

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

REFERENCE:
AL BRA 11/2020

9 October 2020

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 intimidation and judicial harassment against two Brazilian lawyers, Mr. Roberto Teixeira and Mr. Cristiano Zanin Martins, allegedly in connection to the legal assistance they provide to Mr. Luiz Inácio Lula da Silva (hereinafter "Lula"), Brazilian politician and former President of Brazil.

Mr. Roberto Teixeira is an attorney and founding member of *Teixeira Zanin Martins & Advogados* (hereinafter "the law firm"). He has been the legal adviser of former President Lula from the 1980s until 2018, when he left the law firm due to health issues.

Mr. Cristiano Zanin Martins is an attorney and became a partner at *Teixeira Zanin Martins & Advogados* in 2004. Since 2014, he has been providing legal assistance to former President Lula as well as to a number of other public figures and media outlets (including a portal which is very critical of the current President of Brazil, H.E. Mr. Jair Bolsonaro).

The law firm *Teixeira Zanin Martins & Advogados* was established by Mr. Teixeira in 1970. Its lawyers have been involved in a series of high visibility cases in front of Brazilian and international courts. In October 2018, at the request of Mr. Teixeira and Mr. Zanin Martins, the Human Rights Committee awarded interim measures in favour of former President Lula.¹

According to the information received:

"Search and seizure" warrants against the two lawyers

On 9 September 2020, a trial court judge of the Federal Court of Rio de Janeiro, Mr. Marcelo Bretas, issued 75 "search and seizure" warrants against different lawyers and law firms involved in the so-called "Car Wash" operations. In the case of *Teixeira Martins & Advogados*, the warrants requested the search of the

¹ The Committee requested Brazil to take all necessary measures to ensure that Lula could enjoy and exercise his political rights while in prison, as candidate in the 2018 presidential elections. The Committee also requested Brazil not to prevent Lula from standing for election in the 2018 presidential elections, until his appeals before the courts have been completed in fair judicial proceedings.

offices of Mr. Teixeira and Mr. Zanin Martins at the law firm premises, as well as the search of their personal residences.

The aim of the warrants was to ascertain the kind of services provided by the law firm to the *Federação do Comércio do Rio de Janeiro (Fecomércio-RJ)*, a private entity which embodies the interests of over 320 thousand commercial establishments within the State of Rio de Janeiro.² The judge considered the fees paid by *Federação do Comércio* to its legal representatives to be excessive, but did not indicate why they were deemed to be too high.

It is alleged that the overly generic nature of the search and seizure warrants issued by the judge was indicative of an intention to harass and intimidate Mr. Teixeira and Mr. Zanin Martins for the professional support they provide to Mr. Lula. The open support of the judge to the current President of Brazil raises concerns as to whether Mr. Bretas possesses the necessary independence and impartiality to adjudicate on this case (see section (d) below).

All the search warrants issued by judge Bretas against the different law firms and lawyers were carried out simultaneously on 9 September 2020.

The search at the premises of *Teixeira Zanin Martins & Advogados* started around 6 a.m. and lasted approximately until 12pm, while operations at the residences of Mr. Teixeira and Mr. Zanin Martins started around 7 a.m. and lasted approximately 3 hours. The search warrants were executed by Federal Police agents and Federal Revenue agents. A federal prosecutor was also present during the search at the law firm premises.

Members of the Prerogatives Commission of the São Paulo Bar Association (OAB/SP) were present during the search of the law firm, but did not participate in the search of Mr. Zanin Martins (see section (b) below).

During the search at Mr. Zanin Martins' house, the police allegedly said they were searching for a "weapon". However, the search for a weapon was completely outside the formal purpose of the "search and seizure" warrant. According to the complainant, such circumstance reinforces the allegation that the warrant was issued in an overly general form with the purpose of finding a valid reason to prosecute the legal counsel of former President Lula.

During the search at the law firm premises, the Federal Police and the Federal Revenue Service seized a number of documents (including about 50 notebooks with work material that were found next door from Mr. Zanin Martins' office). At Mr. Zanin Martins' residence, the agents seized an external hard drive (containing confidential material regarding former President Lula's case), cell phones, and other documents.

² *Teixeira, Martins & Advogados* provided legal services to *Federação do Comércio do Rio de Janeiro* since 2014. According to its control system, 77 different legal professionals at the law firm provided some 12,000 hours of work in favour of the *Federação do Comércio*, and produced more than 1,400 legal documents (petitions and other legal documents). This control system has reportedly been subjected to an independent audit to attest its integrity.

