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International and Regional Standards on Judicial Independence

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Contents

224 West 57th Street
New York, NY 10019
P. +1 212-548-0600
opensocietyfoundations.org

Introduction

This research memo identifies the relevant international and regional standards regarding the independence of the judiciary. It analyzes standards from the United Nations, the African Union, the Council of Europe and European Union, as well as the Organization of American States.

The memo is structured in three sections. *Section I* covers the general duty of States to guarantee judicial independence in law and in practice, while *Section II* focuses on standards related to the security of tenure and irremovability of judges. *Section III* outlines standards on functional immunity of judges.

It was authored by Clarisse Ikeda Larcher, legal intern at the Open Society Justice Initiative, under the supervision of Maïté De Rue, senior managing litigation officer at the Open Society Justice Initiative. It was edited by Genevieve Quinn, strategic litigation officer at the Open Society Justice Initiative.

1 States Must Guarantee Judicial Independence in Law and in Practice

This section discusses the concept of judicial independence as developed in international and regional standards and jurisprudence and what it encompasses in terms of obligations for States. While *Subsection 1.1* covers the recognition of judicial independence as an essential prerequisite for the protection of human rights and the rule of law, *Subsection 1.2* develops that States have a duty to guarantee the independence of the judiciary in law and in practice.

1.1 Judicial independence as an essential prerequisite for the protection of human rights and the application of the rule of law

The independence of the judiciary as a whole, and of judges as individuals, has been recognized by international and regional bodies as being as a prerequisite, a *sine qua non*, for the protection of democracy, human rights and fundamental freedoms and the application of the rule of law. Numerous universal and regional bodies have adopted instruments containing language that emphasizes their interdependence.

1.1.1 United Nations system

Various instruments from the United Nations recognize judicial independence as an essential prerequisite for the protection of human rights and for upholding democracy and the rule of law.

In **Resolution 67/1** (2012),[1] the **UN General Assembly** adopted the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, in which heads of states and governments declared that they are "convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for

1 United Nations General Assembly, Resolution adopted by the General Assembly on 24 September 2012, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 30 November 2012.

upholding the rule of law and ensuring that there is no discrimination in the administration of justice."[2]

The **Bangalore Principles of Judicial Conduct**,[3] adopted in 2002 by the Judicial Group on Strengthening Judicial Integrity[4] and endorsed by the **UN Economic and Social Council** (ECOSOC) in Resolution 2006/23,[5] stresses in its preamble that "the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice."[6] The Principles, which are intended, *inter alia*, to assist members of the executive and the legislature to better understand and support the judiciary,[7] provide under Title "Value 1 Independence" that "[j]udicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial."[8] **ECOSOC Resolution 2006/23**[9] underscores that it is convinced that "the integrity, independence and impartiality of the judiciary are essential prerequisites for the effective protection of human rights and economic development"[10] and invites Member States, "consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct (…) when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary."[11]

2 Ibid., para. 13.

3 The Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct, 2002.

4 The Bangalore Principles were drafted, on the invitation of the United Nations Centre for International Crime Prevention (UNCICP), by a representative group of Chief Justices (now known as the Judicial Integrity Group), in consultation with senior judges from over 75 countries.

5 UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, 27 July 2006, E/2006/INF/2/Add.1.

6 The Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct, 2002.

7 Ibid., Preamble.

8 Ibid., Principle 1.

9 UN ECOSOC, UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, Preamble.

10 Ibid., Preamble.

11 Ibid., para. 1.

The **UN Commission on Human Rights** (replaced by the UN Human Rights Council in 2006) declared, in **Resolution 2002/46** on "Further measures to promote and consolidate democracy," that "the essential elements of democracy include respect for human rights and fundamental freedoms, (…) the separation of powers, the independence of the judiciary (…)."[12] Its successor, the **Human Rights Council**, has proclaimed that the independence of the judicial system is "an essential prerequisite for the protection of human rights and fundamental freedoms, for upholding the rule of law and democracy."[13] In **Resolution 23/6** on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers,[14] the Human Rights Council reiterated that it remains "[c]onvinced that an independent and impartial judiciary, (…) an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are prerequisites for the protection of human rights and the application of the rule of law, and for ensuring fair trials and that there is no discrimination in the administration of justice."

Former **United Nations Special Rapporteur** (hereafter "UN SR") **on the independence of judges and lawyers** Leandro Despouy stressed that "[i]n any democratic society, judges are the guardians of rights and fundamental freedoms. Judges and courts undertake the judicial protection of human rights, ensure the right of appeal, combat impunity and ensure the right to reparation."[15] His successor, Mónica Pinto, also emphasized that "an independent and impartial justice system is considered integral and inherent to the protection and promotion of human rights and the rule of law"[16] and that "[t]he independence of the

12 United Nations Human Rights Commission, Further measures to promote and consolidate democracy, UN Doc. E/CN.4/RES/2002/46, of April 23, 2002, para. 1.

13 UN Human Rights Council, Resolution on the Integrity of the judicial system, A/HRC/RES/37/3, 22 March 2018. See also UN Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020.

14 United Nations Human Rights Council, Resolution adopted by the Human Rights Council on 16 July 2020, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020.

15 Human Rights Commission, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Civil and Political Rights, including the Questions of Independence of the Judiciary, Administration of Justice, Impunity, UN Doc. E/CN.4/2004/60, December 31, 2003, para. 30

16 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/32/34, 5 April 2016, para. 33.

judiciary and the legal profession is (…) central to the right to an adequate and effective remedy for human rights violations."[17]

1.1.2 African system

The **African Court on Human and Peoples' Rights** (hereafter "ACtHPR") has recognized in its case-law that "the independence of the judiciary is one of the fundamental pillars of a democratic society."[18]

In the same vein, the **African Commission** underscored the central role played by judicial independence in guaranteeing democracy and sustainable development in the Preamble of its **Resolution on the Respect and the Strengthening on the Independence of the Judiciary** adopted in 1996:

> *Noting that justice is an integral part of human rights and a necessary condition for democracy;*
>
> *Considering the importance and the role of the judiciary not only in the quest for the maintenance of social equilibrium, but also in the economic development of African countries;*
>
> *Recognizing the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development;*[19]

The **Dakar Declaration on the Right to Fair Trial in Africa** (1999) adopted by the African Commission in its **Resolution on the Right to Fair Trial and Legal Assistance in Africa**[20] identifies the independence of the judiciary as a prerequisite for the realization of the right to fair trial. Notably, the Declaration makes clear that "[t]he right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights"[21] and "therefore the right to fair trial is a non-derogable right, especially as the African Charter does not

17 Ibid.

18 Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin (hereafter "Ajavon v. Benin"), Application 062/2019, Judgement (Merits), 4 December 2020, para. 277.

19 ACHPR, Resolution on the Respect and the Strengthening on the Independence of the Judiciary, ACHPR/ Res.21(XIX)96, 19th Ordinary Session, 1996.

20 ACHPR, Resolution on the Right to Fair Trial and Legal Assistance in Africa, ACHPR/Res.41(XXVI)99, 15 November 1999

21 ACHPR, The Dakar Declaration on the Right to Fair Trial in Africa, 9-11 September 1999.

expressly allow for any derogations from the rights it enshrines."[22] It further states that "the realization of [the right to fair trial] is dependent on the existence of certain conditions and is impeded by certain practices," and includes the independence and impartiality of the judiciary in the list of such conditions.[23]

1.1.3 European system

Both the Council of Europe and the European Union have recognized the interlink between judicial independence and the rule of law. For both legal orders, judicial independence is understood as a prerequisite to, or an enabler of, the rule of law. For the European Union, this link becomes of particular importance since the rule of law is listed as one of the common values on which the Union has been founded.

1.1.3.1 Council of Europe

The **European Court of Human Rights** (hereinafter "the ECtHR") has recognized in its jurisprudence that "judicial independence is a prerequisite to the rule of law."[24] It has also indicated that judicial independence is "one of the most important values underpinning the effective functioning of democracies."[25]

The **Consultative Council of European Judges** (CCJE), an advisory body of the Council of Europe, adopted, in 2001, Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges. The Opinion stated the rationales of judicial independence as follows:

> *Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a*

22 Ibid.

23 Ibid., para. 2.

24 ECtHR (Grand Chamber), *Grzęda v Poland*, Application no. 43572/18, Judgment of 15 March 2022, para. 298. See also ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgment of 1 December 2020, para. 239.

25 ECtHR, *Oleksandr Volkov v. Ukraine*, Application no. 21722/11, Judgment of 9 January 2013, para. 199.

> *prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.*[26]

In 2010, the CCJE adopted the Magna Carta of Judges, which summarized and codified the main conclusions of the Opinions it previously adopted. The text affirmed that as "one of the three powers of any democratic state," the judiciary's mission is "to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner."[27] and that "[j]udicial independence and impartiality are essential prerequisites for the operation of justice."[28]

1.1.3.2 European Union

Article 2 of the **Treaty on European Union** (hereafter "TEU") lists the rule of law as one of the shared values upon which the Union is founded:

> *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The **Court of Justice of the European Union** (hereafter "CJEU"), in the case *European Commission v. Republic of Poland*, articulated the bridge between the requirement of judicial independence and the protection of the rule of law as follows:

> *The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States*

26 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, 23 November 2001, para. 10.

27 Consultative Council of European Judges (CCJE), Magna Carte of Judges (Fundamental Principles), CCJE(2010)3, 17 November 2010, para. 1.

28 Ibid., para. 2.

set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[29]

1.1.4 Inter-American system

The **Inter-American Court of Human Rights** (hereafter "IACtHR") has also emphasized that judicial independence is essential for the protection and effective guarantee of human rights, the rule of law and democracy.

In *Ríos Ávalos et al. v. Paraguay* (2021), the IACtHR, referencing instruments from the United Nations system and the jurisprudence of the ECtHR,[30] recognized "the important role that judges play in a democracy as guarantors of human rights."[31] The Court stated that this, in turn, mandates States to respect and recognize their independence:

> *[T]his requires that their independence be recognized and safeguarded, especially in relation to the other powers of the State. To the contrary, their work could be hindered to the point of preventing them from being able to determine, declare and eventually punish arbitrary acts that could involve the violation of [human] rights, and to order the corresponding reparation.*[32]

The Court further articulated that judicial independence is essential for States to fulfill their obligations to ensure the free and full exercise of human rights:

> *[S]ince the case of Velásquez Rodríguez v. Honduras, the Court has affirmed that the obligation to ensure rights pursuant to Article 1(1) of the Convention entails the State duty to organize the whole governmental apparatus and, in general, all the structures through which public powers are exercised, so that they are capable of ensuring, legally, the free and full exercise of human rights. In the context of this obligation to ensure rights, judicial independence stands out as an essential element of the organization of the governmental apparatus without which the State is unable to ensure the free and full*

29 CJEU (Grand Chamber), *European Commission v. Republic of Poland*, Judgment of 24 June 2019, C-619/18, para. 58. See also CJEU (Grand Chamber), *A.K. and Others v. Krajowa Rada Sądownictwa (Independence of the Disciplinary Chamber of the Supreme Court)*, Judgment of 19 November 2019, C-585/18, para. 120.

30 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, fns. 85-87

31 Ibid., para. 89.

32 Ibid.

> *exercise of rights. Consequently, judicial independence is essential for the protection and effective guarantee of human rights.*[33]

Moreover, the Court underscored that judicial independence is the very enabler of the rule of law and democracy:

> *Ultimately, without judicial independence the rule of law does not exist and democracy is not possible (Article 3 of the Inter-American Democratic Charter) because judges must have adequate and sufficient guarantees to exercise their function to decide the disputes that occur in society in accordance with the law. The lack of independence and respect for their authority is synonymous with arbitrariness.*[34]

1.2 States have a duty to respect and guarantee the independence of the judiciary in law and in practice

International and regional bodies are unequivocal in asserting that States have a general duty to guarantee judicial independence and a corresponding obligation to provide mechanisms to protect judges against interference, pressure, and attacks (*Subsection 1.2.1*). Furthermore, this entails an obligation to enshrine judicial independence in the Constitution or the law (*Subsection 1.2.2*).

1.2.1 States have a general duty to respect and guarantee judicial independence and must provide mechanisms to protect judges against undue interference

International and regional bodies unanimously consider that States have the duty to respect and guarantee judicial independence. In addition, some international and regional bodies have established that judicial independence should be actionable for judges and that States should accordingly provide mechanisms to protect them against interference, pressure, and attacks.

1.2.1.1 United Nations system

The duty to respect and guarantee judicial independence is found in a plethora of legal instruments from the United Nations.

33 Ibid., para. 90.
34 Ibid., para. 91.

Binding law

Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) enshrines the subjective right to an independent tribunal. It reads as follows:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

In addition, Article 25 (c) of the ICCPR guarantees the right of every citizen "to have access, on general terms of equality, to public service in his country."[35]

Soft law

In **General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial** (2007), which provides interpretation guidance on **Article 14 of the ICCPR**, the **Human Rights Committee** stressed that "[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception."[36]

The General Comment defines the notion of a "tribunal" by reference to its independent character:

> *The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific*

35 The Human Rights Committee has found a violation of Article 25(c), read in conjunction with Article 14(1), in two individual communications where a judge was unilaterally dismissed, by presidential decree, before expiration of his term. See *Mikhail Ivanovich Pastukhov v. Belarus*, Communication No. 814/1998, CCPR/C/78/D/814/1998, 14 July - 8 August 2003, para. 7.3 and *Soratha Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, CCPR/C/121/D/2203/2012, 24 July 2008, para. 7.3. For more details, see sections II. A and II. C. 3.

36 Ibid., para. 19.

cases judicial independence in deciding legal matters in proceedings that are judicial in nature.[37]

Moreover, the General Comment insists on a clear separation of powers between the judiciary and executive and the absence of external interference. It clarifies that "[t]he requirement of independence refers, in particular, to (…) the actual independence of the judiciary from political interference by the executive branch and legislature"[38] and highlights that "[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."[39]

Several instruments adopted by the **UN General Assembly** also refer to States' duty to respect and guarantee the independence of the judiciary and define the scope of such obligation. Article 10 of the **Universal Declaration of Human Rights**[40] and Article 9(2) of the **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms**[41] both enshrine the subjective right to an independent tribunal**.**

The **UN Basic Principles on the Independence of the Judiciary** were formulated in 1985 to assist Member States in their task of securing and promoting the independence of the judiciary. The Preamble notes that these Principles "should be taken into account and respected by Governments within

37 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 18.

38 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

39 Ibid., para. 19.

40 Article 10 of the Universal Declaration of Human Rights reads as follows: Everyone is entitled in full equality 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.

41 Article 9(2) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1999) provides that "[e]veryone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law (…)."

the framework of their national legislation and practice."[42] *Principle 1* explicitly states that "[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[43] *Principle 2* develops that "[t]he judiciary shall decide matters before them (…) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[44] *Principle* 4 requires that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process (…)."[45]

The **Bangalore Principles of Judicial Conduct (2002),** endorsed by the **Economic and Social Council** in its Resolution 2006/23, not only underscore the duty to guarantee the independence of judges from the executive branch, but also state that judges must appear as independent "to a reasonable observer":

> *A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom*.[46]

The Bangalore Principles incorporate some of the language used in the UN Basic Principles regarding the absence of external interference but refer to individual judges rather than the judiciary as a whole: "A judge shall exercise the judicial function independently (…), free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."[47]

The **Human Rights Committee** has also made multiple references to the importance of the separation of powers to guarantee the independence of the judiciary in its Concluding Observations on States.[48] In its 2000 Concluding

42 Basic Principles on the Independence of the Judiciary, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Preamble.

43 Ibid., Principle 1.

44 Ibid., Principle 2.

45 Ibid., Principle 4.

46 The Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct, 2002, Principle 1.3.

47 Ibid., Principle 1.1.

48 Human Rights Committee, Concluding Observations on El Salvador, CCPR/C/79/Add.34, 18 April 1994, para. 15; ; and the Concluding Observations on Nepal, CCPR/C/79/Add.42, 10 November 1994, para. 18; Concluding Observations on Tunisia, CCPR/C/79/Add.43, 23 November 1994, para. 14; Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, 28 July 1999, para. 10; Concluding Observations on Peru, CCPR/CO/70/PER, 15 November 2000, para. 10.

Observations on Peru, the Human Rights Committee stressed that "[a]n impartial and independent system of justice is essential for compliance with a number of articles of the Covenant, notably article 14."[49] In two decisions relating to individual communications, the Committee underscored that "any situation in which the executive is able to control or direct the judiciary is incompatible with the Covenant."[50]

The **Special Procedures of the Human Rights Council** have also produced instruments that emphasize States' duty to respect and guarantee judicial independence and that clarify the scope of this obligation. As emphasized by **UN Special Rapporteur on the independence of judges and lawyers** Leandro Despouy, the independence of judges is recognized as international custom and general principal of law and is a treaty-based obligation.[51]

Successive mandate-holders of the UN Special Rapporteurship on the independence of judges and lawyers have submitted a large number of reports that have contributed to the development of international standards on judicial independence.[52] A number of these reports underscore the need for a strict separation of powers to ensure judicial independence. For instance, Param Cumaraswamy stated in a report (1995) that "the principle of the separation of powers […] is the bedrock upon which the requirements of judicial independence

49 Human Rights Committee, Concluding Observations on Peru, CCPR/CO/70/PER, 15 November 2000, para. 10.

50 Human Rights Committee, *Gabriel Osío Zamora v. Venezuela*, Communication No. 2203/2012, CCPR/C/121/D/2203/2012, 7 November 2017, para. 9.3 and *Marcos Siervo Sabarsky v. Venezuela*, Communication No. 2254/2013, CCPR/C/125/D/2254/2013, 27 March 2019, para. 8.4.

51 See United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 14:

Since very early in the existence of the mandate, the principle of the independence of judges and lawyers has been defined as international custom and general principle of law recognized by the international community, respectively, in the sense of article 38 (1) (b) and (c) of the Statute of the International Court of Justice. Furthermore, it has also been a treaty-based obligation, as shown by the requirement of "independence of a tribunal" established in article 14, paragraph 1, of the ICCPR, which, as stated by the Human Rights Committee in its general comment No. 32,1 is an absolute right that is not subject to any exception.

52 All annual thematic reports are accessible here and reports related to country visits here.

and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State […].[53] He then emphasized "the special and urgent necessity for respecting the principle of separation of powers and the requirements of judicial independence and impartiality, especially in countries in transition to democracy."[54] In a report on the human rights situation in Nigeria (1997), the UN SR on the independence of judges and lawyers and the UN SR on extrajudicial, summary or arbitrary executions emphasized that "[t]he separation of power[s] and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively."[55]

In addition to their general duty to guarantee the independence of judges, States "have to put in place mechanisms to protect judges, prosecutors and lawyers against pressure, interference, intimidation and attacks and to ensure their security,"[56] as stated by UN SR on the independence of judges and lawyers Mónica Pinto in a 2016 report.

1.2.1.2 African system

The **African Charte**r safeguards the independence of the judiciary by framing it both as a duty on Members States (Article 26) and as an individual right (Article 7(1)(d)).

Article 26 imposes a duty on States Parties to guarantee the independence of the courts:

> *States parties to the present Charter shall have the duty to guarantee the independence of the Courts and allow the establishment and improvement of*

53 UN Economic and Social Council, Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, 6 February 1995, para. 55.

54 Ibid.

55 UN Economic and Social Council, Report of Special Rapporteurs on the situation of human rights in Nigeria, UN document E/CN.4/1997/62/Add.1, 24 March 1997, para. 71.

56 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/32/34, 5 April 2016, para. 40.

> *appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guarantees by the present Charter*.[57]

Article 7(1)(d), for its part, guarantees the individual right to have access to an independent and impartial judiciary[58]:

> 1. *Every individual shall have the right to have his cause heard. This comprises:*
>
> *...*
>
> *d) The right to be tried within a reasonable time by an impartial court or tribunal*.[59]

Case-law of the African Court on Human and Peoples' Rights

In its case-law, the ACtHPR clarified that Article 26 of the Charter "does not only enshrine the independence of courts, as judicial bodies, but also that of the judiciary as a whole, similar to that of the executive power and the legislative power."[60]

The Court has clearly held that **Article 26 of the Charter requires that, according to the principle of separation of powers, the judiciary exercises powers independently, without external interference**.

The Court defined that in substance, "[t]he notion of judicial independence essentially implies the ability of courts to discharge their functions free from external interference and without depending on any other authority."[61]

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57 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986), OAU Doc CAB/LEG/67/3 rev. 5 , 21 I.L.M. 58 (1982), Article 26.

58 Sègnonna Horace Adjolohoun, Judges Guarding Judges: Investigating Regional Harbors for Judicial Independence in Africa, *Journal of African Law* (2023), pp. 10, 13, 14.

59 African Charter on Human and Peoples' Rights, entry into force on 21 October 1986, Article 7(1)(d).

60 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* (hereafter "Ajavon v. Benin"), Application No. 062/2019, Judgment of 4 December 2020, para. 310; ACtHR, *Houngue Eric Noudehouenou v. Republic of Benin* (hereafter "Houngue v. Benin"), Application 028/2020, Judgment of 1 December 2022, para. 69.

61 ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 277.

In *Houngue v. Benin* (2022), the Court held that it endorses the Commission's position that "the doctrine of separation of powers requires the three (3) pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise in order to guarantee its independence, the judiciary, must be seen to be independent from the executive and parliament."[62] In *Ajavon v. Benin* (2017), the ACtHPR held that under Article 26 of the Charter, "guaranteeing the independence of the Courts imposes on States (…) the obligation to refrain from *any* interference in the affairs of the judiciary at all levels of the judicial process."(emphasis added).[63] In *Houngue v. Benin* (2022), the Court further clarified that:

> *[T]he judiciary should not be subordinate to any other authority. It follows that neither the executive power nor the legislative power should interfere, directly or indirectly, in all matters relating to the organisation and functioning of the judiciary, including those of the entities that manage the careers of judges.*[64]

The ACtHPR also developed in its case-law that **under Article 26, States have the duty to guarantee judicial independence, both in its institutional and individual aspects**. Indeed, it has held on several occasions that "[j]udicial independence has two main limbs: institutional and individual"[65] and that "[t]he obligation to guarantee the independence of courts in Article 26 (…) includes both the institutional and individual aspects of independence."[66] With regard to the scope of both aspects, the Court clarified that "[w]hereas institutional independence connotes the status and relationship of the judiciary with the executive and legislative branches of the government, individual independence

62 ACtHPR, *Houngue v. Benin*, Application 028/2020, Judgment of 1 December 2022, para. 70. See also ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 313.

63 ACtHPR, *Ajavon v. Benin*, Application No. 013/2017, Judgment of 29 March 2019, para. 280.

64 ACtHPR, *Houngue v. Benin*, Application 028/2020, Judgment of 1 December 2022, para. 72.

65 ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, , para. 278; ACtHPR, *Oumar Mariko v. Republic of Mali,* Application 029/2018, Judgment of 24 March 2022, para. 73.

