



## **Safeguarding the independence of judicial systems in the face of contemporary challenges to democracy**

Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for her upcoming report to the Human Rights Council 56<sup>th</sup> session

January 2024

### **I. Introduction**

The International Commission of Jurists (ICJ) thanks the Special Rapporteur for this opportunity to provide input to her forthcoming report at the 56th session of the Human Rights Council in June 2024, on the role of judges and lawyers on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy.

The ICJ provides factual information and analysis regarding 13 countries from around the world, addressing some of the Special Rapporteur's questions, especially on the role of judges and lawyers in safeguarding the rule of law and the obstacles, risks and challenges they are facing while doing so. The submission does not purport to be comprehensive but highlights a range of issues of interest to the report, especially regarding the: a) role of the executive in the appointment and dismissal of judges with an aim to co-opt or unduly influence the judiciary; b) attacks, harassment and undue proceedings against judges who investigate or try cases that involve political sectors; c) arbitrary dismissal of judges; d) attacks and harassment against lawyers that litigate cases against executive officials or who express their views against the conduct of executive officials; and the e) undue prosecution against political dissidents or abuse of the prosecutorial powers in electoral processes.

It is important to note that most of the information provided in the present submission is drawn from ICJ existing work and reports in the concerned countries. The ICJ stresses that it is critically important for these countries to undertake immediate genuine and comprehensive judicial, legal and practical reforms to uphold the independence of the judiciary and of the legal profession in accordance with international human rights law and standards on the independence of the judiciary and the role of lawyers.

### **II. Countries of focus**

In **Eswatini**, a State which has never been a democracy, the procedure for the appointment of judges is unduly influenced by the executive. The King, who is one of world's last remaining absolute monarchs, appoints the Chief Justice and there is no formal application or interview process. In other words, there is no process by which any interested candidates might apply and be considered for judicial appointment. The

appointment of other judges appears to take place without following any procedural or transparent process.

In addition, the Swazi authorities have to date not implemented the decision of the African Commission on Human and Peoples Rights (ACHPR) regarding the unlawful removal of Justice Thomas Masuku.<sup>1</sup> The ACHPR found that Eswatini breached the African Charter in its conduct surrounding the removal from judicial office of Justice Thomas Masuku.

**Guatemala** is presently undergoing a transfer of executive political authority through democratic processes that have come under threat by powerful political actors. Independent judges, prosecutors and lawyers have been the target of widespread attacks, harassment and spurious criminal investigations by the executive authorities and many of them are in exile.<sup>2</sup> Many of these attacks have been undertaken against judges that heard -or were hearing- cases of gross human rights violations and corruption, including cases against former members of the executive branch or persons with political, military and economic power in the country.<sup>3</sup>

In addition, the Prosecutor Office, especially, the Chief Prosecutor, played a leading role in the attempts to disrupt the 2023 presidential election process that resulted in the election of Bernardo Arévalo de León and Karin Herrera Aguilar as President and Vice-President. Among other actions, the Prosecutor Office opened criminal investigations and issued arrest warrants and search warrants against justices and staff members of the Supreme Electoral Tribunal, members of the party of the elected president, members of civil society organizations, academics, and students.<sup>4</sup>

In **Hungary**, the ICJ remains gravely concerned about the deterioration of independence of the judiciary over the past decade, in the context of a broader authoritarian rule of law threat that has emerged under the government of Viktor Orban. On 18 January, the EU Parliament adopted a resolution expression strong concern about the further erosion of democracy, the rule of law and human rights.<sup>5</sup> There is an over-concentration of power within the National Judicial Office (NJO), where the appointment of judges is centralized and lacks adequate checks. The Integrity Policy issued by the NOJ President can be and has been used as a tool to silence judges who want to speak up inter alia for judicial independence. The Kúria (Supreme Court of Hungary), itself has in appropriately ruled that the request for a preliminary ruling to the Court of Justice of the EU (CJEU) by

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<sup>1</sup> International Commission of Jurists, Eswatini: The authorities should implement the Decision of the African Commission on Human and Peoples Rights regarding the unlawful removal of Justice Thomas Masuku, September 19, 2022, available at: <https://www.icj.org/eswatini-the-authorities-should-implement-the-decision-of-the-african-commission-on-human-and-peoples-rights-regarding-the-unlawful-removal-of-justice-thomas-masuku/>

