

Endangered Lawyers need International Protection

YASUSHI HIGASHIZAWA, CO-CHAIR OF THE HUMAN RIGHTS SECTION OF LAWASIA:
PROFESSOR, FACULTY OF LAW, MEIJI GAKUIN UNIVERSITY, TOKYO



The unduly harsh sentence against the prominent Iranian human rights lawyer, Nasrin Sotoudeh, shocked the global community of lawyers early this year. It has been reported that her representation of dissenting activists, including women prosecuted for removing their mandatory headscarf, resulted in 38 years' imprisonment and 148 lashes by the Islamic Revolutionary Court in Tehran.¹ Major international organisations of lawyers immediately responded with strong statements of concern against such oppression of lawyers and their duties.²

Unfortunately, attacks on lawyers for carrying out their professional duties are nothing new and still pervasive. LAWASIA, an association of lawyers that advocates for the interests and concerns of the Asia Pacific legal profession, has published numerous statements since 2015 in support of endangered lawyers in China, Turkey, Pakistan, the Philippines

and the Maldives.³ More generally, the Council of Bars and Law Societies of Europe (CCBE) reported that it has had to intervene in support of almost 800 cases where lawyers were subject to threats and violence, acts of reprisal, hindrance, intimidation, harassment, prosecution, torture and murder for merely carrying out their professional duties.⁴

Those interferences against lawyers came not only from government authorities, but also from social groups such as religious or ethnic extremists, powerful political figures, adversarial parties (including business powers) and even the media. Lawyers are in danger wherever governments target them or fail, whether intentionally or not, to take measures to protect the professional activities of lawyers.

Are there any international rules to address those situations or to hold such aggressive or negligent governments to

account? Are the rules, if any, binding on states as part of International Human Rights Law (IHRL)? The answers are not simple. The IHRL does not distinguish lawyers from other individuals. Roles of lawyers are, however, implied in order to guarantee individuals' rights to access justice and to a fair hearing.⁵ Thus, human rights documents have correctly pointed out that "the administration of justice --- especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development."⁶

With this understanding, the United Nation Congress on Crime Prevention and Criminal Justice (the UN Congress), held every five years, adopted the Basic Principles on Role of Lawyers (the Basic

Principles) at the 8th UN Congress in 1990.⁷ The Basic Principles consist of 29 principles, including, Principle 16, which provides that governments shall ensure lawyers:

- are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; and
- 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 Basic Principles, on the surface, provide international guidelines for protecting lawyers and their professional activities. So why do lawyers around the world suffer from interferences and attacks? Why do governments often fail to acknowledge these international rules? I would suggest that there are several flaws in the rules.

First and foremost, the Basic Principles, as a resolution of the UN Congress, are by no means a binding instrument of international law. There have been no successful initiatives or keen interest from states to incorporate rules of the Basic Principles into a binding treaty. Thus, it still continues to be a “soft law” incorporated on a voluntary basis. Secondly, the Basic Principles were provided without any monitoring or implementing systems. The UN Congress, or the UN Commission on Crime Prevention and Criminal Justice which succeeded the legislative function of the UN Congress in the early 1990s, continues to fail to discuss such systems. Thirdly, the Basic Principles themselves do not include a suitable provision on the institutional protection of lawyers. Instead, that is within the ambit of independent bar associations or law societies (Bars) to function as a safeguarding body of their members.

I would like to discuss the last point further. Clearly, in order to protect lawyers, it is crucial to recognise the role of

independent Bars and to empower them to protect their members. The 7th UN Congress in 1985 had once resolved on that point that it is:

“[a]ware that bar associations and other professional associations of lawyers have a vital role and responsibility to strive to protect and defend their members against improper restrictions or infringement, as well as to uphold their professional ethics.”⁸

Nevertheless, the Basic Principles adopted thereafter limit the role of Bars to protecting lawyers’ “professional integrity” by cooperating “with Governments” (Principles 24 and 25). They were silent on the Bars’ role to protect and defend their members against improper restrictions or infringement.

Although the Basic Principles have the aforementioned flaws, they have been relied upon by several UN human rights bodies. Committees of human rights conventions have referred to the Basic Principles from time to time when addressing situations of state parties. A recent example involves China and the Committee against Torture (CAT) of the body that monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The CAT, expressing its concerns about “the unprecedented detention and interrogation of, reportedly, more than 200 lawyers and activists since 9 July 2015,” recommended that the Chinese government “stop sanctioning lawyers for actions taken in accordance with recognized professional duties.”⁹

Also, there exists a monitoring mechanism in the form of a *Special Rapporteur on the Independence of Judges and Lawyers*, at the UN Human Rights Council, originally established in 1994. The successive Special Rapporteurs have produced annual reports on the independence of lawyers since 1995. In her recent activities, the Special Rapporteur, Ms. Mónica Pinto, reported

that, among communications she sent to states and one entity from August 2015 to February 2016, “a dozen communications contained allegations of violations of the rights and independence of lawyers, which included killings, attacks, threats, intimidation, harassment and detention, as well as undue restrictions on their work.”¹⁰

Another recent publication on Bar associations was a report in 2018 by the Special Rapporteur, Mr. Diego García-Sayan. In his report, he said: “it is the duty of all State authorities to respect the role of bar associations in protecting their members, so as to ensure that they are able to carry out their professional activities without any intimidation, hindrance, harassment or improper interference.”¹¹ That recommendation might urge the Basic Principles to be more comprehensive by including a clear role of Bars to protect lawyers and impose duties on governments to respect and maintain the role of Bars.

