



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12 – 30 March 2007

DECISION

Communication No. 1219/2003

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|--------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| <u>Submitted by:</u> | Vladimir Raosavljevic (not represented) |
| <u>Alleged victim:</u> | The author |
| <u>State party:</u> | Bosnia and Herzegovina |
| <u>Date of communication:</u> | 3 July 2003 (initial submission) |
| <u>Document references:</u> | Special Rapporteur's rule 97 decision, transmitted to the State party on 18 November 2003 (not issued in document form) |
| <u>Date of adoption of decision:</u> | 28. March 2007 |

* Made public by decision of the Human Rights Committee.

Subject matter: Non-renewal of appointment of Supreme Court judge for participation in controversial judgements – Alleged lack of an effective remedy to challenge decision of High Judicial and Prosecutorial Council

Substantive issues: Right of equal access to public service – Right to an effective remedy

Procedural issues: Admissibility *ratione materiae* – Level of substantiation of claim – Exhaustion of domestic remedies

Articles of the Covenant: 2 (1) and (3), 17, 25 (c)

Articles of the Optional Protocol: 2, 3 and 5, paragraph 2 (a) and (b)

[ANNEX]

ANNEX

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

Eighty-ninth session **

concerning

Communication No. 1219/2003

Submitted by: Vladimir Raosavljevic (not represented)
Alleged victim: The author
State party: Bosnia and Herzegovina
Date of communication: 3 July 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2007

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Vladimir Raosavljevic, a national of Bosnia and Herzegovina, born on 28 July 1939. He claims to be a victim of violations by Bosnia and Herzegovina¹ of article 25, read alone and in conjunction with article 2, paragraphs 1 and 3, and, indirectly, article 17 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented.

1.2 On 19 January 2004, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with Rule 97, paragraph 3, of the

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

¹ The Covenant and the Optional Protocol entered into force for the State party on 6 March 1992 and 1 June 1995, respectively.

Committee's Rules of Procedure. On 11 February 2004, the Committee, through its Special Rapporteur on new communications, decided to examine the admissibility of the communication together with the merits.

Factual background

2.1 From 1965 to 2003, the author served as a judge on the Municipal Court of Prnjavor (5 years), the District Court (23 years) and, from 1993 to 2003, on the Supreme Court of the Republika Srpska, where he presided over the criminal department.

2.2 In 2002, the High Representative for Bosnia and Herzegovina established High Judicial and Prosecutorial Councils at State level and in both of the Bosnian Entities. All existing judicial posts in the State party were declared vacant and incumbents were required to reapply for appointment. The High Judicial and Prosecutorial Council of the Republika Srpska (HJPC) conducted the process of selection and appointment in Republika Srpska (RS), in accordance with the criteria set out in Article 41² of the Law on the High Judicial and Prosecutorial Council of the Republika Srpska (RS Law on HJPC).

2.3 On 4 November 2002, in extraordinary review proceedings, a chamber of the Supreme Court of RS chaired by the author vacated a final judgment of the Bijeljina Basic and District Courts, which found several defendants guilty of kidnapping and forcible abortion and sentenced them to prison terms of between 4 years and 6 months and 6 years and 6 months. It referred the matter back to the first instance court. In another case, a chamber also chaired by the author, acting as second instance court, upheld a conviction of murder, allegedly despite insufficient evidence and without properly reviewing the verdict. In both cases, complaints were brought against the author by the Office of the UN High Commissioner for Human Rights in Bosnia and Herzegovina and by the father of the murder convict, respectively.

² Article 41 ("Criteria for Appointment") of the RS Law on HJPC (23 May 2002) reads:

"The Council shall assess whether the applicant is able to perform judicial or prosecutorial functions, taking into account the following criteria:

- (1) Professional knowledge and performance;
- (2) Proven capacity through academic written works and activities within professional associations;
- (3) Proven professional ability based on previous career results, including participation in organized forms of continuing training;
- (4) Work capability and capacity for analysing legal problems;
- (5) Ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he/she is being considered;
- (6) Communication abilities;
- (7) Relations with colleagues, conduct out of office, integrity and reputation; and
- (8) Managerial experience and qualifications (for the positions of president of court and public prosecutor).

The Council shall implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others. Appointments to all levels of the judiciary should also have, as an objective, the achievement of equality between women and men."

2.4 According to the author, in early 2003, the HJPC Field Office in Banja Luka evaluated his application for reappointment to the Supreme Court of RS. Based on an investigation of the two complaints, the investigator found that the above verdicts were unlawful and that they called into question the author's suitability. On 12 March 2003, the HJPC decided not to reappoint the author as a Supreme Court judge. The fact he had not been selected would not prevent his future appointment to the position of judge or prosecutor. The decision was taken on the basis of a complex rating system (see also paragraph 5.2 below).

