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JUDGES' SYMPOSIUM ON JUDICIAL INDEPENDENCE, ACCOUNTABILITY AND REFORM IN LESOTHO
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LESOTHO SUN, MASERU, LESOTHO

Honourable Minister for Justice and Constitutional affairs

His Lordship, the Hon. Chief Justice

My Lords and learned friends,

Good morning. It is a great pleasure indeed to be here. My name is Wilder Tayler, of the ICJ.

I have been assigned the topic of **judicial independence in international law**. I will offer a very brief overview of where the concept is located, of some of its contents, and a short reflection about its value and future prospects. The existing legal norms are extremely rich; given this richness a comprehensive examination of the standards on judicial independence and the relevant topics would require more time than I've been allocated today.

Given that most of the elaboration on the legal concept of judicial independence has developed under **international human rights law** I will refer mostly to this area of law. The mechanisms that monitor the integrity of the judicial independence at the international level, as well as the implementation of States' commitments to uphold it are an integral part of the international human rights machinery: for example the UN Special Rapporteur on the Independence of Judges and Lawyers who operates on behalf of the Human Rights Council; or the Human Rights Committee that oversees the implementation of the International Covenant on Civil and Political Rights.

Judicial independence is frequently associated with the ideas of democracy, individual freedom and social justice. The social scientist is inclined to analyze the political role that the judiciary plays in society, as well as the reasons why that independence is not only desirable but necessary for the realisation of a just society.

JUDICIAL INDEPENDENCE AND INTERNATIONALSTANDARDS

We, in the ICJ adhere to the almost unanimous view that sees judicial independence as an essential component of **the rule of law**. In turn, for us the concept of rule of law reflects the idea that law must be just (i.e. in accordance with human rights norms) and the contents of the law and its enforcement mechanisms are able to guarantee the enjoyment of peoples' rights including protection against the arbitrary exercise of power; whether from the State or from non-State actors. The idea of rule of law also implies that the State must be held accountable when it abuses or

undermines human rights. We hold the belief that international law and the rule of law are powerful instruments to further the enjoyment of human rights by everyone.

Human rights law in general, has approached judicial independence not from the point of view of the judiciary's political or social role, or the objectives pursued it , but with the individual rights in mind. Most human rights instruments refer to the **independence of the judiciary in the context of the right to a fair trial.**

Thus, the **Universal Declaration of Human Rights** in Article 10 states that *"[e]veryone is entitled ... to a fair and public hearing by an **independent** and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".*

The **International Covenant on Civil and Political Rights**, in elaborating and expanding the principles laid out in the Declaration stresses the idea that "*everyone shall be entitled to a fair and public hearing by a competent, **independent** and impartial tribunal established by law,* (Article 14.1) whereas its regional predecessor, the **European Convention for the Protection of Human Rights and Fundamental Freedoms**, uses almost identical language.

The more recent **Charter of Fundamental Rights of the European Union**, of December 2000, confirms the right to an effective remedy and to a fair trial as containing the element of "independence" in its Art. 47. "*Everyone is entitled to a fair and public hearing within a reasonable time by an **independent** and impartial tribunal previously established by law.* To notice though is the addition of a temporal requirement for the establishment of the independent tribunal. In this case, an example of Latin American standard that made its way into European law making, as we will see below.

The **American Convention of Human Rights** (the Pact of San Jose de Costa Rica) of 1969 refers to the "*right to a hearing, with due guarantees and within a reasonable time, by a competent, **independent,** and impartial tribunal, **previously** established by law" (Article 8)*, the unique latter feature was contrived to pre-empt the establishment of ad-hoc tribunals.

The **American Declaration of the Rights and Duties of Man** which preceded the Convention (and indeed the Universal Declaration), did not include the requirement of **independence** of the courts in any of the three relevant articles in its text: the Right of protection from arbitrary arrest, Article XXV; the Right to due process of law, Article XXVI and the Right to a fair trial, Article XVIII**.** The Pact of San Jose innovated and improved in relation to the Declaration by including the requirement of independence in its relevant articles.

