



The Effectiveness of Bar Associations in Conflict & Crisis

December 2016

THE EFFECTIVENESS OF BAR ASSOCIATIONS IN CONFLICT & CRISIS

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Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

www.lawyersconflictandtransition.org/contact



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December 2016

Acknowledgements & Disclaimer

This report was prepared by Jonathan Porter, in association with the *Lawyers, Conflict and Transition* project. All views expressed, and any errors, remain the responsibility of the authors.

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Executive Summary

- Bar associations (also known as bar councils and law societies) are often created to provide a unified voice within the legal profession and may also play other roles including: the regulation of the legal profession; the protection of the rule of law; and engaging in law reform.
- International standards on the regulation and effectiveness of bar associations have been developed by the United Nations (UN). These include the UN Basic Principles on the Role of Lawyers which is mainly directed at individual lawyers but also includes guidelines and recommendations for bar associations. The UN Special Rapporteur on the Independence of Lawyers and Judges has also developed guidelines for bar associations.
- The International Bar Association regularly disseminates statements, declarations and guidance on the effective functioning of national bar associations.
- International standards on the roles of bar associations imply that they should be active in:
 - Defending the independence of the legal profession. Bar associations play a critical role in ensuring that the legal profession is free from state interference and that individual lawyers are able to carry out their work free of harassment or threat. The importance of this role is all the more salient in times of crisis or conflict, wherein state authorities may attempt to control or oversee the administration of justice and the legal profession at large.
 - Ensuring access to justice. International standards indicate that bar associations should provide support to individuals in accessing the law, particularly the poor and marginalized, for example, by removing barriers to accessing legal services and providing pro-bono services. This role is critical at times of crisis when such marginalized groups can be targeted and are thus more likely to require access to legal services.
 - Regulation and training. Regardless of their structure or the jurisdiction in which they work, bar associations must regulate and

train their members, including regulating ethics, instituting disciplinary proceedings, and providing continuing legal education.

- Defending the rule of law. As the unified voice of the legal profession, bar associations serve as the vanguards in defending the law, particularly during times of crisis. This may necessitate political activity where the administration of justice and treatment of lawyers is concerned.
- In addition to these international standards, national best practice provides further guidance on missions and mandates, organization and structure, and programming.
- The responsibilities and roles of bar associations operating in jurisdictions experiencing crisis and conflict are often more difficult to identify. The independence of the legal profession may be threatened, the rule of law weakened, or corruption endemic, causing multiple problems for the effective functioning of bar associations. International standards make little reference to these situations and much must be inferred from case studies and international response.
- The extent to which bar associations should maintain a position of neutrality or actively respond to crises, including human rights violations and threats to the rule of law, is contested.
- Some bar associations have been particularly active in times of conflict or authoritarianism. Where bar associations have been silent in the face of human rights violations and attacks of the rule of law, they have been the subject of criticism.
- Corruption in jurisdictions in crisis poses a special problem for bars, as clientelism may infect the organization and the activities of the bar association itself.
- Despite these challenges, criticism of inaction and the work of cause lawyering have been effective in some cases in pushing bar associations to become more actively involved in responding to crisis.
- There remains a need for more detailed standards and guidance on the role and responsibilities of bar associations in crisis or conflict environments. Standards should be developed on issues such as:
 - When and how bar associations should take stances when defending the rule of law and human rights violations.

- Guaranteeing access to legal services through pro bono services, particularly where the crisis or conflict affects a marginalized or minority community and compromises their ability to access such services.
- How to protect the independence of the legal profession from state interference in crisis.
- Mechanisms to protect lawyers and seek justice for lawyers whose lives are threatened or who are killed as a result of their work.

Introduction

Bar associations, bar councils and law societies¹ have become a standard feature of most modern legal systems. They are often created to provide a unified voice within the legal profession and play other roles such as the regulation of the legal profession, the protection of the rule of law, and the promotion of law reform. Most modern bar associations have similar mandates that seek to benefit three target groups: individual lawyers, the legal profession as a whole, and the public more generally.²

Bar associations take a myriad of different forms depending on the jurisdiction. Some are mandatory, regulatory bars where membership is obligatory to legally practice law, while others are voluntary or limited to specialty groups that may serve specific fields of law or are reserved to minority groups of legal professionals.³ Equally as diverse as the bar associations themselves are the jurisdictions in which they function. Some bar associations regulate the legal profession in political and social environments where the rule of law is strong and where the legal profession enjoys full independence. However, other bar associations must carry out their duties amidst armed conflicts, natural disasters, political upheavals or other widespread crises that threaten the rule of law, human rights and the independence of the legal profession.

Given the diversity of bar associations and the range of jurisdictions in which they operate, are there fundamental best practices that define or characterize an effective bar association? Additionally, in the event of political or social upheaval,

¹ In this article, these various terms will be regarded as synonymous and 'bar association' will be used.

² Quintin Johnstone, 'Bar Associations: Policies and Performances,' *Yale Law and Policy Review* 15(193), 1996 p.195.

³ Many jurisdictions have a mandatory bar as a requirement for legal practice and may have additional voluntary bars to represent special interests. For example, India requires all lawyers to be enrolled with the Bar Council of India to practice, making it a mandatory bar. In the US, most states require membership in the state's bar association to practice law. Voluntary bar associations include non-mandatory, non-regulatory private bodies, including for example, the Federation of Women Lawyers in Kenya, the Arab Associations for International Arbitration in France, or one the largest voluntary bar associations – the American Bar Association.

what are the roles and responsibilities of effective bar associations and how should they be carried out? This paper examines shared standards of bar associations to identify what criteria exist to measure their effectiveness in times of both peace and conflict. The first section looks at the existing international framework and identifies where standards exist regarding the roles and responsibilities of bar associations and where further development is required. The second section looks at common trends and points of difference among various bar associations to identify national best practices and standards that make up an effective bar association. The final section analyzes the gaps in standards for jurisdictions that experience crisis or conflict. In particular it focuses upon the need for developing standards and norms for bar associations that function in emergency and high-risk environments.

