

Mandates of the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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(Please use this reference in your reply)

22 March 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolutions 53/12 and 52/9.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning Palestinian citizens of Israel (PCIs) who are lawyers; Israeli lawyers who oppose the ongoing Israeli armed attack in Gaza; PCI and Israeli judges who have released individuals detained for their speech or activities in support of Palestinians or in opposition to the Israeli armed attack in Gaza.

Since early October 2023, Palestinian citizens of Israel (PCIs) who are lawyers and Israeli lawyers who oppose the ongoing Israeli armed attack in Gaza, have encountered harassment from other members of the legal profession and were the subject of complaints to the Israeli Bar Association for their public speech. In addition, judges have been attacked online following decisions they made to release individuals who were arrested for their speech or activism.

According to the information received:

Harassment of Lawyers

On October 12th, the Israeli Bar Association sent an email to all registered lawyers stating that the National Ethics Committee would have “zero tolerance” for any lawyer who published content on their personal social media accounts that was perceived to be “incitement to violence”, and that the Committee would pursue legal action against such lawyers. The letter did not specify what kinds of statements would count as incitement.

On 15 October, the Israeli Bar Association issued a public statement signed by its Chair, stating that the Bar had received many complaints regarding a lawyer who published social media posts “supporting terrorism and displaying public identification with the terrorist organization Hamas”. The statement continued that the Bar would do everything in its power to revoke the lawyer's license and remove the lawyer from the Bar. The statement concluded by saying that the Bar Association is examining the possibility of advancing new emergency regulations to allow for the immediate suspension of lawyers in such cases.

On 18 October, the Deputy Chairman of the Israel Bar Association posted a message on his official Facebook account stating that the Ethics Committee of the Bar Association submitted new emergency regulations to the Minister of

Justice. These regulations would apparently grant the Ethics Committee the authority to immediately suspend lawyers suspected of “supporting terrorism”.

In this context, the Bar Association’s email was perceived to be intended to suppress speech in support of Palestinians or in opposition to the attacks in Gaza from those in the legal profession.

Since the Bar Association issued its statement on October 12th, many lawyers who are Palestinian citizens of Israel (PCI) or Israeli lawyers who have expressed support for Palestinians had numerous complaints against them submitted to the Ethics Committee of the Bar Association, or sometimes to the police, based solely on their exercise of free speech. Some lawyers have threatened other lawyers by saying, via social media, that they will report them to the Ethics Committee for their support of Palestinians. For example, one Israeli lawyer has shared numerous posts on her public Facebook account naming specific PCI lawyers, calling for mass submission of complaints against them, and noting the number of complaints the posting lawyer and others had already submitted to both the Ethics Committee and Israeli police. These posts stated that named PCI lawyers were “supporting terrorism” and committing “incitement to violence.” In some cases, lawyers even called for violence against other named lawyers.

The information further suggests that these threats and complaints against Palestinian and other lawyers may severely damage these lawyers’ safety, reputation, relationship with colleagues, credibility with clients, and ability to carry out their work. For this reason, reports suggest that many lawyers have started censoring their speech and professional conduct due to the fear instilled by this suppression of their rights and the distrust it has created among colleagues and clients. Some PCI lawyers representing Palestinian detainees have also reported that they have experienced a growing level of disrespect and mistreatment from police officers and fellow lawyers during client visits, making it difficult for them to properly defend their clients.

According to the information, the Bar Association has not taken any public action concerning lawyers making threats against other lawyers.

Public Accusations Against Judges

Since early October, elected and appointed Israeli officials have accused Israeli judges of supporting or sympathizing with Hamas following decisions they made to release individuals detained for their statements or activism. For example, a Knesset member whose name has been withheld from this letter tweeted that a judge “sympathized” with Hamas supporters after the judge decided to release two Palestinian workers who had chanted a statement approving the October 7 Hamas attack on the grounds that their arrest was inappropriate as it was for “expression offences”.

In another example, Itamar Ben-Gvir, Israel’s Minister of National Security, labeled a judge a “domestic enemy” on Twitter because the judge had ordered the release of an individual who posted images on social media that appeared to approve of the Hamas attack, on the grounds that such posts did not justify detention.

