

December 2009

SPOT REPORT**Independence of the Judiciary:
Undue Pressure on BiH Judicial Institutions**

Under the Dayton Agreement, the OSCE is mandated to closely monitor the human rights situation in Bosnia and Herzegovina (BiH). As part of this mandate, the OSCE Mission to Bosnia and Herzegovina (“OSCE BiH” or “the Mission”) has also monitored criminal proceedings before all courts in BiH since 2004. The Mission has paid particular attention to the issue of the independence and impartiality of the judiciary, these being absolute prerequisites to the rule of law and a fundamental guarantee of a fair trial.

OSCE BiH is deeply concerned about the nature of statements expressed by some prominent political representatives, particularly but not exclusively from the Republika Srpska, in relation to the work of the Court of BiH and BiH Prosecutor’s Office. While the executive and legislative powers may legitimately scrutinize and comment on the functioning of the judiciary, the Mission’s assessment is that these statements, due to their harsh content, unsubstantiated nature, and frequency, overstep the limits of acceptable criticism and constitute undue pressure on these independent institutions.

In recent months, judges and prosecutors working in the Court of BiH and BiH Prosecutor’s Office have been harshly criticized as lacking integrity and professionalism. By making explicit reference to the processing of specific ongoing criminal cases, these statements constitute a clear interference with the judicial process. Even more concerning is the fact that some of these statements call into question not only the work of the state level judiciary, but also the very constitutionality of the existence of the Court of BiH and BiH Prosecutor’s Office, and the sustainability of the judicial reforms undertaken in BiH.

This spot report does not aim to address the issue of the independence of the country’s justice system as a whole. Rather, the report focuses exclusively on judicial institutions at the state level taking into account their discrete competences and legal *status* within the country’s institutional structure. Bearing this in mind, it should be emphasized that instances of improper pressure have also occurred in relation to the work of judicial institutions within the entities. In this regard, instances of political interference in the long-standing stalemate over appointment of judges to the Federation of BiH Constitutional Court remain a matter of deep concern. The Mission is closely monitoring such situations and stands ready to address them in future reports.

Therefore, it is with urgency that the OSCE BiH urges political representatives to refrain from any improper influence or pressure in relation to the judicial process and from attacks upon the reputation and integrity of the judiciary. Allegations of misconduct by judicial actors should be referred to and dealt with by the High Judicial and Prosecutorial Council (HJPC), as the only responsible organ regulating the conduct of judges and prosecutors in BiH. The institutional independence of the HJPC itself is a guarantee of the legitimacy of inquiries into such matters.

The international obligation to preserve the independence of the judiciary

Independence of the judiciary is generally recognized as a fundamental tenet of international human rights law, including several international instruments such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (ECHR), and OSCE human dimension commitments. This principle is also enshrined in the Constitution of BiH, which recognizes the direct applicability of the ECHR and its priority over all other national law. According to the UN Basic Principles on the Independence of the Judiciary, “it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” Moreover, “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.”¹ States should take specific measures guaranteeing the independence of the judiciary, hence protecting judges from any form of political influence in their decision-making.²

Importantly, it must be underscored that freedom of expression does not necessarily provide an equitable excuse behind which harsh critics of the judiciary’s work can seek solace. Article 10 of the ECHR declares that freedom of expression may have a legitimate limit in the need to maintain the authority and impartiality of the judiciary. On this point, the European Court of Human Rights explains that:

... [R]egard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.³

Instances of undue pressure on the Court of BiH and BiH Prosecutor’s Office

Frequently, the Court of BiH and the BiH Prosecutor’s Office have been the object of attacks coming from political and other influential figures of both Entities, mainly in connection with investigations or trials conducted by these institutions against them. For instance, the former member of the Presidency of Bosnia and Herzegovina and current President of HDZ BiH Party Dragan Čović stated on a number of occasions that his own trial on charges of abuse of office – which started in 2006 before the Court of BiH -- was politically motivated.⁴

However, in the course of the last 12 months these instances have dramatically increased and the intensity of criticism and pressure has reached an unprecedented level. The investigation that followed the 2008 request of the BiH Prosecutor’s Office to deliver documents related to allegations of abuse of office seems to have triggered a political campaign against the state judicial institutions by a number of RS political representatives. The Government of Republika Srpska, in a Conclusion adopted on 20 October 2008, formally refused to hand over the requested material on the grounds that the BiH Prosecutor’s Office does not have jurisdiction over the alleged offences. The Office of the High Representative and the EU Police Mission condemned this conclusion as interference with the independence of the judiciary, stating that it is up to judicial authorities and not to the executive power to decide upon jurisdictional matters. A specific request from the Peace Implementation Council

resulted in the documents eventually being handed over⁵ (this episode marked the start of a progressively intense campaign of attacks by political representatives from the Republika Srpska against the Court of BiH and BiH Prosecutor's Office).

