

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

Ref.: AL BIH 2/2023
(Please use this reference in your reply)

24 August 2023

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 **recent pressure and initiatives by the leadership of the Republika Srpska entity of Bosnia and Herzegovina targeting the Constitutional Court of Bosnia and Herzegovina that may amount to incursion into the Court's independence and functioning.**

The Constitutional Court of Bosnia and Herzegovina¹ was established by the Constitution of Bosnia and Herzegovina as part of the General Framework Agreement for Peace (Dayton Peace Agreement) (annex 4, article VI).² It was set up following the election and appointment procedures in May 1997, when the first session of the Constitutional Court was held. Rules of Procedure were initially adopted at the session held on 29 July 1997, and have since been amended six times, with the adoption the Rules of the Constitutional Court of Bosnia and Herzegovina on 23 July 2005. The seat of the Court is in Sarajevo.

The Constitutional Court is composed of nine members. Six judges are selected by the respective assemblies or parliaments of the two Entities (four members are selected by the House of Representatives of the Federation of Bosnia and Herzegovina, two members are selected by the National Assembly of Republika Srpska). The remaining three judges are appointed by the President of the European Court of Human Rights after consultation with the tripartite Presidency of Bosnia and Herzegovina (these judges must not be citizens of Bosnia and Herzegovina or of any neighbouring state).

The term of office of those judges who were initially appointed was five years. Judges subsequently appointed may serve until the age of 70, unless they resign or are removed for cause by consensus of the other judges.

The Constitutional Court of Bosnia and Herzegovina is the ultimate judicial authority in safeguarding constitutional rights, including the human rights of all individuals within the jurisdiction of Bosnia and Herzegovina. Its role is crucial in interpreting and ensuring implementation of the obligations of Bosnia and Herzegovina incumbent on the State and all its constitutive parts under the European Convention on Human Rights and Fundamental Freedoms and other international human rights treaties. In addition to control of constitutionality, this court possesses appellate jurisdiction over issues arising from the Constitution of Bosnia and Herzegovina, emanating from judgments rendered by any court within the country. Consequently, it functions as the de facto supreme court or final instance court in disputes related to the protection of human rights guaranteed by the Constitution of

¹ [Constitutional court of Bosnia and Herzegovina | Organization \(ustavisud.ba\)](https://www.ustavisud.ba)

² <https://www.ohr.int/dayton-peace-agreement/annex-4/>

Bosnia and Herzegovina.

According to the information received:

Allegations of initiatives against the independence of the Constitutional Court

Reports indicate that the Republika Srpska National Assembly (RSNA) has not replaced one of the two RSNA-appointed judges after his retirement on 3 November 2022, even though the RSNA had received applications for the vacancy, and the vacancy affects the work of the Court. In February 2023, the selection process was put on hold. The appointment of another judge by the House of Representatives of the Federation of Bosnia and Herzegovina also remains pending.

The information further suggests that the RSNA accelerated its Court-related actions after the Constitutional Court declared as non-constitutional the Republika Srpska Law on agricultural land and forest (September 2021)³ and the Republika Srpska law on immovable property (September 2022)⁴.

For example, an agreement signed on 24 April 2023 by the political parties forming the Republika Srpska ruling coalition included a request for the resignation of the remaining RSNA-appointed judge of the Constitutional Court of Bosnia and Herzegovina. On 27 April 2023, the Republika Srpska National Assembly adopted a decision at a special session, formalizing this request. Shortly thereafter, the Judge in question announced that he would submit his request for early retirement at the end of 2023, before the mandatory end of his term in 2030.

These developments prompted the Constitutional Court to issue a press release, on 19 June 2023⁵, denouncing the political pressure on one of its judges and describing the events as creating the “biggest crisis” faced by the institution since its establishment. The Court also revised its procedures for the adoption of rulings to ensure it would be able to issue decisions in case of the repeated absence of a judge. The revisions stipulate that at least one judge from the Republika Srpska entity and three judges from the Federation of Bosnia and Herzegovina must attend the sessions dedicated to assessing the constitutionality of legislation passed at the State level or lower levels. And it stipulates that, in the case of two consecutive absences of some judges, the session would be held in their absence.

The Republika Srpska entity’s leadership reportedly viewed these amendments as posing a threat to the Republika Sprska entity and has called for their withdrawal, as well as for the reform of the Constitutional Court, in particular for the removal of international judges. The information suggests that new legislation was then passed by the RSNA in response to revisions introduced by the Constitutional Court to its internal rules of procedure:

On 27 June, the RSNA adopted the Law on non-application of decisions of the Constitutional Court of Bosnia and Herzegovina in the Republika Sprska

³ [Zakon o poljoprivrednom zemljištu Republike Srpske - Paragraf Lex BA.](#)

⁴ [U RS stupio na snagu Zakon o nepokretnoj imovini, uprkos suspenziji OHR-a \(slobodnaevropa.org\).](#)

⁵ [https://www.ustavnisud.ba/en/press-release-2235.](https://www.ustavnisud.ba/en/press-release-2235)

entity (by 56 votes in favour out of 65 parliamentarians present), providing that the rulings of the Constitutional Court of Bosnia and Herzegovina would no longer apply in the Republika Srpska entity until the Parliamentary Assembly of Bosnia and Herzegovina adopts a law to reform the Constitutional Court.

Without prejudging the accuracy of these allegations, I would like to express my serious concern about what appears to be improper interference in the exercise of the Constitutional Court's judicial independence.

Specifically, I am concerned about the series of actions taken by officials of the Republika Srpska entity that, separately and in combination, appear to be aimed at undermining the Constitutional Court of Bosnia and Herzegovina. These actions include measures taken by the RSNA to delay judicial appointments, call for the resignation of specific judges, and pass legislation purporting to erode the authority of the Constitutional Court of Bosnia and Herzegovina. If confirmed, this course of action would constitute a serious breach of international human rights standards and the Basic Principles on the Independence of the Judiciary.

In this regard, I would like to recall that the right to a fair and public hearing by an independent and impartial tribunal is provided for in international human rights standards, and that a competent and independent court is one of the guarantees of a fair trial. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, guarantees relating to their security of tenure, and guarantees of respect for their independent rulings.

The reported actions strike at the independence of the judges of the Constitutional Court, as well as the independence of the Court itself. Pressure by high-level officials on a sitting judge to resign, attempts by officials to control the ability of the court to function by manipulating vacancies, and passing legislation purporting to not recognize the Court's lawful decisions amount to interference in the court's independence.

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.
2. Please explain how the actions taken are compatible with Your Excellency's Government's obligations under ICCPR and the Basic Principles on the Independence of the Judiciary, and in particular principles 11 and 12.

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.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite
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 the attention of your Excellency's Government to the Universal Declaration of Human Rights (UDHR) and refer to its article 10, which guarantees "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"; and to the fundamental norms set forth in article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Bosnia and Herzegovina in 1993, which enshrines the principle of equality before the law and the right of every person to be heard publicly and with due guarantees by a competent, independent and impartial court, established by law, a right that cannot be subject to any exception.

As affirmed by the Human Rights Committee: "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. States should take specific 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". (General comment no. 32, para. 19).

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, establish that all governmental and other institutions must respect and conform to the independence of the judiciary (principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason" (principle 2).

These Basic Principles on the Independence of the Judiciary also provide that: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.....Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists (principles 11 and 12)."

In 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency" (A/HRC/11/41, para. 18). Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur

on that mandate highlighted that “respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy” (A/HRC/35/31, para. 16).