

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Special Rapporteur on the situation of human rights defenders

Ref.: OL BIH 1/2024
(Please use this reference in your reply)

23 October 2024

Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 50/10 and 52/4.

In this connection, we would like to bring to the attention of your Excellency's Government some observations concerning the Bill entitled the *Law on Amendments of the Criminal Code of Republika Srpska*, first adopted by the Republika Srpska authorities on 4 July 2024, and now scheduled for first reading by the National Assembly of Republika Srpska during the 11th regular session, which will begin on 29 October.

The Bill was assessed with regard to international human rights standards and rule-of-law principles. The following conclusions and considerations contributing to those conclusions have been identified:

Comments

It is the opinion of the signatory Special Procedures following their review of the Bill that it runs counter to the national and international human rights legal obligations of Bosnia and Herzegovina – in relation to its constituent Republika Srpska entity – not to discriminate in the protection of human rights based on any status.

The international human rights obligations of the State under the treaties it has succeeded to are reflected in the Constitution of Republika Srpska, which likewise provides that human rights must be guaranteed without discrimination on any basis. The Constitution provides in its preambular recitation of its object and purpose that it is based on, *inter alia*: “[...] the rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms and rights and the rights of minority groups in accordance with international standards, [and] non-discrimination”. Article 5 provides that “The constitutional organisation of the Republic shall be based upon: guarantee and protection of human freedoms and rights in accordance with international standards, [...]”. With regard to all “human rights and freedoms” guaranteed by the Constitution, article 10 observes “Citizens of the Republic shall be guaranteed equal

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freedoms, rights and duties; they shall be equal before the law and enjoy equal legal protection irrespective of their race, sex, language, ethnic origin, religion, social background, birth, education, financial standing, political and other beliefs, social status and other personal circumstances. [...]” Similarly, article 44 provides with regard to non-citizens also that “Aliens shall have the human rights and freedoms determined by the Constitution as well as other rights as provided by law and international agreements.” Articles 48 and 49 of the Constitution require judicial protection of all human rights and prohibit their unlawful restriction.

Hence, authorities are obligated under both national and international law to prohibit discrimination both directly and indirectly in the realization of all other human rights. (See also, Vienna Convention on the Law of Treaties, to which Bosnia and Herzegovina succeeded on 1 September 1993, and much of which comprises customary international law; per article 27, a State is equally obligated under the treaties that it has accepted to be bound by in relation to the laws and conduct of authorities in its constituent entities: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”)

Among the laws implementing the State’s national and international human rights obligations, the Criminal Code of Republika Srpska currently provides for the protection of all persons from discrimination on the basis of gender identity (among other protected grounds), including in relation to their fair-trial rights, freedom from hate crimes and incitement to hatred or violence, and freedom from discriminatory denial of their human rights and fundamental freedoms.

- The Criminal Code provides in its definitions (article 123.21) that “*Criminal offence perpetrated out of hatred (i.e. hate crime)* shall constitute a criminal offence that is entirely or partly perpetrated on account of racial, national or ethnic origin, language, religious beliefs, skin color, sex, sexual orientation, social origin, health status or gender identity of a person.”
- Article 139 criminalizes “Infringement of the Equality of Citizens”, providing criminal penalties for any person who, based on a number of grounds, “denies or restricts the freedom of human rights enshrined in the Constitution, a law or a ratified international agreement” (at para. 1). The same article (at para. 2) extends the punishment “to the persons who persecute individuals and organizations that advocate equality”, thus also protecting human rights defenders and their advocacy work for the guaranteeing of human rights without discrimination on the basis of gender identity.
- Article 359 provides criminal penalties for “Publicly Inciting and Inflaming Violence and Hatred” in any forum – “by using press, radio, television, a computer system or a social network, at a public gathering or at a public area or otherwise” – including when any person “publicly calls for, incites, or inflames or makes available to the public the leaflets,

images or any other materials that call for violence or hatred against a certain person or groups on account of their national, racial, or religious or ethnic affiliation, skin colour, sex, sexual orientation, disability, gender identity, origin or other properties [...].”