I. International Standards

Along with medical professionals, lawyers are the only profession with highly developed and structured standards at the United Nations level.⁴ The UN Basic Principles on the Role of Lawyers confers obligations on the legal profession to ensure its effective functioning and encourage respect for basic rights. Specifically, lawyers are to “uphold human rights and fundamental freedoms recognized by national and international law,” and “act in accordance with the law and recognized standards and ethics of the legal profession.”⁵ The Basic Principles recognize the vital role of bar associations 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.”⁶ Additionally, the Basic Principles recognize that these basic rights and freedoms require access to a legal profession that remains independent at all times.⁷ These requirements have been further developed by the UN Special Rapporteur on the Independence of Judges and Lawyers, as discussed below.

Additionally, the International Bar Association (IBA) provides important guidelines on best practices for local bar associations to follow. As the ‘global voice’ of the legal profession, the IBA seeks to influence the development of international law and shape the future of legal profession throughout the world.⁸ One of the IBA’s three main activities is support of bar associations worldwide. This includes support for the development of bar associations and best practices in their governance and functioning.⁹ These general standards, along with those included in the UN Basic Principles, are analyzed below.

⁴ Kieran McEvoy, ‘What Did the Lawyers do During the ‘War’: Neutrality, Conflict and the Culture of Quietism,’ *The Modern Law Review*, 74(3), 2001, p.383.

⁵ UN Basic Principles on the Roles of Lawyers, (7 September 1990), para. 14.

⁶ *Ibid.* Preamble.

⁷ *Ibid.*

⁸ International Bar Association website, About the IBA, Available at [http://www.ibanet.org/About the IBA/About the IBA.aspx](http://www.ibanet.org/About%20the%20IBA/About%20the%20IBA.aspx), Accessed 30 Oct 2015.

⁹ *Ibid.*

Guarantee the Independence of the Legal Profession

The independence of the legal profession is a fundamental principle that is integral to the effective functioning of a bar association and is strongly protected at the international level. The UN Basic Principles provide that bar associations have a vital role in protecting lawyers and the legal profession as a whole from restrictions and infringements.¹⁰ The IBA has recognized that the independence of the legal profession “constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate legal services.”¹¹ Indeed, the IBA has as one of its three main objectives the maintenance of the independence of the legal profession and the right for lawyers to practice without interference. Thus, effective bar associations must work to ensure that lawyers are able to practice without fear or favour. As discussed below, the independence of the legal profession becomes critical during times of crisis, where bar associations and the profession as a whole have a central role in maintaining the rule of law and ensuring access to justice.

Ensure Access to the Law

International standards provide that bar associations have an obligation to ensure access to the law for all persons in a jurisdiction. The UN Basic Principles include four articles on access to legal services without discrimination (based on a non-exhaustive list of social status) and with specific provisions for the poor.¹² Additionally, bar associations are to work with governments to ensure that all persons have equal and effective access to legal services and are assisted by lawyers without improper interference (Arts 24-25).¹³ Access to legal services not only requires the availability of lawyers and proximity to services, but also necessitates the affordability of legal services or the provision of low-cost or free legal services to groups and individuals who are unable to afford them. The UN Basic Principles call on governments to ensure that there are sufficient resources

¹⁰ Basic Principles, preamble.

¹¹ International Bar Association, IBA Standards for the Independence of the Legal Profession, Adopted 1990.

¹² *Ibid.* paras 1-4.

¹³ *Ibid.* paras 24,25.

to ensure legal services to the poor.¹⁴ They also underline, however, the important role that bar associations play in the organization and provision of such services, and in particular in enabling the poor to access them.¹⁵

The IBA has also argued that one of the key responsibilities of bar associations is to promote free and equal access of the public to the justice system, including the provision of legal aid and advice.¹⁶ To ensure that no person is denied justice, the IBA also states that bar associations should make available the services of lawyers to those unable to pay for such services.¹⁷ In its Pro Bono Declaration, the IBA states that such pro bono services are an integral part of the legal profession and therefore an integral part of the role and responsibilities of bar associations.¹⁸

As both the UN Basic Principles and the IBA suggest, the provision of pro bono legal services should be consistent and permanent as an integral part of the organization of the legal profession. However, the provision of pro bono services are of particular importance during periods of crisis or conflict. As will be discussed further below, where jurisdictions experience upheaval, bar associations have a fundamental role in ensuring that all persons and communities, and particularly the poor and underprivileged, have the opportunity to access legal services.

Regulation and Training

Effective bar associations ensure that there is adequate regulation of legal professionals and provide training opportunities to lawyers and others in the legal profession, including students and paralegals. The UN Basic Principles state that “lawyers [should] 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.”¹⁹ It is likely impossible to

¹⁴ Basic Principles, paras 1-4.

¹⁵ *Ibid.*

¹⁶ IBA Standards, *supra* n. 11, para 18(e).

¹⁷ *Ibid.* para 15.

