

CONTEMPORARY CHALLENGES TO PROSECUTORIAL INDEPENDENCE

Submission of the International Commission of Jurists (ICJ)
to the Special Rapporteur on Independence of Judges and Lawyers, Mr. Diego García-Sayán
on his 2020 report to the UN Human Rights Council

15 December 2019

The International Commission of Jurists (ICJ) makes this submission in response to the call of UN Special rapporteur on the independence of judges and lawyers, for input to his report to be presented to the UN Human Rights Council in June 2020. The call for input indicates that the focus of the report will be on “contemporary challenges to prosecutorial independence” and that the purpose of the report is to “analyze how the independence of prosecutorial offices might be at risk, particularly when prosecutors handle cases on transnational corruption and transnational organized crime.”¹ The ICJ urges the Special Rapporteur to ensure his report is not restricted to threats from corruption and organized crime, but also includes a substantial focus on contemporary threats to the independence of prosecutors emanating from actors within Executive governments, whether to target human rights defenders, political opponents or others, or giving rise to systemic lack of fair trial for accused persons, or entrenching impunity of State perpetrators of human rights violations, as a dominant challenge to prosecutorial independence globally from a human rights perspective.

Risks to prosecutorial independence from private actors including in relation to transnational corruption and transnational organized crime is a legitimate concern for the UN system. Indeed, the UN Office on Drugs and Crime (UNODC) has already produced a considerable body of high quality research and detailed guidance on the role and independence of prosecutors in relation to anti-corruption measures and organised crime,² and receives considerable dedicated resources to this end. In recognition of the very limited resources available to the mandate of the Special Rapporteur to focus on the independence of judges and lawyers (including prosecutors) from a human rights perspective, the resolutions governing the mandate request the Special Rapporteur: “To continue to cooperate closely, while avoiding duplication, with relevant United Nations bodies, mandates and mechanisms and with regional organizations”.³

While lack of independence of prosecutors in relation to transnational corruption and transnational organised crime can and does certainly have impacts on human rights, the ICJ notes that the call for input and questionnaire published by the Special Rapporteur only mentions human rights once,

¹ <https://independence-judges-lawyers.org/un-press-releases/questionnaire-for-the-report-contemporary-challenges-on-the-independence-of-prosecutors-2020/> (accessed 21 November 2019).

² See e.g. <https://www.unodc.org/unodc/en/corruption/index.html>
<https://www.unodc.org/unodc/en/organized-crime/intro.html>

³ Human Rights Council res 17/2 (2011), including this language in its paragraph 2(f), sets out the terms of the mandate (through explicit referential incorporation in resolution 26/7 (2014), paragraph 2, and then resolution 35/11 (2017), paragraph 2). Emphasis added.

in setting out the name of the Human Rights Council. The ICJ also notes that a previous Special Rapporteur on Independence of judges and lawyers, Gabriela Knaul, has already in 2012 presented the Human Rights Council with a report on prosecutors and prosecution services, including the particular need to protect prosecutors in sensitive cases such as organized crime and to avoid corruption of prosecutors. The longstanding 1990 UN Guidelines on the Role of Prosecutors, already include numerous provisions to address threats to the independence and impartiality of prosecutors, whether emanating from the executive or from private actors including organized crime.

While the range of threats to independence of prosecutors may differ across different countries or regions, in the view of the ICJ an equal if not predominant concern globally in terms of contemporary risks to prosecutorial independence from a human rights perspective is a lack of independence and impartiality of prosecutors in relation to the Executive government, including particularly other law enforcement officials and political actors within the Executive, resulting in either targeted abuse of the criminal justice system against particular individuals or categories of individuals, particularly human rights defenders, routine failures of the right to fair trial in violation of the rights of accused persons more generally, and impunity of State actors for human rights violations.

In many parts of the world, lack of independence of prosecutors from the Executive enables and results in selective and unjustified prosecutions of human rights defenders, political opponents, and others; results in violations of the rights to a fair trial within the criminal justice system more generally; and enables impunity for gross human rights violations perpetrated by officials of the Executive. The ICJ urges the Special Rapporteur to make such human rights impacts of lack of independence of prosecutors vis-à-vis the Executive, and such effects, a primary focus of his report.

The ICJ has undertaken work on prosecutors and corruption, and other threats to prosecutors from sources other than the Executive, such as:

- ICJ hosts two day anti-corruption training workshop in Zimbabwe with prosecutors (19 March 2019).⁴
- Guatemala: the ICJ strongly condemns the attack against the Deputy Prosecutor for Human Rights (16 February 2018).⁵

However, the vast majority of relevant examples from the ICJ's own work primarily concern lack of independence of prosecutors from the Executive resulting in targeted prosecution of human rights defenders and others, systematic violations of fair trial rights of accused persons, or provision of impunity to State actors responsible for human rights violations. Examples include:

- Cambodia: charges against journalists Yeang Sothearin and Uon Chhin must be dropped (4 October 2019).⁶
- The Russian Federation: the ICJ calls for an end to intimidation and prosecution of lawyers

⁴ <https://www.icj.org/icj-hosts-two-day-anti-corruption-training-workshop-in-zimbabwe/>

⁵ <https://www.icj.org/guatemala-the-icj-strongly-condemns-the-attack-against-the-deputy-prosecutor-for-human-rights/>

⁶ <https://www.icj.org/cambodia-charges-against-journalists-yeang-sothearin-and-uon-chhin-must-be-dropped/>