In another case, Minister Ben-Gvir claimed on social media that a judge was an “enemy from within” following the judge’s order to release an Israeli activist who had been apprehended by the police under suspicion of engaging in conduct that could disturb the public peace, after a police search of the activist’s home uncovered Palestinian flags and posters supporting Palestinian security prisoners that he had used in previous demonstrations.

The information suggests that these social media posts with accusations by public officials against judges present a security risk for the judges’ safety and for the integrity of the judicial process.

While we do not wish to prejudge the accuracy of these allegations, we express our serious concern at reports that Palestinian citizens of Israel and Israeli lawyers who have expressed their support for Palestinians or opposition to the assault on Gaza are facing harassment from other members of the legal profession and have become the subject of complaints to the Israeli Bar Association. Additionally, reports concerning the proposed emergency regulation by the Bar Association appear to present an acutely high risk of such undue interference with the free exercise of the legal profession, provided for in international human rights standards. Further, we are concerned that the allegations described above may have a chilling effect on the freedom of expression of lawyers. We are particularly concerned that the emergency regulation stifles freedom of expression of lawyers by unduly labeling statements in support of Palestinians or critical of Israeli policies as ‘incitement to violence’.

The legal profession and its free exercise are an essential element of the rule of law, the protection of human rights and the functioning of an independent judicial system. It contributes to ensuring access to justice, oversight of state power, protection of due process and judicial guarantees. According to international standards, States must guarantee that those who practice law can do so free from intimidation, obstacles, harassment or interference.

In relation to judges, we are concerned that some judges have been publicly smeared by Israeli government officials following decisions they made to release individuals whom they found to have been unlawfully detained. We take this opportunity to highlight that according to international standards, it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

These attacks are of special concern when they come from government officials. Some of these statements by government officials, when directed against specific judges for particular decisions, may amount to interference in the independence the judiciary. We recall in addition that public officials should not make statements that are likely to promote intolerance, discrimination or dis/misinformation and should, instead, take advantage of their leadership positions to counter these social harms and to promote intercultural understanding and respect for diversity.

In the context of the cases mentioned in this communication, we wish to underline the importance of upholding freedom of expression while prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in accordance with the six-part threshold test proposed by the Rabat Plan of Action (A/HRC22/17/Add.4)

Any restriction of the freedom of should only be such as are provided by law, pursue a legitimate aim, and are necessary and proportional, in line with the requirements of Article 19 (3) of the International Covenant on Civil and Political Rights.

Incitement and threats against judges and lawyers are an attack at the rule of law, jeopardize the judges' and lawyers' personal and professional interests, and undermine judicial independence.

Online attacks create a hostile environment for lawyers and judges seeking to play their important role in the legal system aimed at upholding the rule of law. If confirmed, the lack of protection from harassment suffered by lawyers and judges exercising their functions described in the allegations would amount to a breach of a number of international and regional standards relating to the free and independent exercise of the legal profession.

States must put in place all appropriate measures to ensure that lawyers are not subject to, or threatened with, prosecution, revocation of their licenses, or any administrative, economic, or other sanctions for any action taken in accordance with recognized professional duties, standards, and ethics. International and regional standards also expressly prohibit the identification of lawyers with their clients or their clients' causes in the discharge of their professional duties.

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 our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we 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 about how the Israeli Bar Association's proposed emergency regulation does not violate lawyers' rights to due process and freedom of expression in line with Articles 14 and 19 of the ICCPR.
3. Please provide information about the due process safeguards afforded to lawyers who are subject to discipline by the Bar Association Ethics Committee. Please also specify what judicial review is available to lawyers who have been disciplined by the Bar Association.
4. Please provide detailed information on measures adopted by Israel to ensure the protection of judges and lawyers facing threats and intimidation in relation to their work and their expression.

We would appreciate receiving a response within 60 days. Past 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, we 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.

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

A copy of this letter will be transmitted to the Government of the State of Palestine.

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

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above. In particular, we would like to highlight the relevant provision of the International Covenant on Civil and Political Rights (ICCPR), which Israel ratified on the 3 October 1991, the Convention on the Elimination of Racial Discrimination (CERD), ratified by Israel on 3 January 1979, as well as the Universal Declaration of Human Rights, which reflects customary international law.

We would like to recall that article 19 of the ICCPR guarantees the right to opinion and expression. In the General Comment 34, the Human Rights Committee stated that States parties to the ICCPR are required to guarantee the right to freedom of opinion and expression, including inter alia 'political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism', subject only to admissible restrictions as well as the prohibition of propaganda for hatred and incitement to hatred, violence and discrimination.

