

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

Ref.: AL TUR 9/2022
(Please use this reference in your reply)

14 October 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 the alleged lack of independence of the judges who oversaw the lawsuits regarding Türkiye's withdrawal from the Istanbul convention, as well as procedural issues that may have impacted the right to a fair hearing of the people and organizations in the country protesting this Presidential Decision.

Your Excellency may recall that I had already expressed concerns in relation to the composition and functioning of the Council of Judges and Prosecutors (CoJP), in JOL TUR 5/2017; and OL TUR 15/2020 as well as its repercussions for the administration of justice, which were sent in May 2017 and September 2020 respectively. I thank you and acknowledge the replies received.

According to the information received:

On 19 March 2021, Decision No. 3718¹ of the President of the Republic of Türkiye was published notifying of the country's withdrawal from the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereafter the Istanbul Convention).

More than 220 lawsuits have been filed at the Council of State by various individuals and organizations against the Presidential Decision. In addition to natural persons, lawsuits have been filed by women's organizations, bar associations, trade unions, political parties, and several associations. The Council of State is the Higher Judicial authority tasked with settling the disputes between the state and natural or legal persons.

The 10th Chamber of the Council of State initially turned down the request for the stay of execution of the Presidential Decision, by a vote of two out of three, on 29 June 2021.

Appealing this ruling, some of the plaintiffs brought it before the Board of Administrative Litigation Chambers, (BoALC), the appeals body of the Council of State. The BoALC also ruled against the request for the stay of execution by a majority of votes on 21 February 2022.

¹ The President's decision was based on the authority granted to the President by Presidential Decree No. 9 to ratify, implement, cease implementation, and terminate international treaties

Shortly after that, to the extent that it was made public, three different Council of State Prosecutors wrote opinions where they suggested that the Presidential Decision to withdraw from the Istanbul Convention was unlawful and it needed to be repealed.

Collective hearings on lawsuits were held on four different dates: 28 April, 7 June, 14 June and 23 June 2022. Hearings of 15 to 20 lawsuits were conducted each day.

The 10th Chamber of the Council of State turned down the request for the stay of execution of the Presidential Decision to withdraw from the Istanbul Convention by a vote of two against three. Although the date on this ruling was 28 April 2022, it was announced on 19 July 2022, only one day before the start of the judicial recess.

According to information received, notifications of rejection are currently being served to the plaintiffs whose cases have been heard or who filed their lawsuits without requesting a hearing. These files are in the appeal stage.

In addition, there are some other plaintiffs who are still waiting to get a hearing date as they had requested hearings when filing their lawsuits.

Hearings on the lawsuits

According to information received, the overall process of class-action lawsuit was negatively affected by poor handling, in violation of the article 6 of the European Convention on Human Rights and the Constitution of the Republic of Türkiye, article 36 on the freedom to seek redress and article 141 on judicial economy. (141/4: It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost.)

For example, the trial of these lawsuits, first of which was filed on 19 March 2021, was not concluded within a reasonable period of time and the process has yet to be finalized; no evidence was collected *ex officio* or upon request. In addition, information received notes the failure to try lawsuits relating to the same matter through joinder of actions, or by holding the hearings on different weeks or months, as well as the failure to assign a hearing date although the judgments have been issued in other lawsuits.

In addition, information provided suggests that courts ruled full attorney's fee, even though in serial lawsuits, the courts are supposed to rule an attorney's fee that is equivalent to the 50%, 40% or 25% of the full fee for each case, separately. Considering more than 220 lawsuits were filed, ruling a full attorney's fee for each case in favour of the defendant would lead to disproportionate enrichment of the Presidency's attorney, while punishing the plaintiffs, and deterring others who might want to seek redress through filing similar lawsuits in the future.

Lack of independent and impartial judges

According to information received, there are concerns regarding the independence and impartiality of the judges presiding over these lawsuits, and hearings on the request to stay the Presidential decision.

On 1 June 2022, the Council of Judges and Prosecutors (CoJP) selected three new members for the vacant seats at the Council of State. Upon the Presidential Decision published on the Official Gazette of 2 June, the Deputy Minister of Justice, was appointed as a Council of State Member. According to reports, the President has appointed members and executives of the political party he leads, the Justice and Development Party (AKP) to the judicial bodies.

