

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL MDA 1/2018

19 December 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **unfair dismissal and ongoing criminal prosecution against judge Domnica Manole**, allegedly as a result of a decision she took in the exercise of her function that was unfavourable to the governing party and as a reprisal for the critical views she expressed on the functioning of the Superior Council of Magistracy and the dire problems affecting the judicial system in the Republic of Moldova.

Domnica Manole was a judge at the Chisinau Court of Appeals. She acted as a judge for almost 25 years until 4 July 2017, when she was dismissed by the Superior Council of Magistracy. Judge Manole is currently being prosecuted in relation to an allegedly "illegal" decision she took on 14 April 2016, in a case related to a constitutional referendum aimed at revising the national constitution of the Republic of Moldova

According to the information received:

In 2014, judge Manole was elected by her peers as a member of the Disciplinary Board of the Superior Council of Magistracy (hereinafter, "the SCM"), the independent body in charge of safeguarding the independence of the judiciary and of individual judges, for a four-year term.

During her mandate, she was rapporteur on several cases, including a number of disciplinary proceedings against judges of the Supreme Court of Justice that attracted a lot of attention on the media. One of the judges that was subject to disciplinary sanctions by the Disciplinary Board during the time judge Manole was rapporteur of the Disciplinary Board is currently the President of the Supreme Court, and part of the panel of judges that is examining the dismissal case against judge Manole.

Judge Manole expressed critical views on the functioning of the SCM and on the status of the judiciary in Moldova.

At the March 2016 General Assembly of Judges, she publicly criticised the system for the selection and promotion of judges system as well as the proposals formulated by the country's judicial élite to reform Moldova's judiciary.

In the same year, she appealed a decision of the SCM on the promotion of judges to the Supreme Court (decision 7/2 of 26 January 2016) for its alleged lack of transparency. The Supreme Court dismissed her appeal as ill-founded.

Judge Manole also expressed critical views on the so-called “laundromat case”, a money-laundering scheme to move \$20–80 billion out of Russia from 2010 to 2014 through a network of global banks, many of them in Moldova and Latvia, which was reportedly implemented with the participation of a number of Moldovan judges. She requested to discuss the situation of the judiciary at the General Assembly of Judges of 21 October 2016, but her proposal did not meet sufficient votes to be included on the agenda.

In June 2017, judge Manole announced her intention to participate as a candidate in the elections of the judges members of the SCM (6 out of 12 members are elected by judges). This announcement might have spurred the rushed dismissal proceedings of 4 July 2017.

Reportedly, judge Manole criticized the functioning of the judiciary in various public interviews with the press since 2016. In particular, she raised issues relating to a rigged system for the selection and promotion of judges (favouritism of certain judges at the expense of merits-based procedures), political interference, increased prosecutorial bias and selective justice. With regard to the Superior Council of Magistracy, she claimed that the Council had contributed to the deterioration of the judicial independence in the country through arbitrary promotion decisions and biased disciplinary procedures aimed at marginalising independent judges or removing them from office.

It is alleged that judge Manole’s dismissal from the judiciary and her ongoing prosecution are directly linked to, and constitute an act of reprisal for, the critical opinions she expressed on the Superior Council of Magistracy and, more in general, the situation of the judiciary in Moldova.

Criminal proceedings

On 30 March 2016, judge Domnica Manole annulled the decision of the Central Electoral Commission, the State agency responsible for the implementation of the electoral policy and the organisation and conduct of elections, to reject the initiation of a constitutional referendum to introduce the direct election of the President of the country and ordered the Commission to allow the referendum.

On 14 April 2016, the Central Electoral Commission requested the prosecution service to initiate criminal proceedings against judge Manole. The charges referred to the decision adopted by judge Manole on 14 April 2016, and were based on article 307, para. 1, of the Criminal Code, relating to the criminal liability of judges for issuance of a court judgment contrary to the law.

On 26 May 2016, the (then) Interim Prosecutor-General requested the SCM to authorise the initiation of a criminal investigation against judge Manole.