¹⁸ IBA, IBA Pro Bono Declaration, 16 Oct 2008, paras 1-2. Available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=C4B06FD6-A807-44D4-A98A-C73B464589C6>

¹⁹ Basic Principles, para 9.

create an international standard for admission to bar associations since jurisdictions vary in requirements and legal education. However, admission standardization should include at least prerequisite education, practical experience, an examination, moral standards, and an oath of conduct.²⁰ The IBA states that regardless of the methods chosen, admission requirements should promote a high standard of legal education as a prerequisite.²¹

Following admission to the bar, effective associations ensure that continuing education is provided to members. Continuing legal education (CLE) requirements for members of bar associations is not only a best practice at the national level, but is arguably an international standard that is required of all bar associations. The IBA has stated that continuing education "shall be made an obligation of every member in the legal profession"²² and that bar associations and law societies have primary responsibility for encouraging their members to take part in continuing education.²³

Codes of conduct are equally essential to a bar association to maintain the integrity of the legal profession. These codes should regulate relationships between lawyers and clients, other lawyers, the court and society at large.²⁴ Where there is misconduct by lawyers, international standards suggest that bar associations must strengthen discipline and enforcement measures. The UN Basic Principles require bar associations to establish: codes of conduct; appropriate procedures for discipline upon breach; and relevant enforcement mechanisms to ensure compliance.²⁵ The IBA has echoed these requirements, adding that a core role of the bar association is to maintain the "honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession."²⁶

²⁰ International Network to Promote the Rule of Law (INPROL), 'Establishing and Reforming Bar Associations in Post-Conflict States,' January 2010 at p.11

²¹ IBA Standards, *supra* n.11, para 18(h).

²² International Bar Association, 'IBA Policy Guidelines for Training and Education of the Legal Profession (Part II),' 23 October 2014, para 5.

²³ *Ibid.*, para 2.

²⁴ INPROL, *supra* n.20 at p.19.

²⁵ Basic Principles, paras 16-19.

²⁶ IBA Standards, *supra* n. 11 at para 18(b).

Defense of the Rule of Law

Effective bar associations have a clear role to play in defending the rule of law both within their jurisdiction as well as at an international level. Indeed, as the voice of the legal profession, bar associations have a responsibility to ensure that the rule of law is respected and upheld. The UN Basic Principles make numerous references to the role of professional associations in ensuring “adequate protection of the human rights and fundamental freedoms to which all persons are entitled,” requiring that “all persons have effective access to legal services provided by an independent legal profession.”²⁷ Additionally, the IBA has called upon all of its members to speak out in support of the rule of law in their respective communities. This necessitates effective action on the part of bar associations to ensure respect for rule of law in a jurisdiction where fundamental rights are guaranteed.

The way in which bar associations materialize this support for the rule of law and take stances against threats to it is debated both within and across bar associations. Depending on the threat at hand, initiatives promoting the rule of law may necessitate making public stances on specific issues or legislation, or denouncing certain government policies. Some observers suggest that bar associations should avoid highly contentious law reform endeavours, particularly when they do not have a direct impact on the legal profession or where they cannot realistically expect to exert much influence.²⁸ Thus, many rule of law initiatives of bar associations have focused on work in other jurisdictions rather than the development of the rule of law ‘at home’. For example, the ABA’s Rule of Law Initiative (ROLI) has worked in over 90 countries to develop the capacity of bar associations to engage in public interest efforts, address issues regarding independence of the legal profession, and work on resolving human rights issues.²⁹

In addition to these international standards, national best practice provides further guidance on missions and mandates, organization and structure, and programming. Indeed, across jurisdictions, there are both commonalities and striking differences in the characteristics of bar associations that enable them to

²⁷ Basic Principles, 9th paragraph, preamble.

²⁸ Johnstone, *supra n.1* at 240.

²⁹ See, J. Rasmussen, ‘A Short History of the American Bar Association Rule of Law Initiative’s Technical Assistance Approach,’ *Wisconsin Int’l L. J.* 31(3), 2013.

carry out their roles. The next section examines the mandates, organization and programming of various national bar associations in order to isolate further criteria and standards of effectiveness.

II. National Standards

The stated missions or mandates of bar associations form a critical foundation that set out the expected standards and purpose of the organization and guide the organization in implementation of activities. The organization and leadership of bar associations in different jurisdictions also display important structural requirements to the effective functioning of associations. Finally, the targeted programming and activities of bar associations suggest a pattern for effectiveness and display the degree to which implementation of activities correlates with the mandates and mission statements.

Missions and Mandates

The mission of a bar association underpins its organization and programming and assists the organization in prioritizing its activities. As seen in the examples below, most bar associations have similar mandates and are founded on related principles. Generally, bar associations are organized to become a voice of the legal profession in a jurisdiction. National or state-level mandatory or comprehensive bars are guided by missions that emphasize the rule of law, the regulation of the legal profession, ethical conduct and professionalism. They often focus on issues such as eliminating biases and discrimination in the legal profession and the justice system or advancing networking opportunities for lawyers in the same field of law.³⁰

For example, the American Bar Association (ABA), one of the largest voluntary bar associations in the world, has for its purpose to: serve its members through professional growth opportunities; improve the legal profession through legal education, ethical conduct and public service; eliminate bias and enhance diversity in the legal profession and the justice system; and advance the rule of law throughout the world.³¹ Similarly, the UK Bar Council has as its mission to:

³⁰ E. Chambliss and B. Green, 'Some Realism about Bar Associations,' *DePaul Law Review*, 57(2), 2008, p. 425; See also, Law Society of Upper Canada, 'Law Society Studies and Scan of Best Practices,' October 30, 2014, p.27.