<sup>2</sup> International Commission of Jurists, Oral Declaration before the ID with the Special Rapporteur on the Independence of judges and lawyers, Human Rights Council 53rd period of sessions, June 2023, available at: <https://www.icj.org/un-human-rights-council-concerns-about-independence-of-judges-and-lawyers-in-guatemala-tunisia-vietnam-and-thailand-and-about-summary-executions-in-egypt/>

<sup>3</sup> See, for example, the case of judges Miguel Angel Galves and Erica Aifan, currently on exile. Information available at: <https://elfaro.net/es/202303/centroamerica/26794/con-el-caso-diario-militar-entendi-que-guatemala-esta-disenada-para-la-impunidad>

<sup>4</sup> International Commission of Jurists, Guatemala: Peaceful transfer of presidential power must proceed on 14 January in accordance with the Rule of Law, January 12, 2024, available at: <https://www.icj.org/guatemala-peaceful-transfer-of-presidential-power-must-proceed-on-14-january-in-accordance-with-the-rule-of-law/>

<sup>5</sup> See: <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16780/the-hungarian-government-threatens-eu-values-institutions-and-funds-meps-say>

Hungarian judges is unlawful and some judges faced disciplinary proceedings for such requests. Hungary has failed to implement an important decision of the European Court for Human Rights *Baka v. Hungary*, which is likely to carry a chilling effect on freedom of expression of judges.

In **India**, the democratic and rule of law institutions in place since independence in 1947 have come under increased strain. The ICJ is particularly concerned at patterns of undue interference and influence on judges from within the judiciary on account of the power of the Chief Justice to allocate cases and constitute benches without any clear criteria. Where Chief Justices and Court Presidents enjoy effectively unfettered or otherwise under-regulated discretion to allocate cases to benches of their choice, judicial outcomes are prone to manipulation. Judges who may hold an unfavourable disposition to Government policies or practice may also be subjected to discriminatory or arbitrary treatment from within the courts and excluded from hearing important cases. Chief Justices may also prioritise and list cases in a manner that benefits the Government. These factors have contributed to the perception that the Supreme Court favours the Government at the expense of human rights in cases with political implications, including cases that involve religious and other minority communities and the persecution of human rights defenders.<sup>6</sup>

**Myanmar**, which had been on a path to at least the partial establishment of rule of law institutions, including an independent judiciary, suffered an enormous setback with the military coup d'état of February 2021. The ICJ has continued to have close engagement of the situation from inside and outside Myanmar and can unsurprisingly report that the judiciary has become overwhelmingly subservient to the military and has lost the modest gains it had made in establishing its independence and effectiveness in the last decade. In December 2021, State Counsellor Aung San Suu Kyi and President Win Myint were convicted in sham trials by a military tribunal, demonstrating the militarization of the judiciary in Myanmar.<sup>7</sup>

Another step taken by the military since the *coup d'état* was the "suspension" of many human rights guarantees, including the right to petition for a writ of habeas corpus to challenge unlawful detention.<sup>8</sup> The suspension of this right has facilitated numerous arbitrary arrests and made it impossible to challenge the lawfulness of detention in court. More than 25,904 people have been subjected to arbitrary arrest and detention.<sup>9</sup> Ordinary procedures and protections of arrest and detention, while never fully observed, have now been entirely disregarded. The State Administration Council (SAC) established courts inside prisons to try those arrested after the coup, thereby preventing observers from attending trials. Military courts have been established to try civilians. After the coup, the SAC declared martial law in 11 townships across Yangon and Mandalay. In these townships, regional military officials have been given all executive and judicial powers and civilians are tried by military tribunals for any of 23 violations of the Penal Code. As a

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<sup>6</sup> See, for example, <https://thewire.in/law/article-370-jammu-and-kashmir-supreme-court-pending> and <https://www.livelaw.in/top-stories/supreme-court-umar-khalid-bail-plea-adjourned-248258>

<sup>7</sup> International Commission of Jurists, Myanmar: Authorities must immediately quash convictions of Aung San Suu Kyi and Win Myint after sham trial and conviction, December 2021, available at: <https://www.icj.org/myanmar-authorities-must-immediately-quash-convictions-of-aung-san-suu-kyi-and-win-myint-after-sham-trial-and-conviction/>

