

Mandates of the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the independence of judges and lawyers

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolutions 34/5 and 35/11.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **amendments to the Law on the Legal Status of Judges and the Law on Public Prosecutor's Office**, which introduce a new procedure for the dismissal of judges and heads of the prosecution service on the basis of a recommendation from the National Security Council of Mongolia.

We would also like to raise some general concerns with regard to the current procedures for the appointment and dismissal of judges, prosecutors, members of the Judicial General Council and its Ethics Committees, which appear to be at odds with international standards relating to the independence of the judiciary, the autonomy of the prosecution service and the separation of powers.

According to the information received:

The National Security Council of Mongolia is the highest State consultative body responsible for the elaboration and implementation of the State policy on national security. According to the Constitution, the President of Mongolia chairs the Council and appoints its Secretary. The Council also includes the Speaker of the Parliament and the Prime Minister as core members.

On 26 March 2019, the Speaker of the Parliament issued a decree to amend, at the request of the President of Mongolia, the agenda for the current session of Parliament to include the discussion of the amendments to the Law on the Legal Status of Judges, the Law on Prosecutor's Office and the Anti-Corruption Law.

The Speaker stated that it was an "order" from the National Security Council of Mongolia dated 25 March 2019 that prompted the President to submit the amendment proposal to Parliament.

On 27 March 2019, the proposed amendments were adopted in an emergency session by a majority of the ruling Mongolian People's Party, which holds 65 out of 76 seats in the Parliament. They entered into force on the day of adoption, without any *vacatio legis*.

The following day, on 28 March 2019, the Chief Justice of the Supreme Court, the Prosecutor-General and Deputy Prosecutor were reportedly dismissed by Presidential order, issued upon recommendation of the National Security Council.

Before explaining our concerns on this law, we wish to remind your Excellency's Government of its obligations under article 14 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#), ratified by Mongolia on 18 November 1974, which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

In [General Comment No. 32 \(2007\)](#), the Human Rights Committee stressed that the requirement of independence of a tribunal is "an absolute right that is not subject to any exception." The requirement of independence "refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." The Human Rights Committee clearly stated that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal" (para. 19).

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 main instrument specifically aimed at regulating the profession of prosecutors is the [Guidelines on the Role of Prosecutors](#).

The Guidelines recognise that prosecutors play a crucial role in the administration of justice. Principle 4 of the Guidelines provides that States have a duty to ensure that prosecutors are able to perform their professional functions impartially and objectively, without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. The Guidelines include provisions relating to, inter alia, the qualifications, selection and training of prosecutors (principles 1 and 2), status and conditions of service (principles 3 to 7), role in criminal proceedings (principles 10 to 16), and disciplinary proceedings against prosecutors (principles 21 and 22).

A few international instruments contain provisions applicable to both judges and prosecutors. Article 11 of the [United Nations Convention against Corruption](#), ratified by Mongolia on 11 January 2006, requires Member States, in accordance with the fundamental principles of their legal system and without prejudice to judicial independence, to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary and also within the prosecution services in States Parties where they do not form part of the judiciary.

In light of the above-mentioned standards, we are concerned that the recent amendments to national legislation on the judiciary and prosecution service fall short of international standards relating to the independence of the judiciary, the autonomy of the prosecution service and the separation of powers. We are also worried at the wide discretionary powers that the Head of State retains in the appointment of judges, heads of the prosecution service, members and president of the Judicial General Council, and members and president of the Judicial Ethics Committee.

Law on the Legal Status of Judges

a) Amendments of 27 March 2019

According to the Law on the Legal Status of Judges, a judge can only be dismissed by presidential decree issued on the basis of a recommendation of the Judicial General Council. Article 17 of the Law provides a number of grounds for dismissal of judges, including engagement in activities incompatible with the judge's position; committal of a second disciplinary violation within one year; court decision convicting the judge of criminal offense; decision on forced medical treatment etc.

The amendments of 27 March 2019 add a new ground for dismissal, i.e. the adoption of a recommendation by the National Security Council. They do not specify neither the grounds for the adoption of such a recommendation nor the procedure for its adoption.

We consider that the involvement of the National Security Council in the procedure for the dismissal of judges constitutes a serious breach of the principles of independence of the judiciary and separation of powers.

