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Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy

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Summary

This report sets out the activities of the Special Rapporteur on the independence of judges and lawyers during 2006, and then describes the various circumstances in which the Special Rapporteur has intervened from 1994 to date, in particular situations in which there was a direct threat to those working in the judicial system, or where structural problems impinged on the effective operation and the independence of the judicial system and undermined the rule of law. The aim is to provide an overview of the main findings from the last 12 years.

Given the gravity and extent of the problems that beset the judicial system and the rule of law, the Special Rapporteur recommends that the Human Rights Council devote even greater attention to the administration of justice and judicial independence. Mechanisms to defend the judiciary should be strengthened, in particular through the office of the Special Rapporteur, whose sphere of action should be enhanced. Furthermore, the Special Rapporteur underlines the urgent need for the United Nations to make justice a priority both when providing assistance to States and when reviewing its own institutions. Lastly, the Special Rapporteur recommends that in its endeavours the Human Rights Council should draw on the contributions and experience of national and international jurists' organizations established to defend judicial independence.

In response to repeated requests by various governmental and non-governmental delegations during the interactive dialogue in the General Assembly, the Commission and the Human Rights Council, the Special Rapporteur also considers the impact of states of emergency on human rights, and in particular the ensuing constraints on the judiciary. In the same context, the Special Rapporteur refers to legislation on terrorism, national security and immigration. On the basis of his assessment, the Special Rapporteur recommends that States bring their domestic legislation and practice into line with the international principles, judicial practice and standards that govern states of emergency, and to this end draws attention to the elements which it is essential to include in any legislation in these areas. Since grave human rights violations have been observed in states of emergency, the Special Rapporteur suggests that an international declaration should be drafted to consolidate the body of principles and case law that govern the protection of human rights in such circumstances.

Against the backdrop of the dramatic deterioration of the situation in Iraq and the judgement handed down by the Supreme Iraqi Criminal Tribunal, the Special Rapporteur reiterates his criticism expressed to the General Assembly in October 2006, and recommends that the United Nations contribute to the establishment of an independent tribunal to comply with international standards on human rights.

Finally, the Special Rapporteur welcomes the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance, and urges States to ratify the Convention promptly.

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Introduction

1. This is the thirteenth report submitted to the Human Rights Council (formerly Commission on Human Rights) since the mandate of the Special Rapporteur on the independence of judges and lawyers was established in 1994, and the fourth report submitted by the current Special Rapporteur. This report is submitted pursuant to Council decision 1/102.

2. In this report the Special Rapporteur analyses his activities undertaken through the communications procedure and country missions since he assumed his mandate, the aim being to give the Council an overview of the nature and extent of attacks on the judicial system. He also addresses a specific and far-reaching issue, namely the impact of states of emergency, and related legislation, on human rights and the administration of justice. Finally, he mentions certain major developments in international justice, a matter he intends to address more extensively in the future.

I. ACTIVITIES IN 2006

A. International meetings

3. In Geneva, following his attendance at the first session of the Human Rights Council, the Special Rapporteur participated in the thirteenth annual meeting of mandate holders of the special procedures from 19 to 23 June 2006. From 20 to 25 September, he took part in the second session of the Human Rights Council in Geneva, where he presented reports on his activities in 2005. On 23 October, he participated in the sixty-first session of the United Nations General Assembly, in New York, at which he presented his report A/61/384 and detailed his activities during 2006. The report considers the situation of military justice in the world and recommends the adoption of the relevant draft principles drawn up by the expert Mr. Emmanuel Decaux. The presentation gave rise to a lively and extensive debate on the substantive issues.

4. From 31 July to 4 August 2006, the Special Rapporteur contributed to the 17th international course on judicial independence, human rights and the Inter-American Democratic Charter, organized by the Andean Commission of Jurists and the Spanish Agency for International Cooperation in Cartagena, Colombia. In his address, he described judicial independence as a guarantee of the judicial function.

5. On 26 September, he addressed the Inter-Parliamentary Union seminar in Geneva on "Law and justice: the case for parliamentary scrutiny". His contributions covered "The presumption of innocence, equality of arms and the right to be tried without undue delay: what parliaments can do to guarantee these essential ingredients of the right to a fair trial" and "How to ensure an independent and impartial judiciary, a pillar of democracy."

B. Consultations and preparations for country visits

6. In June, the Special Rapporteur held meetings in Geneva with several ministers and members of various permanent missions, and with representatives of governmental and

non-governmental organizations including the Inter-Parliamentary Union. In October, in New York, he again held meetings with representatives from some permanent missions and many non-governmental organizations.

7. In June, the Special Rapporteur met with the Minister for Foreign Affairs of the Republic of Maldives in Geneva. The Minister repeated his Government's invitation to undertake a mission to that country. The Rapporteur held consultations on this matter with officials of the Office of the United Nations High Commissioner for Human Rights in order to prepare for the visit, which was originally scheduled for November, but then postponed until early 2007. The Rapporteur wishes to thank the Government of Maldives for its kind invitation and for its understanding of the difficulties that obliged him to defer his visit.

8. During 2007, the Special Rapporteur also intends to conduct missions to Cambodia, as part of the follow-up to a mission by the United Nations High Commissioner for Human Rights, and to the Russian Federation. If possible, the Special Rapporteur will also visit Kenya and the Democratic Republic of the Congo, and he hopes to visit Guatemala in 2008. The Special Rapporteur wishes to thank the Governments which have already extended invitations. Replies are awaited from the Governments of Cambodia, Kenya and the Democratic Republic of the Congo. In the future, the Special Rapporteur has expressed a desire to visit the Philippines, Nigeria, the Islamic Republic of Iran, Sri Lanka, Tunisia, Turkmenistan and Uzbekistan. Replies are awaited from the Governments of these countries.

