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**LAWYERS' ROLE
IN THE SAFEGUARD OF JUDICIAL INDEPENDENCE**



**Human Rights
Institute**

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Honourable Judges, distinguished delegates, ladies and gentlemen,

I am very grateful for the invitation to speak at this international conference, in the framework of the 61st Annual Meeting of the International Association of Judges, and honoured to be here. On behalf of the International Bar Association's Human Rights Institute, I salute your work in protecting the independence of the judiciary and promoting the rule of law.

I will not expand further on the concept of “judicial independence”, which has been broadly discussed today both in its external and internal components. Its fundamental character for “any society based on the rule of law cannot be doubted”.¹ I will focus instead on the role of lawyers and bar associations in safeguarding this independence.

As recently underlined by the Special Rapporteur on the Independence of Judges and Lawyers, Mr García-Sayán, in his report to the General Assembly on the role of bar association², both lawyers and **bar associations** have a key role to safeguard the independence of the judiciary. In this regard, the **International Bar Association (IBA) and its Human Rights Institute (IBAHRI)** are leading advocates for judicial independence and carry out this mission by developing standards, including the *IBA Minimum Standards of Judicial Independence* and the *IBA International Principles on Conduct for the Legal Profession*,³ denouncing threats and attacks to judicial independence (for instance, by closely following the trial of former Judge María Lourdes Afiuni in Venezuela) and by conducting continuous thematic research to examine the threats to judicial independence⁴, and providing training.

Focusing on the **role of individual lawyers**, as pointed out by Mark Ellis, Executive Director of the International Bar Association, last week during our Annual Conference in Rome, “when we took our oath ... we agreed to become custodians of the rule of law”. We can further note with former Chief Judge of the New York Court of Appeals Judith Kaye, that “Lawyers are part and parcel of the legal system, they depend on, and in turn

¹ Geoffrey Robertson, Judicial Independence: Some Recent Problems, IBAHRI Thematic papers No4, June 2014, p.4, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9f2297b2-5bdf-4c7c-b950-025604a2c363>

² UN Basic Principles on the Independence of the Judiciary, Principle 1, <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx> ; Special Rapporteur on the Independence of Judges and Lawyers, Report to the General Assembly, 5 September 2018, paras 19-22, <http://undocs.org/A/73/365>

³ IBA Minimum Standards of Judicial Independence, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29> ; IBA International Principles on Conduct for the Legal Profession, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C>

⁴ IBA Judicial Integrity Initiative, Judicial Systems and Corruption, May 2016, https://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx; Jessica Walsh, A Double-Edged Sword: Judicial Independence and Accountability in Latin America, IBAHRI Thematic papers No.5, April 2016, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=61b5c2d2-e02c-472d-84a6-3274297b9f07>

are depended on for, the effective administration of justice”.⁵ Likewise, the *Code of conduct for European Lawyers* states that “a lawyer must serve the interests of justice”.⁶

What does this entail?

I will discuss how, in order to fulfil their role as “custodians of the rule of law”, lawyers must not only adequately perform their professional duties, but also play a key role in safeguarding judicial independence through advocacy activities outside the courtroom.

1. Lawyer’s professional duties to safeguard judicial independence

Lawyers’ role in upholding judicial independence is embodied in the rules set out in deontological codes, civil and common law alike. They concern the **lawyers’ relation with the court, their clients and with other lawyers.**

Principle 2 of the *IBA International Principles on Conduct for the Legal Profession*, which takes into account national professional rules from around the world, states that “A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards [...] the court”. This leads to the positive obligation of mutual respect and consideration,⁷ and to the prohibition to “knowingly give false or misleading information to the court”,⁸ which would result in an undue interference in judicial independence.

Even if “a lawyer shall treat client interests as paramount”, the *IBA International Principles on Conduct for the Legal Profession* clarifies that this obligation is “subject always to there being no conflict with the lawyer’s duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.”⁹ Consequently, lawyers have the obligation to reveal their clients fraudulent conduct to the relevant authorities.¹⁰ Lawyers must also report any infringement of professional or legal duties by their colleagues of which they acquire knowledge.

