights, and addressing concerns about selective justice’ (United Kingdom to Ukraine)

## INTEGRATION OF HUMAN RIGHTS PRINCIPLES AND GOOD PRACTICES

The aim of the UPR is to achieve a dialogue between states based upon an exchange of good practices. The recommendations of the Special Rapporteur, and the good practices he/she identified, should naturally nurture the recommendations made at the UPR. The IBAHRI therefore encourages states to be guided by the core human rights principles of non-discrimination, participation, access to information and accountability and the good practices identified by the Special Rapporteur, while drafting their recommendations.

As mentioned above, the Special Rapporteur on the independence of judges and lawyers has contributed to identifying how the core human rights principles apply in the administration of justice. For instance, the holding of public hearings in the judicial selection process in the High Court in Ecuador had been identified by the Special Rapporteur as a good practice contributing to the participation and access of information of the rights-holders into the justice system.<sup>191</sup> Public hearings at which backgrounds of the nominees could be openly scrutinised were held. The Special Rapporteur then noted that this can be crucial for the population to gain confidence in the court system.

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191 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (2009) UN Doc A/HRC/11/41, para 32.

Most of the recommendations would gain from referring to the recommendations of the Special Rapporteur, which build on the country experience gathered by the mandate. For instance, looking at the recommendations on the training of legal professionals, the mandate spelt out a number of recommendations. The Special Rapporteur thus recommended, inter alia, that:<sup>192</sup>

- International human rights law should be included in the curricula of all law faculties and law schools, and in the curricula of schools for the judiciary and the academic programmes of bar associations.
- Particular attention should be given to the different levels and categories of judges.
- Education programmes should be designed taking into account the expectations, responsibilities and interests of each level and category.
- The need to enhance the education of judicial staff (such as court secretaries, assistants, law clerks and registrars) should be assessed before training.
- Legal education for judges, prosecutors and lawyers should be delivered using the latest training methodologies, including interactive sessions, seminars and workshops.
- Judicial human rights education, including continuous learning, should be designed in the broader context of judicial development strategies. An effective partnership between the judiciary and the executive power should be developed to obtain adequate and sustainable resourcing while always preserving judicial independence. Universities and law faculties should operate within an approved and harmonised national curriculum, which should, in particular, include international human rights law education.
- Bar associations and associations of magistrates have a crucial role to play in the effective training of judges and lawyers and their support to the Special Rapporteur and OHCHR is particularly important.
- The introduction of a mandatory human rights training period prior to being admitted to the bar is of paramount importance to ensuring the independence, integrity and effectiveness of professional legal counsel provided by lawyers.
- Initial education initiatives for judges should in particular cover basic education on the country's international obligations with an emphasis on human rights. Incoming judges should also be acquainted with the impact of decisions.

Further examples of recommendations from the Special Rapporteur are provided under the 'thematic scope' in Chapter One of the report. In addition, some recommendations could gain from current in-country practice. Some states recommended the adoption of a code of ethics for the judiciary. It could be recommended that in accordance with current in-country practice a code of ethics be either drafted by the judiciary or adopted after including input from the judiciary.

In practice, some states' recommendations align with the recommendations of the Special Rapporteur. For example, looking at the diversity and representativeness of the judiciary, Nepal

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192 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul* (2010) UN Doc A/HRC/14/26, para 99.

recommended that Croatia should ‘continue efforts for the appropriate representation of national minorities in public and judicial authorities’. That is also the case for the United Kingdom, which recommended that Montenegro should ‘fully publish and implement a plan that addresses how the government of Montenegro intends to make appointments and promotions in the judiciary a fair and transparent process, to ensure that the independence of the judiciary is fully protected’.

On the other hand, some states’ recommendations aligned poorly with the recommendations made by the Special Rapporteur. For instance, the Special Rapporteur flagged up the risk of politicisation, when judges are *directly* elected by popular vote. Rather, the Special Rapporteur recommended establishing an independent body in charge of the selection of judges by merit. This body should have a plural and balanced composition and avoid politicisation by giving judges a substantial say.<sup>193</sup> In light of this, the recommendation addressed by Nicaragua to Bolivia to ‘[p]romptly adopt effective measures to ensure that the judicial authorities are elected by direct universal suffrage’ does not align with the recommendations of the Special Rapporteur.

### **Figure 10: Comparison of UPR recommendations relating to independence of the judiciary, in light of international standards**

A recommendation can be considered as specific and progressive, from a human rights-based approach, if it satisfies three conditions. First, it should refer to the most relevant international human rights instruments and recommendations of the Special Rapporteur. Then, it should translate into a concrete recommendation based on the human rights principles of non-discrimination, participation, access to information or accountability, taking into account the legal, institutional and budgetary context of the country. Finally, it should clearly identify the rights-holders and duty-bearers in the specific recommendation made. A sample of recommendations that were made by states at the UPR is discussed below in light of these criteria.

## **Independence of the judiciary**

### *Appointment process and composition of the judiciary*

**International standard:** Access to the profession and the promotion of judges shall be based on objective criteria, such as ability, integrity and experience, and be free from discrimination and political interference (Basic Principles on the Independence of Judges, Principles 10 and 13).

**International recommendation:** ‘Member States [should] consider establishing an independent body in charge of the selection of judges, which should have a plural and balanced composition, and avoid politicization by giving judges a substantial say’ (SR IJL (2009) UN Doc A/HRC/11/4, 1 para 97).

193 *Ibid*, para 97.

**The following recommendations comply with the general substance of the 1985 Basic Principles on the independence of the judiciary.**

**Recommendations (1), (2) and (3) could be improved through an explicit reference to the Basic Principles and Guidelines as benchmarks for their implementation.**

(1) ‘Establish an independent body to safeguard the independence of the judiciary and to supervise the appointment, promotion and regulation of members of the profession’ (Slovakia to Honduras).

(2) ‘Ensure independent, open and transparent selection procedures based on merit for judges and prosecutors’ (United Kingdom to Venezuela).

(3) ‘Reinforce the impartiality of the judiciary promoting an appointment system by competitive examinations at all levels of the judiciary’ (Spain to Nicaragua).

**Recommendations (4), (5) and (6) address the representativeness of the judiciary, in accordance with the principles of participation and non-discrimination in the justice system:**

(4) ‘Continue efforts for the appropriate representation of national minorities in public and judicial authorities’ (Nepal to Croatia).

(5) ‘Take steps to make the judiciary more representative of Mauritanian society in terms of ethnic and social origin, language and gender’ (United Kingdom to Mauritania).

(6) ‘Actively consider undertaking more aggressive strategies to increase the number of people with immigrant heritage in the public service, particularly the police, civil service and the judiciary, in order to better reflect the broad diversity within France’ (India to France).

### *Transparency and access to information*

**International recommendation: ‘Selection and appointment procedures [should] be transparent and public access to relevant records be ensured’ (SR IJL (2009) UN Doc A/HRC/11/41, para 97).**

**The following state recommendations comply with the general substance of the international recommendation of the Special Rapporteur.**

**Recommendations (1), (2) and (3) can be improved by recommending a specific action to be undertaken by the state.**

(1) ‘Increase efforts to ensure the independence and transparency of the judiciary’ (Estonia to Albania).

(2) ‘Increase judicial transparency in the use of the death penalty’ (Norway to China).

(3) ‘Take necessary measures to ensure transparency in the independent appointment of judicial and prosecutorial officers’ (Australia to Venezuela).

**Recommendations (4) and (6) address the principle of access to information through free access by the rights-holders to the records of the court or information on the functioning of the court system:**

(4) ‘Fully publish and implement a plan that addresses how the Government of Montenegro intends to make appointments and promotions in the judiciary a fair and transparent process, to ensure that the independence of the judiciary is fully protected’ (UK to Montenegro).

(5) ‘Make case law from Danish courts and administrative organs publicly available and free of charge’ (Hungary to Denmark).

### *Human and material resources*

**International standard: It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions’ (Basic Principle on the Independence of the Judiciary, Principle 7).**

**International recommendation: ‘The administration of funds allocated to the court system [should] be entrusted directly to the judiciary or an independent body responsible for the judiciary.’ ‘The judiciary [should] be given active involvement in the preparation of its budget’ (SR IJL (2009) UN Doc A/HRC/11/41, para 101).**

**The following state recommendations comply with the general substance of the 1985 Basic Principles on the Independence of the Judiciary.**

**In recommendation (1) a clear prescription is, however, missing to be considered as action-orientated.**

(1) ‘Allocate increased human and financial resources in order to strengthen the independence of its judicial system’ (Angola to Djibouti).

**State recommendations (2), (3) and (4) are more action-orientated than recommendation (1) and address a specific objective to be reached:**

(2) ‘Assign resources to the Judicial Power that facilitate access to justice, particularly in rural areas’ (Spain to Tanzania).

(3) ‘Ensure, as a matter of urgency, that the national portion of the budget for the Extraordinary Courts is met’ (New Zealand to Cambodia).

(4) ‘Provide the judicial system with solid logistical and administrative foundations in order to avoid delays, procedural impasses and the replacement of judges, particularly in ongoing human rights trials’ (Switzerland to Argentina).

## Independence of prosecutors

### *Non-interference of the executive in the prosecution function*

**International standard:** ‘States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability’ (Guidelines on the Role of Prosecutors, Principle 4).

**State recommendation (1) complies with the general substance of the 1990 Guidelines on the Role of Prosecutors:**

(1) ‘Implement legal reform to ensure an independent Prosecuting Authority promoting effectiveness, impartiality and fairness of prosecutors in criminal proceedings’ (Denmark to Zimbabwe).

**State recommendation (2) has a greater potential of impact on human rights than recommendation (1) as it refers to the UN Guidelines as benchmarks for the implementation of the recommendation:**

(2) ‘Consider creating an independent prosecution authority in accordance with the United Nations guidelines and consider to fully implementing the right to a fair trial for all’ (Zambia to Zimbabwe).

### *Guidelines for the prosecuting service*

**International standard:** ‘In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution’ (Guidelines on the Role of Prosecutors, Principle 17).

**State recommendation (1) complies with the general substance of the 1990 Guidelines on the Role of Prosecutors. Guidelines on the Role of Prosecutors should be referred to, however, to ensure that the implementation of the recommendation aligns with human rights.**

(1) ‘Consider the elaboration of specific legislative guidelines for codification of discretionary penalties and dissemination of such guidelines among all judges, lawyers and prosecutors concerned’ (Azerbaijan to Saudi Arabia).

### *Human and material resources*

**International standard:** ‘Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension, and age of retirement shall be set out by law or published rules or regulations’ (Guidelines on the Role of Prosecutors, Principle 6).

**State recommendations (1) and (2) comply with the 1990 Guidelines on the Role of Prosecutors and specifically refer to the instrument to be implemented or the objective to reach. The reference to a prior human rights recommendation gives weight to the recommendation.**

(1) ‘Allocate additional resources to the State’s Prosecutor’s Office to ensure the full application of the Instructions it issued in October 2008 with regard to local war crimes proceedings’ (Netherlands to Croatia).

(2) ‘Strengthen capacity, including that of the Prosecutor-General’s Office, to examine allegations of torture and ill-treatment as recommended by the Committee against Torture’ (Denmark to Georgia).

### *Protection measures for prosecutors*

**International standard: ‘Prosecutors and their family shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions’ (Guidelines on the Role of Prosecutors, Principle 5).**

**State recommendation (1) complies with the 1990 Guidelines on the Role of Prosecutors and specifically identifies a right-holder.**

(1) ‘Strengthen the Office of the Special Prosecutor for Human Rights, and ensure that the Special Prosecutor receives proper protection against violence and threats thereof’ (Netherlands to Honduras).

## **Independence of lawyers**

### *Regulatory framework for a lawyers’ association*

**International standard: ‘Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics’ (Basic Principles on the Role of Lawyers, Principle 25).**

**State recommendations (1) and (2) comply with the general substance of the 1990 Basic Principles on the Role of Lawyers. They should specifically refer to the Basic Principles to guide the implementation of the recommendation and secure stronger impact on human rights.**

(1) ‘Take effective measures to ensure that lawyers can defend their clients without fear of harassment and can participate in the management of their own professional organisations’ (Finland to China).

(2) ‘Actively support the establishment of an independent bar association’ (Netherlands to Maldives).

**State recommendation (3) is more progressive than (1) and (2) as it refers to the principle of representativeness.**



(3) ‘Adopt a law on the bar association that recognizes the right of the bar to self-government and guarantees proper representativeness by regular elections and regional representation’ (Hungary to Ukraine).

### *Lawyers’ protection*

**International standard:** ‘Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics’ (Basic Principles on the Role of Lawyers, Principle 16).

**State recommendations (1) and (2) comply with the general substance of the 1990 Basic Principles on the Role of Lawyers:**

(1) ‘Ensure that human rights defenders, lawyers and other civil society actors are able to carry out their legitimate activities without fear or threat of reprisal, obstruction or legal and administrative harassment’ (Sweden to Azerbaijan).

(2) ‘Strengthen security for judicial staff and lawyers’ (Austria to Iraq).

**State recommendation (3) ensures a greater impact on human rights than (1) and (2) as it refers to the Basic Principles and a human rights instrument as benchmarks for the implementation of the recommendations:**

(3) ‘Respect and protect the ability of human rights defenders and lawyers to carry out their work without hindrance, intimidation or harassment, in line with the United Nations Declaration on Human Rights Defenders and the United Nations Basic Principles on the Role of Lawyers’ (United Kingdom to Russian Federation).

### *Training for lawyers in human rights*

**International standard:** Lawyers shall receive continuous appropriate education and training (Basic Principles on the Role of Lawyers, Principles 9 and 12).

**International recommendations:** International human rights law should be included in the curricula of all law faculties and law schools, and in the curricula of schools for the judiciary and the academic programmes of bar associations (SR IJL (A/HRC/14/26), para 92(f)).

**The following state recommendations comply with the general substance of the 1990 Basic Principles on the Role of Lawyers.**

**Recommendations (1) and (2) are too general to be monitored.**

(1) ‘Continue ensuring systematic human rights awareness-raising and training for all personnel working in the legal and justice system, including police, public defenders, lawyers and judges’ (Malaysia to Venezuela).

(2) ‘Continue to prioritize the allocation of resources to the key institutions in the criminal justice system and provide extensive training for judges, prosecutors, defence counsel and investigators to ensure safe prosecutions and respect for due process’ (South Africa to Liberia).

**Recommendation (3) has more potential for impact on human rights on the ground than (1) and (2) as it refers to the specific human rights issues legal professionals should be trained in. The recommendation could be improved by referring to the frequency of the training, the geographical scope and the monitoring of legal professionals’ skills, that is, impact monitoring of the training.**

(3) ‘Formally incorporate education about child sexual abuse and its prevention into the training of teachers and other professionals working with children, health professionals, lawyers and police officers’ (Slovenia to Iceland).

### *States’ level of cooperation*

In assessing states’ level of cooperation, the IBAHRI takes into account both the level of acceptance of recommendations relating to the administration of justice and the extent to which those recommendations are implemented.

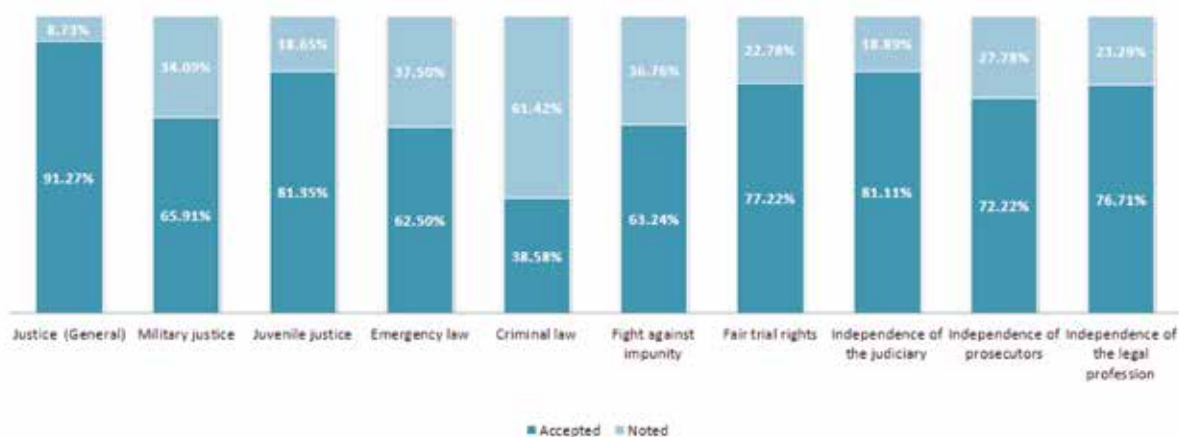
#### LEVEL OF ACCEPTANCE

States under review at the UPR are free to accept or note – reject – recommendations proposed by recommending states.

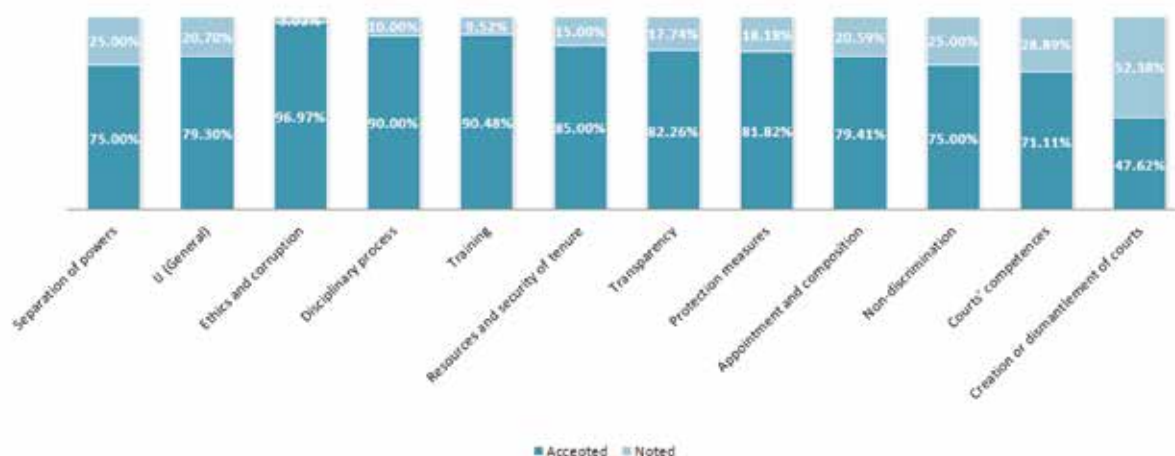
In light of Figure 11 below, it appears that recommendations relating to the independence of judges, lawyers and prosecutors are relatively well accepted, when compared with recommendations addressing criminal law, military justice or the fight against impunity. Approximately one out of every four recommendations made on the independence of judges and lawyers are not accepted. Comparatively, almost two out of every three recommendations on criminal law, and one out of every three recommendations on military justice or emergency law are noted. These recommendations concern sensitive areas touching on the protection of core societal values and national security. In most cases, these recommendations also include calls for specific actions, which renders their acceptance even less likely.

**Figure 11: Percentage of accepted recommendations related to the administration of justice (by topic and following the IBAHRI classification)**

The same is true when we look closer at recommendations related to the independence of the judiciary (Figure 12): the creation or dismantlement of courts (a 47 per cent acceptance rate), courts’ competences (a 71 per cent acceptance rate) and the separation of powers (a 75 per cent acceptance rate). The more sensitive the issue, the less often it is accepted.



**Figure 12: Percentage of accepted recommendations related to the independence of the judiciary (by issue)**



### Level of implementation

As explained in a number of guides issued to states,<sup>194</sup> the UPR recommendations, together with the rest of international human rights recommendations, are intended to complement countries’

194 See, for example, OIF, *Guide pratique. Examen périodique universel* (OIF 2013).

national human rights action plans. The idea is not to duplicate human rights processes at the domestic level, but rather to strengthen those already in existence.