There is one particular feature of Article XXVI of the American Declaration that is interesting - this is its resolve to prevent ad-hocery in the administration of justice… The article says: "*Every person accused of an offense has the right to be given an impartial and public hearing, and to be **tried by courts previously established in accordance with pre- existing laws**".* This double temporal requirement of when the court must be established, and the preceding character of the regulating law in order be competent to adjudicate a case, would have proven of key importance in the 1970s and 80s Latin American when the military dictatorships that ravaged the continent, found themselves delegitimized when established ad-hoc military tribunals to repress civilian dissent. I want to believe that, at the very least, the seeds of the principle of judicial independence were already planted in those requirements of the original American human rights text in 1948, that inspired during decades the struggle for the rule of law in the Americas.

In any event, subsequent international instruments in the region reaffirmed the principle of independence. In the case of the **Inter-American Democratic Charter** adopted by the OAS General Assembly in 2001, this

reaffirmation of judicial independence features as a fundamental element of democracy and came hand in hand with the concept of separation of powers.

The **African Charter on Human and Peoples Rights** for its part, emphasizes the right to be tried by a competent and impartial tribunal (Art 7) but it does not assert the right to an independent tribunal. It takes a different approach from the other regional human rights treaties by determining that guaranteeing the independence of the Courts shall be a duty of the State (Art 26) - the first regional human rights treaty to do so. Others have now followed. But the Banjul Charter will be analyzed by other, more learned speakers today.

The **Arab Charter** on Human Rights of the League of Arab States, the latest regional comprehensive human rights instrument to have entered into force, in March 2008, combines both approaches seen above. While in Art 12 (equality before the law) it sets the duty of States to "guarantee the **independence** of the judiciary and protect magistrates against any interference, pressure or threats", in Art 13 it defines the content of the right to a fair trial by establishing that such right must afford " *adequate guarantees before a competent, **independent** and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations*". This mutually reinforcing combination of State duty on the one hand and individual right to an independent tribunal on the other, offers probably the strongest guarantees for judicial independence, and hopefully it will be emulated in future standard setting exercises.

Other, more specialized international conventions follow the traditional approach of dealing with the concept of judicial independence in the context of the right to a fair trial. The **Convention on the Rights of the Child** for example refers to matters to "*be determined without delay by a competent, independent and impartial authority or judicial body"* (Article 37). The CRC does not restrict itself by attributing the requirements of independence and impartiality to the courts only, because the text opens the way for children who find themselves in conflict with the law not to undergo judicial proceedings, if this were to be considered appropriate or desirable.

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** also incorporates the requirement of the independence of tribunals to which the migrant workers (and their families) are entitled to in the determination of criminal charges against them or of their rights in a suit of law (Art 18) in a formula that paraphrases the ICCPR, mentioned above.

The two major international conventions designed to fight different forms of discrimination - The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 and the International Convention on the Elimination of All Forms of Racial Discrimination – ICERD - 1965), while being valuable instruments in the pursuit of their specific anti-discrimination objectives , do not appear to have included specific references to judicial independence as a requisite for the resolution of discrimination issues.

But the recently adopted **Convention on the Rights of Persons with Disabilities** that entered into force in May 2008 does contain a specific provision in Article 12 (Equal recognition before the law) in relation to the safeguards designed to prevent abuse in the application measures relating o the exercise of legal capacity. Indeed measures relating to legal capacity should be subject to "regular review by a competent, **independent** and impartial authority or judicial body". Once again the treaty, while preserving the requirement of independence, allows for such requirement to be attributed to an institution different than a court of law.

In the context of **international humanitarian law** (IHL) however, neither Common Article 3 to the Geneva Conventions nor **Protocol Additional 1** (relating to the Protection of Victims of International Armed Conflicts) refer expressly to the independence of the Courts. The earlier speaks of "*regularly constituted*"

courts affording all the "*judicial guarantees which are recognized as indispensable by civilized peoples*", while the latter demands that such courts respect "*the generally recognized principles of regular judicial procedure*". Today, it would be safe to say, that given the degree of consensus reached as to the desirability and mandatory character of the requirement of judicial independence that the idea of independence should be considered to be contained in the referred formulations.