⁵ Judith S. Kaye, "Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts," Hofstra Law Review, Vol. 25, Iss. 3, 1997, p.13,

<http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss3/1>

⁶ Code of conduct for European Lawyers, Preamble (1.1.),

https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

⁷ Council of Europe, Strengthening judicial Independence and impartiality as a pre-condition to the rule of law in Council of Europe Member States, p.40, <https://rm.coe.int/proceedings-of-the-conference-on-strengthening-judicial-independence-s/16808b64d4>: “that the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system”

⁸ Code of Conduct for European Lawyers, Principle 4.4,

https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

⁹ IBA International Principles on Conduct for the Legal Profession, Principle 5, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C>

¹⁰ For instance, American Bar Association, Model Code of Professional Responsibility, EC 8-5, https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/mod_code_prof_resp.authcheckdam.pdf

Furthermore, in order to preserve judicial independence, lawyers must carry out efforts to **combat corruption within the profession**. As noted by the International Commission of Jurists, corruption in one group of actors in the legal system (court clerks, prosecutors, lawyers...) “can [foster] corruption in the others” and lead to “deliberate collusion”.¹¹ Interestingly, the study carried out by the International Bar Association Judicial Integrity Initiative on judicial corruption in 2016 shows that “respondents are of the view that lawyers, compared with judges, more frequently interact with third parties and are thus more likely to serve as intermediaries to influence the outcome of cases”.¹²

2. Safeguarding judicial independence outside the courtroom

Lawyers’ role in safeguarding judicial independence is not however reduced to court proceedings. In this regard, Principle 23 of the *UN Basic Principles on the Role of Lawyers* states that lawyers “have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights”.¹³ A broader conception of the role of lawyers includes their **right to monitor and to respond to threats to judicial independence** in their capacity as members of the legal profession and intermediaries between courts and the general public.

a) Lawyers as members of the legal profession

In this regard, lawyers can play a leading role in **fair judicial appointment**. An example of this is the on-going elections for the Supreme Court of El Salvador. This election is a two-phase process and consists of a pre-selection stage by the National Council of the Judiciary and the national federation of lawyers and the final election by the Legislative Assembly.¹⁴ The role of Salvadoran lawyers is two-fold: first, they are in charge of pre-selecting qualified applicants. Second, they are responsible of monitoring the election by the Legislative Assembly and promoting fair appointments. Noting that the elections closed in July 2018 and that the two-months delay has heavily impaired the functioning of the court,¹⁵ a Salvadoran lawyer has recently filed a complaint to the Public Prosecutor (thus acting as guarantor of judicial independence).¹⁶

¹¹ International Commission of Jurists, *Judicial Accountability Practitioners Guide* N.13, pp.107-108, <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>

¹² IBA Judicial Integrity Initiative, *Judicial Systems and Corruption*, May 2016, p.29, https://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx

¹³ UN Basic Principles on the Role of Lawyers, Principle 23, <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>

¹⁴ DPLF, WOLA, CEJIL, *Informe Final Panel Independiente, Selección de magistradas y magistrados de la Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador*, 2018, http://www.dplf.org/sites/default/files/informefinal_panelindependiente_v1.pdf

¹⁵ Special Rapporteur on the Independence of Judges and Lawyers, *El Salvador: the Legislative Assembly must ensure the prompt selection of Supreme Court judges*, 29 August 2018, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23485&LangID=E>

¹⁶ El Salvador, *¿Diputados serían sancionados por falta de elección de magistrados de la Corte Suprema?*, 20 de agosto de 2018, <https://www.elsalvador.com/noticias/nacional/511046/diputados-serian-sancionados-por-falta-de-eleccion-de-magistrados-de-la-corte-suprema/>

As an aside, it is interesting to note, mainly in the context of the recent polemics surrounding elections for Supreme Court of the United States, that their Model Code of Professional Responsibility dictates “lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench”.¹⁷