66 Ibid.

pertains to the personal independence of judges and their ability to perform their functions without fear of reprisal.[67]"[68]

The Court has also outlined the criteria it uses to assess both institutional and individual judicial independence. On *institutional* independence, the Court noted that it is "determined by reference to factors such as: the statutory establishment of judiciary as a distinct organ from the executive and the legislative branches with exclusive jurisdiction on judicial matters, its administrative independence in running its day to day function without inappropriate and unwarranted interference, and provision of adequate resources to enable the judiciary to properly perform its functions."[69] On *individual* independence, the Court held that it is "primarily reflected in the manner of appointment and tenure security of judges, specifically the existence of clear criteria of selection, appointment, duration of term of office, and the availability of adequate safeguards against external pressure."[70]

Decisions of the African Commission on Human and Peoples' Rights on Communications (non-binding)

The African Commission has had the opportunity to clarify the distinction between Articles 7 and 26 of the Charter in its decisions on communications. In *Civil Liberties Organization v. Nigeria* (1995), the Commission underscored that:

> *Article 26 of the African Charter reiterates the right enshrined in Article 7 but is even more explicit about States Parties' obligations to "guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guarantees by the present Charter." While Article*

67 The original footnote reads: "African Commission on Human and Peoples' Rights, Guidelines and principles on the right to fair trial in Africa, § 4 (h) (i)., See also Principles 1-7, UN Basic Principles on the Independence of the Judiciary, General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985."

68 ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 278; ACtHPR, *Oumar Mariko v. Republic of Mali*, Application 029/2018, Judgment of 24 March 2022, para. 73.

69 ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 279. See also *Oumar Mariko v. Republic of Mali*, Application 029/2018, Judgment of 24 March 2022, para. 75.

70 ACtHPR, *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 280.

> *7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power.*[71]

The Commission has also had the occasion to clarify that Article 26 prohibits the executive from presiding over the authority in charge of appointing, promoting and transferring judges. In *Gunme v. Cameroon* (2009), the complainants alleged that the judiciary in Cameroon was not independent because "the executive branch influence[d] the judiciary through the appointments, promotions or transfer policy" and alleged that "the President of the Republic convenes and presides over the Higher Judicial Council,"[72] which was the appointing and disciplinary authority for judges in the circumstances of the case. The Commission considered that "the admission by the Respondent State that the President of the Republic, and the Minister responsible for Justice are the Chairperson and Vice Chairperson of the Higher Judicial Council respectively is manifest proof that the judiciary is not independent,"[73] and that "the composition of the Higher Judicial Council by other members is not likely to provide necessary checks and balance against the Chairperson, who happens to be the President of the Republic."[74] Thus, the Commission concluded that Cameroon had violated Article 26.[75]

It is also worth noting that the African Commission has taken into consideration, in its decisions on communications, other international instruments, such as the UN Basic Principles or General Comment No. 32 on Article 14 of the ICCPR, as "subsidiary measures to determine the principles of law."[76] In *Media Rights Agenda & Others v. Nigeria*, the African Commission relied on General Comment No. 32 and noted that:

71 ACHPR, *Civil Liberties Organization v. Nigeria*, Communication No. 129/93, 1995, para. 16.

72 ACHPR, *Kevin Mgwanga Gunme and others v. Cameroon*, Communication 266/03, 45th ordinary session, 13-27 May 2009, para. 209.

73 Ibid., para. 211.

74 Ibid., para. 212.

75 Ibid.

76 African Charter, Article 61.

> *[T]he Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.*[77]

The African Commission has also referred to the UN Basic Principles in its findings, especially Principles 1,[78] 5,[79] 10,[80] and 11.[81] In *Media Rights Agenda & Others v. Nigeria*, the Commission went even further in holding that Nigeria violated Principle 10 of the UN Basic Principles.[82]

Additional non-binding instruments

Other instruments adopted by the African Commission make clear that States are under the duty to respect and guarantee judicial independence.

The African Commission's **Resolution on the Respect and the Strengthening on the Independence of the Judiciary** (1996) explicitly incorporates a negative obligation for States to "refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates."[83]

In the **Dakar Declaration on the Rights to Fair Trial in Africa**, adopted in 1999, the African Commission stressed that:

77 ACHPR, Media Rights Agenda & Others v. Nigeria, Communication 224/98, 23rd October to 6th November 2000, para. 51.

78 ACHPR, Lawyers for Human Rights v. Swaziland, Communication 251/02, 37th Ordinary Session (27 April-11 May 2005), 18th Annual Activity Report, para. 55

79 ACHPR, Media Rights Agenda & Others v. Nigeria, Communication 224/98, 23rd October to 6th November 2000, para. 64.

80 Ibid., para. 60

81 ACHPR, Lawyers for Human Rights v. Swaziland, Communication 251/02, 37th Ordinary Session (27 April-11 May 2005), 18th Annual Activity Report, para. 55

82 ACHPR, Media Rights Agenda & Others v. Nigeria, Communication 224/98, 23rd October to 6th November 2000, operative paragraph.

83 ACHPR, Resolution on the Respect and the Strengthening on the Independence of the Judiciary, ACHPR/ Res.21(XIX)96, 19th Ordinary Session, 1996, para. 1.

> *While there are constitutional and legal provisions which provide for the independence of the judiciary in most African countries, the existence of these provisions alone does not ensure the independence and impartiality of the judiciary. Issues and practices which undermine the independence and impartiality of the judiciary include the lack of transparent and impartial procedures for the appointment of judges, interference and control of the judiciary by the executive, lack of security of tenure and remuneration and inadequate resources for the judicial system*.[84]

In 2003, the African Commission elaborated **the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**.[85] Although these are not binding, they provide guidance to States on how to protect the independence of judges. Notably, in its Resolution on the Situation of Human Rights Defenders in Africa (2007), the Commission refers to the Principles and Guidelines as creating obligations for States Parties: "Urges all States Parties to the African Charter to fulfill all their *obligations* as stipulated in the Charter, in the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa (…)." (*emphasis added*).[86]

The Principles and Guidelines state in their Preamble that the Commission "recognizes that it is necessary to formulate and lay down principles and rules to further strengthen and supplement the provisions relating to fair trial in the Charter and to reflect international standards."[87] In a dedicated section on "Independent tribunal" (Principle 4), the document clearly stipulates that "[t]he independence of judicial bodies and judicial officers shall be (…) respected by the government, its agencies and authorities,"[88] and that"[a]ll judicial bodies shall be independent from the executive branch."[89] The Principles and Guidelines also underscore that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process."[90]

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84 ACHPR, Dakar Declaration on the Rights to Fair Trial in Africa, adopted by Resolution ACHPR/Res.41(XXVI)99, 15 November 1999, para. 2.

85 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003.

86 ACHPR, Resolution on the Situation of Human Rights Defenders in Africa, ACHPR/Res.104(XXXXI)07, 30 May 2007.

87 Ibid., Preamble.

88 Ibid., Principle 4(a).

89 Ibid., Principle 4 (g).

90 Ibid., Principle 4 (f).

1.2.1.3 European system

1.2.1.3.1 Council of Europe

Case-law of the European Court of Human Rights

The ECtHR has derived the requirement of judicial independence from Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention" or "the ECHR"). The provision reads as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

In contrast to some international and regional orders, the ECtHR has not recognized the right for a judge to have his or her independence safeguarded and respected by their government.[91] Rather, the Court has fleshed out the requirement of judicial independence from the right to a fair hearing by "an independent and impartial tribunal established by law." The Court has assessed the compliance with this requirement *in concreto*[92] in two main ways.

Under a first approach, the Court assesses whether a given tribunal satisfies the criterion of independence contained in Article 6 § 1, under a four-pronged test. It

91 Mathieu Leloup, Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR, European Constitutional Law Review, 2021, pp. 399-400.

92 The Court recalled on several occasions that "Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (…), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met." ECtHR (Grand Chamber), *Kleyn and Others v. the Netherlands*, Applications nos. 39343/98, 39651/98, 43147/98 and 46664/99, Judgment of 6 May 2003, para. 193. See also ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, Application no. 23614/08, Judgment of 30 November 2010, para. 46; ECtHR, *Sacilor-Lormines v. France*, Application no. 65411/01, Judgment of 9 November 2006, para. 59; ECtHR (Grand Chamber), *Ramos Nunes de Carvalho e Sá c. Portugal*, Application nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018, para. 144; ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgment of 1 December 2020, para. 207.

has consistently held, in its assessment, that regard must be had, *inter alia*, to (1) "the manner of appointment of its members" and (2) "their term of office," (3) "the existence of guarantees against outside pressures" and (4) "the question whether the body presents an appearance of independence."[93] The criterion on judges' tenure will be further developed in *Subsection 2*.

This last criterion on appearance has been largely considered by the doctrine as the most crucial one for the determination of whether the right to an independent tribunal has been upheld. Indeed, it emerges from the Court's case law that the appearance of independence operates as a "fulcrum on which the three previous criteria are weighed simultaneously according to the circumstances of the case."[94] The Court concludes that a given body lacks independence when an external observer accepts as reasonable and objective the argument by a party or the public that the court deciding the case is insufficiently independent.[95]

Under a second approach, the Court examines the issue of judicial independence through the lens of the "tribunal established by law" criterion. The Court has used this approach mainly in cases where the issue invoked by the plaintiff concerned the composition of a Court or the appointment of judges. The leading case is

93 See, *inter alia*, ECtHR, *Campbell and Fell v. United Kingdom*, Application nos. 7819/77 & 7878/77, Judgment of 28 June 1984, para. 78; ECtHR, *Langborger v. Sweden*, Application no. 11179/84, Judgment of 22 June 1989, para. 32; ECtHR, *Bryan v. the United Kingdom*, Application no. 19178/91, Judgment of 22 November 1995, para. 37; ECtHR, *Findlay v. the United Kingdom*, Application no. 22107/93, Judgment of 25 February 1997, para. 73; ECtHR (Grand Chamber), *Incal v. Turkey*, No. 41/1997/825/1031, Judgment of 9 June 1998, para. 65; ECtHR, *Brudnicka and Others v. Poland*, Application no. 54723/00, Judgment of 3 March 2005, para. 38; ECtHR, *Luka v. Romania*, Application no. 34197/02, Judgment of 21 July 2009, para. 37; ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, Application no. 23614/08, Judgment of 30 November 2010, para. 45; ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, Application nos. 2312/08 & 34179/08, Judgment of 18 July 2013, para. 49; ECtHR, *Tsanova-Gecheva*, Application no. 438000/12, Judgment of 15 September 2015, para. 106; ECtHR (Grand Chamber), *Ramos Nunes de Carvalho e Sa v. Portugal*, Application nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018, para. 144.

94 Rafael Bustos Gisbert, Judicial Independence in European Constitutional Law, European Constitutional Law Review, 2022, p. 605.

95 Ibid., p. 606. See also ECtHR (Grand Chamber), *Incal v. Turkey,* Application no. 22678/93, Judgment of 9 June 1998, para. 71; ECtHR, *Miroshnik v. Ukraine,* Application no. 75804/01, Judgment of 27 November 2008, para. 61; ECtHR, *Fruni v. Slovakia,* Application no. 8014/07, Judgment of 21 June 2011, para. 141.

Guðmundur Andri Ástráðsson v. Iceland (2020), in which the Grand Chamber refined and clarified the meaning to be given to the concept of a "tribunal established by law." It analyzed the individual components of that concept and provided interpretative guidance on the terms "tribunal"[96], "established",[97] and "by law."[98] In this respect, the Court noted it has held in the past that "a judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a 'tribunal' for the purposes of Article 6 § 1."[99]

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96 On the term "*tribunal*", the Grand Chamber clarified that (para. 219):

According to the Court's settled case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, such as "independence, in particular of the executive; impartiality; duration of its members' terms of office; ..." (see, for example, Belilos v. Switzerland, 29 April 1988, § 64, Series A no. 132)

97 On the term *"established"*, it stated that (para. 223):

The Court reiterates that according to its settled case-law, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by the court or tribunal with the particular rules that govern it and the composition of the bench in each case [see Sokurenko and Strygun v. Ukraine, nos. 29458/04 and 29465/04, § 24, 20 July 2006, Richert v. Poland, no. 54809/07, § 43, 25 October 2011, and Ezgeta v. Croatia, no. 40562/12, § 38, 7 September 2017]. The scope of application of the requirement of a "tribunal established by law" may, therefore, not be confined to instances where a judicial body lacked the competence to act as a court or tribunal under domestic law (…).

98 On the term *"by law"*, the Court underscored that (para. 230):

The nature and scope of the cases that have so far come before the Court in respect of the "tribunal established by law" requirement have mostly called for a determination as to whether a court overseeing a case had any legal basis in domestic law and whether the requirements arising from the relevant domestic law had been complied with in the constitution and functioning of that court. The Court wishes to clarify in this connection that (…) it has interpreted the requirement of a "tribunal established by law" also to mean a "tribunal established in accordance with the law" (see, mutatis mutandis, Ilatovskiy, § 39; Momčilović, § 29; and Jenița Mocanu, § 37, all cited above). It considers this interpretation to be consonant with the general object and purpose of the relevant requirement and sees no reason to depart from it.

99 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgment of 1 December 2020, para. 232.

Notably, the Court developed in the above-mentioned case that "the need to maintain public confidence in the judiciary and to safeguard its independence vis-à-vis the other powers underlies each of [the institutional requirements of Article 6 § 1]."[100] Against this background, the Court underscored that "the examination under the 'tribunal established by law' requirement must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the (…) fundamental principles [of the rule of law and the separation of powers] and to compromise the independence of the court in question. (…)."[101]

Furthermore, the Court has underscored on multiple occasions that the object of the term "established by law" in Article 6 § 1 is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament."[102]

Other instruments of the Council of Europe

In addition to the case-law of the ECtHR, soft law norms of the Council of Europe system clearly establish that judicial independence should be guaranteed by States.

For instance, **the Committee of Ministers of the Council of Europe** recommended, in 1994, that "[t]he executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges."[103] In its 2016 Plan of Action on Strengthening Judicial Independence and Impartiality, the Committee of Ministers affirmed that the Council of Europe will support Member States' efforts aimed at "[e]stablishing effective mechanisms and other measures to fully implement Member States' obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms to guarantee access to an independent and impartial tribunal whenever civil rights or obligations are at issue or criminal charges are to be determined; these mechanisms and action including all those that are required

100 Ibid., para. 233.

101 Ibid., para. 234.

102 ECtHR, *Miracle Europe Kft v. Hungary*, Application no. 57774/13, Judgment of 12 January 2016, para. 51; ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgment of 1 December 2020, para. 214.

103 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle I.2.b.

to implement the judgments of the European Court of Human Rights which affect the independence and impartiality of the judiciary, particularly with regard to the guarantees provided by Article 6 concerning the right to a fair trial."[104]

The Magna Carta of Judges (2010) adopted by the **CCJE** also proclaimed that:

> *Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence*.[105]

The **Venice Commission** recalled that "[t]he principles of 'separation of powers' and balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions"[106] and stated that "[t]he concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches."[107]

Other norms have further articulated that **judges must be provided mechanisms to contest cases where their independence is threatened.** In this respect, in Recommendation CM/Rec(2010)12, the **Committee of Ministers of the Council of Europe** stated that "[w]here judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy."[108] The Committee of Ministers reiterated in its 2016 Plan of Action on Strengthening Judicial Independence and Impartiality that "effective remedies should be provided, where appropriate, for judges who consider their

104 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, p. 9, para. A.

105 Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), 17 November 2010, para. 3

106 European Commission for Democracy Through Law (Venice Commission), Compilation of Venice Commission Opinions and Reports Concerning Separation of Powers, CDL-PI(2020)012, 8 October 2020, para. 14.

107 Ibid., para. 15.

108 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Judges: independence, efficiency and responsibilities, para. 8.

independence threatened."[109] The **European Charter on the Statute for Judges** clearly states that "[t]he statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority with effective means available to it of remedying or proposing a remedy."[110] For its part, the **CCJE** has recommended that "In all cases of conflict with the legislature or executive involving individual judges the latter should be able to have recourse to a council for the judiciary or other independent authority, or they should have some other effective means of remedy."[111]

1.2.1.3.2 European Union

The Court of Justice of the European Union has recognized that Member States must respect and guarantee judicial independence. In its case-law, the Court derived this requirement from two main legal bases: Article 19(1) TEU and Article 47 Charter of fundamental rights (hereinafter "CFR").

The second subparagraph of Article 19(1) TEU provides that

> *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*.

For its part, Article 47 CFR states that

> [*E]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article" and that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*

In the *Portuguese Judges* Case (2018), the Court affirmed, on the basis of the second subparagraph of Article 19(1) TEU and Article 47 CFR, the duty of Member States to respect their judiciary's independence: "The guarantee of

109 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 2.2.

110 Council of Europe, The European Charter on the Statute for Judges, 1998, para. 1.4.

111 Council of Europe, Consultative Council of European Judges (CCJE), Opinion No. 18 on "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE(2015)4, 16 October 2015, para. 43.

independence (…) is required not only at EU level (…) but also at the level of the Member States as regards national courts."[112] In sum, the Court established that any domestic court that pplies EU law must guarantee the right to an effective remedy, which includes the right to an independent tribunal.[113]

In the *Repubblika* Case (2021), the Court clarified the relation between the independence of judges and other provisions under EU law:

> *The independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects (...). It is, thus, essential to the proper working of the judicial-cooperation system embodied by the preliminary-ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (...). Furthermore, the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial as provided for by Article 47 of the Charter, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.*[114]

This allowed the CJEU to later flesh out the main component elements of the concept of judicial independence, which, according to the Court, "presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."[115]

In the *Repubblika* Case, the Court also held that States must establish rules on, *inter alia*, terms of office and grounds for dismissal of judges:

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112 CJEU (Grand Chamber), *Associacao Sindical dos Juizes Portugueses v. Tribunal de Contas*, Judgment of 27 February 2018, C-64/16, para. 42. See also paras. 29-43.

113 Ibid., paras. 29-43.

114 CJEU (Grand Chamber), *Repubblika v. Il-Prim Ministru*, Judgment of 20 April 2021, C-896/19, para. 51.

115 CJEU, CJEU (Grand Chamber), *Associacao Sindical dos Juizes Portugueses v. Tribunal de Contas*, Judgment of 27 February 2018, C-64/16, para. 44.

> *It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (...).*[116]

It further elaborated on the scope of such rules:

> *(...) It is necessary that judges should be protected from external intervention or pressure liable to jeopardise their independence. The rules mentioned in paragraph 53 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (...).*[117]

1.2.1.4 Inter-American system

The **American Convention on Human Rights** (1969) enshrines in its **Article 8(1)** the subjective right to a hearing by an independent tribunal:

> *Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.*[118]

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116 CJEU (Grand Chamber), *Repubblika v. Il-Prim Ministru*, Judgment of 20 April 2021, C-896/19, para. 53. See also CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 74; CJEU *TDC A/S v. Erhvervsstyrelsen*, Judgment of 9 October 2014, C222/13, para. 32; CJEU (Grand Chamber), *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Judgment of 19 November 2019, C-585/18, para. 123.

117 CJEU (Grand Chamber), *Repubblika v. Il-Prim Ministru*, Judgment of 20 April 2021, C-896/19, para. 55. See also CJEU (Grand Chamber), *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Judgment of 19 November 2019, C-585/18, para. 125.

118 American Convention on Human Rights, 22 November 1969, Article 8(1).

Besides, **Article 1(1)** of the Convention provides that Member States must respect this protected right and ensure to all persons subject to their jurisdiction the free and full exercise of it:

> *States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*[119]

Case-law of the Inter-American Court on Human Rights

The Inter-American Court on Human Rights (hereafter "IACtHR") has interpreted that Article 8(1), in conjunction with Article 1(1) of the American Convention, establishes that **States have a duty to respect and guarantee the right to be tried by an independent judge**. In *Reverón Trujillo v. Venezuela* (2009), the Court held that:

> *Article 8(1) acknowledges that "[e]very person has the right to a hearing[…] by a […]independent[…] tribunal." The terms in which this article is written indicate that the subject of the law are the parties, the person sitting before the judge that will decide the case submitted to it. Two obligations arise from this right. The first corresponding to the judge and the second to the State. The judge has the duty to be independent, duty fulfilled only when he rules pursuant with –and moved by- the Law. On its part, the State has the duty to respect and guarantee, pursuant with Article 1(1) of the Convention, the right to be tried by an independent judge.*[120]

The Court then proceeded to define the scope of States' duty to respect and guarantee the right to be tried by an independent judge, articulating that **States must (1) refrain from interfering with the judiciary (duty to respect) and (2) prevent, investigate, and punish interferences (duty to guarantee)**:

> *The duty of respect consists in the negative obligation of public authorities to abstain from illegally interfering in the Judicial Power or with its members, that is, with regard to the specific judge. The duty of guarantee consists in*

119 Ibid., Article 1(1).

120 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 146.

preventing those interferences and investigating and punishing those that commit them (…).[121]

On the duty to refrain from interfering with the judiciary, the IACtHR has asserted on many occasions that "one of the main objectives of the separation of public powers is to guarantee the independence of the judicial authorities."[122] In this respect, it recognized in several cases that **the guarantee of judicial independence includes a guarantee against external pressures**.[123] In substance, the Court clarified that this implies that States "must refrain from undue interference in the Judiciary or with its members, and take measures to avoid such interference being committed by persons or organs outside the judiciary."[124] The Court has relied on the UN Basic Principles to develop such standard, holding that "the United Nations Basic Principles [on the Independence of the Judiciary] provides that the Judiciary 'shall decide matters before them [...] without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'"[125] Additionally, it has

121 Ibid.

122 IACtHR, *Constitutional Court v. Peru*, Judgment of February 16, 2021, para. 73; IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 55; IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 67; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 97; IACtHR, *Atala Riffo and Daughters v. Chile*, Judgment of February 24, 2012, para. 186; IACtHR, *Acosta et al. v. Nicaragua*, Judgment of 25 March 2017, para. 171; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 144; IACtHR, f *Villaseñor Velarde et al. v. Guatemala*, Judgment of February 5, 2019, para. 83; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 53; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 71; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 86.

123 IACtHR, *Constitutional Court v. Peru*, Judgment of February 16, 2021, para. 75; IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 70; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 72; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, paras 52 & 67; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 87.

124 IACtHR, *Villaseñor Velarde et al. v. Guatemala*, Judgment of February 5, 2019, para. 84. See also IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 67.

