



The Protection of Lawyers in Conflict and Crisis

December 2016

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Contents

PREFACE	1
ACKNOWLEDGEMENTS & DISCLAIMER	3
EXECUTIVE SUMMARY	4
INTRODUCTION	6
I. INTERNATIONAL LEGAL FRAMEWORK	8
International Human Rights Law	8
UN Principles	10
Other International Standards	13
II. STATE RESPONSIBILITIES	15
III. INTERNATIONAL JURISPRUDENCE	16
CONCLUSION	21
REFERENCES	22
Books, Articles & Reports	22
Case Law	24
Legislation	25

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 author.

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Executive Summary

The independence of the legal profession is an essential element of any democratic society based on the rule of law. It is particularly important in terms of defending human rights and fundamental freedoms. Whilst the independence and safety of individual members of the legal profession may be threatened in times of peace and political stability, such risks multiply in the context of conflict and crisis. This paper is guided by three fundamental principles:

- Lawyers are particularly vulnerable to intimidation and threats to professional and personal wellbeing in jurisdictions experiencing crisis or upheaval.
- Where widespread violence and political upheaval occurs, it is more important than ever that lawyers take on the challenging work of upholding basic human rights and fundamental freedoms.
- In order to do such work, lawyers must enjoy the full protection afforded to them under the terms of international human rights law and standards on the independence of the legal profession.

To test the extent to which lawyers are adequately protected in times of crisis and conflict we firstly examine the relevant international legal framework. This includes reference to human rights law as well as international law and standards specific to the protection of members of the legal profession. The UN Basic Principles and Special Procedures, as well as other international standards and norms, clearly establish obligations to ensure that lawyers are able to: perform their functions without intimidation, harassment or interference; consult with their clients; and fulfil their professional duties without fear of sanction or intimidation.

The stipulations of the UN Special Rapporteur on the Independence of Judges and Lawyers also helps to clarify what constitutes intimidation and harassment of lawyers. Further guidance is contained within the standards of international legal collectives such as the International Bar Association. It is abundantly clear from these international statutes and norms that, besides individual rights enshrined in international human rights law, lawyers enjoy specific protections arising from their responsibility to enable and facilitate the rights of fellow-citizens. It is equally

clear that there is an obligation on states to safeguard those rights and indeed the independence of the legal profession as a whole.

In the second part of this paper we turn to the specific responsibilities of states. This is framed in terms of both the negative obligation imposed upon states to refrain from interfering with the independence of the legal profession, as well as the positive obligation to establish a domestic legislative framework that creates an environment in which the legal profession can flourish. The latter includes a responsibility to investigate and prosecute threats made against lawyers, regardless of the source. The right to a fair investigation is of course well-established in international human rights law but states also have an obligation to adhere to the supplementary and specific provisions relating to the legal profession and individual lawyers. This includes adopting all reasonable measures to guarantee the right to life, personal liberty and personal integrity of human rights defenders. Fulfilling these various obligations depends upon the state being aware of the nature and extent of intimidation faced by lawyers. It is thus suggested that particular attention must be paid to events, modes of practice and institutions that are particularly threatening for lawyers. It is also clear that, alongside the state, professional associations have a central role to play in safeguarding the legal profession and individual lawyers at times of crisis.

In the final section we review some of the most relevant international jurisprudence to clarify the type of actions and activities that constitute either undue interference by the state or a failure adequately to protect lawyers and the legal profession. Case law consistently suggests that, where a state's actions directly intimidates or harasses lawyers, or where their rights are infringed as a result of their professional activities, this constitutes interference in the legal profession. Sanctions have included demands for compensation and steps to guarantee non-recurrence. In addition to freedom of expression, the rights of lawyers to peaceful assembly and to freedom of association (including the formation of legal collectives) have each been addressed in international jurisprudence. Where states interfere directly with these rights, or where states attempt to direct or control the actions of professional legal associations, they have been found guilty of improper interference.