On 31 May 2016, the Superior Council of Magistracy authorised the criminal investigation against judge Manole. Although judge Manole allegedly requested the SCM to examine the Prosecutor-General's request in open sitting, the SCM rejected her request and adopted its decision behind closed doors.

On 8 June 2016, the Interim Prosecutor-General initiated a criminal investigation against judge Manole (case no. 2016928173) for issuing a willfully illegal decision.

On 13 June 2016, judge Manole filed a complaint with the Supreme Court of Justice (SCJ) to request the annulment of the SCM decision to authorise the initiation of a criminal investigation against her. She also requested the SCJ to suspend, as an interim measure, the criminal investigation until the conclusion of the disciplinary proceedings that the SCM initiated against her following judge Manole's decision of 30 March 2016.

On 22 June 2016, a representative of the Anticorruption Prosecution office reportedly seized the computers of judge Manole and her assistant. Allegedly, the judge was not presented with any formal accusation/charges at this stage. Judge Manole's lawyer appealed this seizure, but the investigative judge rejected the appeal. The computers of judge Manole and her assistant were only returned after 6 months.

On 23 June 2016, the Supreme Court rejected judge Manole's request for interim measures.

According to the Law on administrative procedure, the SCJ was supposed to schedule a hearing by 26 June. The first hearing, however, was only scheduled for 7 July 2016.

On 15 December 2016, the SCJ requested the Constitutional Court of Moldova to review the constitutionality of article 307 of the Criminal Code.

On 13 March 2017, at the request of the Constitutional Court, the Venice Commission issued Opinion No. 880/2017 "Amicus curiae brief for the Constitutional Court on the criminal liability of judges."

On 28 March 2017, the Constitutional Court ruled that article 307 of the Criminal Code was constitutional. In its ruling, which largely adhered to the principles outlined in the Venice Commission's amicus curiae brief, the Constitutional Court stated that criminal liability can only arise when the deliberate intention of the judge to deliver the judgment in breach of the law is proven beyond any reasonable doubt, and the quashing of the judgment by a higher court cannot be used as a determining ground for criminal prosecution of the judge.

In April 2017, judge Manole requested a suspension in the examination of her case due to the fact that in a separate case, a request was presented to the Constitutional Court to review the constitutionality of article 25, para. 2, of the Law on the Superior Council of Magistracy, which relates to the competence of the SCM in relation to a Prosecutor-General's request to authorise the criminal investigation of a judge. Since the challenged provisions were directly linked to judge Manole's case, the SCJ accepted the request to suspend the examination of the case.

On 27 June 2017, the Constitutional Court declared the impugned provision unconstitutional insofar as it did not require the SCM to assess the quality and authenticity of the materials presented by the prosecution before authorising criminal investigations against judges.

On 5 October 2017, the SCJ resumed consideration of judge Manole's appeal against the SCM decision to authorise a criminal investigation against her.

On 7 December 2017, the SCJ rejected judge Manole's appeal. It is alleged that in rejecting the appeal presented by judge Manole, the Supreme Court did not consider the complaint concerning the fact that the SCM provided its authorisation to criminally investigate her without verifying the quality of the materials attached by the Prosecutor-General.

Following the SCJ decision, criminal proceedings against judge Manole resumed.

On 4 April 2018, judge Manole was informed of the end of the criminal investigation, and had access to the criminal investigation file for the first time. The file allegedly contain personal information irrelevant to the case. The defendant's lawyer produced several documents and proofs, which were reportedly ignored by prosecution. These include, inter alia, judge Manole's statement as accused, the statistical record-keeping sheet of the court case-file regarding the disputed judgment of 14 April 2016, and an extract from the Case Management Integrated System with all activities undertaken in relation to the disputed case.

On 21 April 2018, the indictment and the case file against judge Manole were sent to court. The indictment was allegedly sent to judge Manole's lawyer via email, and the judge herself was presented with the indictment only during the first court hearing, which took place on 10 May 2018.

During the first hearing, judge Manole asked for a postponement of the hearing due to the absence of her defence lawyer, who was allegedly not informed about the hearing. The defendant also requested that the next hearing be held no earlier than 12 June 2018 in light of her precarious health and the need to undergo a

medical treatment. The 3-judge panel assigned to examine her case rejected judge Manole's request, and fixed the next court hearing for 29 May 2018.

