

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

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(Please use this reference in your reply)

15 February 2022

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 alleged violations of the right to a trial by Mr. **Benyamin Steinmetz**.

According to the information received:

Mr Benyamin Steinmetz is a French-Israeli businessman. He is a beneficiary of a family foundation that made a bona fide financial investment together with others in [REDACTED]

[REDACTED]

Mr. **Steinmentz** had no direct role in the investment, and only provided ad hoc investment advice. [REDACTED]

[REDACTED]

In December 2015, a criminal investigation was opened against Mr. Steinmetz.

On 17 May 2016, the National Anticorruption Directorate ("DNA") brought charges against 23 persons, including Mr. Steinmentz, alleging that together they established an organised criminal group with the aim of acquiring the properties claimed by [REDACTED] by means of corruption including offering money/assets to people working for public authorities owning or managing these properties or to other people with influence over the public servants to make them act according to the group's purpose, the instigation and accessory to maladministration by these persons and influence peddling over public servants.

Furthermore, Mr. Steinmetz was charged with complicity to influence peddling through providing financing, coordination and interventions at the disposal of his co-defendants’

The DNA’s case against Mr. Steinmetz was primarily built on alleged “ambient recordings” said to have been made at the home of [REDACTED] a translated transcript thereof, and the statements of eight witnesses. The DNA failed to establish the origin of or to demonstrate the authenticity and chain of custody for the “ambient recordings”. During the first instance trial, a court-appointed expert conceded that he was unable to verify the authenticity of the ambient recordings due to the non-disclosure of the recording device and absence of necessary equipment. A court-certified expert instructed by Mr. Steinmetz demonstrated that the recordings had been tampered with, and therefore could not be relied upon. Likewise, at first instance, Mr. Steinmetz successfully demonstrated that the DNA’s translated transcript of the “ambient recordings” and of the witness statements of [REDACTED] contained major errors and additions that significantly altered their intended meaning.

On 27 June 2019, the first instance Brasov Court of Appeal (“Brasov Court”) acquitted Mr. Steinmetz of all charges brought against him. Notably, the Court found that alleged “ambient recordings” lacked “sufficient guarantees of reliability to be used as means of evidence in the case”.

On 23 January 2020, the DNA appealed the Brasov Court Judgment to the High Court of Cassation and Justice (“High Court”), relying on the content of the “ambient recordings” (ignoring the Brasov Courts finding on their unreliability) to argue that Mr. Steinmetz was the “big boss” of the alleged criminal organisation who provided his co-defendants with financial resources and political connections to carry out the alleged criminal activity. No new evidence was presented and only four of the eight witnesses relied on by the DNA were called to testify before the High Court.

According to Romanian law, High Court trial panels are composed of randomly selected judges using the ECRIS software. The software requires human data input on each judge and each case to be tried. Whilst a court-ordered review of the selection process found no violations, analysis of the underlying evidence reveals significant irregularities, data errors and suggests that data was deliberately manipulated in an effort to doctor the composition of the High Court panel in this case. The judges selected for the panel are known in Romania as the “Black Panel” – judges who have an unusually high conviction rate. At least one of the judges was not legally sworn in prior to the commencement of trial. There is therefore a reasonable basis to believe that the random selection process was doctored to achieve a pre-determined panel of judges – hand-picked by the executive.

The appeal trial before the High Court was replete with procedural violations and unjustified restrictions on defendants' rights, raising credible doubts as to the judges' impartiality and independence:

(a) **The High Court disregarded expert evidence and the Brasov Court's findings on the authenticity and reliability of the "ambient recordings"**. The DNA relied on the "ambient recordings" in its appeal brief as evidence of Mr. Steinmetz's alleged role in setting up a criminal group. In his final brief, Mr. Steinmetz relied on the expert opinion of [REDACTED] and the findings of the Brasov Court to demonstrate that the "ambient recordings" were tampered with and cannot be relied on as evidence. In its Judgment, the High Court relied on the "ambient recordings" as key evidence to convict Mr. Steinmetz, disregarding the expert evidence, and the Brasov Court's findings. Specifically, the High Court held that expert evidence adduced by one of the parties cannot not be relied upon to remove evidence from the case file. This ruling contravenes Romanian law, which does not distinguish between court or party appointed forensic experts provided they are impartial and independent. Crucially, the ruling effectively deprived Mr. Steinmetz of an opportunity to adduce expert evidence to challenge key Prosecution evidence.

(b) **The High Court disregarded Mr. Steinmetz's evidence demonstrating errors and additions in the DNA's transcript of "ambient recordings" and witness statements**. The DNA relied on an inaccurate translated transcript of the "ambient recordings" and erroneous records of witness evidence as evidence of Mr. Steinmetz's alleged role in setting up a criminal group. In his final brief, Mr. Steinmetz demonstrated that there were major errors and additions in the DNA's transcript and witness statements, significantly altering the evidence. In its Judgment, the High Court relied on the erroneous transcript and witness statements, ignoring the errors and additions demonstrated by Mr. Steinmetz, without providing any justification. The ruling deprived Mr. Steinmetz of an opportunity to adduce evidence in response to key evidence relied on by the Prosecution.