Introduction

The independence of the legal profession is an essential element of any democratic society based on the rule of law and is critical for ensuring respect for human rights and fundamental freedoms.¹ Whilst lawyers in any jurisdiction may experience interference with their work, or indeed face threats and be subject to human rights violations, those practising in states undergoing social, political or civil upheaval or conflict are often at acute risk. Lawyers who speak out on issues of human rights violations or who bring cases against state officials or members of opposition groups are often the most targeted. State actors may also attempt to intervene in legal proceedings, meddle in lawyers' associations or politicize the professional actions of lawyers; whilst state or non-state actors may threaten individual lawyers with physical violence or carry out kidnappings or executions. Where lawyers are publicly associated with the defense or prosecution of alleged terrorists, well-known criminals, members of organized crime groups or drug traffickers, the risk of threat or attack is heightened.

The protection of lawyers and the legal profession at large has been recognized by the international legal community as a critical issue and is manifest in the creation of the UN Special Rapporteur on the Independence of Judges and Lawyers. Regional human rights bodies have also created similar obligations upon states in recognition of the pervasive threat to the independence of the legal profession.² According to the UN Special Rapporteur, the prohibition on interference with the legal profession is routinely breached, occurring most frequently when lawyers defend clients in politically sensitive cases, including those that deal with corruption, organized crime, terrorism or drug trafficking.³ The Special Rapporteur has further stated that the "majority of the national situations brought to (the Special Rapporteur's) attention" involved threats to lawyers as a result of representing sensitive cases and being inappropriately

¹ UN Doc E/CN.4/Sub.2/1993/25, Report on the independence of the judiciary and the protection of practising lawyers, para 1.

² For example, the Inter-American Commission has created a Rapporteurship on Human Rights Defenders and the African Commission has created a similar Special Rapporteur on Human Rights Defenders.

³ UNGA, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/64/181, 28 July 2009, para.64.

identified with their clients.⁴ In particular, the Special Rapporteur notes that the risk of harassment is heightened when the media and others publicly associate individual lawyers with particular clients and causes.⁵ Such dangers are not confined to defense lawyers. For example, the Special Rapporteur has also noted that a state prosecutor's position is one of the most dangerous jobs in a country because he or she is responsible for deciding whether or not to prosecute high profile suspects, making them vulnerable to serious threats to their life.⁶

While states have an obligation to protect the lives of all individuals within their jurisdiction or control, they have particular responsibilities with respect to lawyers and members of the legal profession such as judges, prosecutors and paralegals. International law clearly stipulates both negative and positive state obligations to maintain the independence of the legal profession and to protect lawyers from persecution and threats to their rights, including arbitrary detention, disappearance and attack. The safeguarding of an independent legal profession underpins the ability of lawyers to carry out their duties without fear of harassment or interference. Where states experience emergencies or crises, that independence is vitally important to ensure that fundamental rights and freedoms are upheld. Derogation from procedural rights makes the involvement of effective counsel essential. In such instances the role and responsibilities of lawyers are enhanced and individual lawyers on high-profile cases may become acutely vulnerable to threats to their safety. Where there are threats to the lives of lawyers, the state has an obligation to ensure that they are protected.

This paper outlines firstly the international legal framework establishing the requirement to protect lawyers and the legal profession. It then explores the specific responsibilities of states to give effect to those rights and obligations. Finally, it reviews some of the relevant international jurisprudence in order to clarify the type of actions and activities that constitute either undue interference by a state, or failure adequately to protect lawyers and the legal profession.

⁴ UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc E/CN.4/2004/60, 31 December 2003, para 49.

⁵ UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers on her mission to Tunisia, UN Doc A/HRC/29/26/Add.3, 26 May 2015, para 61. Available at <http://www.refworld.org/docid/558410d84.html>

⁶ *Ibid.* para. 64.

I. International Legal Framework

Lawyers enjoy the protection of both general international human rights law as well as international law and standards specific to the protection of the legal profession. International law clearly requires the protection of lawyers in all states, and such protection becomes particularly important in states that experience conflict or crisis. There is significant treaty law and international standards that include important state obligations to ensure the independence of the legal profession and to guarantee the protection of individual lawyers.

International Human Rights Law

As individual rights holders, lawyers are entitled to the myriad rights and protections enshrined in international and regional⁷ human rights treaties. These include provisions on the right to life⁸, liberty and the security of person,⁹ prohibition of torture or other cruel, inhuman or degrading treatment or punishment (other ill-treatment)¹⁰, and equality before the law.¹¹ International and regional human rights courts have also read the duty to investigate into the right to life and the prohibition of torture and other ill-treatment¹² as well as a duty to prevent and protect individuals from threats to their lives. Indeed, courts have found that there is a principle of due diligence to prevent and punish acts of violence, even where they are committed by non-state actors.¹³ Where there is

⁷ See, European Convention on Human Rights, Articles 2, 3, 5 and 6; American Convention on Human Rights Articles 4, 5, 7 and 8; African Charter on Human and People's Rights Articles 3, 4, 5 and 6.