Allegedly, a large number of journalists were outside the premises of the law firm when the Federal Police and the Federal Revenue Service arrived to carry out the “search and seizure” warrants. It appears that the State agents themselves leaked information to the press, in the attempt of discrediting the two lawyers in front of their peers, clients and the general public. It is also reported that two Federal Police helicopters flew over the law firm and the residences of the two lawyers during the execution of the warrants.

The search was also widely covered on the Brazilian and foreign press. As has been the case in relation to other persons involved in the “Car Wash” operation, confidential information on the two lawyers, their practice and their clients was reportedly leaked to the press. This contributed to reinforcing the idea in the general public of the culpability of the two lawyers, in violation of the presumption of innocence.

The allegation that the attacks against the two lawyers are closely related to the role they played in the “Car Wash” operation seems to be reinforced by a news report published by the legal magazine *Consultor Jurídico* (CONJUR) on 10 September 2020. According to this report, a person charged in the context of the “Car Wash” operation had been induced to accuse Mr. Teixeira and Mr. Zanin Martins, and his testimony was apparently used to issue the “search and seizure” warrant against the two lawyers and to initiate criminal proceedings against them in the context of “Car Wash” operation.

Report of the São Paulo Bar Association

On 14 September 2020, the Prerogatives Commission of the São Paulo Bar Association (OAB/SP) issued a report on the “search and seizure” operations carried out at the premises of the law firm *Teixeira Zanin Martins & Advogados* and at the private homes of Mr. Teixeira and Mr. Zanin Martins.

The report concluded that

- 1) the warrant was “rather generic” since it described “only the suspects under investigation and the authorised measures (...), without, however, describing the scope of the investigation”;³
- 2) the judicial decision authorising the search was not made available to the members of the Commission, who had been allegedly informed by the Chief of Federal Police that the investigation concerned “the contracts signed with *Fecomércio/RJ* and entities members of *Sistema ‘S’*”;

³ In this regard, the report pointed out that according to article 7, item II, of the Brazilian Bar Association Bylaws, the inviolability of the law office is one of the basic rights of lawyers which can only be dismissed on the basis of a well-grounded judicial decision and with the issuance of a specific search and seizure warrant.

- 3) upon request of the members of the Commission, a number of devices, such as flash drives and an SSD hard drive of Mr. Zanin Martins and the hard drive of Mr. Roberto Teixeira's computer, were ultimately not removed from the office, and the consultation of data they contained was carried out by a criminal expert on the spot;
- 4) during the search operation, computers, electronic devices and files of lawyers not covered by the judicial warrant were also searched by the police and collected from their offices. While some of the documents and devices were finally returned since they were not covered by the judicial warrant, the documents collected from the office adjoining that of Mr. Zanin Martins were finally seized by the police;
- 5) members of the Commission were not present during the search operations at Mr. Zanin Martins's home, despite the fact that the supervision of OAB/SP representatives is required by national legislation for the execution of searches and seizures at the professional and private premises of members of the Bar.

Criminal charges against Mr. Teixeira and Mr. Zanin Martins

On 9 September 2020, the same day of the execution of the “search and seizure” warrants, the prosecutor in charge of the “Car Wash” operation brought charges against Mr. Teixeira and Mr. Zanin Martins, accused of being the leaders of a criminal organisation “essentially composed of lawyers” that embezzled BRL 151 million reais (approximately USD 26.903.000) under the cover of payment of attorney fees. Mr. Zanin Martins was charged of 278 crimes, allegedly in an attempt to intimidate him and undermine his professional image.

At 7.15 a.m., while the search warrants were executed at the premises of the law firm *Teixeira Zanin Martins & Advogados*, the media relations of the “Car Wash” Federal Prosecution Service published on its website a press release to disclose that the criminal charges had been brought against Mr. Teixeira and Mr. Zanin Martins.⁴ The press release included pictures of the two lawyers, and was accompanied by the disclosure of sensitive information, such as the lawyers' home addresses and confidential material related to their clients that is protected by the attorney/client privilege.

Allegedly, the two lawyers were charged without being questioned by the police or the prosecution service. Consequently, they were deprived of the possibility to clarify the nature of the legal services they provided to their clients, the attorneys' fees they had received and the taxes they had regularly paid on these fees.

On 9 September, the prosecution service also requested the judge in charge of the “Car Wash” operation, judge Bretas, to confiscate BRL 302 million reais (approximately USD 53.805.000) from the two lawyers. The amount, which correspond to twice the amount allegedly embezzled, was to repair the moral

⁴ <http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/lava-jato-rj-operacao-e-quema-s-constata-desvio-de-mais-de-r-150-mi-do-sesc-e-senac-rj>

and material damages caused by the infractions. The following day, judge Bretas ordered the freeze of all the bank accounts belonging to the two lawyers, as well as the accounts of their law firm. It is alleged that the freeze was part of a wider strategy aimed at discrediting the two lawyers in the press, as well as at forcing them to close down their law firm.