C. Urgent appeals and letters of allegation addressed to Governments, and press releases

9. Document A/HRC/4/25/Add.1 contains a summary of the allegations sent to various Governments and the answers received, along with statistics for the years 2004, 2005 and 2006. As an indication, between 1 January and 8 December 2006, 97 urgent appeals, 39 letters of allegation and 9 press releases were issued. In response to these 145 communications, which concerned situations in 54 countries, the Special Rapporteur received 51 responses from 29 countries.

II. CLASSIFICATION OF THE SITUATIONS ADDRESSED BY THE SPECIAL RAPPORTEUR, 1994-2006

10. One of the Special Rapporteur's main activities is to consider allegations received and decide what action should be taken in response.[1] For this purpose, under the generic title "communications", the Special Rapporteur has available to him two procedures, urgent appeals and letters of allegation, which allow him to consult governments about:

[1] Depending on the content and scope of the allegations, such steps may be taken individually or together with one or several other Special Rapporteurs.

(a) Circumstances which could affect the independence of judges, prosecutors, lawyers or court officials;

(b) Circumstances which could constitute a violation of international standards for a fair trial; or

(c) Other factors relevant to the proper functioning of the judiciary and therefore to the rule of law.

Urgent appeals are issued where the alleged facts indicate a degree of urgency; letters of allegation are sent when the allegation concerns complex circumstances and further factual or legal clarification is required before action can be taken. The Special Rapporteur may also issue press releases if he believes that a violation of international norms has occurred or is about to occur. Country visits may be undertaken in response to an official invitation. These visits are an opportunity to involve all interested parties in an assessment of the broad range of topics and circumstances directly or indirectly relevant to the judicial system. Thus, while the communications act predominantly as a deterrent, country missions help to enhance knowledge of the national context, to ensure an appropriate level of intervention, including on structural matters, and to improve follow-up on recommendations.

11. An overview is given below of the conditions and circumstances that influence the administration of justice, whether in organizational or operational terms, as apparent from the Special Rapporteur's activities and missions between 1994 and 2006. Since the aim is to distinguish different types of situation affecting the judicial system, and given the large number of country situations the Special Rapporteur has attended to over the years, this overview will not refer to specific countries or cases. Specific references are contained in the relevant documents submitted annually to the Commission, and latterly to the Human Rights Council.

12. For ease of assessment, the various situations identified have been classified as:

(a) Circumstances affecting the independence of judges, prosecutors, lawyers or court officials;

(b) Standards and practices relevant to the rule of law, jeopardizing the smooth functioning of the judicial system and the right to a fair trial;

(c) Various specific challenges to the judiciary and its independence, for example, states of emergency.

Most often a single complaint will raise several of these aspects together, with one violation linked to or facilitated by others.

13. It is worth noting that the Special Rapporteur is never concerned solely with an individual judge or lawyer, but rather with the role that both can play in safeguarding human rights and fundamental freedoms for the good of the population as a whole. His interest lies not in the concerns of any particular profession, but in the central role of judges, lawyers and other court officials in defending and safeguarding human rights and, more broadly, upholding the rule of law.

A. Circumstances affecting the independence of judges, prosecutors, lawyers or court officials

14. From the Special Rapporteur's activities since 1994 it is clear that, throughout the world, those who work in the judicial system face situations that result in violations of their human rights. This includes threats, harassment, intimidation, vilification and various forms of interference. The threats may be direct, anonymous or under cover of a false identity, and may be delivered by telephone, post or e-mail. There may be interference with mail, press campaigns, house raids, or travel bans which can even prevent travel to attend events or training on human rights or public international law. Regrettably there are also instances of physical attacks, threats of abduction or actual abduction, enforced disappearance, arbitrary detention, torture, and even assassinations and summary executions. In such cases, complaints to the Special Rapporteur often allege inadequate or no effort by the authorities to respond and provide protection, even when reports have been submitted to the police or the judicial authorities.

15. Experience shows that those who work in the judicial system are particularly at risk of such attacks if they are prominent defenders of human rights. This includes lawyers for victims of enforced disappearance or extrajudicial executions, or those who specialize in sensitive fields, for example, terrorism; organized crime such as people trafficking; land ownership; protection of the environment and natural resources; advocacy for vulnerable groups such as indigenous peoples, or ethnic, linguistic, religious or cultural minorities who are critical of the status quo and assert their rights; women who are victims of violence or discrimination; and those who oppose war or campaign for their region's independence. Many judges are also subjected to pressure, intimidation, death threats or actual assassination attempts because of their role in investigating the involvement of politicians or other well-connected figures in assassinations or other serious human rights violations. Confronted with such risks arising from their beliefs or activities, those who work in the judicial system are quite often forced to resign, move to another town, or go underground or into exile, and the threats may extend to family members. The authorities do not always provide sufficient protection or a clear condemnation of these criminal activities, which often go unpunished.

16. These circumstances most commonly affect judges and lawyers, particularly when they become identified with the cases they take on. Governments often regard judges and lawyers' efforts to defend human rights and fundamental freedoms as political interference. Lawyers are regularly hunted down and arrested because they are identified with their clients, and continue to be harassed by the authorities following their release. This in turn means that individuals accused of sensitive crimes may have difficulty finding a lawyer who will take their case.

17. Cases recorded in 2006 show how regularly such circumstances arise. About 55 per cent of communications, relating to some 148 cases in 54 countries, concerned violations of the human rights of judges, lawyers, prosecutors and court officials. Threats, intimidation and acts of aggression directed against lawyers accounted for 17 per cent of communications issued by the Special Rapporteur, and the corresponding figure for judges and prosecutors was 4 per cent. Arbitrary detention and judicial harassment accounted for 26 per cent of communications concerning lawyers and 4 per cent of those concerning judges and prosecutors. Assassinations of lawyers, judges and prosecutors accounted for 4 per cent of the total number of communications.