⁸ ICCPR, Article 6.

⁹ ICCPR, Article 9.

¹⁰ ICCPR, Article 7.

¹¹ ICCPR, Article 14.

¹² ICCPR, Art 2. See also, Human Rights Committee, General Comment No.31, 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant,' paras 15 and 18. See also, ECtHR, *Assenov et al. v. Bulgaria*, Judgement, App no. 90/1997/874/1086, 28 October 1998, where a violation of the prohibition of torture was found, not because torture occurred, but because the state failure to carry out an effective investigation into the allegations. See also, Human Rights Committee (HRC), *Casafranca v. Peru*, Comm No. 981/2001, 19 Sept 2003; HRC, *Zelaya Blanco v. Nicaragua*, Comm no. 328/1988, 20 July 1994; IACtHR, *Velasquez-Rodriguez v. Honduras*, Judgment, 29 July 1988

¹³ ECtHR, *Osman v. UK*, App no. 87/1997/871/1083, 28 October 1998; IACtHR, *Campo Algodonero v. Mexico*, Judgment, 19 Jan 2009; ACHPR, *Mouvement Burkinabe des Droits de l'homme et des Peuples v. Burkina Faso*, Comm No. 204/97, 2006.

sufficient evidence, this responsibility necessitates the duty to prosecute and punish the persons allegedly responsible for the violation.¹⁴ These obligations apply to lawyers and paralegals, as they would to all other individuals within a state's jurisdiction or control.

In addition to these generic rights to which lawyers are entitled, international human rights law acknowledges the specific and important role of lawyers, and therefore contains provisions protecting lawyers and the legal profession. Indeed, many of the rights guaranteed to individuals within a state's jurisdiction or control necessitate the specific protection of lawyers, in order to ensure that those rights can be fully realized. Otherwise, there is a risk that individuals enjoy rights in theory but cannot find lawyers to instruct in order to protect those rights in court. Several of the international human rights treaties and widely recognized non-binding instruments contain provisions on the right to legal representation.¹⁵ While these provisions do not explicitly articulate the obligation to protect lawyers, their substance would be hollow without the ability of lawyers to represent clients independently and free from interference or harassment from the state or other third parties. Although these instruments lack specific declarations on the protection and safety of lawyers, their provisions guarantee the functioning of the rule of law by commitment to effective counsel.¹⁶

As noted above, the provisions obligating the protection of lawyers become critical in times of crisis or conflict, particularly where the state declares an emergency and derogates from core provisions of the International Convention on Civil and Political Rights and related international and regional treaties (although notably states cannot derogate from, *inter alia*, the right to life and the prohibition on torture or other ill-treatment).¹⁷ Additionally, international human rights bodies have held that any trial leading to the imposition of the death penalty during a state of emergency must conform to all of the fair trial rights guaranteed in the

¹⁴ See, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, III (4).

¹⁵ ICCPR, Article 14(3)(d); See also, ECHR Article 6; ACHR, Article 8; ACHPR, Article 6

¹⁶ Martin Flaherty, 'Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland,' *Harvard Human Rights Journal*, 7 (1994), pp87-124, p90.

¹⁷ ICCPR, Article 4.

ICCPR.¹⁸ In crises that threaten the life of the nation and where states derogate from other obligations, the role of a lawyer and the independence of the legal profession are critical to protect against arbitrary deprivations of life, and from torture or other ill-treatment. Lawyers are essential to upholding fair trial rights, which, although technically derogable, cannot be derogated from so far as to “circumvent the protection of non-derogable rights.”¹⁹ International treaty law thus suggests a state responsibility to protect lawyers, particularly during times of crises, so as to ensure the respect of human rights and fundamental freedoms of society at large.