Protocol Additional II however **(relating to the Protection of Victims on Non-International Armed Conflicts**) does not leave room for interpretation: Art 6.2 states that "[*n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of* ***independence*** *and impartiality*". Being so explicit has clear reasons in the case of Protocol Additional II; on the one hand it is almost impossible that a rebel group – that is likely to be one of the contending parties in an internal armed conflict could establish a "*regular constituted court*" as required in the other IHL instruments. Hence the need to spell out the specific guarantees that a (possible) rebel court should offer. On the other hand, it also makes sense to use a concept closer to the language of human rights law in this case; after all non-international armed conflicts constitute a natural field of application for the norms of international human rights law.

It is clear from this quick overview that there is a vast array of legal norms that link judicial independence with human rights, and rightly so.

This comprehensive body of international norms affirming the principle of judicial independence has led the first UN Special Rapporteur on the independence of judges and lawyers, Dr Param Cumaraswamy to assert that: "*the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law* " and that "the … *concepts of judicial independence and impartiality […] are 'general principles of law recognized by civilized nations' in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice*."[1]

However, what we still don't have are **mandatory international norms wholly dedicated to the protection of the principle of judicial independence**, norms that would disaggregate the different components of concept and set up the international mechanisms necessary to monitor compliance with their provisions by States.

ELABORATION OF THE BASIC PRINCIPLES

The most comprehensive existing text on judicial independence is not found in a treaty but in a "soft law" instrument. It is a very valuable tool nonetheless. This is the **Basic Principles on the Independence of the Judiciary,** of 1985. They were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, in Milan and, in the same year, they were endorsed by the UN General Assembly. These facts give the text considerable international authority.

The elaboration of the Basic Principles is the result of the work of organizations like the ICJ's Centre for the Independence of Judges and Lawyers (CIJL) and many others, that devoted their energy into promoting debates and initiatives, perfecting texts and lobbying governments and international institutions over decades. The ICJ which committed its first three decades to efforts intended to define principles of the Rule of Law

[1] *Report of the Special Rapporteur on the independence of judges and lawyers*, *UN document E/CN.4/1995/39, para. 55.*

and human rights, to elaborate norms that would provide the procedural and substantive safeguards to protect them, and to reflect upon the role of jurists in society and in the international community, then turned its attention to the issue of judicial independence.

This standard setting effort on the protection of judicial independence ran in parallel with **similar initiatives to develop international principles on the role of lawyers and prosecutors**. It was indeed part of a comprehensive and long term strategy to strengthen the protection and acquire the recognition of the role of the whole legal profession at the international level. These latter twin instruments were adopted in 1990.

The **discussions on standard setting** prospects on judicial independence started in earnest in the late 70s and early 80s during which time a number of texts were prepared. Key among these were the ***Draft Principles on the Independence of the Judiciary*** **(Syracuse Principles)** of 1981 in a seminar convened by the CIJL and the International Association of Penal Law. These were followed by the International Bar Association's ***Minimum Standards of Judicial Independence*** of 1982 and in 1983 by the World Conference on the Independence of Justice, held in Montreal, where similar standards to the IBA's ones were unanimously adopted in a Declaration (the **Montreal Declaration**) by the delegates of almost every organization active in the field, including the ICJ.

At the same time an important process was taking place at the inter-governmental level. Since the late 70s the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities had entrusted a distinguished Indian jurist (and founder of the Centre for the Independence of Judges and Lawyers) Dr L.V. Singhvi, with a study on the **independence of judges, jurors, assessors and lawyers.** Apart from delivering a profound analysis of the relevant issues, Dr Singhvi produced a **Draft Universal Declaration on the Independence of Justice**. It is this document that, having taken into account the contributions mentioned above and many others, would eventually constitute the basis for the Basic Principles of 1985.