125 IACtHR, *Villaseñor Velarde et al. v. Guatemala*, Judgment of February 5, 2019, para. 84. See also IACtHR, *López Lone et al. v. Honduras,* Judgment of October 5, 2015, para. 197.

stated that "the Principles establish that '[t]here shall not be any inappropriate or unwarranted interference with the judicial process.'"[126]

Beyond the guarantee against external pressures, the Court has also established that **guarantees derived from judicial independence include an appropriate appointment process and a secured tenure in the position:**

> *According to the jurisprudence of this Court and the European Court, as well as pursuant with the Basic Principles of the United Nations on the Independence of the Judiciary (...), the following guarantees are derived from the judicial independence: an adequate appointment process, the tenure in the position, and the guarantee against external pressures.* [127]

Furthermore, the IACtHR has indicated in its consistent case law that **States must respect and guarantee judicial independence both in its institutional** *(the judiciary as a whole)* **and individual** *(judges as individuals)* **aspects**. In particular, it has emphasized that:

> *[T]he State should ensure the autonomous exercise of the judicial function, both its institutional aspect – that is, in relation to the Judiciary as a system – and its individual aspect – that is, in relation to the person of the specific judge. The purpose of this protection is to avoid the judicial system, in general, and its members, in particular, potentially being subject to undue restrictions in the exercise of their functions by organs outside the Judiciary, or even by those who exercise functions of review or appeal.*[128]

126 IACtHR, *Villaseñor Velarde et al. v. Guatemala*, Judgment of February 5, 2019,para. 84. See also IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 80 and IACtHR, *López Lone et al. v. Honduras,* Judgment of October 5, 2015, para. 197.

127 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 70; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 98. See also IACtHR, *Colindres Schonenberg v. El Salvador*, Judgment of February 4, 2019, para. 68; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 52; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 87.

128 IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 55; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 53; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 71; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 86.

In addition to the duty to guarantee institutional and individual independence, the Court has also referred to the necessity to safeguard **internal** independence[129] and has established that "the State has the duty to **guarantee an appearance of independence** of the Magistracy that inspired legitimacy and enough confidence not only to the parties, but to all citizens in a democratic society."[130]

Notably, the Court has made clear that **judicial independence must be guaranteed even in times of emergencies**:

> *[T]he principle of judicial independence results necessary for the protection of fundamental rights, reason for which its scope shall be guaranteed even in special situations, such as the state of emergency.*[131]

Soft law from the Inter-American Commission on Human Rights

The **Inter-American Commission on Human Rights** (herafter "IACHR") published in 2013 a **report on the "Guarantees for the independence of justice operators"** in order to "identify the obligations that the Member States of the Organization of American States (OAS) have undertaken to ensure access to justice through guarantees that must be afforded to justice operators to enable them to discharge their functions independently, while enhancing observance of the standards of international law and identifying certain obstacles still present in some States of the hemisphere."[132]

In its report, the IACHR recalled that the judiciary must be independent from the other branches and organs of the State.[133] In this regard, the Commission stated that it "insists that the independence of the Judiciary and its clear separation from the other branches of government must be respected and ensured both by the

129 IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 84.

130 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 67. See also IACtHR, *Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, para. 171.

131 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 68. See also Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1), and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 30, and Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention of Human Rights), para. 20.

132 Inter-American Commission on Human Rights, Guarantees for the independence of justice operators, Toward strengthening access to justice and the rule of law in the Americas, 5 December 2013, OEA/Ser.L/V/II. Doc. 44, para. 4.

133 Ibid., paras. 29-34.

executive and by the legislature (…)."[134] In addition, the Commission developed on the scope of States' duty to guarantee judicial independence as follows:

> *In practice, the guarantee of the judiciary's independence must be assured in a variety of ways, among them the following: the judiciary's financial independence, in the sense that it must not be made to rely upon the legislature for its budgetary appropriations; prompt tenured appointment, and observance of an appropriate and transparent process of selection and appointment of judges to the high courts; respect for the independence of judges in their deliberations, decisions and the general functioning of the Judiciary; and disciplinary proceedings that offer due process guarantees.*[135]

1.2.1.5 Other sources

Other instruments have likewise articulated that States have an obligation to respect and guarantee the independence of the judiciary. For instance, the **Universal Charter of the Judge**,[136] an instrument adopted in 1999 and updated in 2017 by the International Association of Judges, establishes that "[t]he independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence."[137] Notably, in its Article 2, the Charter underscores that "[t]he **judge**, as holder of judicial office, **must be able to exercise judicial powers free from social, economic and political pressure**, and independently from other judges and the administration of the judiciary."[138]

Besides, the **Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration)**, adopted by the General Assembly of the Latin American Federation of Judges (FLAM) in 2008, provides that **States must provide mechanisms to counter threats and attacks against judicial independence**: "The attacks to judicial Independence should be sanctioned by the law, which must provide the mechanisms through

134 Ibid., para. 34.

135 Ibid.

136 International Association of Judges, The Universal Charter of the Judge, Adopted by the IAJ Central Council on 17 November 1999 and updated on 14 November 2017.

137 Ibid., Article 1.

138 International Association of Judges, The Universal Charter of the Judge, Adopted by the IAJ Central Council on 17 November 1999 and updated on 14 November 2017, Article 2.

which the judges who feel disturbed or upset in their independence could obtain the support of the superior bodies or the Judiciary government."[139]

1.2.2 States must enshrine the independence of the judiciary in the Constitution or national law

International and regional bodies have reached a broad consensus about States' duty to formally enshrine principles to guarantee judicial independence in their legal systems, this is in their Constitution or national law.

1.2.2.1 United Nations system

Several instruments from the United Nations set out that States must enshrine judicial independence in their laws and adopt legislative measures to enable judges to perform their functions in full independence. The **Basic Principles on the Independence of the Judiciary** (1985) clearly state that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country."[140]

The **UN Commission on Human Rights' Resolution 2004/33** on the Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers "[c]alls upon all Governments to respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind."[141] The **Human Rights Council's Resolution 23/6** on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers (2020)[142] incorporates some of the language from Resolution 2004/33 but requires a more stringent duty on States "to guarantee the independence of judges and lawyers and

139 Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 4.

140 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, 6 September 1985, Principle 1.

141 UN Commission on Human Rights, Resolution on the Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, E/CN.4/RES/2004/33, 19 April 2004, para. 1.

142 United Nations Human Rights Council, Resolution adopted by the Human Rights Council on 16 July 2020, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020.

the objectivity and impartiality of prosecutors, as well as their ability to perform their functions accordingly, including by taking effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional functions without interference, harassment, threats or intimidation of any kind."[143]

The **General Comment no. 32 on Article 14 of the ICCPR** further recommends States to "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."[144]

1.2.2.2 African system

The **African Court on Human and Peoples' Rights** has indicated in its case-law that under Article 26 of the Charter, "guaranteeing the independence of the Courts imposes on States (…) the duty to enshrine this independence in their legislation."[145]

The **African Commission**, in its **Resolution on the Respect and the Strengthening on the Independence of the Judiciary** (1996) calls upon Members States to both "incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure."[146] Furthermore, the Resolution calls upon States to "repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges"[147] and to "refrain from taking any action which may threaten

143 United Nations Human Rights Council, Resolution adopted by the Human Rights Council on 16 July 2020, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020, para. 1.

144 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

145 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Application 013/2017, Judgement of 29 March 2019, para. 280.

146 ACHPR, Resolution on the Respect and the Strengthening on the Independence of the Judiciary, ACHPR/ Res.21(XIX)96, 19th Ordinary Session, 1996, para. 1.

147 Ibid.

directly or indirectly the independence and the security of judges and magistrates."[148]

In *Lawyers for Human Rights v. Swaziland* (2005), the Commission recalled the latter provisions of the 1996 Resolution[149] and concluded that "retaining a law which vests all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole,"[150] in violation of Article 26 of the African Charter.

The **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** (2003) elaborated by the Commission further reiterate that States must guarantee judicial independence in their constitution and laws: "[t]he independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities."[151]

1.2.2.3 European system

1.2.2.3.1 Council of Europe

Multiple Council of Europe instruments concur in recommending that States enshrine the "principle of judicial independence," "the independence of judges," "basic principles ensuring independence" or "fundamental principles of the statute for judges" at the highest level in the law. In addition, some instruments recognize that "rules" on the "fundamental principles of the statute for judges" or "more specific rules" should be laid down in legislation.

Recommendation No. R (94) 12 of the **Committee of Ministers of the Council of Europe** on the Independence, Efficiency and Role of Judges (1994) reads as follows:

> *The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitution or other legislation or incorporating the*

148 Ibid.

149 ACHPR, Lawyers for Human Rights v. Swaziland, Communication 251/02, 37th Ordinary Session (27 April-11 May 2005), 18th Annual Activity Report, para. 57.

150 Ibid., para. 58.

151 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle 4 (a).

> *provision of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:*
>
> > *(…) ii. The terms of office of judges and their remuneration should be guaranteed by law (…).*[152]

In Recommendation CM/Rec(2010)12, the Committee of Ministers of the Council of Europe reiterated in clearer terms that "[t]he independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in Member States, with more specific rules provided at the legislative level."[153]

The Committee of Ministers of the Council of Europe also included, in its 2016 Plan of Action on Strengthening Judicial Independence and Impartiality, that:

> *The Council of Europe will support all the efforts of its Member States aimed at achieving the following results:*
>
> *(…) B. Improving, or establishing where these are lacking, formal legal guarantees of judicial independence and impartiality and putting in place or introducing the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judicial branch in a democratic society based on human rights and the rule of law.*[154]

The **European Charter on the statute for judges** (1998) clearly sets out that "[i]n each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level."[155] Its Explanatory Memorandum further clarifies the scope and the purpose of such requirement as follows:

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152 Committee of Ministers of the Council of Europe, Recommendation No. R (94) of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle I.2.a.

153 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Judges: independence, efficiency and responsibilities, para. 7.

154 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, p. 9.

155 Council of Europe, European Charter on the Statute for judges, 9-10 July 1998, para. 1.2.

> *The fundamental principles constituting a statute for judges, determining the safeguard on the competence, independence and impartiality of the judges and courts, must be enacted in the normative rules at the highest level, that is to say in the Constitution, in the case of European States which have established such a basic text. The rules included in the statute will normally be enacted at the legislative level, which is also the highest level in States with flexible constitutions.*
>
> *The requirement to enshrine the fundamental principles and rules in legislation or the Constitution protects the latter from being amended under a cursory procedure unsuited to the issues at stake. In particular, where the fundamental principles are enshrined in the Constitution, it prevents the enactment of legislation aimed at or having the effect of infringing them.*[156]

Opinion No. 1 of the **Consultative Council of European Judges** (2001) also underscores that the principle of judicial independence should be guaranteed at the highest level and preferably at constitutional level or among the fundamental principles by those countries with no written text:

> *The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions or among the fundamental principles acknowledged by countries which do not have any written constitution but in which respect for the independence of the judiciary is guaranteed by age-old culture and tradition. This marks the fundamental importance of independence, whilst acknowledging the special position of common law jurisdictions (England and Scotland in particular) with a long tradition of independence, but without written constitutions.*[157]

The Magna Carta of Judges (2010) adopted by the CCJE provides that "Judicial independence shall be statutory, functional and financial. It shall be guaranteed

156 Council of Europe, Explanatory Memorandum, European Charter on the Statute for judges, 9-10 July 1998, para. 1.2.

157 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, 23 November 2001, para. 16.

with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level."[158]

The **Venice Commission**, in its Report on the Independence of the Judicial System (2010), endorsed Recommendation 94 (12) and Opinion No. 1 of the CCJE in this regard, and stated that "[t]he basic principles ensuring independence should be set out in the Constitution or equivalent texts."[159]

1.2.2.3.2 European Union

The Court of Justice of the European Union has fleshed out that States have the duty to respect the principle of non-regression in relation to the rule of law and judicial independence, according to which States have an obligation to refrain from adopting rules that would reduce guarantees of judicial independence.

The Court introduced this principle in the *Repubblika (Maltese Judges)* Case (2021), which was hailed by legal scholars as a pathbreaking ruling.[160] In particular, the Court emphasized that:

> *[C]ompliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU.*[161]

It concluded that "[t]he Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is

158 Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), 17 November 2010, para. 3.

159 European Commission for Democracy through Law (Venice Commission), Draft Report on the Independence of the Judicial System, Part I: The Independence of Judges, 5 March 2010, CDL(2010)006, para. 22.

160 See, inter alia, Leloup M., Kochenov D. and Dimitrovs A., Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru, Reconnect, June 2021; Dice E., The Principle of Non-Regression in Rule of Law in the EU, Stockholm University, 2023.

161 CJEU (Grand Chamber), *Repubblika v. Il-Prim Ministru*, Judgment of 20 April 2021, C-896/19, para. 63. The Court reaffirmed this principle in the *Commission v. Poland* judgment by citing the findings of the *Repubblika* case (see CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 15 July 2021, C-791/19, para. 51).

prevented, by refraining from adopting rules which would undermine the independence of the judiciary."[162]

1.2.2.4 Inter-American system

Article 2 of the American Convention requires Member States to adopt legislative or other measures to give effect to rights protected by the Convention: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of th[e] Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms protected by the Convention." The **case-law of the Inter-American Court of Human Rights** has further underscored that "States not only have the positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights established in the Convention, but must also avoid enacting laws that prevent the free exercise of those rights, and eliminating or amending laws that protect them.[163]"[164]

The Court has had the opportunity to interpret Article 2 in relation to the right to be tried by an independent tribunal enshrined in Article 8(1) of the American Convention. In *Reverón Trujillo v. Venezuela* (2009), the Court held that the duty to guarantee the right to be tried by an independent judge enshrined in Article 8(1) of the American Convention includes the duty to prevent interference with the judicial process, which in turn, consists in "the adoption, pursuant with Article 2 of the Convention, of an appropriate normative framework that ensures an adequate process for the appointment and tenure of the judges (…)."[165] In addition, in *Chocrón Chocrón v. Venezuela* (2011), which dealt with the issue of dismissal of provisional judges, the Court held that "the inexistence of clear norms and practices for the full exercise of judicial guarantees in the removal of provisional and temporary judges adversely affected the obligation to adopt appropriate and effective measures to guarantee judicial independence, which

162 Ibid., para. 64.

163 The original footnote reads as follows: "Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 207; Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits. Judgment of May 6, 2008. Series C No. 179, para. 122, and Case of Heliodoro Portugal v. Panama, supra note 14, para. 57."

164 IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 140.

165 Ibid.

results in the failure to comply with Article 2 in relation to Articles 8(1) and 25(1) of the American Convention."[166]

The **Inter-American Commission** has highlighted in its 2013 Report on Guarantees for the independence of justice operators that "the independence of the Judiciary and its clear separation from the other branches of government must be respected and ensured both by the executive and by the legislature, based on the recognition, in law, of the judiciary's independence, including from interference by other branches of government"[167] and added that "[t]his guarantee is established in law through recognition of the principle of separation of powers."[168]

1.2.2.5 Other sources

Other soft-law norms recognize that States must adopt legislative measures to guarantee judicial independence. The **Universal Charter of the Judge** (1999) sets out that "[j]udicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers."[169] The **Measures for the effective implementation of the Bangalore Principles of Judicial Conduct**, adopted in 2010 by the Judicial Integrity Group as guidelines or benchmarks for the effective implementation of the Bangalore Principles, provides extensive guidance on guarantees that States are required to incorporate in their legal systems "through constitutional or other means."[170] According to these, guarantees that States must anchor in law include the following:

166 Ibid., para. 142.

167 Inter-American Commission on Human Rights, Guarantees for the independence of justice operators, Toward strengthening access to justice and the rule of law in the Americas, op. cit., para. 34.

168 Ibid.

169 International Association of Judges, The Universal Charter of the Judge, Adopted by the IAJ Central Council on 17 November 1999 and updated on 14 November 2017, Article 2.

170 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 10.1.

- "that the judiciary shall be independent of the executive and the legislature, and that no power shall be exercised as to interfere with the judicial process;"[171]
- "that in the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and exercise unfettered freedom to decide cases impartially, in accordance with their conscience and the application of the law to the facts as they find them;"[172]
- "that a person exercising executive or legislative power shall not exercise, or attempt to exercise, any form of pressure on judges, whether overt or covert;"[173]
- "that legislative or executive powers that may affect judges in their office, their remuneration, conditions of service or their resources, shall not be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges."[174]

171 Ibid., para. 10.1.a.

172 Ibid., para. 10.1.d.

173 Ibid., para. 10.1.g.

174 Ibid., para. 10.1.h.

2 States Must Respect and Guarantee the Principle of Irremovability of Judges

Securing the independence of judges requires protecting them from arbitrary and unlawful decisions of removal and discipline. Such decisions can indeed be used abusively to intimidate, threaten or punish a judge for the way they carry out their professional activities. International and regional bodies have unanimously recognized that States must specifically guarantee the security of tenure of judges (*Subsection 2.1*), which entails that States have a duty to provide adequate safeguards for removal proceedings against judges. According to international and regional standards, these safeguards fall under two categories: States must (1) anchor in the law clear, precise and objective criteria for removals (*Subsection 2.2)* and (2) guarantee due process in removal proceedings (*Subsection 2.3)*.

2.1 Security of tenure is a component of judicial independence

Bodies from the United Nations and the African, European and Inter-American systems unanimously consider that in order to guarantee judicial independence, States must guarantee the security of tenure of judges and ensure their irremovability from office. According to international and regional standards on the irremovability of judges, judges may only be removed under two types of circumstances: (1) circumstances that are compatible with the guarantee of irremovability and are dictated by the term of office, period of appointment, or mandatory retirement age; and (2) circumstances related to the judge's fitness for office, namely, through the disciplinary system.

2.1.1 United Nations system

Numerous instruments from the United Nations set out that States have the duty to guarantee judges' security of tenure until a mandatory retirement age.

The **United Nations Basic Principles on the Independence of the Judiciary** endorsed by the **General Assembly** underscore that "[t]he term of office of judges, their independence, security, adequate remuneration, conditions of

service, pensions and the age of retirement shall be adequately secured by law"[175] and that "[j]udges (…) shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[176]

According to **General Comment No. 32 on Article 14 of the ICCPR** adopted by the **Human Rights Committee**, Article 14 of the Covenant requires States to guarantee judges' security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist. In that sense, the General Comment mentions that "[t]he requirement of independence [in Article 14] refers, in particular, to (…) guarantees relating to [judges'] security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist (…)".[177] These guidelines on the interpretation of Article 14 also provide that "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for (…) tenure (…) of the members of the judiciary."[178] The Human Rights Committee has also underscored, in decisions on individual communications, that "guarantees relating to [the] security of tenure [of judges] are requirements for judicial independence"[179] and has found that in the absence of guarantees relating to the security of tenure of judges, "in particular guarantees protecting them from discretionary removal," judges did "not enjoy the necessary guarantees of independence provided for under article 14 (1) of the Covenant, in violation of this provision."[180]

In addition to Article 14, the Human Rights Committee has relied on Article 25(c), which guarantees the right of every citizen "to have access, on general

175 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, 6 September 1985, Principle 11.

176 Ibid., Principle 12.

177 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

178 Ibid.

179 Human Rights Committee, *Gabriel Osío Zamora v. Venezuela*, Communication No. 2203/2012, CCPR/C/121/D/2203/2012, 7 November 2017, para. 9.3. See also *Marcos Siervo Sabarsky v. Venezuela*, Communication No. 2254/2013, CCPR/C/125/D/2254/2013, 27 March 2019, para. 8.4.

180 Human Rights Committee, *Gabriel Osío Zamora v. Venezuela*, Communication No. 2203/2012, CCPR/C/121/D/2203/2012, 7 November 2017, para. 9.3.

terms of equality, to public service in his country" in cases where judges were unilaterally dismissed by presidential decree before the expiry of their term of office. In *Mikhail Ivanovich Pastukhov v. Belarus* (2003), the Committee found, in the circumstances of the case,[181] that "the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country."[182] The Committee therefore concluded that there had been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1 and the provisions of article 2.

In multiple resolutions, the **Human Rights Council** has stressed that "the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement should be adequately secured by law, that the security of tenure of judges is an essential guarantee of the independence of the judiciary (…)."[183]

The **United Nations Office on Drugs and Crime (UNODC)'s Commentary on the Bangalore Principles of Judicial Conduct** notes that security of tenure, "i.e. a tenure, whether for life, until the age of retirement, or for a fixed term, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner" is one of the minimum conditions for judicial independence.[184]

The **UN Special rapporteur on the independence of judges and lawyers** Leandro Despouy has also underscored that "it is crucial that tenure be guaranteed

181 The sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was not the case, and no effective judicial protections were available to the author to contest his dismissal by the executive.

182 Human Rights Committee, *Mikhail Ivanovich Pastukhov v. Belarus*, Communication No. 814/1998, CCPR/C/78/D/814/1998, 14 July - 8 August 2003, para. 7.3.

183 UN Human Rights Council, Resolution on the Independence and impartiality of the judiciary jurors and assessors, and the independence of lawyers, A/HRC/RES/23/6, 13 June 2013, para. 3; UN Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/29/6, 2 July 2015, para. 3; UN Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020, para. 3

184 United Nations Office on Drugs and Crime (UNODC), Commentary on the Bangalore Principles of Judicial Conduct, September 2007, para. 26.

through the irremovability of the judge for the period he/she has been appointed,"[185] stressing that "[t]he irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary".[186] His successor, Gabriela Knaul, also pointed, in a report on her mission to **Tunisia** in 2015, that "[t]he law governing the statute of judges should (…) guarantee security of tenure for judges until a mandatory retirement age or the expiry of their term of office."[187] The UN Rapporteurship made it clear that "only in exceptional circumstances may the principle of irremovability be transgressed,"[188] one of these exceptions being "the application of disciplinary measures, including suspension and removal."[189]

Additionally, Gabriela Knaul outlined that in order to prevent risks of abuses of power and improper influence, States must establish a clear set of standards with regard to accountability mechanisms:

> *[T]he implementation of judicial accountability mechanisms implies that certain parties can and should exercise power of supervision and control over others. Thus, in order to prevent abuses of power and improper influence by the supervising parties, a clear set of standards must be established so that justice operators and institutions are not held to account in an arbitrary way. Accountability presupposes the recognition of the legitimacy of established standards, clear mechanisms and procedures established by law, and clear rules on the authority of the supervising parties.*[190]

2.1.2 African system

The **African Court on Human and Peoples' Rights** explicitly stated in *Ajavon v. Benin* (2020) that States have a duty to ensure that judges are not dismissed at the whim or discretion of government authorities: "Individual independence (…)

185 United Nations, Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 2009, para. 57

186 Ibid.

187 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 99.

188 Ibid.

189 Ibid.

190 United Nations, Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 48.

requires that States must ensure that judges are not transferred or dismissed from their job at the whim or discretion of the executive or any other government authority or private institutions."[191] To support such an interpretation, the Court made reference to the Commission's Principles and Guidelines on the Right to Fair Trial in Africa, the UN Basic Principles on the Independence of the Judiciary, as well as the jurisprudence of the ECtHR.[192]

The **African Commission**, for its part, considers that States must guarantee the security of tenure of judges. The **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** make it clear that "[j]udges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office"[193] and that "[t]he tenure (…), age of retirement (…) shall be prescribed and guaranteed by law."[194] The Principles and Guidelines also explicitly proscribe temporary appointments of judges.[195]

Furthermore, the African Commission's **Resolution on the Respect and the Strengthening on the Independence of the Judiciary** calls upon African countries to "incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure"[196] and to "refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates."[197]

191 *Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para. 280.