UN Principles

In addition to the implications from treaty law, there are important international standards and norms that set out more explicitly the obligation of states to respect the independence of the legal profession and to actively protect lawyers. The UN Basic Principles on the Role of Lawyers (UN Basic Principles) suggest that the independence of the legal profession is a fundamental pillar for maintaining the rule of law in a democratic society. In the preamble, the UN Basic Principles state that “...adequate protection of the human rights and fundamental freedoms to which all persons are entitled...requires that all persons have effective access to legal services provided by an independent legal profession.”²⁰

The UN Principles set out specific obligations for governments to ensure that lawyers are able to: perform their functions without intimidation, harassment or interference; consult with their clients; and fulfil their professional duties without fear of threat or sanction.²¹ They also explicitly state that states cannot restrict the freedom of movement of lawyers to be able to meet with clients.²² In line with the prohibition on interference, the Principles provide that states must also grant

¹⁸ UN Human Rights Committee, General Comment 29. U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

¹⁹ *Ibid.*

²⁰ UN Basic Principles on the Role of Lawyers, Ninth Paragraph in Preamble.

²¹ Basic Principles, Principle 16.

²² Basic Principles, Principle 16; *See also*, Special Rapporteur, *supra* at 3, para 63.

immunity from civil and criminal proceedings when fulfilling their functions in good faith, including in written or oral proceedings or in appearances in court.²³

The dangers of the media or others inappropriately associating lawyers with the crimes or causes of their clients is explicitly prohibited under the obligation of non-interference.²⁴ The UN Special Rapporteur on the Independence of Judges and Lawyers has further underlined that the identification of lawyers with their clients is a form of intimidation and harassment of lawyers and therefore interference with the legal profession at large.²⁵ Instead it is suggested that, where there is evidence of lawyers being inappropriately identified with their clients' causes, the state should refer the complaints to the appropriate disciplinary body of the legal profession.²⁶ The prohibition on implicating lawyers by dint of association with particular clients and causes is particularly crucial in emergency situations and crises, where due process rights necessitate the involvement of lawyers in complex and politically sensitive cases.

The Basic Principles also identify interference with professional legal associations as tantamount to interference in the activities of the legal profession as a whole. Principle 24 states that lawyers "shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity." Indeed the preamble to the Principles highlights the importance of these professional 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."²⁷ The UN Office of the High Commissioner for Human Rights further recognizes "the importance of the role of non-governmental organizations, bar associations and professional associations of judges in the defence of the principles of the independence of

²³ Basic Principles, Principle 20; IBA Standards, para 11.

²⁴ Basic Principles, Principle 18.

²⁵ UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc A/64/181, 28 July 2009, para.66.

²⁶ UNGA, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Report on the mission to Peru, E/CN.4/1998/39/Add.1, para 145.

²⁷ Basic Principles, Preamble.

lawyers.”²⁸ States therefore must allow not only the free assembly of associations for the upholding of standards, but must also permit associations to carry out activities to protect lawyers from harassment, threats and other improper interference of individual lawyers. The UN Special Rapporteur on the independence on judges and lawyers specifically stresses that states should allow professional organizations to take any necessary actions in cases of arrests and detention of lawyers.²⁹

The international standards for the protection of lawyers are further delineated in the UN Declaration on Human Rights Defenders. For example, it asserts a right to participate in activities against human rights violations, and a right to be protected by the state from threats or harassment as a result of those activities.³⁰ The UN Office of the High Commissioner for Human Rights has thus summarised that “a just and efficient administration of justice requires that lawyers...should be allowed to work without being subjected to physical attacks, harassment, corruption, and other kinds of intimidation.”³¹ The High Commissioner has also called upon states to “respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind.”³² This requirement has been echoed on several occasions by the UN Human Rights Council.³³

²⁸ OHCHR, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, Commission on Human Rights resolution 2002/43, UN Doc E/2002/23- E/CN.4/2002/200 p.2.

²⁹ Special Rapporteur, *supra* at 3, para 69.

³⁰ UN Declaration on Human Rights Defenders, UN Doc A/RES/53/144, Article 12

³¹ UN Office of the High Commissioner for Human Rights, ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Geneva, 2003, p.151.

³² UN Office of the High Commissioner for Human Rights, Commission on Human Rights Resolution 2004/33: Independence and impartiality of the judiciary, jurors and assessors of the independence of lawyers, UN Doc E/CN.4/RES/2004/33.