On 3 October 2020, Justice Gilmar Mendes – the judge-rapporteur in charge of the “Car Wash / Rio de Janeiro” operation at the Federal Supreme Court – accepted a submission presented by the Bar Association on behalf of lawyers affected by the “search and seizure” operations, and suspended the criminal proceedings against Mr. Teixeira and Mr. Zanin Martins until the Federal Supreme Court reaches a final decision on the legality of the search operations and criminal charges.

According to Justice Mendes, there was a suspicion that judge Bretas and the prosecutors of “Car Wash / Rio de Janeiro” operation carried out clandestine investigations on events that fell outside their jurisdiction, thereby usurping the jurisdiction of Superior Courts of Brazil.

Justice Mendes also ordered that the devices and files seized at the premises of the law firm and in the private residences of the two lawyers not be made available to the prosecution service before a final decision on the legality of the legal proceedings is reached.

Alleged lack of independence and impartiality of judge Bretas

It is alleged that the “search and seizure” warrants issued by judge Bretas were closely linked to the criminal charges brought against Mr. Teixeira and Mr. Zanin Martins on the same day, and aimed at identifying a legal justification to prosecute the two lawyers.

In this regard, serious concerns have been raised in relation to the personal independence and impartiality of judge Bretas.

It appears that the judge is a strong supporter of the current President of Brazil. On a number of occasions, he is said to have expressed his support to President Bolsonaro and his political party in the social media.⁵ Judge Bretas also appears to have participated side by side with the President or other Government officials in a number of public political events, and on one occasion he reportedly travelled to the event in the same vehicle as the President.⁶

The Brazilian Bar Association initiated a disciplinary procedure against the judge in relation to his participation, on 15 February 2020, in the inauguration of a public construction work alongside President Bolsonaro and his political

⁵ <https://politica.estadao.com.br/noticias/eleicoes,marcelo-bretas-curte-publicacoes-de-bolsonaro-nasredes-sociais,70002425863>

⁶ <https://oglobo.globo.com/brasil/cada-vez-mais-proximo-bolsonaro-bretas-usa-ate-carro-oficial-dapresidencia-24252559>

ally, the Mayor of Rio de Janeiro. In its submission, the Bar Association argued that the open support shown by the judge to the President of Brazil was incompatible with his professional obligations as a judge. On 17 September 2020, the Special Body of the Federal Regional Court of the 2nd Region (TRF2) found, by a majority of 12 to 1, that judge Bretas violated the rules of professional conduct through acts of “overexposure” and “self-promotion”.⁷

Brazilian media speculate that Judge Bretas would be a candidate for some positions that will be opened in the near future at the Federal Supreme Court. According to the Federal Constitution, such positions must be filled on the basis of a recommendation made by the President of Brazil.⁸

Without prejudging the accuracy of the information made available to me, I would like to express my concerns at the the search, criminal prosecution and freeze of assets belonging to Mr. Roberto Teixeira and Mr. Cristiano Zanin Martins, allegedly in connection to the legal assistance they provide to the former President of Brazil. The alleged intimidation and judicial harassment against the two lawyers appear to be part of a wider strategy aimed at intimidating lawyers who are linked to opposition parties or otherwise represent members of opposition parties.

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/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the execution of the “search and seizure” warrants against the lawyers at Teixeira Zanin Martins & Advogados, and explain whether the searches were conducted in respect of the guarantees that national legislation and international standards recognize to individual lawyers and to the professional organisations that protect their interests. Please comment, in particular, on the allegations that (1) the judicial decision authorising the search was not made available to the members of the Commission, (2) the search operation at the law firm led to the seizure of electronic devices and files of lawyers not covered by the judicial warrant, and (3) members of the Bar association were not present during the search of Mr. Zanin Martin’s residence.

⁷ The decision has not yet been published, but the trial has been monitored and registered by various outlets of the media in Brazil, including those specializing in covering legal events, such as websites *Consultor Jurídico* and *Migalhas*: see <https://www.conjur.com.br/2020-set-17/trf-condena-bretas-participar-atos-lado-bolsonaro> and <https://migalhas.uol.com.br/quentes/333546/trf-2-aplica-pena-de-censura-a-bretas-por-participar-de-atos-com-bolsonaro>