At the court hearing of 29 May 2018, judge Manole was absent, due to her treatment, and was represented by one of her defence lawyer. The following court hearing was scheduled for 19 June.

At the court hearing of 19 June 2018, judge Manole and her defence lawyers filed two requests to recuse the president of the judicial panel, judge Sergiu Lazări.

The first recusal request was based on the fact that judge Sergiu Lazări was subject to disciplinary proceedings before the Disciplinary Board (decision of 22 July 2016) when judge Manole was deputy president of the Board. There were reasonable grounds to believe that judge Sergiu Lazări could be biased against her in view of the disciplinary sanctions the Disciplinary Board imposed on him.

The second recusal request was based on the fact that judge Sergiu Lazări had arbitrarily accepted three requests for abstention submitted by three different judges of the same court that did not want to examine judge Manole's complaint against the Security and Intelligence Service evaluation (regarding a procedure that took place in 2017).

Both requests for recusal were rejected by the court.

The next court hearings took place on 2 and 17 July 2018, respectively. Judge Manole did not attend due to her health conditions. Her lawyers submitted medical certificates to justify her absence, and requested the postponement of the hearing.

The court granted this request, and postponed the hearing to 7 August 2018. At that hearing, and in spite of medical certificates submitted by her defence team, the court qualified judge Manole's absence as not justified due to the fact that she "was not hospitalized". The request submitted by the prosecutor to bring the judge before the court by force was rejected by the 3-judge panel.

In August 2018, the court hearings took place on 7, 14 and 17 August. At the latter hearing, the preliminary court trial stage was finalised.

On 4 October and 8 November 2018, the court took notice of the withdrawal of the first and the second lawyers assisting judge Manole. At the latter hearing, judge Manole requested the court to suspend the examination of the case for at least of one month, in order allow her to identify a lawyer of her choice and provide him or her sufficient time to get familiar with the complexity and high profile of the case.

Disciplinary Proceedings

On 4 July 2017, the SCM found judge Manole unfit to discharge her judicial duties, and requested the President of the Republic to remove her from office. The SCM reached this decision on the basis of an opinion rendered by the Security and Intelligence Service (SIS). The request for removal was based on an alleged breach of articles 8 and 25 of Law No. 544 of 20 July 1995 on the status of a judge, which prevent judges from discussing or commenting on ongoing cases with the press, the parties to the case and any third party.

The alleged breach consisted in an SMS judge Manole sent to a journalist of Jurnal TV, in which she explained the rationale for a separate opinion she issued in a case related to another media outlet, Jurnal de Chisinau, which was brought to court by the Speaker of the Parliament for defamation.

A 3-panel judge of the Chisinau Court of Appeals, led by judge Manole, rejected Jurnal de Chisinau's request to extend the time limit for appealing the decision of the first instance court, which upheld the defamation claim against the Jurnal de Chisinau. When Jurnal TV contacted judge Manole to request information on this issue, her separate opinion had not been yet published on the court's website. However, judge Manole announced her intention to issue a separate opinion on the case, as well as the main reasons behind it, at a public hearing, which several representatives of the media attended.

Reportedly, judge Manole was dismissed by the SCM without a proper disciplinary procedure, which is required by law. Furthermore, it appears that allegations relating to the comments she made to the TV reporter were not brought in advance, but only mentioned briefly during a SCM hearing that took place on 4 July 2017. The meeting had been scheduled to consider the opinions issued by the SIS on several judges, including judge Manole. Judge Manole realised that the SMS sent to the Jurnal TV journalist was one of the reasons for her dismissal only after the publication of the final opinion of the SCM.

Judge Manole appealed the decision of the SCM before the Supreme Court on 16 July 2017. At the beginning of August 2017, judge Manole challenged the constitutionality of several provisions of Law No. 271 of 18 December 2008, which refer to the periodic verification of judges by the SIS, before the Constitutional Court. The proceedings before the SCJ were suspended pending the consideration of the case.

