

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

REFERENCE:
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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 abuse of process and judicial harassment against Mr. [REDACTED], which appear to be connected to a bribery request allegedly made by the presiding magistrate to deliver a favourable verdict.

According to the information received:

[REDACTED] is an Australian citizen.

On 20 September 2013, while he was on holiday in the Solomon Islands, he was arrested by the police at his motel in Honiara. Mr. [REDACTED] was charged with eight offences of indecent exposure contrary to s.143(3) of the Penal Code and one offence related to the importation of prohibited goods, namely indecent and obscene articles, contrary to s.34(1), para. 4 of Second Schedule and s.213 of the Customs & Excise Act Cap 21.

The alleged victims were a group of local women who had been sitting outside the house next to the one Mr. [REDACTED] had rented. Mr. [REDACTED] claimed that the charges brought against him were based on false or exaggerated allegations made with the aim of extorting money from him as "a white Australian visitor".

Mr. [REDACTED] was detained for 13 weeks on the basis of these charges.

Before the hearings started, the prosecutor allegedly proposed to Mr. [REDACTED] lawyers that if the defendant were to plead guilty to a single charge of his choosing, the prosecution would have withdrawn the other charges and submitted to the court that a fine would have been adequate punishment. The prosecution would have also not objected to Mr. [REDACTED] departing to Australia upon payment of the fine. Mr. [REDACTED] did not accept the "deal" allegedly offered by the prosecutor.

The trial, which took place between 3 and 16 December 2013, was allegedly marred with procedural irregularities.

The charges against Mr. [REDACTED] were not counter-signed by a Magistrate as required by s.75 of the Criminal Procedure Code Cap 7, and the whole

proceedings were invalid because in breach of s.126 of the Criminal Procedure Code, which provides that no criminal proceedings may be brought against a non-citizen without the authorization of the Director of Public Prosecutions. Furthermore, the complaint was brought by a police sergeant, Sgt Nester Koloni, who is related by blood or marriage to the alleged victims.

Throughout the proceedings, witnesses referred to Mr. [REDACTED] as the "white man" or "the Australian". All witnesses appeared to be either police officers or relatives of police officers. The close relationship between the complainant, the police and the prosecutor contributed to strengthening the idea that proceedings were biased against the accused, and that he was treated unfairly on account of his race, nationality and economic status.

The trial concluded on 16 December 2013, and the matter was adjourned pending verdict. Mr. [REDACTED] was granted bail to return to Australia, and was asked by the presiding judge and then acting Chief Magistrate, Mr. Rogers Tovosia, in the presence of the prosecutor to deposit SBD\$20,000 (2,470 USD) into the personal bank account of the Magistrate. Mr. [REDACTED] refused and deposited the funds with the Court Registry. Mr. [REDACTED] has not yet recovered the money deposited, despite no longer being on bail.

On 9 January 2014, the day the verdict was supposed to be issued, Mr. [REDACTED] allegedly received a phone call from acting Chief Magistrate Tovosia, in which the magistrate offered to issue a favourable verdict in exchange for payment. Between 9 January 2014 and 15 January 2014, Mr. [REDACTED] allegedly received five additional phone calls from Mr. Tovosia. He recorded some of these calls, and used the recordings to report acting Chief Magistrate Tovosia. The acting Chief Magistrate resigned from the bench shortly after the recordings were handed in to the Solomon Islands High Court and the police.

On 17 January 2014, the Chief Justice of the Solomon Islands, Sir Albert Palmer, publicly denied any allegations of judicial corruption in a newspaper article. Following the release of the recordings, both Mr. [REDACTED] and his lawyer received threats and various forms of intimidation.

The trial ended without a formal verdict. Reportedly, no formal inquiry was conducted into the allegations concerning the alleged bribery attempt of the acting Chief Magistrate.

On 18 February 2014, Mr. [REDACTED] left the Solomon Islands, having complied with the bail conditions established by the Court.

In April 2014, Mr. [REDACTED] applied first to the Hight Court and then to the Court of Appeal in order to have the case permanently stayed on account of gross violations of his fair trial guarantees.

In its judgment of 9 May 2014, the Solomon Islands Court of Appeal rejected the application for a permanent stay of the proceedings, and in light of the seriousness of the allegations, referred the matter back to the High Court for re-trial. The Court acknowledged that the fair trial guarantees of the accused had been prejudiced by the failure to complete the trial, and requested the re-trial proceedings be expedited.

On 26 May 2015, twelve months after the Court of Appeal's judgment, the Director of Public Prosecutions made substantial amendments to the original indictment to address the procedural irregularities that affected the initial proceedings against Mr. [REDACTED]. There are apparently great differences between the first and second set of charges, including the identification of new alleged victims. Reportedly, Mr. [REDACTED] was only notified of the new charges on 18 June 2015.