2.5 By letter dated 17 March 2003, the author and another Supreme Court judge, whose reappointment was denied because of his participation in the above verdicts, objected to the decision of the HJPC, arguing that in the kidnapping and forcible abortion trial, the lower courts should have ordered an expertise to assess the mental capacity of the main accused at the time of commission of the crime; their evaluation of the medical evidence had been one-sided.

2.6 On 20 March 2003, the author requested the HJPC to reconsider its decision to terminate his appointment, emphasizing his professionalism, the efficiency of the criminal department at the Supreme Court of RS that he presided and the high respect that he enjoyed among his colleagues. On 2 April 2003, the HJPC rejected the request, stating that this decision was not subject to appeal.

The complaint

3.1 The author claims that the non-renewal of his appointment based on his legal assessment in the two above cases was discriminatory, amounted to a denial of his right to equal access to public service, interfered with his independence as a judge and damaged his honour and reputation, in violation of articles 2, paragraph 1, 17 and 25 (c), read in conjunction with article 2, paragraph 3, of the Covenant (in the absence of an effective remedy to challenge the decision of the HJPC).

3.2 The author reiterates that the criminal department of the Supreme Court of RS which he presided over was the most efficient in Bosnia and Herzegovina, with only three unresolved cases as of 12 February 2003. He had participated in several expert teams reviewing and drafting legislation in the RS and Brcko District. Although he had received higher scores in the evaluation process than all the candidates who were appointed to the Supreme Court, the decision to terminate his appointment prior to reaching the retirement age of 70 was based on two controversial judgments only. None of the following criteria were taken into consideration by the HJPC: the efficiency of his department, his professionalism and work experience, the absence of any irregularities in his previous cases and absence of any disciplinary action against him.

3.3 By reference to Section 258 of the Code of Criminal Procedure, the author argues that the decision of 4 November 2002 to revoke the convictions in the kidnapping and forcible abortion case was lawful, as it was based on the opinion of several forensic psychiatrists that the accused suffered from mental illness when he committed the crime.

3.4 The author claims that, apart from interfering with his independence as a judge, the HJPC was not composed as it should have been when deciding on his application, since one of the

members was appointed from among the lowest professional category of attorneys, although he/she should have been appointed by the Attorney General's Office.

3.5 The author submits that he could not appeal the decision of the HJPC to any other instance and that he was denied access to the files after completion of the evaluation process.

State party's observations on admissibility and merits

4. On 19 January 2004, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as he did not file an application for review of the decision of the HJPC in the Supreme Court of RS, nor any further appeal with the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina set up under Annex V of the Dayton Agreement. It requests the Committee to ascertain that the same matter is not being examined by the European Court of Human Rights.

5.1 On 30 April 2004, the State party reiterated its arguments for challenging the admissibility of the communication and commented on its merits, arguing that the facts as presented raise no issues under articles 17 and 25 (a) and (b) of the Covenant.

5.2 On the claim under article 25 (c), the State party submits that the author's application was part of a process for the appointment of 16 judges to the Supreme Court of the RS. Of 98 candidates who applied for the 16 posts, 91 were interviewed. All of them met the legal requirements for appointment to the Supreme Court. The HJPC was competent to select the candidates it considered best suited, on the basis of the criteria prescribed by Article 41 of the RS Law on HJPC. Under the State and RS Constitutions, the ethnic composition of the Supreme Court was to reflect the ethnic composition of the RS population, in accordance with the 1991 census conducted in the Former Socialist Republic of Yugoslavia. Thus, the 13 judges proposed by the nomination panel included eight Serbs, two Bosniaks, two Croats and one "Other". The author received high evaluation marks by the panel but was ranked below the threshold set for the eight judges of Serb ethnicity. The selection process was based on objective criteria rather than political opinion and affiliation and provided the author with "a fair opportunity" to run for the post of judge, in accordance with domestic law and article 25 (c) of the Covenant.

5.3 The State party submits that during the selection process, the HJPC was composed in accordance with Articles 5³ and 76⁴ of the RS Law on HJPC. While Article 5 defined the

³ Article 5 ("Members of the Council") of the RS Law on the HJPC reads: "The Council shall have members, as follows:

- a judge of the Supreme Court of Republika Srpska, elected by all the judges of the Court;
- a public prosecutor of the Public Prosecutor's Office of Republika Srpska elected by the Public Prosecutor of the Republic and deputy public prosecutors in the Office;
- one judge, either from a district court or a basic court, elected by the Association of Judges and Prosecutors of Republika Srpska;
- one public prosecutor or deputy public prosecutor, either from a district public prosecutor's office or from a basic public prosecutor's office, elected by the Association of Judges and Prosecutors of Republika Srpska;
- a minor offence court judge elected by the Association of Minor Offence Court Judges of Republika Srpska;

composition of the Council in principle, Article 76 gave the High Representative a certain margin of discretion to depart from this provision when appointing HJPC members during the transitional period.