(24 September 2019)⁷

- Egypt Constitutional Amendments: Unaccountable Military, Unchecked President and a Subordinated Judiciary (20 April 2019).⁸
- Ukraine: criminal proceedings against lawyer Andriy Domanskyi raise concerns (12 April 2019).⁹
- Turkey: Dismissal of judges and prosecutors tainted by unfairness, says ICJ (4 February 2019).¹⁰
(see also Justice Suspended – Access to Justice and the State of Emergency in Turkey (18 July 2018),¹¹ and Turkey: the Judicial System in Peril (2 June 2016).¹²)
- Egypt: authorities must end the arbitrary detention of human rights lawyer Mohamed Ramadan (14 December 2018).¹³
- Kazakhstan: the ICJ calls to immediately drop prosecution of lawyer Bauyrzhan Azanov (31 July 2018).¹⁴
- Thailand: end prosecution of Chiang Mai academics (4 July 2018).¹⁵
- Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutors (June 2018).¹⁶
- Nepal: the ICJ and Amnesty sent letter to Attorney General on Maina Sunuwar’s murder case (19 May 2017).¹⁷

See also the Declaration adopted at the 2019 ICJ Congress, “The Tunis Declaration on Reinforcing

⁷ <https://www.icj.org/the-russian-federation-the-icj-calls-for-an-end-to-intimidation-and-prosecution-of-lawyers/>

⁸ <https://www.icj.org/wp-content/uploads/2019/04/Egypt-Constitutional-amendments-advocacy-analysis-brief-2019-ENG.pdf> Egypt is also an example where Special Procedures have repeatedly expressed concern about prosecutors’ abuse of counter-terrorism legislation to target people expressing dissent and seeking to promote and protect human rights: see for instance,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23658&LangID=E> and <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25323&LangID=E>.

⁹ <https://www.icj.org/ukraine-criminal-proceedings-against-lawyer-andriy-domanskyi-raise-concerns/>

¹⁰ <https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-tainted-by-unfairness-says-icj/>

¹¹ <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>

¹² <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

¹³ <https://www.icj.org/egypt-authorities-must-end-the-arbitrary-detention-of-human-rights-lawyer-mohamed-ramadan/>

¹⁴ <https://www.icj.org/kazakhstan-the-icj-calls-to-immediately-drop-prosecution-of-lawyer-bauyrzhan-azanov/>

¹⁵ <https://www.icj.org/thailand-end-prosecution-of-chiang-mai-academics/>

¹⁶ <https://www.icj.org/wp-content/uploads/2018/06/Lebanon-Memo-re-prosecutors-Advocacy-Analysis-Brief-2018-ENG.pdf>

¹⁷ <https://www.icj.org/wp-content/uploads/2017/05/Nepal-AG-letter-Maina-Sunuwar-Advocacy-Open-letters-2017-ENG.pdf>

the Rule of Law and Human Rights (March 2019)", paragraphs 11, 12, 13, 19, and paragraph 54 which states: "Governments, particularly their security sectors, have sought to undermine the independence of judiciaries and prosecutors, as well as national human rights institutions and ombudspersons' offices, to gain cover for the consolidation of political power. In various instances, prosecutors and judges have abdicated their professional responsibilities and are used as a tool to persecute human rights defenders, political opponents, and journalists. Civil society efforts to seek effective remedies from international mechanisms have faced obstacles."¹⁸

The role of prosecutors and unjustified prosecution of human rights defenders features prominently in the most recent Report of the Special Rapporteur on the situation of human rights defenders setting out his "Observations on communications transmitted to Governments and replies received" (February 2019).¹⁹ In addition to being specifically mentioned in a significant proportion of the summaries of individual communications from around the world, the regional summaries for Africa (see para 14, 17, 19), Asia-Pacific (paras 283, 284), Europe and Central Asia (paras 443, 446), and Middle East North Africa (paras 563 and 564), all highlighted increasing trends of abusive criminal prosecution of human rights defenders. In the Americas region, the Special Rapporteur highlighted concerns arising from corruption and criminal groups (para 124), but also highlighted impunity for human rights violations and abuses arising from failures to prosecute those responsible (para 125), and the abuse of criminal proceedings against human rights defenders (para 126).

The abuse of counter-terrorism legislation to selectively prosecute members of civil society without justification, is also repeatedly highlighted in the March 2019 report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, on "Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders."²⁰

The role of prosecutors in misuse of criminal law to violate human rights of indigenous peoples was also highlighted in the August 2018 report of the Special Rapporteur on the rights of indigenous persons, on attacks on and criminalization of indigenous peoples (see e.g. paras 6, 46, 50, 55, 71-76, 91(g)).²¹

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his 2016 report on "contemporary challenges to freedom of expression", highlighted the role criminal prosecutions play in "criminalization of criticism" (paras 29-34), and repression of journalism (paras 35-38).²²

Targeted or otherwise unjustified criminal prosecutions are also a key and recurring concern in recent reports of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.²³

These are only examples. The ICJ recommends that the Special Rapporteur, as part of his study, to analyse recent thematic reports, as well as individual communications in the UN database, from a

¹⁸ <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>

¹⁹ <https://undocs.org/A/HRC/40/60/Add.1>

²⁰ <https://undocs.org/en/A/HRC/40/52>

²¹ <https://undocs.org/A/HRC/39/17>

²² <https://undocs.org/A/71/373>

²³ <https://undocs.org/A/HRC/41/41> (2019), <https://undocs.org/A/HRC/38/34> (2018)

wide range of mandates, to gather additional more detailed information on the range of cases in which an apparent lack of independence or impartiality on the part of prosecutors has played a role in the case, and any overall patterns and the implication that prosecutorial independence from the Executive, and the human rights violations that result from lack of such independence, remains as much a contemporary challenge as it has ever been.

The ICJ appreciates the opportunity to provide input to the study being conducted by the Special Rapporteur, on contemporary challenges to prosecutorial independence, and looks forward the forthcoming report.