<sup>8</sup> International Commission of Jurists, Myanmar: A year after military takeover, no rule of law or judicial independence, 10 February 2022, available at: <https://www.icj.org/myanmar-a-year-after-military-takeover-no-rule-of-law-or-judicial-independence/>

<sup>9</sup> See daily statistics by the Assistance Association for Political Prisoners here: <https://aappb.org/>

result, there is practically no legal recourse available to thousands of people in Myanmar who have been subject to arbitrary detention, enforced disappearance, torture and ill-treatment, unlawful killings, forceful displacement, and other serious human rights violations since the military takeover in 2021.<sup>10</sup>

In **Peru**, which is in a period of serious institutional instability, attacks on judicial independence have increased, especially by members of congress and politicians with the aim to destabilize the check and balances in the country. For example, Jorge Luis Salas Arenas, a judge from the Supreme Court who sits and presides over the National Jury of Elections (JNE), an independent body that oversees electoral disputes and proclaims the result of elections, has been victim of harassment, hate messages, and threats, due to his role as president of the JNE, especially regarding the unfounded claims of fraud during the presidential election of 2021. In fact, right-wing politicians filed unfounded complaints before the Peruvian Congress and the Constitutional Tribunal alleging wrongdoing by Salas Arenas. His situation is so critical that the Inter-American Court of Human Rights issued precautionary measures in his favour in September 2023.<sup>11</sup>

In addition, the Parliament has initiated proceedings against members of the National Board of Justice (JNJ), an independent body in charge of appointing and disciplining judges and prosecutors. Some of those proceedings are “summary proceedings” that are not regulated by law and had not fulfil due process guarantees.<sup>12</sup> These proceedings came after the JNJ initiated an investigation against the Chief Prosecutor of the country for allegations of corruption and for favouring members of Congress who were under criminal investigation by the Prosecutor Office by offering the closing or dismissal of investigations against them. As a result, Congress is attempting to remove the members of the JNJ from office.

In **Poland**, there have been persistent attacks on the judiciary since the government initiated highly problematic reforms in 2015. These reforms have systematically compromised the separation of powers and weakened the independence of the judiciary. Notably, they have increased influence over the National Council of the Judiciary (NCJ) and imposed executive control over the appointment process of judges, particularly in the Supreme Court. Legislative amendments have curtailed judges' ability to comment on the legitimacy of judicial appointments, interfering with their right to freedom of expression and international standards on the independence of the judiciary. There were also restrictions placed on judges in applying judgments of the CJEU. (In 2021, Poland's Constitutional Tribunal ruled that applying measures taken by the CJEU to the Polish judiciary was unconstitutional). There have been multiple cases of disciplinary and criminal proceedings against judges, forced retirements, and the creation of new disciplinary offences under vague criteria. The ICJ hopes that the newly constituted government will carry through on its commitments to reverse these retrograde developments.

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<sup>10</sup> International Commission of Jurists, Myanmar: A year after military takeover, no rule of law or judicial independence, February 2022, available at: <https://www.icj.org/myanmar-a-year-after-military-takeover-no-rule-of-law-or-judicial-independence/>

<sup>11</sup> Inter-American Court of Human Rights, Resolution of September 4th, 2023, Adoption of Precautionary Measures on the issue of Jorge Luis Salas Arenas and his family against Peru, available at: [https://www.corteidh.or.cr/docs/medidas/salas\\_arenas\\_se\\_01.pdf](https://www.corteidh.or.cr/docs/medidas/salas_arenas_se_01.pdf)

<sup>12</sup> Human Rights Watch, Peru: Congress Should Respect Judicial Independence, November 7, 2023, available at: <https://www.hrw.org/news/2023/11/07/peru-congress-should-respect-judicial-independence>

