

Background paper

25 YEARS - BASIC PRINCIPLES ON THE ROLE OF LAWYERS

“LAWYERS ARE NOT THEIR CLIENTS”

Lawyers for Lawyers Seminar

General Observations

The work of lawyers engaged in human rights cases impinges upon the core values of a democratic State. Despite their formal commitment to respecting the rule of law and fundamental freedoms, many governments regard the promotion of human rights as equivalent to political interference, and, above all, as a threat to their power. In line with this view, it is often the case that authorities attempt to control and hamper the work of lawyers engaged in the protection of human rights, and sometimes even threaten their physical integrity.

The international community has long recognized the relationship between the weakening of safeguards for lawyers and the fact that they act in a context of existing gravity and frequent violations of human rights.¹

In 1990, the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the UN *Basic Principles on the Role of Lawyers*. The Principles aim to strengthen the due process guarantees recognized by international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and, therefore, to provide protection to the legal profession in defending basic human rights.

As the Preamble states:

“adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession”.

To this end, the Basic Principles require States to provide - among other things - essential guarantees to ensure the professional functioning of individual lawyers and associations of lawyers.

¹ Commission on Human Rights, Resolution nr. 41/1994 establishing the *Special Rapporteur on the Independence of Judges and Lawyers*

The Basic Principles constitute the most authoritative set of international norms on the position of lawyers to date. They were ‘welcomed’ by the General Assembly of the United Nations in Resolution 45/166 of 18 December 1990, which invited governments to “take them into account within the framework of their national legislation and practice”. Although they do not have the formal status of a Treaty, they could arguably be treated as ‘subsequent agreements’ of Article 31, para. 3a) of the Vienna Convention on the Law of Treaties. At the same time, many rights included in the Basic Principles are also enshrined in binding international or regional human rights treaties as well as in national legislation.

Regrettably, 25 years after the adoption of the Basic Principles, in many countries attorneys who defend human rights are still threatened, harassed, prosecuted, imprisoned and in some cases even killed, simply for discharging their professional duties.

In the course of this Seminar celebrating the 25th Anniversary of the Basic Principles, L4L will invite the participants to reflect on the obstacles faced by human rights attorneys who defend the rights of particular categories of clients. Under the heading ‘**Lawyers are not their clients**’ the seminar will focus on one of the mechanisms leading to harassment of lawyers: the identification of lawyers with their clients. Principle 18 of the Basic Principles is very clear:

“Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.”

Already in 1998, the Special Rapporteur on the Independence of Judges and Lawyers noted in his report to the UN Commission on Human Rights “the increased number of complaints concerning governments’ identification of lawyers with their clients’ causes [which resulted in] lawyers representing accused persons in politically sensitive cases [being] often subjected to such accusations”.² As the Special Rapporteur noted, identifying lawyers with their clients or their clients’ causes amounts to nothing less than intimidation and harassment prohibited under Principle 16 of the Basic Principles.³

The L4L Seminar 2015 focuses on the identification-issue in relation to:

- a) Lawyers defending LGBT activists in Cameroon,
- b) Lawyers defending terrorist suspects in Turkey and the Basque Country, Spain,
and
- c) Lawyers working on human rights cases in Colombia.

² Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN.4/1998/39, at 179.

³ *Ibid*; according to Principle 16 “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

The situations chosen are by no means the only examples of the phenomenon, but should serve as a starting point for discussion and lead to further exploration.

Background to the three topics for the breakout sessions.

1) Identification in LGBTI cases

Article 347*bis* of the Cameroon penal code, headed ‘Homosexuality’, punishes ‘sexual relations with a person of the same sex’ with a prison term of six months up to five years and with a fine of 20,000 to 200,000 CFA francs (approximately 40-400 euro). In most cases, investigators rely on torture or ill treatment to extract confessions and the accused are convicted on the basis of little or no evidence.⁴ Homophobia is so widespread and institutionalized in Cameroon that only some five lawyers in the country are willing to represent clients in homosexuality cases.⁵

Among them attorney **Alice Nkom**, who is based in Douala. L4L is honored to have Alice among its speakers today. Since 2012, she and her colleagues have been systematically harassed and stigmatized both by other lawyers and by large sectors of society. Alice Nkom has received numerous anonymous phone calls, text messages and emails threatening her life and the lives of her children. She filed complaints with the authorities but never received any response.



In contrast to the cases mentioned below, threats to human rights lawyers in Cameroon appear to originate from homophobic groups and individuals, rather than authorities of the State, although the latter have often publicly condemned homosexual practices and defined them as contrary to the Country’s values and morality.⁶

2) Identification in terrorism cases

Turkish lawyers who defend their clients' rights in politically sensitive cases are frequently subject to judicial harassment because the State actively identifies them with their clients and their clients’ causes.⁷

Defense lawyers representing PKK (Kurdistan Workers Party) leader, Abdullah Ocalan, have been particularly at risk. On 22 November 2011, 46 lawyers – who have all at one time or another represented Ocalan – were arrested and accused of ‘working for, or belonging to, a terrorist organization’, namely, the Union of Communities in Kurdistan (KCK), which the Turkish authorities regard as a branch of the banned PKK. According to the Prosecutor’s

⁴ See Human Rights Watch, ‘Guilty by Association: Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law’, 2013.