³¹ American Bar Association, Policy and Procedures Handbook 2014-2015, pp.1-2 Available at <http://www.americanbar.org/content/dam/aba/administrative/>

promote the Bar's services; promote fair access to justice; promote standards of ethics, equality and diversity across the profession; and to promote the networking of British lawyers at home and abroad.³² The South African General Council of the Bar seeks to: promote the teaching and practice of law and the administration of justice; deal with all matters of the legal profession and take action on related matters; and to uphold the interest of advocates in South Africa.³³ Despite the varying jurisdictions in which bar associations function, there is a general core mandate of many associations in both common and civil law traditions. As an example of breadth, each of the bar associations in Jamaica, France, Hong Kong, Kenya, Namibia, and Israel contain mission statements or objectives relating to the integrity of the legal profession and standards of conduct, public education for lawyers, assisting the public interest through legal aid initiatives, and advancing the rule of law.³⁴ These national, comprehensive or umbrella bar associations have an important role in regulating the legal profession, ensuring ethical conduct and promoting the rule of law in general. Specialized bar associations, for example, the Hispanic National Bar Association in the U.S., the Indigenous Bar Association in Canada and the Family Law Bar Association in the UK, often have more specific missions that target either a particular field of law, a group of lawyers with a common characteristic or a social or legal cause.

Organization and Bar Structure

The organization of a bar association is affected by its guiding principles or mandates, leadership structure, the diversity of the association, and its various

[house of delegates/2014-2015 policy and procedures handbook greenbook1.authcheckdam.pdf](#)

³² UK Bar Council, Mission Statement. Available <http://www.barcouncil.org.uk/about-us/mission-statement/>, Accessed 30 Oct 2015.

³³ General Council of the Bar of South Africa website, Mission Statement, Available at <http://www.sabar.co.za/about.html> Accessed 30 Oct 2015.

³⁴ See, for example, Jamaican Bar Association, 'About JamBar,' < http://www.jambar.org/index.php?option=com_content&view=article&id=2&Itemid=214 >; Israel Bar Association, 'Statutory Functions,' 31 Aug 2015 < http://www.israelbar.org.il/english_inner.asp?pgId=103336&catId=372 >; Society of Advocates of Namibia, 'The objectives of the Society of Advocates of Namibia,' < <http://www.namibianbar.org/About.htm> >; The Law Society of Kenya, 'Objectives,' 2016, < <http://www.lsk.or.ke/index.php/about-lsk> >; The Law Society of Hong Kong, 'Profile,' April 2015 < http://www.hklawsoc.org.hk/pub_e/about/ >; Conseil National des Barreaux de la France, 'Missions,' 10 Jan 2012, < http://cnb.avocat.fr/Missions-du-Conseil-National-des-Barreaux_a35.html >

committees and sections. Proper organization of the association is essential to the proper functioning of activities and programs. Indeed, poor organization results in waste and inefficiency, but also increases the likelihood of internal dissension, further sacrificing effectiveness.³⁵

Many bar associations typically follow a similar organizational structure with part-time, unpaid members in leadership positions, several committees that focus on specific issues, and a small number of paid staff. The majority of the activities are controlled by the committees or sections that operate autonomously and address a variety of different issues and fields of law. Johnstone argues that, while the top leadership still has some control over the activities and often appoint members to various sections and committees, the leadership is generally voluntary and more ceremonial than authoritative. He submits that this often leads to weak central leadership with a lack of coordination between committees and sections, resulting in a duplication of efforts.³⁶ Thus, effectiveness in any bar association can be improved where there is stronger central leadership and more established coordination between committees or sections in control of programming.

Diversity in leadership and membership as a whole has become an important issue in organization of bar associations. As many bars include in their mission the reduction of bias and discrimination in the legal profession, many have structural requirements of inclusivity and diversity. The Law Society of Upper Canada, for example, emphasizes that "bar associations are well positioned to impact diversity by setting an example to be followed by firms, organizations and individuals."³⁷ The ABA has a Presidential Diversity Initiative that establishes specific programs and diversity plans to ensure inclusion of various minorities in the legal

³⁵ Johnstone, *supra* n.1 at p.199.

³⁶ *Ibid.* p.205.

³⁷ Law Society of Upper Canada, 'Law Society Studies and Scan of Best Practices,' Equity Initiative Department, October 30, 2014, p.27. Available at http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/law-society-studies-and-scan-of-best-practices-racialized-licensees-working-group.pdf

profession.³⁸ The Bar of Northern Ireland has an official diversity policy, and the UK Bar Council has an Equality, Diversity and Social Mobility Committee.³⁹

The role of gender is essential to effective and equitable functioning of bar associations. This demands the inclusion of both male and female lawyers in the organization and structure of the bar, as well as the promotion of gender equality both internally and externally. The Independent Afghan Bar Association has a quota for women in leadership positions and committees.⁴⁰ The American Bar Association instituted a Commission on Women in the Profession to serve as a national voice for female lawyers and to ensure equal opportunity for both male and female legal professionals.⁴¹ Indeed, effective bar associations seek to actively engage legal professionals across all social strata to eliminate bias in the justice system and promote equal participation.

Programming

The programs and activities of bar associations flow from their missions and mandates and may be equally as diverse as the jurisdictions in which they operate. As shown above, many bar associations have similar core mandate elements, resulting in parallel programming that addresses requirements for continuing legal education, professional conduct and discipline, and programs that engage in law reform. These programs will be analyzed in turn to identify criteria for effectiveness.

Continuing legal education (CLE) is essential to effective bar associations and to fulfill the common mission to engage in professional development for lawyers. Indeed, CLE has proven to be an integral program of bar associations throughout the world. CLE courses should be relevant and useful for all audiences, including

³⁸ See, ABA Presidential Diversity Initiative, 'Diversity in the Legal Profession: The Next Steps,' April 2010.

³⁹ UK Bar Council website, 'E&D and Social Mobility,' Accessed 30 Oct 2015.