In some countries, the level of violence was especially high. For example, in one Latin American country, the Special Rapporteur recorded the assassination of 16 employees of the judicial system, 63 cases of threats, 2 abductions and 2 cases of exile between January 2005 and August 2006. In one Asian country, no fewer than 15 lawyers and 10 judges were assassinated with impunity between 2001 and mid-2006.

B. Standards and practices relevant to the rule of law, the smooth functioning of the judicial system and the right to a fair trial

18. From the various allegations received and missions conducted since 1994, it is clear that institutional considerations can affect not only the exercise of judicial authority but also its independence, even jeopardizing the rule of law.

19. Corruption of the judiciary is one of the most pernicious threats to the rule of law and one of the most difficult to eradicate. There are many contributing factors. High levels of corruption and judicial apathy are often attributed to the poor remuneration of judges and lawyers and the judiciary's lack of financial independence; however, the Special Rapporteur would stress the significance of other factors such as judges' ideological or political allegiances. The Special Rapporteur's experience shows that such factors have a decisive impact on judges' ability to act in an effective, independent and impartial manner, in accordance with their professional ethics, particularly when several contributing factors coincide with a weak institutional framework and a culture of corruption. These situations often arise in countries where the principles of judicial independence and international fair trial standards are not well established. The Special Rapporteur has therefore strongly urged States to adopt and subscribe to the Bangalore Principles of Judicial Conduct.

20. The complaints received and missions conducted show that delays in the administration of justice are as common as they are disturbing. Typically violations of the right to judgement without undue delay stem from the unnecessary complexity of judicial procedures combined with an excessive volume of cases reaching the highest courts. Particularly in countries in transition, problems are also due to inadequate physical infrastructure, usually compounded by a chronic shortfall of financial and material resources and support staff. In conflict situations, looting and vandalism may seriously disrupt the work of the judiciary, and States do not always take the necessary measures to punish those responsible or to facilitate the rapid repair of the damaged infrastructure.

21. There are many complex complaints about unequal access to justice. This problem particularly affects the most vulnerable groups (such as children and persons with mental illnesses), those who are discriminated against or persecuted (for example, on grounds of their sex, sexual orientation, ethnic origin, or religious convictions or practices) and members of some social groups (for example, human rights defenders, environmentalists and campaigners seeking to protect natural resources). These same groups often lose out from a failure to enforce court decisions, particularly where economic, social and cultural rights are at issue. Both the lack of access to justice and the failure to enforce court decisions relating to economic, social and cultural rights are symptomatic of the relationship between key economic and social factors and the administration of justice.

22. Reforms affecting the judiciary, the judicial service commission or its equivalent, or the status of judges and lawyers are often a real setback, since instead of reinforcing judicial independence, they undermine it. This is particularly common in cases where there are significant institutional weaknesses, as is often the case in transitional periods, or where legislation is rushed through by an executive authority responding to prevailing political imperatives, without the benefit of effective parliamentary scrutiny, and bypassing statutory prior consultations with the judiciary. Reform of the Supreme Court is undoubtedly one of the most sensitive topics, and in this area transparency in judicial appointments is key to building citizens' confidence in the judicial system as a whole. Serious interference by the executive branch in the composition and functioning of the Supreme Court and corruption within the Court itself are recurrent themes in the complaints received, and constitute one of the worst "ailments" of the rule of law. While reforms to establish specialized jurisdictions, for example courts to hear cases on land ownership or juvenile courts, are generally well regarded, they are not immune from risk. The allegations received show that such jurisdictions are frequently prey to particular political interests, and in addition, do not always meet the requirements set out in article 14 of the International Covenant on Civil and Political Rights.

23. As regards judges, it is often the case that aspects of the statutes governing the judiciary or legal safeguards on conditions of practice in fact impair judicial independence, one example being when judicial appointments are non-permanent and are within the direct gift of the head of State. Short of this extreme, practices involving discrimination on grounds such as political allegiance, religion, beliefs about human rights, sex, sexual orientation, physical disability or ethnic origin can leave judges in a precarious position, affecting their employment and promotion prospects.

24. In some cases, moreover, the prosecutor's office and the executive are so closely identified that the role of judges and lawyers in a trial is reduced to a mere formality. For example, in many Central Asian countries, the prosecution, representing the State in civil and criminal cases, has a decisive influence on the content of sentences, which rarely depart from what the prosecution requests.

25. The Special Rapporteur received many complaints of various kinds from lawyers regarding inadequate, inexistent or disregarded safeguards on the freedom to practise their profession. Prominent concerns included lack of access to clients, which was refused outright or restricted to settings where confidentiality could not be assured; denied, partial or delayed disclosure of documentation; and inequality of arms throughout the case. In addition, lawyers are often confronted with practices which undermine their ability to defend their clients, such as changes of hearing dates without prior notice, decisions to hold hearings in camera, the court's refusal to admit key evidence or witnesses, or designation of a court-appointed lawyer. Such practices seriously violate the rights of the defence and thus the rights of the accused. Judges and lawyers are often subjected to prosecution, threats, or economic or professional sanctions in response to actions that in no way conflict with professional ethics.

26. In some countries, disputes have arisen between the executive and lawyers' professional associations. In others, lawyers' freedom of association and freedom of expression are directly curtailed by measures such as the closure of professional bodies or restrictions on the exercise

of the profession such as the withdrawal of practising certificates. There have also been complaints about attempts to install individuals close to the executive at the head of professional associations, and the Rapporteur has recorded instances of professional associations threatening to sanction members for taking part in human rights training sessions.

27. Freedom of expression on subjects related to the professional activities of those working in the judicial system is especially sensitive. Government authorities often intimidate lawyers and judges who express views on the cases they are involved in, including where the case concerns human rights violations. This is particularly prevalent in countries with no regulations that give effect to the relevant international principles.

C. Particular challenges

28. The Special Rapporteur invites the Council to devote particular attention to a number of other challenges that confront the judiciary and on occasions threaten the rule of law.