In order to facilitate the integration of international recommendations coming from the UPR and treaty bodies in the national human rights action plan, in 2014 Brazil launched an online platform providing access to all regional and international human rights recommendations.<sup>195</sup> Recommendations are clustered there by topics and can be searched by keywords. The platform is a key tool to identify resonance amongst recommendations, and consequently key recommendations to be given priority. For each recommendation, the entity in charge of implementation, as well as the status of implementation, is mentioned.

Among the recommendations compiled for this report, the IBAHRI selected 225 recommendations, which were action-orientated, in order to assess the extent of their implementation. The objective was also to compare the implementation measures undertaken by states for similar recommendations. The implementation measures adopted by states were identified in the national mid-term reports and the UPR Info Mid-term Implementation Assessment reports.

The IBAHRI found that:

- For almost 39 per cent of the recommendations (87), no information was available as to their implementation.
- Among the 138 recommendations for which some information was available, 85 recommendations had been fully or partially implemented (62 per cent) and 53 had not been implemented (38 per cent). By topic, 74 per cent of recommendations pertaining to training have been fully or partially implemented, compared to 64 per cent of the recommendations regarding the composition of the judiciary and judicial appointment process, and 44 per cent of the recommendations concerning resources allocated to the judiciary.
- None of the recommendations concerning corruption (7) has been implemented.

Regarding the reporting, the IBAHRI observes that information provided by NGOs, on the one hand, and states, on the other hand, is not always easy to reconcile and draw conclusions upon. States provide mostly positive reports, while NGOs' reports are mostly negative. Furthermore, unless recommendations contain specific benchmarks, their impact on human rights on the ground is difficult to assess. When recommended, for instance, to provide training, states provide very different reports: generally on the implemented measures (setting up of a training programme, creating a training institution, translating legal material), on their choice of providing continuing education or ad hoc trainings, the subjects taught (administration of justice, national/international law) and/or the choice of the training centre or partner (NHRI).

The IBAHRI found that generally the reporting exercise was not providing any account of the impact achieved. For example, Maldives adopted a voluntary code of conduct for judges as recommended at the UPR. However, as raised by the NGO Friends of Maldives (FOM),<sup>196</sup> without monitoring the implementation of the code, the mere adoption of the code remains insufficient. More instances of

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195 The platform is available at [www.observadh.sdh.gov.br](http://www.observadh.sdh.gov.br).

196 UPR Info, Mid-term Implementation Assessment, Maldives (2013), 14.

insufficient impact monitoring can be identified. In relation to the recommendations made by Nepal and Serbia,<sup>197</sup> Croatia recognised a right to priority for the participation of national minorities in judicial institutions.<sup>198</sup> In response to a similar recommendation made by India,<sup>199</sup> France adopted programmatic measures for the promotion of diversity and the human resources policy for the prevention of discrimination.<sup>200</sup> In response to the recommendation made by Argentina,<sup>201</sup> New Zealand launched an awareness-raising campaign for women's involvement in the judiciary.<sup>202</sup> In all three cases, the impact of the measures adopted on the current participation of minorities or women in the judiciary was not documented.

As an overall conclusion, the IBAHRI observes that a more comprehensive reporting system with a clear focus on the impact on human rights on the ground is necessary. Identifying and consolidating good practices at the international level would also merit consideration.

A number of indicators and checklists have been developed at the international level in order to assess states' performance in advancing human rights in the administration of justice. Among them, the United Nations Rule of Law Indicators<sup>203</sup> translate hard and soft law instruments into a number of various indicators. In addition, the checklist of the Venice Commission on the rule of law,<sup>204</sup> the IFES checklist on judicial transparency,<sup>205</sup> the factors used by the WJP<sup>206</sup> and the indicators of the Vera Institute<sup>207</sup> are all instrumental to appraising a country's justice system from different perspectives. In order to provide information relevant to the development of their justice support programme, the European Union<sup>208</sup> and UNDP<sup>209</sup> have also developed assessment methodologies that take into account the nature of the justice system, as well as the legal traditions of the country in question.

In order to ensure comprehensive reporting at the UPR, the IBAHRI encourages the development of a model report for states to be able to assess quickly the progress as well as any remaining gaps in the

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197 Nepal recommended that Croatia should '[c]ontinue efforts for the appropriate representation of national minorities in public and judicial authorities' while Serbia recommended ensuring 'the effective participation of national minorities in public life, in decision-making processes and in executive and judicial institutions at all levels of governance'.

198 Croatia National Mid-term Report (2013), 29–30.

199 India recommended that France should '[a]ctively consider undertaking more aggressive strategies to increase the number of people with immigrant heritage in the public service, particularly the police, civil service and the judiciary, in order to better reflect the broad diversity within France'.

200 UPR Info, Mid-term Implementation Assessment, France (2011), 21.

201 Argentina recommended that New Zealand should '[i]mplement active policies to speed up and increase the representation of women, in particular in local governments, the judiciary and the health sector.

202 UPR Info, Mid-term Implementation Assessment, New Zealand (2012), 29.

203 *United Nations Rule of Law Indicators* (UN 2011).

204 European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law* (Venice, 25–26 March 2011).

205 IFES, *Judicial Transparency Checklist. Key Transparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms* (IFES, 2003). Available at: <http://www.dumay.info/pdf/Transparency/7.pdf>.

206 Available at: <http://worldjusticeproject.org/rule-of-law-index>.

207 Vera Institute of Justice, *Measuring progress toward safety and justice: a global guide to the design of performance indicators across the justice sector* (2003). Available at: <http://www.vera.org/pubs/measuring-progress-toward-safety-and-justice-global-guide-design-performance-indicators-across>.

208 European Commission, *Support to justice and the rule of Law* (European Commission 2012). Available at: [http://knjiznica.sabor.hr/pdf/E\\_publicacije/Support\\_to\\_justice\\_and\\_the\\_rule\\_of\\_law.pdf](http://knjiznica.sabor.hr/pdf/E_publicacije/Support_to_justice_and_the_rule_of_law.pdf)

209 UNDP, *A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (UNDP 2005).

domestic system. The report should use the UN Basic Principles and Guidelines and the reports of the Special Rapporteur as key benchmarks.

This would build on existing assessment tools and take into account the analysis undertaken in this report concerning the UPR recommendations relating to the administration of justice. Indicators used should be both quantitative and qualitative and include indicators of perception. In the context of the UPR, the recommendation is to use ‘progress indicators’, which would shed light on progress realised since the last UPR.

Furthermore such a monitoring process should encompass:

- a preliminary description of the legal and court system;
- progress realised in the constitutional, legal, policy, budgetary, human resources and monitoring frameworks of the independence of judges, lawyers and prosecutors (structural and process indicators); and
- progress realised in ensuring the independence, impartiality, transparency, accessibility and accountability of the administration of justice (impact indicators).

In the context of the adoption of the SDG 16 on access to justice, the IBAHRI and the International Commission of Jurists (ICJ) proposed two indicators that should be included in the international monitoring system of the administration of justice:

- existence of a specific legal framework to protect judges from external interference and arbitrary removal and punishment; and
- existence of a self-governing professional association of lawyers established through law with the mandate and authority to protect the independence and role of the legal profession, in compliance with the Basic Principles on the Role of Lawyers.

### 3.3 Conclusions of Chapter Three

Chapter Three looks at the recommendations made at the UPR over 19 sessions to assess in quantitative and qualitative terms, how these recommendations could advance human rights in the administration of justice in practice. Overall, the IBAHRI concludes that regardless of how actionable and progressive the UPR recommendations are, their monitoring is suboptimal. This could be remedied by consolidating a ‘model report’ that outlines the different components of the administration of justice in light of international human rights standards and norms. Such an approach would highlight not only the importance of the justice system in the realisation of all rights, but also the possibility to turn recommendations into more concrete actions.

The following conclusions can be reached from the study of the recommendations.

## *The administration of justice should receive more attention at the UPR and be addressed in line with other international human rights mechanisms*

The IBAHRI estimates that, out of the 38,298 UPR recommendations made over seven years, slightly more than three per cent addressed the independence of judges, lawyers and prosecutors (military and juvenile justice included) and less than two per cent the guarantees of a fair trial.

- A third of the recommendations addressing the independence of the judiciary are general.
- The independence of lawyers is only sporadically mentioned and the role of professional associations of lawyers is mentioned even less.
- The independence of prosecutors is barely addressed, in comparison to the great number of recommendations calling for prosecutions and investigations.
- Key factors impacting on the independence of judges, lawyers and prosecutors are addressed, such as training, the appointment process, material resources and security of tenure.
- Key attributes of the court system such as it being transparent, representative and participatory are too rarely mentioned.
- Explicit reference to the UN Guidelines on the Role of Judges, Prosecutors and Lawyers and the recommendations of other UN human rights mechanisms, including the Special Rapporteur, is only made sporadically.

In light of the above, the IBAHRI makes the following recommendations to recommending states:

- When making recommendations, refer to the UN Basic Principles and Guidelines and prior recommendations and good practices in the administration of justice as identified by international human rights mechanisms, especially the Special Rapporteur on the independence of judges and lawyers.
- Call for judges, prosecutors and lawyers to be recognised as subjects of specific protection measures to ensure that they carry out their professional duties without any external or internal interference.
- Call for the administration of justice to be transparent, accessible to all (through the provision of legal aid where necessary), participatory and representative of the population it serves as a requirement to ensure access to justice by vulnerable groups.
- Call for the state under review to allocate material and financial resources to the justice system, and ensure that the judiciary be given an active involvement in the preparation of its budget and enjoy autonomy in the allocation of its resources, while remaining accountable to the other branches of power for any misuse.
- Call for the legal community to receive continuous legal training on key human rights issues encountered in the country, in accordance with the recommendations of the Special Rapporteur, *and* to be involved in law reform, especially in the revision of criminal legislation.
- Call for the independence of prosecutors and respect for international human rights standards in the fight against impunity and terrorism.

## *Shortcomings in the implementation and monitoring recommendations on the administration of justice: a renewed challenge in the context of Sustainable Development Goal 16*

The absence of reporting guidelines has a detrimental effect on the quality of reporting and monitoring. It results in inconsistent formats and discrepancies between states and NGOs reporting, which renders the reconciliation of information challenging. The UPR recommendations should afford specific attention not only to the *what*, but also to the *how* to achieve a particular result. The reporting process in turn should focus on the *impact* and *progress* achieved. For instance, the adoption of an ethics code or the development of a training programme should be monitored so as to ensure that the legal profession's respect for ethics or knowledge of human rights has improved.

The IBAHRI recommends that:

- states under review should use the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors as benchmarks for monitoring the administration of justice, including the implementation of the UPR recommendations relating to the administration of justice.
- the OHCHR should disseminate the United Nations Rule of Law Indicators in order to assist states and NGOs in the monitoring of human rights in the administration of justice; and foster the use of reporting guidelines at the UPR by states and NGOs.



## **Chapter Four**

### **Country Analyses**

Chapter Four provides an analysis of the role of the UPR in advancing human rights in the administration of justice in ten countries. For each country, the IBAHRI assessed the administration of justice in that country within the 18 months prior to or following its review by the HRC (see Chapter One: Introduction).

In looking more closely at the ten countries, it is not the aim of this chapter to draw overarching conclusions on the process and the impact of the UPR. Rather, it aims to consider different *scenarios* in order to understand the strengths and weaknesses of the UPR process, which depend upon a number of criteria, such as: the extent to which the state cooperates with international and regional human rights systems; the existence of a UN country mandate; the content and the source of the information submitted to the HRC in the course of preparing the report; and how developed the justice system and the political situation in the country are, that is, whether the country is at the beginning of a political transition or whether it is a long-established democracy.

Each analysis assesses:

- the relevance of the UPR recommendations pertaining to the administration of justice in light of the information on the country justice system available to states at the time the UPR took place;
- the level of awareness of the UPR among legal professionals; and
- the involvement of lawyers' organisations in the UPR process, whether or not they were formally consulted by the government.

## 4.1 Methodology

The UPR process of each country was assessed in a systematic manner using quantitative and qualitative indicators:

- The number of NGOs making concrete recommendations on the administration of justice and the scope of the information submitted to the HRC (ie, number of issues addressed) were used to assess the extent to which objective, reliable and comprehensive information on the administration of justice was available to recommending states at the time of the review.
- The relevance of the UPR recommendations concerning the independence of the judiciary, lawyers and prosecutors was assessed through the percentage of recommendations relating to the administration of justice (quantitative dimension) and in light of the IBAHRI recommendations, prior human rights mechanisms' recommendations and other authoritative sources (qualitative dimension).
- The level of awareness of lawyers about the UPR and their level of involvement (ie, by direct consultation or voluntary engagement) was assessed through face-to-face and telephone interviews with representatives of the national bar associations, when possible and/or independent lawyers.

- The level of implementation and monitoring of the recommendations on the ground was assessed using the UPR Info Mid-term Implementation Assessment (MIA) reports and national mid-term reports, when existing.

For each indicator, the following colour code was used:

	Satisfactory
	Fair
	Unsatisfactory
	Not documented

The four main sources of information presented below were examined in order to assess the relevance of the UPR recommendations.

### *Recommendations of the IBAHRI fact-finding missions*

The IBAHRI undertakes fact-finding missions to countries where there are signs of threats to, or deterioration of, the rule of law, human rights or the independence of the legal profession. Mission reports contain findings and recommendations addressing the recommending states and the international community. Each fact-finding mission has specific terms of reference. In seven of the countries under study – Myanmar, Hungary, Egypt, Democratic Republic of the Congo (DRC), Zimbabwe, Malawi and Venezuela – the aim of the mission was to assess the status of judges and lawyers and their capacity, in general, to carry out their mission freely. In the three other countries – Azerbaijan, Swaziland and Brazil – the mission was more specific and focused on the criminalisation of freedom of association in Azerbaijan, the Suppression of Terrorism Law in Swaziland and the criminal justice system in Brazil. In most cases, specific attention was paid to the criminal system and prosecutors, and the effective role of professional organisations of lawyers in protecting their members and enhancing the rule of law and human rights.

The core objective of the IBAHRI's fact-finding missions is to gather *facts* and re-establish a complete chain of causes responsible for major deficiencies in the administration of justice as well as the promotion and protection of the individual rights of legal practitioners in the country. The primary legal instruments referred to are the UN Basic Principles and Guidelines.

### *International human rights mechanisms recommendations*

The underlying rationale of the UPR is to strengthen other international human rights mechanisms. For each country, recommendations addressed by the treaty bodies and the special procedures and relating to the administration of justice were identified using the Universal Human Rights Index. Only the recommendations made within the five years prior to the review of each country were considered as relevant for the assessment of the UPR recommendations received by this country.

Depending on the country's level of ratification and diligence in reporting, the volume of recommendations made by the treaty bodies can vary widely from one country to another. When the country has demonstrated poor cooperation with UN mechanisms, the UPR de facto substitutes those mechanisms.

## *NGOs' and other stakeholders' information*

Each country analysis in this chapter takes into account the national and mid-terms reports submitted by the state under review; the OHCHR report compiling information from UN bodies; the OHCHR report compiling submissions made by civil society actors, national human rights institutions and other stakeholders; and the UPR Info MIA reports, when available.

A quick assessment was made beforehand, comparing recommendations made by NGOs and recommendations reported by the OHCHR. Results from this exercise suggested that NGOs do not systematically make clear recommendations, and might only submit facts. It also appears that most of the content of NGOs' messages is reproduced in the OHCHR report, although the specific recommendations made by NGOs are not always reproduced.

Among lawyers' organisations, the organisation Lawyers for Lawyers has submitted information on the status of the legal profession and recommendations related thereto, for about 12 states since 2011. While interviewed, they testified the necessity to be in direct contact with the diplomatic missions to voice their recommendations. They also experienced difficulty in seeing the recommendations on legal professionals that had been adopted.

### **WJP** RULE OF LAW INDICATORS

The WJP's Rule of Law Index<sup>210</sup> is a quantitative assessment of perception of the rule of law in states, which started in 2009. It measures how the rule of law is experienced by ordinary people in 99 countries around the globe. The WJP rule of law indicators have been available since 2012 in relation to nine key factors, namely limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, civil justice, criminal justice and informal justice. The WJP gathers a number of country information facts and establishes a rating of the country's performance, in comparison with the rating of countries: of its geographical group (eg, Georgia scores 0.5 (on a scale where 0 is the lowest and 1 the best performance), while the average of the region (Eastern Europe and Central Asia) is 0.6); and of the economic group (eg, the United Kingdom ranks 0.5 in access to justice while the average in high-level-income countries is 0.8).

## **4.2 Findings**

### *Asia*

#### MYANMAR

The HRC reviewed the human rights situation in Myanmar for the first time in January 2011 before the country embarked on a process of reform. The second review took place in November 2015, again at a cross-road, a few days before the general elections. Historically, Myanmar's cooperation with international human rights mechanisms has been limited. Myanmar has yet to become

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210 <http://worldjusticeproject.org/rule-of-law-index>.

party to the ICCPR, the International Covenant on Economic, Social and Cultural Rights,<sup>211</sup> the Convention against Torture and the Rome Statute of the International Criminal Court establishing the International Criminal Court. Myanmar has, however, signed and ratified a number of treaties, including, inter alia, the four Geneva Conventions (but not the additional protocols), the Genocide Convention, the Convention on the Rights of the Child (but not its optional protocol on the involvement of children in armed conflict).

The country has cooperated to some extent with the Special Rapporteur on the situation of human rights in Myanmar ('Special Rapporteur on Myanmar'), which was created in 1992. However, the government has not accepted visits from other HRC Special Procedures. A few months before the first UPR, in an official response to the 2010 report presented by the Special Rapporteur on Myanmar to the General Assembly of the United Nations, the government of Myanmar 'categorically reject[ed] the entire report and dissociat[ed] itself from it'.<sup>212</sup> In this context, the fact that Myanmar accepted 77 recommendations out of 197 UPR recommendations, at the first UPR, could have been seen as a modest but tangible step towards a human rights dialogue at the international level. However, the impact of the first UPR has remained limited and the situation has degraded in many aspects. The human rights situation in the country – particularly for ethnic and religious minorities – warranted the extension of the Special Rapporteur mandate at the UN HRC until now.

In a fact-finding mission conducted by the IBAHRI in 2012, the high-level delegation shed light on systemic and far-reaching impediments to the democratic process in Myanmar.<sup>213</sup> The mission's report reassessed the key priorities at legislative and institutional levels to establish the separation of powers and the independence of judges and lawyers. A reform of the judiciary to ensure independence and impartiality plus accountability on the part of the military were two of the four 'core human rights elements' the Special Rapporteur identified as necessary for the democratic transition to which the government of Myanmar has committed.<sup>214</sup>

As demonstrated below, the independence of the judiciary and the accountability of the military received less attention at the UPR than the two other core elements, namely the release of all prisoners of conscience and the review and reform of specific national legislation, in compliance with international human rights standards. The vast majority of the UPR recommendations tackled the ratification of international instruments, minorities' rights and freedom of opinion and expression.<sup>215</sup>

At the two UPRs, the lack of separation of powers was hardly even mentioned. The UN Country Team (UNCT), in preparation for the 2011 UPR, had submitted a report to the HRC, which explicitly presented Myanmar as a 'military government'.<sup>216</sup> The report clearly established that the military has the power to veto

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211 Myanmar has signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights. Information on the status of reporting is available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MMR&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MMR&Lang=EN).