A motion filed by Republika Srpska authorities opposing the seizure of documents was rejected by the Court of BiH in December 2008. The Republika Srpska Prime Minister and leader of the SNSD (Union of Independent Social Democrats), Milorad Dodik suggested that the Court and Prosecutor's office were biased against the Republika Srpska.⁶ When, in February 2009, the State Investigation and Protection Agency sent a criminal report against the Republika Srpska Prime Minister and several other current and former RS government officials to the BiH Prosecutor's Office, the PM labeled the report an "attempt to destabilise and then abolish RS" and the product of a plot against the Republika Srpska ordered by "foreigners."⁷ In the following months, the Republika Srpska Prime Minister reiterated his attacks in several statements both on television and in the print media openly accusing the Court of BiH and BiH Prosecutor's Office of being prejudicially anti-Serb due to the fact that indictments have not been raised in several specific cases involving alleged war crimes against Serb individuals. Another recurrent accusation is that state level criminal justice institutions are controlled by the Office of the High Representative (OHR) through the presence of international prosecutors and judges.⁸ At best, such accusations are wholly unsubstantiated by evidence of misconduct by judicial officials. At worst they represent a clear interference in the aforementioned ongoing criminal investigations. Due to their content and source, these statements are intended to affect unduly how the judges and prosecutors are handling the proceedings in question.

Most concerning of all are assertions from the Republika Srpska Prime Minister that the Court of BiH and BiH Prosecutor's Office are illegal institutions, as they are not envisaged in the Dayton Constitution. According to his own statements, Prime Minister Dodik is therefore unwilling to respond to any summons that may be sent to him in relation to the above-mentioned investigation, or to otherwise cooperate with the state level judicial institutions in specific proceedings.⁹ Such statements seem to disregard that the Constitutional Court of BiH has affirmed the constitutionality and legitimacy of these institutions.¹⁰

Other prominent political representatives from the Republika Srpska, including the RS Minister of Justice, Dzerard Selman, and the President of the Party of Democratic Progress (PDP), Mladen Ivanić, have also cast doubts concerning the impartiality and legitimacy of the state level judicial institutions. These statements increase the impression that a concerted campaign against the state judiciary, as well as an effort to derail judicial reforms, is underway.¹¹

Accusations of bias against Serbs and of the judiciary acting under the influence of the international community were also expressed in both Houses of the BiH Parliamentary Assembly. On the occasion of the presentation of the Report on the Work of the BiH Prosecutor's Office for 2008, a number of Serb delegates in the House of Representatives and the House of Peoples harshly criticized the work of the BiH Prosecutor's Office – in particular that of international prosecutors – accusing them of only processing war crimes committed by Serbs and failing to prosecute cases involving crimes against Serbs.¹² Dusanka Majkic (SNSD) attacked the professional integrity of a specific international prosecutor who is conducting the investigation against the Prime Minister Dodik. Accusations were repeated

by Serb representatives during presentation of the Annual Report of the HJPC for 2008 at the 23 July 2009 session of the House of Peoples.

In light of the obligation of the State to protect the independence and reputation of the judiciary, the above-mentioned statements overstep the limits of acceptable criticism and constitute undue interference with the work of the judiciary. Accusations that only Serbs are prosecuted for war crimes and that cases involving crimes against Serbs are not being processed are unfounded. As affirmed in the National War Crimes Prosecution Strategy adopted by BiH in December 2008, the policy of the Prosecutor's Office of BiH shall be to prioritize prosecution of persons most responsible for the most serious and complex crimes rather than to achieve an ethnic balance in prosecution. OSCE BiH fully agrees with this policy and the Mission's monitoring findings do not indicate that ethnicity has been a motivating factor in either the selection of war crimes cases for prosecution or the manner in which they have been adjudicated or sentenced.

