

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL BRA 14/2018

10 October 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the decision by the Chief Justice of the Supreme Court to uphold an earlier decision to block the newspaper *Folha de S. Paulo* from interviewing imprisoned former head of State, Luiz Inacio Lula da Silva, ahead of presidential elections which took place on 7 October 2018.

Mr. Luiz Inacio Lula da Silva ("Lula") served as the 35th President of Brazil from 2003 to 2011. He was arrested on 7 April 2018 and sentenced to 12 years in prison for corruption and money laundering. He is currently serving the sentence.

According to the information received:

The first round of the presidential elections in Brazil took place on 7 October 2018.

On 5 August 2018, Lula was officially announced as candidate for the Worker's Party for the 2018 presidential elections.

On 17 August 2018, in response to an appeal, the UN Human Rights Committee issued a decision on interim measures, stating that Lula cannot be disqualified from upcoming presidential elections because his legal appeals are ongoing. The Human Rights Committee "*requested Brazil to take all necessary measures to ensure that Lula can enjoy and exercise his political rights while in prison, as a candidate in the 2018 presidential elections*".

On 31 August 2018, the Superior Electoral Court disqualified Lula from running as a candidate under the "Clean Record Law".

On 11 September, former President Lula was replaced by Fernando Haddad as the Presidential candidate of the Workers' Party.

On 28 September 2018, Federal Supreme Court Justice Ricardo Lewandowski authorized the newspaper *Folha de S. Paulo* to interview former President Lula directly from the prison where he is serving his sentence, under supervision of the Federal Police in Curitiba. The decision was made in response to a complaint filed

by *Folha de S. Paulo* in which it argued that the decision entered by the 12th Federal Court of Curitiba denying the interview request imposed censorship to the press and curtailed freedom of expression, thus violating a previous Federal Supreme Court decision. Justice Lewandowski stated in his judgement that *“the only conclusion one may reach is that the challenged decision [entered by the Curitiba Courts], which imposes censorship to the press and denies the person under custody’s right to have contact with the outside world under the argument that “there is no constitutional or legal provision that substantiates the arrested person’s right to give interviews or similar activities,” blatantly violates what has been decided in the scope of ADPF 130/DF”. When deciding on the mentioned ADPF (action against the violation of a constitutional fundamental right), the Federal Supreme Court ensured “full” freedom of the press as a legal category that cannot suffer any sort of previous censorship”*. Subsequently, the Office of the Attorney General released a statement affirming that it was not going to appeal against Justice Lewandowski’s decision, in respect to freedom of expression.

Later on the same day, Justice Luiz Fux, Vice-Chief Justice of the Federal Supreme Court, granted the suspension of the permission given earlier the same day, at the request of Partido Novo, prohibiting the interview and its probable publication, under penalty of contempt. Justice Fux cited the risk that the interview would spread *“disinformation”* ahead of the first round presidential vote on 7 October.

On 1 October, Justice Lewandowski reaffirmed his decision of 28 September, ordering the interview to be authorized, and added that the decision entered by Justice Fux *“is not acceptable under the law in force; in addition, it is important to point out that its content is absolutely unfit to produce any effect in the legal system”*. Justice Lewandowski also argued that the challenge to the decision was motivated and designed with the *“purpose of hindering freedom of the press, which is a constitutional guarantee, to one of the most prestigious national news agencies”*. He also affirmed that *Partido Novo* did not have procedural legitimacy to file a motion to suspend an injunction. He added that *“Contrarily to what Justice Luiz Fux’s decision indicates, the present complaint was examined on its merits by a single judge; therefore, it is not a preliminary injunction. The complaint was granted in favour of the petitioners to ensure they exercise their constitutional guarantee of freedom of the press, and access to the source of journalistic information, which is essential in their profession”*.

Later on the same day, Justice Dias Toffoli, Chief Justice of the Federal Supreme Court upheld the suspension of the interview until *“subsequent deliberation of Federal Supreme Court en banc”*. It is at the time of this communication not clear when such deliberation will take place.

We express concern at the decision to prevent the press from interviewing Mr. Lula in prison. We are additionally concerned that the decision has been issued in the context of elections, where the role of the press and the public’s right to information is of paramount importance and may have an impact on the election results.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the measures taken by your Excellency's Government to ensure that media is not prevented or censored from covering and publishing events and interviews in general and in particular during elections.

I would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In particular, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), which Brazil acceded to on 24 January 1992, and in particular to article 19, which guarantees the right of everyone to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media.

Article 19(3) of the ICCPR requires that any restriction on the right to freedom of expression is provided by law, serves a legitimate purpose, and is necessary and proportional to meet a legitimate objective. As observed by the Human Rights Committee, *"the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output"* (CCPR/C/GC/34).

The Human Rights Committee has raised concern at restrictions on political discourse, including blocking of access during election periods to sources, including local and international media, of political commentary, and limiting access of opposition parties and politicians to media outlets (CCPR/C/GC/34).

As noted by the Special Rapporteur on freedom of expression, the right to freedom of expression is a guarantor of free and fair electoral processes, and meaningful and representative public and political discourse. It is during times of political change that the right to freedom of expression is most essential, ensuring that a well-informed and empowered public is free to exercise its civil and political rights. The Special Rapporteur has recommended in this regard that States should take general measures to encourage a diverse and pluralistic political process that is hospitable to ideologies from across the political spectrum. An important element of achieving this is ensuring that all political candidates' parties have access to the media for campaigning and advertising purposes; and to remove restrictions or regulations that might place the media under political influence or compromise the role of the media as public watchdog (A/HRC/26/30).