(c) **Mr. Steinmetz's request to adjourn a crucial hearing – on the ground that his counsel had Covid-19 and was subject to mandatory self-isolation – was rejected depriving Mr. Steinmetz of effective representation during the examination of a key witness**. On 30 January 2020, Mr. Steinmetz's counsel of choice [REDACTED] presented Mr. Steinmetz's power of attorney to the High Court, confirming [REDACTED] appointment for the purpose of the appeal trial proceedings. According to Article 91 paragraph 4 of the Romanian Criminal Procedure Code, the mandate of any *ex officio* counsel shall cease upon the presentation of the appointed attorney to the court. Ignoring this provision, the High Court never rescinded the *ex officio* counsel's mandate. On 10 October 2020, Mr. Steinmetz's counsel – [REDACTED] – was diagnosed with Covid-19 and had to go into mandatory self-isolation. The High Court scheduled to hear a co-defendant and key witness – [REDACTED] - on 14 October 2020. On 14 October 2020, [REDACTED] wrote to the High Court requesting a short adjournment of the hearings for the duration of his mandatory self-isolation. The High Court rejected the request for adjournment and directed the hearing to proceed in the presence of the *ex officio*

counsel. The *ex officio* counsel had had no contact with Mr. Steinmetz or his counsel and had not participated in Mr. Steinmetz's defence since 30 January 2020. The High Court proceeded to hear [REDACTED]. As such, Mr. Steinmetz was not effectively represented by counsel of his choosing at a key hearing.

(d) **Mr. Steinmetz was denied access to classified court documents that may have contained evidence of judicial bias/lack of independence.** The DNA's case was in part based on wiretap recordings made by the SRI on authorisation from the High Court. These wiretap authorisations were obtained through secret agreements between the DNA, the SRI and the High Court (the "Secret Protocols"). The Secret Protocols have been repeatedly ruled unconstitutional by the Romanian Constitutional Court, and in violation of the ECHR by the European Court of Human Rights [REDACTED]

[REDACTED] Mr. Steinmetz had a reasonable suspicion that at least one of the appeal trial panel judges had issued unlawful national security warrants authorising the SRI to wiretap his telephone conversations. Considering the illegality of the relationship between the High Court and the executive which gave rise to these warrants, Mr. Steinmetz had legitimate grounds to fear a lack of independence or bias on the part of any judge involved in the authorisations. On 3 June 2020, Mr. Steinmetz requested access to classified Court protocols through which these national security warrants were issued, to cross-check the names of the judges with a view to gathering potential evidence of bias/lack of independence on the part of the appeal trial panel. On 4 June 2020, the High Court denied the request, on the basis that counsel had had an opportunity to study the documents during the first instance trial (notwithstanding the fact that counsel could not make copies or notes and could not anticipate the names of appeal judges at the time). The High Court's denial of Mr. Steinmetz's request effectively prevented him from challenging the independence and impartiality of the tribunal.

(e) **The High Court refused to allow Mr. Steinmetz's counsel to pursue important lines of questioning during the cross examination of key witnesses, asked leading questions and was hostile to defence witnesses.** On 18 June 2020, the High Court rejected Mr. Steinmetz's line of questioning (without reasonable justification) aimed at eliciting information about contact between witness [REDACTED] and another witness in the case – depriving him of an opportunity to clarify inconsistencies in the prosecution witnesses' statements. On 26 June 2020, the High Court rejected Mr. Steinmetz's line of questioning to witness [REDACTED] aimed at adducing evidence (including documentary evidence from the DNA's case file) that undermined the credibility of the witness' account on his meeting with [REDACTED] – thereby depriving him of an opportunity to demonstrate key inconsistencies in the witness' evidence. On 24 September 2020, during the cross-examination of witness [REDACTED], the High Court rejected – without adequate justification – Mr. Steinmetz's line of questioning aimed at eliciting exonerating evidence in relation to the charges of influence peddling and formation of a criminal group. Mr. Steinmetz has documented numerous instances where the High Court was inappropriately hostile to witnesses who failed to support the prosecution's case theory.

(f) **The High Court allowed the Prosecution’s eleventh-hour substitution of the main charge against Mr. Steinmetz without debate or interlocutory decision.** In its appeal against the Brasov Court decision filed on 23 January 2020, the DNA sought Mr. Steinmetz’s conviction for the crime of establishing an organised criminal group under Article 367 paragraph 1 of the Romanian Criminal Code. On 7 April 2020, the DNA requested the High Court to change the framing of the alleged offence to the aggravated form of the crime under Article 367 paragraph 2 of the Romanian Criminal Code. Mr. Steinmetz opposed this eleventh-hour substitution of the main charge against him. The Constitutional Court of Romania has held that any change in framing of a charge after the commencement of proceedings must be debated in an adversarial hearing and must be decided on in an interlocutory decision – not in the decision on the merits of the case. This finding is consistent with Mr. Steinmetz’s right to be informed promptly of the nature and cause of the accusations against him. Ignoring the applicable law, the High Court failed to put this matter to an adversarial hearing or to rule on the request in advance of the judgement on the merits.