³³ See, UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc A/HRC/RES/23/6, 19 June 2013. Available at <http://icj.wpenet.netdna-cdn.com/wp-content/uploads/2014/03/UN-Human-Rights-Council-independence-of-the-judiciary-resolution-A-HRC-RES-23-6-2013-eng.pdf>;

See *also,*
Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers.

UN Doc A/HRC/29/L.11, 30 June 2015).

Other International Standards

A raft of additional international standards and norms add weight to the UN Basic Principles and Special Procedures. The ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis declares that:

“All branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions...The authorities must desist from and protect against all such adverse actions.”³⁴

The ICJ argues that the ability for lawyers to be free to carry out their professional duties without political interference must be protected in law and in practice from attacks, harassment and persecution, particularly when they act in defense of human rights.³⁵ It also states that these protections are of particular importance during states of emergency and conflict situations. Specifically,

“Where a state of siege or martial law is declared to deal with the exceptional situation, the following basic safeguard should be strictly observed: [...] The independence of the judiciary and of the legal profession should be fully respected. The right and duty of lawyers to act in the defence of, and to have access to, political and other prisoners, and their immunity for action taken within the law in defence of their client, should be fully recognised and respected.”³⁶

Further standards have been developed by the international community urging states to consider their responsibilities to respect and protect the legal profession. For example, the International Commission of Jurists’ (ICJ) Geneva Declaration on

³⁴ International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges & Lawyers in Times of Crisis, May 31, 2011 Principle 7.

³⁵ *Ibid.* p.114.

³⁶ ICJ Declaration on Human Rights in an Undemocratic World, ‘The Rule of Law under Military Regimes,’ 1977, Paragraph 8. Available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/ICJ-Review-18-1977-eng.pdf>

Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis outlines core principles that include the responsibility of states to protect lawyers and judges.

Official statements by international organizations and professional associations of lawyers have also helped to detail the list of actions that are classified as improper interference. For example, the International Bar Association has developed the Standards for the Independence of the Legal Profession. These Standards insist that “an equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.”³⁷ Specific guidelines include reference to the need for states to refrain from publishing inflammatory rhetoric against lawyers representing high profile suspects³⁸ and the importance of immediately informing lawyers’ associations upon the arrest of a lawyer. In such instances it is suggested that the appropriate representative association should be: supplied with the reason and legal basis for the arrest of a lawyer; given details of the place of detention; and assured of the right of access to the detained or arrested suspect.³⁹ Again, the central role of lawyers’ associations in holding states accountable for their treatment of lawyers in times of crisis is a key tenet of the broader protection and enforcement architecture.⁴⁰

It is clear from these various international standards and norms that there is an obligation on states to protect lawyers and the legal profession. In addition to lawyers constituting individual rights holders of any given state and therefore possessing general protections of human rights law, they have specific additional

³⁷ International Bar Association, Standards for the Independence of the Legal Profession, 1990, Preamble.

³⁸ See, 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>

³⁹ IBA Standards, para 20.

⁴⁰ See, *for example*, IBA, ‘IBAHRI condemned recent violence and threats made against Zimbabwean lawyers by police and other officials,’ 22 March 2007; Lawyers Without Borders, ‘Colombia: Failure to fulfill duties in response to attacks on lawyers, 25 May 2014; IBA, ‘IBA’s grave concern at threats of several members of legal profession in Haiti,’ 20 April 2004.

protections. As discussed above, lawyers are essential to the realization and enjoyment of several basic human rights. The obligation to protect lawyers is particularly salient during times of crises or emergencies where, although states may derogate from certain fundamental freedoms in human rights treaties, certain non-derogable rights implicate the activities of a protected and independent legal profession.

II. State Responsibilities

Under the international legal standards and norms outlined above, there is a clear responsibility for states to refrain from interfering with the independence of the legal profession. Particularly in states that experience emergencies and crises, the independence of the legal profession becomes critical to ensure the effective rule of law. Not all state interaction is prohibited. Indeed, close interaction between government and the legal profession is important in order to deliver quality legal services to the community and to promote public confidence in the rule of law.⁴¹ Indeed criticism of the legal profession and of lawyers is an important element of maintaining accountability.