In its [General Comment No. 32 \(2007\)](#), the Human Rights Committee stressed that the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal “is incompatible with the independence of the judiciary” (para. 20).

The involvement of the National Security Council in the dismissal of judges is even more problematic because according to new provisions, the Council seems to have *carte blanche* to dismiss individual judges outside the cases listed in paragraphs 1 to 7 of article 17. The overly broad discretionary powers granted to the National Security

Council do not provide any guarantee to judges against arbitrary dismissal. It is not even clear whether the recommendation of the National Security Council needs to be motivated or not.

It is true that the recommendation of the National Security Council is formally addressed to the General Judicial Council, which is composed of a majority of judges elected by their peers. However, the fact that the all members of the General Judicial Council are formally appointed by the President of Mongolia makes it easier for the President to exert pressure on the judge-members of the Council, who may feel pressured to uphold the decision of the National Security Council in order to minimise the risk of being dismissed themselves.

b) Disciplinary proceedings against judges

The ‘ordinary’ procedure for disciplining, suspending and removing judges provides that complaints against judges are received by the secretariat of the Judicial Ethics Committee, a subsidiary body of the Judicial General Council.

The procedure, which provides the possibility for the judge concerned to be heard and to appeal against the decision of the Committee, is described in details in a recent report published by the OECD on Mongolia.¹

We consider that the ordinary procedure is generally in line with relevant international standards, which provide that judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.

In particular, the Basic Principles state 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). Furthermore, decisions in disciplinary, suspension or removal proceedings should be subject to an independent review (principle 20).

The law provides three possible disciplinary sanctions: warning, decrease of salary up to 30 percent for a maximum period of 6 months, and dismissal. In the case of admonition and pecuniary sanctions, the Ethics Committee applies the disciplinary sanctions directly. If the disciplinary action is dismissal, it is the Judicial General Council that issues a recommendation to the President of Mongolia (with prior presentation to the Parliament in relation to the Supreme Court Judges).

The relationship between the ‘ordinary’ disciplinary procedure and the new procedure introduced with the amendments of 27 March 2019 is unclear.

¹ OECD, Anti-corruption reforms in Mongolia: 4th round of monitoring of the Istanbul Anti-Corruption Action Plan, 2019, pp. 58-59.

In particular, it is unclear whether the guarantees set out in the Basic Principles, which are applicable in the case of ‘ordinary’ proceedings before the Ethics Committee, are applicable when the dismissal is recommended directly by the National Security Council.

c) Judicial appointments

The President of Mongolia has wide discretionary powers in the appointment of all judges, members and president of the Judicial General Council, and members and president of the Judicial Ethics Committee.

The procedure for the appointment of judges

The President appoints judges of the Supreme Court upon their presentation to the Parliament by the Judicial General Council, and appoints judges of other courts on the basis of a proposal of the Council.

We consider that the wide powers entrusted to the Head of State in the appointment of judges undermines the independence of the judiciary and the separation of powers. In cases where constitutional or legislative provisions prescribe that the Head of State, the Government or the legislative branch of power formally appoints judges, it is a good practice for the relevant appointing authorities to follow in practice the recommendations made by the judicial council or an equivalent independent authority, such as a qualification commission ([A/HRC/38/38](#), para. 52).

The procedure for the appointment of members of the Judicial General Council

The Judicial General Council is mandated by the Constitution to ensure the independence of judges. The Council also deals with administrative operations and human resource management of courts.

The Judicial General Council is composed of five full-time members. Three members are nominated by courts of first instance, courts of appeal, and the Supreme Court, respectively, while the other members are nominated by the Bar Association of Mongolia and by the Ministry of Justice.

The composition of the Council is consistent with international standards, which recommends a mixed composition for judicial councils, with a majority of judge-members elected by their peers. In my report on judicial councils, we noted that a mixed composition presents the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy ([A/HRC/38/38](#), para. 67).

With regard to Mongolia, we note with concern that the wide powers entrusted to the President with regard to the formal appointment of the Council members risk hampering the independence of the Council and the judicial system as a whole.

