

Mandates of the the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL SRB 2/2019

9 August 2019

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolutions 34/18 and 35/11.

In this connection, we would like to bring to the attention of your Excellency's Government information I have received concerning the alleged harassment and verbal attacks from MPs of the National Assembly directed against particularly, Judge Miodrag Majić, but also Judge Omer Hadžiomerović, both from the Court of Appeal in Belgrade. These attacks seem to have been motivated because of their critical views of the Serbian judiciary system and legislative initiatives.

According to the information received:

Judges Miodrag Majić and Omer Hadžiomerović have been victims of verbal attacks for years due to their criticism of the situation of the judiciary in Serbia.

In 2018, these attacks increased in frequency and gravity after they openly opposed some constitutional amendments because of the negative impact they could have on the rule of law and the independence of the judiciary.

Most recently, they have expressed their position to the project of Law Amending the Criminal Code, in particular on the introduction of life imprisonment without the possibility of conditional release. They argued that the proposed provisions would entail a violation of human rights and freedoms enshrined in the Serbian Constitution, international human rights instruments and case law of the European Court of Human Rights.

On 19 May 2019, Judge Miodrag Majić expressed his concerns regarding the Law Amending the Criminal Code on the television talk show "Utisak nedelje".

On 20 May 2019, during the discussions in the National Assembly to adopt the said Law, several MPs carried out verbal attacks against Judge Majić and his independence and integrity, in connection with the opinions expressed in the television show. Judge Majić was accused of corruption, rendering sentences in exchange for money (accusation also addressed to Judge Hadžiomerović); in addition to other derogatory and defamatory remarks, such as: "It is a disgrace to have a judge like Majić" or "It is not laws that are bad, judges are bad, with Judge

Majić tellingly attesting to that. And, in my opinion, Judge Majić is probably worse than all those he has tried”. There were even veiled threatening remarks, such as “he acquitted 11 proven Albanian terrorists, who had committed the most atrocious crimes against non-Serbs in Gnjilane, so please be understanding should something come to pass”. MPs also questioned the possibility for judges to speak in the media or be a member of an NGO.

On 21 May, the National Assembly adopted the Law introducing the sentence of life imprisonment into the criminal law system, stipulating that perpetrators convicted of specific offences shall not be entitled to conditional release.

On 4 June, the High Judicial Council condemned “the remarks made by particular MPs, accompanied by personal insults and disqualifications of the expertise and professional work of specific judges, and thus bringing into question the integrity of all judges”.

Without prejudging the accuracy of these allegations, I would like to express serious concern at the reported attacks against Judges Miodrag Majić and Omer Hadžiomerović. They constitute a serious breach of the principles of judicial independence; undermine public trust in the judiciary and erode the principle of separation of power. It puts in place an environment where judges and magistrates are exposed to various forms of pressure, threats and interferences that may adversely affect their capacity to decide matters before them impartially, on the basis of facts and in accordance with the law. Lastly, we express concern that the attacks against the judges relates to the exercise of their right to freedom of expression, and that the manner in which such attacks are presented will have a chilling effect which unduly restricts the exercise of this right beyond the legitimate restrictions allowed for under international human rights law.

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 our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the inquiries carried out or to be carried out regarding the alleged verbal attacks in the National Assembly on 20 May 2019 to analyse if they constitute an attack to the independence of the judiciary as well as threats to the integrity of Judges Majić and Hadžiomerović; and accordingly adopt the relevant sanctions and remedies.

3. Please provide detailed information on the guarantees in place to protect and promote the independence of the judiciary as a whole as well as the independence of individual judges.
4. Please provide detailed information on the guarantees in place to protect and protect the freedom expression and association of judges

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we 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 am considering to publicly express my concerns in the near future as, in my view, the information in my possession appears to be sufficiently reliable to indicate a matter warranting serious attention. I also believe that the wider public should be alerted to the potential human rights implications of these allegations. Any public statement on my part 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 our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Serbia is a party, including the International Covenant on Civil and Political Rights (ICCPR), succeeded on 12 March 2001, and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) ratified on 3 March 2004.

Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Your country's adherence to these treaties means that it must, *inter alia*, adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making. Furthermore, both instruments provide that everyone shall have the right to freedom of association with others, and that any restriction on such right must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; 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 the legislature. 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 a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. 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). In addition, members of the judiciary are entitled to freedom of expression and association (principle 8). Freedom of expression and association of judges are also enshrined in the Bangalore Principles of Judicial Conduct (principle 4.6).

The report of the Special Rapporteur on the independence of judges and lawyers to the Human Rights Council (A/HRC/41/48, para. 35) refers to the judgement of the European Court of Human Rights in the *Baka v. Hungary* case, where it is affirmed that in view of the growing importance attached to the principles of the separation of powers and the independence of the judiciary, any interference with the freedom of expression of a judge "calls for close scrutiny".

Lastly, we remind that both the ECHR Article 10 and the ICCPR Article 19 guarantee the right to freedom of opinion and expression. These rights apply to everyone, including public officials serving in the judiciary. Any restriction on the right to freedom of expression must comply with the requirements established in the particular treaties, see ECHR Article 10 (2) and ICCPR Article 19 (3). As noted by the European Court of Human Rights in *Wille v Lichtenstein*, “it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question.” (para. 64) This related, in particular to addressing issues which have political implication. However, the Court affirmed that “questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter.” (para. 67)

We further remind Your Excellency’s Government of the duty under Article 2 of the ICCPR to ensure the rights guaranteed in the Covenant. As affirmed by the Human Rights Committee, “States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression”, CCPR/C/GC/34 para. 23. Any attacks, including threats to life, because of an individual’s exercise of his or her freedom of expression, is incompatible with the covenant, and “should be vigorously investigated in a timely fashion, and the perpetrators prosecuted”, *id.*