This assessment is consistent with findings of international non-governmental organisations such as Human Rights Watch and the International Center for Transitional Justice. The facts that the state level judicial institutions employ judges and prosecutors belonging to all three BiH constituent peoples, and that the leadership of these institutions includes individuals of Serb ethnicity, also contradict allegations of ethnic bias.

On a final note, there have been concerns expressed regarding the possibility of political pressure on the judiciary by virtue of threatened or actual cuts made to the funding of the justice sector through the budgetary process. Among others, the President of the Court of BiH has often lamented that the cuts imposed by the BiH Parliament within the State Court's 2009 budget were emblematic of a lack of political commitment to supporting the Court's work. Judicial officials both in the Court of BiH and the BiH Prosecutor's Office have also expressed fears that further cuts within the 2010 Budget could have serious consequences on the implementation of the National Strategy on War Crimes Processing.¹³ While there is little doubt that any further cuts to the present capacity of the state level judiciary would have serious negative consequences on its capacity to process complex criminal cases, there is nothing that suggests that the budget cuts imposed in the last year have been intended as a means to exert pressure or to interfere with the state judicial institutions.

International standards¹⁴ underscore the obligation of both the legislative and executive branches of governments to ensure that adequate resources are allocated to the judiciary. Such decisions on judicial budgets are intended to guarantee that such institutions can discharge their functions appropriately, according to their own stated and assessed needs. Ensuring that judicial institutions are allocated sufficient resources has been a matter of concern also at the entities' level.¹⁵ Given the present environment, it will be essential to ensure that the budgetary process for the coming year and beyond is free of any taint or appearance that funding levels are influenced by political considerations.

Recommendations for the strengthening of judicial independence at the state level

As part of its overall strategy to support the establishment of the rule of law throughout the country, the OSCE Mission to Bosnia and Herzegovina will continue to monitor the justice sector and offer technical assistance wherever possible to bolster the criminal justice system's ability to prosecute serious crimes in a fair, effective, efficient and independent manner. As

part of these efforts, the Mission will continue to support the country's courts in their efforts to implement both the Justice Sector Reform Strategy and National Strategy on War Crimes Processing. To do so, the Court of BiH and the BiH Prosecutor's Office will need to remain a leading force within the criminal justice system. This will require both adequate resourcing and political backing. The Mission will support the Court and the Prosecutor's Office in getting both.

In that same vein, the Mission welcomes the decision of the High Representative extending international judges and prosecutors working on war crimes cases and the statement by the Steering Board Ambassadors of the Peace Implementation Council supporting that extension. In the current situation, international judges and prosecutors working on such sensitive cases provide a bulwark against the intimidation and political pressures which have been described in this report. In this regard, the unfortunate decision to reduce the international presence in the organized crime section creates an even stronger need for respect and protection of the independence of the judiciary by national political forces and for support to the work of the state level judicial bodies by the International Community. OSCE-BiH, for its part, will continue to monitor the most sensitive cases conducted before the Court of BiH and to be vocal in condemning attempts to exert political pressure on the judiciary in BiH, whatever their political provenance. This in the understanding that future evaluations of the timeframe for further phasing down of the international presence should be based, among other considerations, on evidence of concrete and firm commitment by the relevant political forces to the preservation of the independence, the work capacity and the integrity of the judiciary in general and of state level judicial institutions in particular.

As such the following recommendations are designed to ensure that adequate measures are taken to safeguard and enhance the independence of judicial institutions in Bosnia and Herzegovina:

1. Political representatives should refrain from any improper influence or pressure on the judicial process and from attacks upon the reputation and integrity of the judiciary.

In order to correct and counter the appearance of a political campaign aimed at undermining the state level judiciary of BiH, political leaders should immediately cease making statements against the work and legal foundations of the Court of BiH and Prosecutor's Office of BiH that go beyond acceptable limits of commenting on the judicial branch. Allegations of misconduct by judicial actors should be referred to and dealt with by the High Judicial and Prosecutorial Council (HJPC), as the only responsible organ regulating the conduct of judges and prosecutors in BiH.

2. The independence and *status* of judicial institutions at the state level and of the High Judicial and Prosecutorial Council should be enshrined in the Constitution.