192 Ibid., footnote 105: "African Commission on Human and Peoples' Rights, Guidelines and principles on the right to fair trial in Africa, § 4 (h) (i)., See also Principles 1-7, UN Basic Principles on the Independence of the Judiciary, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also ECHR, Campbell and Fell, §78, Judgment of 28 June 1984; Incal v. Turkey, Judgment of 9 June 1998, Reports 1998-IV, p. 1571, §65."

193 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle 4(l).

194 Ibid., principle 4(m).

195 Ibid., principle 4(n)(3).

196 ACHPR, Resolution on the Respect and the Strengthening on the Independence of the Judiciary, Resolution CHPR/Res.21(XIX)96, April 1996, para. 1.

197 Ibid.

2.1.3 European system

2.1.3.1 Council of Europe

Case-law of the European Court of Human Rights

The ECtHR has indicated in its consistent case-law that States must guarantee the irremovability of judges.

To assess whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1, the ECtHR has indeed consistently held that regard must be had to the judges' term of office.[198]

As recalled by the Grand Chamber in the *Guðmundur Andri Ástráðsson v. Iceland* decision (2020), the Court has underscored on multiple occasions that the principle of irremovability of judges is included in the guarantees of Article 6 § 1:

> *The Court (...) notes as relevant the principle of the irremovability of judges during their term of office. This principle is in general considered as a corollary of judges' independence – which is a prerequisite to the rule of law – and thus included in the guarantees of Article 6 § 1 (see the principles on the irremovability of judges emerging from the Court's case-law under Article 6 § 1 in Maktouf and Damjanović, cited above, § 49; Fruni v. Slovakia, no. 8014/07, § 145, 21 June 2011; and Henryk Urban and Ryszard Urban, cited above, § 53; see also paragraph 20 of General Comment no. 32 of the UN*

198 See, *inter alia*, ECtHR, *Campbell and Fell v. United Kingdom*, Application nos. 7819/77 & 7878/77, Judgment of 28 June 1984, para. 78; ECtHR, *Langborger v. Sweden*, Application no. 11179/84, Judgment of 22 June 1989, para. 32; ECtHR, *Bryan v. the United Kingdom*, Application no. 19178/91, Judgment of 22 November 1995, para. 37; ECtHR, *Findlay v. the United Kingdom*, Application no. 22107/93, Judgment of 25 February 1997, para. 73; ECtHR (Grand Chamber), *Incal v. Turkey*, No. 41/1997/825/1031, Judgment of 9 June 1998, para. 65; ECtHR, *Brudnicka and Others v. Poland*, Application no. 54723/00, Judgment of 3 March 2005, para. 38; ECtHR, *Luka v. Romania*, Application no. 34197/02, Judgment of 21 July 2009, para. 37; ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, Application no. 23614/08, Judgment of 30 November 2010, para. 45; ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, Application nos. 2312/08 & 34179/08, Judgment of 18 July 2013, para. 49; ECtHR, *Tsanova-Gecheva*, Application no. 438000/12, Judgment of 15 September 2015, para. 106; ECtHR (Grand Chamber), *Ramos Nunes de Carvalho e Sa v. Portugal*, Application nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018, para. 144.

> *Human Rights Committee cited in paragraph 118 above; paragraph 57 of Opinion no. 1 (2001) of the CCJE, cited in paragraph 124 above; and Baka, cited above, §§ 72-87, for other relevant international material).*[199]

In several decisions, the Court held that national judicial bodies did not appear independent because judges could be removed by members of the executive and no adequate guarantees protecting them against the arbitrary exercise of that power were available.

In *Brudnicka v. Poland* (2005), the Court found that maritime chambers in Poland were not independent because they did not present an appearance of independence. In this specific case, the presidents and vice-presidents of the maritime chambers were appointed and removed from office by the minister of justice in agreement with the minister of transport and maritime affairs. In its reasoning, the Court developed that:

> *In maintaining confidence in the independence and impartiality of a tribunal, appearances may be important. Given that the members of the maritime chambers (the president and vice president) are appointed and removed from office by the Minister of Justice in agreement with the Minister of Transport and Maritime Affairs, they cannot be regarded as irremovable, and they are in a subordinate position vis-à-vis the Ministers. Accordingly, the maritime chambers, as they exist in Polish law, cannot be regarded as impartial tribunals capable of ensuring compliance with the requirement of "fairness" laid down by Article 6 of the Convention. In the Court's view, the applicants were entitled to entertain objective doubts as to their independence and impartiality (...). There has therefore been a violation of Article 6 § 1 of the Convention.*[200]

In *Urban and Urban v. Poland* (2010), the Court had to determine whether an assessor who tried the applicants in the first-instance court had the required "appearance" of independence.[201] The Court ruled that:

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199 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgment of 1 December 2020, para. 239.

200 ECtHR, *Brudnicka v. Poland*, Application no. 54723/00, Judgment of 3 March 2005, para. 41. In the instant case, the Court considered the concepts of independence and objective impartiality together, as they are "closely linked" (para. 40).

201 ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, Application no. 23614/08, Judgment of 30 November 2010, para. 46.

> *[T]he assessor (…) lacked the independence required by Article 6 § 1 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister (see, by contrast, Stieringer v. Germany, no. 28899/95, Commission decision of 25 November 1996, in which the relevant German regulation provided that dismissal of probationary judges was susceptible to judicial review). It is not necessary to consider other aspects of the status of assessors since their removability by the executive is sufficient to vitiate the independence of the Lesko District Court which was composed of the assessor (…).*[202]

Other instruments of the Council of Europe

Several soft law instruments also contain clear language affirming that security of tenure and irremovability are key components of judicial independence. These norms clarify that the principle of irremovability implies that judges must have guaranteed tenure until a mandatory retirement age. Exceptions to this principle are limited to cases where incapacity, serious infringements of disciplinary rules or criminal offences are found.

The **Committee of Ministers of the Council of Europe**, in its Recommendation No. R (94) 12, clearly sets out that "[a]ppointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons (…) could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules" .[203]

Recommendation CM/Rec(2010)12 adopted by the same body explicitly states, in a section entitled "Tenure and Irremovability," that:

> *Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists*.[204]

202 Ibid., para. 53.

203 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12, Principle VI, 2.

204 Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 49.

In addition, it its 2016 Plan of Action, the Committee of Ministers set out that the Council of Europe would support all the efforts of Member States aimed at "[s]afeguarding and strengthening the judiciary in its relations with the executive and legislature by taking action to (…) limit excessive executive and parliamentary interference in the disciplining and removal of judges, particularly as regards disciplinary committees of judicial councils or other appropriate bodies of judicial governance which should be completely free of political or other influence and seen to be so,"[205] with the precision that "'excessive' means any action taken beyond the existing legal framework that interferes with the processes referred to, to an extent that the independence and impartiality of the judiciary is significantly compromised."[206]

In the following paragraph, the Committee added that the same support would be provided by the Council of Europe to efforts by Member States aimed at "[p]rotecting the independence of individual judges and ensuring their impartiality by taking action to (…) ensure that the rules relating to judicial accountability (…) fully respect the principles of judicial independence and impartiality."[207] In this respect, it underscored that "States must take measures to ensure that accountability mechanisms are not used as an instrument of reprisal or pressure against judges in their decision making."[208]

The **CCJE's** Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges underscores that:

> *It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles, paragraph 12; Recommendation No. R (94) 12 Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). (…)*[209]

205 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, p. 9, para. C(iii).

206 Ibid., p. 9, footnote 1.

207 Ibid., p. 10, para. D (ii).

208 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 2.2.

209 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, para. 57.

The CCJE also stressed in the same Opinion that "[t]he existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined."[210]

The Magna Carta of Judges (2010), adopted by the CCJE, also underscores that "[j]udicial independence shall be guaranteed in respect of judicial activities and in particular in respect of (…) irremovability (…)"[211]

In its report on the Independence of the Judicial system (2010), the **Venice Commission** strongly recommended that "ordinary judges be appointed permanently until retirement"[212] and stated that "probationary periods for judges in office are problematic from the point of view of independence."[213]

Furthermore, several instruments underscore that the principle of irremovability should be enshrined in the law. The **Committee of Ministers of the Council of Europe**, in Recommendation CM/Rec(2010)12, set out that "[t]he terms of office of judges should be established by law"[214] and restated in its Plan of Action on Strengthening the Independence and Impartiality of Judges (2016), that "the term of office of judges must be adequately secured by law."[215] The **CCJE** also clearly stated in its Opinion No. 1 (2001) that "the irremovability of judges should be an express element of the independence enshrined at the highest internal level."[216] In

210 Ibid., para. 59.

211 Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), para. 4.

212 Venice Commission, Report on the Independence of the Judicial system, Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004, para. 38.

213 Ibid.

214 Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 50.

215 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

216 CCJE, Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, para. 60.

addition, the **Venice Commission** also proclaimed that it has "consistently supported the principle of irremovability in constitutions."[217]

2.1.3.2 European Union

The CJEU case-law, following some of the standards set out by the ECtHR, has affirmed that States have a duty to guarantee the irremovability of judges, which includes the duty to provide a specific set of guarantees surrounding judges' disciplinary regimes.

The Court developed on the scope of such guarantees in the *Minister for Justice and Equality (Deficiencies in the system of justice)* case (2018):

> *The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.*[218]

In *Commission v. Poland* (2019), the Court of Justice explicitly articulated the principle of irremovability of judges and precised the conditions under which exceptions to this principle might be permissible under EU law:

> *[F]reedom of the judges from all external intervention or pressure, which is essential, requires, as the Court has held on several occasions, certain guarantees appropriate for protecting the individuals who have the task of*

217 Venice Commission, Report on the Independence of the Judicial system, Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004, para. 43.

218 CJEU (Grand Chamber), *Minister for Justice and Equality v. LM (Deficiencies in the system of justice)*, Judgment of 25 July 2018, C-216/18 PPU, para. 67.

> *adjudicating in a dispute, such as guarantees against removal from office (…).*[219]

The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.[220]

In sum, under the case-law of the CJEU, judges may only be removed on legitimate and compelling grounds specifically provided for in the law, subject to the principle of proportionality, and in accordance with procedures before an independent body that respects the rights of the defence and the right of appeal.

2.1.4 Inter-American system

Case-law of the Inter-American Court on Human Rights

The Inter-American Court on Human Rights has developed extensive standards on the guarantee of tenure and irremovability of judges.

In *Reverón Trujillo v. Venezuela* (2009), the Court clarified that elements constituting the guarantee of tenure include continuance in the position and the absence of unjustified dismissals or free removals, and that, hence, States have the duty to comply with all these guarantees in order to satisfy the requirement of judicial independence:

> *[T]enure is a guarantee of the judicial independence that at the same time is made up by the following guarantees: continuance in the position, an adequate promotions process, and no unjustified dismissals or free removal. This means that if the State does not comply with one of these guarantees, it*

219 CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, Case C-619/18, para. 75.

220 Ibid., para. 76.

> *affects the tenure and, therefore, it is not complying with its obligation to guarantee judicial independence.* [221]

In addition, in several decisions, the Court took the opportunity to outline safeguards that derive from the guarantee of tenure and irremovability of judicial authorities:

> *Regarding the guarantee of the tenure and irremovability of these authorities, the Court has considered that this entails the following: (i) that separation from office should be due exclusively to permitted causes, either by means of a procedure that complies with judicial guarantees or because the term or mandate has concluded; (ii) that judges may only be dismissed due to serious disciplinary offenses or incompetence, and (iii) that any procedure instituted against judges should be decided based on the established rules for judicial conduct and by just, objective and impartial proceedings, pursuant to the Constitution or the law.*[222]

The Court considered that such safeguards are "essential because freely removing judicial authorities leads to objective concerns about their real possibility of exercising their functions without fear of reprisals."[223]

Furthermore, it emerges from the IACtHR's case-law that when a judge's tenure is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right to access to and permanence in public service, on general conditions of equality, established

221 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 79.

222 IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 155; IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 192; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 72; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 88.

223 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 88. See also IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 44; IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 78; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 72.; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 99; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* Judgment of August 23, 2013, para. 145; IACtHR, *López Lone et al. v. Honduras,* Judgment of October 5, 2015, para. 196; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 55.

in Article 23(1)(c) of the Convention.[224] Article 23(1)(c) of the American Convention provides that "[e]very citizen shall enjoy the following rights and opportunities: (…) to have access, under general conditions of equality, to the public service of his country."[225] The Court's consistent case-law has underscored that "equal opportunities in access to and stability in the post guarantee freedom from all political interference or pressure."[226]

In a number of judgments, the Court has interpreted that Article 23(1)(c) "does not establish the right to accede to public office, but rather the right to do so 'on general terms of equality"[227] and has thus inferred that "[t]his means that this right is respected and guaranteed when 'the criteria and processes for appointment, promotion, suspension, and removal are objective and reasonable,'" and when the "individual is not discriminated against" in the exercise of this right."[228]

The Court has also clarified that Article 23(1)(c) protects not only the right to accede to public office but also the right to permanence in the post. In this respect, the Court noted that "the Human Rights Committee has interpreted that the guarantee of protection [of the right to remain in the exercise of public service] covers both access and permanence under conditions of equality and non-

224 IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* Judgment of August 23, 2013, para.155.

225 It should be noted that the African Charter on Human and Peoples' Rights contain a similar provision. Indeed, Article 13(2) and (3) reads as follows:

2. Every citizen shall have the right of equal access to the public service of his country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

226 IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 135; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 150; IACtHR, *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment of August 28, 2013, para. 194.

227 IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 206 ; IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 138; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 135; Judgment of August 23, 2013, para. 150; IACtHR, *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment of August 28, 2013, para. 194.

228 Ibid.

discrimination with regard to the procedures of suspension and dismissal[229]"[230] and underscored on this basis that "access under equal conditions constitutes an insufficient guarantee if it is not accompanied by the effective protection of permanence in the post to which the individual has acceded, especially if stability is considered a component of judicial independence."[231]

Besides, the Court has been confronted to the issue of mass and arbitrary dismissal of judges in *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* (2013). The Court dealt with the dismissal of 27 judges of the Supreme Court of Justice of Ecuador through a parliamentary resolution in the absence of a clear legal framework regulating the grounds and proceedings for removal from office. The Court affirmed that "mass and arbitrary dismissal of judges is unacceptable given its negative impact on judicial independence in its institutional aspect",[232] and that "[t]he mass dismissal of judges, particularly of High Courts, constitutes not only an attack against judicial independence but also against the democratic order."[233] The Court concluded that Ecuador violated Article 8(1) in conjunction with Article 23(1) (c) and Article 1(1) of the American Convention, "given the arbitrary effects on the tenure in office of the judiciary and the

229 "United Nations, Human Rights Committee, *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) paras. 7.3 and 9; *Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at para. 5.2."

230 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 138; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 135; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 151; IACtHR, *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment of August 28, 2013, para. 195.

231 Ibid.

232 IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 177.

233 Ibid., para. 170. See also para. 178, in which the Court stated that:

[I]n the circumstances of this case, the arbitrary dismissal of the entire Supreme Court constituted an attack on judicial independence, disrupted the democratic order and the Rule of Law and implied that there was no real separation of powers at that time. Furthermore, it implied the destabilization both of the judiciary and of the country in general (…) which, amid a deepening political crisis, was left without a Supreme Court for seven months (…), with the negative effects that this entailed for the protection of citizens' rights.

consequent effects on judicial independence, to the detriment of the 27 victims in this case."[234]

Soft law from the Inter-American Commission on Human Rights

The **Inter-American Commission** has also underscored the critical importance attached to the principle of tenure of judges in guaranteeing judicial independence. In its Report on the guarantees for the independence of justice operators, the Inter-American Commission asserted that "[f]or their independence and impartiality to be guaranteed, judges must enjoy tenure in their posts so long as their conduct is above reproach" [235] and that "[t]hese are the underlying principles of the separation of powers and of the judicial branch's independence and autonomy."[236] The Commission made clear that "States have an obligation to ensure that justice operators are able to function independently, and should therefore give them stability and tenure in their posts."[237] It also indicated that it "believes that a good practice in the case of justice operators is a one-term appointment for a fixed period of time, thereby ensuring tenure in the position for the stipulated time period."[238]

2.1.5 Other sources

The duty of States to guarantee judges' tenure has been recognized in a number of other international instruments. The **Measures for the effective implementation of the Bangalore Principles of Judicial Conduct**, adopted in 2010 by the Judicial Integrity Group, clearly provide that "a judge should have a constitutionally guaranteed tenure until a mandatory retirement age or the expiry of a fixed term of office."[239] The **International Bar Association's Minimum Standards of Judicial Independence** (1982) clearly state that "[j]udicial appointments should generally be for life, subject to removal for cause and

234 Ibid., para. 180.

235 Inter-American Commission on Human Rights, Guarantees for the independence of justice operators, Toward strengthening access to justice and the rule of law in the Americas, op. cit., para. 212.

236 Ibid.

237 Ibid., para. 93

238 Ibid., para. 85.

239 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 13.2.

compulsory retirement at an age fixed by law at the date of appointment (…)"[240] In addition, the **Commonwealth (Latimer House) Principles** (1998) indicate that "arrangements for appropriate security of tenure and protection of levels of remuneration must be in place."[241]

2.2 Criteria for removals must be clear, objective and prescribed by law

International and regional bodies have clearly articulated that, in order to guarantee judicial independence, States have a duty to establish in the law clear and explicit grounds under which judges may be removed from office. Furthermore, they have fleshed out objective removal grounds that are deemed compatible with judicial independence: serious or gross misconduct incompatible with judicial office,[242] physical or mental incapacity,[243] conviction of a (serious) crime,[244] and serious or gross incompetence.[245] In addition, some international and

240 The International Bar Association, IBA Minimum Standards of Judicial Independence, 1982, para. 22.

241 Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) with Annex on Parliamentary Supremacy, Judicial Independence, Latimer House Guidelines for the Commonwealth (19 June 1998), Guideline IV, paragraph (b).

242 Human Rights Council's General Comment on Article 14, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and Latimer House Guidelines. Other wordings include "behavior that renders them unfit to discharge their duties/unfit to be a judge" (UN Basic Principles, HRC Resolution 23/6, UN SR, Draft Universal Declaration, Beijing Principles), "willful misconduct in office" (UN SR), "most serious cases of misconduct" (UN SR), "justice operators should be held *accountable* for instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute" (UN SR), "substantial violation of judicial ethics/disciplinary rules" (UN SR, Council of Europe) and "conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary" (Bangalore Principles).

243 UN Basic Principles, HRC Resolution 23/6, UN SR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Council of Europe, IBA Minimum Standards, Beijing Principles, and Latimer House Guidelines. Alternative wording is "proved incapacity" (UN SR, Bangalore principles, Draft Universal Declaration).

244 Bangalore Principles, UN SR, Council of Europe, IBA Minimum Standards, and Beijing Principles.

245 Human Rights Council's General Comment on Article 14 and Bangalore Principles. Alternative wordings include "persistent failure to perform their duties, habitual intemperance" (UN SR) and "gross or repeated neglect" (IBA Minimum Standards).

regional bodies have clearly outlined that judges cannot be removed for bona fide errors,[246] having their rulings reversed or modified on appeal,[247] their "interpretation of the law, assessment of facts or weighing of evidence to determine cases, except in cases of malice and gross negligence,"[248] or the "content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts."[249]

2.2.1 United Nations system

The **UN Basic Principles** on the Independence of the Judiciary, which were endorsed by the **General Assembly**, explicitly identify the only valid grounds for (suspension or) removal of judges, namely, "incapacity" or "behaviour that renders them unfit to discharge their duties."[250]

In its **General Comment** on Article 14 of the ICCPR, the **Human Rights Council** provides that judges may be dismissed "only on serious grounds of misconduct or incompetence."[251] In its Resolution on the Independence and impartiality of the judiciary jurors and assessors, and the independence of lawyers (2013), the UN Human Rights Council further clarified that "grounds for removal

246 Concluding Observations of the Human Rights Committee on Vietnam, UN document CCPR/CO/75/VNM, para. 10: the Committee expressed its concern at "the procedures for the selection of judges as well as their lack of security of tenure (appointments of only four years), combined with the possibility, provided by law, of taking disciplinary measures against judges because of errors in judicial decisions. These circumstances expose judges to political pressure and jeopardize their independence and impartiality."

247 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, doc. cit., Principle A, paragraph 4 (n) 2 and Council of Europe, recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, 17 November 2010, para. 70.

248 Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, para. 66.

249 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 87. See also Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 7.b.3 : "the content or sense of their adopted judicial decisions."

250 UN Basic Principles on the Independence of the Judiciary, Principle 18.

251 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 20.

must be explicit with well-defined circumstances provided by law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions (…)."[252]

The **Human Rights Committee** has emphasized in its case-law that States should establish "objective criteria for the (…) dismissal of the members of the judiciary and for disciplinary sanctions against them."[253] In addition, in several Concluding observations on reports by Member States, the Committee has expressed concern about judicial reform that would have enabled the removal of judges as a result of the performance of their duties,[254] and has deemed that the possibility, provided by law, of subjecting judges to disciplinary measures because of "incompetent rulings"[255] or "errors in judicial decisions"[256] exposes them to pressure and endangers their independence and impartiality.

The **United Nations Special Rapporteur** on the Independence of Judges and Lawyers Leandro Despouy (2003-2009) underscored that "the law must give **detailed guidance on the infractions by judges triggering disciplinary measures**, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand."[257] For instance, as stressed by his successor Gabriela Knaul (2009-2015), disciplinary offenses that refer in general terms to "threat or harm to the correct administration of justice (…) are not sufficiently defined by the law, and therefore risk undermining the independence of the judiciary."[258] In addition to the requirement of precision, the Special Rapporteur has stated that, "[t]o avoid being used as a means to interfere

252 United Nations Human Rights Council, Resolution on the Independence and impartiality of the judiciary jurors and assessors, and the independence of lawyers, 13 June 2013, A/HRC/RES/23/6, para. 3.

253 *Eligio Cedeño v. Bolivarian Republic of Venezuela*, Communication No. 1940/2010, 2012, CCPR/C/106/D/1940/2010, para. 7.3.