⁴⁰ International Network to Promote the Rule of Law (INPROL), 'Establishing and Reforming Bar Associations in Post-Conflict States,' January 2010, p.10

⁴¹ American Bar Association, 'Women in the Profession,' 2015, Available at <http://www.americanbar.org/groups/women.html>

seasoned lawyers.⁴² Additionally bar associations should seek to help with law schools in order to influence legal education for prospective lawyers.⁴³ Some bar associations from large jurisdictions with significant funding may provide online, distance programs, while others adapt to local circumstances and resources.

Codes of professional conduct are essential for bar associations to self-regulate the behaviour of lawyers and to discipline misconduct in order to maintain the integrity and reputation of the legal profession in that jurisdiction.⁴⁴ In the US, Devlin finds that all jurisdictions have stated that punishment is not the purpose of disciplinary hearings, but rather it is intended to protect the public and the profession from malpractice and thus deter similar conduct from other lawyers.⁴⁵ To be effective, there must be a mechanism to enforce disciplinary measures and ensure compliance. Different rules and disciplinary procedures across jurisdictions are inevitable as a result of differing cultures and legal environments. Where membership in the association is not mandatory, like the independent bar of Mexico, Trebilock and Daniels argue that there is virtually no mechanism to enforce its regulations.⁴⁶ Even where bar association membership is mandatory and associations have the responsibility to regulate lawyer quality, the disciplinary mechanisms often prove to be inadequate in practice.⁴⁷ In some jurisdictions, like Ecuador, Trebilock and Daniels argue that sanctions for violations range from warnings to small fees.⁴⁸ In others, like South Africa, membership is mandatory at a national level whereas regional associations control adherence to national

⁴² Johnstone, *supra* n.1 at p.210, 236.

⁴³ *Ibid.* at p.208.

⁴⁴ See, for example, General Council of the Bar of South Africa, 'Uniform Rules of Professional Conduct,' Available at <http://www.sabar.co.za/GCB-UniformRules-of-Ethics-updated-July2012.pdf>; Kosovo Bar Association, 'Lawyers Code of Professional Ethics,' 01 Dec 2012, Available at [http://www.oaks.org/repository/docs/Code of Ethics 2012 \(ENG\) \(update January 2014\) 638576.pdf](http://www.oaks.org/repository/docs/Code of Ethics 2012 (ENG) (update January 2014) 638576.pdf); Bar Council of India, 'Bar Council of India Rules,' Amended 30 Sept 2009, Available at <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf>

⁴⁵ Mary Devlin, 'The Development of Lawyer Disciplinary Procedures in the United States', *Georgetown Journal of Legal Ethics*, Spring 1994, p.385

⁴⁶ M. Trebilock and R. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, (Edward Elgar Publishing: 2009), p.320

⁴⁷ *Ibid.* p.321.

⁴⁸ *Ibid.*

standards, which leads to discrepancy in conduct regulations between regions depending on the efficacy of the regional association.⁴⁹

Stronger forms of sanctions, including suspension and disbaring, are available for the most serious offenses, although the frequency of their use is difficult to gauge, or may be unavailable to the disciplining authority within the bar association. In different jurisdictions, disciplinary measures vary significantly and often change as the bar association develops. For example, the Portuguese bar was traditionally seen as lenient with regard to the 'sins' of lawyers. However, as the bar grew in membership, disciplinary procedures became more formalized with written admonitions increasing ten-fold, fines increasing thirty-fold and suspensions increasing four-fold.⁵⁰ As noted above, in other jurisdictions bar associations are limited or prohibited from implementing disciplinary measures on lawyers. In Nigeria, although the bar association is self-regulating, disciplinary measures are undertaken by the courts.⁵¹ In Hong Kong, Dikes submits that the disciplinary tribunal within the bar association has the authority to censure, to suspend, to strike off, to order payment and to award costs.⁵² Devlin suggests that bar associations should rather play a rehabilitative, preventative and dispute resolution role in order to protect the legal system, rather than actually disciplining lawyers, which may be best delegated to the courts.⁵³ Ultimately, however, bar associations have a critical role to play in ensuring that disciplinary measures remain a priority in order to ensure the integrity of the legal profession and remain consistent with their respective mandates.

Finally, effective bar associations are active and influential in law reform, frequently through their various committees. For example, the New South Wales Bar Association has a Criminal Law Committee that is active on reforming drug

⁴⁹ *Ibid.* p.324.

⁵⁰ Jose Miguel Judice, Disciplinary Measures of the Portuguese Bar Association, Paper presented at the IBA Mid-Year Council, Lisbon, May 2005.

⁵¹ IBA, 'Bar Associations – Discipline and the Law', Bar Representatives Session, Lisbon Portugal, 19 May 2005. Available at http://www.ibanet.org/barassociations/bar_associations_disciplinary_measures.aspx

⁵² Philip Dikes, Discipline and the Hong Kong Bar, Paper presented at the IBA Mid-Year Council, Lisbon, May 2005.

⁵³ Mary Devlin, 'The Development of Lawyer Disciplinary Procedures in the United States', *Georgetown Journal of Legal Ethics*, Spring 1994, p.387.

policy in Australia. The Canadian Bar Association has committees dedicated solely to legislation and law reform.⁵⁴ Many bar associations may evaluate bills before legislature and may subsequently take a public stance.⁵⁵ Further, the association may lobby legislators individually for legal reform in line with the association's priorities and the rule of law.⁵⁶ These tensions are most frequently noted in contexts of social upheaval and crisis.

In situations of crisis the role of bar association is often highly contentious and sensitive. Particularly in jurisdictions where membership is mandatory, individual members may take issue with the bar association speaking on their behalf, particularly when they fundamentally disagrees with the collective stance.⁵⁷ Others argue that the intersection between law and politics is such that lawyers have a duty to speak out and take a stance on contentious issues.⁵⁸ As discussed in the final section, the standards to guide local bar associations in jurisdictions that experience domestic social or political crises are lacking in clarity and are not uniformly applied.