The level of permissible interaction and influence is nonetheless sometimes difficult to measure, not least because public criticism can potentially lead to threats against individual members of the legal profession. Additionally, although states must have disciplinary measures to safeguard against legal malpractice and to ensure accountability, such measures can potentially be used to threaten or intimidate lawyers. Although international legal instruments clearly prohibit interference in the legal profession, the specific activities that amount to prohibited 'interference' are not always clearly identified. Since not all state interaction with the legal profession is prohibited it can be difficult to determine which actions constitute interference and which are acceptable. Furthermore, it is important to note that *interaction* with the state should not be misinterpreted as

⁴¹ D. Pimentel, 'Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity,' *Cleveland State Law Review*, 57(1), 2009, p.15.

a responsibility of the state to not *interfere*. Ensuring the protection of lawyers engages both a negative obligation not to interfere as well as a positive obligation to establish a domestic legislative framework that creates an environment where the legal profession can flourish. Specifically, states have a positive obligation to investigate threats made to lawyers' lives and to prosecute harmful actions carried out on lawyers, regardless of the source of the threat or attack. As discussed in the next section, there is a growing body of case law, soft law, and statements from international organizations that detail a myriad of activities that can be categorized as interference and are thus prohibited.

III. International Jurisprudence

The activities amounting to interference in the legal profession are several and diverse, and there is clear precedent to suggest that states must abstain from such actions. The international case law that exists on the harassment of lawyers clarifies specific activities that are considered interference by the state. For example, where a state's actions directly intimidate or harass lawyers, or where their rights are infringed as a result of their professional activities, there is consistent case law suggesting that such activities constitute interference. For example, in *Hammel v Madagascar*, the UN Human Rights Committee found that the detention and deportation of a foreign lawyer as a result of his professional activities with opposition groups to be improper interference with the legal profession.⁴² The Committee also found that the decision to detain and expel the applicant was linked to the fact that he had represented persons before the Human Rights Committee, which the Committee judged to be "incompatible with the spirit" of the ICCPR and its Protocol.⁴³ Madagascar was obligated to remedy the violation and to take steps to guarantee non-repetition.⁴⁴ Further, in *Ramon B. Martinez Portorreal v Dominican Republic*, the Human Rights Committee found that the author, a practicing lawyer and leader of a human rights association, was

⁴² UN Human Rights Committee, *Eric Hammel v. Madagascar*, Communication No. 155/1983, UN Doc CCPR/C/OP/2, 1990.

⁴³ *Ibid.* para 19.3.

⁴⁴ *Ibid.* para 21.

arbitrarily arrested and subjected to inhuman and degrading treatment as a result of his professional activities.⁴⁵ The Committee drew attention to the Dominican Republic's failure to investigate in good faith the violations of the Covenant⁴⁶ and ordered the state party to provide compensation as remedy and to guarantee non-repetition.⁴⁷ The African Commission on Human and Peoples' Rights has also found that fair trial rights were violated where two defense teams were "harassed into quitting the defence of the accused persons."⁴⁸

Where states interfere with the professional activities of lawyers, international human rights bodies have found such action to violate the obligation of non-interference. In a landmark case on legal professional privilege, the European Court of Justice recognized the confidentiality of written communications between lawyer and client.⁴⁹ In *Morice v France*, the European Court of Human Rights cited the UN Basic Principles as relevant international standards and emphasized the importance of ensuring the freedom of expression of lawyers, suggesting that lawyers making critical statements in the public are to be protected under freedom of expression provisions in the European Convention.⁵⁰ The Court further held that only under exceptional circumstances may a restriction on this freedom of lawyers, even by way of a lenient penalty, be accepted as necessary in a democratic society.⁵¹ The same Court has found elsewhere that while lawyers may be subject to certain restrictions on their professional conduct, they must enjoy exclusive rights and privileges, including a "certain latitude regarding arguments used in court."⁵²

⁴⁵ UN HRC, *Ramon B. Martinez Portorreal v. Dominican Republic*, Communication No. 188/1984, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* para 12.

⁴⁸ ACHPR, *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr. And Civil Liberties Organisation) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 101.

⁴⁹ ECJ, May 18th, 1982, *AM & S Europe v. Commission*, Case 155/79 [1982] ECR 1575.

⁵⁰ ECtHR, *Morice v France*, (Application No. 29369/10), 23 April 2015.

⁵¹ *Ibid.* para 135.