29. Some of the most serious problems recorded, which have given rise to numerous complaints, concern the trial of civilians before military courts and the trial of members of the armed forces accused of serious human rights violations by their peers. In response, the Special Rapporteur, who has frequently intervened on this subject, presented a report to the sixty-first session of the General Assembly on the situation of military justice in the world (A/61/384), and recommended the adoption of the draft principles drawn up by Emmanuel Decaux, an expert from the Sub-Commission on the Promotion and Protection of Human Rights.

30. The Special Rapporteur has repeatedly been concerned with restrictions imposed on the judiciary under a state of emergency, a legal institution that will be examined in greater detail in the next section.

31. Special courts are generally associated with a serious violation of the principles of natural law, in particular the right to a defence and other procedural guarantees set out in article 14 of the International Covenant on Civil and Political Rights. For example, there have been frequent complaints about the use of “faceless” judges. This practice, intended to protect judges against possible reprisals, calls the procedure itself into question and can entail a denial of justice. While it is vital to guarantee the safety of judges and witnesses, this must not be a pretext for undermining judicial independence and impartiality.

32. Over the last three years, the Special Rapporteur has noted a growing number of complaints that certain legislation introduced to combat terrorism, and legislation on national security and political asylum, restrict rights by precluding or limiting recourse to the justice system and according broad powers to the executive. Typically, such laws suspend habeas corpus or *amparo*, and establish an internal review or appeal mechanism devoid of any judicial involvement.

33. Other complaints referred to the adoption of amnesty laws, which prevented those who had authorized or perpetrated grave and systematic human rights violations from being brought

to justice. The denials of habeas corpus and *amparo* are particularly significant in cases of enforced disappearances. These matters were considered in the Special Rapporteur's previous report on efforts to combat impunity and the right to the truth (E/CN.4/2006/52).

34. The death penalty has been especially controversial. For the purposes of this mandate, if a death sentence is handed down following a trial which did not comply with the relevant standards, not only is the right to a fair trial violated, so too is the right not to be deprived of one's life arbitrarily. Many of the Special Rapporteur's interventions have been aimed at preventing the infliction of the death penalty on juveniles, disabled persons or persons with mental health problems.

35. Regarding the right to asylum and the obligation on States not to return persons to their country of origin or to other places where they would be at risk of human rights violations, the Special Rapporteur notes that the allegations generally concern inappropriate recourse to national standards incompatible with international standards, or a profusion of diplomatic undertakings which are never a sufficient safeguard to justify removal.

36. A significant number of complaints reflect the difficulties many States have in reconciling modern, positive law and religious, traditional or tribal law. Communications received by the Special Rapporteur often mentioned stoning for adultery, honour crimes, the forced marriage of children and amputations for theft. Many of these issues have clear gender implications and have been the subject of joint action with the Special Rapporteur on violence against women, its causes and consequences. The Special Rapporteur's approach to all cases is to take international human rights law as a starting point, and while traditional justice systems are taken into account, they are regarded as having validity only insofar as their principles and practices conform to international standards.

III. THE RULE OF LAW AND STATES OF EMERGENCY

A. Legal regulation of states of emergency

37. All legal systems in the world provide for the adoption of emergency measures by Governments to deal with crisis situations. At present, a state of emergency may be declared only to maintain constitutional order and safeguard institutions when organized community life is threatened. This is the starting point for analysing the state of emergency, an institution which departs from the maxim *necessitas legem non habet* and is regarded as a fundamental tool of the rule of law. Prior to the establishment of the United Nations, and with it an international system for the protection of human rights, the prevailing view of states of emergency was distinctly absolutist. The declaration and maintenance of a state of emergency were associated with the exercise of State sovereignty, and what little legislation existed on the matter was generally confined to establishing a governing authority.

38. One of the main challenges facing international human rights law has been to change that view, by specifying the legal framework governing states of emergency. The basic text - on account of its universal scope with respect to countries, subjects and rights protected - is article 4 of the International Covenant on Civil and Political Rights, which lays down the formal and

material requirements for introducing a state of emergency. This article has been the subject of extensive comments by the Human Rights Committee, particularly in its general comment No. 29 on article 4 (Derogations during a state of emergency).[2] The delay in the entry into force of the Covenant meant that the Commission on Human Rights also became involved in the clarification and protection of human rights, including during states of emergency. The Subcommission and the Commission established a special procedure under the successive mandates of two Special Rapporteurs: Nicole Questiaux[3] and Leandro Despouy. The mandate of the latter consisted of drawing up an annual list of States that had proclaimed a state of emergency and a final report presented to the Commission on Human Rights in 1997.[4] This report contains guidelines for use by States in drafting legislation and explains the legal principles governing the declaration and implementation of states of emergency.

B. Principles governing states of emergency: relationship with the administration of justice

39. From the standpoint of international law, a state of emergency, its declaration and its application are governed by eight basic principles that are widely applied in the administration of justice.

40. The principle of legality relates to the need to have in place and to observe clear and precise provisions relating to the state of emergency. It also calls for monitoring mechanisms, including the judiciary, to ensure that the state of emergency is in keeping with the law. Observance of the principle of legality during a state of emergency therefore consists of observance of the provisions relating to the declaration and application of the state of emergency, and of rules and regulations to ensure oversight of the executive by the judiciary. Although in purely formal terms the principle of legality is met by invoking a reason provided for by law, the absence of legal definitions for many types of offences, especially those involving terrorism, gives rise to serious problems. In this connection many States have incorporated definitions that are clearly contrary to the principle of legality in their legislation. International human rights law stipulates the need for a clear and precise definition of offences and appropriate penalties, which are applicable only after their codification. Given the diverging views on the concept of terrorism, it is essential that the courts should be fully independent and competent to monitor anti-terrorist legislation and its implementation. A particularly telling example is a recent judgement by the Supreme Court of the Philippines. It found that although the declaration of a state of emergency in February 2006 following a coup attempt was constitutional, in various

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[2] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* [A/56/40 (vol. 1)], annex V.

