



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

"Dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights"

DRAFT AT 21.10.08

ICJ DECLARATION AND PLAN OF ACTION ON THE ROLE OF JUDGES AND LAWYERS IN TIMES OF CRISIS

Recognizing that in times of crisis, the capacity of judges and lawyers to fulfill their essential role as protectors and guarantors of human rights may come under enormous strain;

Aware that such crises may consist in or arise out of a declared or undeclared public emergency, armed conflict, internal political instability, state of civil unrest, generalised situation of violence, social or economic upheaval, or natural disaster;

Reaffirming the universality, indivisibility and interdependence of all human rights *and Emphasising* the need to protect in times of crisis civil, cultural, economic, political and social rights;

Recalling that the principle of the separation of powers is a bedrock component of the Rule of Law;

Recalling its primary mission to uphold the principles of the rule of law, the independence of the judiciary and the legal profession and human rights;

The International Commission of Jurists proclaims following principles and plan of action:

Principles on the Role of Judges and Lawyers in Times of Crisis

1. The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis. The judiciary serves as an essential check on the other branches of the State and ensures that any such laws and measures adopted to address the crisis comply with the Rule of Law, international human rights law and, where applicable, international humanitarian law. In times of crisis, the principle of judicial review is indispensable to the effective operation of the rule of law and judges must retain the authority within the scope of their jurisdiction as final arbiter to state what the law provides. The judiciary itself must have the sole capacity to decide upon its own competence to adjudicate a case.

2. In times of crisis, the executive and legislative branches must preserve and guarantee, in law and practice, the independence and effective functioning of the judiciary in carrying out the fair administration of justice, the protection of human rights, including implementation of effective remedy and redress for violations. They should not take any decision or action the effect of which would be to nullify, invalidate or otherwise revise or undermine the integrity of judicial decision, without prejudice to mitigation or commutation of sanctions by competent authorities consistent with international law.

3. The executive and legislative branches should under no circumstance invoke a situation of crisis to restrict the competence or capacity of the judiciary to carry out its essential functions, to transfer those functions to non-judicial bodies or to circumvent judicial proceedings, control or review. They should not remove from the jurisdiction of ordinary tribunals the capacity to adjudicate complaints concerning human rights violations or to provide fundamental judicial remedies; or place the administration of justice under military

authority; or confer on the military the authority to carry out criminal investigations in matters of the jurisdiction of ordinary justice.

4. To safeguard the Rule of Law, all measures adopted to address the crisis, including pursuant to a declared state of emergency, must be subject to judicial oversight/review and there must be the possibility for affected persons to access judicial proceedings to challenge the legality of these measures and/or their conformity with national international law.

5. In times of crisis the stability and continuity of the judiciary is essential and judges should not be subject to removal, individually or *en masse*, by the executive and legislative branches. Judges may only be removed, by means of fair proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions.

6. The establishment of temporary or interim judges during times of crisis should generally be avoided. In respect of instances where it may become necessary to augment the capacity of the judiciary by expanding the number of active judges or through the creation of special chambers or units, the fundamental principles regarding the appointment and security of tenure must be strictly respected. Considerations of merit must remain essential criteria for appointments.

7. Because the protection of human rights may be precarious in times of crisis, lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and defending human rights. Governments must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights. In particular, lawyers should not be identified with their clients or clients' causes as a result of discharging their functions and the authorities must desist and protect from defamatory statements in that regard. Lawyers should never be subjected to abusive criminal, discriminatory or administrative sanction or procedures that would impair their professional functions.

8. In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients at all stages of proceedings, including to those deprived of their liberty. The government must take all necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including through access to all relevant case files.

9. In times of crisis, anyone who is deprived of his/her liberty has the right to challenge the lawfulness of detention (*habeas corpus*, *amparo*) before an ordinary tribunal and to be released if the detention is not lawful. Deprivation of liberty must at all times be under judicial control or supervision and judges should ensure that detainees enjoy prompt access to lawyers, contact with family members, and when necessary, access to adequate medical attention.