SOME COMPONENTS OF JUDICIAL INDEPENDENCE

The **Basic Principles contain twenty provisions** that set out some of the most fundamental guarantees for the functioning of an independent judiciary and for the protection of the independence of individual judges. Some of these provisions will be briefly referred to here.

While the Basic Principles is a fairly comprehensive document, the fundamental **principle of separation of powers**, that underpins the whole instrument, is not explicitly mentioned in the text. Despite its written absence, international law, jurisprudence and analysts have dealt with its essential character. For example, the former Special Rapporteur on the independence of judges and lawyers, Leandro Despouy of Argentina, deals with the idea as a prerequisite to judicial independence in his last report to the UN Human Rights Council: "*It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency*" [2]

With similar determination has pronounced itself the **Human Rights Committee** in one of its most recent **General Comments** to the ICCPR, where it deals with Art 14, the Right to equality before courts and tribunals and to a fair trial: "*A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".* [3]

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[2] *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. A/HRC/11/41*

[3] *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial. CCPR/C/GC/32, 23 August 2007*

And those international instruments that establish the connection between judicial independence and the democratic functioning of the state recognize that the principle of separation of powers is intrinsic to the idea of the rule of law. Thus, the **Inter-American Democratic Charter** (adopted by the OAS General Assembly in Lima, Peru in 2001), states: Article 3: "*Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, …and the separation of powers and independence of the branches of government.*"

Now, while the Basic Principles do not make an explicit reference to the principle of separation of powers, the text is unambiguous as to the importance of **guaranteeing the independence of the judiciary at the highest possible level.** Art 1 says: "*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.* In the ICJ we have a strong preference in favour of the independence of the judiciary being guaranteed at the highest possible level. Therefore we promote the existence of Constitutional provisions in this respect, without prejudice of course of the regulatory provisions that may well be contained in other laws. In preparing for this meeting I noticed that the Constitution of Lesotho does meet this requirement of the Basic Principles.

Principle 1 also sets out the principle of **institutional independence** and affirms the "*duty of all governmental and other institutions to respect and observe the independence of the judiciary*". There are then a number of areas such as the assignment of cases and the exercise of the jurisdiction itself (so that judicial decisions cannot -- in principle -- be modified by non judicial bodies) that international law recognizes should stay strictly within the realm of the judicial branch. Thus, for example Principle 14 deals with the assignment of cases by stating that: "*The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration*."

It must be stressed that while the requirement to respect the independence of the judiciary is generally addressed to the executive power and to a lesser extent to the legislative branch, a proper understanding of the concept extends beyond the idea of separation of powers mentioned above. Individual judges suffer undue pressure very often from the parties to the procedures, as well as from the media, political bodies, or associations representing business interests or social groups. In these cases it is of the essence that the State adopts proactive measures to prevent pressure or interference with the work of judges.

It is particularly at this level where the principle of **individual independence** (as opposed to the concept of institutional independence mentioned before) that Principle 2 becomes especially relevant: *The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

Individual independence, also refers frequently to **independence within the judicial institution.** In order to preserve this principle, the Special Rapporteur has suggested that a "*system whereby court chairpersons are elected by the judges of their respective court"* and to avoid situations " *in which the overturn of judgments by higher judicial bodies includes a sanction to the lower-level judges that made those rulings*."

Some of the **key areas** dealt with by the Basic Principles are:

(a) the selection and appointment of judges;

(b) the exercise of fundamental freedoms by judges and magistrates;

(c) security of tenure, and promotion

(d) financial autonomy and

(e) the issue of accountability.

International law provides important guidance on some aspects of the **appointment of judges**. Principle 10 emphasizes the attributes required from those to be selected ("integrity and ability with appropriate training or qualifications"); it warns against "improper motives" of selection and affirms the key principle of non-discrimination with the exception of the nationality requirement if a state were to choose to have judiciary exclusively integrated by citizens.

