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

REFERENCE:
AL RUS 9/2020

15 December 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 44/8.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **judicial harassment against a Ukrainian lawyer, Ms. Lilia Ibrahimovna Hemedzhy, allegedly as a result of the legitimate exercise of the legal profession.**

Ms. Hemedzhy is a lawyer of Crimean Tatar origin who resides in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation (hereinafter – Crimea).[1] She is a member of the Bar Association of the Chechen Republic, and is admitted to practice law in the Russian Federation. Ms. Hemedzhy often represents Crimean Tatar defendants in high-profile cases in Crimea and the Russian Federation.

According to the information received:

Ms. Hemedzhy is the defence lawyer of eight Crimean Tatar men accused of being members of a terrorist organisation for their alleged involvement in the activities of *Hizb ut-Tahrir*, a religious organisation banned under Russian law.

In August 2019, the pre-trial investigation on the defendants was completed, and the case was referred to the Yuzhnyi circuit military court of the Russian Federation, based in Rostov-on-Don, for consideration on merits.

During the trial, which lasted almost one year, the three-judge panel allegedly showed bias towards the defence lawyer. On several occasions (for instance, at the hearings that took place on 4 December 2019, 14 January 2020 and 20 January 2020, the judges reportedly "cautioned" Ms. Hemedzhy for "over eagerness" during witness cross-examinations, for polemicising with the court and for "violating the court order".

On 17 August 2020, during the course of a hearing, Ms. Hemedzhy – who participated by videoconference from Crimea during the travel restrictions caused by the COVID-19 pandemic – motioned the court to summon a witness. When the prosecutor objected to her request, she asked the court to make a rebuttal comment ("replika"). As the panel of judges did not respond to her

[1] References to Crimea should be read in accordance with General Assembly resolution 68/262, in which the General Assembly affirmed its commitment "to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognised borders" (para. 1).

request, Ms. Hemedzhy allegedly reiterated her request several times, to no avail.

Having received no response, Ms. Hemedzhy said: "I interpret your silence as a permission for me to speak". It is worth noting that the lawyer could only see one of the judges on her computer screen, as the other two judges outside the scope of the video camera.

Following her intervention, the presiding judge reportedly said that Ms. Hemedzhy had interrupted his deliberation with another judge, and adjourned the hearing. The defence lawyer tried to explain that she could not see that the judges were deliberating because they were not framed by the video camera, but the judges did not reportedly take her comments into account.

Shortly after, on that same day, the court issued a "special ruling" ("chastnoye opredeleniye") to sanction Ms. Hemedzhy's behaviour, which disrupted the court's proceedings and constituted, according to the judges, a contempt of court.

The three-page special ruling detailed various instances in which Ms. Hemedzhy acted in contempt of court, including the event that took place on 17 August 2020, described as "making statements during the deliberation of judges without their permission". Other examples of the lawyer's alleged misconduct included interrupting witness testimonies, making unauthorised comments or facial expressions to disagree with the decisions of the court, or otherwise polemicising with the judges or the prosecutor.

In the same ruling, the military court also requested the Bar Association of the Chechen Republic of the Russian Federation to "take notice" of the alleged misconduct of their member and inform the court about the actions taken. Ms. Hemedzhy now faces the risk of disciplinary measures, including disbarment.

On 26 August 2020, Ms. Hemedzhy appealed against the special ruling before the appellate military court of the Russian Federation.

The hearing took place via videoconference on 27 October 2020. Allegedly, the appellate military court rejected the request made by Ms. Hemedzhy's lawyer to have access to the transcripts and the audio recordings of the court hearing of 17 August 2020, when the alleged disruption of court proceedings took place.

On the same day, following a pro forma hearing, the Appellate military court upheld the special ruling of the court of the first instance.

Allegedly, the special ruling has had a chilling effect on the discharge of Ms. Hemedzhy's professional duties. Fearing additional sanctions, Ms. Hemedzhy decided to practice self-censorship by shortening her closing remarks in *Hizb ut-Tahrir* case, so as to avoid upsetting the judges with any statement or behavior that the court "may not like".

