

Summary of the Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy¹

by

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The Special Rapporteur on the independence of judges and lawyers was established in 1994. The Special Rapporteur's mandate is:

- a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon;
- b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and
- c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.²

The Special Rapporteur fulfills his mandate through the communications procedures and country missions. One of the Special Rapporteur's main activities is to consider complaints received and decide on the actions to be taken to remedy the reported situation. The Special Rapporteur consults with governments, mainly through urgent appeals and letters of allegations, about the following situations:

- a) Circumstances affecting the independence of judges, prosecutors, lawyers or court officials;
- b) Standards and practices relevant to the rule of law, jeopardizing the smooth functioning of the judicial system and the right to a fair trial; and
- c) Various specific challenges to the judiciary and its independence, for example, states of emergency.³

Urgent appeals are issued where the alleged facts warrant a degree of urgency. Letters of

¹ *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, [Report of the Special Rapporteur](#) on the independence of judges and lawyers, Leandro Despouy, A/HRC/4/25 18 January 2007.

² *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41, E/CN.4/1995/39, para. 1

³ *Supra*, note 1, para. 10.

allegation are sent when the allegations involve complex circumstances and further factual or legal clarification is required. The Special Rapporteur can also issue press releases. Country visits can be undertaken in response to an official invitation, which involves all interested parties in an assessment of a broad range of topics. Therefore, communications act as a deterrent while country visits increase knowledge, ensure an appropriate level of intervention and improve follow-up on recommendations.⁴

Circumstances Affecting the Independence of Judges and Lawyers

Individuals throughout the world who work in the judicial system face situations that result in violations of their human rights. Violations include threats, harassment, intimidation, vilification, interference with professional activities (e.g. house raids, travel bans), physical attacks, abduction, threats of abduction, enforced disappearance, arbitrary detention, torture, assassinations and summary executions. Complaints often allege failure by the state to provide protection even imminent or actual threats or attacks are reported to authorities.

Prominent human rights defenders are most at risk of attack. This includes lawyers defending victims of enforced disappearance and extrajudicial executions; lawyers specializing in sensitive areas such as terrorism, people trafficking, land ownership, protection of the environmental and natural resources; lawyers advocating for vulnerable groups such as indigenous people, minorities critical of the status quo and asserting rights, female victims of violence or discrimination and lawyers advocating for people opposing war and people promoting a region's independence.

Many judges are also subject to intimidation, pressure, death threats or assassination attempts because of their role investigating serious human rights allegations against politicians and other influential people.⁵

Despouy reports that states often regard the defense of human rights by judges and lawyers as political interference, and states,

"Lawyers are regularly hunted down and arrested because they are identified with their clients, and continue to be harassed by the authorities following their release. This in turn means that Individuals accused of sensitive crimes may have difficulty finding a lawyer who will take their case."⁶

Approximately 55% of 2006 communications concerned violations of the human rights of lawyers and judges. Threats, intimidation and acts of aggression directed against lawyers account for 17% of communications, with 4% of communication concerning similar acts directed against judges. Arbitrary detention and harassment directed against lawyers account for 26% of communications, with 4% of communication concerning similar acts directed against judges. Assassinations of lawyers and judges account for 4% of communications.⁷

Standards and Practices Relevant to the Rule of Law

Despouy identifies corruption of the judiciary as a 'pernicious and difficult to eradicate threat to the rule of law'. Factors contributing to corruption of the judiciary: lack of financial Independence, political allegiances of judges and failure by the state to adopt and subscribe

⁴ *Ibid*

⁵ *Ibid*, para. 14-15.

⁶ *Ibid*, para. 16.

⁷ *Ibid*, para. 17

to the Bangalore Principles.

Complaints to the Special Rapporteur reveal serious problems in the judicial system arising from: delays and unequal access to the protection of the law especially for vulnerable groups. Despouy notes proper functioning of the judiciary hampered by: reforms that impair judicial independence, interference from the executive, lack of job security and Improper appointment procedures. The rights of accused persons, he observes, are impaired when advocacy rights and inadequately protected by: lack of access to clients, lack of proper disclosure, inadequate notice, in-camera hearings, restrictions that prevent the preparation of a full defence and refusal to admit material evidence.⁸

Particular Challenges

Other challenges to the rule of law identified by Mr. Despouy arise from:

- 1.The trial of civilians before military courts.
- 2.The restrictions imposed on the judiciary under a state of emergency.
- 3.Special courts that violate defence rights.
- 4.Legislation introduced ostensibly to combat terrorism and protect national security that suspends habeas corpus and impairs or removes fair trial rights and/or restricts advocacy rights.
- 5.The adoption of amnesty laws granting immunity to perpetrators of human rights violations.
- 6.The death penalty on juveniles, disabled persons or persons with mental health problems.
- 7.Recourse to national standards incompatible with international standards, to justify removal of persons seeking asylum.
- 8.Difficulties in reconciling modern law with religious, traditional or tribal law.⁹

The Rule of Law and States of Emergency

All legal systems provide for the adoption of emergency measures in crisis situations. The declaration and maintenance of a state of emergency is an exercise of State sovereignty. However, Article 4 of the International Covenant on Civil and Political Rights¹⁰ lays down the formal and material requirements for declaring a state of emergency. In international law, the legitimacy of a state of emergency is governed by eight principles:

- 1.Principle of legality
 - Relates to the need to have in place and to observe clear and precise provisions relating to the state of emergency.
 - Calls for monitoring mechanisms to ensure that the state of emergency is keeping with the law.
- 2.Principle of proclamation
 - Relates to the need to publicize the declaration of, grounds for and duration of the state of emergency at the domestic level.
 - Requires the judiciary to verify whether the formal requirements are met.
- 3.Principle of notification
 - Relates to the need to inform other State parties in an agreement of the specific provisions suspended and the reasons for the decision.
- 4.Principle of temporality
 - Relates to the need for a close connection between the duration of the state of

⁸ *Ibid*, para 18-27.

⁹ *Ibid*, para. 29-36

¹⁰ <http://www2.ohchr.org/english/law/ccpr.htm>

- emergency and circumstances that gave rise to it.
- Requires the judiciary to ensure that the principle of temporality is upheld by questioning the lawfulness of successive extensions.
5. Principle of exceptional threat
- Refers to the nature of the danger or alleged event that led to the state of emergency.
 - The danger must be exceptional, current or imminent, real, specific and affect the entire nation.
6. Principle of proportionality
- Aims to strike an appropriate balance between the measures applied and the gravity of the situation.
 - Requires the judiciary to have the power to suspend emergency measures which are unnecessary.
7. Principle of non-discrimination
- Provisions which differentiate between nationals and foreigners, in terms of enjoyment of their rights, may contravene the principle of non-discrimination.
8. Principle of compatibility
- The application of emergency measures which conflict with other international obligations are prohibited.¹¹

Many preemptory norms must be upheld during a state of emergency, including: freedom from torture, the right to be informed of the reasons for arrest, safeguards against incommunicado or indefinite detention, habeas corpus, due process.¹²

The provisions of international humanitarian law lays down the minimum due process rights that cannot be derogated from during a state of emergency; namely rights to:

1. be informed promptly of the reasons for arrest
2. be allowed the necessary means of preparing and presenting a defence
3. be present during the trial
4. the presumption of innocence
5. remain silent
6. an independent and impartial tribunal
7. appeal
8. the non-retroactivity of criminal laws
9. present witnesses
10. the principle of *non bis in idem* (freedom from double jeopardy)
11. have the lawyer of one's choosing
12. legal aid
13. have judgment pronounced publicly¹³

The rights most blatantly violated are of the rights to: habeas corpus, legal assistance of one's own choosing, appeal before an independent tribunal, a public hearing, a public judgment and present a defence. Other frequent violations include indefinite detention without charges, incommunicado detention, torture, convictions based on confessions obtained by torture, double jeopardy and the arbitrary use of preventive detention.

In addition, the executive may adopt measures to prevent the judiciary from acting as a

¹¹ *Ibid*, para. 37-47

¹² *Ibid*, para. 48

¹³ *Ibid*, para. 49

safeguard against excesses, including replacing ordinary courts by military courts or commissions, harassing judges, prosecutors and lawyers, removing judges or transferring them to places where they are unable to interfere with the executive, subordinating the judiciary to the executive and discrediting or disregarding judicial decisions.¹⁴

Supreme Iraqi Criminal Tribunal

The legal problems of the Supreme Iraqi Criminal Tribunal can be divided into four areas. Firstly, the *Geneva Conventions* prohibit an occupying power from establishing courts *ex novo*. Secondly, the Statute of the Tribunal does not comply with international human rights standards in many respects, including a) failure to prohibit confessions obtained by torture, b) inclusion of *ex poste facto* offences, c) failure to protect the right to remain silent. The third problem concerns the conduct of the trial relating to the Al-Dujail massacre.