212 UNGA Res 65/368 (15 September 2010), UN Doc A/RES/65/368, Annex, para 10.

213 IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (IBAHRI 2012).

214 UNGA, *Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana* (10 March 2010), UN Doc A/HRC/13/48, para 14.

215 Source: UPR Info statistics, available at [www.upr-info.org/database/statistics/index\\_sur.php?fk\\_sur=119&cycle=](http://www.upr-info.org/database/statistics/index_sur.php?fk_sur=119&cycle=).

216 UNCT, *Submission by the United Nations Country Team Myanmar for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review Submission to the Human Rights Council* (UNCT 2010), 2. OHCHR, 'Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with para 15 (b) of the annex to Human Rights Council resolution 5/1 – Myanmar' (15 November 2010) UN Doc A/HRC/WG.6/10/MMR/2, paras 6 and 22.

legislation, while the Supreme Court has no jurisdiction over military justice or constitutional matters. The Ministry of Home Affairs, the focal ministry for the UPR process, is itself headed by a military officer. Despite these well-known facts, none of the UPR recommendations, neither in 2011 nor in 2015, tackled the issue of separation of powers in the country and interference by the military in executive, parliamentary and judicial powers. Only a few states echoed the concerns raised by the UNCT and the Special Rapporteur as to the impunity and immunity of military personnel.<sup>217</sup> Recommendation 107.6 made by New Zealand, in 2011, called upon the state to ‘repeal Art.445 of the 2008 Constitution, which effectively grants total immunity to states and military personnel to act with impunity, even for criminal offenses’.<sup>218</sup>

Similarly, the independence of the judiciary was addressed in a superficial manner in 2011 and was almost absent in 2015. In 2011, five states addressed the independence of the judiciary, all of which have done so in very general terms.<sup>219</sup> The government accepted the recommendation made by Italy, but rejected those made by Canada, Ireland, Turkey and New Zealand. While evidence has been submitted of the persistent lack of independence of judges,<sup>220</sup> some of which are even appointed by the military, only one recommendation called upon Myanmar to guarantee that judges can ‘perform their professional functions without improper interference’.<sup>221</sup> Almost paradoxically, states put a heavy emphasis on the release of political detainees<sup>222</sup> and the need for establishing and then strengthening a national human rights commission.

In 2011, in response to recommendations urging for a democratic legislative reform, Myanmar agreed to ‘amend its domestic law to ensure that people in the country are able to enjoy their fundamental rights’.<sup>223</sup> However, at the same time, it rejected the recommendation made by New Zealand to ‘repeal

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217 UNHRC, *Report of the Working Group on the Universal Periodic Review – Myanmar* (24 March 2011) UN Doc A/HRC/17/9, para 19 (Sweden), para 59 (Ireland). UNHRC, *Report of the Working Group on the Universal Periodic Review* (10 November 2015) UN Doc A/HRC/WG.6/23/L.9, para 5.81 (Lithuania).

218 UNHRC, *Report of the Working Group on the Universal Periodic Review – Myanmar* (24 March 2011) UN Doc A/HRC/17/9, Rec 107.6.

219 Recommendation 104.37 (Italy): ‘Ensure the independence and impartiality of the judiciary and guarantee due process of law’; Rec 107.37 (Canada): ‘Thorough reform of the judiciary to ensure compliance with due process and fair trial standards, including independence and impartiality’; Rec 107.38 (Ireland): ‘Initiate a review and reform of the judiciary to assure its independence and impartiality, and that specific measures are taken to ensure that military and police personnel respect international human rights and humanitarian law’; Rec 107.70 (Turkey): ‘Seek technical assistance from the United Nations to reform the judiciary, to establish accessible judicial remedies as well as to alleviate poverty’; Rec 107.5 (New Zealand): ‘Repeal laws that are not in compliance with international human rights law and review its legal system to ensure compliance with the rights to due process and a fair trial and respect for the rule of law’.

220 See, inter alia, submissions made by the IBAHRI and the ICJ to the UPR of the Republic of the Union of Myanmar (March 2015).

221 UNHRC, *Report of the Working Group on the Universal Periodic Review – Myanmar* (10 November 2015) UN Doc A/HRC/WG.6/23/L.9, para 6.73 (Hungary).

222 Ten states mentioned during the interactive dialogue that more than 2,000 prisoners of conscience remained detained in Myanmar. UNGA, ‘Report of the Working Group on the Universal Periodic Review’ (24 March 2011) UN Doc A/HRC/17/9, para 19 (Sweden), para 21 (Japan), para 26 (UK), para 37 (Brazil), para 61 (Belgium), para 63 (Switzerland), para 66 (Korea), para 72 (USA), para 74 (New Zealand) and para 79 (Portugal). Thirteen states called for their release. All their recommendations were rejected. The head of Myanmar’s delegation explained during the interactive dialogue that ‘those referred to as “political prisoners” and “prisoners of conscience” are in prison because they had breached the prevailing laws and not because of their political beliefs’. UNHRC, ‘Report of the Working Group on the Universal Periodic Review – Myanmar’ (27 May 2011) UN Doc A/HRC/17/9/Add.1, para 51. Four years later, the release of political prisoners was again called upon by a number of states. UNHRC, ‘Report of the Working Group on the Universal Periodic Review – Myanmar’ (10 November 2015) UN Doc A/HRC/WG.6/23/L.9. See recommendations made by Germany, Greece, Spain, Czech Republic, United States, Croatia, Norway and France.

223 UNHRC, *Report of the Working Group on the Universal Periodic Review – Myanmar* (24 March 2011) UN Doc A/HRC/17/9, Rec 104.37 (Italy).

laws that are not in compliance with international human rights law and review its legal system to ensure compliance with the rights to due process and a fair trial and respect for the rule of law'. The 2012 IBAHRI report cited specific laws requiring significant amendments, starting with the citizenship law, a source of systemic discrimination in the country.<sup>224</sup> The 2015 recommendations gave account of the worrying results of efforts to undertake law reform: the four laws on 'Protection of Race and Religion' and the News Media Law were denounced as *liberticide* by recommending states. The 1982 Citizenship Law still remains to be amended to ensure equal access to citizenship.

One great success following the IBAHRI advocacy efforts and work in establishing an independent association of lawyers at the national level was that three states recommended in 2015 ensuring independence of the legal profession and establishing an independent and self-governing Bar Council.<sup>225</sup> This constitutes a major step forward, especially considering the legislative reform process still facing the nascent democracy.

Looking at the dialogue between the state and civil society, the government has claimed that civil society had been consulted for the 2011 and 2015 UPR. The newly-constituted Myanmar National Human Rights Commission assisted the government with national consultations in preparation of the second report and some civil society organisations have been included in a joint workshop with the government. However, the validity of these consultations is questionable. It has come to the IBAHRI's attention that some members of civil society have expressed a fear of facing a backlash for submitting stakeholder reports as the organisation's name would be cited in the footnotes of the OHCHR summary. The OHCHR office in Bangkok has played a minor role regarding civil society involvement, but has been instrumental in gathering information from UN agencies. The government has not accepted formal assistance from the OHCHR in the preparation of its second national report.

In February 2015, the IBAHRI organised a meeting with 60 independent lawyers from around the country and discussed the UPR. It became abundantly clear during the event that the level of awareness among lawyers about the UPR is extremely low – only two out of the 60 participants had heard about the UPR process, one through civil society groups and another through human rights training received outside Myanmar. The lack of familiarity with the UPR process reveals a more acute problem of acquaintance of the legal profession in Myanmar with international human rights law and international human rights mechanisms. At the same time, Myanmar ranks among the top recipients of development aid and around 20 agencies present in Myanmar now take part in monthly 'rule of law' coordination meetings in Rangoon.

1. The UPR is based on objective, reliable and comprehensive information on the administration of justice
2. Key issues in the administration of justice were appropriately addressed at the UPR
3. Professional organisation of lawyers were involved in the UPR process
4. The UPR recommendations were implemented and monitored on the ground



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224 IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (IBA HRI 2012). UPR Info, Mid-term Implementation Assessment, Myanmar (2014), 63, Rec 37.

225 Canada, Hungary and Austria.

## Eastern European Group

### AZERBAIJAN

Azerbaijan has repeatedly come under fire for jailing opponents, and obstructing democracy. The climate for freedom of expression – along with human rights more broadly – has been steadily deteriorating for many years, as the government worked to silence all forms of criticism and dissent. In recent years, there has been an unprecedented crackdown on NGOs portrayed as ‘allied of foreign enemies’, forcing many to close down. Lawyers who have been associated with the cause of their clients have been collateral victims of this climate of repression.<sup>226</sup> In spite of that, the government has maintained a continuous dialogue with international human rights mechanisms. In 2009, the HRC and four treaty bodies successively reviewed the human rights situation in Azerbaijan.<sup>227</sup> At that time, a number of Special Rapporteurs had visited the countries.<sup>228</sup> In April 2013, the HRC reviewed Azerbaijan for the second time.

The IBAHRI set up a fact-finding mission eight months after the second UPR, in December 2013. The objective of the mission was to assess the right to a fair trial in freedom of expression cases. The IBAHRI report highlighted the systematic use of criminal law, and especially the crime of defamation, against journalists and others involved in cases involving freedom of expression. It also highlighted the systematic interference of the executive in the judiciary and the national bar association, the Bar Association of the Republic of Azerbaijan (BAA), as the key obstacle to enjoyment of fair trials rights. At the same time, the report identified a continuing shortage of defence lawyers, made worse by a bar association that, rather than defending the interests of its members, pursued disciplinary measures against those carrying out politically sensitive work.<sup>229</sup> Overall, despite some important reforms<sup>230</sup> – in particular in relation to the number of courts and training of judges – and the constitutional

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226 IBAHRI, *Azerbaijan: Freedom of Expression on Trial* (IBAHRI 2014), 37.

227 See Concluding Observations of the CCPR (13 August 2009) UN Doc CCPR/C/AZE/CO/3; Concluding Observations of the CEDAW (7 August 2009) UN Doc CEDAW/C/AZE/CO; Concluding Observations of the CERD (7 September 2009) UN Doc CERD/C/AZE/CO/6; and Concluding Observations of the CAT (8 December 2009) UN Doc CAT/C/AZE/CO/3.

228 Special Rapporteur on freedom of religion (26 February to 5 March 2006) UN Doc Res A/HRC/4/21/Add.2. Special Rapporteur on independence of judges and lawyers; (R on 5 February 15). Special Rapporteur on water and sanitation. Representative of the Secretary General on Internally Displaced Persons (2–6 April 2007) Report A/HRC/8/6/Add.2. Special Rapporteur on freedom of opinion and expression (22–28 April 2007) Report A/HRC/7/14/Add.3. Successively, between the first and second UPR, the country was reviewed by the following special procedures: Representative of the Secretary General on Internally Displaced Persons (19–24 May 2010); Special Rapporteur on health (16–23 May 2012); Special Rapporteur on violence against women (25 November to 5 December 2013); Special Rapporteur on IDPs (18–24 May 2014); Working Group on Business and Human Rights (18–27 August 2014).

229 IBAHRI, *Azerbaijan: Freedom of Expression on Trial* (IBAHRI 2014).

230 Government of Azerbaijan, *Interim report of the Government of the Republic of Azerbaijan on the implementation of the recommendations by the Working Group of the UN Human Rights Council on the Universal Periodic Review with respect to the first report of the Republic of Azerbaijan* (17 January 2012), 5–7. Treaty bodies noted that despite the reforms undertaken and the progress made during the reporting period, through, inter alia, amendments to the Judges Act, the adoption of the Judicial Council Act, the establishment of the statute of the Judges’ Selection Committee and the Code of Ethics for Judges, the judiciary is still not independent and corruption remains a serious problem. See Concluding Observations of the CCPR (13 August 2009) UN Doc CCPR/C/AZE/CO/3, and Concluding Observations of the CAT (8 December 2009) UN Doc CAT/C/AZE/CO/3.



guarantees of judicial independence, the independence of judges and lawyers continues to be repetitively infringed.<sup>231</sup>

What is more, these same problems have been unsuccessfully raised in numerous resolutions of the Parliamentary Assembly of the Council of Europe, judgments of the European Court of Human Rights, decisions of the Committee of Ministers, and reports and statements by the Commissioner for Human Rights. Given the context in which legally binding judgments of the European Court of Human Rights are not being implemented, a peer-review mechanism, such as the UPR, can serve as a platform for recommendations to gain political traction. However, for the UPR to fulfil its potential of having a ripple effect, recommendations on the administration of justice, particularly from Azerbaijan's strategic partners, should be more powerful and pervasive.

The IBAHRI observes that the 2009 and 2013 UPR processes primarily addressed issues of freedom of expression, freedom of assembly and freedom of the press, as well as women's and children's rights. The independence of legal professionals and the role of the judiciary were rather poorly addressed.<sup>232</sup>

In addition to general recommendations pertaining to the administration of justice,<sup>233</sup> a few recommendations addressed the training of judges on specific human rights issues, such as sexual orientation or gender identity and the protection of children, women and minorities<sup>234</sup> and the strengthening of the juvenile justice system.<sup>235</sup> In 2009, some recommendations addressed the representation of women in the judiciary<sup>236</sup> and access to justice for victims of violence.<sup>237</sup> In 2013 the focus shifted to providing due process for prisoners of conscience<sup>238</sup> and facilitating access to justice

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231 UN Special Rapporteur on the independence of judges and lawyers, Communication to Azerbaijan (2015).

232 Source: UPR Info database, country statistics: available at [www.upr-info.org/database/statistics/index\\_sur.php?fk\\_sur=11&cycle](http://www.upr-info.org/database/statistics/index_sur.php?fk_sur=11&cycle).

233 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, Recs 96.21 (Mexico), 96.16 (Czech Republic). UNHCR, *Report of the Working Group on the Universal Periodic Review* (5 July 2013) UN Doc A/HRC/24/13, Rec 109.90.

234 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20 Rec 96.7 (Czech Republic): 'Provide law enforcement and judicial officials with specific education-sensitivity training towards the protection of children, women and persons of minority sexual orientation or gender identity'. UNHRC, *Report of the Working Group on Universal Periodic Review* (5 July 2013) UN Doc. A/HRC/24/13, Recs 109.38 (Malaysia), 109.41 (Republic of Korea), 109.42 (Pakistan) and 109.43 (Philippines).

235 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, Rec 96.11 (Brazil), and Rec 96.12 (Czech Republic). UNCHR, *Report of the Working Group on Universal Periodic Review* (5 July 2013) UN Doc A/HRC/24/13, Recs 109.96 (Uruguay), 109.97 (Hungary), 109.98 (Kazakhstan) and 109.99 (Czech Republic).

236 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, Rec 109.64 (Ecuador).

237 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, Recs 96.8 (France) and 96.9 (Lithuania). UNCHR, *Report of the Working Group on the Universal Periodic Review* (5 July 2013) UN Doc A/HRC/24/13, Rec 109.83 (Italy).

238 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (5 July 2013) UN Doc A/HRC/24/13, Recs 109.82 (Australia) and 109.125 (United States).

for migrants.<sup>239</sup> Despite the alarm raised by treaty bodies about the independence of the judiciary after the 2009 UPR,<sup>240</sup> only two states addressed the issue during the interactive dialogue in 2013.<sup>241</sup>

Regarding lawyers, the IBAHRI notes that it was only in the 2013 UPR process that their protection was specifically recommended. During the interactive dialogue, Belgium questioned Azerbaijan on the limited number of lawyers taking an active part in the fight against impunity.<sup>242</sup> The Czech Republic and Sweden recommended that lawyers, together with human rights defenders and other civil society actors, are enabled to carry out their legitimate activities freely.<sup>243</sup>

While not every observation made by treaty bodies on the administration of justice was echoed by the states during the UPR,<sup>244</sup> almost every UPR recommendation on the administration of justice reverberated concerns previously raised either by the treaty bodies<sup>245</sup> or the Special Rapporteur on freedom of expression. However, both in 2009<sup>246</sup> and 2013,<sup>247</sup> explicit references by states to human rights mechanisms and human rights instruments were sporadic. Furthermore, the UPR recommendations tended to be less categorical than those of the treaty bodies. For instance, in 2009, no state *explicitly* recommended lifting the criminal constraints on freedom of expression as recommended by the Special Rapporteur in 2008. States recommended the need to ‘change the criminal legislation provisions’<sup>248</sup> or to ‘consider modifying or repeal’.<sup>249</sup> It was only in 2013 that clear recommendations to decriminalise freedom of association were made.<sup>250</sup>

Looking at the impact of the recommendations made in 2009, Azerbaijan accepted all recommendations pertaining to granting access to justice for women,<sup>251</sup> and victims of domestic

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239 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (5 July 2013) UN Doc A/HRC/24/13, Rec 109.69 (Indonesia).

240 CCPR/C/AZE/CO/3 (HRC 2009).

241 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, para 33.

242 UNHRC, *Draft Report of the Working Group on the Universal Periodic Review – Azerbaijan* (2 May 2013) UN Doc A/HRC/WG.6/16/L.11 (2013), para 23.

243 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, Recs 109.110 (Czech Republic) and 109.111 (Sweden).

244 No recommendation echoed the recommendations of the CEDAW and CRC to criminalise the rape and trafficking of children.

245 Recommendations from the Human Rights Committee, the CERD and CEDAW concerning juvenile justice, access to justice (CCPR/C/AZE/CO/3 (HRC, 2009)), especially by migrants (E/C.12/AZE/CO/3 (CESCR, 2013); CMW/C/AZE/CO/1 (CMW 2009)) and women victims of violence (CEDAW/C/AZE/CO/4 (CEDAW, 2009)), due process for detainees and human rights training for the judiciary were echoed.

246 In 2009, out of 58 statements made by the delegations, nine states referred to recommendations made by treaty bodies and/or Special Procedures, one to the recommendations of the Council of Europe and one to the recommendations made by the OSCE. See UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, paras 31, 33, 37, 40, 41, 47, 48, 70 and 74. In 2013, reference to international human rights mechanisms substantially decreased to two states’ interventions. See UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (5 July 2013) UN Doc A/HRC/24/13, paras 46 and 64.

247 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20, paras 46 and 64.

248 *Ibid*, Rec 96.14 (Lithuania).

249 *Ibid*, Rec 96.14 (Netherlands).

250 UNHRC, *Report of the Special Rapporteur on Freedom of Expression 7/14* (2008) UN Doc A/HRC/7/14/Add.3. See also CERD/C/AZE/CO/6 (CERD 2009); CCPR/C/AZE/CO/3 (HRC 2009).

251 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20 Rec 96.8.

violence,<sup>252</sup> but ‘noted’ the recommendations on criminal law reform and the administration of justice. Overall, Azerbaijan accepted only 57 of the 91 recommendations in 2009. Conversely, in April 2013, Azerbaijan accepted 163 of the 167 recommendations. However, the prospect of their implementation seems to be poor.

This is particularly the case for one of the main issues addressed by the UPR: the decriminalisation of defamation. Despite Azerbaijan’s 2012 National Human Rights Action Plan, which contained a pledge to decriminalise defamation by the end of 2012, Parliament passed legislation extending criminal defamation provisions to online content in May 2013. During the interactive dialogue that same month, the state representative stated that the law would be reviewed with reference to international standards and the case law of the European Court of Human Rights. The representative conceded deficiencies in the judicial interpretation of the law. However, he also made clear that Azerbaijan’s legislation was ‘in full compliance with international standards’ and that ‘an analysis was carried out of similar laws on all European states, and it was found that sanctions provided for in the criminal code of Azerbaijan are in line with similar sanctions in other Member States of the Council of Europe’.<sup>253</sup>

In order to improve the effectiveness of the UPR process, not only do the UPR recommendations need to be more potent, but they also need to come from strategic partners of the country under review.<sup>254</sup> The foremost donor countries in the justice sector<sup>255</sup> in Azerbaijan have failed to make sufficient recommendations on the administration of justice.<sup>256</sup> Germany, the main and most stable donor on justice system reforms, only made a recommendation regarding pre-trial detention. Japan, which had funded justice-related projects, mainly aimed at improving infrastructure and e-justice, focused its recommendations on building the capacities of police personnel. The USA, which works closely with the Azerbaijani government agencies and has allocated a significant amount of grants to economic development and democracy projects over the last years, recommended the release of political prisoners.<sup>257</sup> Norway recommended Azerbaijan to ‘abolish relevant articles of the criminal code which effectively serve as defamation provisions’.<sup>258</sup>

In preparation of the 2013 UPR, Intigam Aliyev, then Chair of the NGO Legal Education Society, an Azerbaijani civil society organisation, met with different missions in addition to the information session organised by UPR Info. Mr Aliyev is an award-winning human rights activist working to defend the rule of law in Azerbaijan and has represented more than 100 victims of alleged human rights breaches before the European Court of Human Rights. Mr Aliyev’s statement presented a

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252 *Ibid*, Rec 96.9.