[3] See E/CN.4/Sub.2/1982/15.

[4] See the report of the Special Rapporteur on human rights and states of emergency to the forty-ninth session of the Commission (E/CN.4/Sub.2/1997/19 and Add.1); see also L. Despouy, *Los derechos humanos y los estados de excepción*, Universidad Autónoma de México, 1999.

respects it failed the constitutionality test, in particular the order issued to law enforcement officers concerning acts of terrorism, since the absence of a definition of "terrorism" gave rise to legal ambiguity which could result in arbitrary action.[5]

41. The principle of proclamation refers to the need to publicize the declaration of, grounds for and duration of the state of emergency. This is an action taken at the domestic level which is strictly regulated from the procedural and substantive standpoints. Although treaties do not contain explicit provisions on the subject, it is understood that the proclamation is the responsibility of the State's political authorities. What is more controversial is the role of the judiciary and its authority to verify whether the formal and substantive requirements applying to the act of proclamation are met. Setting aside the latter until the principle of exceptional threat is considered, there is unanimous agreement on the fundamental role of the judiciary in verifying whether the formal requirements applying to the state of emergency are met. South Africa and Colombia offer noteworthy examples. Under the South African Constitution, a state of emergency must be declared by Parliament, and the courts have considerable discretion to decide on the validity of the declaration and action taken pursuant to it. Under the Colombian Constitution, a state of emergency must be declared by Presidential decree and must be subsequently reviewed by the Constitutional Court. The Constitution expressly provides that the decree must comply with international human rights law, a requirement verified by the Constitutional Court. The Colombia office of the Office of the United Nations High Commissioner for Human Rights participated in this process and the subsequent declaration of unconstitutionality, through an *amicus curiae* appearance in the Court.

42. Like the principle of proclamation, the purpose of the principle of notification is to publicize the state of emergency, but in this case within the international community: States which declare a state of emergency must immediately inform other States parties in an agreement specifying the provisions suspended and the reasons for the decision. Only if this requirement is met may the State invoke the restrictions introduced before the relevant supervisory body. During his 12-year mandate, the Special Rapporteur on states of emergency followed the practice of sending notes verbales to all States requesting information about the existence and application of every state of emergency which was notified to him by one channel or another - the reasons for proclaiming it, rights restricted, etc. In this way, the authority to monitor States' compliance with their international obligations during states of emergency - which as a rule national bodies do not do - was transferred to the international level.

43. The principle of temporality implies a close connection between the duration of the state of emergency and the circumstance that gave rise to its introduction. Through violation of the principle of temporality states of emergency become permanent in nature, as a result of which the executive holds extraordinary powers. In such cases the judiciary plays an important role in ensuring that the principle of temporality is upheld, by questioning the lawfulness of successive extensions of the state of emergency. However, the exercise of such power by the judiciary is often challenged, the assumption being that it is the political authorities which should evaluate the circumstances that prompted the declaration and application of the state of emergency. Yet,

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[5] G.R. No. 171396. 3 May 2006, *Randolf et al., David et al. v. Gloria Macapagal-Arroyo*.

there is an increasing trend for the judiciary to take steps to end the state of emergency once the conditions that prompted it no longer exist. In this connection, and confronted with numerous cases of the unnecessary continuation of a state of emergency, the Colombian Constitutional Court stated that the restriction of fundamental rights "must have as its basic purpose the preservation of those rights, which may under no circumstances be destroyed but only temporarily restricted with a view to restoring the rule of law and the full enjoyment of rights and freedoms".[6]

44. The principle of exceptional threat refers to the nature of the danger or alleged event that enables the state of emergency to be declared. It must be an exceptional danger, current or imminent, real and specific, which affects the entire nation to the extent that the measures for restricting or limiting rights allowed under normal circumstances are clearly inadequate. The existence of such a threat is closely related to judicial oversight of the proclamation of the state of emergency, specifically the substantive oversight of the "exceptional threat". While the proclamation is the *prima facie* responsibility of the political authorities, which are best placed to assess the scale of the emergency, the repeated resort to unjustified emergency measures has prompted various high-level courts to question *en passant* the grounds for declaring states of emergency. As far as terrorism is concerned, not every act of terrorism justifies the declaration of a state of emergency, since it must pose a real and specific threat to the organized life of the nation. For example, in its ruling resulting in the repeal of part of the Anti-terrorism Act, the Judicial Committee of the House of Lords of the United Kingdom questioned whether terrorism was an exceptional danger threatening the life of the nation.[7]

45. The aim of the principle of proportionality is to strike an appropriate balance between the measures applied and the gravity of the situation. This means that any restrictions or suspensions should fall strictly within the limits imposed by the exigencies of the situation. This principle foreshadows and shapes the exercise of emergency powers, and is based on the essential link with the events which prompt the state of emergency and the appropriateness, necessity and strict proportionality of the measures applied.[8] Judicial bodies must have the authority to suspend emergency measures which are unnecessary or go beyond what is allowed under domestic law and international treaties. Like self-defence, which is one of its foundations, this principle implies the existence of an imminent threat and calls for an appropriate balance between the threat and the methods used to avert it; the latter, in order to be legitimate, must be proportionate to the gravity of the threat. For this reason, if the grounds for the state of emergency are to be considered a legal concept under international law, they must be evaluated by an impartial authority. The judiciary therefore has a position of special responsibility in assessing the proportionality of the measures applied during states of emergency.[9]

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[6] Judgement C-939/02 of 31 October 2002, *op. cit.*, considerations and grounds, para. 7.

[7] *A. v. Secretary of State for the Home Department*, 2005, 2 A.C. 68 (H.L.), 130.

[8] *Loc. cit.* (note 6), para. 5.