"One judge, several proposed judges, three lawyers and a court employee were assassinated during the trial. Another judge withdrew from the case after being subject to pressure..." The judge who replaced him and handed down judgement had been accused and imprisoned for activities against the Hussein Regime. For several months the accused were refused access to a lawyer of their choosing, and when they were allowed access, the lawyers in question complained so much of threats against them and interference in their work that they were expelled from the trial." To enforce the death sentence in these circumstances violated the rights to due process and not to be arbitrarily deprived of life.¹⁵

Extraordinary Chambers in Cambodia

The Special Rapporteur commended the Extraordinary Chambers in Cambodia for initiating the prosecution of the senior leaders of the Khmer Rouge.¹⁶

Recommendations

Mr. Despouy's recommendations are reproduced in full below.

“69. The Special Rapporteur invites the Human Rights Council to increase still further its efforts to defend the work being accomplished by different actors involved in the administration of justice and to consider every year the scale and gravity of problems affecting the judicial system and its independence, with a view to recommending that States should adopt specific measures intended to guarantee to judicial employees the safety and protection they require to perform their duties properly.

70. In the light of the findings set out above, it is imperative for the Council to strengthen the work of the Special Rapporteur by granting him the resources he needs to do his work more effectively, and to enable him to expand his activities.

71. It is also important that in its support and technical cooperation activities the United Nations should promote the theme of justice, especially with respect to countries which are in transition or are recovering from an armed conflict which has had a serious impact on nation-building. (FN A/HRC/4/25 page 21)

¹⁴ *Ibid*, para. 51

¹⁵ *Ibid*, para. 55-58

¹⁶ *Supra*, para. 59

72. Bearing in mind that the administration of justice is one of the pillars of the rule of law and the democratic system, the defence of justice must be accorded priority when analysing the institutional aspects encompassed by the activities of the United Nations as a whole.

73. Considering the dynamic and leading role now played by national and international associations of jurists to promote an independent judiciary, it would be appropriate for the United Nations to take account of their input and experience in its technical cooperation and other activities relating to the promotion and protection of human rights. Accordingly, the Special Rapporteur intends to work to bring about this rapprochement between the United Nations and judicial circles.

74. Concerning states of emergency, it is imperative that States should bring their domestic legislation and practices into line with international principles, judicial practice and standards relating to the application of states of emergency.

75. As far as the administration of justice is concerned, it is imperative that legislation relating to states of emergency should in all cases prevent:

(a) Measures which invalidate the provisions of the Constitution or basic law and legislation relating to the appointment, mandate and privileges and immunities of members of the judiciary, and their independence and impartiality;

(b) Measures which limit the jurisdiction of the courts: (i) to consider whether the declaration of a state of emergency is compatible with the laws, Constitution and obligations under international law, and whether it is unlawful or unconstitutional, in the event of incompatibility; (ii) to consider whether any measure adopted by a public authority is compatible with the declaration of the state of emergency; (iii) to take legal action to ensure the observance and protection of any right enshrined in the Constitution or basic law and in national or international law that is not affected by the declaration of the state of emergency; (iv) to try criminal cases, including offences relating to the state of emergency.

76. Bearing in mind that states of emergency continue to give rise to serious human rights violations, the Special Rapporteur recommends that an international declaration should be drafted which incorporates existing practices and principles and whose purpose is to ensure the observance of human rights and fundamental freedoms during states of emergency. A single text would provide clear guidance for States on how to bring their conduct into line with international law during crisis periods. In this connection, it is recommended that the Human Rights Council should establish a mechanism to draft (FN 21 This refers in particular to the principles set forth in the Special Rapporteur's 1997 report, and the case law and general comments of the Human Rights Committee, as well as the wealth of case law produced by the regional human rights monitoring bodies. (A/HRC/4/25 page 22) the declaration, and, at the same time, should seek the opinion of the sectors concerned by this matter. To this end, the Council is requested to ask the Office of the United Nations High Commissioner for Human Rights to hold an international expert seminar during 2007 to prepare the ground for the proposed instrument.

77. As far as the Supreme Iraqi Criminal Tribunal is concerned, the Special Rapporteur reiterates emphatically the recommendations he made to the General Assembly in October 2005: that the Iraqi authorities should be urged to follow the example of other countries with shortcomings in their judicial systems, by seeking the assistance of the United Nations in the establishment of an independent tribunal which

complies with international human rights standards; and also that it should refrain from imposing the death penalty under all circumstances.

78. With regard to the Tribunal in Cambodia, the Special Rapporteur urges the judges to ensure that the rules of procedure contain all the necessary provisions to ensure that the trials are conducted in full compliance with international standards relating to the right to a fair, impartial and independent trial.

79. The Special Rapporteur urges all States to ratify promptly the International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted recently.”

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