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**International Bar Association's
Human Rights Institute
5 Chancery Lane London**

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Subject: IBAHRI submission regarding the preparation of the 2021 Forum on the Rule of Law, Human Rights and Democracy

The International Bar Association's Human Rights Institute (IBAHRI) welcomes the upcoming edition of the Forum on Human Rights, Democracy and the Rule of Law:

'Equal access to justice for all: a necessary element of democracy, rule of law and human rights protection'.

The Forum will represent a key platform to discuss challenges, good practices and opportunities to enhance access to justice, including challenges and opportunities that emerged from the Covid 19 emergency measures, as well as the relevant safeguards that can be ensured by effective access to justice to restore full enjoyments of rights. More than ever, states should be reminded of their commitment, enshrined in Sustainable Development Goal 16 of the 2030 Agenda of Sustainable Development, to provide equal access to justice for all and to build effective, accountable and inclusive institutions at all levels

Noting the objective of the Forum to serve as a platform promoting dialogue and cooperation as well as identifying and analysing best practices, present challenges and opportunities for States in their efforts to secure human rights, democracy and the rule of law, the IBAHRI would like to recommend the following topics for discussion during the Forum.

Proposed Panel # 1: 'Equal access to justice in and after a time of emergency

- a) *In-Focus discussion: The protection of the right to dissent in times of emergencies, including COVID-19 pandemic*

In 2020, the world witnessed a global health emergency due to the COVID-19 pandemic, which initially affected more than two-thirds of countries. While, as afforded by international law, states have undertaken extraordinary measures to curb the spread of COVID-19, normal life has been suspended, by way of 'lockdowns', bans on social gatherings, and the closure of public facilities. These measures have also significantly impacted all aspects of justice systems and the work of parliaments. By doing so, state responses to the pandemic have raised a significant number of human rights issues endangering the very fabric of the rule of law and democracy in a great number of countries.

Since the beginning of the crisis, human rights mechanisms have reminded states that emergency measures adopted in response to the COVID-19 pandemic are subject to strict conditions under international law and must as such be evidence-based, legal, necessary to protect public health, non-discriminatory, time-bound and proportionate to the objective they serve. Extraordinary measures are legitimate in so far as they aim at responding to an immediate threat to public health and only to the extent necessary and proportionate to counter such threat. Furthermore, responses

must be firmly grounded on the respect of human dignity, independence and autonomy of the person, non-discrimination and equality, respect of diversities and inclusion.

In such a time of crisis, it is of utmost importance that people can still stand peacefully for their rights, question their government's policies and emergency measures taken, as well as in court. Procedural guarantees must remain in place and the functioning of the Judiciary be adapted for that purpose.

Conversely, in a number of countries, states abusively resorted to emergency powers, unduly restrained fundamental rights, including the freedom of expression and the right to access information and used the blank prohibitions on freedom of assembly to push for laws or reforms that would otherwise draw strong opposition. Whereas extraordinary measures must be limited in time, in order to be proportionate to the objective they serve, there is great concern that in the 'new normal' of the post-COVID crisis, those fundamental freedoms, instead of unfolding again, remain unduly restrained and gravely threaten the rule of law. Invasive tools implemented during this time, which can be used to repress, will only grow more efficient with time, and thus may become more appealing to states, both authoritarian and democratic. Equal access to justice as a guarantee for all human rights is the ultimate safeguard to protect the right to dissent, encompassing the two fundamental freedoms of expression and peaceful assembly, cornerstones of the democracy.

The IBAHRI recommends a panel discussion providing an opportunity for legal practitioners to share the challenges encountered and envisioned in light of the past experience of emergency measures, to:

- Challenge before courts the disproportionate extraordinary measures adopted and undertaken (i) during the declared state of emergency, and (ii) those integrated in ordinary law in the post-crisis, and
- Provide access to justice for those who have been and are being persecuted for duly exercising their freedom of expression and freedom of peaceful assembly.

In light of the SDG 16, the panel should address, *inter alia*:

- The measures directly impacting access to courts, which has come under severe restrictions during the time of emergency; and
- The experience of lawyers and legal professionals to draw on recommendations as to legal avenues to promote and protect freedom of expression and freedom of peaceful assembly as a practical appraisal of access to justice for the protection of the rule of law and democracy, in and after a time of emergency.
- Draw on examples throughout the Pandemic, including the implications on fundamental freedoms and regional trends in this regard.

The panel would then highlight:

- The interdependence between access to information and access to justice, on the premise that there can be no justice, where people have hindered or no access to information. Access to information is critical in efforts to curb the spread of COVID-19 and information is to be widely available to all persons, and not just selected government officials or other intermediaries. Conversely, freedom of expression and the right to access information have been under attack worldwide during the pandemic. Across the globe, journalists and media workers, human rights defenders and other independent or critical voices have been threatened

and criminally sanctioned for speaking out about the extent of the situation in their countries or the measures adopted in response to the pandemic. Measures taken by state and non-state actors to censure supposed “fake news” or information threatening public health, including passing or proposing amendments to laws that violate international human rights standards, constitute a slippery slope directly attacking the cornerstone of the democracy and the rule of law.

- The challenges encountered by lawyers to protect freedom of assembly, while prolonged restrictions are maintained after a declared state of emergency, on the basis of public health grounds. Also in question is the effective enjoyment of the right to dissent, when blank prohibitions on freedom of assembly have been used by governments to introduce laws or reforms that would otherwise draw strong opposition, and no alternative have been/are provided to the members of public to oppose.

b) In-focus discussion: ‘Remote access to justice: how equal can it be?’

Within the framework of this first panel, the IBAHRI recommends to place special emphasis with a dedicated discussion on “Remote access to justice” addressing the growing trend to resort to virtual justice, from the perspective of equal access to justice.