The information received notes that Deputy Minister of Justice appointed in 2019, was involved in the process of laying the groundwork for the decision to withdraw from the Istanbul Convention, and he made his position clear in a social media post he shared on 20 March 2022.

There are also concerns in relation to the composition and functioning of the Council of Judges and Prosecutors, noting that all personal rights of both the newly-appointed judges and those who are already in office are bound by the CoJP. According to the information received, in such an atmosphere, it would not be feasible to expect any judge to make independent and impartial decisions.

While the legal cases were ongoing, it was reported that the President allegedly intervened in the structure of the Board of Administrative Litigation Chambers (BoALC). The term of office of the members of the BoALC, was extended from 31 December 2022 to 31 December, 2026, upon the Law on Amending the Law on Judges and Prosecutors and Other Laws, published on 28 June 2022.

Thus, the existing structure of this Board, which rejected the appeals to the Council on the stay of execution of the President's decision and will examine the decision of the 10th Chamber of the Council of State and have the final say, has been preserved, reportedly ensuring that appeals will be rejected.

Regarding the actual proceedings, it was reported that in one of the lawsuits against the decision to withdraw from the Istanbul Convention, in response to the rejection of the request for stay of execution, an attorney filed a motion to recuse a Judge of the Council of State claiming that she would not act impartially in a case where the defendant is the President. While this motion was turned down, the Council of State Judge filed a complaint against this attorney and some other people who criticized her on social media, on the charges of "insulting a civil servant for performing her duties".

In addition, after the lawsuits related to the Istanbul Convention were filed, two members of the committee tasked with the initial examination of the case were replaced by two new members, one of whom was a former Justice and Development Party (AKP) municipal legal counsel. It was those two members who, together with the presiding judge, decided in June 2021, against the

Istanbul Convention. Only two out of five judges voted for a stay of execution of the President's decision.

Restrictions on women expressing their views

The first hearing, held on 28 April 2022, was attended by many women from across Türkiye, representatives of women's organizations and women attorneys. Following press statements given just before the hearing, more than a hundred women were kept at the door to the Council's courtroom for nearly two hours. Although the court was already in session, the women were held off and not admitted into the courtroom by the officials who used various excuses. After hours of waiting and struggling, when the women grew impatient, started chanting and attempted to go inside, the police used pepper gas against many women, resorted to physical violence, and even dragged some women on the ground. Once the feminist attorneys inside the courtroom were made aware of the disarray in front of the door, they informed the Presiding Judge about the situation and the court took a recess; later, the hearing resumed after all women waiting outside had been admitted into the courtroom. Many women including some of the plaintiffs and attorneys had to miss out on the first hearings.

Before the hearing of 23 June 2022, members women's organizations and other women who had come for the hearing were not allowed to read their press statements within the grounds of the Council of State. The women were not admitted into the Council of State premises. They were stuck in a space between the highway and the fences surrounding the Council of State. The women were not allowed to make a press statement, and they had to endure verbal violence for a long while. In the presence of custody vehicles parked right next to them, the women at constant risk of being taken into custody if the conflict were to escalate. As the start time of the hearings neared, the women were once again threatened by the officers who told them that they could either read their statements or attend the hearing, but not both. In the end, creating a de facto situation, the women made it to where the press members were, and read their statements. Most women were unable to attend the first hearings.

The total sum of fines imposed on Mersin Women's Platform for holding the Istanbul Convention Watch since 20 March 2021 when it was announced that Türkiye had withdrawn from the Istanbul Convention upon a Presidential Decision now amounts to more than 120.000 TL. These fines were brought before the Constitutional Court by the women, and the Court recently ruled that they are unlawful.

Without prejudging the accuracy of these allegations, I would like to express my concern about the information received regarding the alleged mishandling of the lawsuits and hearings that ensued after the Presidential decision to withdraw from the Istanbul Convention. Reports regarding alleged irregularities in the way these lawsuits were handled, if proven to be true, could amount to a violation of the right to a fair trial, and the procedural guarantees protected in that right, such as the equality of arms and of access to justice.

I am also concerned at reports of the alleged lack of independence and impartiality of the judges presiding over these cases, at the public statements made by those appointed to the CoJP regarding the withdrawal from the Convention, together with the observations I've already made about this body. If proven to be correct, these instances would represent a violation of the right to a fair trial, in particular its provision of the right to appear before an impartial and independent judge.