The source alleges that the verdict at issue relies heavily on the testimony of a witness whose anti-Semitic comments were quoted by the judges. According to the information received, a witness used the term “a Jew” and “the Jews” when referring to Mr. Steinmetz and the case, which could indicate anti-Semitic prejudice, and the judges in the case did not dismiss these statements.

On 26 November 2020, Mr. Steinmetz filed his final appeal submissions, arguing *inter alia* that the “ambient recordings” are unreliable evidence, that the reframing of the charge violated Mr. Steinmetz’s procedural and constitutional rights, and that the constituent elements of the charged offence are not met by the DNA’s evidence.

On 17 December 2020, the High Court issued an oral and unreasoned decision, convicting Mr. Steinmetz *in absentia* on charges of establishing an organized criminal group (Article 367 para. 1 and 2 of the Romanian Criminal Code) and sentencing him to five years of imprisonment and to pay 40,500 LEI in judicial expenses. The High Court issued its fully reasoned written judgement on 8 April 2021. A High Court decision is not appealable but may be challenged for annulment in limited circumstances.

Mr. Steinmetz has filed three challenges for annulment. On 19 January 2021, he filed a challenge on the grounds that one of the appeal judges – [REDACTED] – lacked judicial capacity as she had not been legally sworn in prior to the appeal trial proceedings, and that the composition of the appeal panel was unlawfully manipulated by the executive. The challenge was rejected as premature and inadmissible on 2 February 2021. Mr. Steinmetz subsequently re-filed the first challenge for annulment. The challenge was admitted in principle but rejected on the merits on 22 April 2021. On 7 May 2021, Mr. Steinmetz filed a further challenge for annulment on the grounds that the judges lacked impartiality and that Mr. Steinmetz was unrepresented during a crucial hearing. The third challenge was admitted in principle but rejected on

the merits on 6 July 2021. Mr. Steinmetz has no further avenues to challenge the lawfulness of his conviction under Romanian law.

On 6 October 2021, Mr. Steinmetz filed an application to the European Court of Human Rights against Romania (Application 50074/21), alleging multiple violations of Article 6 of the Convention during the appeal trial.

On 11 October 2021, the Commission for the Control of INTERPOL's Files ("INTERPOL Commission") removed Mr. Steinmetz's data from its Red Notice database, on the grounds that it had "strong concerns [...] under its study of Articles 2 and 3 of INTERPOL's Constitution" (i.e., the political character of the case and due process).

On 24 November 2021, Mr. Steinmetz was arrested by Greek authorities based on a Schengen Information System alert issued by Romania. The Public Prosecutor's Office of the Court of Appeal of Athens ordered Mr. Steinmetz to appear every Monday at the police department of his place of residence, imposed a ban on leaving Greece, applied a cash bail of 5,000 EUR, in wait for the hearing on his extradition to take place on 12 January 2022.

I am concerned that the information provided may constitute a violation of the right to fair trial, as well as a violation of the right of equality before the courts.

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 to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any information and/or comment on the alleged violations that have prevented or limited the right of Mr. Steinmetz to a fair trial.
2. Please provide clarification on the allegations that anti-Semitic statements were allowed during the proceedings in the case of Mr. Steinmetz and were also repeated in the verdict. Please provide detailed information on the measures taken to address discrimination in the administration of justice in Romania.
3. Please provide an update on the current status of Mr. Steinmetz's case.
4. Please provide detailed information on the measures adopted to ensure the independence and impartiality of 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. 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, 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.

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 a number of international and regional human rights treaties to which Romania is a party, including the International Covenant on Civil and Political Rights (ICCPR), ratified on 9 December 1974, and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ratified on 20 June 1994.

Article 14 of the ICCPR provides that right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

Furthermore, it establishes the right to fair proceedings before a competent, independent and impartial tribunal established by law. In this regard, General Comment No. 32 (2007) of the United Nations Human Rights Committee indicates in its paragraph 10 that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”. It notes as well that 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. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial. (General Comment No. 32, para. 21).

The General Comment also describes that the right to equality before courts and tribunals also ensures equality of arms. 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 (paragraph 13).

As a member State of the European Union, Romania is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (art. 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is binding on Romania, and reflects fair trial requirements.

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 held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) provide that: “(...)The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration” (principle 14).

Furthermore, Principle 2 of the UN Basic Principles on the Independence of the Judiciary states 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.”

The Bangalore Principles of Judicial Conduct contain detailed guidance regarding impartiality: “A judge shall perform his or her judicial duties without favour, bias or prejudice” (Principle 2.1). In addition, regarding Equality: “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds” (Principle 5.1). In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary.

The European Charter on the statute for judges (1998), states that “Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence” (article 4.3).

The standards referred to above refer to the obligations of governmental and other institutions to protect and promote the independence of the judiciary.