In the above-mentioned report on judicial council, we have stressed that the involvement of political authorities, such as the Parliament or the executive branch of power at any stage of the selection process of judge-members of the Council should be discouraged, so as to insulate judicial councils from external interference, politicization and undue pressure ([A/HRC/38/38](#), para. 76).

Equally worrying is the role of the President in the appointment of the chairperson of the Council. The law provides that after their appointment, the members of the Council nominate, by majority vote, one from among themselves as the chairperson of the Council, but stress that such a nomination is subject to the approval of the President of Mongolia, who retains discretionary powers also in relation to the appointment of the chairperson.

In this regard, we note that in accordance with international standards, the chair of a judicial council should be elected by the council itself, preferably among its judge-members. In order to enable the Judicial General Council to fulfil its role as guarantor of judicial independence, it is of utmost importance that members of the executive branch of powers refrain from participating in the selection and appointment of judicial council's members.

The procedure for the appointment of members of the Judicial Ethics Committee

The Judicial Ethics Committee is a subsidiary body of the Judicial General Council that has general responsibilities for disciplinary proceedings against judges.

The Committee consists nine members, selected from among distinguished legal professionals and academic scholars. Courts of first instance, courts of appeal and the Supreme Court nominate one candidate each; the Bar Association of Mongolia and the Ministry of Justice nominate three candidates each.

We note with concern that judges only represent a minority of members of the Committee. International standards provide that the independent authority competent to hear disciplinary cases and to take a decision on disciplinary measures should be composed primarily of judges. In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, this authority can also include members from outside the judicial profession, but in no case should such persons be members of the legislative or executive branches of the State ([A/HRC/38/38](#), para. 61).

In [General Comment No. 32 \(2007\)](#), the Human Rights Committee has also stressed that the involvement of members of the executive branch of power (Head of State, Minister of Justice or any other representative of the political authorities) in the

disciplinary body is *de facto* incompatible with the principle of the independence of the judiciary (para. 20).

As is the case for the appointment of the members of the Judicial General Council, all members of the Committee – including its chair – are formally appointed by the President of Mongolia, who retains the same level of discretion as in other appointments in the judiciary.

The involvement of the President of Mongolia in the appointment of the members of the Judicial Ethics Committee undermines the independence of the Committee, and consequently the legitimacy of the whole procedure for disciplining judges in Mongolia.

Law on the Prosecutor's office

According to the Constitution of Mongolia, the Prosecutor's office is part of country's judicial system. In order to guarantee the independence of prosecutors from any interference and undue influence or pressure, the Law on Prosecutor's Office include various provisions aimed at enabling prosecutors to perform their professional functions in an impartial and objective way.

The Law states that the Prosecutor's Office is independent from political institutions, and should not receive from them any instructions, especially on concrete cases. The new amendments, however, go in the opposite direction, and may be regarded as an attack to the independence of the prosecution service.

a) Amendments of 27 March 2019

Article 46.6 of the Law on Prosecutors defines the circumstances under which the President of Mongolia can dismiss the General and Deputy Prosecutors. The decision on the early termination of powers of the General Prosecutor should be made by the President with the consent of the Parliament.

Besides the general grounds envisaged by the Civil Service Law, such as reaching the retirement age or resignation, this provision provides three grounds for the early termination of powers of the General or Deputy Prosecutor: (1) appointment or election to another job or position with his/her consent; (2) his/her conviction for a crime by a final Court judgement; and (3) health condition preventing from performing his/her powers.

The amendments of 27 March 2019 add a new paragraph 4 to article 46.6, which provides a new ground for dismissal: the issuance of a recommendation by the National Security Council.

The new amendments provide a wide discretionary power to the President of Mongolia, who upon recommendation of the National Security Council that he presides may decide to dismiss the General and/or Deputy Prosecutor outside the cases indicated

in paragraphs 1 to 3 of article 46.6. As is the case for the dismissal of judges, it is not even clear whether the recommendation of the National Security Council needs to be motivated or not.

This overly broad discretionary power entrusted to the President is likely to have far-reaching adverse consequences on the autonomy and independence of the whole prosecution service, since the General and Deputy Prosecutor may feel compelled in politically sensitive cases to follow the instructions received from the executive branch of power in order to avoid, or minimize, the risk of being dismissed.