In the **Russian Federation**, in which democracy and the rule of law has undergone sharp degradation following Russia's military invasion of Ukraine, independent members of the legal profession face continuous harassment, threats, and other interference with professional duties.<sup>13</sup> Recent examples include the arrests of Vadim Kobzev, Alexey Liptser, and Igor Sergunin, who were defending high-profile figures like Alexei Navalny, on charges purportedly for participating in an 'extremist community'. This represents a broader strategy to send a chilling message to human rights defenders. The expansive Foreign Agents Law, targeting independent lawyers and labelling them as foreign agents for fulfilling their professional duties, undermines lawyers' freedom of expression and association. For example, this law has affected lawyers of the informal association 'Team 29', including Ivan Pavlov and Valeria Vetoshkina, restricting their ability to practice law. An increase in State control over the Bar Association leads to the weakening of its independence and the persecution of independent lawyers. Proposed amendments to the Law on Advokatura in Parliament (draft Federal Law No. 301952-859) threaten the confidentiality of lawyer-client communications, personal data, and private life information of both lawyers and their clients.

In **Tunisia**, there has been extreme backtracking on the gains that had been on the rule of law, human rights and democracy, following the revolutionary events of 2010-11. In particular, there has been a pattern of arbitrary dismissals and prosecutions of judges and prosecutors ("magistrates") in the context of broader attacks on judicial independence.<sup>14</sup> In June 2022, Tunisia's President dismissed 57 magistrates without due process based on vague accusations.<sup>15</sup> Two women who were dismissed faced gender-based harassment and the dismissal of one of them was made seemingly in connection to adultery charges, conduct that should not have been criminalized in the first place.<sup>16</sup>

The ICJ is also concerned at arbitrary prosecutions of lawyers due to their work defending dismissed magistrates or political opponents or for making statements deemed critical of the executive.<sup>17</sup> Emblematic of this is the recent arrest of defence lawyer Bechir Ferchichi, while visiting a client at Mornaguia prison, based on questionable allegations that he had

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<sup>13</sup> International Commission of Jurists, Access to Lawyers for Anti-war Protesters in the Russian Federation, Briefing paper, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2022/06/Access-to-lawyers-for-anti-war-protesters-in-the-Russian-Federation.pdf>.

<sup>14</sup> International Commission of Jurists, Tunisia: Attacks on Judges and Prosecutors in Tunisia: Arbitrary dismissals and prosecutions, 18 December 2023, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2023/12/ICJ-attacksonjudgestunis-ENG.pdf>

<sup>15</sup> International Commission of Jurists, Tunisia: President should reverse the decision to dismiss 57 judges, 2 June 2022, available at: <https://www.icj.org/tunisia-president-should-reverse-decision-to-dismiss-57-judges/>

<sup>16</sup> International Commission of Jurists, Tunisia: Attacks on Judges and Prosecutors in Tunisia: Arbitrary dismissals and prosecutions, 18 December 2023, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2023/12/ICJ-attacksonjudgestunis-ENG.pdf>

<sup>17</sup> International Commission of Jurists, Tunisia: Silencing Free Voices, a briefing paper on the enforcement of Decree 54 on "Cybercrime", July 2023, p.16, available at: <https://www.icj.org/tunisia-silencing-free-voices-a-briefing-paper-on-the-enforcement-of-decree-54-on-cybercrime/>.

tried to facilitate the client's escape after keys and a razor blade were found among his possessions, during a search for which he was told not to be present.<sup>18</sup>

Undermining the separation of powers and the ability of the judiciary to act as a check on the executive, Tunisia has failed to establish the constitutional court as provided for under the 2014 constitution. The court was mandated, among other things, to review the constitutionality of laws and of presidential exceptional measures. The 2022 constitution provides for a weakened constitutional court (still not established), with nine judges named by presidential order and no mandate for review of exceptional measures. The actions by Tunisia's President since July 2021 have thus proceeded without any judicial oversight and appear set to continue in this manner.

In **Türkiye**, with an increasingly authoritarian executive, the independence of the judiciary and lawyers continues to be under attack. There was a systematic practice of arbitrary dismissal of judges and prosecutors by Turkey's Council of Judges and Prosecutors, often violating the right to a fair trial,<sup>19</sup> especially as these judges and prosecutors have not been reinstated, including following judgments of the European Court of Human Rights.<sup>20</sup> Criminal charges and investigations against the President and Board Members of the Istanbul Bar Association for displaying a photograph of lawyer Ebru Timtik, who died following a hunger strike in detention, is one example. This situation is part of the broader context in Turkey where charges of "terrorism" are frequently used to silence freedom of expression and target lawyers among others. Approximately 26 lawyers were arrested and around 100 are under investigation in Eastern Turkey. These lawyers, many of whom are active in defending human rights, face vague charges commonly used to target human rights defenders in Turkey.