[9] L. Despouy, *op. cit.* (note 4 above), pp. 38 and 39.

46. The principle of non-discrimination during states of emergency may be inferred both from article 4, paragraph 1, of the International Covenant on Civil and Political Rights and, in general, from the principle of non-discrimination underpinning international human rights law. In this connection, provisions which differentiate between nationals and foreigners in terms of enjoyment of their rights, including jurisdictional rights, may contravene the principle of non-discrimination. An example of this can be seen in the United Kingdom's Anti-Terrorism, Crime and Security Act 2001. This Act empowered the Home Office to detain indefinitely and without trial foreigners suspected of participating in terrorist activities who could not be deported. In response to the allegation that the powers contained in the Act violated the right to individual liberty, the right to a fair trial, the right to non-discrimination and other rights, the Government argued that it was confronted with an emergency. Three years later, the House of Lords Judicial Committee found that it was not acceptable for laws to differentiate between foreigners and nationals,[10] which is reflected in the Terrorism Act 2006.

47. Lastly, the principle of the compatibility, consistency and complementarity of the various provisions of international law prohibits the application of emergency measures which, although admissible under a given international treaty, conflict with other international obligations, whether they come under customary or treaty law. The right to a fair trial - enshrined in articles 14 and 9 of the Covenant - must be further analysed in the light of peremptory norms and on the basis of obligations arising from other provisions of international law, in particular international humanitarian law.

48. There are peremptory norms which require that general safeguards concerning detention must be upheld even during a state of emergency. Many international precedents have identified many other non-derogable rights, such as the right to be informed of the reasons for arrest,[11] providing safeguards against incommunicado or indefinite detention, the right to file a petition for habeas corpus, safeguards against abuses during questioning,[12]and maintaining normal standards of proof. Also inherent in non-derogable rights are procedural measures intended to ensure their protection, as a result of which the provisions relating to those measures may not be derogated from. In this connection, the reaction of the Supreme Court of the United States is to be welcomed. In the *Rasul v. Bush* case the Court found that the petitioners had the right to file a habeas corpus petition before any federal court,[13] thereby

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[10] See note 7 above.

[11] With emergency laws in force in Northern Ireland, the practice of not informing persons arrested of the reasons for their arrest was declared illegal by the courts of the United Kingdom. EHCR also refers to the practice in *Ireland v. the United Kingdom*, p. 76, para. 198.

[12] Not only are such abuses prohibited, the evidence is considered invalid. See in this connection the Human Rights Committee's general comment No. 13 (CCPR/C/21/Add.3), p. 6.

[13] Regrettably, the Military Commissions Act, adopted in September 2006, among other regressive provisions, also ignores this fact.

opposing the Government's position that Guantánamo does not lie within the territory of the United States and that persons held there are therefore not "entitled to the privilege of litigating in United States courts".[14]

49. The provisions of international human rights law and international humanitarian law are complementary. The International Court of Justice has ruled that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the Covenant". The Court also held that "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law".[15] The provisions of international humanitarian law - which are basically the same as those of article 14 of the Covenant - lay down minimum requirements relating to the right to due process of law which cannot be derogated from. Under the Geneva Conventions and the protocols to them, the right to a fair trial and the right to due process are non-derogable, and their violation represents a grave breach of the Conventions.[16] The following are by and large the essential components of the right to due process:[17] (a) the right to be informed promptly of the reasons for arrest; (b) the right to the necessary means of defence; (c) the right to be present during the trial; (d) the presumption of innocence; (e) the right to remain silent; (f) the right to an independent and impartial tribunal; (g) the right to appeal; (h) the non-retroactivity of criminal laws; (j) the right to present witnesses; (k) the principle of *non bis in idem*; (l) the right to have the lawyer of one's choosing; (m) the right to legal aid; (n) the right to have the judgement pronounced publicly. If such safeguards are provided during wartime,[18] there can be no justification for disregarding them during peacetime.

50. In addition to the complementarity of the two branches of international law, the non-derogable nature of the right to a fair trial arises from the obligation States have to observe and guarantee the rights recognized in the treaties and to offer the possibility of an effective remedy in the event of a violation, as provided for under article 2, paragraph 3, of the International Covenant on Civil and Political Rights. Although this is not one of the non-derogable articles mentioned in article 4, paragraph 2, of the Covenant, it is a treaty obligation inherent in the Covenant that must be observed at all times.

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[14] United States Submissions to the Supreme Court in *Shafiq Rasul et al. v. George W. Bush et al.*, "Brief for the respondents in opposition", October 2003, p. 18.

[15] "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories", *Advisory Opinion, I.C.J. Reports 2004*, para. 106.

[16] Geneva Convention III, art. 130, and Geneva Convention IV, art. 147.

[17] See Protocol I, art. 75, and Protocol II, art. 6.

[18] Geneva Convention III, arts. 82-108; Geneva Convention IV, arts. 43, 65, 67, 71-76, 78, 117 and 126; Additional Protocol I, art. 75; Additional Protocol II, art. 6.

C. Impact of states of emergency and other exceptional measures

51. While the precedents established by the treaty and non-treaty bodies have enabled progress to be made in the legal regulation of states of emergency, nowadays there are still many cases in which improper conduct by State institutions has an adverse effect on the exercise of human rights, in particular as far as the right to a fair trial and the independence of the judiciary are concerned. With regard to the former, the most blatant violations are of the right of habeas corpus, the right to legal assistance of one's own choosing, the right to appeal before an independent court, the right to a public judgement, the right to present one's own witnesses and the right to a public trial. Other frequent violations are indefinite detention, without charges or a trial, protracted incommunicado detention, obtaining confessions using torture, convictions based on such confessions, the violation of the principle of *non bis in idem* and the indiscriminate use of preventive detention. Measures are also adopted to prevent the judiciary from acting as a counterweight to the executive. Such measures include, for example, replacing ordinary courts by military courts or commissions, harassing judges, prosecutors and lawyers, removing judges or transferring them to places where they are unable to interfere with the executive, subordinating the judiciary to the executive and discrediting or disregarding judicial decisions.