253 UNHRC, *Report of the Working Group on Universal Periodic Review – Azerbaijan* (5 July 2013) UN Doc A/HRC/24/13, para 56.

254 For more information on Azerbaijan’s trade partners, see [www.azerbaijans.com/content\\_1679\\_en.html](http://www.azerbaijans.com/content_1679_en.html).

255 Main country donors on justice system reform in Azerbaijan (OECD data): 2009: Canada, Germany, Norway, Finland, UK and USA; 2010–2013: Germany, Japan, Norway, UK, USA, Finland, South Korea and Slovenia.

256 Recommending states on the administration of justice and criminal legislation, in 2009: Czech Republic, Brazil, Japan, Chile, Mexico, France, Lithuania, Netherlands, Norway and Ireland; in 2013: Nigeria, Ecuador, France, Malaysia, Republic of Korea, Pakistan, Philippines, Uruguay, Hungary, Kazakhstan, Czech Republic, Sweden, Indonesia, Italy, United States, Austria, Norway, Canada and the Netherlands.

257 UNHRC, *Report of the Working Group on the Universal Periodic Review – Azerbaijan* (29 May 2009) UN Doc A/HRC/11/20 Rec 109.125.

258 *Ibid*, Rec109.126.

worrying picture of the lawyer's working environment and the pressure exercised by the government and the BAA on the profession. In August 2014, Mr Aliyev was sentenced to seven-and-a-half years' imprisonment for tax evasion and abuse of authority.<sup>259</sup>

The IBAHRI, through its work with Azerbaijani human rights lawyers, has observed a lack of knowledge of the UPR as a human rights mechanism among the Azerbaijani legal profession. This impedes the dialogue between local lawyers and the international community. The IBAHRI observes that lawyers who had been working with NGOs, before they were forced to close, are more familiar with the UPR process. One interviewee described the UPR as 'a new trend in Azerbaijan' that will certainly receive more and more attention. Another participant mentioned that the international community needs to better understand the situation in Azerbaijan. In the current context, a number of initiatives have been encouraged by the Council of Europe and donor countries in order to address the shortcomings of public institutions in place. However, as mentioned by one of the interviewed lawyers, imported solutions are currently disconnected from the other institutions. For instance, the Justice Academy established under the aegis of the Council of Europe is currently the only institution training legal professionals in human rights.<sup>260</sup> No human rights education is provided by public universities or the BAA. Another example is the recently created institution of the ombudsman, which promises great potential, but which is currently disconnected from judges and prosecutors, who are the ones directly applying the law and human right norms. Unless the UN standards on judges and lawyers are genuinely domesticated, imported solutions will remain insufficient. Azerbaijani lawyers interviewed were confident, however, that the UPR can play a role in highlighting the state's duty to put into place an independent organisation of legal professionals and re-establish and redefine the system of checks and balances currently in place. 'NGOs have vanished. We need to get the information of what is happening in the country widely disclosed. We need questions and recommendations from the international community for the government to take action.'

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## HUNGARY

The review of Hungary by the HRC took place in May 2011 – one month after Hungarian Parliament had passed a new constitution for the country: the Fundamental Law of 25 April 2011. The new

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259 IBAHRI press release, 'IBAHRI urgently calls on Azerbaijani Government to review sentencing of human rights lawyer Intigam Aliyev' (6 May 2015). Available at: [www.ibanet.org/Article/Detail.aspx?ArticleUid=cefb509-e783-4e5c-844c-e514373dac10](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=cefb509-e783-4e5c-844c-e514373dac10).

260 One of the lawyers interviewed mentioned that, in 2007, a decree was passed that forbids any private university to teach law. The fact that only public universities inherited from the Soviet regime could teach law gives no space for human rights. In November 2014, Parliament changed the law so that only lawyers of the Collegium would defend criminal cases and all lawyers working on human rights cases were disbarred from the Collegium. Conversely, some good practices should be highlighted and some sound improvement looked for.

coalition government had gained a two-thirds (66 per cent) parliamentary majority in the April 2010 election, which enabled it to adopt and amend the new Fundamental Law, and other sensitive pieces of legislation without giving the opposition or civil society sufficient opportunity to participate in the drafting process. The legal reform also created a new National Judicial Office and its politically appointed president was entrusted with the powers of judicial appointment, supervision and case allocation. In addition, the Constitutional Court saw its power to review legislation limited.

The circumstances of the review of Hungary therefore raise the question of the responsiveness of the UPR process to a rapidly evolving political and legal environment.

One NGO, the Hungarian Helsinki Committee (HHC), drew the attention of the HRC to ‘the removal of checks and balances from the constitutional framework in which human rights are enforced’.<sup>261</sup> The submission described that:

‘since the elections a considerable number of the bills adopted, implementing the program of the Government, were introduced to the Parliament by individual MPs. This method was aimed at eluding the legal provisions guaranteeing the publicity of the procedure of preparing bills, since these rules do not apply to bills introduced by MPs. The Constitution was amended already seven times since the elections. In a number of cases, MPs tried to legitimize unconstitutional proposals by passing amendments of the Constitution.’<sup>262</sup>

The HHC referred explicitly to questionable constitutional amendments aimed at putting the appointment of constitutional judges in the hands of the Parliament, and limiting the courts’ power to review legislation. The OHCHR reporting on these fundamental points summarily stated: ‘HHC reported that the new Government started to prepare a new Constitution without giving proper reasons on why it was necessary. HHC recommended, inter alia, that the Constitution should not be amended on an ad hoc basis [*sic*].’<sup>263</sup>

To some extent, these concerns were echoed during the interactive dialogue held by the HRC in May 2011. Pakistan asked how the government intended to build national consensus on the constitution.<sup>264</sup> Germany and Italy, too, questioned why the Constitution now limited the jurisdiction of the Constitutional Court.<sup>265</sup> In line with the statements made by Ecuador<sup>266</sup> and Norway,<sup>267</sup> Australia recommended that Hungary should ‘ensure that legislation introduced giving effect to the new Constitution complies with Hungary’s international human rights obligations’.<sup>268</sup>

Most of the UPR recommendations, however, addressed minorities’, migrants’ and women’s rights. Issues related to the Roma community were extensively discussed from different angles as well. The

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261 Hungarian Helsinki Committee, *Submission by the Hungarian Helsinki Committee for the UN Universal Periodic Review 11th session, May 2011* (8 November 2010).

262 *Ibid.*

263 OHCHR, *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 – Hungary* (28 January 2011) UN Doc A/HRC/WG.6/11/HUN/3, para 2.

264 UNHRC, *Report of the Working Group on the Universal Periodic Review – Hungary* (11 July 2011) UN Doc A/HRC/18/17, para 38.

265 *Ibid.*, para 59.

266 *Ibid.*, para 35.

267 *Ibid.*, paras 57–58.

268 *Ibid.*, Rec 94.15.

justice system was only addressed incidentally insofar as recommendations were made to ensure access to justice to victims of domestic violence<sup>269</sup> and hate crimes<sup>270</sup> as well as to provide training for judicial officials on hate and racial crimes.<sup>271</sup>

The rule of law deteriorated in the months following Hungary's UPR. For instance, at the end of 2011, the Hungarian Parliament passed legislation introducing a mandatory retirement for judges over the age of 62, causing the early retirement of over 200 judges, prosecutors and public notaries. In response, the European Commission launched an accelerated infringement procedure against Hungary for breaching EU law in respect of, among other issues, matters affecting the judiciary. The EU values in question are 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.<sup>272</sup> Later that year, the European Commission brought an action against Hungary before the Court of Justice of the European Union, which held that the radical lowering of the retirement age for Hungarian judges constituted unjustified discrimination on grounds of age.<sup>273</sup>

In March 2012, the IBAHRI deployed a fact-finding mission delegation to assess the ability of judges and lawyers to carry out their professional duties freely. In its mission report, published in September 2012, the IBAHRI concluded that, cumulatively, the legislative reforms, 'undermined the independence of the judiciary and the necessary democratic checks and balances that are essential to the rule of law'.<sup>274</sup> The outcome recommendations made by the IBAHRI addressed both the separation of powers and the independence of the judiciary. Among them, the IBAHRI recommended establishing a panel to review the new Fundamental Law to assess how it is operating in practice and to suggest amendments. It also recommended the government of Hungary to refrain from using non-standard parliamentary procedures in order to legislate in areas affecting fundamental aspects of public life, and cease the practice of overturning Constitutional Court judgments with which it disagrees.<sup>275</sup>

As a result of the unfortunate timing of the UPR, the 2014 mid-term report submitted by Hungary on the implementation of the UPR recommendations did not provide an account of the major human rights issues within Hungary over the three previous years. Neither did NGOs take the opportunity of the UPR Info MIA to raise those issues. The main impact of the UPR in relation to the administration of justice was to inform, to some extent, the drafting of a new criminal code,<sup>276</sup> in line with the recommendations made by treaty bodies and the Council of Europe prior to the adoption of the new Constitution. Access to justice for victims of domestic violence, as recommended,<sup>277</sup> was strengthened

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269 *Ibid*, Rec 94.10 (United States); Rec 94.66 (Finland).

270 *Ibid*, Rec 94.83 (Austria).

271 *Ibid*, Recs 94.53 (United Kingdom), 94.82 (Norway), 94.83 (Austria) and 94.85 (Canada).

272 EU press release, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary' (Strasbourg, 17 January 2012).

273 ECJ Case C-286/12 (*European Commission v Hungary*) (4 December 2012).

274 See IBAHRI, *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary* (IBAHRI 2012), 6 at [www.ibanet.org/Article/Detail.aspx?ArticleUid=93e2c33c-71e5-4ab5-89a7-299f5c5752ce](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=93e2c33c-71e5-4ab5-89a7-299f5c5752ce).

275 *Ibid*, 7–8.

276 Source: response from the Government of Hungary to the questionnaire sent by the IBAHRI, received on 24 March 2015.

277 UNHRC, *Report of the Working Group on the Universal Periodic Review – Hungary* (11 July 2011), UN Doc A/HRC/18/17, Rec 94.66 (Finland).

on this occasion. Juvenile justice was also addressed at the UPR<sup>278</sup> and a new legislative package on child-friendly justice was adopted by modifying criminal and criminal procedural legislation. Finally, following the UPR recommendations made at the UPR by the United Kingdom, Norway, Austria and Canada,<sup>279</sup> the government made a proposal to the Hungarian Judicial Academy of the National Office for Judiciary in order to include in its training programme the issue of racially motivated crimes. According to the Act on the status and revenue of judges, which came into effect on 1 January 2004, every judge is obliged to participate in free and regular courses organised by the Hungarian Judicial Academy, including ones on hate crimes.

The succession of events in the case of Hungary may have been too fast for the UPR to serve as an early warning process. At the same time, the fact that the Constitution was adopted in haste with no meaningful contribution from the opposition and civil society clearly did not attract the international attention it should have had. The Constitution is the building block for democracy, and the foremost legal act through which a state demonstrates respect for the rule of law. A government cannot revise or amend the Constitution lightly without sending a strong signal of disregard for the rule of law.

Nonetheless, it is not to be excluded that the UPR serves as an early warning mechanism. The interactive dialogues, which take place at the time of the review and before the adoption of the UPR Working Group's report, provide key opportunities for addressing issues that could have arisen in between.

Another noticeable feature in relation to the UPR process in the case of Hungary is the relatively low number of NGO submissions, with seven contributions, including one joint statement. This constitutes one of the lowest levels of civil society participation in the UPR process. Lawyers that were consulted contributed to the UPR in relation with the work of an NGO. Lawyers tend to privilege hard law mechanisms – such as the European Convention on Human Rights – that have a stronger bargaining power compared to other non-binding international mechanisms. A submission to the UPR process was likened to a 'moral duty' by one of the lawyers interviewed. However, although NGOs are unwilling to prioritise the UPR and allocate resources to travel to Geneva and address their concerns, they did take part in the consultation process organised by the state regarding the implementation of the UPR recommendations. The government set up an interministerial Human Rights Working Group (HRWG) in February 2012, which was tasked with monitoring human rights in Hungary, consulting stakeholders engaged in human rights matters and advising the government on human rights legislation. In addition, the HRWG operates a Human Rights Roundtable composed of 12 task forces, in which different stakeholders are actively participating, including representatives of the Commissioner for Fundamental Rights, the Equal Treatment Authority, the National Authority for Data Protection and Freedom of Information, as well as more than 40 other NGOs active in this field. The 12 task forces cover the following areas of the law: freedom of opinion, other civil and political rights, economic, social and cultural rights, rights of Roma, minorities, women, children, disabilities, elderly, homeless, LGBT and refugees. This process, however, was described by some NGOs as mere window dressing: it was organised in a rush, the agenda was provided to participants

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278 *Ibid*, Recs 94.77 (Thailand) and 94.87 (Iran).

279 *Ibid*, Recs 94.53 (United Kingdom), 94.82 (Norway), 94.83 (Austria) and 94.85 (Canada).

at the last minute and comments made by NGOs were not taken into account as regards the implementation of the UPR recommendations.

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## Africa

### EGYPT

The first review of Egypt by the HRC in 2010 brought hopes of a positive impact that vanished to a great extent at the second review. Between the two, Egypt faced two revolutions, on 25 January 2011 and 30 June 2013, and the political regime in place shifted from a police state to an attempt of theocracy, and then turned back to a police state that was even more oppressive than it had been previously. The IBAHRI undertook two fact-finding missions in 2011 and 2013 and documented the pivotal role of the judicial system in the deterioration of the human rights situation and the establishment of an oppressive regime, even after the withdrawal of the emergency law in 2012.

In the absence of a state-civil society dialogue in the country, the first review at the UPR *did* create a space for Egyptian civil society's concerns outside the borders. Thus more than a dozen Egyptian-based organisations contributed to the process. At that time, a representative from the Cairo Institute for Human Rights Studies (CIHRS), a Cairo-based NGO, stated that the 'most beneficial aspect of the UPR for the Arab region has not been what... occurred in Geneva, but what the process... stimulated on a national level. Indeed, no other UN human rights mechanism is currently as successful at stimulating national level action by both governments and civil society organizations within the Arab region'.<sup>280</sup> The UPR was seen as offering 'not only a site from which to challenge the Egyptian government, but a domestic and regional opportunity to increase popular attention to human rights issues through the media'.<sup>281</sup> Given these considerations, Egypt's case represented a rather optimistic account of domestic NGO capacity to externalise human rights domestic demands and strengthen domestic human rights campaigns at the UPR.<sup>282</sup>

In 2010, after more than five decades of a state of emergency, the country was pressured by UN mechanisms to withdraw the emergency law and actively work on torture prevention.<sup>283</sup> Ten of the 171 UPR recommendations called upon the withdrawal of the emergency law, and five upon a

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280 Laura Landolt, 'Externalizing Human Rights: From Commission to Council, the Universal Periodic Review and Egypt' (2013) 14 Hum Rights Rev 124.

281 *Ibid*, 125.

282 *Ibid*, 126–127.

283 UNHRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin 13/37* (14 October 2009) UN Doc A/HRC/13/37/Add.2.



legal revision to align with the UN Convention against Torture.<sup>284</sup> Most of these recommendations were accepted, and the two from Canada and Germany that were ‘noted’ were not any different in substance. The government also accepted that it needed to decriminalise freedom of expression, protect fair trials rights and release those people who had been detained or imprisoned for exercising their freedom of expression. It also agreed to ensure that detainees can access lawyers, and that those detained without being formally charged be sent to trial or released. It finally accepted the independent monitoring of centres of detention and the prohibition of the use of confessions obtained under torture in court. Apart from the participation of women in the judiciary, the issues of independence of the judiciary and the respect of fair trials rights by all courts, whether ordinary, military or emergency courts, were not addressed. Among key recommendations, the state refused recommendations pertaining to the recognition of the principle of non-discrimination based on sexual orientation.<sup>285</sup>

Looking at implementation, the impact of the first UPR has been negligible. The emergency law was effectively withdrawn, however the new counterterrorism law, together with the 2014 constitution, now give way to major authoritative drifts. No revision of the criminal code regarding the definition of torture was undertaken: the recommendation was reiterated in 2014 – however by a different group of states. Freedom of expression was not decriminalised – to the contrary, even more legal restrictions were placed on the freedoms of expression, association and assembly.

Egypt’s 2014 UPR took place against the background of an unprecedented human rights crackdown. Under the short period of military rule that followed the 2011 revolution, Egypt’s transitional military administration introduced controversial protest and NGO laws and brought nearly 12,000 civilians before military courts for ‘crimes against the military’<sup>286</sup> – including such crimes as ‘insulting the military’. Then, under Morsi’s Brotherhood presidency, those who insulted Islam or insulted the President himself were targeted. Finally, in the post-Morsi era, during the second half of 2013, a startling number of prosecutions were initiated against Brotherhood figures, including the President himself and the Brotherhood’s entire senior leadership. In the first six months of 2014, thousands of people were condemned to death in a series of mass trials. Instead of weighing the evidence against each person, judges convicted defendants en masse without regard for fair trial standards. Mass trials were loudly denounced in the joint statements of seven Special Rapporteurs.<sup>287</sup> In preparation of the second UPR in November 2014, NGOs drew the attention of the HRC on the limitations of the newly adopted 2014 Constitution. The IBAHRI in that respect highlighted that ‘[i]t is deeply concerning that Egypt’s new constitution still allows military courts to trial civilians, even though the judges in these courts lack independence and the courts have been shown to lack fundamental due process guarantees’.<sup>288</sup>

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284 See UNHRC, *Report of the United Nations High Commissioner for Human Rights on the promotion of human rights and fundamental freedoms while countering terrorism* (28 December 2009) UN Doc A/HRC/13/37/Add.2.

285 UNHRC, *Report of the Working Group on the Universal Periodic Review – Egypt* (26 March 2010) UN Doc A/HRC/14/17, Recs 97.3 (Canada); 97.7 (Canada); and 97.8 (Canada).

286 See, for example, Human Rights Watch, ‘Egypt: Retry or Free 12,000 After Unfair Military Trials’ (10 September 2011), available at <https://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials>.

287 OHCHR press release, ‘Egypt: UN Experts “outraged” at confirmation of 183 death sentences’ (30 June 2014).

288 IBAHRI, *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt* (IBAHRI 2014), 7.

In 2014, the IBAHRI's main finding<sup>289</sup> was that the Ministry of Justice – and in particular the Minister himself – controls much of the judicial branch, which breaches the principle of separation of powers and can lead to politicised judicial decision-making. Many jurisdictions combine the judicial and prosecutorial services, which has major implications on the core functioning of the judiciary and the oversight of the Minister of Justice over the prosecutorial service. The IBAHRI recommended a clear division of function between the judiciary and the prosecutorial service; a revision of the legal framework to ensure that military courts' jurisdiction is limited to military personnel; and the establishment of a fact-finding commission to determine responsibility for crimes committed since 2010. Only the recommendations on military courts' jurisdiction found resonance in the UPR recommendations, and criminal legislation raised more concerns than the new Constitution. It is to be noted that the vast majority of the UPR recommendations addressed women's rights and freedom of assembly.