In this regard, the dismissal of the General and Deputy Prosecutor the day after the amendments entered into force is likely to have a chilling effect on the persons who will be designated to lead the Prosecutor's Office.

b) The procedure for the appointment of the General and Deputy Prosecutors

The General Prosecutor is appointed by the President of Mongolia with the consent of the Parliament (by a simple majority vote). The General Prosecutor is appointed for a 6-year term with the possibility of reappointment/prolongation for one consecutive term.

According to the law, the General Prosecutor is assisted by two Deputy Prosecutors, appointed for a 6-year term by the President with the consent of the Parliament on the basis of the proposal of the General Prosecutor. The law establishes minimal requirements to the candidates, including 5 years of prosecutorial experience, but no competitive procedure for the nomination is prescribed. Deputy Prosecutor General may be reappointed for a second consecutive term.

In a report specifically devoted to the independence and impartiality of prosecutors and prosecution services, the former Special Rapporteur on the independence of judges and lawyers observed that a lack of autonomy and functional independence can erode the credibility of the prosecutorial authority and undermine public confidence in the justice system. While there has been a growing tendency to move towards a more independent prosecution service model, in some countries the prosecution service continue to remain subject to various forms of interference from the executive branch of power. In assessing the independence and impartiality of prosecutors, it is therefore important to examine both the structural independence of prosecution services and their operational independence and impartiality, or functional independence (see [A/HRC/20/19](#), paras. 26-27).

In the case of Mongolia, the OECD report on anti-corruption concluded that the involvement of political bodies in the appointment and dismissal of the General and Deputy Prosecutors with a significant level of discretion, as well as powers of the President to approve different regulations directly related to the institution's daily work pose serious risks of political interference in prosecutions.²

² OECD, Anti-corruption reforms in Mongolia, *cit.*, p. 70.

We agree with this analysis. We are of the view that the procedure for the appointment of the General and Deputy Prosecutors leaves a substantial level of discretion to both the President and the Parliament in making decision on appointment of a Prosecutor General. Apart from the general requirements, such as age, legal and prosecutorial experience, there are no specific rules for selection of nominees. As a result, the candidates proposed to the Parliament risk being identified mainly on the basis of their actual or perceived political affiliation, rather than on their integrity, ability and appropriate qualifications and professional experience.

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, we would like to recommend that your Excellency's Government and the Parliament, where relevant:

1. Repeal the amendments to the Law on the Legal Status of Judges and the Law on the Public Prosecutor's Office, in order to eliminate any interference by the National Security Council with the independence of the judiciary and the prosecution service.
2. Reviews the Law on the Legal Status of Judges, so as to exclude the involvement of the President of Mongolia and, where applicable, the Parliament, in the appointment and dismissal of judges, members and president of the Judicial General Council, and members and president of the Judicial Ethics Committee.
3. Review the composition of the Judicial Ethics Committee, so as to exclude members of the executive branch of power from its members and ensure that the Committee is composed of a majority of judges elected by their peers.
4. Amend the Law on the Public Prosecutor's Office, so as to identify appropriate criteria for the selection of candidates to the offices of General and Deputy Prosecutors. Such criteria should require that persons selected for these offices are chosen solely on the basis of their integrity, qualification and professional experience, rather than their political affiliation.
5. Review the procedure for the appointment of the General and Deputy Prosecutors. Transparency and public scrutiny should guide the selection process of magistrates of the Supreme Court of Justice through public hearings with citizens, non-governmental organizations and other interested parties to scrutinize the independence, competencies and integrity of the candidates.
6. Ensure that the review of national legislation on the judiciary and the prosecution service is carried out in accordance with existing norms and

standards relating to the independence of the judiciary and the autonomy of the prosecution service, the separation of powers and the rule of law, as enshrined in the Mongolian Constitution and in a vast array of international treaties to which Mongolia is a party.

7. Ensure that the reform of the judiciary and the prosecution service is the result of an open, fair and transparent process, involving not only the parliamentary majority and the opposition, but also judges, lawyers and their professional associations, the National Human Rights Commission and civil society actors.
8. Adopt any other appropriate measure to ensure the protection and promotion of the independence of the judiciary and the autonomy of the Prosecutor's Office.

Finally, we would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website and the [webpage](#) of the Special Rapporteurs within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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