Author's comments

6.1 On 22 May 2004, the author commented, arguing that he never contacted the European Court of Human Rights and that the State party had failed to cite a single provision under domestic law which would have enabled him to challenge the decision of the HJPC in another instance. He exhausted the only remedy available to him by filing a request for reconsideration under Article 79 (3)⁵ of the RS Law on HJPC. The decision of the HJPC rejecting his request clearly stated that it was not subject to appeal. Furthermore, Article 86⁶ of the RS Law on HJPC defined this Law as "lex specialis," precluding the application of any remedies foreseen in other laws. The recent inclusion of a provision on court protection in the new draft State Law on HJPC only concerned disciplinary proceedings and was without retroactive effect. The Human Rights Chamber had ceased to receive cases at the time he sought to appeal the decision of the HJPC. It was not a domestic remedy. He therefore exhausted all available domestic remedies.

- an attorney elected by the Bar Association of Republika Srpska;
- a person of high moral character and integrity appointed by the President of Republika Srpska; and
- the members of the High Judicial and Prosecutorial Council established under the Constitution and laws of the Federation of Bosnia and Herzegovina.
Members of the Council shall be independent and impartial in the exercise of their functions, shall be persons of high moral standing and integrity, and shall have a reputation for efficiency, competence, and integrity."

⁴ Article 76 ("Composition, Appointment, and Terms of Office") of the RS Law on the HJPC reads:

"During the transitional period, the High Representative shall appoint to the Council the members specified in Article 5, to the extent possible. During this period the Council shall not include a minor offence court judge. The mandates of the national members shall be for a term of four years as set forth in by Article 6 of this law.

The High Representative shall also appoint up to eight (8) international members to the Council. The mandates of the international members shall be confined to the transitional period."

⁵ Article 79 (3) of the RS Law on HJPC reads:

"An incumbent judge, public prosecutor, or deputy public prosecutor who is not selected for judicial or public prosecutorial office under this Article may file a request for reconsideration:

- (1) if the Council failed to consider material facts favorable to the applicant provided that information was submitted to the Council at the time of application, or
- (2) if the applicant exercised his right to review application material under Article 40 prior to the Council's decision and the Council took adverse decision based upon information not made available to the applicant."

⁶ Article 86 of the RS Law on HJPC reads:

"[...] Statutory provisions contained in the laws of Republika Srpska shall be brought into harmony with this law and any provisions that are inconsistent with this law are hereby repealed."

6.2 By reference to statistical reports which show that he exceeded the workload quota by 217.4 percent in 2000 and by 161.5 percent in 2001, the author reiterates that his appointment was terminated despite the fact that he obtained the highest evaluation scores of all candidates, based on criteria set out in Article 41 of the RS Law on HJPC. In accordance with Article 17 of the Rules of Procedure of the HJPC, the evaluation records are confidential and not to be disclosed to the candidates. The State party failed to present these records to the Committee in order to conceal his and other candidates' evaluation scores.

6.3 Without challenging the selection of judges on the basis of ethnic quota, the author submits that ethnicity was not an issue in his case, given that the eight judges appointed to the RS Supreme Court's criminal department were all Serbs. Four of them came from lower instance courts; one had never decided on appeal in his career.

6.4 The author emphasizes that the only reason for not reappointing him to the Supreme Court of RS was his legal assessment in the two verdicts, based on which the HJPC marked him as unsuitable, unlike other candidates who were appointed to the RS Supreme Court or to the Constitutional Court of Bosnia and Herzegovina although they had participated in the same judgments. The HJPC deprived him not only of his right to equal access to the RS Supreme Court, but also recommended that his application for any other judicial post be rejected.

6.5 For the author, the fact that the judgments were declared unlawful by the HJPC after it received complaints from dissatisfied parties amounts to a severe interference with his independence as a judge as well as usurpation, by an executive organ, of judicial power that can only be exercised by a higher court. When working on the cases, he faced considerable pressure from HJPC investigators showing a strong interest in both cases. Although the investigators were not qualified to exercise judicial power, they scrutinized the verdicts, which were the result of years of work, in a few days and summarized their analysis of these complex cases in a few sentences. Their findings on both verdicts were arbitrary, incomplete and inaccurate.

6.6 The author argues that the membership of the HJPC is regulated in detail in the RS Law on HJPC to ensure an impartial and transparent appointment procedure. This process was flawed in his case, since one of the members of the HJPC, S. M., a deputy public prosecutor from the basic public prosecutor's office, had not been elected by the Association of Judges and Prosecutors of RS, as required by Article 5 of the RS Law on HJPC. The list of elected candidates forwarded to the High Representative for approval did not include S. M. It would, moreover, have been possible to appoint a public prosecutor of the Public Prosecutor's Office of RS, in accordance with Article 5. The flexibility clause in Article 76, which required the High Representative to appoint members specified in Article 5 only "to the extent possible" during a transitional period, was no justification for the unlawful composition of the HJPC at the time when his appointment was terminated. The State party should have disclosed the relevant evidence if it wanted to show that the Council was properly composed.