Restrictions on the right to freedom of expression must be compatible with the requirements set out in article 19 (3), that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate. The State has the burden of proof to demonstrate that any such restrictions are compatible with the Covenant. An attack on a person because of the exercise of his or her freedom of opinion or expression, including arbitrary arrest, torture, threats to life and killing, cannot be compatible with Article 19. (GC34 paragraph 23)

As to incitement and hate speech, article 20 of ICCPR stipulates that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"; while article 4 of CERD provides that State parties will "(...)undertake to adopt immediate positive measures designed to eradicate all incitement to, or acts of, such discrimination and to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention (...)".

Further, the CERD Committee has noted that the chapeau of article 4 incorporates the obligation to take "immediate and positive measures" to eradicate incitement and discrimination, a stipulation that complements and reinforces obligations under other articles of the Convention to dedicate the widest possible range of resources to the eradication of hate speech. In general recommendation no. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee summarized "measures" as comprising "legislative, executive, administrative, budgetary and regulatory instruments...as well as plans, policies, programmes and regimes". (CERD/C7GC/35, paragraph 10).

The Committee has recalled the mandatory nature of article 4, and observed that during the adoption of the Convention, it "was regarded as central to the struggle against racial discrimination", an evaluation which has been maintained in Committee practice. CERD noted article 4 also underlined "the international community's

abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society” (CERD/C7GC/35, paragraph 10).

As it relates the right to a fair trial, article 14(1) of the ICCPR 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 addition, article 14 of the ICCPR encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice; and provides a set of procedural guarantees that must be made available to all persons, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing.

In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. She should also be able “to advise and to represent persons charged with a criminal offense in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter” (CCPR/C/GC/32, para. 34).

We also bring to your attention the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (A/HRC/22/17/Add.4), which recalls that “under international human rights standards, which are intended to guide legislation at the national level, expression labeled as “hate speech” can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds, including respect for the rights of others, public order, or national security. States are also obliged to “prohibit” expression that amounts to “incitement” to discrimination, hostility or violence (art. 20, para. 2, of the Covenant and, under some different conditions, art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination)”. The Plan of Action, proposes a six-part threshold test was proposed for expressions considered as criminal offenses:

(a) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) Speaker: The Speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed;

(c) Intent: article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of

material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) Content and form: The content of the speech constitutes one of the key foci of the court's deliberation and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

We 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 (Havana, Cuba), 27 August-7 September 1990.

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.

Principle 18 provides that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. This principle must be read in conjunction with principle 16(c), referred to above, which requires national authorities to adopt all appropriate measures to ensure that lawyers are not subject to, or threatened with prosecution or any other administrative, economic or disciplinary sanctions for actions undertaken in good faith in the exercise of their professional duties and responsibilities.

Principle 23 entitles lawyers to freedom of expression, belief, association, and assembly. This principle expressly recognizes the right of lawyers to engage in public discussion of matters pertaining to the law, administration of justice, and protection of human rights, without professional consequences as long as their conduct remains in accordance with the law and the ethical standards of the profession. Under A/HRC/RES/12/16, protecting the speech of lawyers working on human rights

matters is of paramount importance, as “the exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, ... and is instrumental to the development and strengthening of democratic systems.” Especially where lawyers exercise their right to free speech while acting as human rights defenders, States should “take all measures necessary to ensure [their] rights and safety.” (A/HRC/RES/31/32).

Principle 27 also requires that lawyers receive due process protections when facing charges or complaints made against them in their professional capacity. These protections must be in line with international standards, including that complaints are processed expeditiously and fair, that lawyers receive a fair hearing, and that they can be assisted by a lawyer of their choice. Moreover, principle 28 provides that all disciplinary proceedings against lawyers are brought before an impartial committee, statutory authority, or court, and are subject to independent judicial review. These principles must be read in tandem with principle 29, which requires all disciplinary proceedings are determined in accordance with the national code of professional conduct, international norms and standards, and in light of all of these principles.

Finally, we would like to bring attention to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, Italy), 26 August-6 September 1985).

Principle 2 provides that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Principle 4 states 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. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Principle 6 entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.