Likewise, lawyers can play a role as international observers in guaranteeing the independence of vetting and disciplinary proceedings against judges, as recently stated by the International Commission of Jurists and the Venice Commission.¹⁸

b) Lawyers as public intermediaries

Lawyers, but also judges and prosecutors, “have a crucial role to fulfil in ensuring that human rights are effectively implemented at the domestic level”.¹⁹ In this interest, as developed in the jurisprudence of the European Court of Human Rights (ECHR), lawyers have a “central position in the administration of justice as intermediaries between the public and the courts [and] play a key role in **ensuring that the courts [...] enjoy public confidence**”.²⁰ At the same time, lawyers have the right to **responsibly criticize the shortcomings of the judicial system**, particularly concerning matters of public interest and “value judgments with a sufficient factual basis”.²¹

They also have a responsibility in **denouncing threats or attacks** to judicial independence from the government, the general public and even justice itself. In his recent report to the General Assembly, Special Rapporteur García-Sayán underlines that “Bar associations [...] should advocate for a strong and independent judiciary and legal profession and denounce any abuse of power by State authorities that prevents or limits access to justice.”²²

This role as guarantors of the rule of law is often fulfilled by international bar associations or human rights organizations, such as the IBA and the IAJ. Some examples are the recent international reactions against the attacks and prosecution of judges in Poland and

¹⁷ American Bar Association, Model Code of Professional Responsibility, EC 8-6, https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/mod_code_prof_resp.authcheckdam.pdf

¹⁸ International Commission of Jurists, Judicial Accountability Practitioners Guide N.13, p.96, <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>; European Commission for Democracy through Law (Venice Commission), Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, 2016, paras 69-73, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e)

¹⁹ OHCHR, International Human Rights Law and the Role of the Legal Professions: A General Introduction, p.6, <https://www.ohchr.org/documents/publications/training9chapter1en.pdf>

²⁰ European Court of Human Rights, Grand Chamber, *Morice v. France*, App. No. 29369/10, 23 April 2015, para 132

²¹ European Court of Human Rights, Background Paper for the Judicial Seminar 2018: The Authority of the Judiciary, pp.10, 11, https://www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf

²² Special Rapporteur on the Independence of Judges and Lawyers, Report to the General Assembly, 5 September 2018, para 84, <http://undocs.org/A/73/365>

Guatemala.²³ This responsibility is particularly evident in times of crisis or threats to democracy, when solidarity amongst or with the legal profession in other countries is essential.

Finally, I will conclude with the reminder that, in order to fulfil their role as advocates of judicial independence, lawyers themselves must benefit from adequate protection for their work, freedom of expression, including the right to establish bar associations, and receive appropriate, continuous education and training in ethical duties and human rights in national and international law.²⁴

All in all, a legal system based on respect for the rule of law needs strong, independent and impartial judges, prosecutors and lawyers. Unless each of them plays their respective key roles to the full in maintaining justice in society, there is a serious risk that a further deterioration in the administration of justice will occur and a culture of impunity will take root.

Thank you.

²³International Bar Association Human Rights Institute, *IBAHRI calls on Poland's government to stop persecution of judges and respect democratic norms*, 3 July 2018, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=738d7f7c-1151-43a0-b4b7-c8ec0df0bc0d> ; International Association of Judges, Solidarity, news and statements about Poland, <https://www.iaj-uim.org/solidarity-news-and-documents-about-poland/>; International Commission of Jurists, *Guatemala: la Justicia bajo ataque de la propia Corte Suprema de Justicia*, 22 de julio de 2018, <https://www.icj.org/es/guatemala-la-justicia-bajo-ataque-de-la-propia-corte-suprema-de-justicia/>

²⁴ UN Basic Principles on the Role of Lawyers, Principles 9, 16, 23, <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>. See also Special Rapporteur on the Independence of Judges and Lawyers, Report to the General Assembly, 5 September 2018, para 126, <http://undocs.org/A/73/365>