254 UN Human Rights Committee, Concluding observations, Venezuela, CCPR/CO/71/VEN, 26 April 2001, para. 13.

255 UN Human Rights Committee, Concluding observations, Uzbekistan, CCPR/CO/71/UZB, 26 April 2001, para. 14.

256 UN Human Rights Committee, Concluding observations, Viet Nam, CCPR/CO/75/VNM, 5 August 2002, para. 10.

257 United Nations, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 24 2009, para. 57.

258 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to El Salvador, A/HRC/23/43/Add.1, 24 May 2013, para. 76.

with the independence of the judiciary and the legal profession, accountability mechanisms should follow (…) **objective criteria** provided for by law and established standards of professional conduct."[259]

Successive mandate-holders of the UN Special Rapporteurship on the independence of judges and lawyers have **identified which removal grounds are objective and therefore compatible with judicial independence**. Gabriela Knaul clarified that "international standards state that disciplinary measures and sanctions against them can be triggered only for reasons of incapacity or behaviour that render them unfit to discharge their duties and in cases provided for by the law."[260] She further developed that "judges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, wilful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics,"[261] and stated that justice operators should be held accountable for instances of "professional misconduct that are gross *and* inexcusable *and* that also bring the judiciary into disrepute."[262] She particularly emphasized that "justice operators must be duly held to account when engaged in corrupt practices."[263] In particular, in a report on her mission to **Tunisia** in 2015, Special Rapporteur Knaul recommended that "[t]he law governing the statute of judges should provide that judges may only be removed or suspended for reasons of incapacity or behaviour that renders then unfit to discharge their duties."[264] Special Rapporteur Mónica Pinto (2015-2016) similarly recalled that "judges and prosecutors must only be removed from office for proved incapacity, conviction for a crime, or conduct that renders them unfit to discharge their professional

259 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 78.

260 Ibid., para. 84.

261 Ibid.

262 Ibid., para. 87 (emphases added).

263 Ibid., para. 84.

264 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 99.

duties."[265] Diego García-Sayán (2016-2022) emphasized that "[r]emoval from office should only be imposed in the most serious cases of misconduct."[266]

The successive mandate holders have also elaborated on **purported removal grounds that they have deemed incompatible with judicial independence**. Gabriela Knaul stated that "[i]n order to safeguard the independence of justice operators, accountability mechanisms and proceedings must therefore have a restricted application" and accordingly, "judges should not be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law."[267] She added that "in order to ensure the independent exercise of their functions, [justice operators] should not be subject to disciplinary proceedings or sanctions relating to the content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts."[268] Diego García-Sayán reiterated that "[i]nternational and regional standards recognize that no disciplinary action can be instituted against a judge as a consequence of the content of her or his decisions, differences in legal interpretation or judicial mistakes."[269]

265 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/32/34, 5 April 2016, para. 23.

266 Human Rights Council, Report of the UN Special Rapporteur on the independence of judges and lawyers, Independence of judges and lawyers, A/HRC/41/48, 29 April 2019, para. 99. The report focuses on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors.

267 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 28 2014, para. 84.

268 Ibid., para. 87. In her analysis, among other documents, the Special Rapporteur cited the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia of the Organization for Security and Cooperation in Europe (OSCE), which indicated that the: "[d]isciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts."

269 General Assembly. Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, A/75/172, 17 July 2020, para. 21. The Special Rapporteur has also indicated that "judges should in principle be immune from criminal proceedings in relation to the content of their orders and judgments." General Assembly. Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, A/72/140, 25 July 2017, para. 101.

2.2.2 African system

The **African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** clearly outline that there are only two grounds under which judicial officials may be removed or suspended from office: (i) "gross misconduct incompatible with judicial office" and (ii) "physical or mental incapacity that prevents them from undertaking their judicial duties."[270] Furthermore, this instrument also indicates that judicial officials 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."[271]

2.2.3 European system

According to European standards, the principle of irremovability of judges requires States to adopt a legal framework defining clear, precise and objective criteria for removals. In particular, European bodies have reached a broad consensus on the need for a precise and clear definition of criteria under which judges may be dismissed. In addition, it is well established that dismissals should only be reserved for cases of serious infringements of disciplinary rules, criminal offences or incapacity.

2.2.3.1 Council of Europe

Case-law of the European Court of Human Rights

The **ECtHR** has recently developed that States must anchor in the law, in clear terms, criteria under which judges may be dismissed. In *Broda and Bojara v. Poland* (2021), the Court held that "the domestic legal framework applicable at the time of the applicants' dismissal did not clearly specify the conditions under which a head of court could be dismissed, in derogation of the principle of irremovability of judges during their term of office."[272]

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270 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle A.4(p).

271 Ibid., Principle A.4(n) 2.

272 Unofficial translation from ECtHR, *Broda and Bojara v. Poland*, Judgment of 29 June 2021, Applications Nos. 26691/18 and 27367/18, para. 147. Original text is as follows :

[L]a Cour souligne l'importance accordée tant à la nécessité de sauvegarder l'indépendance du pouvoir judiciaire qu'au respect de l'équité procédurale dans les

The Court has also hinted that criteria for dismissal of judges must be objective. In *Guðmundur Andri Ástráðsson v. Iceland* (2020), the ECtHR endorsed the CJEU's approach in the case of *Commission v. Poland* (see below), under which exceptions to the principle of the irremovability of judges were deemed acceptable if "justified by a legitimate objective" and proportionate.[273]

In *Commission v. Poland* (C-619/18), the CJEU Grand Chamber declared that the principle of the irremovability of judges is not absolute, although an exception to that principle would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it."[274]

Other instruments of the Council of Europe

Soft law instruments from the Council of Europe have further developed standards according to which conduct which may lead to disciplinary sanctions, as well as dismissals, must be defined in precise terms in the law and be objective.

> In Recommendation No. R (94) 12, the **Committee of Ministers of the Council of Europe** insisted on the need for precise definition of offences for which a judge may be removed from office:*Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law (…).*[275]

In its Plan of Action on Strengthening Judicial Independence and Impartiality (2016), the Committee of Ministers similarly made clear that:

affaires concernant la carrière de juges. En l'espèce, elle constate non seulement que le cadre juridique national qui était applicable au moment de la révocation des requérants ne précisait pas clairement les conditions dans lesquelles un chef de juridiction pouvait être révoqué par dérogation au principe d'inamovibilité des juges en cours de mandat (…)

273 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Judgment of 1 December 2020, Application no. 26374/18, para. 239.

274 CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 79.

275 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12, Principle VI, 2.

> *The disciplinary offences must be defined clearly and precisely. A graduation of the possible sanctions should be provided for and used in practice.*
>
> …
>
> *Where systems for the assessment of judges' work have been established it must be ensured that unsatisfactory evaluation results lead to dismissal or other punitive sanctions only in clearly defined exceptional circumstances.*[276]

The **European Charter on the Statute for Judges** (1998), to which the ECtHR refers to in its case-law,[277] affirms the principle of legality of disciplinary sanctions:

> *The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision (…) of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties (...) The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality.*[278]

The Explanatory Memorandum to the Charter provides interpretative guidance on the provision:

> *The Charter deals here with the judges' disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute.*[279]

Furthermore, the **CCJE** stressed in its Opinion No. 1 (2001) that "it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps

276 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

277 See, for instance, *Manole v. The Republic of Moldova*, Application no 26360/19, Judgment of 18 July 2023, para. 39.

278 Council of Europe, European Charter on the Statute for Judges, 8 – 10 July 1998, DAJ/DOC (98) 23, para. 5.1.

279 Council of Europe, Explanatory Memorandum to the European Charter on the Statute for Judges, 8 – 10 July 1998, DAJ/DOC (98) 23, para. 5.1.

or change of status, including for example a move to a different court or area."[280] In Opinion No. 3 (2002), the CCJE concluded that "in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed"[281] and that "the sanctions available (…) in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner."[282] In the Magna Carta of Judges (2010), the CCJE reiterated that "[i]n each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure."[283]

In addition to the requirement that grounds for disciplinary sanctions, including removals, must be precisely defined in the law, Council of Europe bodies have made clear that such grounds must be objective. Several instruments elaborate that dismissals should only be reserved for cases of serious infringements of disciplinary rules, criminal offences or incapacity.

In this respect, the **Committee of Ministers of the Council of Europe** recommended that "[a] permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions."[284] In particular, the Committee underscored that "sanctions must (…) not be imposed arbitrarily or for political motives or for any reason not related to the suitability of the judge to

280 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, 23 November 2001, para. 60.

281 Consultative Council of European Judges (CCJE), Opinion No. 3 (2002) on principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, para. 77 (i).

282 Ibid., para. 77 (vi).

283 Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), 17 November 2010, para. 19.

284 Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 50. Here, the Committee of Ministers incorporated some of the principles of Recommendation No. R (94) 12 (see Principle VI, 2).

exercise judicial office"[285] and identified impermissible grounds for disciplinary sanctions, such as: "judicial errors"[286]; "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases"[287] - except "in cases of malice and gross negligence"[288]; or "a decision that is overruled or modified by a court of higher instance."[289]

2.2.3.2 European Union

In a number of cases, the **CJEU** has taken the opportunity to develop standards specific to guarantees surrounding criteria for removals of judges.

First and foremost, the Court has consistently held that grounds of dismissal should be laid down in express legislative provisions. In the *Pilato* case (2008), the Court underscored that:

> *The Court has (...) had occasion to indicate that those guarantees of independence and impartiality require rules, particularly as regards (...) length of service and the grounds for (...) dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (...). In that regard, in order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions (...).*[290]

285 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

286 Ibid., Appendix, Action 2.2.

287 Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 66. See also Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 2.2.

288 Ibid.

289 Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 70.

290 CJEU, *Jonathan Pilato v. Jean-Claude Bourgault*, Order of 14 May 2008, C109/07, para. 24. See also CJEU, *H. I. D. and B. A. v Refugee Applications Commissioner and Others*, Judgment of 31 January 2013, C175/11, para. 97; *TDC A/S v. Erhvervsstyrelsen*, Judgment of 9 October 2014, C222/13, para. 32; CJEU (Grand

In *Commission v. Poland* (2019), the Court indicated that guarantees of judicial independence include rules defining the conduct that may amount to disciplinary sanctions and applicable penalties:

> *(…) [I]t is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable (…) constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (…).* [291]

In addition, it can be inferred from the Court's case-law that grounds of dismissal should be sufficiently precise. In *Air Serbia and Kondić* (2017), the Court concluded that the body which referred the question for a preliminary ruling was not independent, and therefore not a "Court or a tribunal" within the meaning of EU law, due to, *inter alia*, the lack of a precise definition of "serious misconduct," which constituted a ground for dismissal of the person in charge of correctional proceedings.[292]

Furthermore, it emerges from the CJEU's case-law that criteria for removals of judges must be objective and proportionate in order to prevent any undue interference. In this respect, the Court set out, in *Commission v. Poland* (2019), that exceptions to the principle of irremovability of judges are possible only if "it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it."[293] More specifically on

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Chamber) *Minister for Justice and Equality (Deficiencies in the system of justice)*, Judgment of 25 July 2018, C216/18 PPU, para. 66.

291 CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 77. See also *Minister for Justice and Equality (Deficiencies in the system of justice)*, Judgment of 25 July 2018, C-216/18 PPU, para. 67.

292 See to that effect, CJEU, *Air Serbia and Kondić,* Order of 16 November 2017, C476/16, para. 25.

293 CJEU (Grand Chamber), *Commission v Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 79.

grounds of dismissal, the Court held that "it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, *provided the appropriate procedures are followed*."[294]

2.2.4 Inter-American system

The **Inter-American Court of Human Rights** has established in its case-law that the principle of freedom from *ex post facto* laws, i.e. the principle of legality, guaranteed by Article 9 of the American Convention,[295] applies to disciplinary sanctions. Accordingly, criteria for disciplinary sanctions must be clearly provided in the law prior to being applied in a specific case. Although Article 9 explicitly refers to criminal offenses, the IACtHR has consistently held that the provision is applicable to disciplinary proceedings that are of a punitive nature[296] because "administrative sanctions, like criminal sanctions, are an expression of the punitive powers of the State and, at times, they are of a similar nature to criminal sanctions because both of them entail impairment, deprivation or alteration of human rights."[297] The Court has emphasized that "[c]onsequently, in a democratic system, it is necessary to take special care to ensure that such measures are adopted strictly respecting the basic rights of the individual and following a careful verification of the effective existence of a wrongful conduct."[298] Therefore, "in the interest of legal certainty, it is essential that the norm establishing the sanction exists and is known or can be known, before the act or omission occurs that violates it and that it is sought to sanction."[299]

The Court has also underscored that "based on the *guarantee of judicial tenure*, the grounds for removing judges from their posts must be clear and established by

294 Ibid., para. 76 (emphasis added).

295 Article 9 of the American Convention provides that "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed."

296 IACtHR, *Baena Ricardo et al. v. Panama*, Judgment of February 2, 2001, para. 106; IACtHR, *Vélez Loor v. Panama*, Judgment of November 23, 2010, para. 183. See also IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, paras. 257-258.

297 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 257.

298 Ibid.

299 Ibid.

law"[300] and has highlighted that the guarantee of tenure and irremovability from office means that "the separation of judges from office must be exclusively as a result of the permitted grounds, either through procedures that comply with judicial guarantees or because the mandate has concluded."[301]

The **Inter-American Commission** has also established that there must be "clear rules on the grounds and procedure for removing judges from office"[302] and that "[i]n addition to fueling doubts about the independence of the judiciary," the absence of such rules "can lead to arbitrary abuses of power, with direct repercussions for the rights of due process and of freedom from ex post facto laws."[303]

Furthermore, the **Inter-American Court** has clarified the degree of precision required with regard to grounds that can lead to removals. It explicitly held that although "the precision of a norm establishing a sanction of a disciplinary nature may be different from that required by the principle of legality in a criminal matter, owing to the nature of the disputes that each one is designed to resolve,"[304] grounds for removal shall be predictable, and hence, clear and precise:

> *Taking into account that dismissal or removal from office is the most restrictive and severe disciplinary measure that can be adopted, the possibility of its application must be predictable, either because the punishable conduct is expressly and clearly established, precisely, clearly and previously, by law, or because the law delegates its imposition to the judge or to an infra-legal norm, under objective criteria that limit the scope of discretion.*[305]

The Court further articulated that "the fact that a law grants some discretionary power [to the body responsible for applying the sanction] is not incompatible with the degree of predictability required, provided that the scope of the discretion and

300 Ibid., para. 259.

301 IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 72 (emphasis added).

302 IACHR, Case 12.600 of *Hugo Quintana Coello et al. (Supreme Court) v. Ecuador*, Merits Report No. 65/11, March 31, 2011, para. 95.

303 Ibid.

304 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 257. See also para. 272: "it may be admitted that the precision required in matters of disciplinary sanctions is less than in criminal matters"

305 Ibid., para. 259.

the way in which it is exercised are indicated with sufficient clarity in order to provide adequate protection against arbitrary interference."[306]

On the issue of open and indeterminate disciplinary grounds, the Court pointed out that "the application of an open disciplinary offense does not constitute, in principle a violation of the right to due process, provided that the relevant jurisprudential parameters are respected."[307] In this respect, the IACtHR clarified that "the use of open assumptions or vague concepts such as the "dignity of the administration of justice" or the "decorum of the office" require the establishment of objective criteria that guide the interpretation or content that should be given to such concepts in order to limit discretion in the application of sanctions" and that "[s]uch criteria can be established by law or by means of interpretation in light of case law that places these concepts within the context, purpose and objective of the norm, in order to avoid the arbitrary use of such assumptions, based on the personal and private opinions or prejudices of the judges when they are applied."[308] In addition to concepts such as the decorum and the dignity of the administration of justice, the Court also held that a dismissal based on "the needs for the service" "denotes the application of an indeterminate legal concept; namely, one relating to an aspect of reality the limits of which were not clearly established by this expression."[309]

The **Inter-American Commission** has also pointed out that a number of countries in the region have impeachment clauses in their constitutions with broad and vague language, which pose a threat to judicial independence:

> *In States like these, apart from the threat to the independence of the judiciary by the fact that justice operators can be disciplined by a branch of government that is essentially political in nature, many of the grounds for*

306 Ibid., para. 264.

307 IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 77.

308 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 272. See also IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 78: "[W]hen applying open or indeterminate disciplinary norms that require considering concepts such as the decorum and the dignity of the administration of justice, it is essential to take into account the effects that the conduct examined could have on the exercise of the judicial function, either positively by the establishment of normative criteria for its application, or by means of an adequate interpretation and statement of reasons by the judges when applying them. To the contrary, the scope of these disciplinary measures would be subject to the private of moral beliefs of the judges."

309 IACtHR, *Casa Nina v. Peru*, Judgment of November 24, 2020, para. 93.

> *impeachment are stated in broad and vague language and may become problematic for observance of the principle of freedom from ex post facto law. The grounds include such things as "poor performance of functions", "notable dereliction of duty," "crimes committed in office or in the exercise of one's functions," "crimes of responsibility," "Treason, Bribery, or other high Crimes and Misdemeanors," "acts performed in the performance of one's function that are detrimental to the functioning of government," "the commission of common crimes" or "serious crimes," "a violation of the Constitution" or "when there are constitutional grounds" or "conduct unbefitting the office."*[310]

Beyond the principle of legality and the necessity of clear and precise criteria, the **Inter-American Court** has clarified that judges may only be dismissed in cases of serious misconduct or incompetence. Indeed, it considers that "the possibility of dismissal must abide by the (…) principle of extreme gravity,"[311] since "the protection of judicial independence requires that the dismissal of judges be considered as the *ultima ratio* in judicial disciplinary matters."[312] Drawing on the UN Human Rights Committee's General Comment No. 32 and the UN Basic Principles, the Court has underscored that "one of the essential components of the guarantee of tenure for judges is that they may only be dismissed for conducts that are clearly inexcusable"[313] or "clearly inacceptable."[314] It has also noted that some international and regional standards differentiate between applicable sanctions and that "[t]enure implies that dismissal is due to fairly serious conducts, while the other sanctions may be used in the case of negligence or incapacity."[315] The Court therefore considers that the guarantee of tenure and irremovability from

310 Inter-American Commission on Human Rights, Guarantees for the Independence of Justice Operators. Towards Strengthening Access to Justice and the Rule of Law in the Americas, op. cit., para. 203.

311 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 259.

312 Ibid.

313 Ibid., para. 198.

314 IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* Judgment of August 23, 2013, para. 147; *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment of August 28, 2013, para. 191.

315 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 199. See also *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment of August 28, 2013, para. 192.

office mandates that "judges may only be dismissed on serious grounds of misconduct or incompetence"[316] or "serious disciplinary offenses."[317]

The **IACtHR** has also identified grounds on the basis of which judges may not be removed, which include the overturn, appeal or review of their decisions, and the content of judicial decisions or opinions, *except in cases of intentional violations of the law or proven incompetence*.

In *Apitz Barbera et al. v. Venezuela* (2008), the IACtHR emphasized, relying on standards from the African system,[318] that "judges cannot be removed on the sole ground that one of their decisions has been overturned on appeal or review by a higher judicial body."[319] The Court explained that "this safeguards the independence of judges internally, since they should not feel compelled to avoid dissenting with the reviewing body which, basically, only plays a distinct judicial role that is limited to dealing with the issues raised on appeal by a party who is dissatisfied with the original decision."[320]

In *Ríos Ávalos et al. v. Paraguay* (2021), the Court dealt with impeachment proceedings against justices of the Supreme Court of Justice of Paraguay that culminated in their removal on the basis of the content of judicial decisions. The Court emphasized that "several international instruments explicitly recognize the prohibition to subject the judicial decisions of the courts to review – other than by the procedural mechanism of appeal – as a specific mechanism for the protection

316 IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 72. See also IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 259: "the Court reiterates that the guarantee of tenure for judges requires that they may not be dismissed or removed from office, unless they commit acts that are clearly punishable; in other words, based on the most serious grounds of misconduct or incompetence."

317 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 202; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 55: "judges may only be dismissed owing to serious disciplinary offenses or incompetence." See also IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 88: "judges may only be dismissed due to serious disciplinary offenses or incompetence."

318 The Court referred to Principle A, para. 4 (n) 2 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

319 IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 84.

320 Ibid.

of judicial independence."[321] In addition, the Court underscored that Article 70(2) of the American Convention, which provides that ""[a]t no time shall the judges of the Court […] be held liable for any decisions or opinions issued in the exercise of their functions,"[322] "reveals an interpretation standard to ensure judicial independence in the terms of the Convention."[323] Based on this, the Court held that "the independence of the judiciary requires that, when instituting impeachment proceedings against judicial officials, the organ or organs that intervene in their processing, deliberation and decision are prohibited from reviewing the grounds for, or the contents of, the decisions of those authorities."[324] Accordingly, the Court underscored that "the impeachment or the eventual removal of a judge as a result of this procedure cannot be founded on the content of the decisions that he or she has issued, in the understanding that the protection of judicial independence prevents inferring responsibility owing to the votes and opinions issued in the exercise of the jurisdictional function, with the exception of intentional violations of the law or proven incompetence."[325] The Court explained that "[t]o the contrary, judicial authorities could be subject to undue interference in the exercise of their functions, in evident detriment to the independence they should necessarily be ensured in order to fulfill their vital role under the rule of law effectively."[326]

2.2.5 Other sources

A number of other international instruments explicitly set out that conduct that could lead to removal must be provided by law in clear terms. For instance, the **Universal Charter of the Judge**, which was adopted by the International Association of Judges, states that "[a] judge cannot be transferred, suspended or

321 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 101. The Court cited the UN Basic Principles, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, and Recommendations No. R (94) 12 and CM / Rec (2010) 12 of the Committee of Ministers of the Members States of the Council of Europe.

322 American Convention on Human Rights, 22 November 1969, Article 70(2).

323 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 106.

324 Ibid., para. 107.

325 Ibid.

326 Ibid., para. 108.

removed from office unless it is provided for by law,"[327] and the **International Bar Association Minimum Standards of Judicial Independence** provide that "[t]he grounds for removal of judges shall be fixed by law and shall be clearly defined."[328] The **Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration)** also establishes that "judges are immovable, making it impossible to be (…) removed (…) or in any other way retired from the exercise of their functions (…), with the exception of cases unequivocally prescribed by the law."[329]

Some international instruments also identify valid grounds for removal. The **Measures for the effective implementation of the Bangalore Principles of Judicial Conduct** set out that "[a] judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary,"[330] while the **IBA Minimum Standards of Judicial Independence** establish that "[a] judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge."[331] The **Beijing Principles** underscore that "[j]udges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge."[332] The **Commonwealth (Latimer House)**

327 International Association of Judges, The Universal Charter of the Judge, Adopted by the IAJ Central Council on 17 November 1999 and updated on 14 November 2017, Article 8.

328 The International Bar Association, IBA Minimum Standards of Judicial Independence, 1982, para. 29. a.

329 General Assembly of the Latin American Federation of Judges, Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 7.b.2.

330 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 16.1.

331The International Bar Association, IBA Minimum Standards of Judicial Independence, para. 30. In its case-law, the African Commission cited this paragraph along with other international standards to establish the content of the duty to guarantee judicial independence required by Article 26 of the African Charter (Lawyers for Human Rights v. Swaziland, Communication 251/02, 2005, para. 55).

332 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 19 August 1995, para. 22.