⁵² ECtHR, *Steur v. Netherlands*, Application No. 39657/98, 28 January 2004; *See also*, ECtHR, *Kyprianou v. Cyprus* (Grand Chamber); ECtHR *Foglia v. Switzerland*, *Kabanov v. Russia*; ECtHR, *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*; ECtHR, *Mor v. France* and ECtHR, *Ümit Bilgiç v. Turkey*.

Similar to the special freedom of expression granted to lawyers, it has been established that the freedom to associate and to collectively form bar associations should not be subject to interference by states. The rights of lawyers to peaceful assemble, to freedom of association, and to freedom of expression have each been addressed in international jurisprudence.⁵³ Where states interfere directly with these rights of individual lawyers, or where states attempt to direct or control the actions of professional legal associations, they have been found in violation of improper interference of those respective rights. The Human Rights Committee has concluded that states must ensure that the "criteria for access to and the conditions of membership in the Bar do not compromise the independence of lawyers."⁵⁴ In multiple situations, the Committee has criticized states that require that bar associations be overseen by, or become members of state-controlled ministries or associations.⁵⁵

As noted above, in addition to the basic requirement to investigate threats on any individual's life,⁵⁶ there are supplementary and specific provisions and responsibilities when threats are directed at the legal profession and individual lawyers.⁵⁷ The UN Special Rapporteur on the Independence of Judges and Lawyers has interpreted this principle as meaning that, in the event of harassment or threats to the lives of lawyers, impartial and independent investigations must be made promptly.⁵⁸ International case law confirms the obligation to conduct an investigation. In *Jiminez Vaca v Colombia*, a legal advisor to several trade unions and 'peasants' organizations' was threatened with death, with an attempt to kill him. There was no investigation into the death threats nor of the attempted

⁵³ See, ECtHR, *Ezelin v. France*, Judgment of 26 April 1991, Series A, No. 202; ACtHPR, *Civil Liberties Organisation v. Nigeria* (in respect of the Nigerian Bar Association), Communication No. 101/93, decision adopted during the 17th Ordinary session, March 1995; ECtHR, *Schöpfer v. Switzerland*, judgment of 20 May 1998, Reports 1998-III

⁵⁴ HRC, *Concluding Observations of the Human Rights Committee on Azerbaijan*, UN doc CCPR/CO/73/AZE, para. 14.

⁵⁵ See, HRC, *Concluding Observations of the Human Rights Committee on Belarus*, CCPR/C/79/Add.86, para. 14; HRC, *Concluding observations of the Human Rights Committee on the Libyan Arab Jamahiriya*, CCPR/C/79/ Add.101, para. 14.

⁵⁶ See, ECtHR, *Osman v. UK*, Application No. 23452/94; ECtHR, *Ergi v. Turkey*, Application No. 23818/94; HRC, *Giri v. Nepal* Comm 1761/2008

⁵⁷ As noted in Section 1, these are clearly delineated in the UN Basic Principles on the Role of Lawyers.

⁵⁸ Special Rapporteur, *supra* at 3, para 69.

murder. The UN Human Rights Committee found a violation of the right to life since the state had not investigated the attempted murder.⁵⁹ Governments have also a clear responsibility to ensure thorough, independent and effective investigations and authorities are specifically obligated to take steps to expedite investigations into threats and attacks on lawyers.⁶⁰

It is furthermore clear that states have a responsibility to adopt other proactive measures in situations of emergency and crisis where lawyers are at a heightened risk of danger. In *Valle Jaramillo v. Colombia*, the Inter-American Court of Human Rights held that states have the obligation to adopt all reasonable measures to guarantee the rights to life, personal liberty and personal integrity of those defenders who denounce human rights violations and who are in a situation of vulnerability, citing the case of armed conflict in Colombia.⁶¹ However, "this obligation is conditional upon the State being aware of a real and immediate danger to the said human rights defenders and upon the existence of a reasonable possibility of preventing or avoiding this danger."⁶²

Past experience dictates that states should focus particular attention on events or institutions where lawyers may be more vulnerable to threat or attack. For example, in the case of Northern Ireland, many threats against defense lawyers were alleged to have been made during the interrogation of detainees in holding centres.⁶³ Detainees deal in the first instance with lawyers, who advise them on issues including avoiding self-incrimination, protection against ill-treatment, and investigate for exculpatory evidence.⁶⁴ Thus, independent monitoring of detention centres would help to determine the accuracy of the allegations and also be a preventative measure against threats and subsequent harassment. Indeed,

⁵⁹ UN Human Rights Committee, *Jimenez Vaca v Colombia*, Communication No 859/1999: Colombia. UN Doc CCPR/C/74/D/859/1999, 15 April 2002. Available at <http://www.unhcr.ch/tbs/doc.nsf/0/b8708c80eebeec9ec1256c1b004c520f?Opendocument>

⁶⁰ IBA, *Sri Lanka*, *supra* at 42.