Other international instruments stress the **objectivity and transparency** that must define the **selection and appointment process**. In this sense the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** is remarkable for the degree of precision that brings: "*The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability"* and "*No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions".*

International law however **remains silent *vis a vis* the body that should appoint members of the judiciary** and the specific procedures for such appointments. These have been left to domestic law. And, as we know, at the domestic level there are different ways in which judges are appointed; these vary from situations where the executive or legislative branches play a defining role in the nomination and or appointments of judges, down to the existence of bodies only composed by judges or judicial councils with plural representation. There are also mixed systems and systems that contemplate popular vote.

The debate about which system is preferable remains open. International human rights bodies however (including the Human Rights Committee and the Special Rapporteur), tend to favour **procedures that minimize the risks of politicization**, where the executive branch tends to play a non decisive role, if any, with independent bodies where political representatives do not conform the majority of membership and where the judiciary itself has a substantial say.

As for the **nomination and appointment procedures**, the Special Rapporteur, agreeing with the Human Rights Committee, has stressed the importance of having "**objective criteria** in the selection of judges". The objective criteria relate particularly to qualifications, integrity, ability and efficiency. In addition the Special Rapporteur has also emphasized that the selection of judges must be based on merit alone, "a key principle also enshrined in Recommendation No. R (94) 1228 and the Statute of the Ibero-American Judge". The Special Rapporteur has also underscored that "*competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process*."

The rights to **freedom of association and speech**, important as they are for other individuals do have particular importance when their exercise is associated to the exercise or defence of judicial independence. In the case of freedom of association it is clear that when judges freely join professional organizations, set up for the defence of their vital function, their chances to succeed in preserving the integrity of those functions are higher than when they act alone. But apart from being an important tool to preserve their independence, judges' associations can play an important role in the training of judges and in general in the defence of their interests.

Freedom of speech for its part allows the members of the judiciary to take part in and contribute to important public debates relevant to legal reform in their countries. In the case of judges, the exercise of freedom of speech also carries an **enhanced responsibility** so that their integrity as an agent that must, above all, impart justice in an impartial manner is never compromised.

These elements are recognized in Article 8 of the Basic Principles that recognizes that judges are entitled to enjoy their fundamental freedoms "*provided .... that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the impartiality and independence of the judiciary* ".

There is only a slim possibility of an independent judge successfully withstanding pressure without proper **security of tenure**; there may be courageous judges in this respect, but courage alone will not guarantee their independence. This is particularly true in systems where the executive branch plays a key role in the appointment of judges. As seen before, the Basic Principles require that *"issues of security, remuneration, conditions of service, pensions and the age of retirement ...be adequately secured by law.*"

The **length of tenure is not completely solved** by the Basic Principles that offer two options instead: a) a judge should have guaranteed tenure until mandatory retirement or b) until the expiry of their term of office, "where such exists". Some private standards (like the **Universal Charter of the Judge**) suggest tenure for life or permanent appointments. Others remain silent. What is important though is that the length of tenure does place the individual judge in such a precarious position the performance of his independent function is compromised.

Once again, the **African Guidelines** on fair trial offer detailed guidance: while on one hand they state that "*tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law*" they go further unequivocally stating that "*judicial officers shall not be appointed under a contract for a fixed term*" thus eliminating the figure or the "short term" or "provisional judges" that we have seen in some regions.

Still, one aspect that requires more attention is that of **probationary periods**, that, while being a reasonable tool in certain circumstances can be easily abused.

The **promotion of judges** raises some of the same issues presented by their appointment. The main contribution international law has made is to bring back the idea of objective criteria for promotion and highlight the requirements of ability, integrity and experience as in the Basic Principles, Principle 13.

On the issue of **financial autonomy** and the **judicial budget** the Basic Principles are particularly laconic: Principle 7 says: *It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.* In general international law does not offer a definite position in this respect, acknowledging that it is better to leave it to each individual State to establish the best way to guarantee that the judiciary receives adequate funds to perform its functions independently.

But other bodies and institutions have been more precise. The Special Rapporteur has identified at two main dimensions in this matter:

- how procedures used to allocate the funds to the judiciary take into account the need to preserve judicial independence and,

- the administration of these funds.