Without prejudging the accuracy of the information made available to me, I would like to express my serious concerns at the alleged intimidation and the sanctions imposed on Ms. Hemedzhy as a result of the legitimate exercise of her professional functions. I am also concerned that on the basis of these sanctions, Ms. Hemedzhy may be subject to disciplinary proceedings before the Bar Association of the Chechen Republic, which may result in the imposition of disciplinary measures, including disbarment.

If confirmed, these facts would be in breach of the guarantees that lawyers are entitled to in order to perform their professional functions without any threat, intimidation, harassment or interference, and without suffering, or being threatened with, prosecution or any administrative or disciplinary sanctions for actions undertaken in accordance with professional duties and ethical standards. In particular, international standards provide that lawyers should not be subject to civil, criminal or disciplinary liability for statements made in good faith in written or oral pleadings or in their professional appearances before the judicial authority.

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 and clarify all cases brought to our attention, I would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.

2. Please provide information on the circumstances that led to the adoption of the special ruling of the circuit military court, and explain why Ms. Hemedzhy's explanations concerning her alleged interruption to the deliberation process were not taken into account by the three-judge panel.

3. Please explain to what extent the special ruling on the contempt of court can be regarded in the present case as a legitimate sanction that is proportionate to the alleged misconduct perpetrated by the lawyer.

4. Please comment on the alleged violations of the fair trial rights that have prevented or limited the right of Ms. Hemedzhy to defend from the alleged contempt of court before the appellate military court. Can the decision of the appellate military court be appealed before a civilian court?

5. Please provide detailed information on the measures adopted to ensure the independence and impartiality of military courts, and to ensure that defendants and their legal counsels are granted all the fair trial guarantees set out in article 14 of the International Covenant on Civil and Political Rights.

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.

In accordance with General Assembly resolution 68/262 on the territorial integrity of Ukraine, and taking into account General Assembly resolutions 71/205, 72/190, 73/263 and 74/168 on the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, I wish to inform you that a copy of this letter will also be sent to the authorities of Ukraine for their information.

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 facts and concerns, I would like to draw your attention to the International Covenant on Civil and Political Rights (ICCPR), ratified by the Russian Federation on 16 October 1973.

In its General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, the Human Rights Committee observed that States Parties are required by article 2(1) to respect and to ensure the Covenant rights "to all persons who may be within their territory and to all persons subject to their jurisdiction". This means that a State party must respect and ensure the rights laid down in the Covenant to "anyone within the power or effective control of that State Party", even if not situated within the territory of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained… (para. 10).

In resolution 74/168 and previous resolutions on the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, the General Assembly urged the Russian Federation to, inter alia, "uphold all of its obligations under applicable international law as an occupying Power" (para. 6 (a)).

I would like to draw your attention to article 14 (1) of the ICCPR, which sets out a general guarantee of equality before courts and tribunals and the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law.

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 observed that the right to equality before courts and tribunals guarantees, in general terms, equal access and equality of arms (para. 8). This means that "the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant" (para. 13). The Human Rights Committee stressed that the principle of equality between parties demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.

With regard to the right to a fair trial before an independent and impartial tribunal previously established by law, the Human Rights Committee underscored in General Comment No. 32 that the provisions of article 14 apply "to all courts and tribunals (…) whether ordinary or specialised, civilian or military". In relation to military courts, the Committee observed that while the Covenant does not prohibit the trial of civilians in military courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned", and should therefore be "exceptional". In cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, the State must take "all

necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14" (para. 22).

Former Special Rapporteur Gabriela Knaul considered the issue of military tribunals in one of her reports to the General Assembly to (A/68/285). The report concludes that military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards. They should have jurisdiction only over military personnel who commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations. In order to ensure the independence and integrity of the justice system, States have the obligation to guarantee that ordinary tribunals are independent, impartial, competent and accountable. Failure to do so cannot be used as a justification for the use of military or special tribunals to try civilians (paras. 88-90).