6.7 The author submits that the State party has not established an effective remedy to review decisions on the appointment of judges, in violation of article 2, paragraph 3, of the Covenant. The rejection by the HJPC of his request for reconsideration was a stereotyped decision designed for mass communication, which did not address a single issue raised by him. The possibility to file such a request was not an effective remedy, as it did not involve review by another instance.

The discretion vested in the HJPC to appoint judges cannot be unlimited but must respect applicable domestic and international standards.

6.8 The author claims that he was deprived of an opportunity to present his arguments and to defend his rights. Any allegations against him should have been dealt with in disciplinary proceedings under Article 49 of the RS Law on HJPC. It was only after the State party had received his communication that he was granted access to the files of the HJPC. He claims compensation for the moral and material damage suffered, including damage to his honour and reputation after 38 years of judicial service.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the question of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the author did not file either an application for review of the decision of 12 March 2003 the HJPC in the Supreme Court of RS, nor further appealed to the Constitutional Court or the Human Rights Chamber of Bosnia and Herzegovina. It also notes the author's objection that his request for reconsideration under Article 79 (3) of the RS Law on HJPC was the only remedy available to him under domestic law.

7.4 The Committee recalls that it is implicit in rule 97 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of admissibility of a communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their case. It considers that, while generally referring to remedies before the Supreme Court, the Constitutional Court and the Human Rights Chamber of Bosnia and Herzegovina, the State party has not provided any detailed information on the availability and effectiveness of these remedies in the circumstances of the author's case. The Committee is therefore satisfied that the author exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, by filing a request for reconsideration with the HJPC.

7.5 Insofar as the author alleges violations of his rights under article 25 (a) and (b) of the Covenant, the Committee observes that his claims are inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.6 With regard to the author's claim under article 25 (c) that the decision of the HJPC not to reappoint him as a Supreme Court judge violated his right to equal access to public service, the Committee notes that article 25 (c) guarantees not only access to public service, but also a right of retention in the public service on general terms of equality. In principle, therefore, the claim falls within the scope of the provision. The principle of access to public service on general terms

of equality implies that the State party must not discriminate against anyone, on any of the grounds set out in article 2, paragraph 1, of the Covenant. The author claims that the only reason not to re-appoint him was his legal determination of two controversial judgments, and that other judges who participated in the same judgments were appointed to the Supreme Court of RS or the Constitutional Court of Bosnia and Herzegovina. The Committee notes, however, that the rating system used to determine the eligibility and suitability of judges was complex and based on objective criteria (see paragraph 5.2), and that while the author was given high evaluation marks by the panel, he was ranked below the threshold set for judges of Serb ethnicity. On the basis of the material before it, the Committee considers that the author has failed to substantiate sufficiently, for purposes of admissibility, that his non-inclusion in the appointment list of judges was exclusively based on the two controversial judgments he had delivered, and not on other objective criteria underlying the ranking system. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol.

7.7 As regards the allegation that the HJPC was improperly constituted, interfered with his independence as a judge and violated his honour and reputation, the Committee notes that the author does not explicitly invoke a specific provision of the Covenant in relation to this claim. It considers that he failed to substantiate, for purposes of admissibility, that the appointment of a deputy public prosecutor from the basic public prosecutor's office, who had not been elected by the Association of Judges and Prosecutors of RS, was not covered by the flexibility clause in Article 76 and therefore in breach of Article 5 of the RS Law on HJPC. Similarly, the author did not substantiate, for purposes of admissibility, that the evaluation of his suitability by the HJPC based on, *inter alia*, two judgments, which gave rise to complaints calling into question his integrity and impartiality, interfered with his judicial independence or violated his honour and reputation. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.8 The author has invoked article 2 of the Covenant read together with articles 17 and 25 (c). This raises the question as to whether the fact that he had no possibility to appeal the decision of the HJPC to another instance amounted to a violation of his right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. The Committee recalls that article 2 can only be invoked in conjunction with a substantive right protected by the Covenant,⁷ and only if a violation of that right has been sufficiently well-founded to be arguable under the Covenant.⁸ As the author has failed to substantiate, for purposes of admissibility, his claims under articles 17 and 25 (c), his claim of a violation of article 2 of the Covenant accordingly is also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

⁷ Communication No. 275/1988, *S. E. v. Argentina*, decision on admissibility adopted on 26 March 1990, at para. 5.3.

⁸ Communication No. 972/2001, *Kazantzis v. Cyprus*, decision on admissibility adopted on 7 August 2003, at para. 6.6.

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