The IBAHRI notes that the eight recommendations<sup>290</sup> that called for fair trials rights, *without referring to military courts*, were all accepted. Conversely, among the four recommendations addressing fair trials *in the context of military courts*, one was rejected,<sup>291</sup> and three were partially accepted.<sup>292</sup> However, since 2014, for the OHCHR 'partial acceptance' is tantamount to 'rejection'. This tends to confirm the observation that general recommendations are more easily accepted than recommendations referring to the specific institution, context, right or specific vulnerable groups at issue. As a result, it cannot be expected that general recommendations produce the same, or a broader, impact on the ground than specific recommendations.

The first UPR brought hope as to the possibility for grassroots organisations to externalise demands. At the time of the second UPR, the risk of reprisal was such that local organisations felt restrained from attending the review in Geneva. The role of international organisations in taking over messages to denounce the situation in the country was even greater than in the past. In absence of progress to respond to the UPR recommendations or other calls made by local and international organisations, the strength of the UPR lies in the solidarity it creates among NGOs and that allows local NGOs to exist and survive in a deleterious environment.

Until now, lawyers have, however, remained mainly outside the process. The involvement of lawyers and judges in human rights mechanisms, processes, and by extension the universal periodic review, is rare in Egypt, despite the significant role allotted to civil society organisations. Both legislative and security obstacles are numerous. With the exception of some lawyers interested in working in the field of human rights, even for lawyers representing civil society organisations, their participation in the preparation of these reports or participation in discussions or even in submitting reports is very limited. For one of the lawyers interviewed, a driver for change would be to develop a draft agreement or covenant on the independence of the legal profession. The instrument would represent 'an extension and development of United Nations Basic Principles on the Role of Lawyers'

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289 *Ibid*, 54–55.

290 UNHRC, *Report of the Working Group on the Universal Periodic Review – Egypt* (24 December 2014) UN Doc A/HRC/28/16, Recs 166.124 (Uruguay), 166.77 (Belgium), 166.179 (France), 166.180 (Ireland), 166.181 (Luxembourg), 166.183 (Canada), 166.184 and 166.185 (Mexico).

291 *Ibid*, Rec 166.186 (Austria).

292 *Ibid*, Recs 166.178 (Czech Republic), 166.182 (Norway) and 166.187 (Lithuania).

and transfer these principles into practical and detailed operation. For this legal practitioner, ‘the absence of agreement or covenant on the role of lawyers and the independence of the legal profession and the presence of protocol attached to it, may be a factor in the insufficient respect for the independence of the legal profession at the local level’.

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## DEMOCRATIC REPUBLIC OF THE CONGO

The first review of the Democratic Republic of the Congo (DRC) by the HRC took place on 3 December 2009 and the second on 29 April 2014. At the time of its first review, a number of reports on the rule of law and the justice system had been conducted,<sup>293</sup> among which was the 2009 IBAHRI report.<sup>294</sup>

All the reports converged in describing general impunity as the main contributing factor to human rights violations being committed in DRC. While 86 per cent of the human rights violations were imputed to the armed forces and the police,<sup>295</sup> only a few cases were at that time ever brought to justice. A lack of independence as well as a lack of resources on the part of the justice system, especially the military justice system, had created the unfortunate optimal conditions for corruption to grow, and for the demand for justice to remain unsatisfied, especially in rural areas.

The IBAHRI report highlighted similar ailments concerning the legal profession: shortage of lawyers; lack of funds; lack of support from central government; lack of access to Congolese laws; lack of infrastructure; and lack of training. As a result, the IBAHRI recommended a strengthening of the legislative process, the financial and human resources of the judiciary, the independence and capacities of the military justice to investigate war crimes and crimes against humanity, the bar associations’ capacities, access to legal aid and trial monitoring.<sup>296</sup>

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293 See, for instance HRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Addendum – Mission to the Democratic Republic of the Congo* (11 April 2008) UN Doc A/HRC/ 8/4/Add.2. See also the joint reports co-signed by the same Special Rapporteur with six other special procedures: *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country* (5 March 2009) UN Doc A/HRC/10/59. *Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo* (8 March 2010) UN Doc A/HRC/13/63.

294 IBAHRI, *Rebuilding courts and trust: an assessment of the needs of the justice system in the Democratic Republic of the Congo* (IBAHRI 2009).

295 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Addendum – Mission to the Democratic Republic of the Congo* (11 April 2008), UN Doc A/HRC/8/4/Add.2 (2008), para 71.

296 IBAHRI, *Rebuilding courts and trust: an assessment of the needs of the justice system in the Democratic Republic of the Congo* (IBAHRI 2009).

Six years and two UPRs later, a number of reports have evidenced the slow pace at which the administration of justice has been improving in DRC.<sup>297</sup> The level of cooperation the country demonstrated in the UPR process was, however, fairly encouraging. The government accepted 79 per cent of the recommendations in 2010 and 82 per cent in 2014, and submitted a mid-term implementation report.

Among the plethora of mechanisms scrutinising the situation in DRC, the UPR has a ripple effect through the repetition of the same recommendations by different states and over time. Thus all the 2014 recommendations on the justice system reiterated recommendations made in 2010 and previously by other mechanisms, concerning the need for financial and/or human resources,<sup>298</sup> legal training<sup>299</sup> and geographical coverage.<sup>300</sup> The impact remains limited. While the state reported an increased number of magistrates and resources together with the establishment of the Judicial Authority, NGOs reported that only 0.1 per cent of the budget had been attributed to the Ministry of Justice.<sup>301</sup>

In order to genuinely protect rights, the UPR would have a significant added value if it involved further the legal profession and the judiciary, in order to better assess the needs of the justice system, but also the rights and duties of the legal community. Thus, the composition and training of the judiciary play an important role that has been too partially addressed in the case of DRC until now. States made a strong call to protect vulnerable groups' rights – most of the UPR recommendations to DRC pertained to children's rights, women's rights and human rights defenders. Besides, a number of recommendations called upon the state to 'effectively investigate cases of sexual violence', and this was partly translated into recommendations addressing judicial training in these areas, especially gender-based violence.<sup>302</sup> However, no recommendation addressed the lack of women in the judiciary. In 2008, the Special Rapporteur on the independence of judges and lawyers highlighted the fact that there were only two women judges for the province of Sud-Kivu, and the same for Nord-Kivu and Orientale provinces, making a total of six women among 153 judges.<sup>303</sup> Similarly, other areas

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297 A/HRC/13/63 (2010); CRC/C/OPAC/CD/CO/1 (2012) para 39; United Nations Organisations Stabilization Mission Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo, April 2014.

298 UNHRC, *Report of the Working Group on the Universal Periodic Review – Democratic Republic of the Congo* (4 January 2010) UN Doc A/HRC/13/8, Recs 94.70 (Sweden), 94.72 (Brazil), 94.73 (Norway) and 94.75 (Spain); UNHRC, *Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo* (7 July 2014) UN Doc A/HRC/27/5, Recs 133.19 (Luxembourg), 134.107 (Thailand), 134.109 (Sierra Leone), 134.110 (Chile) and 134.113 (Brazil).

299 UNHRC *Report of the Working Group on the Universal Periodic Review – Democratic Republic of the Congo* (4 January 2010) UN Doc A/HRC/13/8, Recs 94.9 (Denmark), 94.19 (Czech Republic), 94.74 (Nigeria) and 96.8 (South Africa); UNHRC, *Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo* (7 July 2014) UN Doc A/HRC/27/5, Recs 134.107 (Thailand), 134.108 (USA), 134.113 (Brazil), 134.55 (State of Palestine), 134.117 (Republic of Korea), 134.118 (Timor-Leste), 134.124 (Ethiopia) and 134.128 (Lithuania).

300 UNHRC, *Report of the Working Group on the Universal Periodic Review – Democratic Republic of the Congo* (4 January 2010) UN Doc A/HRC/13/8, Rec 94.76 (Czech Republic); UNHRC, *Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo* (7 July 2014) UN Doc A/HRC/27/5, Rec 134.111 (Morocco).

301 UPR Info, Mid-term Implementation Assessment, Democratic Republic of the Congo (2012), Rec 40.

302 UNHRC, *Report of the Working Group on the Universal Periodic Review – Democratic Republic of the Congo* (4 January 2010) UN Doc A/HRC/13/8, Recs 94.9 (Denmark), 94.19 (Czech Republic), 94.74 (Nigeria) and 96.8 (South Africa); UNHRC, *Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo* (7 July 2014) UN Doc A/HRC/27/5, Recs 134.55 (State of Palestine) and 134.113 (Brazil).

303 UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Addendum – Mission to the Democratic Republic of the Congo* (11 April 2008) UN Doc A/HRC/8/4/Add.2, para 37.

of the administration of justice were lacking. In 2009, up to 29 recommendations were made that called for the perpetrators of human rights violations to be ‘brought to justice’. While 86 per cent is attributed to the military, no reference was made in 2009 or in 2014 to military justice. Finally, no recommendation addressed juvenile justice issues, which should have been an important issue in the case of child soldiers.<sup>304</sup>

In that context, it is regrettable that despite the accountability gap in the country being the main issue, the legal profession has until now been poorly involved in the UPR process. As evidenced by the three bar associations interviewed during the assessment, the level of awareness and, consecutively, the level of involvement of lawyers in the UPR remains extremely low. Active participation of the state and key stakeholders is a fundamental requisite to foster the relevant legal and institutional changes.

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## ZIMBABWE

Three years after the signing of the Global Political Agreement dividing power between the two political parties, ZANU-PF and MDC, the IBAHRI set up a mission in Zimbabwe in June 2011. At that time the Constitution-making process had not yet been completed. The objective of the mission was to assess the progress of the rule of law in the country, in the context of the strained relationship between the two parties forming the bicephal government.<sup>305</sup> Clear evidence was provided in the IBAHRI’s report showing that the judiciary and the prosecuting service were under constant pressure from one political party (ZANU-PF) to selectively prosecute the members of the other political faction – the MDC.<sup>306</sup> The IBAHRI report concluded that priority should be given in particular to ensuring the independence of the prosecuting authority (DPP), as well as the independence of the Judicial Service Commission (JSC).<sup>307</sup> These were the recommendations that were then submitted to the UPR that took place in October 2011.

A turning point for human rights, the separation of powers and the independence of the judiciary in the country was the adoption of a new Constitution in 2013. The Constitution has significantly fostered interactions between actors on a democratic basis. The outcomes of the first UPR remained limited. On the one hand, the UPR *recommendations* themselves had a very limited impact on the

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304 In relation to criminal legislation, the government accepted all the recommendations calling to withdraw the witchcraft act (Recs 94.65 (Belgium), 94.66 (Italy) and 94.67 (Mexico)).

305 OHCHR, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 – Zimbabwe (22 July 2011) UN Doc A/HRC/WG.6/12/ZWE/3, para 5v.

306 IBAHRI, *Zimbabwe: a time for a new approach* (IBAHRI 2011).

307 *Ibid*, 52–54.

administration of justice. On the other hand, the UPR *process* did contribute to a substantial multi-stakeholders' dialogue on human rights involving lawyers and the judiciary.

On the negative side, most of the ten UPR recommendations on the administration of justice were rejected or received limited implementation.

Regarding the judiciary, the government refused to 'reform the judiciary to ensure its independence and impartiality'.<sup>308</sup> It was argued by the head of the delegation during the interactive dialogue that 'Zimbabwe had an independent judiciary tasked with the impartial interpretation of human rights law and continuous development of human rights jurisprudence'. Then '[t]he Constitution guaranteed the independence of the judiciary and the newly promulgated Judicial Service Act provided for its budgetary autonomy'.<sup>309</sup> It was also explained during the adoption of the UPR Working Group's report that the employment of judicial officers and staff through the Public Service Commission was justified by the need to 'move cases through courts more quickly and the need for adequate human and material resources'.<sup>310</sup> Conversely, the government accepted the need to establish a juvenile justice system,<sup>311</sup> enhance the courts' competence and functioning, including through the training of judges,<sup>312</sup> as well as extend access to justice to remote areas.<sup>313</sup> To date, and in the words of the Secretary General of the Law Society of Zimbabwe, if efforts are made regarding judicial training, access to remote areas with no existing infrastructure remains a challenge. A major step towards the independence of the judiciary was the creation of a Constitutional Court in 2013, as recommended by the IBAHRI; however this recommendation was not reflected at the UPR. The problem remains that judges serving in the Constitutional Court are judges of the Supreme Court, rather than new judges with the relevant training.

The government rejected the recommendation to reform the prosecuting authority in accordance with UN guidelines<sup>314</sup> and to establish a civilian authority charged with receiving complaints of crimes committed by police, military and security forces.<sup>315</sup> Since then, the government has however dissociated the functions of legal adviser and prosecuting authority, which before had been cumulated by the Attorney-General. This remains nonetheless insufficient to prevent selective application of the law denounced by the IBAHRI in 2011, as evidenced by NGOs in 2014:

'[t]he law continued to be selectively applied against perceived supporters of opposition parties and legitimate HRDs. From January 2012 to December 2013, 2416 HRDs were arrested, detained, with some being prosecuted. The leaders of the security sector also made partisan utterances before the elections with the Police Commissioner General in May 2013 publicly refusing to entertain security

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308 UNHRC, *Report of the Working Group on the Universal Periodic Review – Zimbabwe* (19 December 2011) UN Doc A/HRC/19/14, Rec 95.38.

309 *Ibid*, para 10.

310 *Ibid*, para 20.

311 Recommendation 94.29 from Indonesia was accepted, while the similar recommendation 94.28 from Slovenia was rejected. UNHRC, *Report of the Working Group on the Universal Periodic Review – Zimbabwe* (19 December 2011) UN Doc A/HRC/19/14, Recs 94.29 and 94.28.

312 *Ibid*, Rec 93.45 (Mexico).

313 *Ibid*, Rec 94.42.

314 *Ibid*, Recs 95.36, 95.1 and 95.30.

315 *Ibid*, Rec 95.29. In response it stated that the Parliamentary Portfolio Committee on Home Affairs exercised an oversight role over the activities of the police force: A/HRC/19/14, para 2.1.

sector reforms. The partisanship and selective application of law within the police was apparent with police being accused of failing to protect known MDC candidates and supporters. Such harassment included disruption of their campaign efforts by militias or themselves, arresting and detaining known ZANU PF candidates and supporters for frivolous charges<sup>316</sup>

Concerning lawyers, the government rejected the recommendation to protect the legal profession ‘from any form of intimidation and harassment while performing their legitimate duties’.<sup>317</sup> Cases of harassment of lawyers continue to be reported,<sup>318</sup> and some NGOs recall not only the responsibility of the state, but also of the Law Society of Zimbabwe in the protection of its members, who are threatened because of their activism or work on human rights cases.

With respect to criminal law, 11 states made specific recommendations, six of which were accepted. Zimbabwe accepted the need to criminalise torture<sup>319</sup> and increase the age of criminal responsibility.<sup>320</sup> However, it rejected recommendations to revise the Criminal Code that restricts freedom of assembly and expression.<sup>321</sup> The government rejected the view that the Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act ‘unjustifiably interfered with some liberties of the individual and noted that there was strikingly similar legislation in the jurisdictions of some Member States’.<sup>322</sup> The state also refused to ban corporal punishment<sup>323</sup> and decriminalise possible sexual relations between consenting adults of the same sex.<sup>324</sup>

On the positive side, the level of cooperation demonstrated by Zimbabwe in the UPR is in itself noticeable, if one considers that the country has proved extremely uncooperative in allowing scrutiny of its records by UN human rights officials.<sup>325</sup> One hundred and twenty of the 180 UPR recommendations were accepted. Unfortunately, those that were the most important were rejected as is demonstrated below.

Furthermore, information on the judiciary system that was submitted to the HRC for review was fairly substantial. Eight out of the 12 contributing NGOs made clear recommendations on the independence of the judiciary and/or criminal law revision. Among local NGOs, some had usefully benefited from previous experience in engaging with regional human rights mechanisms. Besides NGOs, the contribution of the UN Country Team (UNCT) had raised a number of concerns related

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316 UPR Info, Mid-term Implementation Assessment, Zimbabwe (2014), Zimbabwe Civil Society Organisations’ response, 47–48.

317 UNHRC, *Report of the Working Group on the Universal Periodic Review – Zimbabwe* (19 December 2011) UN Doc A/HRC/19/14, Rec 95.57 (Slovakia).

318 IBAHRI press release, ‘IBA calls for the immediate release of Zimbabwean human rights lawyer Beatrice Mtetwa’ (18 March 2013), available at [www.ibanet.org/Article/Detail.aspx?ArticleUId=23ed900b-2f05-44ab-8eab-66423b89d2b1](http://www.ibanet.org/Article/Detail.aspx?ArticleUId=23ed900b-2f05-44ab-8eab-66423b89d2b1).

319 UNHRC, *Report of the Working Group on the Universal Periodic Review – Zimbabwe* (19 December 2011) UN Doc A/HRC/19/14, Rec 94.24 (Brazil).

320 *Ibid*, Recs 94.25 (Austria), 94.26 (Brazil), 94.27 (Slovakia) and 94.29 (Indonesia).

321 *Ibid*, Recs 95.62, 95.43 and 95.48.

322 UNHRC, *Report of the Working Group on the Universal Periodic Review- Zimbabwe* (19 December 2011) UN Doc. A/HRC/19/14, para.9.

323 UNHRC, *Report of the Working Group on the Universal Periodic Review- Zimbabwe* (19 December 2011) UN Doc. A/HRC/19/14 Rec.94.22

324 *Ibid*, Rec 95.17 (France).

325 Between 2000 and now, Zimbabwe submitted one report to the CEDAW (2009) and to the CRC (2013). Only in 2006 did the country submit its first report to the African Commission on Human and Peoples’ Rights.

to the judiciary, such as the need for financial and human resources to ensure legal aid, insofar as only 17 legal aid lawyers can be counted in the country;<sup>326</sup> the state's right to appeal against an order granting bail;<sup>327</sup> and the establishment of a juvenile justice system, while raising the minimum age for criminal responsibility, which was the 'lowest in the world' (seven years old).<sup>328</sup>

Finally, what constitutes probably the main impact of the UPR in Zimbabwe has been highlighted by the NGO Zimbabwe Lawyers for Human Rights as 'confirming the space for dialogue between human rights lawyers and the government'. Both the judiciary and the legal profession were given the opportunity to cooperate with the government, including for the drafting of the national reports. For instance, the Law Society of Zimbabwe (LSZ), the Zimbabwe Women Lawyers Association (ZWLA) and Zimbabwe Lawyers for Human Rights (ZLHR) were consulted in the drafting of Zimbabwe's mid-term UPR report. They were then kept informed of the progress made under the UPR. In its response to the IBAHRI, the state highlighted the complementary nature of the mission involving the government and the legal profession. Both the judiciary and lawyers are currently involved in activities that implement some of the UPR recommendations, although they may not be 'deliberately intended to implement such recommendations'. In line with UPR Recommendations 39 and 42, the judiciary contribute to programmes on access to justice, for example, the Victim Friendly System, and gender-based violence. Organisations such as ZWLA also contribute to provide legal assistance and representation to vulnerable members of society such as women and children.

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4. The UPR recommendations were implemented and monitored on the ground



## SWAZILAND

In 2009, the IBAHRI and Amnesty International joined together to call upon the government of Swaziland to withdraw the Suppression of Terrorism Act of 2008, on the basis of a thorough analysis of its impact on a broad range of human rights. The IBAHRI/Amnesty International report<sup>329</sup> sheds light on the legal uncertainty stemming from the blurred definitions and imprecision of the legislation and the excessive restriction on freedom of expression, freedom of assembly and association, the right not to be subjected to torture, the right to a fair trial and obligation against forcible return where there is risk of persecution.