52. New threats have justified new ways of suspending human rights, in breach of the obligations undertaken by States. Use is made of exceptional measures under ordinary circumstances, in disregard of some of the aforementioned principles, namely those of proclamation, notification, exceptional threat, proportionality and non-discrimination. Together with the persistence of unlawfully extended states of emergency and the consequent human rights violations, nowadays restrictions are frequently imposed that go far beyond the limitations and derogations allowed under ordinary circumstances, generally by means of laws on national security, anti-terrorist and immigration.[19]

53. The fight against terrorism poses new challenges. Terrorism is increasingly presented as the justification for declaring a state of emergency, when in fact it may not be, and very often is not. Apart from undermining the guarantees of due process, the fight against terrorism is used as a pretext for restricting or denying other rights, such as freedom of expression, freedom of association, the free movement of persons, etc. In this connection, some States have even gone as far as to create parallel systems for the administration of justice which completely ignore universally applicable standards and avoid the application of international human rights law and international humanitarian law by describing the accused as "terrorists", "subversives" or "enemy combatants".

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[19] In this respect it should be emphasized that a measure is exceptional above and beyond the declaration of a state of emergency if it exceeds the limitations allowed under ordinary circumstances.

IV. MAJOR DEVELOPMENTS IN INTERNATIONAL JUSTICE

A. Supreme Iraqi Criminal Tribunal

54. The Special Rapporteur has followed from the outset the establishment and activities of the Iraq Special Tribunal, initially with anticipation and subsequently with concern. The legal problems surrounding the Tribunal, which is now called the Supreme Iraqi Criminal Tribunal, may be divided into four main areas.

55. The first relates to the establishment of the Tribunal and its possible violation of the rules of war. The Geneva Conventions prohibit the occupying Power from establishing courts *ex novo*, and although the Statute adopted by the Coalition Provisional Authority was subsequently endorsed by the Governing Council and thereafter by the elected Iraqi authorities, this does not resolve the original problem. The changes made to the Statute of the Tribunal and its organizational affiliation - there have been several changes in its position in the hierarchy - have led to instances of serious incompatibility with the norms of due process and the independence of the judiciary.

56. Besides the many limitations of the Statute of the Tribunal in terms of the time periods and individuals covered, as indicated in previous reports, it should be noted that in many respects the Statute does not comply with international human rights standards. The fact that it does not rule out confessions obtained as a result of torture or arbitrary detention, includes as offences acts which were defined as such only after their commission by Saddam Hussein's regime, and does not protect the right not to testify against oneself has been mentioned by the Special Rapporteur and many human rights organizations.

57. The third and no less worrying problem concerns the development and conduct of the trial relating to the Al-Dujail massacre, with regard to both the pretrial investigation and the trial proceedings. One judge, several proposed judges, three defence lawyers and a court employee were assassinated during this trial. Another judge withdrew from the case after being subjected to pressure on account of his former links with the Ba'ath regime. The judge who replaced him and handed down the judgement had been accused and imprisoned for activities against the Hussein regime. For several months the accused were refused access to a lawyer of their choosing, and when they were allowed access, the lawyers in question complained so much of threats against them and interference in their work that they were expelled from the trial.

58. The death sentence imposed on several of the accused is of particular significance. Above and beyond the widespread current condemnation of the death penalty, whose reintroduction in Iraq[20] made it impossible for the United Nations to cooperate in the establishment of the Tribunal, there is broad consensus even among those who support this type of sentence that it cannot be handed down unless all judicial safeguards have been respected. This was not the case in the trial held in the wake of the Al-Dujail massacre; thus to enforce the

[20] After being briefly suspended by the occupying Powers.

sentence would not only violate the right to due process, but also the right not to be arbitrarily deprived of one's life. This is tantamount to violation of a peremptory norm that would shatter the foundations on which the new Iraq is to be built. It would also have a harmful effect on the right to justice and the right of many other victims of the serious and repeated crimes committed by Saddam Hussein to obtain compensation. Lastly, some believe that the enforcement of the death sentence would be an aggravating factor in the civil war which is unfolding in Iraq and the spread of violence throughout the region.

B. Extraordinary Chambers in Cambodia

59. The Special Rapporteur is pleased that the Extraordinary Chambers in Cambodia have initiated the prosecution of the senior leaders of the Khmer Rouge for the heinous crimes committed between April 1975 and January 1979. The Special Rapporteur notes with satisfaction that on 3 July 2006, the Cambodian and international judges were sworn in, and, immediately after taking up their duties, invited the public and several experts to comment on the rules of procedure of the Chambers. Also particularly welcome is the fact that the prosecutors have started their investigations. In this connection, the Special Rapporteur applauds the transparency of the procedure established.

V. CONCLUSIONS

60. Analysis of the activities carried out through communications and missions between 1994 and 2006 highlights the magnitude and gravity of situations adversely affecting the judicial system and those involved in it, and their negative impact on the rule of law.

61. It is a matter of concern that despite the legal guarantees provided by each State and the many international instruments intended to preserve their independence, lawyers, judges, prosecutors and court officers in all regions are frequently subjected to pressures, harassment and threats that may result in their enforced disappearance, assassination or extrajudicial execution, simply because they are doing their job.

62. Also of concern are the wide range of situations which undermine the independence of judicial systems throughout the world, and their impact on the rule of law, insofar as the judiciary is one of its main guardians.

63. The large number and frequency of activities engaged in by the Special Rapporteur through communications and country visits demonstrate the intensity of the work being undertaken and the need to strengthen this procedure. With the support of NGOs and the positive response by States to the Special Rapporteur's communications, it is often possible to prevent or put a stop to many violations. In addition, other types of action, such as that taken in Ecuador where prominent international and judicial figures and institutions were involved in resolving the problems affecting them, may be considered "good practices" that should be followed.