On the procedures the Rapporteur argues for a significant degree of involvement of the judiciary in the preparation of its budget. If there is an independent body in charge of selection and appointment of judges, this may also be instrument to channel the budgetary needs. But the Special Rapporteur also expresses a **marked preference for the active involvement of members of the judiciary** in the legislative deliberations about their budget. In the ICJ we sympathize with this proposal.

As for the **management of the allocated budget** the Rapporteur insists that the administration of the funds by the judiciary itself, or by an independent body in charge of judicial matters, is likely to reinforce judicial independence, without prejudice that the either the judiciary or the independent body remain accountable to a mechanism of external oversight.

The final point I shall mention briefly is the issue of **accountability of judges**. It is generally accepted that the removal of a judge can only result from serious cases such as a criminal offence or grave disciplinary fault or other misconduct, or incapacity. The Basic Principles synthesize the above points in Article 18 by stating that suspension or removal should only take place "*for reasons of incapacity or behaviour that renders them unfit to discharge their duties*".

Simple errors or differences in the interpretation of the law should never be a cause of dismissal. Here again the African Guidelines on fair trial are worth noting for the precision of its concepts and also for going further than other standards in spelling out the protection of judges. The Guidelines are the only international instrument to prohibit the removal of judges for reasons of their rulings been reversed: *Judicial officers shall not be: removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body*.

At this stage I would like to touch upon some of the important **issues I have not been able to deal with** due to timing. These are aspects both of institutional and individual independence: for example, the issues of immunities, conditions of services and training, as well as the very important issue of security of members of the judiciary and their families are not being dealt with here. Nor have I dealt with the way in which the State should respond to and investigate undue interferences in judicial affairs. The question of military justice that is now high in the international debate -- and to which the ICJ has devoted entire conferences -- is not deal here either – though these are areas where international law has something to offer.

REFLECTING ON THE CURRENT STATE OF AFFAIRS

I have then listed international treaties that proclaim judicial independence and bind States Parties and presented briefly some of the elements of the Basic Principles as the main international human rights instrument, even if not a treaty, devoted to judicial independence.

In closing I would like to mention the **present status of the debate**. One could think that after the principle of judicial independence was affirmed in all continents and latitudes, and after the international community had reached agreement on the contents of the Basic Principles, the chapter would have closed on this subject.

But exactly the contrary happened… The debate that led to the drafting of the Basic Principles became even more intense. After 1990 every region saw new norms and standards emerging (whether public or private) and dealing with the independence of the judiciary. The elaboration of these norms, many of them coming from private associations has been driven mostly by judges and other jurists in all regions.

In Latin America Spain and Portugal, the Statute of the Ibero-American Judge was approved by the Summit of Presidents of Supreme Courts and Tribunals of Justice in 2001, further expanding the principles of the independence of the judiciary.

The Committee of Ministers of the **Council of Europe** in 1994, issued its Recommendation to Members States on the Independence, Efficiency and Role of Judges and in 1998 the European Charter on the Statute of Judges.

The meeting of Chief Justices of the **Asia Pacific Region** adopted a Statement of Principles on the Independence of the Judiciary in their region in 2001, while the Commonwealth elaborated the Latimer House Guidelines on parliamentary supremacy and judicial independence in 1998 and Principles on the Accountability and the relationship between the three branches of government in 2003.

And finally I turn to Africa, which has produced the excellent Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human & Peoples' Rights adopted in 2001 going deeper and further than many other instruments in the protection of judicial independence.

These are only some examples of a larger body of successive and mutually reinforcing instruments that have emerged in the last two and a half decades since the Basic Principles were adopted. Most of them build upon and improve the Basic Principles. They also contribute new dimensions and propose solutions and approaches to new and old problems faced by the judiciary around the world.

In the ICJ we **welcome and encourage these developments**. Our organization not only monitors the integrity of the rule of law and judicial independence around the world. We also engage actively in advocating the improvement of the legal framework and judicial mechanisms that guarantee human rights. And in that capacity we are acutely aware of the present threats and obstacles that may undermine the independence of the judiciary.