At this stage, Mr. [REDACTED] had depleted all his financial resources, and was no longer able to retain a private lawyer. In July 2015, the Director of the Public Solicitor's Office reportedly denied him access to public legal assistance on account of his nationality and because he had failed to prove a lack of sufficient financial means. Such requirements, however, do not seem to be specified in the Public Solicitor Act or the Criminal Procedure Code. Similarly, no means test seems to have ever been conducted. For these reasons, Mr. [REDACTED] is not assisted by any legal representative at the moment.

In December 2017, the prosecution service informed the High Court that they were preparing an application for Mr. [REDACTED] extradition to the Solomon Islands to face prosecution. To date, however, no formal application has been made.

To this day, Mr. [REDACTED] trial continues to be subject to substantial and unwarranted delays. The High Court has not yet fixed a date for the first hearing, and Mr. [REDACTED] has not received any formal information from the Court or the prosecution service about his re-trial.

Without prejudging the accuracy of the information received, concern is expressed at the above allegations. The procedural irregularities that vitiated the initial proceedings against Mr. [REDACTED] and the substantial and unwarranted delays in the re-trial proceedings appear to constitute serious violations of the right to a fair trial. Furthermore, the lack of any investigation into the serious allegation of judicial corruption raised by the accused and the subsequent behaviour of national authorities, which also denied Mr. [REDACTED] access to free legal assistance, cast serious doubts over the impartiality of the judiciary and the prosecution service.

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 that you may have on the above mentioned allegations.
2. Please provide detailed information on the measures your Excellency's Government has taken, or intends to take, to investigate into the allegations of judicial corruption raised by Mr. [REDACTED] against the then acting Chief Magistrate, Mr. Rogers Tovosia. If no investigation has been initiated so far, please explain why.
3. Please provide updated information on the status of re-trial proceedings against Mr. [REDACTED].
4. Please provide updated information on the status of the request for Mr. [REDACTED]'s extradition to the Solomon Islands to face prosecution.
5. Please provide detailed information on factual and legal grounds for denying Mr. [REDACTED] access to free legal representation, and explain how this decision measures is in line with international standards relating to legal aid.
6. Please provide detailed information on the measures adopted by the Solomon Islands to protect and promote the independence of the judiciary as well as the independence and impartiality of individual judges. Please indicate the measures put in place to prevent and punish judicial corruption.

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 article 10 of the Universal Declaration of Human Rights., which establishes that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Judicial independence has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary, which 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).

In addition, in the General Comment No. 32 (2007), the Human Rights Committee observed that article 14 of the International Covenant on Civil and Political Rights, which contains similar obligations as those in article 10 of the Universal Declaration of Human Rights, 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).

Although judicial independence forms an important guarantee for judges, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour. In this regard, the United Nations Convention against Corruption, accessed by the Solomon Islands on the 6 of January 2012, contains various provisions aimed at combating judicial corruption. In particular, article 11 provides that "Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."

In a report devoted to this issue (A/HRC/26/32), one of my predecessor, Ms. Gabriela Knaul, observed that judicial accountability existed to avoid any improper, inadequate or unethical behaviour of justice operators and was, as such, closely related to judicial independence. The Special Rapporteur encouraged States to consider enacting specific legislation at the domestic level establishing a comprehensive system of judicial accountability that is effective, objective, transparent and in line with their international human rights obligations. In a report submitted to the Human Rights Council on 2017 (A/HRC/35/31), I stressed that the existence of corruption in the judiciary directly undermines the rule of law and the ability of the judiciary to guarantee the protection of human rights.

In relation to legal aid, the right to free legal assistance has been proclaimed in a large number of United Nations legal instruments, including the Basic Principles on the Role of Lawyers (hereinafter, “the Basic Principles”) and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (“the UN Principles and Guidelines on Legal Aid”).

The Basic Principles provide that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings (principle 1), and that any person who does not have a lawyer is entitled, in all cases in which the interests of justice so require, to have a lawyer assigned to him or her, “without [any] payment if they lack sufficient means to pay for such services” (principle 6).

In addition, the Basic Principles call on Government to adopt all appropriate measures to ensure that effective and equal access to lawyers is provided “for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status” (principle 2).

Similarly, the UN Principles and Guidelines on Legal Aid provide that States should ensure the provision of legal aid “to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status” (principle 6).

In a report specifically devoted to legal aid (A/HRC/23/43), my predecessor, Ms. Gabriela Knaul, recommended that States consider enacting specific legislation to establish a comprehensive legal aid system that is accessible, effective, sustainable and credible. Such legislation should, inter alia contain a broad definition of legal aid, develop specific criteria to determine eligibility for legal aid, and ensure that effective legal assistance is provided at all stages of the criminal justice process, at the pretrial stage and in any non-criminal judicial or extrajudicial procedure aimed at determining rights and obligations. In relation to the notion of beneficiaries of legal aid, Ms. Knaul concluded that it should not only include defendants in criminal proceedings but should

also include (a) any person whose rights or freedoms have been violated as a result of an act, or a failure to act, perpetrated by a State actor; and (b) any person who participates in judicial or extrajudicial procedures aimed at determining rights and obligations “in a suit at law”.