⁸ <https://epoca.globo.com/brasil/marcelo-bretas-alem-da-toga-24262484>

3. Please provide detailed information on the charges brought against Mr. Teixeira and Mr. Zanin Martins by the prosecutor in charge of the “Car Wash” operation, and explain whether the two lawyers had been questioned by the police or the prosecution service before the charges were pressed and brought to the attention of the press.
4. Please comment on the allegation that information about the search operation and the charges brought against the two lawyers was leaked to the press as part of a wider negative campaign against the two lawyers defending the former President of Brazil, and explain how this is compatible with the general obligation of Brazilian authorities to adopt all appropriate measures to ensure that lawyers are not identified with their clients or their clients’ causes as a result of discharging their functions.
5. Please provide information on the decision adopted by judge Bretas to order the freeze of all accounts belonging to the two lawyers and their law firm.
6. Please provide information on the decision adopted by Justice Gilmar Mendes on 3 October 2020 to suspend the criminal proceedings Mr. Teixeira and Mr. Zanin Martins until against the Federal Supreme Court reaches a final decision on the legality of the search operations and criminal charges against the two lawyers. Please comment on the allegation Justice Gilmar made that judge Bretas may have made a secret agreement with the prosecutors of “Car Wash / Rio de Janeiro” operation to investigate on events that fell outside their jurisdiction.
7. Please provide detailed information on the results of the disciplinary procedure initiated against judge Bretas in relation to his alleged violation of the rules of professional conduct. Has judge Bretas been requested to recuse himself followed the decision taken by the Special Body of the Federal Regional Court of the 2nd Region (TRF2) on 17 September 2020? If not, what measures can be adopted in accordance to national legislation to eliminate the conflict of interest between the judge’s political ties and his duty to adjudicate impartially?
8. Please provide information on the measures that your Excellency’s Government has taken, or intends to take, to ensure the independence of the judiciary and to enable lawyers to perform their professional functions freely and without any intimidation, threat, harassment or improper interference.

This communication and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 60 days. 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.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

In connection with above alleged intimidation and judicial harassment against the two lawyers, I would like to draw your attention to the International Covenant on Civil and Political Rights (ICCPR), acceded by Brazil on 24 January 1992, and to the Basic Principles on the Role of Lawyers.

Article 14 provides a set of contain procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing. The right of access to a lawyer is a right in itself and an essential precondition for the exercise and enjoyment of a number of other rights enshrined in the Covenant, including the right to liberty and security of person, the right to a fair trial and the right to an effective remedy.

They require States to adopt all appropriate measures to ensure that lawyers are able to perform all of their professional functions “without intimidation, hindrance, harassment or improper interference”.

I would also like to refer your Excellency’s Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990.

The Basic Principles represent the most comprehensive international normative framework for the safeguard of the right of access to legal assistance and the independent functioning of the legal profession. The Basic Principles clearly recognise that the primary obligation to protect lawyers and enable them to exercise their functions freely lies with the State authorities.

Principle 16 requires Governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent that lawyers be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

In relation to the alleged lack of independence and impartiality of judge Bretas, I would like to refer to the International Covenant on Civil and Political Rights (ICCPR), to the Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct.

Article 14 of the Covenant provides that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law”. Your country’s adherence to the Covenant requires State institutions adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.

In its General Comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; 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 the legislature. 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).

With regard to the impartiality of the judge, I would like to draw your attention to the Bangalore Principles on Judicial Conduct, endorsed by the Economic and Social Council in ECOSOC resolution 2006/23.

Value 2 underscores that impartiality “is essential to the proper discharge of the judicial office” and applies “not only to the decision itself but also to the process by which the decision is made”.

The Commentary to the Bangalore Principles explain that independence and impartiality are mutually reinforcing attributes of the judicial office: independence is the necessary precondition to impartiality and is a prerequisite for attaining impartiality. A judge could be independent but not impartial (on a specific case by case basis); however, a judge who is not independent cannot, by definition, be impartial (on an institutional basis).

Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge’s behaviour on the bench, or his or her associations and activities outside the court.

If a judge appears to be partial, public confidence in the judiciary is eroded. Therefore, a judge must avoid all activity that suggests that the judge’s decision may be influenced by external factors such as a judge’s personal relationship with a party or interest in the outcome of a case. In deciding whether there is legitimate reason to fear that a particular judge in a criminal case lacks impartiality, the standpoint of the accused

is important but not decisive. What is decisive is whether this fear can be held to be objectively justified before the reasonable observer who represents society.

In relation to political activism, the Commentary to the Bangalore Principles clearly acknowledges that “partisan political activity or out-of-court statements concerning issues of a partisan public controversy by a judge may undermine impartiality and lead to public confusion about the nature of the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other hand”. A judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary. The perception of partiality “will be reinforced if, as is almost inevitable, the judge’s activities attract criticism or rebuttal”.