⁵⁴ See, Canadian Bar Association, Legislation and Law Reform Committee, 'About', Available at <http://www.cba.org/Sections/Legislation-and-Law-Reform>.

⁵⁵ Johnstone, *supra* n.1 at p.228.

⁵⁶ *Ibid.*

⁵⁷ See, *Keller v. State of California*, 496 U.S. 1, No 88-1905 (1990).

⁵⁸ The related depiction of lawyers as moral actors rather than simply service providers is well established in the literature on cause lawyering. See, for example, Kieran McEvoy and Rachel Reoubche, 'Mobilising the Professions? Lawyers, Politics and the Collective Legal Conscience,' in J. Morrison, K. McEvoy and G. Anthony (eds) *Judges, Human Rights and Transition* (Oxford, 2007), pp275-314.

III. The Role of Bar Associations in Conflict & Crisis

The characteristics and responsibilities of effective bar associations in jurisdictions experiencing conflict or crisis are not always easy to identify. Indeed, where there are mass violations of human rights and, in particular, severe threats to the safety and independence of the legal profession, bar associations have the difficult task of navigating their response to events, policies and actions. Specifically, what exactly is the responsibility of lawyers in crisis environments? Is it sufficient that lawyers continue doing work and representing clients in court, or do they have a responsibility at a policy level to take public stances for or against issues affecting the public interest? How are these activities to be carried out effectively?

Current international standards make little reference to the role of bar associations in times of crisis. Instead, inferences of effective response must be drawn from national case studies and existing international standards of best practices for legal professionals. Interestingly, the UN Basic Principles make no exception for states in conflicts, implying that the responsibilities of the legal profession remain the same during states of emergency. The International Commission of Jurists (ICJ) Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis states that “the role of the...legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency,”⁵⁹ and that “...lawyers’ associations have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights.”⁶⁰ Particularly where individual lawyers are threatened, international standards are clear that bar associations have an important role in coming to their defense. The UN Special Rapporteur on the Independence of Judges and Lawyers has stated that professional organizations are required to take any necessary action in cases of arrests or detention of lawyers.⁶¹ It is clear that bar associations have a critical role to play in states of emergency as a collective of lawyers and as

⁵⁹ International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 31 May, 2011, Principle 1.

⁶⁰ *Ibid.* Principle 13.

⁶¹ L. Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/64//181, 28 July 2009, para 69.

the voice of the legal profession. However, universal agreement about the activities that bar associations should take to this end has yet to develop.

In some crisis environments, the legal profession has been extremely active in taking stances on very sensitive political issues. In Pakistan, for example, the legal community has had a strong voice and has been successful in persistently challenging governmental policies during and after martial law.⁶² Bar Associations have also been active in taking stances on political issues, and particularly in resisting the Islamization of the legal system.⁶³ Additionally, during the conflict in Sierra Leone, the national bar association often took positions on human rights and public interest issues affecting the rule of law, particularly in urging the government to ensure that prosecutions were not carried out with political agendas related to the conflict and serving as an important lobby group for human rights matters.⁶⁴ The IBA has been particularly active in publicly denouncing threats to the legal profession, the rule of law or to human rights. For example, the IBA has spoken out against threats to the independence of the legal profession in Sri Lanka, lawyers arrested in Turkey, and threats against lawyers in Zimbabwe.⁶⁵

Further, where there has not been effective action on the part of bar associations during crises, heavy criticism has followed. During the conflict in Northern Ireland, for example the legal profession largely failed to respond to political events and

⁶² R. Mehdi, *The Islamization of the law in Pakistan*, (Curzon Press: 1994), para 1.8.1.

⁶³ *Ibid.*

⁶⁴ M. O'Flaherty, 'Sierra Leone's Peace Process,' in E. Lutz and E. Babbitt (eds), *Human Rights and Conflict Resolution in Context: Colombia, Sierra Leone & Northern Ireland*. (Syracuse, 2009), p.95; See also, Niobe Thompson, 'In Pursuit of Justice: A report on the judiciary in Sierra Leone,' Report of the Commonwealth Human Rights Initiative and the Sierra Leone Bar Association, 2002, p.35. Available at http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf

⁶⁵ See, IBA, 'IBA expresses concern at prosecution of four lawyers, Turkey, January 2004', 20 Jan 2004, Available at [http://www.ibanet.org/Human Rights Institute/About the HRI/HRI Activities/HRI Media/HRI Interventions/archive/200104_Turkey.aspx](http://www.ibanet.org/Human%20Rights%20Institute/About%20the%20HRI/HRI%20Activities/HRI%20Media/HRI%20Interventions/archive/200104_Turkey.aspx); IBA, 'Sri Lanka: IBAHRI recommends protections for a justice system, legal profession and media in peril,' 26 May 2009, Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7DF2962F-7769-4FAF-8E16-6371B408C174>; IBA, 'IBAHRI condemned recent violence and threats made against Zimbabwean lawyers by police and other officials,' 22 March 2007, Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=2402BBB3-3819-4511-BA6E-88FE10CAB1F1>.

human rights abuses, particularly against lawyers themselves.⁶⁶ Despite the official condemnation of high profile killings, the Law Society stopped short of calling for official investigation or engaging at a higher level, instead stating that the Law Society's policy of 'neutrality' prevented it from becoming involved in activities seen as overtly political.⁶⁷ While most lawyers continued their work, McEvoy notes that those who spoke out against human rights abuses and threats to the rule of law were accused of undermining the profession's neutrality.⁶⁸ Further, the Law Society of Northern Ireland did not make any submissions to investigations that reported on the emergency law system.⁶⁹ The United Nations Special Rapporteur on the Independence of Lawyers and Judges concluded that the inaction of the Law Society breached its duties of professional conduct under the UN Basic Principles, which obligates bar associations to ensure that lawyers can carry out their duties without improper interference.⁷⁰