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326 Zimbabwe UN Country Team, Submission to the Human Rights Council (March 2011), paras 22 and 25.

327 *Ibid*, para 24.

328 *Ibid*, para 23.

329 IBAHRI/Amnesty International, *Suppression of Terrorism Act* (IBA/Amnesty International 2009).



At the time of the report, and to date, Swaziland functions in many aspects as an absolute monarchy. Despite the Constitution of Swaziland adopted in 2005, the 1973 King's Proclamation to the Nation prohibiting political parties has not been officially repealed.<sup>330</sup>

The first review of Swaziland by the HRC took place two years later, on 4 October 2011.

The participation of the country in the UPR process was an achievement in itself, if we consider the visibility given at the international level to the human rights situation in the country. If Swaziland has ratified all the core human rights treaties, it has a poor record of reporting on the implementation of its international human rights treaty obligations. Moreover, the first review of the UPR process had been well documented. A significant amount of information on the administration of justice was submitted to the UPR by NGOs and the UNCT.<sup>331</sup> The Suppression of Terrorism Law, as well as constitutional issues, criminal law and the independence of the judiciary were addressed in submissions to the HRC. Key issues that were documented concerned: the absence of separation between the executive, legal and judiciary powers; the absence of auditing of public expenses; the lack of independence of the judiciary; judicial unfairness stemming from dualism in the legal system (customary and common law); the deficient legal aid system; the lack of law enforcement; the lack of understanding of legal rights among the population; of the fact that, in practice, police officers could choose the court to which a case is sent; the discriminatory legal regime towards women; and the use of torture despite its constitutional prohibition.<sup>332</sup> The UNCT also highlighted the slow process of revising national legislation in accordance with the constitution – more than 100 laws were awaiting acceptance – and passing the laws necessary to operationalise the institutions created by the new Constitution.<sup>333</sup>

Outcome recommendations addressed mainly the death penalty (18), women's rights (18), children's rights (18), torture (16) and detention (11).<sup>334</sup> France, Slovakia and Sweden addressed the Suppression of Terrorism Act during the interactive dialogue.<sup>335</sup> Then France<sup>336</sup> and Norway<sup>337</sup> recommended repealing legislative acts restricting civil and political rights and freedom of expression while Sweden<sup>338</sup> recommended repealing or urgently amending the Suppression of Terrorism Act of 2008 in order to bring it in line with international human rights standards. Other states

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330 OHCHR, *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1* (22 July 2011) UN Doc A/HRC/WG.6/12/SWZ/3, para 6.

331 See in particular, *Joint UN Submission for the UN Compilation report: United Nations Country Team report for the Universal Periodic Review – Swaziland* (March 2011), especially 5–6, available at [www.upr-info.org/en/review/Swaziland](http://www.upr-info.org/en/review/Swaziland). See also OHCHR, 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1' (22 July 2011) UN Doc A/HRC/WG.6/12/SWZ/3, paras 25 and 30–35.

332 See, in particular, *Joint UN Submission for the UN Compilation report: United Nations Country Team report for the Universal Periodic Review – Swaziland* March 2011, 5–6, available at [www.upr-info.org/en/review/Swaziland](http://www.upr-info.org/en/review/Swaziland).

333 OHCHR, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution (22 July 2011) 5/1A/HRC/WG.6/12/SWZ/2*, para 71.

334 Source, UPR Info statistics, available at [www.upr-info.org/database/statistics](http://www.upr-info.org/database/statistics).

335 UNHRC, *Report of the Working Group on the Universal Periodic Review – Swaziland* (12 December 2011) UN Doc A/HRC/19/6, paras 28 (France), 35 (Slovakia) and 46 (Sweden).

336 UNHRC, *Report of the Working Group on the Universal Periodic Review – Swaziland* (12 December 2011) UN Doc A/HRC/19/6, para 77.48 (France).

337 *Ibid*, Rec 77.54 (Norway).

338 *Ibid*, Rec 77.58 (Sweden).

recommended criminalising torture,<sup>339</sup> prohibiting corporal punishment<sup>340</sup> and raising the age of criminal responsibility.<sup>341</sup>

Only six recommendations addressed the administration of justice. Half of them recommended judicial training.<sup>342</sup> The three others recommended in general terms that the functioning of juvenile justice system be ensured;<sup>343</sup> the independence and impartiality of the judiciary be guaranteed;<sup>344</sup> and the improvement of the judicial system be accelerated.<sup>345</sup>

DRC mentioned the legal dualism existing as a source of discrimination in the country,<sup>346</sup> and South Africa recommended aligning both legal systems with international human rights law.<sup>347</sup> The legal aid system was not addressed.

One hundred and seven recommendations of 143 made by 39 states were accepted. All the recommendations on the administration of justice and the ones calling for the repealing of the Suppression of Terrorism Act were accepted. None has been implemented so far. The UPR Info MIA report noted that the Suppression of Terrorism Act had not been repealed and that, at the time of reporting in 2014, ten people had been charged under these laws and were awaiting trial beginning in June.<sup>348</sup> Other respondents confirmed this fact during the interviews conducted by the IBAHRI.

Despite the lack of implementation of its recommendations, the UPR is gaining increasing attention, especially from lawyers. The mechanism provides civil society organisations with a unique opportunity to externalise human rights demands. Swaziland does not tolerate criticism and any criticism levelled against the government is viewed as un-Swazi. Media are heavily controlled, and no information on the UPR is publicly circulated. The lack of awareness about the process and the limited amount of time to focus on the UPR were highlighted as the two main reasons for lawyers not to have been involved during the first review. On the eve of the second review, the dynamic is, however, changing. At the time this report is being drafted, Lawyers for Human Rights is coordinating the participation of civil society organisations in the second UPR. Then the Law Society of Swaziland (LSZ), long criticised for its apathy, is now engaging in the rule of law. The repeated and planned governmental

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339 *Ibid*, Recs 77.25, 77.34 and 77.35.

340 *Ibid*, Recs 77.31 and 77.38.

341 *Ibid*, Rec 76.38.

342 UNHRC, *Report of the Working Group on the Universal Periodic Review – Swaziland* (12 December 2011) UN Doc A/HRC/19/6, Recs 76.34, 76.35 and 77.27.

343 *Ibid*, Rec 76.38.

344 *Ibid*, Rec 76.36 (Canada).

345 *Ibid*, Rec 76.40.

346 UNHRC, *Report of the Working Group on the Universal Periodic Review – Swaziland* (12 December 2011) UN Doc A/HRC/19/6, para 54. Paragraph 74 states: ‘On the issue related to contradictions in civil and customary laws, Swaziland recognized that some of its cultural practices could be perceived to be against human rights. However, it would endeavour to harmonize those cultural practices with the Doctrine of human rights. It stressed that the Constitution had identified those practices which should be dealt with only by the customary law in order to minimize instances of the conflict between the two sets of laws.’

347 *Ibid*, Rec 76.7. ‘Consider aligning national laws, including customary laws with the protections outlines in the Constitution of the Kingdom of Swaziland, as well as with the provisions of International Human Rights Instruments to which Swaziland is a party’ (South Africa).

348 UPR Info, *Mid-term Implementation Assessment, Swaziland* (2014), 10. See also the Southern Africa Litigation Centre, Lawyers for Lawyers, IBAHRI and Judges for Judges, *Joint submission to the 2nd Cycle Universal Periodic Review of Swaziland* (21 August 2015), 6.

attacks on members of the judiciary and the legal profession have served as a wake-up call. The LSZ report to the UPR focuses on the ‘legal fraternity’ and the administration of justice, rather than human rights. The objective is to keep a professional, rather than partisan, standpoint.

This increasing involvement of lawyers locally and internationally<sup>349</sup> to denounce the abuses of the system is very much needed in the context of continuous deterioration of the rule of law in the country. In preparation for the second review of the country at the UPR, the Southern Africa Litigation Centre, Lawyers for Lawyers, the IBAHRI and Judges for Judges reiterated their concerns about the procedure by which an organisation can be declared a terrorist organisation in Swaziland in order to suppress opposition, particularly in light of the broad definition of terrorism in the law.<sup>350</sup> They also raised the attention of the HRC to the apparent lack of independence of the judiciary resulting in a violation of the right of access to justice and to an effective remedy, as well as undue interference with the independence of lawyers.<sup>351</sup> Before Chief Justice Ramodibedi was fired in June 2015, Ms Ramjathan-Keogh, Director of the Southern African Litigation Centre, commented:

‘[t]he administration of justice in Swaziland has been deteriorating for several years... The Swazi judiciary have not been very transparent or overly concerned with how they are perceived by the international community. We have experienced this in the cases that we currently have in the Swazi courts. It is a concern that the judiciary are ruling in favour of government and the way that legal cases continue to be manipulated is a damning indictment on the independence of the judiciary. Just last month the Members of Parliament raised their concerns about judges’ impartiality by questioning the Minister of Justice on the manner in which cases are allocated in the High Court. The MPs were concerned that it was becoming predictable that a set group of judges would hear all cases with a political slant, and that judgments that favoured the government would invariably result. In fact, since the Chief Justice passed a practice directive in 2011, which stipulated that all cases would be allocated to individual judges by himself, the Swazi government has not lost a single case in court.’

Since the departure of Chief Justice Ramodibedi, structural problems remain, mainly the composition of the Judicial Service Commission and its close connections to the King. However, in the past few months, the judiciary has tried to rid itself of the appearance of a lack of independence, which prevailed during Michael Ramodibedi’s tenure. It remains to be seen whether a new Chief Justice with greater respect for the independence of the judiciary might be appointed.

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349 *Ibid.*

350 *Ibid.*, 6.

351 *Ibid.*

The first review of Malawi took place in 2011 and definitely contributed to bringing human rights forward on the government's agenda. During the preparation for the UPR, the government concomitantly decided in 2010 to set up a human rights unit at the Ministry of Justice, and seriously catch up with human rights reporting to international mechanisms. In April 2012, following the death of the country's third president, the Vice-President assumed the presidency. The country saw the dialogue between civil society and government improve, and the human rights unit turn into a human rights office. Malawi submitted its first report to the Human Rights Committee in 2012, and in April 2013 its first report to the African Commission on Human and Peoples' Rights. In 2014, it submitted a report on the Convention on the Elimination of All Forms of Discrimination against Women. In 2015, it submitted its combined third, fourth and fifth periodic reports on the United Nations Convention on the Rights of the Child. The country was reviewed for the second time by the UPR in 2015, one year after the elections of the new president, in a context of relative political stability.

The knock-on effect of the UPR on the international dialogue also benefited the dialogue between civil society and government. While at the first UPR, civil society and the state were clearly seated in two opposite camps, an open and continuous interaction between the two took place in preparation for the second review. If the UPR process was beneficial, the UPR recommendations had a more limited impact on the administration of justice, as demonstrated below.

When the IBAHRI visited the country in 2012, mid-way between the two UPRs, the objective was to assess the rule of law and the independence of judges, lawyers and prosecutors in the follow-up of previous activities conducted to strengthen the capacities of the Malawi Law Society. The IBAHRI made a number of recommendations addressing the independence of the prosecuting service and the Judicial Service. It called upon strengthening the institutions supporting the rule of law and better coordination and communication among them. It also drew the attention of the government to the need to assist the Malawi Law Commission in order to foster the legal reform process, especially concerning controversial laws.

The law reform, unlike the independence of the judiciary and prosecutors,<sup>352</sup> received major attention at the two UPRs.<sup>353</sup> However, the most key controversial issues were either rejected or tackled through an interminable law-revision process. A series of back-and-forth negotiations started at the time of the first UPR and continued at the level of other human rights mechanisms, concerning the abolition of the death penalty<sup>354</sup> and the decriminalisation of same-sex

352 See UNHRC, *Report of the Working Group on the Universal Periodic Review – Malawi* (4 January 2011) UN Doc A/HRC/16/4, Rec 102.37. Only the juvenile justice system was directly addressed at the UPR in 2010. See also Report of the Working Group on the Universal Periodic Review Malawi (20 July 2015) UN Doc A/HRC/30/5. At the 2015 review, Morocco (Rec 110.105) and Botswana (Rec 110.106) addressed the system of management of criminal cases and the need to ensure a comprehensive strategy to reduce the backlog of cases. See Recs 110.105 and 110.106. Switzerland (Rec 110.107) and Uruguay (Rec 110.108) addressed the need to ensure access to justice. Finally, Austria (Rec 110.109) and Botswana (Rec 110.110) recommended that Malawi should investigate attacks against human rights defenders.

353 UNHRC, *Report of the Working Group on the Universal Periodic Review – Malawi* (20 July 2015) UN Doc A/HRC/30/5, See, *inter alia*, Recs 110.12 (Senegal), 110.13 (Egypt), 110.14 (Canada), 110.15 (Chile), 110.16 (Slovenia), 110.18 (Italy), 110.19 (Ghana), 110.22 (Chile), 110.25 (Ireland), 110.26 (Portugal) and 110.100 (Switzerland).

354 UNHRC, *Report of the Working Group on the Universal Periodic Review – Malawi* (4 January 2011) UN Doc A/HRC/16/4, Recs 105.12 (Spain) and 105.13 (Switzerland).

relationships.<sup>355</sup> Both issues were reiterated by a greater number of states at the 2015 UPR.<sup>356</sup> Besides, the law criminalising human trafficking and the repeal of the Witchcraft Act, which resulted from some of the 2010 recommendations, were presented by the state in 2015 as among a number of draft laws under consideration by the Malawi Law Commission.

Besides a very slow law reform, NGOs denounced the implementation of the UPR recommendations in fits and starts. The Legal Aid Bill was eventually adopted after a very long process, which had started before 2010, but was still lacking operationalisation in 2015.<sup>357</sup> Then NGOs interviewed reported that some judicial training was organised on purpose just months before the second UPR with a view to demonstrating efforts made at the UPR.

In the context of substantial law reform, both the representative of the Human Rights Office of the Ministry of Justice and NGOs have expressed their wish to see the Malawi Law Society providing greater assistance in the legal reform process, especially in relation to bills that have been in the adoption process for several years. The Malawi Law Society in turn has expressed expectations that the UPR can foster accountability of the judiciary.

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## *Latin America and Caribbean*

### **BRAZIL**

The HRC reviewed Brazil in 2008 and 2012. While the first review can be compared to a warm-up lap, with only eight recommendations received, Brazil received 185 recommendations at the second review and accepted all of them but one. Midway between the two reviews, in 2010, the IBAHRI conducted a needs assessment of the criminal justice system with a specific focus on the use of pre-trial detention. The objective was to assess the root causes of the problems within the criminal justice system, for example the backlog of cases to overcrowded prisons, which violate the human rights guaranteed in the Brazilian constitution and laws themselves.<sup>358</sup>

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355 *Ibid*, Recs 105.17 to 105.29.

356 UNHRC, *Report of the Working Group on the Universal Periodic Review Malawi* (20 July 2015) UN Doc A/HRC/30/5. On the abolition of the death penalty, see Recs 113.1 (Madagascar), 113.2 (Germany), 113.3 (France), 113.4 (Montenegro), 113.5 (Portugal), 113.6 (Namibia), 113.7 (Timor Leste), 113.8 (Nepal) and from Recs 113.29 (Portugal) to 113.37 (Spain). On the decriminalisation of same-sex relationships, see Recs 113.13 (Brazil) to 113.28 (Uruguay) (16 recommendations all noted).

357 In 2010, it was recommended that Malawi should ensure the right to access justice and reparation (Rec 102.34), especially for victims of trafficking (Rec 102.31), torture (Rec 102.35) and gender-based violence (Rec 102.29–36).

358 IBAHRI, *One in five: the crisis in Brazil's prisons and criminal justice system* (IBA HRI 2010).

The fact that Brazil is one of the countries with the highest number of pre-trial detainees in the world is in itself a serious reason to look at the criminal justice system.<sup>359</sup> In order to effectively remove bottlenecks, the IBAHRI made a recommendation to the government to appraise the criminal justice system as a whole, and strengthen each key institution of the justice chain for the system to be fairer, faster and more cost-effective. In particular, the IBAHRI recommended that the Public Defenders' Office, which is the constitutionally mandated body to provide legal assistance to indigents, should be given more resources. The IBAHRI also highlighted the need to encourage grass-roots solutions to the problems that exist rather than creating new institutions or top-down programmes, which could make the situation worse by adding more layers of bureaucracy to an already dysfunctional system. In the follow-up to the report, the IBAHRI partnered with Brazilian organisation Instituto Inovare to establish an annual human rights prize for innovative justice sector projects within the legal profession and developed an extensive torture prevention capacity-building programme with key state and federal justice institutions, in particular the Public Defender's Office.

The UPR had a twofold effect in Brazil. On the one hand, it gained the attention of the government and civil society and initiated a more holistic dynamic in the human rights dialogue at the international level, as demonstrated below. On the other hand, it provided a number of concrete and relevant recommendations in the criminal justice system; however none of them conveyed the holistic approach to the criminal justice system and the community-based solutions that would be needed to address the root causes of the problems.

Looking first at the process, the UPR benefited from the participatory approach to governance that Brazil has increasingly fostered since the end of the dictatorship. Under the auspices of the National Secretary of Human Rights, a large awareness-raising campaign was organised, and more than 30 entities related to the federal government were consulted. Among them, a number of consultative committees were constituted of both government and civil society representatives. Public hearings were then organised, in which representatives from the Supreme Court actively took part. Landmark decisions held by the Federal Supreme Court concerning the constitutionality of same-sex unions and indigenous people's land rights were then put forward during the presentation of the national report to the HRC.<sup>360</sup> The draft national report was put online for comments. Contributions received remained disappointingly limited; however the dynamic was unprecedented.

This process is even more significant given that the number of entities involved in the preparation of national human rights reports has usually been a cause for delay in Brazil. The number of authorisations consecutively required to submit a report would usually create significant delay in reporting to treaty bodies. However, treaty bodies do not generally receive as much of civil society's attention as the UPR has received until now. There can be many years between the submission of a national report and its review by a treaty body. By contrast, the UPR takes place a few months after submission of the national report and in a completely transparent process that is accessible to all. This partly justifies why the UPR has benefited until now from close attention from civil society and a diligent process from the government. During the inter-state dialogue in 2012, the Brazilian representative

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359 OSJI, *Presumption of guilt: the global overuse of pretrial detention* (OSJI 2014), 22.

360 UNHRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Brazil* (7 March) UN Doc A/HRC/WG.6/13/BRA/1, para 37.

presented the Brazilian participation in the universal periodic review as a great contribution to human rights in the country – an ongoing exercise that involves the entire Brazilian government.<sup>361</sup>

Looking at the recommendations received by Brazil in 2012, the conditions in prisons was among the main issues addressed, together with women’s rights, children’s rights, poverty eradication, the ratification of international instruments and indigenous people’s rights.<sup>362</sup> States duly addressed the problem of overcrowding in prisons with 14 recommendations; however, only few addressed the root causes of the problem. Pre-trial detention was addressed only twice and the United States recommended implementing the 2011 Law to reduce precautionary measures. While the IBAHRI recommended a properly resourced public legal aid service, two states recommended having public defenders in all detention centres, and one state improving the financial accessibility of the justice system. The police was addressed only as to training, but not as to the improvement of their working conditions. As to the judiciary, there was a recommendation to address judicial corruption, ensure the representation of women in the judiciary, the protection of judges and provide judicial training on gender-based violence. Community-based solutions such as mobile courts that had been recommended by the IBAHRI in 2010 and by the ICJ during the UPR process were not mentioned.