The intended purpose of the Bill currently before the National Assembly of Republika Srpska is to remove the term “gender identity” from the Criminal Code of Republika Srpska, and specifically from the aforementioned provisions (art. 5; art. 123(21); art. 139; and art. 359). In arts. 123(21) and 359, the term “other personal feature” would also be added, which would be redundant in art. 359 alongside “other properties” and would lack legal clarity in art. 123(21) in relation to the prohibited grounds of discrimination subject to aggravated penalties. Yet the clear purpose remains the same. The proposed amendments would proactively remove existing human rights protections for specific persons, including those who are the targets of (1) hate crimes, (2) incitement to violence and hatred, or (3) other forms of denial of human rights based on gender identity. If “gender identity” were removed from the criminal code, it would send a dangerous message that State protection from crimes committed on this ground is being withdrawn. This would imply that authorities are no longer concerned with violence and hatred directed against an entire category of persons whom the State has an obligation to protect, and against those defending their human rights. We are particularly concerned that the amendments could also reduce the scope of application of article 139(2), which specifically refers to individuals and organizations advocating for equality. This could potentially impact human rights defenders and civil society organizations that are engaged in the promotion and protection of the rights and equality of persons of diverse gender identities, as well as reduce protection grounds in case they are targeted in retaliation for their legitimate human rights and advocacy work.

From both procedural and substantive standpoints, it is highly concerning to propose the amendment of foundational criminal law with a clearly regressive view to reduce the scope of its protection. This implies that authorities would no longer offer protection against bias-motivated crimes based on gender identity and would therefore be encoding into law *de jure* discrimination. Those concerns compound potential rule-of-law violations regarding the proposed regressive amendments that run counter to the obligations of the State under both national and international human rights law, which promote the enhancement rather than reductions of human rights protections for at-risk individuals and groups as well as those defending their human rights.

Additionally, it appears that the Republika Srpska authorities did not meaningfully assess the provisions of the Bill to ensure their conformity with the State’s national and international human rights obligations prior to its adoption and transmission to the National Assembly. Authorities published a draft of the Bill on its website for only one week, receiving only one comment on it. That comment on the draft from the Helsinki Citizens’ Parliament of Banja Luka was highly critical of what it called a regressive effort to diminish human rights protections for a vulnerable group. The concerns raised in the comment appear not to have been addressed in the Bill. Additionally, the Government

reportedly held no consultations either with the persons whose human rights protections the Bill would reduce or with relevant human rights experts and organizations, including from civil society or the national human rights institution. Holding inclusive and meaningful consultations is vital in the legislative process.

In its October 2018 resolution 39/11, the Human Rights Council encouraged Governments to give due consideration to the *Guidelines for States on the effective implementation of the right to participate in public affairs*, submitted to the Council pursuant to its resolution 32/22 by the Office of the United Nations High Commissioner for Human Rights. The *Guidelines* elaborate, among other basic principles underpinning the effective implementation of the right to participate in public affairs, that “States should create and maintain a safe and enabling environment that is conducive to the exercise of the right to participate in public affairs,” including by guaranteeing “the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them. Effective remedies should be available if this right is violated.” (*Guidelines for States on the effective implementation of the right to participate in public affairs*, p. 6, available at: https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs_web.pdf.)

The criminal codes of the Federation of Bosnia and Herzegovina entity, Republika Srpska entity, and the Brcko District all regulate hate crimes in some form, and each provides for the protection of human rights without discrimination based on sexual orientation or gender identity. Incitement to violence and hatred in Republika Srpska and the Brcko District is prohibited on the grounds of nationality, race, religion or ethnicity, color, sex, sexual orientation, disability, gender identity, origin or any other characteristic, thus providing for the protection of human rights without discrimination based on sexual orientation or gender identity. In the Federation of Bosnia and Herzegovina, inciting intolerance or hatred on national, ethnic and religious grounds is prohibited, as is denial of human rights based specifically on sexual orientation, or based on gender identity as protected through other relevant laws (see below).