The legal profession in South Africa was also criticized for its silence during the Apartheid regime. The Truth and Reconciliation Commission found that the bar councils were "complicit" by their silence on apartheid policies, took "no effective initiatives to make the administration of justice accessible," and disbarred lawyers who were anti-apartheid activists or who chose to represent anti-apartheid activists in court.⁷¹ The legal profession was seen to have a policy of abstention and avoidance with issues of justice relating to the apartheid system and refused to use their professional talents to oppose apartheid.⁷² Additionally, there was a strong culture of professional obstructionism towards the entry of black South Africans into the legal profession.⁷³ Associations from other jurisdictions experiencing conflict, including Cambodia, Israel and Latin American states have

⁶⁶ McEvoy, *supra* n.4 at p.369.

⁶⁷ *Ibid.* p.370-1.

⁶⁸ *Ibid.* p.383.

⁶⁹ *Ibid.* p.365.

⁷⁰ P. Cumaraswamy, 'Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland', UN Doc E/CN.4/1999/39/Add.4, 5 March 1998.

⁷¹ 'Truth and Reconciliation Commission, Final Report', Volume 4, Chapter 4, Subsection 3, paras 29-34.

⁷² John Dugard, 'Human Rights, Apartheid and Lawyers. Are there any lessons for Lawyers from Common Law Countries?' *University of New South Wales Law Journal*, 15(2), 1991, pp. 444-445.

⁷³ *Ibid.*

also been criticized for not taking a firm enough stance against threats to the rule of law or human rights.⁷⁴

The structure and organization of bar associations may cause stumbling blocks to their engagement in crises and may pre-empt their ability to effectively take stances against threats to the public interest. In some jurisdictions where loyalty to the state is engrained in the domestic legal culture, the association may be disinclined to criticize.⁷⁵ This is particularly salient in legal cultures, like Northern Ireland, where 'neutrality' is an important principle. In other jurisdictions, universal agreement on a stance, particularly when the bar association has an irreconcilable diversity of political views within its membership, has proven to cause inefficiency and inaction on the part of the association, even in situations of crisis.⁷⁶ Indeed, rather than leading to concerted action on the part of the association, such diversity in viewpoints tends to lead to stalemates or trivial action at best.⁷⁷ Bar associations may adopt a policy of neutrality where they feel that they must be representative of all of its members and must therefore endeavour to satisfy diverse constituencies.⁷⁸

Often these challenges of organization and structure and policies of neutrality create a tension between bar associations and individual lawyers who undertake cause-lawyering in times of political crisis or conflict. Some cause lawyers undertake work for causes or utilize tactics that are politically unpopular, causing issues for the bar associations of which they are members. However, in many instances, cause lawyers are able to push bar associations to take stances on important political issues, even when unpopular, or when they compromise the stated political neutrality of the bar association. For example, Sarat and Scheingold argue that cause lawyering in the United States finally pushed the American Bar Association to make a statement demanding a moratorium on the sharply contested issue of death penalty.⁷⁹ Similarly, McEvoy and Rebouche argue

⁷⁴ McEvoy, *supra* n.4 at p.353.

⁷⁵ *Ibid.* p.380.

⁷⁶ Chambliss and Green, *supra* n.31.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See, A. Sarat and S. Scheingold, *Something to Believe In: Politics, Professionalism, and Cause Lawyering*, (Stanford: OUP) 2004. See, also K. McEvoy and R. Rebouche 'Mobilising

that struggles between activist lawyers and conservative bar associations in crisis environments ultimately resulted in the activist lawyers provoking the legal conscience of the bar in places like Northern Ireland and South Africa, albeit in changed political circumstances.⁸⁰

Despite these issues, there appears to be an emerging international standard for professional associations of lawyers to engage in responding to crises and to take difficult and often controversial stances in favour of the rule of law and human rights. Official policies of 'neutrality' of bar associations or legal cultures that emphasize loyalty to the state are criticized for not adequately speaking out against threats to the rule of law and human rights. Although bar associations may express the desire to remain neutral, the intersection between law and politics is an important reality that implicates the legal profession in political issues, either through their silence or their advocacy. Accordingly, the inclusion of human rights in codes of conduct and a renewed emphasis on the rule of law has been an important trend among bar associations. Bar associations that take unified stances are often able to protect the independence of the legal profession by removing threats against individual members. Indeed, collective positions from bar associations would reduce the risks to the individual lawyer taking a stance that would otherwise subject them to threats, criticism or loss of clients.⁸¹ This is particularly important in cases like Northern Ireland where lawyers were regularly threatened for representing certain clients or for their political views, which contrasted starkly to the Law Society's silence on the issues. In several of the examples given, it was precisely the criticism of the legal profession's silence at a time of crisis that served as 'critical junctures' in the respective legal cultures, providing motivation for bar associations to become more vocal in taking stances on social and political issues.⁸² As noted above, both Northern Ireland and South

the Professions: Lawyers, Politics and the Collective Legal Conscience.' In J. Morrison, K McEvoy and G. Anthony (eds) *Judges, Human Rights and Transition* (Oxford: OUP, 2007) pp.275-314.

⁸⁰ *Ibid.*

⁸¹ K. Mills, *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors*, (Palgrave: 2015), p.196.

⁸² Kieran McEvoy and Rachel Rebouche, 'Mobilising the Professions? Lawyers, Politics and the Collective Legal Conscience,' in J. Morrison, K. McEvoy and G. Anthony (eds) *Judges, Human Rights and Transition* (Oxford: OUP, 2007), pp. 275-314.