In 2014, Brazil established an online platform in order to follow up on the implementation of recommendations coming from human rights mechanisms, regionally and internationally. This platform, as previously mentioned in this report, allows identification of the key issues that are raised by a number of mechanisms. These recommendations are then to be integrated in the national human rights strategy. This platform constitutes a useful tool to potentially bridge the gaps created by the fragmented approach of the UPR.

1. The UPR is based on objective, reliable and comprehensive information on the administration of justice
2. Key issues in the administration of justice were appropriately addressed at the UPR
3. Professional organisations of lawyers were involved in the UPR process
4. The UPR recommendations were implemented and monitored on the ground



## VENEZUELA

Venezuela has long been in the spotlight for openly violating basic principles of the rule of law and separation of powers, and conducting virulent attacks on the judiciary, as well as the legal profession and other human rights defenders. The same problems undermining judicial independence and the independence of lawyers have been addressed over the years by human rights mechanisms,<sup>363</sup> as well

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361 UNHRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Brazil* (7 March) UN Doc A/HRC/WG.6/13/BRA/1, para 3.

362 UPR Info statistics available at [www.upr-info.org/database/statistics](http://www.upr-info.org/database/statistics).

363 CCPR Concluding Observations (2001), CCPR/CO/71/VEN (26 April 2001). IACHR, *Democracy and human rights in Venezuela* (2009) OEA/Ser.L/V/II. Doc 54 (30 December 2009). Human Rights Committee, *Concluding observations* (2015) CCPR/C/VEN/CO/4. Committee against Torture, *Concluding observations* (2014) CAT/C/VEN/CO/3-4. Committee on the Elimination of Discrimination against Women, *Concluding observations* (2014) CEDAW/C/VEN/CO/7-8.

as the IBAHRI,<sup>364</sup> since its first fact-finding mission in 1999. In that respect, the arbitrary arrest of Judge Afiuni, in 2009,<sup>365</sup> and her defence lawyer, Mr Graterol, in 2012,<sup>366</sup> are regarded as emblematic of the lack of independence of the legal profession and the most harmful attempt by the state to intimidate and subdue Venezuela's wider legal profession by fear of what is now referred to as the 'Afiuni effect'.<sup>367</sup> This contributes to entrench impunity and undermine the institutions responsible for upholding the rule of law.

Concomitantly, at the regional level, in September 2012, after a decade of tension with the Inter-American Commission on Human Rights, and failure to comply with its recommendations, as well as with the decisions of the Inter-American Court on Human Rights, Venezuela withdrew from the Inter-American Convention on Human Rights. This constituted a turning point for civil society to increase mobilisation at the level of international human rights mechanisms, including the UPR.

In a context of continuous pressure on human rights defenders, the high level of contributions by civil society organisations to the latest reviews of the country by the UPR in 2011 and treaty bodies in 2014<sup>368</sup> and 2015 is noteworthy. Among them, the presence of lawyers, first limited, is increasing. With the deterioration of the rule of law in the country over the last decade, lawyers have become more and more aware of the importance of embracing human rights and strengthening the independence of the legal profession. As a result, bar associations and lawyers' associations, such as Un estado de derecho, Foro Penal Venezolano and Aequitas, are currently more active in defending the independence of judges and lawyers. In parallel, a number of lawyers specifically engage in human rights within NGOs such as COFAVIC, Observatorio Venezolano de Prisiones, Provea and Comisión de Derechos Humanos de los Colegios de Abogados. Aequitas, Observatorio Venezolano de Prisiones, Provea and COFAVIC contributed to the first UPR of the country.

The mobilisation of civil society and lawyers will be key to protecting the rule of law and independence of the profession in the current circumstances. As demonstrated below, Venezuela is deploying a multifaceted strategy in order to impede international scrutiny in its own domestic affairs.

First, a large participation of pro-government entities, such as the *consigli comunali*, as well as Bolivian civil society organisations was orchestrated by the state, with a clear attempt to dilute civil society reporting in the UPR process. As a result, the OHCHR recorded 571 submissions coming from civil society. Among them, less than 50 submissions can seriously be attributed to Venezuelan NGOs.

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364 IBAHRI, *Introductory Report of the Administration of the Justice in Peru and Venezuela* (IBAHRI 1999). IBAHRI, *Venezuelan Justice System in Crisis* (IBAHRI 2003). IBAHRI, *Justice under threat: a report on the rule of law in Venezuela* (IBAHRI 2007). IBAHRI, *La desconfianza en la justicia* (2011). IBAHRI, *The Execution of justice: the criminal trial of Maria Lourdes Justice* (IBAHRI 2014). IBAHRI, *The Criminal trial of Jose Amalio Graterol* (IBAHRI 2013).

365 IBAHRI, *La desconfianza en la justicia* (2011); IBAHRI, *The Execution of justice: the criminal trial of Maria Lourdes Justice* (2014).

366 IBAHRI, *The Criminal trial of Jose Amalio Graterol* (IBAHRI 2013).

367 IBAHRI press release, 'IBAHRI greatly concerned as Venezuela continues to target lawyers and human rights defenders' (5 August 2015). Available at: [www.ibanet.org/Article/Detail.aspx?ArticleUid=6b6b0ed0-d510-463e-b296-fbafd9e6f812](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6b6b0ed0-d510-463e-b296-fbafd9e6f812).

368 Committee against Torture Concluding observations (2014) CAT/C/VEN/CO/3-4; Committee on the Elimination of Discrimination against Women, Concluding observations (2014) CEDAW/C/VEN/CO/7-8; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Concluding observations (2014) CRC/C/OPAC/VEN/CO/1; Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography; Concluding observations (2014) CRC/C/OPSC/VEN/CO/1; Committee on the Rights of the Child, Concluding observations (2014) CRC/C/VEN/CO/3-5.



Then, for those who provide information to international mechanisms, the risks of reprisals are serious. Despite the promise made in 2014 by Venezuela before the Committee against Torture that human rights defenders would not suffer reprisals, this risk continues to rise.<sup>369</sup>

Secondly, the current states' practice of resorting to the principle of non-interference with their sovereignty, autonomy, independence and national self-determination undermines the potential impact of any international human rights mechanism. While it receives a large number of action-orientated recommendations on the independence of the judiciary,<sup>370</sup> Venezuela 'rejected' all of them on the basis of this principle.<sup>371</sup> In this context, it is also regrettable that only Western states – most of which were donor countries in the justice sector in Venezuela<sup>372</sup> – addressed the independence of the judiciary and that no neighbour states took a position in that respect, neither did they make any recommendation with regard the failure of the country to comply with the decisions of the Inter-American Commission and the Inter-American Court on Human Rights.

Finally, in the absence of information made available by the state on international human rights mechanisms, it falls on the shoulders of civil society organisations to convey the importance of such mechanisms and mobilise public opinion.

There is no doubt that the increasing involvement of the legal profession in the context of the UPR will play a major role in defeating the current legal positioning of the state for not respecting its international human rights obligations as well as giving more impact on the ground to resolutions made by fellow countries.

1. The UPR is based on objective, reliable and comprehensive information on the administration of justice
2. Key issues in the administration of justice were appropriately addressed at the UPR
3. Professional organisations of lawyers were involved in the UPR process
4. The UPR recommendations were implemented and monitored on the ground



## 4.3 Conclusions of Chapter Four

Chapter Four assesses the involvement of lawyers and the relevance of the UPR recommendations on the administration of justice in the case of ten countries. Within the limits of this study, the IBAHRI observes the following.

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369 IACHR press release, 'CIDH expresa su alarma ante intimidación en Venezuela contra personas que acuden al Sistema Interamericano de Derechos Humanos' (20 March 2015). IBAHRI press release, 'IBAHRI greatly concerned as Venezuela continues to target lawyers and human rights defenders' (5 August 2015).

370 UNHRC, *Report of the Working Group on the Universal Periodic Review – Venezuela (Bolivarian Republic of)*A/HRC/19/12 (7 December 2011), Recs 95.5, 95.6, 94.34, 94.5, 96.1, 96.13–22 and 96.24.

371 UNHRC, *Report of the Working Group on the Universal Periodic Review – Venezuela (Bolivarian Republic of) Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (16 February 2012), UN doc A/HRC/19/12/Add.1, paras 4 and 8 in particular.

372 Main donor countries in Venezuela in 'legal and judicial development' (OECD data): (2009) Germany, Switzerland, Spain and Canada; (2010) Spain, USA, Germany and Portugal; (2011) UK, US, Spain and Germany; (2012) UK and the US; (2013) Korea, and Germany.

## *The administration of justice has not received the attention it required*

There is a legitimate expectation that the UPR highlights the most serious human rights issues in the country as a priority. The separation of powers and the independence of the judiciary constitute the building blocks for the realisation of all human rights and should receive special attention in any cause/effect analysis. No right will be efficiently protected if the administration of justice does not genuinely integrate the principles of the independence of judges, lawyers and prosecutors. Judges, prosecutors and lawyers together ensure that people are aware of their rights, are protected from intrusive measures from the executive and have a place to challenge decisions taken against them.

In that context, it is striking to note that the overall number of UPR recommendations pertaining to the administration of justice is low in countries facing major challenges in the justice sector. The study shows that:

- The issues of separation of power and the constitutional-making process have been overlooked in the context of political transition in Myanmar and Hungary.
- Recommendations addressing the administration of justice were overall general. To general recommendations calling upon the state under review to ‘ensure the independence of the judiciary’, states most often reply that their judiciary is independent on the basis of selected evidence. Recommending states should be mindful of the need to make recommendations, which call for a specific action in a given context conducive of human rights. Thus states’ recommendations should point at clear shortcomings in the current legal and institutional frameworks of the state undergoing review. Furthermore, these specific recommendations may not be enough, if the broader context of implementation is not specified. The case of Brazil can be used as an example of such a situation. Brazil received a number of specific recommendations addressing the criminal justice system. However, no state mentioned that its recommendation should take place in a broader strategy taking a holistic approach to the criminal system. This was the IBAHRI recommendation to address meaningfully the problem of pre-trial detention.
- Recommending states have only occasionally referred to the legal profession and asked the state under review either to train lawyers in human rights or ensure that they can carry out their activities without any fear of harassment.
- Recommending states have referred sporadically to the UN Basic Principles and Guidelines and, in comparison to reference to international conventions, and other specific guidelines and principles, such as the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- In most of the countries under study, most of the donor countries in the justice sector were also the countries making the most recommendations on the administration of justice.

## *The participation of lawyers has remained overall limited*

The UPR has raised civil society’s participation in an international human rights mechanism to its highest level in many of the ten countries. This development occurred even in countries where

cooperation with UN mechanisms is portrayed as ‘deteriorating’ the image of the country. Thus, in Zimbabwe and Malawi, over time the UPR has strengthened a space for dialogue between civil society and the government. In other countries, such as Egypt, Swaziland and Azerbaijan, where the dialogue between NGOs and the state does not exist internally, the UPR has created a potential avenue to externalise domestic human rights demands and strengthen solidarity among NGOs at an international level. Given the serious risk of reprisal for local NGOs, this externalisation happens through the intermediary of international NGOs.

As to the involvement of lawyers in human rights monitoring generally, and the UPR specifically, this study shows that:

- In all countries the lawyers’ level of awareness concerning the UPR is very low. This constitutes the main impediment to their participation. In Malawi and Zimbabwe the national bar association has been consulted. In Brazil the judiciary contributed to the consultation process. In Hungary, Swaziland, Myanmar and Venezuela, the second UPR should see a greater participation of lawyers’ organisations and bar associations.
- Lawyers engaged in human rights monitoring through NGOs address human rights in general and are more aware of the UPR than the rest of the legal profession.
- Lawyers with a private practice tend to engage through lawyers’ association and focus on the monitoring of the rule of law and the independence of the legal profession. In Venezuela and Swaziland, it was noted that the growing pace of deterioration of the rule of law in their country over the last decade has been a wake-up call for national bar associations, which then started engaging more and more in the promotion and protection of the rule of law.
- More generally, lawyers tend to lack the human, material and financial resources to engage in human rights mechanisms, and some explicitly justified on this basis the priority given to ‘hard law’ mechanisms, such as the European Court of Human Rights.
- Lawyers acquainted with human rights confirmed the potential of the UPR and the relevance of the involvement of the legal profession to strengthen the profession as guarantor of the rule of law. A number of lawyers also highlighted the need to foster the accountability of the judiciary.

### *The UPR has fostered the human rights dialogue at the international level*

The UPR is expected to provide an intergovernmental forum for following up treaty bodies and regional human rights mechanisms’ activities and recommendations. Looking at the ten countries above, the UPR was compared by one of the lawyers interviewed to a ‘great shaker’ that interjects a sense of international accountability in states, such as Zimbabwe and Swaziland, that have long demonstrated a reluctance to work with international human rights mechanisms. At the same time a number of NGOs mentioned that states used the UPR to undermine the recommendations and conclusions of treaty bodies and special procedures and/or information from NGOs.

The IBAHRI observes that:

- The UPR to some extent acts as a substitute for treaty bodies for states with a limited record on reporting to international human rights mechanisms. That is here the case of Malawi, Swaziland and Zimbabwe. Each of those three states demonstrated a willingness to cooperate with the mechanism. In Malawi, the review process at the HRC has had far-reaching consequences, with the establishment of an institutional framework for the realisation of human rights within the Ministry of Justice.
- In Brazil, the UPR process received greater attention from civil society and government agencies than treaty bodies. This attention was justified by the fact that a short amount of time separates the submission of the report and its review by the HRC. Conversely, at the level of the treaty bodies, many years can separate the two.
- In relation to the administration of justice specifically, explicit reference to UN human rights mechanisms' recommendations was sporadic. In some cases, treaty bodies' recommendations are reiterated without specific reference being made to the source of the recommendation. However, it is only on rare occasions that the UPR has a ripple effect, and that a recommendation issued by one Special Rapporteur is taken up by a significant number of states. When it happened, it happened most often at the second, rather than at the first, review.

### *The level of reporting and monitoring in the administration of justice is insufficient*

Currently, the amount of information gathered at the level of the UPR is unprecedented from a quantitative as well as a qualitative standpoint, if one considers the diversity of stakeholders involved and the different (international, regional and local) approaches they represent. Accurate information on justice systems may come primarily from international and regional human rights mechanisms, UNCT reports and associations of legal practitioners.

In order to improve the reporting, and as mentioned previously, the IBAHRI sees it as particularly important, on the one hand, to develop sector-specific reporting guidelines, addressing both state and non-state actors, and, on the other hand, to involve lawyers in the process. The legal profession plays a key role in strengthening legal reforms and informing legal debates in order to advance human rights in relation to sensitive issues, such as the abolition of the death penalty or the rights of sexual minorities. Involving lawyers in the process can have a very positive impact on the drafting of actionable recommendations and the implementation and monitoring of these recommendations.

## **Chapter Five**

# **Conclusions and Recommendations**

Created in 2006 by a resolution of the UN General Assembly, the Universal Periodic Review (UPR) constitutes a new environment of inter-state dialogue on human rights, providing a peer-to-peer review mechanism of states' human rights obligations. Designed to complement and support other human rights mechanisms, such as the treaty bodies, the UPR has been compared to the 'missing political component' of the UN system, through which international human rights recommendations gain political traction. Currently informed by a wide range of states and non-state actors, the UPR has created an unprecedented data set on states' human rights compliance. The UPR recommendations together with the other international human rights recommendations are intended to complement countries' national human rights action plans.

This report assesses the role the UPR has played so far in advancing human rights in the administration of justice. The core concept of 'human rights in the administration of justice' refers here to the independence of judges, lawyers and prosecutors, as well as the guarantees of a fair trial, as set forth in Article 14 of the ICCPR. The focus of the report is on the independence of legal professionals, which has been elaborated on by a number of standards. Among those, the 'building block' of norms on the independence of justice is constituted by the 1985 Basic Principles on the Independence of the Judiciary, the 1990 Basic Principles on the Role of Lawyers, the 1990 Guidelines on the Role of Prosecutors, the 1999 Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors and the 2002 Bangalore Principles for Judicial Conduct ('Basic Principles and Guidelines').

The report addresses the potential of the UPR in strengthening the international legal framework of human rights in the administration of justice (Chapter Two) and supporting states' efforts in implementing human rights in their justice system (Chapter Three). The report then assesses the relevance of the UPR recommendations relating to the administration of justice, and the involvement of lawyers in the process, in the specific case studies of ten jurisdictions (Chapter Four).

At the time the UPR started in 2008, the international legal framework governing human rights in the administration of justice was already particularly complex, while implementation has, for a long time, remained patchy. Chapter Two of the report sheds light on some key features of the UPR that would provide a justification for lawyers genuinely to engage in this sui generis human rights mechanism to further enhance their own protection and working conditions.

First, the UPR puts states, rather than independent experts, in a position to review the implementation of human rights obligations largely defined. Thus, states are in a position to translate international norms into concrete recommendations. While only a few states have so far explicitly referred to the UN Basic Principles and Guidelines, the UPR has tremendous potential to raise awareness about these standards and consecutively bring them into practice. The more states refer to international standards in their recommendations, the greater the chance that these standards will be integrated in national human rights action plans and implemented in countries' justice systems. Through the repetition of the same recommendations by a number of countries over time and their actual implementation, the UPR has the potential to consolidate and substantiate human rights standards governing the administration of justice as customary rules of human rights.

Secondly, the UPR may foster in an unprecedented manner a dialogue on human rights between the legal community and states. Among the stakeholders to be involved in the UPR process, the UPR guidelines for submissions list, 'inter alia, NGOs, national human rights institutions, human rights defenders, academic

institutions and research institutes, regional organizations, as well as civil society representatives'. This inclusive approach is a key asset of the mechanism: involving the right stakeholders in the process is likely to make the UPR process more impactful, increase compliance, as well as provide for better monitoring. Although not mentioned in the Guidelines, legal professionals are, however, undoubtedly among the actors to be involved in the UPR process. The fact that they assume a specific responsibility to uphold national and international human rights standards would justify their involvement in a more systematic manner. Lawyers know at first-hand how the legal system works on a day-to-day basis. At the same time they should be the first advocates of their own independence and an independent justice system. They should therefore be involved in the recommendations addressing the justice system and law reform. The legal community, sufficiently trained and legally equipped in human rights, has a key role to play to foster changes in the legal culture on the ground.

As evidenced in Chapter Four, within the limits of the ten country cases undertaken here, the participation of lawyers has remained limited until now. This is mostly due to the lawyers' lack of awareness about the mechanism or human rights in general. From interviews conducted by the IBAHRI, lawyers engaging in human rights do see the role of the legal community in the process not only as relevant, but central to their duty to enhance human rights and the rule of law. They also see the value of the UPR as a significant avenue to draw the attention of the international community to human rights violations in the country. Less mentioned, but key, was the opportunity to liaise with other stakeholders nationally and internationally to foster change. Indeed when the UPR has triggered some positive impact, this was most found, in the ten countries considered, in relation to fostering synergy and cooperation among the government and civil society, or strengthening the local institutional framework for the protection and realisation of human rights. The IBAHRI therefore concludes that one of the main achievements of the UPR has been to trigger a truly multi-stakeholder process in the realisation of human rights.

Chapters Three and Four provide qualitative and quantitative insights on the extent to which the administration of justice has been addressed over the first 19 sessions of the UPR, from 2008 to 2014. Chapter Three scrutinises the 1,256 recommendations made during the UPR relating to the independence of judges, lawyers and prosecutors.

The IBAHRI findings should be appraised in the context of a general assessment of the UPR, rather than a mere sectoral analysis of the UPR recommendations. The fact that states tend to overlook the separation of powers and the role of primary institutions, and especially the role of the court systems, in the protection of human rights, is a concern affecting the mechanism as a whole. Also, the fact that states do not address the role of legal professionals as actors that can actually play a role in the implementation of the recommendations, and tend to focus on the 'what' to achieve rather than the 'how', is a concern. It is also an issue that states distance themselves from the universal human rights instruments and the recommendations identified by the human rights mechanisms of the same system. It is with this broader perspective in mind that the findings of the report should be read.