In General Comment No. 32, the Human Rights Committee stressed that the requirement of independence and impartiality of a tribunal in the sense of article 14 (1) of the Covenant "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" (para. 19). The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial (para. 21).

The Bangalore Principles of Judicial Conduct, endorsed by the Economic and Social Council in ECOSOC resolution 2006/23, recognise 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" (value 2). According to this principle, a judge must perform his or her judicial duties "without favour, bias or prejudice" (value 2.1) and ensure that his or her conduct, both in and out of court, "maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary (value 2.2). A judge must also refrain from making any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process (value 2.4).

In a report on the protection of lawyers and the independence of the legal profession (A/71/348), former Special Rapporteur Monica Pinto noted that the misuse of contempt of court charges raises serious concern in relation to the exercise of freedom of expression by lawyers. Although contempt of court represents an important mechanism for preserving the authority and dignity of judges and courts, its use for restricting the ability of lawyers to give their opinions on decisions taken by judicial authorities is particularly troublesome (para. 58). The Special Rapporteur noted that contempt of court should only be used to prevent interference with the administration of justice, not as a tool to hinder criticism of judicial organs in a democratic context,

and recommended the enactment of legislation to define a clear and precise scope for the offence of contempt of court, identifying behaviours constituting contempt of the court and setting up a procedure to deal with such cases.

The Commentary on the Bangalore Principles of Judicial Conduct, published by the United Nations Office on Drugs and Crime in September 2007, underscores that "contempt should be used as a last resort, only for legally valid reasons and in strict conformity with procedural requirements". The abuse of contempt power is "a manifestation of bias", that may occur when a judge has lost control of his or her own composure and attempts to settle a personal score, especially in retaliation against a party, advocate or witness with whom the judge has been drawn into personal conflict (para. 59).

At the regional level, the European Court of Human Rights has issued several judgments on the relationship between freedom of expression and the offence of contempt to court. In the case of *Schöpfer v. Switzerland*, the European Court of Human Rights acknowledged that in the exercise of their right to freedom of expression, "lawyers are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds" (Judgment of 20 May 1998, para. 33). In *Kyprianou v. Cyprus*, the European Court considered that the penalty of five days' imprisonment inflicted on the lawyer for contempt of court "was disproportionately severe on the applicant and was capable of having a 'chilling effect' on the performance by lawyers of their duties as defence counsel". The judges therefore concluded that the national court had failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression (Judgment of 15 December 2005, para. 181).

Finally, I would 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.

Principle 16 requires Governments take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. In particular, lawyers should not be subject to, or threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Principle 20 provides that lawyers must enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

Principle 21 establishes the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

With regard to disciplinary proceedings against lawyers, rules for the conduct of disciplinary proceedings against lawyers are set forth in principles 27 to 29. Principle 27 establishes that charges or complaints made against lawyers in their professional capacity "shall be processed expeditiously and fairly under appropriate procedures", and that lawyers shall have "the right to a fair hearing, including the right to be assisted by a lawyer of their choice". Principle 28 provides that disciplinary proceedings against lawyers "shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court", and shall be subject "to an independent judicial review". Finally, principle 29 provides that disciplinary proceedings "shall be determined in accordance with the code of professional conduct and other recognised ethical standards of the legal profession".

In her report on the protection of lawyers and the independence of the legal profession (A/71/348), former Special Rapporteur Monica Pinto stressed that the establishment of an independent system for the consideration of disciplinary proceedings for alleged violations of the rules of professional ethics is an important factor in the independence of the legal profession (para. 94). With regard to sanctions that may be imposed on lawyers, the mandate holder stressed that disbarment, which consists in taking away a lawyer's licence to practice law, possibly for life, should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer (para. 96).