⁵ See Observatory for the Protection of Human Rights Defenders, ‘Cameroon: Homophobia and Violence against Defenders of the Rights of LGBTI Persons’, 2015, p. 23-24.

⁶ *Ibid.*, p.9-10.

⁷ See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul - Addendum, mission to Turkey, A/HRC/20/19/Add.34, May 2012, at 65-66.

office, the defendants passed on Ocalan's orders to his supporters and are part of an illegal leadership committee linked with the PKK.

The charges are based on evidence allegedly obtained through (illegally) intercepting privileged communications between Ocalan and his legal advisers and (equally illegally) searching and ‘bugging’ the latter's offices and private homes. The Defendants deny all the charges, while most of them were arrested and charged many years after they had ceased to have any contact with Mr. Ocalan. Moreover, the Defendants’ lawyers claim that the evidence on which the Prosecution’s case is based, besides being illegal, does not prove the accusation that the Defendants passed on Ocalan’s orders to his supporters.



L4L is especially glad to have the prominent human rights lawyer in Turkey, Ayşe Bingöl, among its speakers today. Bingöl represented her colleague-lawyer Ramazan Demir, who had been charged with “insulting or (...) offending the dignity of a public authority in the performance of his duties”. The charges were based on pleadings he put forward during the trial against 44 journalists who are suspected of ties with the KCK. He was acquitted on 9 April 2015.

During recent years, Basque lawyers who have defended clients affiliated with the armed faction of ETA have been arrested and sometimes prosecuted. Usually, they have been arrested and held incommunicado under the generic charge of ‘terrorism’. Their offices have been (illegally) searched.⁸ After several years, most of these cases have resulted in a dismissal or an acquittal.

Recently, on 12 January 2015, 16 people, amongst them 12 lawyers, were simultaneously arrested on terrorism charges in Madrid, the Northern Basque Country and Navarra. After their arrest, their offices were searched.

The 12 lawyers represent 500 political prisoners who are on trial in the Audiencia Nacional, the Special Court for terrorist crimes. The four lawyers arrested in Madrid (and released two days later) were representing suspects in a trial of 35 alleged members of Batasuna (the banned political wing of ETA) that was due to start the following day.

By arresting these lawyers the Spanish authorities not only prevented them from exercising their professional duties but also denied their clients the right to be represented by a lawyer of their choice.

3) Identification in certain Human Rights cases

Colombia has suffered from almost five decades of armed conflict between armed left-wing groups (such as FARC and ELN) on the one hand, and other right-wing paramilitaries⁹ and

⁸ Spanish law provides for the possibility of incommunicado detention on suspicion of certain categories of crimes including terrorism.

⁹ In 2003, the Government initiated the paramilitaries demobilization process. More than 30,000 combatants handed over their weapons and joined government programs aimed at reintegrating them into society. However, this process is widely considered to have been a failure, with paramilitary successors groups and drug cartels taking over the former paramilitary structure. The Government refers to these groups as “criminal gangs” and denies any relation with them. However, various members of Congress have been convicted for their ties to paramilitary groups.

the security forces on the other hand. As a result, Colombia is the country with the highest number of internally displaced people worldwide. Paramilitaries and the army frequently force rural communities off their land, which is often in regions rich in natural resource or in strategic locations. Often, the confiscated land is then exploited by multinational corporations for large cattle ranches, plantations of export-oriented food crops, or the extraction of natural resources such as coal and oil.

Human rights lawyers support displaced groups in bringing legal actions to try to regain their land and force the government to meet its obligations.¹⁰ Moreover, they assist in the criminal defense of community leaders who denounce violations of local peoples' rights by members of the armed groups, and who are often arrested and prosecuted under the false accusation that they are involved with the FARC. In Colombia, human rights defenders have traditionally been considered as 'leftists' by the authorities and the paramilitaries, and thus sympathetic to the guerrilla movement.

Human rights lawyers involved in land restitution issues impinge on the interests of the most powerful and frequently find themselves subject to many forms of harassment: from surveillance, cyber-attacks and their offices being burgled, to stigmatization, unfounded prosecutions, arbitrary arrests, death-threats and assassinations.

The International Caravana of Jurists presented very detailed reports on attacks against lawyers in Colombia (2008, 2010, 2012 and 2014). L4L co-authored these reports.

According to the Colombia Caravana UK Lawyers Group, the majority of threats to human rights lawyers originate from illegal paramilitary groups that continue to operate throughout Colombia despite having been officially demobilized. These threats often accuse human rights lawyers of being in collusion with the FARC, thereby exposing them to attacks.¹¹

Identification of lawyers with their clients, therefore, is a pressing issue in Colombia. In addition to death-threats and attacks by paramilitaries, State authorities through public statements discrediting their work often stigmatize human rights lawyers.