In **Uganda**, a senior Supreme Court judge, Ester Kisaakye<sup>21</sup> was removed from her position allegedly due to an unfavourable ruling in the context of national elections, where she found in favour of an opposition candidate.

In **Venezuela**, the Prosecutor's Office, especially its Chief Prosecutor, lacks impartiality. The Office has investigated activists and leaders of the opposition party "Vente Venezuela",<sup>22</sup> including the main opposition candidate selected in the primary elections in October 2023, as well as the commission organizing opposition primary elections.<sup>23</sup> The Prosecutor's Office appears to have failed to act impartially in these cases, acting to impair and discourage the participation of members of the opposition in the electoral process as

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<sup>18</sup> Jeune Afrique, In Tunisia Bechir Manoubi Ferchichi Victim of a Witch Hunt?, 8 January 2024, available at: <https://www.jeuneafrique.com/1522910/politique/en-tunisie-lavocat-bechir-manoubi-ferchichi-victime-dune-chasse-aux-sorcieres/>.

<sup>19</sup> International Commission of Jurists, Turkey: dismissal of judges and prosecutors fundamentally unfair, available at: <https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-fundamentally-unfair/>.

<sup>20</sup> International Commission of Jurists, Turkey: System of transfer of judges undermines judicial independence and must be reformed, available at: <https://www.icj.org/turkey-system-of-transfer-of-judges-undermines-judicial-independence-and-must-be-reformed/>.

<sup>21</sup> <https://www.icj.org/uganda-supreme-court-justice-esther-kisaakye-must-be-granted-a-fair-hearing-to-contest-discipline-charges/>

<sup>22</sup> Comisión Interamericana de Derechos Humanos, Venezuela: CIDH rechaza la persecución penal contra dirigentes opositores en Venezuela, 26 de diciembre de 2023 (IACHR rejects the criminal prosecution against opposition leaders in Venezuela December 26, 2023), available at: <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2023/315.asp>

<sup>23</sup> Inter-American Commission of Human Rights, Venezuela: IACHR Urges State to Implement Agreements, Including Guarantees for Political Participation, October 27, 2023, available at [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2023/253.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/253.asp)

part of a pattern of persecution pattern.<sup>24</sup> Moreover, the Supreme Court (TSJ) lacks independence and impartiality<sup>25</sup> and has played a role in banning opposition members from the electoral process. For instance, in January 2024, the Court issued six decisions upholding the constitutionality of the legislation allowing political disqualification without judicial intervention which contradicted the 2011 ruling by the Inter-American Court of Human Rights against Venezuela.<sup>26</sup> One of these six decisions disqualified the opposition candidate that was selected in the October 2023 primaries, Maria Corina Machado.

In **Zimbabwe**, the prevailing deep political polarization is reflected in two recent disputed general elections (2018<sup>27</sup> and 2023<sup>28</sup>). However, unlike in Kenya and Malawi, the Zimbabwean courts have proved unable to adjudicate disputes arising from these elections fairly and transparently.

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<sup>24</sup> Comisión Interamericana de Derechos Humanos, Venezuela: CIDH rechaza la persecución penal contra dirigentes opositores en Venezuela, 26 de diciembre de 2023 (IACHR rejects the criminal prosecution against opposition leaders in Venezuela December 26, 2023), available at: <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2023/315.asp>

<sup>25</sup> International Commission of Jurists, Judges on the Tightrope. Report on the Independence and Impartiality of the Judiciary in Venezuela, 2021, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2021/06/Venezuela-Judges-on-the-tightrope-Publications-Reports-Thematic-reports-2021-ENG.pdf>

<sup>26</sup> Inter-American Court of Human Rights, Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011, available at: [https://corteidh.or.cr/docs/casos/articulos/seriec\\_233\\_esp.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_233_esp.pdf)

<sup>27</sup> See: <https://mg.co.za/thought-leader/2023-08-12-zimbabwes-2023-elections-who-votes-and-why/>

<sup>28</sup> See: <https://africacenter.org/spotlight/sadc-navigate-zimbabwe-election/>