I am also very concerned at the information received regarding the alleged restrictions placed on women's organizations wishing to express their opinion against the Presidential Decision and wishing to follow the proceedings.

Allow me to also take this opportunity to recall that by becoming parties to international and regional treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. I am concerned that by withdrawing from the Istanbul Convention, Türkiye is going back on the commitments undertaken relate to universal human rights instruments.

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 additional information and/or comment(s) you may have on the above-mentioned allegations of lack of independence of the judges who oversaw the lawsuits regarding Türkiye's withdrawal from the Istanbul convention.
2. Please explain the measures taken by Your Excellency's government to comply with the Your Excellency's Government's obligations under articles 2, and 14, of the ICCPR and article 8, and 10 of the UDHR.
3. Please share the measures taken to ensure that women's voices are heard on this issue, and their views are taken into consideration.
4. Please explain how the withdrawal of from the Istanbul Convention is compatible with Your Excellency's Government's obligations under the treaties ratified by Türkiye, and the UDHR.

I would appreciate receiving a response within 60 days. Past this period, 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, the independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Türkiye is a party, including the International Covenant on Civil and Political Rights, ratified by Türkiye on 23 September 2003, and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ratified on 18 May 1954. Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

Article 14 of the ICCPR establishes the right to fair proceedings before a competent, independent and impartial tribunal established by law; while article 19 establishes the right to freedom of expression.

In its General Comment No. 32 (2007), the Human Rights Committee observed that article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19).

According to article 2 of the Convention of the Elimination of Discrimination against Women (CEDAW), to which Türkiye acceded on 20 December 1985, Türkiye has the core obligation to condemn discrimination of women in all its forms and “to pursue by all appropriate means and without delay” a policy of eliminating discrimination against women, by taking inter alia “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”. Furthermore, article 3 of CEDAW stipulates that “States parties shall take in all fields, in particular, in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

Furthermore, as the CEDAW Committee stated in its Concluding Observations on the eighth periodic report of the Republic of Türkiye of July 2022, withdrawal from the Istanbul Convention is not only “a retrogressive measure that reduces the scope of protection of women’s human rights” but it is also “inconsistent with the State party’s due diligence obligations under the Convention on the Elimination of All Forms of Discrimination against Women to uphold women’s and girls’ highest human rights standards”. Namely, the Committee recalls “the principle of indivisibility and universality of human rights enshrined in the Vienna Declaration and Programme of Action of 1993, and anchored in the Convention, the Committee invites the State party to reconsider its decision to withdraw from the Istanbul Convention, which further weakens protections for women and girls, deprives them of acquired rights and stands

in contrast to the afore-mentioned standards and principles of international human rights law”.

The right to freedom of expression includes the right to seek, receive, and impart information and ideas of all kinds. As interpreted by the Human Rights Committee in General Comment No. 34 (CCPR/C/GC/34), such information and ideas include commentary on one’s own and on public affairs, discussion of human rights, and journalism (paragraph 11). All forms of expression and the means of their dissemination are protected (paragraph 12).

I would like to remind your Excellency’s Government that any restrictions to the right to freedom of expression must meet the criteria established by international human rights standards, such as article 19 (3) of the ICCPR. Under these standards, restrictions must be provided for by law and conform to the strict tests of necessity and proportionality. Article 19 (3) may never be invoked to justify the muzzling of any advocacy of human rights (paragraph 23). Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, be compatible with article 19 (Id.).

The independence of the judiciary is an essential requirement of the democratic principle of separation of powers, which stipulates that the executive, the legislature and the judiciary constitute three separate and independent branches of Government. The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities.

In General Comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stressed that the requirement of independence of a tribunal is “an absolute right that is not subject to any exception.” The requirement of independence “refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.” The Human Rights Committee clearly stated that “[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal” (para. 19).

The principle of the independence of the judiciary has also been enshrined in the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985. The principles provide, inter alia, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and

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 (principle 4).

The Basic Principles also provide guidance on a series of further requirements, including qualifications and selection of judges (principle 10), conditions of service (principle 11), security of tenure (principle 12) and disciplinary, suspension or removal proceedings (principles 17–20). With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

At the regional level, the obligations of States in relation to the safeguard of judicial independence are spelled out in a number of instruments, including the European Charter on the Statute for Judges and the Council of Europe Recommendation on judicial independence.²

² Council of Europe, recommendation of the Committee of Ministers on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, 2010.