During the declared state of emergency in response to the COVID-19 pandemic, many states have temporarily postponed all non-urgent court hearings. Jurisdictions across the world have thus kept the courts running through means of remote access, including via video-link or telephone hearings. If such means can be justified in response to the pandemic, it has also fostered a practice that has been emerging over the last years to digitalise justice. There is no doubt that some states will be inclined to sustain the practice and explore possibilities that on the face of it, and outside a context of pandemic, can appear as serving a more equal access to justice.

However, defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns and contemplate the principle of open justice, accompanied by appropriate safeguards to protect the rights of defendants. More importantly, whereas this drive towards the digitalization of justice could enhance equal access to justice for all, however, to be effective, it is key to address existing digital divides. This is particularly important in remote, impoverished and rural areas, informal settlements, and outskirts of cities, where communities lack internet connection and electronic devices.

In light of the SDG 16, the panel should address, *inter alia*:

- The impact on the right to access to justice of the measures undertaken, including challenges faced by justice systems to quickly adapt;
- The conditions under which such measures could be retained or adapted in order to meet the right to equal access to justice in the post-pandemic.

Proposed Panel #2: Judicial independence: a key pillar for the rule of law and democracy, a prerequisite to access to justice for all, and the foundation of fair trial safeguards

Judicial independence is fundamental to every democracy. It is a guarantor of the separation of powers and of the rule of law. It is the only scrutiny that governments and in particular

authoritarian administrations may undergo. Powerful governments with their executive branch and overwhelming majority in parliament executive power, may endanger rule of law and citizen's rights, if not counterbalanced by an independent and impartial judiciary. An independent judiciary ensures justice and certainty of law, trust in the legal and justice system, equity through the predictability of the administration of justice that cannot be overturned by the political establishment.¹

Independence and impartiality' are key to ensure an effectiveness and equity of the judicial systems. 'Independence' means judges are enabled to act according to their conscience free from political pressures, armies, or any other source of state power or inappropriate influence. 'Impartiality', on the other hand, is the judicial characteristic of disinterest towards parties and their causes in litigation. There is, of course, some overlap: judges who are not independent of the state will be perceived (and may actually become) partial to the state when it is a party to litigation in their court. Judicial independence is key to ensure effective access to justice, fair trial guarantees and remedy.

The Panel may wish to address some key challenges related to judicial independence and Rule of Law, in particular:

- How political interference and the control by the executive branch impact the principles of independence and impartiality of the judiciary and, by doing so, endanger the rule of law and access to justice for all
- The role of lawyers, the independence of the legal profession, access to legal aid and lawyer of one's own choosing to ensure effective access to justice for all
- The use of Military jurisdictions to protect perpetrators of gross human rights violations, including torture, and to deny access to justice and remedy for victims.
- The importance of accountability measure to combat impunity and ensure access to justice and redress
- How the independence of judiciary helps promote economic development, through access to justice for all, including investors that feel more secure if they have access to an independent judiciary to resolve disputes.

Proposed Panel #3: Women in judicial system and gender-based discrimination in access to justice

Persisting gender-based discrimination, stereotypes and inequalities between women and men, result in an unequal access to justice between women and men, with the consequent denial of the right to remedy and perpetration of impunity. This is even more important when tackling victims of gender-based violence or situations of particular vulnerability and intersectional discrimination. The role that women legal professionals should play within the justice system to help and empower other women to access justice, denounce and seek remedy.

This is a compelling issue that needs urgent attention and clear response from the international community.

¹ Judicial Independence: Some Recent Problems, IBAHRI June 2014

In light of the SDG 5, the panel could be a key platform to help address:

- Obstacles experienced by women to access justice, including lack of awareness, confidence and resources, gender bias and cultural, social, and economic barriers.
- Means to enhance the role of women in the legal profession as key agents of change, to address judicial stereotyping, and the role of male legal professionals in championing this change
- Enhance the role of women in the judiciary, including good practices, opportunities, and challenges

In addition to the above-suggested panels, the IBAHRI would also like to draw attention on the importance of the topic related to access to justice for asylum seekers, refugees and migrants, in situation of vulnerabilities.

In 2020 we have reached and surpassed the peak of 80 million displaced persons around the world. Refugees and migrants face sometimes unsurmountable challenges in accessing justice, in particular in relation to key decisions about their rights and interests, such as access to territory, determinations of a person's entitlement to international protection, and refugee status; decisions about detention or criminal proceedings based on one's entry or presence in the country; and decisions about expulsion or onward transfer.

The Pandemic has exacerbated this context. Measures to contain the spread of COVID-19 turned out to be challenges for refugees to reach safety. At the peak of the first wave of the pandemic in April 2020, 168 countries fully or partially closed their borders, with 90 countries making no exception for people seeking asylum. Asylum applications dropped by a third compared to the same period in 2019. The public narrative of "emergency" has been systematically used as a pretext to limit judicial protection and related safeguards with the effect to prevent access to justice for refugees. Judiciary was put under pressure by political interference

In the light of the SDG 16, the panel should address, *inter alia*:

- Legal, financial and practical barriers when judges and lawyers face large numbers of claims and cases, including appropriate training
- Free legal aid, for refugees and migrants in Refugee Status Determination (RSD)
- Independence and impartiality of refugee and immigration judges and other RSD decision makers, including reprisals and targeting against judges who try to uphold the rule of law and the persistent interference from the executive or legislative branches
- Effective access to justice and remedy for refugees and migrants, victims of human rights violations, without discrimination based on their status and with special attention to the particular situation of women and children migrants, and migrants in detention.

For further information:

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