While the Criminal Code of the Federation of Bosnia and Herzegovina should be amended to include both sexual orientation and gender identity as aggravating grounds for criminal punishment of hatred- and bias-motivated crimes, as has already been done in Republika Srpska and the Brcko District, it does not follow that Republika Srpska has cause or a lawful basis to reduce protections from hate crimes, incitement to hatred or violence, or other human rights violations, for only one of the groups protected from such crimes with aggravated penalties. Notably, article 2 of the Law on Prohibition of Discrimination (Official Gazette of BiH No. 59/09) as amended by the Law on Amendments to the Law on Prohibition of Discrimination (Official Gazette of BiH No. 66/16) also includes gender identity among the prohibited grounds of discrimination in Bosnia and Herzegovina.

In response to the recommendations of the third cycle of the Universal Periodic Review by the Human Rights Council, the Government of Bosnia and Herzegovina in 2020 fully accepted the recommendation to “Provide training to law enforcement and judiciary officers in tackling discrimination, hate speech and acts of violence based on the sexual orientation and gender identity of the victims” (A/HRC/43/17/Add.1, recommendation 120.21). Additionally, the Government said it was in the process of implementing the recommendation to “Continue to implement and strengthen initiatives aimed at the elimination of discrimination against all persons, including women, persons with disabilities, ethnic minorities and the lesbian, gay, bisexual, transgender and intersex community” (A/HRC/43/17/Add.1, recommendation 120.48).

Bosnia and Herzegovina also recognized and recited its national and international obligations to prohibit and prevent hate crimes and incitement to hatred and discrimination based on gender identity in its 2021–2024 Action Plan to Improve the State of Human Rights and Fundamental Freedoms of LGBTI People in Bosnia and Herzegovina. Regarding incitement to hatred and discrimination, the action plan notes for instance: “the programme principles of the broadcasting licensees have been established under the Code on Audio-Visual Media Services and Radio Services (Official Gazette of BiH, 3/16) of the Communications Regulatory Agency of BiH, explicitly prohibiting incitement to hatred and discrimination, and the spread of prejudice based on sexual orientation and gender identity as protected grounds.” Underscoring the need for such legal protections, the action plan furthermore observed: “All available research confirms that prejudices and stereotypes about LGBTI people are pronounced, and that LGBTI people are subject to harassment, mistreatment and discrimination. Despite the legislation that prohibits discrimination on the grounds of sexual orientation and gender identity, almost half (49%) of the respondents surveyed stated that they had been discriminated against or harassed in the previous 12 months.”

Key international human rights obligations that should guide authorities in their development of implementing national legislation include articles 2.1 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Bosnia and Herzegovina succeeded on 1 September 1993. Those provisions prohibit discrimination in the implementation of ICCPR obligations based on any status, including gender identity.

In its review of the performance of Bosnia and Herzegovina in implementing the ICCPR, the Human Rights Committee noted in 2017 that it “is also concerned about reports that police officers do not investigate attacks against lesbian, gay, bisexual and transgender persons, especially during public assemblies (arts. 2-3 and 26)” and recommended that “The State party should [...] ensure effective identification, recording, investigation, prosecution and adequate punishment of acts of violence motivated by sexual orientation or gender identity of victims, and intensify its efforts to combat stereotypes and prejudice against lesbian, gay, bisexual and transgender persons, including by providing training to law enforcement officials.” (See, Concluding observations on the third periodic report of Bosnia and Herzegovina, CCPR/C/BIH/CO/3, 13 April 2017, at paras. 25 and 26.)