⁶¹ IACtHR, *Valle Jaramillo et al. v Colombia*, Series C No. 192, Judgement 27 November 2008, para 90-91. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf

⁶² *Ibid.*

⁶³ Flaherty, *supra* at 17, p.120.

⁶⁴ *Ibid.* p.97.

monitoring of detention facilities has been recognized by international human rights bodies as essential in the prevention of torture and ill-treatment and has established bodies to carry out such monitoring.⁶⁵

As discussed above, states also have an obligation to allow the independent association of the legal profession through the creation of bar associations. Bar associations have a critical role to play in the protection of lawyers in emergencies and crises. The Council of Europe has required that in cases such as: arrests or detention of lawyers; decisions to take proceedings calling into question the integrity of lawyers in order to defend their interests; or searches of lawyers or their property, professional organisations must take appropriate action to defend their members.⁶⁶

The IBA Standards further stipulate that lawyers' associations should be informed immediately of the reason and legal basis for the arrest or detention of any lawyer and the association should have access to any lawyers who have been detained or arrested.⁶⁷ Thus, in addition to the state's responsibilities to ensure the protection of lawyers, professional associations have an equally important responsibility to safeguard the legal profession and act on behalf of individual lawyers in crisis. As representatives of a unified legal profession in a given jurisdiction, bar associations have an integral role in speaking out against attacks on the independence of the legal profession. However, often as a result of state interference or fear of state retribution, bar associations sometimes choose to refrain from taking stances or vocalizing criticism in periods of social and political upheaval. Indeed, where bar associations have chosen not to be involved in the protection of lawyers in their jurisdiction, they have been harshly criticized for their silence and inaction.⁶⁸

⁶⁵ The Optional Protocol to the Convention against Torture (OPCAT) established the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), which has for its mandate the responsibility to monitor conditions in detention and treatment of persons deprived of their liberty through country visits. With 25 experts, it is the largest human rights treaty body of the UN. Likewise, the Council of Europe established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which visits places of detention to monitor treatment of prisoners deprived of liberty in Europe.

⁶⁶ Council of Europe, Recommendation No. R(2001) 21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, 25 October 2000, Principle V.

⁶⁷ IBA Standards, para. 20.

⁶⁸ See, Flaherty, *supra* at 17.

Conclusion

Lawyers often find themselves vulnerable to attacks and threats of violence in jurisdictions experiencing crisis or upheaval. Where mass violations of human rights or widespread violence occurs, lawyers must take on sensitive work to uphold basic human rights and fundamental freedoms of society at large. During emergencies, as during times of peace, the state has a clear responsibility to ensure the protection of individual lawyers whilst simultaneously maintaining the independence of the legal profession at large. International law is clear that, in addition to the rights that lawyers hold as persons before the law, they also hold specific protections by virtue of their occupation and responsibility to enable the rights of others. States have a clear responsibility to not interfere in any way in the professional activities of the legal profession, including bar associations or law societies.

Lawyers should never be inappropriately identified by the media or others with the causes or crimes of their clients. Further, in order to enable them to do their job properly, states should take a proactive role in investigating and prosecuting threats, attacks or violence directed towards individual lawyers, regardless of the source. Where there are violations of the independence of lawyers in a given state, there may be recourse to the relevant special procedures through the UN Special Rapporteur. In addition to annual reports and country visits, individuals may submit complaints to the Special Rapporteur regarding alleged violations. The special procedures are important mechanisms to ensure that the independence of the legal profession is maintained and that individual lawyers are protected. Lawyers play a vital role in upholding the rule of law in societies experiencing conflict or crisis, and as such they are entitled, both as individuals and professionals, to the full protection afforded to them under the terms of international and domestic law.

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