Guidelines develop that "[g]rounds for removal of a judge should be limited to (…) inability to perform judicial duties; and serious misconduct."[333] The **Statute of the Ibero-American Judge** indicates that judges can be "suspended or separated from office owing to physical or mental incapacity, or negative evaluation of their professional performance in the cases established by law, or separated from office in case of criminal or disciplinary responsibility by legally established bodies."[334]

Other instruments clearly outline that judges cannot be removed from office due to the content of decisions, their interpretation of the law, assessment of facts or weighing of evidence in exercise of their jurisdiction function. The **Universal Charter of the Judge** provides that, "[s]ave in case of malice or gross negligence […], no disciplinary action can be instituted against a judge as the consequence of an interpretation of the law or assessment of facts or weighing of evidence, carried out by him/her to determine cases" in exercise of his/her functions.[335] Meanwhile, the **Latin American Federation of Judges** has stated that "[j]udges shall receive the guarantee that, due to their jurisdictional activity and the way in which they decide the cases entrusted to them, they shall not be rewarded or punished, and that those decisions are only going to be subjected to the revision of superior courts as it is indicated by their own internal rights"[336] and accordingly, they "shall not be disciplinarily prosecuted or held responsible for the content or the sense in which they adopt their judicial decisions."[337]

333 Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) with Annex on Parliamentary Supremacy, Judicial Independence, Latimer House Guidelines for the Commonwealth (19 June 1998), Guideline VI.I, paragraph (a) (i).

334 Cumbre Judicial Iberoamericana (Iberoamerican Judicial Summit), Statute of the Iberoamerican Judge, 23rd, 24th, and 25th May 2001, Article 14.

335 International Charter of the Judge, adopted by the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999, and updated in Santiago de Chile on November 14, 2017, article 7-1.

336 General Assembly of the Latin American Federation of Judges, Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 2.

337 Ibid., para. 7 (b.3).

2.3 Removal proceedings must comply with due process

It emerges from international and regional standards that in order to guarantee judicial independence, States have the duty to comply with due process in removal proceedings (*Subsection 1*). In particular, this is understood as including the intervention of an independent authority composed predominantly by judges in the proceedings (*Subsection 2*), guarantees of a fair hearing (*Subsection 3*), and review of the removal decision (*Subsection 4*).

2.3.1 Due process requirements apply to removal proceedings

International and regional bodies have widely recognized that due process rights must be guaranteed in proceedings to remove judges.

2.3.1.1 United Nations system

Several bodies from the United Nations have expressly outlined that removal proceedings against judges shall guarantee the right to a fair hearing and must comply with due process.

The **UN Basic Principles on the Independence of the Judiciary** adopted by the **General Assembly** underscore that "[a] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure" [338] and explicitly state that "[t]he judge shall have the right to a fair hearing.[339]

In its **Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers**, the **Human Rights Council** stressed that "procedures upon which the discipline, suspension or removal of a judge are based should comply with due process".[340]

In the **General comment on article 14 of the ICCPR**, the **Human Rights Committee** interpreted that under article 14, "[j]udges may be dismissed only

338 Basic Principles on the Independence of the Judiciary, para. 17.

339 Ibid.

340 UN Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/29/6, 2 July 2015, para. 3.

(…) in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law."[341]

The **UN Special Rapporteurship** on the Independence of Judges and Lawyers has made it clear that removal proceedings against judges shall guarantee due process and be carried out in accordance with, *inter alia*, article 14 of the ICCPR. The UN Special Rapporteur Gabriela Knaul underscored that

> *[a]ll complaints made against justice operators should be processed expeditiously and fairly and the determination as to whether particular behaviour or conduct constitutes a cause for sanction must be carried out by an independent and impartial body pursuant to fair proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights*.[342]

Accordingly,

> *[t]he proceedings should be transparent, impartial, fair, objective, and should not undermine the credibility of the justice system as a whole; justice operators should not fear arbitrary removal from office or sanctions.*[343]

In a report on her mission to Tunisia in 2015, Special Rapporteur Knaul recommended that "[the law dealing with the statute of judges] should stipulate expressly that all stages of disciplinary proceedings should include guarantees of a fair trial."[344] Similarly, Special Rapporteur Diego García-Sayán later reiterated that "[r]emoval from office should only be imposed (…) after a due process hearing granting all guarantees to the accused."[345]

341 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 20.

342 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 79.

343 Ibid., para. 88.

344 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 102.

345 Human Rights Council, Report of the UN Special Rapporteur on the independence of judges and lawyers, Independence of judges and lawyers, A/HRC/41/48, 29 April 2019, para. 99.

2.3.1.2 African system

The African Commission's **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** explicitly state that guarantees of a fair hearing apply to removal proceedings: "Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing."[346]

2.3.1.3 European system

2.3.1.3.1 Council of Europe

Council of Europe bodies have established that due process requirements, as provided under Article 6 § 1 of the ECHR, are applicable to removal proceedings against judges.

Case-law of the European Court of Human Rights

The ECtHR has consistently held that employment disputes involving dismissed judges are of civil nature, and therefore subject to guarantees laid out in Article 6(1) of the European Convention on Human Rights. In *Eminağaoğlu v. Turkey* (2021), the Court highlighted that:

> *Article 6 has been applied to employment disputes involving judges who were dismissed from judicial office (see, for example, Oleksandr Volkov (...), §§ 91 and 96; Kulykov and Others v. Ukraine, nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; Sturua v. Georgia, no. 45729/05, § 27, 28 March 2017; and Kamenos v. Cyprus, no. 147/07, § 88, 31 October 2017), removed from an administrative position without the termination of their duties as a judge (see, Baka (...), §§ 34 and 107-11, and Denisov (...), §§ 25 and 47-48), suspended from judicial office (see Paluda v. Slovakia, no. 33392/12, § 34, 23 May 2017) or otherwise subjected to a disciplinary sanction (see Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, §§ 119-20, 6 November 2018.*[347]

To assess whether the dismissal proceedings are in compliance with the guarantees of Article 6 § 1, the Court examines, in particular, whether the

346 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 4(q).

347 ECtHR, *Eminağaoğlu v. Turkey*, Judgment of 9 March 2021, Application no. 76521/12, para. 62.

dismissal decision was reviewed or open to review (see Subsection 4) by a tribunal or an independent authority (see Subsection 2); and if it satisfied the requirements of procedural safeguards (see Subsection 3).

Other instruments of the Council of Europe

The **Committee of Ministers of the Council of Europe** has explicitly recommended, with regard to judges' removals, that "[t]he law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention (…)."[348] In its **Plan of Action on Strengthening Judicial Independence and Impartiality**, the Committee also underscored that "[w]hen a judge's official performance gives rise to disciplinary proceedings or criminal investigations due to malice or gross negligence, it is imperative that such proceedings be carried out in accordance with the necessary full procedural guarantees before an independent, non-political, authority."[349]

Other Council of Europe norms have emphasized the need for guarantees of procedural fairness and due process of law with regard to removal and disciplinary decisions against judges. For instance, the **European Charter on the Statute for Judges** proclaims that judges should be given full hearing and be entitled to representation,[350] whereas the Opinion No. 3 of the **Consultative Council of European Judges** emphasizes the need for a procedure guaranteeing full rights of defence.[351]

348 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12, Principle VI, 3. Additionally, Recommendation CM/Rec(2010)12 of the Committee of Ministers provides that "disciplinary proceedings (…) [s]hould be conducted by an independent authority or a court with all the guarantees of a fair trial." (see Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, 17 November 2010, para. 69.)

349 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

350 Council of Europe, European Charter on the Statute for Judges, 8 – 10 July 1998, DAJ/DOC (98) 23, para. 5.1.

351 Consultative Council of European Judges (CCJE), Opinion No. 3 (2002) on principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, para. 77 (iii).

2.3.1.3.2 European Union

The **CJEU** has also underscored that dismissal proceedings of judges are subject to the requirements of Article 47 (Right to an effective remedy and to a fair trial) and Article 48 (Right of defence) of the Charter of Fundamental Rights of the European Union. In *Commission v. Poland* (2019), the Court developed that:

> *[I]t is apparent (…) from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules (…), which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (…).*[352]

2.3.1.4 Inter-American system

In a series of cases dealing with dismissal proceedings against judges, the **Inter-American Court** has considered that due process guarantees of Article 8 of the

352 CJEU (Grand Chamber), Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, para. 77. See also judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, para. 67.

American Convention[353] apply to such proceedings.[354] In this respect, the Court has indicated in its consistent case law that "any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of the individual is required to adopt those decisions fully respecting the guarantees of due process of law."[355]

Additionally, the Court has made clear in a number of cases that "the administration *may not invoke public order* to reduce discretionally the guarantees of its subjects."[356]

2.3.1.5 Other sources

The **Commonwealth (Latimer House) Principles** provide that "[d]isciplinary proceedings which might lead to the removal of a judicial officer should include

353 Article 8 (1) of the American Convention provides that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." Article 8 (2) lists "minimum guarantees" "every person is entitled [to], with full equality" during the proceedings, which include prior notification in detail of the charges against him, adequate time and means for the preparation of his defense, the right to defend himself personally or to be assisted by legal counsel of his own choosing, the right to appeal the judgment to a higher court.

354 IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, paras. 66-71; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, paras. 115-123; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, paras. 156-169; IACtHR, *Ríos Ávalos et al. v. Paraguay,* Judgment of August 19, 2021, para. 95. For cases regarding dismissals of prosecutors, see IACtHR, *Martínez Esquivia v. Colombia*, Judgment of October 6, 2020, para. 105 and IACtHR, *Casa Nina v. Peru*, Judgment of November 24, 2020, para. 88.

355 IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, para. 71; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 115; IACtHR, *Martínez Esquivia v. Colombia*, Judgment of October 6, 2020, para. 105; IACtHR, *Casa Nina v. Peru*, Judgment of November 24, 2020, para. 88; IACtHR, *Ríos Ávalos et al. v. Paraguay,* Judgment of August 19, 2021, para. 95.

356 IACtHR, *Baena Ricardo et al. v. Panama*, Judgment of November 28, 2003, para. 126 (emphasis added); IACtHR *Vélez Loor v. Panama*, para. 141; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 115.

appropriate safeguards to ensure fairness."[357] The **Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region** clearly establishes that "[i]n any event, the judge who is sought to be removed must have the right to a fair hearing.[358]

2.3.2 Removal proceedings must be conducted by an independent authority composed predominantly of judges

Under international and regional standards, a condition *sine qua non* of due process is that removal proceedings against judges shall be conducted by an authority independent from the executive. The United Nations and European systems have fleshed out that this authority must be independent and composed primarily of judges. The African system recommends States to establish an independent mechanism to receive and process complaints against judges, while the Inter-American system considers that States have the *duty* to guarantee that a "competent and impartial authority" is in charge of removal proceedings against judges.

2.3.2.1 United Nations system

In a number of concluding observations on reports by Member States, the **Human Rights Committee** has indicated that **in order to be compatible with the principle of independence as enshrined in article 14 of the ICCPR, procedures relating to tenure, disciplining and dismissal of judges should be conducted by an independent authority**. In a report on Sri Lanka, the Committee stated that the removal procedure of judges of the Supreme Court and the Courts of Appeal was incompatible with article 14, since it allowed the Parliament "to exercise considerable control over the procedure for removal of judges."[359] The Committee accordingly recommended that the State "strengthen[s] the independence of the judiciary by *providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct*."[360] In another

357 Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) with Annex on Parliamentary Supremacy, Judicial Independence, Latimer House Guidelines for the Commonwealth (19 June 1998), Principle VII, b.

358 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 19 August 1995, para. 26.

359 Concluding Observations of the Human Rights Committee on Sri Lanka, 1 December 2003, CCPR/CO/79/LKA, para. 16.

360 Ibid. (emphasis added).

report, the Committee invited Georgia to "ensure that documented complaints of judicial corruption are investigated by an *independent agency* and that the appropriate disciplinary or penal measures are taken."[361] In its concluding observations on Vietnam, the Committee expressed concern as to cases in which judges are subject to criminal liability for handing down unjust judgements, recommending that the State "ensure that *judges may not be removed from their posts unless they are found guilty by an independent tribunal of inappropriate conduct*".[362] Finally, in a report on Belarus, the Committee underscored that "the procedures relating to tenure, disciplining and dismissal of judges at all levels do not comply with the principle of independence and impartiality of the judiciary" and pointed, with particular concern, to the fact that "the judges of the Constitutional Court and Supreme Court can be dismissed by the President of the Republic without any safeguards."[363]

According to the **UN Special Rapporteur on the independence of judges and lawyers**, the "responsibility for disciplinary proceedings against judges should be vested in an **independent authority composed primarily of judges, such as a judicial council or a court**"[364] and "the independent body should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable."[365] The Special Rapporteur has been unequivocal in asserting that "[n]o political representation should be permitted"[366] and that in no case should authorities be composed of members of

361 Concluding Observations of the Human Rights Committee on Georgia, 19 April 2002, CCPR/CO/74/GEO, para. 12 (emphasis added).

362 Concluding Observations of the Human Rights Committee on Viet Nam, CCPR/CO/75/VNM, 5 August 2002, para. 10 (emphasis added).

363 Concluding Observations of the Human Rights Committee on Belarus, CCPR/C/79/Add.86, 19 November 1997, para. 13.

364 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 125. See also Report of the Special Rapporteur on the independence of judges and lawyers (on Judicial Councils), A/HRC/38/38, 2 May 2018, para. 101; Report of the UN Special Rapporteur on the independence of judges and lawyers, Independence of judges and lawyers, A/HRC/41/48, 29 April 2019, para. 98.

365 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 126.

366 Ibid.

the legislative or executive branches.[367] In a report on Tunisia (2015), the Special Rapporteur clarified that the independent authority should be in charge throughout the investigation, actual proceedings and implementation of disciplinary sanctions: "[t]he law dealing with the statute of judges should stipulate clearly that the initiation and conduct of disciplinary investigation (including general guidelines in terms of sources of information and how to gather it), disciplinary proceedings and the implementation of disciplinary sanctions are to be conducted by the Supreme Judicial Council."[368] Furthermore, the Special Rapporteur set out that "[t]he competence to receive disciplinary complaints and conduct disciplinary investigations and the competence to adjudicate cases of judicial discipline should be vested in separate branches of the judicial council or in different authorities."[369]

2.3.2.2 African system

In contrast to other regional systems and international standards, the African human rights system has not adopted clear standards on the specific issue of the authority that should be in charge of removal proceedings. The African Commission's **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** provide that "States may establish independent *or* administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery processes of judicial bodies," which "may include processes for judicial bodies receiving and processing complaints against its officers."[370] The Principles clarify that "such mechanisms shall be constituted in equal part of members the judiciary and representatives of the Ministry responsible for judicial affairs."[371]

Nevertheless, the Commission has made clear that, at a minimum, the power to remove judges should not be in the hands of the Head of State. In *Lawyers for Human Rights v. Swaziland* (2005), the Commission held that "retaining a law

367 Report of the Special Rapporteur on the independence of judges and lawyers (on Judicial Councils), A/HRC/38/38, 2 May 2018, para. 103

368 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 102.

369 Report of the Special Rapporteur on the independence of judges and lawyers (on Judicial Councils), A/HRC/38/38, 2 May 2018, para. 102.

370 African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, para. 4(u) (emphasis added).

371 Ibid.

which vests all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole",[372] and concluded that the law, "to the extent that it allows the Head of State to dismiss judges and exercise judicial power," was in violation of Article 26 of the African Charter.[373] The Commission explained that "by concentrating the powers of all three government structures into one person, the doctrine of separation of power is undermine[d] and subject to abuse."[374]

2.3.2.3 European system

2.3.2.3.1 Council of Europe

There is a general consensus across Council of Europe bodies that a tribunal or an independent authority composed at least of a majority of judges should, at a minimum, intervene in removal proceedings.

Case-law of the European Court of Human Rights

The **ECtHR** has established in its case-law that an independent body, composed of a majority of judges, should be in charge of imposing decisions affecting the career of judges. If it is not the case, such decisions must be subject to judicial review by a body complying with the requirements of independence and impartiality. In the *Baka v. Hungary* decision (2016), the Court noted that international and regional standards had largely recognized that an independent authority should intervene in removal and dismissal proceedings against judges:

> *[T]he Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge (…).*[375]

372 ACHPR, Lawyers for Human Rights v. Swaziland, Communication 251/02, 37th Ordinary Session (27 April-11 May 2005), 18th Annual Activity Report, para. 58.

373 Ibid., para. 58.

374 Ibid., para. 56.

375 ECtHR, *Baka v. Hungary* [GC], Judgment of 23 June 2016, Application no. 20261/12, para. 121.

The Court subsequently established that, under Article 6 § 1, in order to guarantee judges' right to have recourse to judicial review to contest disciplinary sanctions, or in other words, their right to an independent and impartial tribunal to contest such decisions, the body in charge of imposing disciplinary sanctions must be a "tribunal" or, in the alternative, the disciplinary decision must be subject to judicial review by an independent body.

The Court articulated the above-mentioned approach in the *Eminağaoğlu v. Turkey* case (2021):

> *In its analysis the Court must first consider whether (...) the body responsible for imposing disciplinary sanctions, can be regarded as a "tribunal" in the substantive sense by virtue of its judicial role: determining matters within its competence on the basis of rules of law, with full jurisdiction, and after proceedings conducted in a prescribed manner (...), irrespective of its status under Turkish law. If the answer to that question is in the negative, the next question is whether the applicant had the opportunity to refer the disciplinary measure, imposed by a body that did not itself meet the requirements of a "tribunal", for review by another body that met the requirements of Article 6 (...). Only in this way will the Court be able to deal with the substance of the applicant's main complaint concerning the right to a court.*[376]

In sum, in the end, what is decisive in the Court's assessment of compliance with Article 6 § 1 is whether the decision of the disciplinary body is subject to a sufficient judicial review by a body complying with the requirements of independence and impartiality.

In addition, it can be inferred from the case-law of the Court that, in order to be considered independent, the authority deciding disciplinary cases should be composed of at least a majority of judges.

In the *Volkov v. Ukraine* decision (2013), the Court acknowledged that "with respect to disciplinary proceedings against judges, the need for substantial representation of judges on the relevant disciplinary body has been recognised in the European Charter on the statute for judges."[377] The Court noted, however, that in the circumstances of the case, the vast majority of the High Council of Justice

376 ECtHR, *Eminağaoğlu v. Turkey* [GC], Judgment of 9 March 2021, Application no. 76521/12, para. 94. This decision confirms the Court's judgement in *Denisov v. Ukraine* [GC], Judgment of 25 September 2018, Application no. 76639/11, para. 65.

377 ECtHR, *Oleksandr Volkov v. Ukraine*, Judgment of 9 January 2013, Application no. 21722/11, para. 109.

(HCJ)'s members were non-judicial staff appointed directly by the executive and the legislative authorities[378] and that "judges constituted a tiny minority of the members of the HCJ hearing the applicant's case."[379] The Court concluded that the facts of the application disclosed a number of serious issues, including the composition of the HCJ, "pointing to (…) structural deficiencies in the proceedings before the HCJ (…)",[380] and that "the proceedings before the HCJ had thus not been compatible with the principles of independence and impartiality required by Article 6 § 1."[381]

In *Denisov v. Ukraine* (2018), the Court clarified the criteria outlined in the *Volkov* as follows:

> *In its Oleksandr Volkov judgment (…) the Court set out a number of criteria for examining whether the HCJ as a disciplinary body of judges complied with the requirements of independence and impartiality. In doing so, the Court relied on its previous case-law and took into account relevant international texts, notably the opinions and recommendations of other bodies of the Council of Europe. First, it emphasised the need for substantial representation of judges within such a body, specifying that where at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality (…).*[382]

Other instruments of the Council of Europe

The **Committee of Ministers of the Council of Europe** has recommended that disciplinary proceedings, which comprise proceedings related to permanent removals, should be conducted by an independent authority or a court. **Recommendation No. R (94) 12** provides that where measures such as permanent removal from office need to be taken, "states should consider setting up, by law, a special competent body which has at its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a

378 Ibid., para. 110.

379 Ibid., para. 111.

380 Ibid., para. 117

381 Ibid.

382 ECtHR, *Denisov v. Ukraine* [GC], Judgment of 25 September 2018, Application no. 76639/11, para. 68.

superior judicial organ itself."[383] In **Recommendation CM/Rec(2010)12**, the Committee of Ministers clarified that disciplinary proceedings against judges "should be conducted by an independent authority or a court."[384] The **2016 Plan of Action of the Committee of Ministers** also notes that "[w]hen a judge's official performance gives rise to disciplinary proceedings or criminal investigations due to malice or gross negligence, it is imperative that such proceedings be carried out in accordance with the necessary full procedural guarantees before an independent, non-political, authority."[385] It adds that "[d]isciplinary committees of judicial councils vested with the power to take decisions on dismissal of judges or on other sanctions must be completely free of political influence and be seen to be so, in order to ensure the requirements of an independent and impartial tribunal."[386]

The **CCJE**, for its part, has underscored that disciplinary proceedings must be determined by an independent body. In **Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges**, the CCJE "considered (…) that the *intervention* of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline (…)."[387] In **Opinion No. 3 (2002) on ethics and liability of judges**, the CCJE considered that "any disciplinary proceedings initiated should be determined by an independent authority or tribunal, (…)"[388] and that "as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in

383 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12, Principle VI, 3.

384 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, 17 November 2010, para. 69.

385 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

386 Ibid.

387 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, 23 November 2001, para. 60 (b).

388 Consultative Council of European Judges (CCJE), Opinion No. 3 (2002) on principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, para. 77 (iii).

their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings."[389]

In the **Magna Carta of Judges**, the CCJE asserted that "disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court."[390] Within the same instrument, the CCJE proclaimed that the independent body should take the form of a Council for the Judiciary, composed at least of a substantial majority of judges, with broad competences for issues related to the status of judges:

> *To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.*[391]

The **European Charter on the Statute for Judges**[392] contains several provisions establishing that termination of office of a judge must, at the very least, involve the intervention of an independent authority composed mainly of judges:

> *In respect of every decision affecting (…) termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary*.[393]

The Explanatory Memorandum of the Charter clarifies that "[t]he wording of this provision is intended to cover a variety of situations, ranging from the mere

389 Ibid., para. 77 (ii).

390 CCJE, Magna Carte of Judges (Fundamental Principles), 17 November 2010, Principle 6.

391 Ibid., Principle 13.

392 Council of Europe, European Charter on the Statute for Judges and Explanatory Memorandum, 8 – 10 July 1998, DAJ/DOC (98) 23.