On 5 December 2017, the Constitutional Court declared that the provisions of Law No. 271 of 18 December 2008 allowing SIS to periodically assess judges were unconstitutional, since they affected the independence of the judges subject to the review. Based on this ruling, in early January 2018 judge Manole requested the SCM to revise its decision of 4 July 2017 on her dismissal.

On 6 February 2018, the SCM rejected the request (decision no. 64/4).

Allegedly, the consideration by the SCJ of the appeal presented by judge Manole against the dismissal decision of the SCM has been characterised by several delays and unjustified postponements.

In particular, at least three hearings took place between 16 February and 24 May 2018, during which several recusal requests regarding the judges on the panel were rejected.

The hearing scheduled for 28 June 2018 did not take place because some of the judges in the panel were not present. The SCJ court clerk announced that the next court hearing was scheduled to take place on 4 October 2018.

On 3 October 2018, however, judge Manole received a written communication in which she was informed that the court hearings were postponed “for an undetermined period of time” due to one of the panel judges’ vacation.

The court hearing was subsequently scheduled for 1 November, and postponed again until 15 November.

On 15 and 16 November 2018 two court hearings took place.

On 19 November 2018, a 9-judge panel of the Supreme Court rejected judge Manole’s appeal. The full text of the Supreme Court decision was not yet available at the time the present communication was sent.

Without prejudging the accuracy of the information received, concern is expressed at the above allegations. The allegedly unfair dismissal of judge Manole and her ongoing criminal prosecution as a result of a decision she took in the exercise of her function may be regarded as an inappropriate interference with the legitimate exercise of her profession as a judge and as an act of reprisal for the legitimate exercise of her right to freedom of expression. The disciplinary and criminal proceedings against judge Manole may also have an adverse impact on the independence of the judiciary in the country, since other judges may be deterred from exercising their judicial independence and their freedom of expression out of fear of being subject to disciplinary or criminal proceedings.

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 be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide updated information on the ongoing criminal prosecution of judge Manole.
3. Please provide detailed information on the SCJ's decision to reject judge Manole's request to annul the SCM decision to authorise the initiation of a criminal investigation against her, and explain how this decision is compatible with the Constitutional Court decision of 27 June 2017, in which the Constitutional Court declared article 25, para. 2, of the Law on the Superior Council of Magistracy insofar as it did not require the SCM to assess the quality and authenticity of the materials presented by the prosecution before authorising criminal investigations against judges.
4. Please provide detailed information on the decision of the SCJ to reject the two requests presented by judge Manole to recuse the president of the judicial panel, judge Sergiu Lazări, and explain how this decision is compatible with existing international standards relating to the independence and impartiality of the judiciary.
5. Please provide detailed information on the factual and legal grounds for the removal of judge Domnica Manole from office, and explain how these measures are compatible with international human rights norms and standards relating to the independence of the judiciary.
6. Please provide detailed information on the legislation concerning accountability of judges, and explain how it is compatible with international human rights norms and standards relating to the independence of the judiciary.
7. Please provide detailed information on the guarantees in place to protect and promote the independence of the judiciary as a whole as well as the independence of individual judges.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is prescribed, *inter alia*, in the International Covenant on Civil and Political Rights (ICCPR), acceded by the Republic of Moldova on 26 January 1993, and the United Nations Basic Principles on the Independence of the Judiciary.

Article 14 of the ICCPR establishes the right a fair and public hearing by a competent, independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee observed that article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19). The Human Rights Committee also stated that judges may be dismissed only on serious grounds of misconduct or incompetence, and in accordance with fair procedures ensuring objectivity and impartiality. The dismissal of judges without following the procedures provided for by the law and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary (para. 20).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

The Basic Principles on the Independence of the Judiciary expressly recognise that like other citizens, members of the judiciary are entitled to freedom of expression, provided that in exercising this rights, they always conduct themselves “in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary” (principle 8).

With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

Judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law. Accountability mechanisms and proceedings should respect the fundamental guarantees of fair trial and due process and should be implemented by an independent and impartial body. Accountability procedures should be limited to instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute (A/HRC/26/32, para. 123).