International standards strongly recommend that the independence of the judiciary be legally guaranteed in the Constitution.¹⁶ Lack of constitutional protection arguably leaves the judiciary constantly at risk of interference from the executive and legislative branches of government. The *status* and independence of judicial institutions at the entities' level is by and large recognized in the Constitutions of the two Entities.¹⁷ This is not the case of the post-Dayton institutions at the state level, i.e. the HJPC, the Court of BiH and the BiH Prosecutor's Office. Giving constitutional *status* to these institutions would constitute the best legal

guarantee of their independence and would better define their relation *vis a vis* the executive and legislative branches in adherence with the principle of separation of powers. It would also be a fundamental step for ensuring the sustainability of these key judicial institutions.

3. The High Judicial and Prosecutorial Council should establish consistent practices to defend members of the judiciary from undue pressures.

The HJPC, as the body having the task of ensuring the maintenance of an independent, impartial and professional judiciary, should establish guidelines and procedures to systematically respond to serious political or media attacks undermining the reputation of the judiciary or its independence.

¹ UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1 and 2.

² Human Rights Committee, General Comment N. 32 on Article 14, 23 August 2007, Para. 19.

³ ECtHR, Prager And Oberschlick V. Austria (Application no. 15974/90), Judgment, 26 April 1995, Para. 34,

⁴ More recently, the owner of the 'Avaz' publishing company and founder of the BiH Party Alliance For Better Future, Fahrudin Radoncic, has harshly accused the BiH Prosecutor's Office of conducting politically motivated investigations against him.

⁵ Peace Implementation Council, Communiqué of the Steering Board, 20 November 2008.

⁶ Mr. Dodik commented upon the decision by declaring to the press that "it is unacceptable for the RS to be judged by Muslim judges" (see Media Intelligence Agency, Morning Media Brief, 11 December 2008). The RS Prime Minister reiterated his distrust towards judges and prosecutors of Bosniac ethnicity during the TV program "Aktuelni intervju" aired by RTRS on 12 June 2009.

⁷ SRNA, Sipa's charges designed to make RS disappear, 23 February 2009.

⁸ FENA, Dodik casts numerous accusations against BiH prosecutors, FBiH media and foreigners in BiH, 17 April 2009. FENA, Dodik: numerous accusations on the work of BiH Prosecutor's Office and Court once again, 3 May 2009. FENA, Dodik: BiH Court and Prosecution serve for political executions, 8 May 2009. Media Monitoring Agency, Morning Media Brief, 24 July 2009.

⁹ ONASA, FENA, SRNA, Dodik says will not cooperate with BiH court and prosecution office, 12 May 2009. Dnevni List, "I will not reply to summons of Court of BiH", pp. 6-7, 10 June 2009.

¹⁰ Constitutional Court of BiH, Decision U 26/01, 28 September 2001 and Decision U 16/08, 28 March 2008.

¹¹ Media Intelligence Agency, Morning Media Brief, 24 July 2009. Media Intelligence Agency, Electronic Media Monitoring Report, Summary of 'Aktuelni razgovor' [RTRS], 1st July 2009.

¹² The Report the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009, A/HRC/11/41, paras 37-43, in which, among other things, it is stated was presented at the HoR Session of 10 June 2009, and at the HoP Session of 13 July 2009.

¹³ See BIRN, Bosnia Budget Cuts Pose Threat to War Crime Trials, 26 November 2009.

¹⁴ See UN, Report of that, according to international and regional standards, "it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions" and "that, under important domestic economic constraints, the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources".

¹⁵ See for example the letter that the HJPC sent in June 2009 to the Prime Minister of Sarajevo Cantonal Government, the Minister of Justice of Sarajevo Canton and the Minister of Justice of FBiH, in which it stated that the cuts imposed on the budget of the Municipal Court in Sarajevo may result in blocking the work of the Court (see HJPC, Reagovanje VSTVBiH povodom rebalansa budžeta za 2009. godinu Vlade Kantona Sarajevo, press release, 30 June 2009).

¹⁶ See UN Basic Principles on the Independence of the Judiciary, Principle 1; see also UN, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009, A/HRC/11/41, paras 20-22.

¹⁷ An exception in this sense is represented by the failure of the FBiH Constitution to regulate the status of the Federal Prosecutor's Office.