393 Ibid., para. 1.3.

provision of advice for an executive or legislative body to actual decisions by the independent body."[394] In paragraph 5.1, the Charter states that:

> *The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. (…)*[395]

The Explanatory Memorandum further develops that "the Charter lays down guarantees on disciplinary hearings: *disciplinary* sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. (…)"[396]

In other provisions, the Charter underscores that the occurrence of a dismissal "must be verified" by the independent authority.[397] The Explanatory Memorandum clarifies that "this condition is easily realized when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement."[398]

2.3.2.3.2 European Union

In *Commission v. Poland* (2019), the **CJEU** made clear that States must adopt a legal framework for disciplinary proceedings, which could result in dismissal, that provides for the involvement of an independent body:

> *[I]t is apparent (…) from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which (…) provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter (…)*

394 Ibid., Explanatory Memorandum, para. 1.3.

395 Ibid., para. 5.1.

396 Ibid., Explanatory Memorandum, para. 5.1.

397 Ibid., paras. 7.1 and 7.2.

398 Ibid., Explanatory Memorandum, para. 7.2.

constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (…).[399]

2.3.2.4 Inter-American system

As the **Inter-American Court of Human Rights** has established that due process guarantees of Article 8 of the American Convention[400] apply to removal proceedings against judges, States therefore have a duty to guarantee that an impartial authority is in charge of removal proceedings against judges.[401] In this respect, the Court explicitly stated that "the authority in charge of the procedure to remove a judge must behave impartially in the procedure established to this end."[402]

On the specific issue of impeachment proceedings against judges,[403] the Court made clear that "the requirement to observe the guarantees of due process during impeachment proceedings against a judge, requires ensuring that the competences of the authorities who intervene in its processing and decision 'are not exercised subjectively or based on political discretionality,' because this could entail an arbitrary infringement of the function of the judicial authorities."[404] It further developed that "even though impeachment proceedings take place within political organs when they are instituted against judicial authorities, the control that such

399 CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 77. See also CJEU (Grand Chamber), *Minister for Justice and Equality (Deficiencies in the system of justice)*, Judgment of 24 June 2019, C-216/18 PPU, para. 67.

400 Article 8 (1) of the American Convention provides that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

401 IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, para. 74; IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 99; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, para. 11; IACtHR, *Ríos Ávalos et al. v. Paraguay,* Judgment of August 19, 2021, para. 129.

402 IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, para. 74.

403 In a number of the countries of the region, disciplinary proceedings involving members of the high courts are conducted by members of parliament through "impeachment."

404 IACtHR, *Ríos Ávalos et al. v. Paraguay,* Judgment of August 19, 2021, para. 97.

organs exercise, rather than being based on reasons of political pertinence, opportunity or convenience, must be subject to legal criteria,"[405] meaning that "the proceedings and the final decision should relate to whether or not the charges have been proved, and whether or not the conduct meets the criteria on which the indictment was based, all while observing the guarantees of due process."[406]

The **Inter-American Commission** has similarly underscored that "the authorities that handle disciplinary proceedings must always ensure the guarantees of independence, competence and impartiality, as this is a materially jurisdictional function and a condition sine qua non of due process, regardless of whether the disciplinary authority is a formal court."[407] The Commission has identified the establishment of a Council of the Judiciary, which "functions as an autonomous organ of governance with appointment-related and disciplinary authority," as a best practice,[408] and has urged States that do not have independent bodies charged with the governance of the judiciary to create them and endow them with the guarantees necessary to perform each of their assigned functions independently.[409]

2.3.2.5 Other sources

Other instruments clearly outline that disciplinary proceedings should be carried out by an authority that is independent from the legislative and executive powers. For instance, the **Universal Charter of the Judge**, drafted by the International Association of Judges, proclaims that "[w]here this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation."[410] The **Measures for the effective implementation of the Bangalore Principles of Judicial Conduct**, adopted by the Judicial Integrity Group, clearly provide that "[t]he power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but

405 Ibid., para. 98.

406 Ibid.

407 Inter-American Commission on Human Rights, Guarantees for the independence of justice operators, Toward strengthening access to justice and the rule of law in the Americas, 5 December 2013, OEA/Ser.L/V/II. Doc. 44, para. 194.

408 Ibid., paras. 247-248.

409 Ibid., para. 248.

410 International Association of Judges, The Universal Charter of the Judge, 1999, Article 11.

which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive."[411] The **International Bar Association Minimum Standards of Judicial Independence** specify that "[t]he Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters."[412] These Minimum Standards further provide that "[t]he power to discipline or remove a judge must be vested in an institution, which is independent of the Executive"[413] and that"[t]he power of removal of a judge should preferably be vested in a judicial tribunal."[414]The **Campeche Declaration** underscores that "the entity with disciplinary competence shall exclusively be part of the same Judiciary."[415]

411 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 15.4

412 The International Bar Association, IBA Minimum Standards of Judicial Independence, 1982, Standard 4(a).

413 Ibid.

414 Ibid., Standard 4(b).

415 Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 10.b.

2.3.3 Removal proceedings must guarantee the right to a fair hearing

International and regional bodies unanimously consider that judges facing removal proceedings are entitled to a fair hearing. This includes the right to be fully informed of charges, the right to defence, the principle of equality of arms, and the obligation to substantiate removal decisions.

2.3.3.1 United Nations system

Several bodies from the United Nations have underscored that States must guarantee procedural fairness in the conduct of dismissal proceedings against judges, which is understood as encompassing the duty to inform judges of the conduct that forms the basis of such proceedings as well as the requirement to motivate the decision.

The **UN Basic Principles on the Independence of the Judiciary**, endorsed by the **General Assembly**, require disciplinary and removal proceedings against judges to be fair and laid out in a code of judicial conduct. They state that "all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."[416] They add that "[a] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure"[417] and that "[t]he judge shall have the right to a fair hearing."[418]

The **Human Rights Committee's General comment on Article 14** of the ICCPR provides that States must adopt laws that establish fair procedures for dismissal proceedings against judges. It advises that "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the (…) suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."[419] In addition, it sets out that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance

416 Basic Principles on the Independence of the Judiciary, 6 September 1985, Principle 19.

417 Ibid., Principle 17.

418 Ibid.

419 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

with fair procedures ensuring objectivity and impartiality set out in the constitution or the law"[420] and that "[t]he dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."[421] More generally, the Committee also underscores in its General comment that "[t]he right to equality before courts and tribunals, in general terms, guarantees (…) [the principles] of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination."[422]

The Committee has also had the opportunity to clarify the scope of States' duty to guarantee fair procedures under article 14(1) in the context of dismissal and has clarified the articulation of this provision with the right to equal access to public service protected by article 25(c). In the communication *Soratha Bandaranayake v. Sri Lanka* (2008), a judge claimed he did not receive a fair hearing in relation to the charges against him that led to his dismissal, in violation of his rights under articles 14(1) and 25(c) (right to equal access to public service).[423] In its consideration of merits, the Committee relied on its jurisprudence that found that "to ensure access [to public service] on general terms of equality, the criteria and procedures for (…) dismissal must be objective and reasonable."[424] The Committee underscored that "[a] procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness."[425] In particular, it found that the [Judicial Service Commission]'s failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of Inquiry's guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and

420 Ibid., para. 20.

421 Ibid.

422 Ibid., para. 8.

423 Human Rights Committee, *Soratha Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, CCPR/C/93/D/1376/2005, 24 July 2008, para. 3.9.

424 *Rubén Santiago Hinostroza Solís v. Peru*, Communication no. 1016/2001, CCPR/C/86/D/1016/2001, 27 March 2006, para. 6.2.

425 Human Rights Committee, *Soratha Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, CCPR/C/93/D/1376/2005, 24 July 2008, para. 7.1.

arbitrary."[426] Hence, it found a violation of article 25 (c) of the Covenant. Furthermore, the Committee recalled in this decision[427] its general comment on article 14, which explained that a dismissal of a judge in violation of article 25 (c) of the Covenant may amount to a violation of this guarantee, read in conjunction with article 14(1) providing for the independence of the judiciary.[428] The Committee also recalled, as set out in the same general comment, that "judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law." As such, since the dismissal procedure in the case "did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees [enshrined by article 14 (1)] to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary," the Committee concluded that the State had violated the author's rights under article 25 (c) in conjunction with article 14(1).[429]

UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul highlighted that "[t]he justice operator to be held accountable must have the means to properly explain and justify any conduct or action deemed inadequate, inappropriate or illegal through due process."[430] Her successor, Diego García-Sayán, wrote that "[d]isciplinary proceedings should be determined in accordance with the law, the code of professional conduct and other established standards and ethics."[431] On the scope of procedural guarantees, he indicated that "[d]isciplinary proceedings should provide the accused judges with all the procedural guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right to defend themselves in person or with the

426 Ibid., para. 7.2.

427 Ibid., para. 7.3.

428 Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), para. 64. See also *Mundyo Busyo et al. v. Democratic Republic of Congo*, Communication No. 933/2000, CCPR/C/78/D/933/2000, para. 5.2 and *Pastukhov v. Belarus*, Communication No. 814/1998, CCPR/C/78/D/814/1998, para. 7.3.

429 Human Rights Committee, *Soratha Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, CCPR/C/93/D/1376/2005, 24 July 2008, para. 7.3.

430 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 49.

431 Human Rights Council, Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29 April 2019, para. 98.

assistance of a legal counsel of their choice"[432] and that "[d]ecisions of the disciplinary body should be reasoned."[433]

2.3.3.2 African system

According to the African human rights protection system, States are under the duty to provide guarantees of a fair hearing in removal proceedings against judges. These guarantees include the right to defense, which, in turn, is comprised of the right to be defended by counsel of one's choice, the right to be informed, in due time, of all charges against oneself, and the right to have adequate time and facilities for the preparation of one's defence.

The African Commission's **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** provide that "[t]he procedures for complaints against and discipline of judicial officials shall be prescribed by law."[434] In addition, they explicitly state that guarantees of a fair hearing apply to removal proceedings: "[c]omplaints against judicial officers shall be processed promptly, expeditiously and fairly"[435] and "[j]udicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing."[436]

General guarantees of a fair hearing are outlined in **Article 7 of the African Charter**, including subparagraph c, which establishes that the right of every individual to have his cause heard includes "the right to defence, including the right to be defended by counsel of his choice."

The **African Court** on Human and Peoples' Rights has clarified that the right to a fair hearing includes the right to be fully informed of charges against oneself. In *Abubakari v. Tanzania* (2016), the Court held that "the right of the accused to be fully informed of the charges brought against him is a corollary of the right to a defence, and is above all, a key element of the right to fair trial."[437] In the case at

432 Report of the Special Rapporteur on the independence of judges and lawyers (on Judicial Councils), A/HRC/38/38, 2 May 2018, para. 104.

433 Ibid., para. 105.

434 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle 4(r). See also Principle 4(m).

435 Ibid., Principle 4(r).

436 Ibid., Principle 4(q).

437 ACtHPR, *Abubakari Mohamed v The United Republic of Tanzania*, Judgment (Merits) of 3 June 2016, Application 007/2013, para. 158.

hand, it concluded that by failing to communicate in due time all the elements of the charge against the applicant, Tanzanian authorities had violated his right to a defence guaranteed by Article 7(1)(c) of the African Charter and Article 14(3)(a) and (b) of the ICCPR.[438]

The **African Commission** drafted the **Resolution on the Right to Recourse and Fair Trial**[439] to provide guidance on the interpretation of article 7 of the African Charter.[440] The Resolution recalls that under article 7, the right to a fair trial includes, in the determination of charges against an individual, the right to have "adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice."[441] Additionally, the Commission has held that the right to a defence includes the right of an accused to be informed of the charges against himself and the evidence of the said charges, and "all sorts of elements required to prepare his defence."[442]

2.3.3.3 European system

2.3.3.3.1 Council of Europe

Case-law of the European Court of Human Rights

Guarantees of a fair hearing under Article 6 § 1 of the ECHR, which apply to disciplinary proceedings against judges according to the ECtHR (see Subsection 2.3.1.3.1. above), include, *inter alia*, the right to adversarial proceedings and the principle of equality of arms.

Firstly, the Court has recognized that parties to the proceedings must be granted the right to present the observations which they regard as relevant to their case. The ECtHR has held that the right to a fair hearing can only be seen to be

438 Ibid., para. 161.

439 ACHPR, Resolution on the Right to Recourse and Fair Trial, Resolution ACHPR/Res.4(XI)92, 1992.

440 See also ACHPR, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, November 2000, para. 43: "In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission (…) expounding on the guarantees of the right to fair trial under the Charter (…)."

441 ACHPR, Resolution on the Right to Recourse and Fair Trial, Resolution ACHPR/Res.4(XI)92, para. 2(e)(i).

442 ACHPR, *Courson v. Equatorial Guinea*, Comm. No. 144/95, November 1997, para. 21.

effective if the observations are actually "heard", that is to say duly considered by the trial court.[443]

Additionally, the Court has noted that the right to adversarial proceedings constitutes a key component of a fair hearing. This includes the right to "have knowledge of, and comment on, all evidence adduced or observations filed,"[444] the right to have sufficient time to familiarize oneself with the evidence before the court,[445] and the right to produce evidence.[446]

Furthermore, the principle of equality of arms, which is closely linked to the right to adversarial proceedings, constitutes another fundamental component of the right to a fair hearing. In essence, each party must be afforded a reasonable opportunity to present its case, including evidence, under conditions that do not place it at a "substantial disadvantage" vis-à-vis the other party.[447] In *Olujić v. Croatia* (2009), the Court clearly affirmed that the principle of equality of arms was applicable in disciplinary proceedings against judges:

> *[A]s regards disciplinary proceedings against a judge, equality of arms implies that the judge whose office is at stake must be afforded a reasonable opportunity to present his or her case - including his or her evidence - under conditions that do not place him or her at a substantial*

443 ECtHR, *Donadze v. Georgia*, Judgment of 7 March 2006, Application no. 74644/01, para. 35:

[L]a Cour estime que les conclusions contenues dans les décisions judiciaires rendues en l'espèce ne témoignent pas que les juridictions internes procédèrent à un examen approfondi et sérieux des moyens du requérant, qu'elles basèrent leur raisonnement (…) sur les éléments de preuve présentés par l'intéressé et qu'elles motivèrent valablement le rejet de ses contestations. Or, même si les tribunaux ne sauraient être tenus d'exposer les motifs de rejet de chaque argument d'une partie (…), ils ne sont tout de même pas dispensés d'examiner dûment et de répondre aux principaux moyens que soulève celle-ci.

444 ECtHR (Grand Chamber), *Vermeulen v. Belgium*, Judgment of 20 February 1996, Application no. 19075/91, para. 33.

445 ECtHR, *Krčmář and Others v. Czech Republic*, Judgment of 3 March 2000, Application no. 35376/97, para. 42.

446 ECtHR, *Clinique des Acacias and Others v. France*, Judgment of 13 October 2005, Application nos. 65399/01, 65406/01, 65405/01, and 65407/01, para. 37.

447 ECtHR (Grand Chamber), *Regner v. the Czech Republic* (Grand Chamber), Judgment of 19 September 2017, Application no. 35289/11, para. 146; ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, Application no. 14448/88, para. 33.

> *disadvantage vis-à-vis the authorities bringing those proceedings against a judge, namely, in the present case, the Government. It is left to the national authorities to ensure in each individual case that the requirements of a fair hearing are met (…).*[448]

Other instruments of the Council of Europe

Soft-law norms of the Council of Europe underscore that dismissal proceedings against judges must satisfy due process requirements, including a full hearing of the parties, the right to answer any charges, and the right to representation.

The **Committee of Ministers of the Council of Europe** has made clear that due process requirements of the ECHR, including the right to answer any charges, are applicable to dismissal proceedings. In **Recommendation No. R (94) 12**, the Committee of Ministers provided, with regard to permanent removals that "[t]he law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."[449] In **Recommendation CM/Rec(2010)12**, the Committee of Ministers reiterated that disciplinary proceedings against judges "should be conducted by an independent authority or a court with all the guarantees of a fair trial."[450] In its **2016 Plan of Action on Strengthening Judicial Independence and Impartiality**, the Committee underscored that:

> *No disciplinary action should be taken against a judge without proper investigation and the conclusion of disciplinary proceedings.*
>
> *…*
>
> *When a judge's official performance gives rise to disciplinary proceedings or criminal investigations due to malice or gross negligence, it is imperative that such proceedings be carried out in accordance with the necessary full*

448 ECtHR, *Olujić v. Croatia*, Judgment of 5 February 2009, Application no. 22330/05, para. 78.

449 Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12, Principle VI, 3.

450 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, 17 November 2010, para. 69.

> *procedural guarantees before an independent, non-political, authority. Sanctions must be applied in a proportionate matter (…).*[451]

The **European Charter on the Statute for Judges**[452] states that disciplinary sanctions may only be issued against judges in proceedings involving the full hearing of the parties and the right to representation:

> *5.1 The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality (…).*[453]

The Explanatory Memorandum to the Charter develops that "the Charter lays down guarantees on disciplinary hearings: (…) The judge must be given full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality (…)."[454]

In another provision, the Charter provides that "[a] judge permanently ceases to exercise office through (…) dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof."[455]

The **Consultative Council of European Judges** underscored in **Opinion No. 3 (2002) on ethics and liability of judges** that "any disciplinary proceedings

451 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 1.3.

452 Council of Europe, European Charter on the Statute for Judges, 8 – 10 July 1998, DAJ/DOC (98) 23.

453 Ibid., para. 5.1.

454 Ibid., Explanatory Memorandum, para. 5.1.

455 Ibid., para. 7.1.

initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence."[456]

2.3.3.3.2 European Union

The Charter of Fundamental Rights of the European Union protects the right to a fair hearing and the rights of the defense. Article 47(2) of the Charter, which enshrines the right to an effective remedy and to a fair trial, proclaims that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" and that "[e]veryone shall have the possibility of being advised, defended and represented." Article 48(2), in turn, provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed."

In *Commission v. Poland* (2019), the **CJEU** established that disciplinary proceedings against judges must safeguard the right to a fair trial and the rights of the defense enshrined in Articles 47 and 48:

> *[I]t is apparent (…) from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (…).*[457]

456 Consultative Council of European Judges (CCJE), Opinion No. 3 (2002) on principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, para. 77 (iii).

457 CJEU (Grand Chamber), *Commission v Poland (Independence of the Supreme Court),* Judgment of 24 June 2019, C619/18, para. 77. See also CJEU (Grand Chamber), *Minister for Justice and Equality (Deficiencies in the system of justice)*, Judgment of 24 June 2019, C-216/18 PPU, para. 67.

2.3.3.4 Inter-American system

As discussed in subsection 2.3.1.4. above, the **IACtHR** considers that due process guarantees of article 8 of the American Convention apply to removal proceedings against judges. In this respect, the Court has also underscored, in several decisions, that guarantees of tenure for judges mean that "any disciplinary procedure against a judge must be decided in accordance with the established norms for judicial conduct in fair proceedings that ensure objectivity and impartiality pursuant to the Constitution or the law."[458] The Court has interpreted article 8 as requiring States to ensure that judges: (i) are informed of conduct they are accused of that has allegedly violated the disciplinary regime, (ii) have the right to defend themselves personally or by a legal counsel of their choice, and (iii) are provided a statement of reasons for removal decisions.

Firstly, under the jurisprudence of the IACtHR, judges must be fully informed of any conduct that forms the basis of disciplinary decisions. Article 8(2) of the American Convention provides that every person is entitled, with full equality, to "prior notification in detail to the accused of the charges against him."[459] The Court has declared that "[a]s part of the minimum guarantees established in Article 8(2) of the Convention, the right to prior and detailed notification of the charges applies in both criminal matters and in the other matters indicated in Article 8(1) of the Convention, even though the information required in the other matters may be less and of another type."[460] It has further developed that "in the case of disciplinary proceedings that may result in a sanction, the scope of this guarantee can be understood in different ways but, in any case, means that the person to be disciplined must be informed of the conducts of which he is accused that have violated the disciplinary regime."[461] The Court has highlighted the importance of this requirement, as it enables the exercise of the right to defence.[462]

Secondly, according to the case-law of the IACtHR, judges must have the right to defend themselves personally or by a legal counsel of their choice in removal

458 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, paras. 198 & 200; IACtHR, *Valencia Hinojosa et al. v. Ecuador,* Judgment of November 29, 2016, para. 105; IACtHR, *Rico v. Argentina*, Judgment of September 2, 2019, para. 55.

459 American Convention on Human Rights, Article 8(2)(b).

460 IACtHR, *Urrutia Laubreaux v. Chile*, Judgment of August 27, 2020, para. 113. See also IACtHR, *Maldonado Ordóñez v. Guatemala*, Judgment of May 3, 2016, para. 80.

461 IACtHR, *Urrutia Laubreaux v. Chile*, Judgment of August 27, 2020, para. 113.

462 IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgment of August 23, 2013, paras. 168-169.

proceedings. Article 8(2) of the American Convention enshrines "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel."[463] The Court has consistently held that "the authority in charge of the procedure of removing a judge must act independently and impartially in the procedure established for that purpose and permit the exercise of the right of defense."[464]

Thirdly, the IACtHR has stressed in several decisions that the obligation to provide a statement of reasons for a decision applies to disciplinary sanctions against judges. The Court has explained that "[t]he obligation to substantiate decisions is a guarantee that emanates from Article 8(1) of the Convention, linked to the correct administration of justice, because it protects the right of the individual to be tried for the reasons established by law and gives credibility to legal decisions in a democratic society"[465] and that "[t]he reasoning shows the parties that they have been heard and, in those cases in which the decision can be appealed, provides the grounds for criticizing the decision and achieving a fresh examination before higher instances."[466] The Court therefore requires that "the reasons for a ruling and for certain administrative acts should reveal the facts, grounds and laws on which the authority based itself to take its decision; thereby ruling out any indication of arbitrariness."[467] Furthermore, the Court has established that in cases of disciplinary sanctions, the justification requirement is "even greater, because the purpose of disciplinary oversight is to assess the conduct, suitability and performance of the judge as a public official and, therefore, to analyze the seriousness of the conduct and the proportionality of the sanction."[468] The Court has elaborated that when dismissal grounds are open and

463 American Convention on Human Rights, Article 8(2)(d).

464 IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, para. 74; IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 44; IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 78; IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 196.

465 IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 79. See also *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, para. 77 and IACtHR, *Casa Nina v. Peru*, Judgment of November 24, 2020, para. 89.

466 Ibid., para. 80.

467 Ibid. See also IACtHR, *Claude Reyes et al. v. Chile,* Judgment of September 19, 2006, para. 122 and IACtHR, *Casa Nina v. Peru*, Judgment of November 24, 2020, para. 89.

468 IACtHR, *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, para. 120.

indeterminate, "it is fundamental to provide a statement of reasons when applying them, because it is incumbent on the disciplinary court to interpret these norms respecting the principle of legality and observing the greatest rigor when verifying the existence of punishable conduct."[469]

2.3.3.5 Other sources

Other instruments refer to the necessity to provide guarantees of due process in removal proceedings against judges. The **International Bar Association's Minimum Standards of Judicial Independence** set out that "[t]he proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing."[470] Similarly, the **Commonwealth (Latimer House) Principles** provide that "[i]n cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, [and] to make a full defence."[471] Additionally, the **Campeche Declaration** states that "[t]he disciplinary system shall be imposed according to the principles of legal standards and non-retroactivity as regards a contradictory proceeding and with respect for the right to defense."[472]

2.3.4 Removal decisions should be subject to review

International and regional human rights bodies recognize that judges must be afforded the opportunity to contest their dismissal decision before a court or an independent authority.