According to Alejandro Arenas Arcila, head of the Association of Litigating Lawyers of Cali:

“the State does not recognize that a lawyer defends a principle rather than a person and that State authorities improperly identify lawyers with their clients and any crimes or misconduct of which they stand accused. Indeed, human rights lawyers speak more generally about being persecuted as a result of the belief by some members of the State that there is a ‘legal war’ (guerra jurídica) being waged in Colombia”.¹²

The delegitimization and criminalization of human rights lawyers was systematic throughout the presidency of Alvaro Uribe. Most recently on 23 January 2015, the former president defined CAJAR - a lawyers' collective representing human rights activists and victims of the armed conflict – as a “FARC collective” on his Twitter account.

¹⁰ In 2011, the government launched a restitution program aimed at returning land stolen as part of the conflict to its rightful owners.

¹¹ An overview of the threats to lawyers in Colombia is available at:

<http://www.colombiancaravana.org.uk/overview-of-threats-to-human-rights-lawyers/>

¹² See “Colombia at the Crossroads: The Vital Role of Lawyers and Human Rights Defenders for Real Justice and Peace”, Report of the IV International Delegation of Lawyers to Colombia, 2014, p. 18.

Such statements bring increased risk to human rights lawyers, both individually and as a group, and often lead to direct reprisals by paramilitaries.

Moreover, human rights lawyers are often subject to unfounded investigations and prosecutions for corruption, judicial fraud, libel and slander. Some of them are also falsely accused of the crime of ‘rebellion’ due to their representation of political prisoners and social leaders.¹³ In addition, the 2014 Caravana report denounces the fact that lawyers are constantly monitored and intercepted by the National Intelligence Service (formerly known as DAS).¹⁴

More broadly, Colombia has failed to show a genuine commitment to deal with the level of violence directed against lawyers. It has failed to adopt effective measures to protect the lives of lawyers and to ensure accountability through investigation and prosecutions.¹⁵



Today, L4L presents an award to attorney Jorge Molano for his long-standing and forceful commitment to end the impunity of human rights abuses by the Colombian army and paramilitaries. Because of his work, he has been subject to numerous death threats and he has recently been subject to illegal wire-tapping and surveillance, both at home and at work.

WAYS FORWARD

To enhance its support for human rights lawyers worldwide, L4L aims to formulate a strategy to better promote the implementation and enforcement of the Basic Principles, and to develop effective methods to counter the practice of identifying lawyers with their clients. To achieve this, L4L invites the participants to debate the following proposals for policy goals:

1) Promotion and enforcement of the Basic Principles

- The Basic Principles have long been an essential part of the international legal framework protecting human rights, and international human rights bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights at times refer to them. What is the role, if any, that the Basic Principles play before national courts? Are they a useful tool for lawyers and judges to enforce the rights provided therein?
- What are the best strategies that should be adopted by international organizations such as L4L to publicize them and encourage national authorities, including Bar Associations, to refer to them?

¹³ See ‘Colombia: The Search for Real Justice Continues’, Preliminary Report of the IVth International Caravan of Jurists to Colombia, 2014, p. 2

¹⁴ See ‘Colombia at the Crossroads’, *supra* n. 8, at 21.

¹⁵ *Ibid.*, at 26 and 48-53.

2) Best practices to counter identification of lawyers with their clients

Understanding the factual circumstances

- Does the phenomenon of identification occur particularly in cases where lawyers represent people accused of specific crimes (such as terrorism and homosexuality)?
- What are the specific ways and means through which this form of harassment takes place (e.g. criminal prosecution, unlawful interception of privileged communications etc.)
- Who is mainly responsible for the identification of lawyers with their clients (governments, local bar associations, media or, others)?
- Do lawyers that are the object of this form of harassment find support among their colleagues or do they feel isolated?

The role of lawyers

Lawyers engaged in politically sensitive cases are often sympathetic to the cause of their clients and not seldom share their world-views. Arguably, this may create confusion in the perception of the public, as it may make it more difficult to differentiate between the two.

- Is there anything a lawyer can or should do to prevent being identified with her/his client? Is educating people about the role and prerogatives of lawyers be considered part of a lawyer's job? Should lawyers explicitly clarify their position with respect to controversial cases? If so, should that include that lawyers explicitly distance themselves from their clients?
- What are the legal and non-legal strategies used by lawyers themselves to prevent and react to identification? Are they successful?

The role of Bar Associations

- What can and/or may be expected from Bar Associations in order to clarify the role of lawyers and protect their rights?
- In some countries where lawyers are subject to threats and harassment the Bar is either absent (for example, Colombia) or not independent. What are the best strategies to adopt in such cases?

The role of international organizations like the UN and Civil Society Organizations

- What can organizations like L4L do to prevent identification?
- Is it always useful to identify and report on cases in which lawyers were identified with their clients?