The work of the Special Rapporteur over a period of 20 years shows how often judges and lawyers are exposed to harassment, intimidation, threats, assault, including physical violence and murder, arbitrary arrest and detention, restrictions on their freedom of movement, or economic or other sanctions, for measures they have taken in accordance with recognised professional obligations. These communications and reports have evidenced how serious the attacks against lawyers and judges

are in countries facing major human rights challenges. Many of these individual cases of violation reflect a more systemic problem in the justice system of the country.

Between 2008 and 2014, the number of communications issued by the Special Rapporteur on the Independence of Judges and Lawyers can be estimated at almost 600, addressing more than 100 different countries. The communications addressed a wide array of violations of the independence of the justice system from cases of arbitrary sanctions and physical attacks against legal professionals to the creation of special courts for expedited trials. In 2015, the HRC condemned the ‘increasingly frequent attacks on the independence of judges, lawyers, prosecutors and court officials’. Concerns and recommendations expressed by states at the UPR during the same period reflected a different perception of the scale of the problem. Out of the 38,298 recommendations made at the UPR over six-and-a-half years, the independence of lawyers received only 72 recommendations. The independence of prosecutors was mentioned 126 times, while 1,162 recommendations addressed the fight against impunity and called the state undergoing review to prosecute. Finally, if the independence of the judiciary attracted more than 1,000 recommendations, a third of the recommendations were general and tackled the ‘independence’, ‘impartiality’ and/or ‘effectiveness’ of the judiciary, or the problem of ‘judicial corruption’, in broad terms. Overall, only 40 countries received a fair signal – more often in general rather than specific terms – about shortcomings in their justice system, at the UPR. This tendency to overlook the far-reaching impact on human rights of the independence of justice and deficiencies in court systems is corroborated by eight out of the ten countries cases undertaken in this report. In these eight countries considered in Chapter Four, the IBAHRI found that the administration of justice did not receive the attention it should have received, in light of the existing challenges on the ground.

Through a mapping of the specific issues addressed at the UPR, the report evidences issues that are absent or too rarely addressed.

Among recommendations addressing specific shortcomings of the court system, about a quarter of the recommendations addressed the need for training of judges, lawyers and prosecutors. The other issues addressed related to the composition and appointment process of the judiciary, transparency in the courts’ set-up and function and the human, material and financial resources of the justice system. For prosecutors, in the limited amount of remaining recommendations, key concerns addressed, apart from training, were the human and material resources of the prosecuting service, and, to a lesser extent, the fight against corruption within prosecuting services and protection measures for prosecutors. Similarly for lawyers, the main issues addressed were training, and to a lesser extent, protection measures.

The most striking gap in the UPR recommendations pertains to the protection of legal professionals, and especially lawyers, in their own right. The specific legal basis and rationale for the protection of legal professionals stem from the UN Basic Principles and Guidelines. Similarly, their right to freedom of expression, assembly and association are conditions for the independence of justice that have almost never been addressed. Professional organisations of lawyers – bar associations or law societies – have rarely been mentioned, even though they have a unique role to play to ensure the protection and education of lawyers and to promote an independent court system. Finally, the involvement of lawyers in law reform and the fight against impunity have never been mentioned.

Positively, the independence of the judiciary is often mentioned in recommendations, as is the need for training legal professionals in human rights. However, access to information about



the court system, the participation and non-discrimination of the justice system are more rarely addressed. The representativeness of the legal community is a requisite for the protection of women's and children's rights, and vulnerable groups, such as migrants, or ethnic or sexual minorities.

The report examines how specific and progressive the recommendations relating to the administration of justice are, from a human rights-based approach. In order to do so, the IBAHRI looked at whether these recommendations are not only 'action-orientated', but also reflect the current level of protection afforded to legal professionals in international human rights law. The report then considers the level of monitoring and implementation of these recommendations. The findings reveal a twofold challenge facing, respectively, recommending states and states under review.

The main challenge facing recommending states is to draft specific and action-orientated recommendations that pinpoint the specific shortcomings in the justice system, borrow the agreed international human rights language and build upon the current international human rights framework. Only a few states have referred so far to the UN Basic Principles and Guidelines, or previous recommendations made by other human rights mechanisms in the administration of justice. Similarly, only a few states have echoed the recommendations and good practices identified by the Special Rapporteurs in the administration of justice. For the UPR to be counted among human rights mechanisms, the UPR recommendations cannot but be guided by the core human rights principles of non-discrimination, participation, access to information and accountability. This is true for all governance sectors, and the administration of justice as well. Thus the Special Rapporteur has recommended that the judiciary should be appointed in a participatory and transparent manner, should be representative of the minorities in the country and should integrate a gender-based approach. Specific recommendations that depart from the international human rights framework lose their potential impact. Specific recommendations can only trigger change if the legal and policy environment, where they are implemented, actively enables the enjoyment of human rights. In other words, a recommendation to train legal professionals in human rights, or appoint judges in an objective and transparent manner, will only be meaningful if the state is also being asked more broadly to comply with the UN Basic Principles and Guidelines and other relevant international human rights instruments.

The main challenge facing states under review is to develop a monitoring system that focuses on the actual impact on the realisation of human rights in the country, and support a self-performance assessment process by the legal profession. Out of a sample of specific, action-orientated recommendations, the IBAHRI found no information on the implementation of almost 40 per cent of them, and that the monitoring most often found addressed specific measures implemented, rather than the actual impact on the administration of justice or access to justice. The absence of implementation or reporting guidelines on the administration of justice is a problem that goes beyond the UPR. Apart from the United Nations Rule of Law Indicators, there is currently no single universal system accepted for measuring adherence to the international standards on the independence of justice. The IBAHRI encourages states to use the United Nations Rule of Law Indicators and set up a monitoring system based on the UN Basic Principles and Guidelines to monitor progress in realising access to justice for all, as targeted by Sustainable Development Goal 16 adopted by all UN Member States in September 2015. In light of the findings presented, the IBAHRI makes the following recommendations with a view to improving the UPR mechanism and ensuring that the relevant stakeholders and standards inform the process and states' recommendations.

## 5.1 To recommending states

### **1. When assessing a state's human rights situation, pay specific attention to the information coming from lawyers' associations.**

Legal professionals are the protectors and guarantors of human rights and have first-hand knowledge of law in the country. The information coming from the legal profession is key to determining legal and judicial challenges encountered in the protection of human rights.

### **2. Consider the separation of powers and the independence of legal professionals as priority issues to be addressed at the UPR as a necessary requisite for the protection of all human rights.**

The separation of powers and the independence of legal professionals constitute a building block for the realisation of all human rights and should receive special attention in the review of the human rights situation of any country. No right will be efficiently protected if the administration of justice does not genuinely integrate the principles of independence of judges, lawyers and prosecutors. The IBAHRI regrets that until now issues of separation of power and the constitutional-making process have been overlooked in a number of countries in political transition.

### **3. When making recommendations, refer to the UN Basic Principles and Guidelines and prior recommendations and good practices in the administration of justice as identified by international human rights mechanisms, especially the Special Rapporteur on the independence of judges and lawyers.**

Standards give recommendations content, as well as authority and legitimacy. They also provide benchmarks for the implementation of the recommendations. Currently, the UPR recommendations are very often too vague to respond efficiently to the shortcomings of any given jurisdiction. Then too many recommendations, although action-orientated, do not borrow the international human rights language, or do not refer to the relevant international human rights instruments, which would inform the conducive legal and institutional environment for the implementation of these recommendations. In order to secure a greater impact on human rights in the country, recommending states should be guided by the core human rights principles of non-discrimination, participation, access to information and accountability and refer explicitly to human rights instruments, while drafting their recommendations.

### **4. Call for judges, prosecutors and lawyers to be recognised as subjects of specific protection measures to ensure that they carry out their professional duties without any external or internal interference.**

The link that exists between violations of human rights and attacks on legal professionals triggered the establishment of the mandate of the Special Rapporteur on the independence of judges and lawyers. This link has been continuously evidenced through the mandate since then. Conversely, the security of tenure of judges and the protective measures for legal professionals have so far been addressed poorly by recommending states. Lawyers, in particular, are rarely recognised by states as subjects of specific protection in their own right, in a manner distinct from the protection recognised to human rights defenders generally. Lawyers serving the defence of a number of interests have been identified as being at risk by the Special Rapporteur. This is the case of lawyers representing persons accused of terrorism, or victims of enforced disappearance or extrajudicial executions, or organised crime such as people

trafficking. This also applies to lawyers addressing corruption, land ownership or the protection of the environment and natural resources or the defence of vulnerable groups, such as indigenous peoples, or ethnic, linguistic, religious, cultural or sexual minorities, who are critical of the status quo and assert their rights; women who are victims of violence or discrimination; political opponents and those who oppose war or campaign for their region's independence. The list is not exhaustive.

**5. Call for the administration of justice to be transparent, accessible to all (through the provision of legal aid where necessary), participatory and representative of the population it serves as a requirement to ensure access to justice by vulnerable groups.**

The UPR recommendations address the independence of the judiciary with a view to fighting impunity and providing access to justice. However, only a few recommendations have so far built bridges between justice systems and rights-holders by ensuring that rights-holders have access to information about the appointment or disciplinary process of judges and the composition of the legal profession is representative of the population. As set out by the Special Rapporteur, justice systems must be transparent, participatory and accountable to instil public confidence in the justice system and ensure effective protection of vulnerable groups.

**6. Call for the state under review to allocate material and financial resources to the justice system, and ensure that the judiciary be given an active involvement in the preparation of its budget and enjoy autonomy in the allocation of its resources, while remaining accountable to the other branches of power for any misuse.**

International organisations, such as the Council of Europe, and international experts have identified lack of financing as one of the main challenges justice systems have been faced with. Around 30 per cent of the UPR recommendations relating to the administration of justice called upon states to strengthen the capacity of their justice systems. In addition, a number of recommendations addressed the fight against corruption within the judiciary. These recommendations are most often drafted in general terms, without calling upon any specific action. The Special Rapporteur highlighted several times that financial autonomy was an essential component of the independence of the judiciary. The judiciary must concomitantly remain accountable to the executive and the legislative function for the use of its resources.

**7. Call for a national independent, self-governed and self-regulatory bar association to be the primary institution charged with protecting the legal profession and fostering lawyers' engagement in the protection of the rule of law and human rights.**

Professional organisations of lawyers were only mentioned by a small number of recommending states. Charged with protecting and enhancing the capacities of lawyers, as set out in Principle 25 of the Basic Principles on the Role of Lawyers, professional organisations of lawyers, such as national bar associations and law societies, should be recognised as among the primary actors in the protection and education of lawyers, as well as their engagement in the protection of human rights. The country case studies presented in Chapter Four of this report demonstrated that the legal community's knowledge about the UPR process is very limited.

**8. Call for the legal community to receive continuous legal training on key human rights issues encountered in the country, following the recommendations of the Special Rapporteur in the 2010 annual report 14/26 and to be involved in the law reform, especially in the revision of criminal legislation.**

It is the IBAHRI's wish to confirm and consolidate the current states' recommendations calling for the training of law enforcement officers and legal professionals in human rights in general, and on sensitive human rights issues in the country in particular. The Special Rapporteur spelt out in 2010 and 2012 a number of recommendations on how to develop a training programme for legal professionals.

It is also the IBAHRI's wish that the legal community plays a greater role not only in the implementation of the law, but also in the legal debates during the law reform processes. Legal professionals are key stakeholders to foster legal changes. Recommending states should call for the states undergoing review to meaningfully involve civil society and the legal community in undertaking law reform. The IBAHRI identified 2,561 recommendations calling for states under review to revise their criminal legislation, in accordance with international human rights law. None of them calls for the contribution of the legal community.

**9. Call for the independence of prosecutors and the respect of international human rights standards in the fight against impunity and terrorism.**

Only ten per cent of the recommendations calling upon states to prosecute and fight against impunity addressed the independence of the prosecution during the period considered in the study. The Special Rapporteur has consistently highlighted the threat to the independence of the judiciary and fair trial rights created by counterterrorism measures.

**10. Cooperate with the state under review to implement the UPR recommendations.**

Most of the 15 countries making the highest number of recommendations on the independence of judges, prosecutors and lawyers are also the main country donors in the legal and judicial development sector. As such, recommending states are particularly well placed to assist states under review in the implementation of recommendations.

## **5.2 To states under review**

**11. Involve the judiciary and professional organisations of lawyers in the implementation and monitoring of international human rights recommendations, including the UPR recommendations, especially relating to the administration of justice and legal reforms.**

Legal professionals are stakeholders with the greater knowledge of the legal and court systems. In accordance with Principle 25 of the Basic Principles on the Role of Lawyers, states and lawyers share a joint responsibility to secure access to justice to all. This should justify a greater dialogue between states and the legal community in human rights, especially in the administration of justice.

**12. Use the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors as benchmarks for the implementation of the UPR recommendations relating to the administration of justice.**

The United Nations Rule of Law Indicators constitute one of the most advanced tools to develop a comprehensive monitoring system, using in addition the UN Basic Principles and Guidelines and the recommendations of the Special Rapporteur on the independence of judges and lawyers. In order to monitor progress in realising access to justice, in accordance with Sustainable Development Goal 16, the IBAHRI encourages using, at least, the two following indicators: (1) the existence of a specific legal framework to protect judges from external interference and arbitrary removal and punishment; (2) the existence of a self-governing professional association of lawyers established through law with the mandate and authority to protect the independence and role of the legal profession, in compliance with the Basic Principles on the Role of Lawyers.

**13. Refer to the landmark cases of the highest judicial instances concerning human rights held in your country, while reporting to the UPR.**

When a state reports on the human rights situation within its jurisdiction to the HRC, its reports are submitted on behalf of the three branches – executive, legislative and judicial – of the state. Case law is the primary evidence of the work of the judiciary in the protection of human rights.

## **5.3 To lawyers and lawyers' associations**

**14. Use the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors and the recommendations of the Special Rapporteur in order to monitor the independence of judges and lawyers in the country.**

In accordance with the role and mission of legal professionals in human rights as mentioned above, professional organisations of lawyers should undertake an annual self-assessment of performance and engage in monitoring the independence of legal professionals in the country.

**15. Monitor the independence of the judiciary and independence of lawyers and prosecutors in their country and take part in the UPR process.**

Coordination among actors is key to ensuring that information is widespread at national and international levels and usefully nurtures the UPR recommendations. The IBAHRI wishes to encourage lawyers' associations to work with national human rights institutions, by providing specific information on the independence of the court system. The IBAHRI encourages the legal profession to develop and use self-assessment performance tools.

**16. Foster exchanges on human rights issues and related case law between national bar associations and members of the judiciary, especially between countries receiving similar recommendations at the UPR.**

The UPR demonstrates the value of a peer-to-peer exchange on human rights. International and regional organisations of legal professionals should further engage in fostering the dialogue on common human rights issues, as well as human-rights-related case law, and self-performance tools.

## 5.4 To the Office of the High Commissioner for Human Rights

### **17. Disseminate the United Nations Rule of Law Indicators in order to assist states and NGOs in the monitoring of human rights in the administration of justice.**

As mentioned under recommendation 12, the United Nations Rule of Law Indicators currently provide one of the most advanced tools to assist states in reporting on human rights in the administration of justice.

### **18. Foster the use of reporting guidelines at the UPR by states and NGOs.**

The absence of reporting guidelines has a detrimental effect on the quality of reporting and monitoring. The IBAHRI found that, in general, the reporting exercise was not providing any account of the impact achieved on a better administration of justice or access to justice. A more comprehensive reporting system with a clear focus on the impact on human rights on the ground is necessary.

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UPR Index: <http://uhri.ohchr.org/en>

URP Info: [www.upr-info.org/en](http://www.upr-info.org/en)

# Annex 1

## List of the main human rights instruments on the administration of justice

### *United Nations Instruments*

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

International Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Elimination of All Forms of Discrimination against Women

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention on the Rights of the Child

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

International Convention for the Protection of All Persons from Enforced Disappearance

Convention on the Rights of Persons with Disabilities

Convention relating to the Status of Refugees

Convention relating to the Status of Stateless Persons

Basic Principles on the Independence of the Judiciary

Basic Principles on the Role of Lawyers

Basic Principles and Guidelines on the Right to a Remedy and Reparation

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Draft Universal Declaration on the Independence of Justice ('Singhvi Declaration')

Guidelines on the Role of Prosecutors

Guidelines for Action on Children in the Criminal Justice System

United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

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# Annex 2

## Regional groups of states

AFRICA	ASIA	EEG	GRULAC	WEOG
Africa	Afghanistan	Albania	Antigua and Barbuda	Andorra
Algeria	Bahrain	Armenia	Argentina	Australia
Angola	Bangladesh	Azerbaijan	Bahamas	Austria
Benin	Bhutan	Belarus	Barbados	Belgium
Botswana	Brunei Darussalam	Bosnia and Herzegovina	Belize	Canada
Burkina Faso	Cambodia	Bulgaria	Bolivia (Plurinational State of)	Denmark
Burundi	China	Croatia	Brazil	Finland
Cape Verde	Cyprus	Czech Republic	Chile	France
Cameroon	Democratic People's Republic of Korea	Estonia	Colombia	Germany
Central African Republic	Fiji	Georgia	Costa Rica	Greece
Chad	India	Hungary	Cuba	Iceland
Comoros	Indonesia	Latvia	Dominica	Ireland
Congo	Iran (Islamic Republic of)	Lithuania	Dominican Republic	Israel
Côte d'Ivoire	Iraq	Montenegro	Ecuador	Italy
Democratic Republic of the Congo	Japan	Poland	El Salvador	Liechtenstein
Djibouti	Jordan	Republic of Moldova	Grenada	Luxembourg
Egypt	Kazakhstan	Romania	Guatemala	Malta
Equatorial Guinea	Kuwait	Russian Federation	Guyana	Monaco
Eritrea	Kyrgyzstan	Serbia	Haiti	Netherlands
Ethiopia	Lao People's Republic	Slovakia	Honduras	New Zealand
Gabon	Lebanon	Slovenia	Jamaica	Norway
Gambia	Malaysia	The former Yugoslav Republic of Macedonia	Mexico	Portugal
Ghana	Maldives		Nicaragua	San Marino
Guinea	Marshall Islands		Panama	Spain
Guinea-Bissau	Micronesia (Federated States of)		Paraguay	Sweden
Kenya	Mongolia		Peru	Switzerland
Lesotho	Myanmar		Saint Kitts and Nevis	Turkey
Liberia	Nauru		Saint Lucia	United Kingdom
Libya	Nepal		Saint Vincent and the Grenadines	United States of America
Madagascar	Oman		Suriname	
Malawi	Pakistan		Trinidad and Tobago	
Mali			Uruguay	
			Venezuela (Bolivarian Republic of)	

AFRICA	ASIA	EEG	GRULAC	WEOG
Mauritania	Palau			
Mauritius	Papua New Guinea			
Morocco	Philippines			
Mozambique	Qatar			
Namibia	Republic of Korea			
Niger	Samoa			
Nigeria	Saudi Arabia			
Rwanda	Singapore			
São Tomé and Príncipe	Solomon Islands			
Senegal	Sri Lanka			
Seychelles	Syrian Arab Republic			
Sierra Leone	Tajikistan			
Somalia	Thailand			
South Africa	Timor-Leste			
South Sudan	Tonga			
Sudan	Turkmenistan			
Swaziland	Tuvalu			
Togo	United Arab Emirates			
Tunisia	Uzbekistan			
Uganda	Vanuatu			
United Republic of Tanzania	Vietnam			
Zambia				
Zimbabwe				
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