2.3.4.1 United Nations system

Several bodies from the United Nations have unequivocally asserted that States must ensure that decisions in disciplinary and removal proceedings are subject to appeal.

469 IACtHR, *López Lone et al. v. Honduras*, Judgment of October 5, 2015, para. 270.

470 The International Bar Association, IBA Minimum Standards of Judicial Independence, 1982, para. 27.

471 Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) with Annex on Parliamentary Supremacy, Judicial Independence, Latimer House Guidelines for the Commonwealth (19 June 1998), Guideline VI.I, paragraph (a) (i).

472 Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 10.

The **UN Basic Principles on the Independence of the Judiciary** indicate that "[d]ecisions in disciplinary, suspension or removal proceedings should be subject to an independent review."[473] Such requirement is excluded only in specific cases, namely "decisions of the highest court and those of the legislature in impeachment or similar proceedings."[474]

In the **General comment on Article 14 of the ICCPR**, the **Human Rights Committee** clearly affirms that "[t]he dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed (…) without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."[475] In a communication brought by a former judge of the Constitutional Court of Belarus, who had been dismissed by presidential decree and whose appeals before domestic courts had been rejected for lack of jurisdiction, the Human Rights Committee noted that "no effective judicial protections were available to the author to contest his dismissal by the executive"[476] and held that "the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country."[477] Thus, it concluded that Belarus had violated article 25 (c) of the Covenant (equal access to public service), read in conjunction with article 14 (1) (independence of the judiciary) and article 2 (3) (effective remedy).

Successive **Special Rapporteurs on the independence of judges and lawyers** have underscored that "[d]ecisions of the disciplinary body should be (…) subject to appeal before a competent court"[478] and that "[d]ecisions in disciplinary

473 Basic Principles on the Independence of the Judiciary, 6 September 1985, Principle 20.

474 Ibid.

475 UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 20.

476 UN Human Rights Committee, Communication N° 814/1998, *Mikhail Ivanovich Pastukhov v. Belarus* (Views adopted on 5 August 2003), CCPR/C/78/D/814/1998, para. 7.3.

477 Ibid., para. 7.3.

478 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers (on Judicial Councils), A/HRC/38/38, 2 May 2018, para. 105.

proceedings should be subject to an independent review."[479] In a report following a mission to Tunisia in 2015, Special Rapporteur Gabriela Knaul recommended that the law dealing with the statute of judges "should stipulate expressly that all stages of disciplinary proceedings should (…) be subject to an independent review by a competent, independent and impartial tribunal."[480]

2.3.4.2 African system

Although the African Court has not yet ruled on the applicability of the right to appeal to the context of removal decisions against judges, the African Commission has clearly articulated that judges facing removal are entitled to an independent review of such decisions.

Article 7(1) (a) of the African Charter enshrines the individual right to have his cause heard, which includes "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."

The **African Court on Human and Peoples' Rights** has clarified the scope of States' obligations with respect to this provision,[481] stating that "[t]his right to appeal requires that individuals are provided with an opportunity to access competent organs, to appeal decisions or acts violating their rights"[482] and that

479 Human Rights Council, Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29 April 2019, para. 100. Also see Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 129. See also Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, 18 April 2011, para. 14 ("there should be some provision for having any disciplinary or administrative decision that has an impact on the status of judges reviewed by an independent judicial body.") and Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Communications to and from governments, A/HRC/17/30/Add.1, 19 May 2011, Bolivia, para. 120.

480 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 102.

481 The case does not relate to the specific issue of judicial independence.

482 ACtHPR, *Mgosi Mwita Makungu vs United Republic of Tanzania*, Application No. 006/2016, Judgment of 7 December 2018, para. 57. It should be however noted that the case does not relate to the specific issue of judicial independence.

"[i]t entails that States should establish mechanisms for such appeal and take necessary action that facilitates the exercise of this right by individuals (…)."[483]

The **African Commission** has specifically underscored in its **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** that "[j]udicial officials facing disciplinary, suspension or removal proceedings shall be entitled to (…) an independent review of decisions of disciplinary, suspension or removal proceedings."[484] Similarly, the **Resolution on the Right to Recourse and Fair Trial**, which provides interpretative guidance on Article 7 of the African Charter, recalls that under this provision, "every person whose rights or freedoms are violated is entitled to have an effective remedy."[485]

2.3.4.3 European system

2.3.4.3.1 Council of Europe

Case-law of the European Court of Human Rights

The ECtHR has recognized that judges must be afforded the opportunity to contest their dismissal decision before a court or an independent authority.

As noted in Subsection 2.3.2.3.1. above on the requirement of intervention of an independent authority in disciplinary proceedings, the Court considers that the assessment of whether a given disciplinary proceeding against a judge complied with the requirements of Article 6 § 1[486] boils down to examining whether the disciplinary decision was subject to a sufficient judicial review by a body complying with the requirements of independence and impartiality. In this respect, the Court outlined in *Denisov v. Ukraine* (2018) that:

483 Ibid.

484 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para. 4 (q).

485 ACHPR, Resolution on the Right to Recourse and Fair Trial, 1992, Resolution ACHPR/Res.4(XI)92, para. 1.

486 In addition to Article 6 § 1, Article 13 grants any individual the right to an effective remedy before a national authority for arguable claims that one or more of their rights set out in the Convention have been violated. The Court considers that Article 6 § 1 is *lex specialis* in relation to Article 13, and as such, in many cases where it has found a violation of Article 6 § 1, it has not deemed it necessary to rule separately on an Article 13 complaint. See ECtHR, Guide on Article 13 of the European Convention on Human Rights, 2022, para. 143.

> *According to the Court's case-law, even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1.*[487]

In several cases, the Court has affirmed judges' right to judicial review of disciplinary decisions. In *Baka v. Hungary* (2016), the Court held that the inability of the applicant, a Supreme Court President, to contest the premature termination of his mandate violated his right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

After noting that "the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired,"[488] the Court held that by failing to provide judicial review with regard to the removal decision, Hungary impaired "the very essence of the applicant's right of access to a court":

> *[T]he premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful (...). [T]he Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge (...). Bearing this in mind, the Court considers*

487 ECtHR (Grand Chamber), *Denisov v. Ukraine*, Application no. 76639/11, Judgment of 25 September 2018, para. 65.

488 ECtHR (Grand Chamber), *Baka v. Hungary*, Application no. 20261/12, Judgment of 23 June 2016, para. 120. Additionally, the Court notes, in the same paragraph, that "a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

> *that the respondent State impaired the very essence of the applicant's right of access to a court.*[489]

Furthermore, in *Eminağaoğlu v. Turkey* (2021), the applicant, a judicial officer, complained that there had been no judicial review of the disciplinary proceedings against him in violation of his right of access to a court under Article 6 § 1. In its assessment, the Court listed relevant principles on the right to an independent and impartial tribunal, which included the following:

> *[T]he right to a fair hearing must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (...).*[490]

The Court concluded that the disciplinary sanction imposed on the applicant by the competent disciplinary authority had not been examined by another body exercising judicial powers or by an ordinary court,[491] and that therefore, there had been "a violation of Article 6 § 1 of the Convention on account of the breach of the principle that a case must be examined by a tribunal established by law."[492]

In addition to requiring that disciplinary decisions be subject to judicial review, the European Court of Human Rights has established that the extent of the judicial review afforded must be "sufficient." The domestic court or tribunal exercising review "must have jurisdiction to examine all questions of fact and law relevant to the dispute before it,"[493] and in this respect, the ECtHR has adopted a case-by-case approach to assess the sufficiency of reviews carried out by domestic courts.[494] The ECtHR has however precised that such assessment is even stricter when it comes to disciplinary sanctions against judges, since they entail serious

489 Ibid., para. 121.

490 ECtHR, *Eminağaoğlu v. Turkey*, Application no. 76521/12, Judgment of 9 March 2021, para. 89.

491 Ibid., para. 104.

492 Ibid., para. 105.

493 ECtHR (Grand Chamber), *Ramos Nunes de Carvalho E Sá v. Portugal*, Applications nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018, para. 176.

494 Ibid., para. 181.

consequences for the judges themselves and for the public confidence in the functioning and independence of the judiciary more largely.[495]

The Court underscored in *Ramos Nunes de Carvalho E Sá v. Portugal* (2018) that a "judicial body cannot be said to have full jurisdiction unless it has the power to assess whether the penalty was proportionate to the misconduct."[496]

Other instruments of the Council of Europe

In **Recommendation CM/Rec(2010)12**, the **Committee of Ministers** explicitly stated that disciplinary proceedings against judges "should (…) provide the judge with the right to challenge the decision and sanction"[497] and that "[j]udicial independence must be actionable: judges who consider their independence threatened should have the possibility to have recourse to a judiciary council or another independent authority."[498] The Committee of Ministers reiterated in its **Plan of Action on Strengthening Judicial Independence and Impartiality (2016)** that "effective remedies should be provided, where appropriate, for judges who consider their independence threatened."[499]

Additionally, the **European Charter on the Statute for Judges** sets out that:

> *The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority with effective means available to it of remedying or proposing a remedy*.[500]

More specifically with regard to disciplinary sanctions, the Charter clearly states that "[t]he decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher

495 Ibid., para. 196.

496 Ibid., para. 202.

497 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, 17 November 2010, para. 69.

498 Ibid., para. 8.

499 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 2.2.

500 Council of Europe, The European Charter on the Statute for Judges and Explanatory Memorandum, 8 – 10 July 1998, DAJ/DOC (98) 23, para. 1.4.

judicial authority."[501] The Explanatory Memorandum further develops that "the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges."[502]

The **Consultative Council of European Judges** has similarly emphasized in **Opinion No. 3 (2002) on ethics and liability of judges** that "the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court."[503] The **Venice Commission**, for its part, has consistently advised that "there should be the possibility of an appeal to a court against decisions of disciplinary bodies."[504]

2.3.4.3.2 European Union

The case-law of the **CJEU** is explicit in establishing that judges must have the possibility of bringing legal proceedings to challenge disciplinary bodies' decisions, including dismissals.

In this respect, the Court developed in *Commission v. Poland* (2019) that guarantees of judicial independence include the establishment of rules which give the possibility to contest disciplinary decisions against judges:

> [*R]ules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the*

501 Ibid., para. 5.1.

502 Ibid., Explanatory Memorandum, para. 5.1.

503 Consultative Council of European Judges (CCJE), Opinion No. 3 (2002) on principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, para. 77 (v).

504 European Commission for Democracy Through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, 12-13 March 2010, para. 43.

> *disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (…).*[505]

2.3.4.4 Inter-American system

Under the Inter-American system, States must ensure that judges can contest dismissal decisions and obtain an effective remedy, including reinstatement in the case of an unlawful dismissal.

Under the **American Convention**, the **right to appeal a judgment** is established in **Article 8(2)(h)**[506] as part of due process of law. The **Inter-American Court on Human Rights** has stressed that the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests.[507] Regarding the scope of an appeal to review a judgment, the Court has ruled that "it must be able to analyze the facts, evidence and law on which the contested judgment was based."[508] The **Inter-American Commission**, for its part, considers that "the phase for review of a disciplinary decision is part of the disciplinary process that must be observed in order to actually dismiss a justice operator."[509]

Besides the right to appeal a judgment, **Article 25(1) of the American Convention** establishes the obligation of States Parties to ensure to all persons subject to their jurisdiction a simple, prompt and effective remedy before a competent judge or court against acts that have violated their fundamental rights. **Article 25(2)** requires States "to develop the possibilities of judicial remedy" and

505 CJEU (Grand Chamber), *Commission v. Poland (Independence of the Supreme Court)*, Judgment of 24 June 2019, C619/18, para. 77. See also CJEU (Grand Chamber), *Minister for Justice and Equality (Deficiencies in the system of justice)*, Judgment of 25 July 2018, C-216/18 PPU, para. 67.

506 Article 8(2) reads as follows: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (…) h. the right to appeal the judgment to a higher court."

507 IACtHR, *Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, para. 158; IACtHR, *Mohamed v. Argentina*, Judgment of November 23, 2012, para. 97.

508 IACtHR, *Mendoza et al. v. Argentina*, Judgment of May 14, 2013, para. 245.

509 Inter-American Commission on Human Rights, Guarantees for the independence of justice operators, Toward strengthening access to justice and the rule of law in the Americas, op. cit., para. 236.

"to ensure that the competent authorities shall enforce such remedies when granted."

In its jurisprudence, **the Inter-American Court on Human Rights** has underscored that **Articles 8** (right to a fair trial), **25** (right to judicial protection) and **1** (obligation to respect rights) of the American Convention are interrelated insofar as "effective judicial remedies (…) must be substantiated in accordance with the rules of due process of law, (…) in keeping with the general obligation of [the] States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1(1))."[510]

The **IACtHR** has consistently held that two specific State obligations can be identified under **Article 25** of the Convention. The first obligation consists in "the obligation to establish by law and to ensure the due application of effective remedies before the competent authorities that protect all persons subject to their jurisdiction against acts that violate their fundamental rights or that result in the determination of their rights and obligations."[511] The second is "the obligation to ensure the means to execute the respective decisions and final judgments delivered by those competent authorities, so that the rights that have been declared or recognized are truly protected."[512]

On the obligation to establish and ensure effective remedies (Article 25(1)), the Court has clarified that "the meaning of the protection granted by Article 25 is that there is a real possibility of access to a judicial remedy so that a competent authority determines whether there has been a violation of a right claimed by the person filing the action, and that the remedy is useful to restitute to the interested party the enjoyment of his right and to provide reparation, if it is found that there has been a violation."[513] The Court has also provided guidance on what remedies cannot be considered as effective: "those remedies that are illusory, owing to the

510 IACtHR, *Velásquez Rodríguez v. Honduras,* Judgment of June 26, 1987, para. 91; IACtHR, *Guerrero, Molina et al. v. Venezuela,* Judgment of June 3, 2021, para. 136; IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 145.

511 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 148. See also IACtHR, *"Street Children" (Villagrán Morales et al.) v. Guatemala*, Judgment of November 19, 1999, para. 237.

512 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 148.

513 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 149. See also Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), para. 24; IACtHR, *Castañeda Gutman v. Mexico*, Judgment of August 6, 2008, para. 100; *Casa Nina v. Peru*, para. 117.

general situation of the country or even the particular circumstances of a case, cannot be considered effective," which "may occur, for example, when their futility has been demonstrated in the practice because the Judiciary lacks the necessary independence to decide impartially, because the means to execute its decisions are absent, or due to any other situation that constitutes denial of justice."[514] Moreover, when evaluating the effectiveness of remedies, the Court has established that "the Court must observe whether the decisions made in it have made an effective contribution to ending a situation that violated rights, by ensuring the non-repetition of the harmful actions and guaranteeing the free and full exercise of the rights protected by the Convention."[515]

With regard to the **obligation to ensure the means to execute final judgments** (Article 25(2)), the Court has held that "pursuant to Article 25(2)(c) of the Convention, the State's responsibility does not end when the competent authorities deliver a ruling or judgment, but also require the State to ensure the means to execute final judgments in order to provide effective protection to the rights that have been declared."[516] It has further specified that "execution of judgment must be governed by those standards that respect the principles, *inter alia*, of judicial protection, due process, legal certainty, judicial independence and the rule of law."[517]

Furthermore, the IACtHR recognized in *Reverón Trujillo v. Venezuela* that **"a remedy that declares the nullity of a dismissal** of a judge because it was not lawful **must necessarily lead to the reinstatement**."[518] In reaching that finding, the Court outlined that:

> *[J]udges have several guarantees that reinforce their stability in their position in seeking to guarantee their independence and that of the system, as*

514 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 158. See also Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), para. 24; IACtHR, *Cordero Bernal v. Peru*, Judgment of February 16, 2021, para. 100.

515 IACtHR, *Chocrón Chocrón v. Venezuela*, Judgement of July 1, 2011, para. 128. See also IACtHR, *"Mapiripán Massacre" v. Colombia*, Judgment of September 15, 2005, para. 214; IACtHR, *Ituango Massacres v. Colombia*, Judgment of July 1, 2006, para. 339; IACtHR, *Manuel Cepeda Vargas v. Colombia*, Judgment of May 25, 2010, para. 139.

516 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, para. 158.

517 Ibid.

518 IACtHR, *Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, para. 81.

well as the appearance of independence with regard to the parties and society. As has been acknowledged in the past by this Tribunal, the guarantee of tenure shall operate so as to allow the reinstatement to the condition of judge to whoever has been arbitrarily deprived of it. This is so, because to the contrary the States could remove the judges and therefore intervene in the Judicial Power without greater costs or control. Additionally, this could generate a fear in the other judges, who observe that their colleagues are dismissed and then not reinstated even when the dismissal has been arbitrary. Said fear could also affect judicial independence, since it would promote that the judges follow instructions or abstain from contesting both the nominating and punishing entity.[519]

2.3.4.5 Other sources

The **Measures for the effective implementation of the Bangalore Principles of Judicial Conduct**, adopted by **the Judicial Integrity Group**, provide that "[t]here should be an appeal from the disciplinary authority to a court."[520]

519 Ibid. (citing *Apitz Barbera et al. (First Court of Administrative Disputes) v. Venezuela*, Judgment of August 5, 2008, para. 246).

520 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 15.6.

3 Judges Should Benefit from Functional Immunity

International and regional bodies have made clear that judges should enjoy functional immunity in order to secure their independence. Therefore, they cannot be liable for lawful conduct in the exercise of their judicial function. Some systems consider that the immunity may be lifted in cases of malice and gross negligence (European system) or proven incompetence (Inter-American system).

3.1.1 United Nations system

The **UN Basic Principles on the Independence of the Judiciary** provide that "[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."[521]

3.1.2 African system

The **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** underscore that judicial officers shall not be "liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions."[522]

3.1.3 European system

The **Committee of Ministers of the Council of Europe** considers that "[t]he interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice."[523] In its 2016 Plan of Action, the Committee of Ministers further developed that "[j]udges' interpretation of the law, weighing of evidence or

521 Basic Principles on the Independence of the Judiciary, para. 16.

522 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle 4(n)(1).

523 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Judges: independence, efficiency and responsibilities, para 68.

assessment of facts must not give rise to criminal, civil or disciplinary liability, except in cases of malice and gross negligence.[524]

The **Venice Commission** has expressed the view that judges should "enjoy functional immunity - but only functional - immunity."[525] It clarified that functional immunity refers to "immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes."[526] In recommendations for judicial reform in Bulgaria, it underscored that "[a]ccording to general standards [magistrates] indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts."[527]

The Magna Carta of Judges adopted by the **Consultative Council of European Judges** also underscores that "judges shall be criminally liable in ordinary law for offences committed outside their judicial office"[528] and that "criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions."[529]

3.1.4 Inter-American system

The **Inter-American Court** has discussed the issue of judges' liability in the context of impeachment proceedings against judges. In *Ríos Ávalos et al. v. Paraguay* (2021), the Court cited a number of international and regional standards establishing the prohibition to dismiss judges based on the content of decisions

524 Committee of Ministers of the Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Appendix, Action 2.2.

525 European Commission for Democracy Through Law (Venice Commission), Report on the Independence of the judicial system Part I: the independence of judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004, paras. 61 and 82.10.

526 Ibid., para. 61.

527 European Commission for Democracy Through Law (Venice Commission), Memorandum Reform of the Judicial System in Bulgaria: Conclusions adopted by the Venice Commission at its 55th plenary session (Venice, 13-14 June 2003), CDL-AD(2003)12, para. 15.a

528 Magna Carta of Judges, para. 20.

529 Ibid.

issued in exercise of their function in order to secure judicial independence[530] and referred[531] as well to Article 70(2) of the American Convention, which states that "[a]t no time shall the judges of the [Inter-American Court of Human Rights] (…) be held liable for any decisions or opinions issued in the exercise of their functions." It underscored that "the text of [Article 70(2)] reveals an interpretation standard to ensure judicial independence in the terms of the Convention,"[532] and inferred from it that "the guarantee of the independence of the judiciary requires that, when instituting impeachment proceedings against judicial officials, the organ or organs that intervene in their processing, deliberation and decision are prohibited from reviewing the grounds for, or the contents of, the decisions of those authorities."[533]

The IACtHR suggested that judges could be liable for "intentional violations of the law or proven incompetence":

> *[T]he impeachment or the eventual removal of a judge as a result of this procedure cannot be founded on the content of the decisions that he or she has issued, in the understanding that the protection of judicial independence prevents inferring responsibility owing to the votes and opinions issued in the exercise of the jurisdictional function, with the exception of intentional violations of the law or proven incompetence.*[534]

The Court concluded that "[t]o the contrary, judicial authorities could be subject to undue interference in the exercise of their functions, in evident detriment to the independence they should necessarily be ensured in order to fulfill their vital role under the rule of law effectively."[535]

3.1.5 Other Sources

Other actors have also underscored the need to protect judges' immunity for their conduct in the exercise of their judicial functions. For instance, the **International**

530 IACtHR, *Ríos Ávalos et al. v. Paraguay*, Judgment of August 19, 2021, paras. 101-105.

531 Ibid., para. 106.

532 Ibid.

533 Ibid., para. 107.

534 Ibid. In its ruling, the Court cited, *inter alia*, the Council of Europe's Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe on judges and the work of the Venice Commission.

535 Ibid., para. 108.

Bar Association's Minimum Standards of Judicial Independence state that "[a] judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions."[536] The **measures for the effective implementation of the Bangalore Principles of Judicial Conduct** adopted by the **Judicial Integrity Group** provide that "[a] judge should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function."[537] These Measures add that "[t]he remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals or judicial review"[538] and that "[t]he remedy for injury incurred by reason of negligence or misuse of authority by a judge should lie only against the State without recourse by the State against the judge."[539]

Regional instruments drafted by judges also reflect the same standard. The Judges' Charter in Europe of the **European Association of Judges** proclaims that "[n]o Judge shall be directly liable to a civil suit in respect of the performance of his professional duties,"[540] while the **Beijing Statement of Principles of the Independence of the Judiciary** refers to the need for personal immunity of judges from civil suits for monetary damages for respective acts in the exercise of their function.[541] The **Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America** affirms that "as a general rule, judges are not personally civilly liable for their decisions, with the exception of cases of fraud or intentional misconduct."[542]

536 IBA Minimum Standards of Judicial Independence, para. 43.

537 Judicial Integrity Group, Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 21-22 January 2010, para. 9.2.

538 Ibid., para. 9.3.

539 Ibid., para. 9.4.

540 Judge's Charter in Europe (European Association of Judges), 4 November 1997, para. 10.

541 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 19 August 1995, para. 32.

542 Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (Campeche Declaration), April 2008, para. 11.a.