In relation to its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Bosnia and Herzegovina succeeded on 1 September 1993, the Committee Against Torture likewise voiced in 2017 that it was “concerned at reports that lesbian, gay, bisexual, transgender and intersex persons and advocates for those persons continue to be attacked, threatened and intimidated and that none of the cases reported to the police and the prosecutor’s office have been tried before the courts since 2015.” The Committee added that it “calls on the State party to publicly condemn threats and attacks on lesbian, gay, bisexual, transgender and intersex persons and their advocates and to effectively protect those persons against threats and attacks based on gender identity, sexual orientation and activities. To that end, the State party should: (a) promptly, thoroughly and impartially investigate all threats and attacks targeting those persons, prosecute perpetrators and, if found guilty, punish them in accordance with the gravity of their acts; (b) provide training to law enforcement officials and the judiciary on hate crimes, particularly on the basis of sexual orientation and gender identity, and systematically monitor such crimes; and (c) compile statistical data, disaggregated by age, sex and ethnicity of victims, on complaints, investigations, prosecutions and convictions in cases of hate crimes against lesbian, gay, bisexual, transgender and intersex persons, raise awareness to counter prejudice and stereotypes, and adopt relevant policies to combat and prevent hate crimes.” (See, Concluding observations on the sixth periodic report of Bosnia and Herzegovina, CAT/C/BIH/CO/6, 22 December 2017, at paras. 36 and 37.)

In relation to the potentially regressive effects of the Bill (e.g. “Infringement of the Equality of Citizens”) on the protection of all persons’ economic, social and cultural rights (ESCR) without discrimination based on gender identity, the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Bosnia and Herzegovina succeeded on 1 September 1993, also requires all States party to prohibit discrimination on the basis of gender identity. In 2009, the Committee on Economic, Social and Cultural Rights reaffirmed that the ICESCR’s non-derogable prohibition on discrimination includes the basis of gender identity, observing in its general comment on non-discrimination that, “gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.” (See E/C.12/GC/20: CESCR general comment No. 20, at para. 32.)

In its concluding observations, the Committee has repeatedly called on States to adopt legislation to protect persons from discrimination based on both sexual orientation and gender identity (see, e.g., E/C.12/HND/CO/2, E/C.12/SDN/CO/2, E/C.12/ITA/CO/5, E/C.12/IRQ/CO/4, E/C.12/UGA/CO/1, E/C.12/1/Add.107, and E/C.12/1/Add.80). The Committee has likewise praised States for the adoption of such legislation (see, e.g., E/C.12/ALB/CO/2-3, E/C.12/1/Add.35, E/C.12/1/Add.70, E/C.12/LIE/CO/1, E/C.12/MCO/CO/1, and E/C.12/CO/BRA/2). In 2016, the Committee explained that non-discrimination: “[...] encompasses the right of all persons, including lesbian,

gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status.” (See E/C.12/GC/22: CESCR general comment No. 22, at para 23).

We also would like to recall the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the United Nations Declaration on Human Rights Defenders, which stresses, in article 12, that “The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.”.

Conclusion

We reiterate the legal obligation of your Excellency’s Government to ensure the development, adoption and implementation of all legislation without discrimination based on any prohibited ground, including based on gender identity.

In light of the concerns enumerated above, we recommend that the National Assembly of Republika Srpska should reject the Bill, and that the authorities in Bosnia and Herzegovina ensure that current and future draft legislation conforms to its national and international human rights obligations.

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 be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the draft *Law on Amendments of the Criminal Code of Republika Srpska* (the Bill), including your Government’s views on the above analysis.
2. Please provide details of the legislative process by which the Bill was developed, along with the efforts to ensure substantive civil society consultation and outreach, and any assessment undertaken to ensure that the provisions contained in the Bill comply with the obligations of the State under international human rights law.
3. Please provide information about how authorities intend to ensure sufficient, inclusive and meaningful public consultation prior to further consideration of the Bill by the National Assembly of Republika Srpska, and how they will take into account the comments from civil society organizations, human rights defenders and international experts.
4. Please provide details of how the domestic legal framework safeguards the rights of all persons of diverse gender identities, and how this Bill is

consistent with those legal requirements implementing the State's international human rights obligations.

5. Please provide information on how the domestic legal framework protects the rights of human rights defenders and those advocating for the rights of persons with diverse gender identities in Bosnia and Herzegovina, so that they can carry out their legitimate work in a safe and enabling environment without fear of attacks, harassment or other intimidation.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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