The final question is how lawyers and the global community could respond to situations where lawyers are in danger as a result of their professional activities.

First, there are many collective initiatives among national, regional and international associations of lawyers. An example is *The Day of the Endangered Lawyer*, held annually on 24 January, which highlights the plight of endangered lawyers all over the world and focusses on a specific country every year.¹²

Secondly, the Council of Europe is drafting a European convention on the profession of lawyer.¹³ The proposed convention intends to impose binding obligations on state parties in relation to prior recommendations on the legal profession,¹⁴ to establish an early-warning mechanism to respond to immediate threats to lawyers’ safety and independence, and to open the future convention to non-member states. If successful, the proposed convention would provide a binding international text to protect lawyers.

Lastly, it is worth reflecting on the origin of the Basic Principles. The next 14th UN Congress will take place in Kyoto, Japan next April (the Kyoto UN Congress).¹⁵ That will be the 30th anniversary of the Basic Principles. While the UN Congress ceased to adopt new international instruments long ago, it is a good opportunity to revisit the Basic Principles and convince states to fully implement and even expand these rules. The Japan Federation of Bar Associations (JFBA) announced its position on the Basic Principles. It urges all participating States to “consider international mechanisms to ensure that basic principles are observed in each state.” It also urges the expansion of the Basic Principles to include the role of Bars to protect and defend their members and to guarantee the Bars’ role under national law. This should be achieved by a consolidated voice of lawyers and the global community to guarantee lawyers over the world can engage in

their professional duties, particularly with regards to defending human rights, without interference or fear.

I would not say that it is an easy task, or that mere written rules could improve the situation. That task requires struggles and solidarity over borders, every day and everywhere. Nevertheless, I hope that current initiatives can be a good start to change the situation of the legal profession, particularly in the Asia Pacific region. **B**

Endnotes

- 1 “Husband of Iranian human rights lawyer says she is sentenced to 38 years, 148 lashes,” REUTERS, March 11, 2019.
- 2 Eg. Statements of the IBA on 15 March 2019, the UIA on March 16 2019 and the LAWASIA on 9 May 2019.
- 3 See those statements at <https://www.lawasia.asn.au/resources-publications/advocacy-documents>.
- 4 The CCBE, “Threats to the Legal Profession,” February 18, 2019.
- 5 Eg. art. 10 of the Universal Declaration of Human Rights and art. 14 of the International Covenant on Civil and Political Rights (ICCPR).
- 6 ‘Vienna Declaration and Programme of Action,’ A/CONF.157/23 (1993), Part I, para. 27.
- 7 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
- 8 ‘Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (A/CONF.121/22/Rev.1, Milan, 26 August – 6 September 1985), ‘I. DECISIONS OF THE CONGRESS,’ ‘E. Other resolutions and decision adopted by the Congress,’ ‘18. Role of Lawyers,’ Preamble para.4 (pp.87-8).
- 9 Concluding observations of the Committee against Torture on China, CAT/C/CHN/CO/5 (2015), paras.18-9.
- 10 A/HRC/32/34(2016), paras.10-12.
- 11 A/73/365(2018), para.106.
- 12 <http://dayoftheendangeredlawyer.eu/foundation/>
- 13 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24466&lang=en>
- 14 Council of Europe, Recommendation Rec (2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer.
- 15 <http://www.un-congress.org>

YOUNG LAWYERS

Young Lawyers’ Premium Dinner

The 2019 Young Lawyers’ annual Premium Dinner was held on Tuesday 3 September at Borsa Pasta Cucina. The intimate crowd of early career professionals enjoyed a night of networking, socialising, what seemed like never-ending Italian food, and a rousing speech from the night’s guest speaker, her Honour Judge Penelope Kari.

Guests arrived to an array of canapés and took the opportunity to socialise with each other and Judge Kari, who made sure to get around to each table. Following main courses, her Honour spoke about what it takes to have a career in the law and that the making of a good practitioner

(or person, for that matter) starts with three key attributes: kindness, honesty and bravery. Her Honour’s very honest and witty account of juggling law with life outside of the law no doubt provided tips that the room of young lawyers will carry with them through their careers. Her Honour’s speech was followed by a mouth-watering dessert spread.

The Young Lawyers’ Committee would like to thank Judge Kari for her time, our major sponsor, Burgess Paluch Legal Recruitment for their continued support, and Borsa Pasta Cucina for their incredible hospitality and, as always, sending all guests home very happy and extremely full.