64. A state of emergency is a legal institution governed by the rule of law, so that judicial oversight is of vital importance both in checking that it has been lawfully declared and in protecting human rights while it is in force.

65. However, the activity of the Special Rapporteur shows that the administration of justice in general, and the right to due process in particular, are among the principal victims of exceptional measures. Often, judicial oversight of executive action is weakened by measures intended to undermine the independence of the judicial system during crisis periods. Similarly, through legislative reforms and other provisions, practices such as indefinite detention without charges, restriction of the right to legal aid, the expulsion of foreigners to countries where torture is practised, and the establishment of special pseudo-courts that do not meet the minimum requirements of independence and impartiality have become widespread.

66. The report also covers situations in which the judiciary has displayed independence and determination in responding to such measures, highlighting the importance of efforts by the judiciary to put a stop to *ultra vires* acts by other authorities. Starting from the premise that the lives of citizens must be protected and the fundamental values of the nation upheld, some courts have challenged the grounds governments give for declaring states of emergency, and have, among other things, questioned whether terrorism is an "exceptional danger threatening the life of society". What is more, in many cases they have annulled measures that are particularly detrimental to fundamental rights.

67. The Special Rapporteur pays particular attention in his work to the activities of the specialized tribunals. This report refers to two of them, including the tribunal in Iraq, whose activities have been followed up in a series of reports, and where he has had to intervene on many occasions as a result of the assassination of judges, lawyers and court officers and the failure to observe international standards relating to the right to a fair trial. The establishment of the Extraordinary Chambers in Cambodia is welcomed, and efforts to end the impunity of those who have committed grave human rights violations are encouraged.

68. Lastly, opportunities for spreading information about the special rapporteurs' activities have increased considerably with developments in computer science and the media. This has also served to enhance the efficiency of their missions and the interest of the general public in their results. Such topical visibility is a fundamental and integral part of the work of experts.

VI. RECOMMENDATIONS

69. **The Special Rapporteur invites the Human Rights Council to increase still further its efforts to defend the work being accomplished by different actors involved in the administration of justice and to consider every year the scale and gravity of problems affecting the judicial system and its independence, with a view to recommending that States should adopt specific measures intended to guarantee to judicial employees the safety and protection they require to perform their duties properly.**

70. **In the light of the findings set out above, it is imperative for the Council to strengthen the work of the Special Rapporteur by granting him the resources he needs to do his work more effectively, and to enable him to expand his activities.**

71. **It is also important that in its support and technical cooperation activities the United Nations should promote the theme of justice, especially with respect to countries which are in transition or are recovering from an armed conflict which has had a serious impact on nation-building.**

72. **Bearing in mind that the administration of justice is one of the pillars of the rule of law and the democratic system, the defence of justice must be accorded priority when analysing the institutional aspects encompassed by the activities of the United Nations as a whole.**

73. **Considering the dynamic and leading role now played by national and international associations of jurists to promote an independent judiciary, it would be appropriate for the United Nations to take account of their input and experience in its technical cooperation and other activities relating to the promotion and protection of human rights. Accordingly, the Special Rapporteur intends to work to bring about this rapprochement between the United Nations and judicial circles.**

74. **Concerning states of emergency, it is imperative that States should bring their domestic legislation and practices into line with international principles, judicial practice and standards relating to the application of states of emergency.**[21]

75. **As far as the administration of justice is concerned, it is imperative that legislation relating to states of emergency should in all cases prevent:**

(a) Measures which invalidate the provisions of the Constitution or basic law and legislation relating to the appointment, mandate and privileges and immunities of members of the judiciary, and their independence and impartiality;

(b) Measures which limit the jurisdiction of the courts: (i) to consider whether the declaration of a state of emergency is compatible with the laws, Constitution and obligations under international law, and whether it is unlawful or unconstitutional, in the event of incompatibility; (ii) to consider whether any measure adopted by a public authority is compatible with the declaration of the state of emergency; (iii) to take legal action to ensure the observance and protection of any right enshrined in the Constitution or basic law and in national or international law that is not affected by the declaration of the state of emergency; (iv) to try criminal cases, including offences relating to the state of emergency.

76. **Bearing in mind that states of emergency continue to give rise to serious human rights violations, the Special Rapporteur recommends that an international declaration should be drafted which incorporates existing practices and principles and whose purpose is to ensure the observance of human rights and fundamental freedoms during states of emergency. A single text would provide clear guidance for States on how to bring their conduct into line with international law during crisis periods. In this connection, it is recommended that the Human Rights Council should establish a mechanism to draft**

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[21] This refers in particular to the principles set forth in the Special Rapporteur's 1997 report, and the case law and general comments of the Human Rights Committee, as well as the wealth of case law produced by the regional human rights monitoring bodies.

the declaration, and, at the same time, should seek the opinion of the sectors concerned by this matter. To this end, the Council is requested to ask the Office of the United Nations High Commissioner for Human Rights to hold an international expert seminar during 2007 to prepare the ground for the proposed instrument.

77. **As far as the Supreme Iraqi Criminal Tribunal is concerned, the Special Rapporteur reiterates emphatically the recommendations he made to the General Assembly in October 2005: that the Iraqi authorities should be urged to follow the example of other countries with shortcomings in their judicial systems, by seeking the assistance of the United Nations in the establishment of an independent tribunal which complies with international human rights standards; and also that it should refrain from imposing the death penalty under all circumstances.**

78. **With regard to the Tribunal in Cambodia, the Special Rapporteur urges the judges to ensure that the rules of procedure contain all the necessary provisions to ensure that the trials are conducted in full compliance with international standards relating to the right to a fair, impartial and independent trial.**

79. **The Special Rapporteur urges all States to ratify promptly the International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted recently.**