10. In times of crisis, only judicial bodies should dispense justice and only a court of law should try and convict a person for a criminal offence. Every person has the right to a fair trial by an independent and impartial tribunal established by law. In times of crisis, civilians should only be tried by ordinary tribunals, except when no civilian tribunals exist or where trial by such tribunals is materially impossible or special rules of international humanitarian law allow military tribunals to try civilians. All such proceedings must respect the inherent minimum guarantees of a fair trial, which include among others, the presumption of innocence, the right to be informed of the charge, the right of defence, the right against self-incrimination, the principle of equality of arms, the right to test evidence, the prohibition against the use of information obtained under torture or other ill-treatment, the non retroactivity of criminal law and the right to judicial appeal.

11. The executive and legislative branches should under no circumstance invoke a situation of crisis to deprive victims of human rights violations and/or their relatives to their rights to an effective access to justice, effective judicial remedy and to seek and obtain full reparation. The adoption of measures to remove jurisdiction from the ordinary courts the judicial remedies for human rights violations constitute a serious attack against the independence of the judiciary and basic principles of Rule of Law.

12. The integrity of the judicial system is central to the maintenance of a democratic society. Impartiality in the judiciary requires that cases be decided only according to evidence and a good faith assessment of the law, free of any extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason. Any other influence on the decision-making process constitutes corruption.

13. Members of the legal profession, including members of the judiciary and their legal staff, legal advisers to the executive and legislature, public defenders, and members of the private bar have a responsibility to uphold and promote the rule of law human rights and to ensure that in carrying out their professional functions they take no measures that would impair the enjoyment of human rights. A lawyer who gives advice which would foreseeably lead to a violation of human rights or international humanitarian law breaches his professional responsibility. When such advice leads to a crime under international law, the offending lawyer may incur civil and criminal responsibility

Plan of Action

The International Commission of Jurists, including its Commissioners, Honorary Members, National Sections and Affiliated Organisations, in pursuant to its primary mission to uphold the principles of the rule of law, the independence of the judiciary, the legal profession and human rights:

1. Reaffirms that the judiciary and legal profession have an enhanced responsibility during times of crisis to ensure the Rule of Law, the protection of human rights and the effectiveness of the administration of justice.
2. Calls on all members of the Judiciary, legal profession and bar associations around the world to mobilise their efforts to support the primacy of the Rule of Law in countries facing times of crisis, in particular judges and lawyers that may be under attack, persecution or harassment;
3. Decides as a global network to work collectively:
 - (a) To monitor situations where the institutional independence and effectiveness of the judiciary or the legal profession are threatened or under attack;
 - (b) To intervene, by appropriate means, to support and protect judges and lawyers who are harassed or persecuted as a result of carrying on their professional duties in times of crisis;
 - (c) To challenge, through advocacy and litigation, any legislation, measures or other actions contemplated, established or implemented in times of crisis at the national level, which place at risk or undermines the independence and effectiveness of the judiciary and the legal profession and their essential missions to protect human rights and Rule of Law;
 - (d) To provide to the United Nations and regional organisations relevant information on the independence of the judiciary and the legal profession in countries in times of crisis and request from them action to protect judges and lawyers under attack.
4. Decides to request its Centre for the Independence of Judges and Lawyers (CIJL):
 - (a) To act as a focal point in all matters concerning the independence and effectiveness of the judiciary and the legal profession in times of crisis;
 - (b) To initiate and implement the above Plan of Action;
 - (c) To work with the ICJ Network to assist efforts and initiatives to support and protect judges and lawyers in times of crisis; and,

- (d) To disseminate this Declaration and the Plan of Action of the Conference to national, regional and international associations of judges and lawyers, including ICJ National Sections and Affiliated Organisations, as well as to intergovernmental organisations and all governments.