Only in the **past four months**, the ICJ has, among other things, visited Russia to appeal for major reforms to protect judicial independence, travelled to Honduras to protest against the abusive dismissal of judges and denounced the pressures of private groups in Guatemala in the selection process of the Attorney General, deplored the obstacles faced by Nepali judges investigating cases of enforced disappearance and torture, argued in the UN the case of Maria Lourdes Afiuni, a Venezuelan judge, arbitrarily imprisoned because of doing her work independently, raised publicly our alarm at the criminal charges brought against Judge Baltasar Garzón in Spain regarding his investigation into crimes against humanity after the Civil War, and monitored a number of judicial developments and trials in Zimbabwe, just to mention a few interventions.

In every region of the world and in all circumstances we find potential threats to judicial independence. But where are these threats and obstacles coming from?

Obviously, **dictatorships and authoritarian** regimes, that reject the principle that the government's acts should be subjected to scrutiny, or that they may be even declared illegal, will only tolerate a docile judiciary, or will create special or exceptional tribunals that will follow their diktat.

But **also in established democracies** we witness the emergence of anti-democratic groups that constrain the functioning of judicial institutions or manipulate the law to serve their interests.

In Latin America, the region I come from, we suffered sometimes the pre-eminence of an **excessive legal positivism**, through which any act of the State was considered just for the simple reason that it was legal, disregarding the elementary idea that it should have been legal only if it happened to be just in the first place.

Situations like these allowed for an enormous **concentration of legal power** in the hands of the executive, which could and did undermine the functions of the judicial and legislative branches. Judicial independence and the human rights guarantees attached to it can never flourish under these conditions. .

In extreme cases, **magistrates give up and hide behind a false argument of neutrality,** or argue that they are "only servants of the law", and therefore bound to apply its provisions, even in the face of blatant injustice. Or they justify the breach of the Constitution and its substitution for a "new legality", imposed by a recently arrived and self serving elite – as did happen in my country at a low point in our history – then the

independence of the judiciary faces the worst kind of threat, the one that comes from within, and erodes the very values that constitute the foundations of justice and democracy.

But as noted before, it **is not just from the State that the threat to the judiciary may arise.** Violent groups and corrupt or criminal associations, those who are favoured by their own economic, social or even military power frequently constitute a serious source of intimidation and pressure. It is frequently from these quarters where we see the most virulent and violent attacks against judges and lawyers.

The judiciary may also come under threat in situations where there is no institutional crisis or conflict. A deliberately cash starved judiciary is a judiciary whose independence is seriously compromised. If the legislative or executive branch fails to allocate the necessary resources to the administration of justice, or at least a reasonable proportion of the resources available within the possibilities of country, they undermine a vital function of the state and deprive the population of an essential service. Judges then cannot execute or communicate, or simply register their decisions. Public trials become illusory and the most elementary security for judges and judicial personnel is not guaranteed.

It is precisely because these threats exist and are real, that the protection of judicial independence at the international level is still **unfinished business**. For this very reason the ICJ welcomes a continued strengthening and development of the international legal norms on the independence of the judiciary.

We think that a **constant and healthy debate,** while it will not solve all the problems, will contribute to the identification of the most difficult challenges.

We also believe that the fact that the law on the independence of the judiciary is **well rooted in human rights** law consolidates the precious link between the needs and expectations of the population and the acts and responsibilities of "their" judges, who have a fundamental role in the protection of everybody's rights, but in particular the rights of those who are weak or vulnerable.

We welcome discussions that place the debate on judicial independence firmly in the context of a broader discussion of the democratic balance of powers, because this helps to consider all the dimensions of the issue, including its difficult political dimensions, and avoids the illusion that judicial independence is nothing more than a technical issue.

I hope that our discussions over the next two days can build on the work of colleagues from all around the world; at the same time we will do all we can to ensure that the result of our reflection and debate comes to enrich the work of judges and lawyers who embrace the same cause of judicial independence.

Thank you.

WT. 10.07.10. Geneva.