Africa, as a result of internal lobbying and pressure from progressive lawyers, have ultimately adopted more progressive stances in modern political issues in their respective jurisdictions.⁸³ Indeed, the South African Bar's constitution now includes as one of its core objective the responsibility to act "as an agent of change in post-apartheid South Africa and to strive towards the ideal of non-racialism and non-sexism in an open society."⁸⁴ Such a stance is an important progression from the characteristic silence and neutrality of the bar association during the apartheid era.

However, there remains a clear need for development of standards on the role that bar associations play in emergency settings. It is not sufficiently clear as to when bar associations should intervene in issues external to the legal profession. American jurisprudence has found that bar associations may take a unified stance when the issue is "germane" to the goals of the bar association.⁸⁵ While there is a standard for some measure of engagement of bar associations in the political process where human rights, the rule of law or the independence of the legal profession is threatened, international best practices are scattered and often limited to public statements. A clearer set of international standards must be developed to identify the responsibilities of bodies of lawyers in crises. To do so, bar associations have a difficult task of prioritizing their objectives and mandates and balancing between potentially conflicting objectives. For example, where the range of political opinion within an association prevents a unified stance on an issue, the association's leadership must decide whether or not such disagreement prevents it from taking collective action on a pressing need. Or, where law societies have an official policy of neutrality and independence but are operating in a jurisdiction where the rule of law or human rights are severely threatened, the association must balance between its principle of neutrality and its role to protect lawyers, to call for inquiries and to condemn widespread abuses.

Other difficulties exist in crisis and conflict situations that pose challenges to the effectiveness of bar associations. Particularly challenging is the issue of endemic

⁸³ *Ibid.*

⁸⁴ General Council of the Bar of South Africa, Constitution with amendments as approved up to July 2012 incorporated herein, Article 2(d), Available <http://www.sabar.co.za/about.html>

⁸⁵ See, *Keller v. State of California*, 496 U.S. 1, No 88-1905 (1990).

societal corruption in many jurisdictions that experience conflict. Although there may be general international standards to guide the role and actions of bar associations, these activities are difficult to implement where there is corruption within the bar association, the legal profession or the State bureaucracy. Carrying out essential activities for bar associations is particularly complex where corruption is endemic within wider society as the independence of the legal profession is often compromised and bar associations are implicit in political clientelism. In several jurisdictions, bar associations are criticized as being subservient to the executive branch. Bar associations and the legal profession at large have the difficult decision of whether or not to participate in what is widely seen as a 'rigged system'. Following the American military order to utilize military commissions in Guantanamo Bay to try captured terrorist or collaborators, there was severe criticism on the commission procedures.⁸⁶ According to Cheh, various American bars criticized the procedure and instructions but did not engage on whether civilian lawyers should participate in the proceedings.⁸⁷ The National Association of Criminal Defense Lawyers stated however that the conditions imposed on counsel make it impossible to provide adequate and ethical representation and advised its members not to take part.⁸⁸

The structure of the bar association, its mission and objectives, its role in ensuring access to the law and in regulation and training may all be compromised by issues of corruption, interference from the Executive or other factors discussed above. With all of the above challenges that exist for bar associations in crisis and conflict situations, there may be a need to concurrently address wider societal and structural issues in order to implement internal activities to improve the effectiveness of the bar association. Bar associations may have a role to lobby state authorities in order to alter structural and procedural barriers to ensure that they are able to carry out the roles described above. Other bar associations face the difficult task of deciding whether or not to engage at all in contexts where the structural and societal barriers are such that the ethical pursuit of justice is virtually impossible.

⁸⁶ M. Cheh, 'Should Lawyers Participate in Rigged Systems: The Case of the Military Commissions,' *I. J. Nat'l Security & Pol'y* 375 (2005), pp 20-21.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

Conclusion – A Standard for an Effective Bar?

The effective operation of a bar association has become critical to the organization, regulation and independence of the legal profession. There are clearly stated aspirations to best practice within bar associations across all jurisdictions. However, a comparison among associations at the local and national level reveals both commonalities and differences in mandate, organization and programming. Best practice is commonly assessed in democratic jurisdictions with reference to standards of organization and structure, diversity and inclusion, regulation and training and protecting the independence of the legal profession. These standards serve as international guidelines for other bar associations. Additionally, international standards have emerged for the development of effective bar associations that permit a level of consistency across jurisdictions while also allowing for differences in local legal cultures. However, there remains a critical gap in standards for bar associations that function in environments experiencing crisis or conflict. International practice suggests a clear responsibility to participate at some level in protecting the rule of law and the independence of the legal profession. Indeed, where bar associations have failed to engage at all, intense criticism has followed. However, there are few clear directions to bar associations on the nature and intensity of engagement with political or social issues in their respective jurisdictions in conflict situations. A stronger consensus on standards for the effective engagement of the organized legal profession is critical to ensure respect for fundamental human rights. International standards may be helpful in developing roles for bar associations in situations of crisis and conflict, such as:

- When and how bar associations should take stances when defending the rule of law and responding to the commission of human rights violations;
- Guaranteeing access to legal services through pro bono services, particularly where the crisis or conflict affects a marginalized or minority community and compromises their ability to access such services;
- How to protect the independence of the legal profession from state interference in crisis;
- Mechanisms to protect lawyers and seek justice for lawyers whose lives are threatened or who are killed as a result of their work.

While these responsibilities can be inferred from international standards and policy, the mechanisms on how and when bar associations should engage on the above issues remain unclear. While the development of consensus on the role of bar associations in times of conflict will be difficult, particularly for jurisdictions where crisis and corruption are endemic, such standards are all the more important in these contexts in order to ensure accountability and to promote justice.

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