

# Environmental democracy: progress unreported

Aarhus Convention shadow implementation report  
**Bosnia and Herzegovina**  
2017



Aarhus  
Centre  
Sarajevo



**TRANSITION**

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## List of abbreviations:

ACCC	Aarhus Convention Compliance Committee
BD	Brčko District
BiH	Bosnia and Herzegovina
CSO	Civil society organization
EIA	Environmental impact assessment
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
IPPC	Integrated Pollution Prevention and Control
MOP	Meeting of the Parties
NGO	Non-governmental organization
OSCE	Organization for Security and Cooperation in Europe
PRTR	Pollutant Release and Transfer Register
RS	Republika Srpska
SEA	Strategic environmental assessment

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# 1) Summary of findings

- **Substantial gap between law in books and law in action;**
- **insufficient publication of environmental information by authorities;**
- **authorities commonly do not even provide information upon request;**
- **non-compliance with PRTR Protocol despite substantial external funding;**
- **common bypassing of EIA procedures;**
- **persistent relatively low engagement of the public in decision-making**
- **public hearings often formal without real impact;**
- **increasingly proactive role of courts of justice, but still only a few cases;**
- **lack of specialized lawyers + environmental law missing from school curricula;**
- **court fees constituting a barrier in access to justice;**
- **cases of arbitrary persecution of environmental activists.**

# 2) Introduction

The year 2016 marked the 15<sup>th</sup> anniversary of the entry into force of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Bosnia and Herzegovina (BiH) acceded to the Convention on 1 October 2008, ten years after its text was finalized and open for signatures in the Danish city of Aarhus.<sup>1</sup> On the territory of its 47 parties (European, Caucasian and Central Asian states) the Aarhus Convention constitutes one of the most powerful tools in the hands of civil society in its struggle for sound environmental policies, transparency and the involvement of non-governmental actors in environmental decision-making, and for the attainment of environmental democracy as such.

To ensure that the provisions of the Convention do not remain mere words on paper – after all, public oversight

and direct involvement in environmental matters can bring about all kinds of uncomfortable situations for the authorities – the Aarhus Convention established a 3-year reporting procedure. In this period of time, each party is obliged to produce a detailed report on the implementation of the convention which is then assessed by the Meeting of the Parties.<sup>2</sup>

Up until today, two cycles have been undergone by Bosnia and Herzegovina, the national implementation reports of which were submitted in 2011 and 2014, respectively. In both cases, the drafting process was driven by the local OSCE mission and the reports themselves were drafted by external consultants, reflecting the lack of capacity and capability of the BiH authorities. Environmental NGOs were invited to take active part in the process, attend meetings and put forward suggestions. Despite partial reservations

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<sup>1</sup> 2161 UNTS 447; 38 ILM 517 (1999). Fulltext of the Convention, <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

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<sup>2</sup> See Guidance on Reporting requirements, ECE/MP.PP/WG.1/2007/L.4, 20 Feb 2007, [https://www.unece.org/fileadmin/DAM/env/documents/2007/pp/ece\\_mp\\_pp\\_wg\\_1\\_2007\\_L\\_4\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf). More on the compliance mechanism can be found in chapter 7.

to the final texts, civil society representatives voiced their overall satisfaction with the process. Unfortunately, this no longer holds true for the reporting on the 2014 – 2016 period.

While it is a regular practice for non-governmental organizations to draft shadow/alternative reports mirroring and supplementing the perceived deficiencies of official national reports, the situation at hand is different still. As BiH's third reporting cycle was concluding, by late-2016, it became clear that this time no national report would be produced at all. The root causes are two-fold. On one hand, it is the fact that OSCE did not take charge of initiating and supervising the process this time, nor of securing the necessary funding (presumably expecting that after six years of external guidance and supervision, the country could manage for itself). On the other hand, it is the retirement of the person who had in the past served as Bosnia and Herzegovina's National Focal Point of the Convention, and the incapacity of the authorities to appoint a new one. Institutionally, the National Focal Point remains with the Federal Ministry for Environment and Tourism, but as of mid-2017 it kept failing to designate its official nominee<sup>3</sup>. As a result of this unprecedented situation, there is simply no person responsible for and capable of drafting the report. This is in itself very much telling of the grave situation of not only the environmental

democracy, but equally of the capacity, efficiency and operability of public administration in Bosnia and Herzegovina.

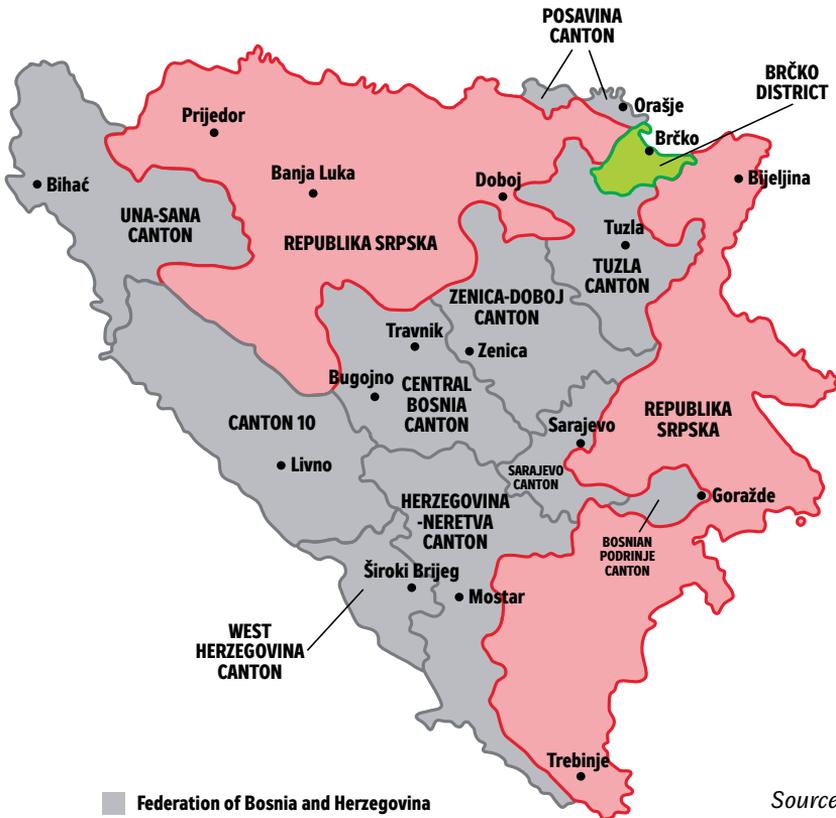
Faced with this reality, and being well aware of the gravity of duly reviewing the Aarhus Convention implementation in BiH, environmental NGOs decided to step in and take charge. The following report is the result of work undertaken by Arnika, a Czech environmental NGO, and the Banja Luka-based Center for Environment (Centar za životnu sredinu, CZSS) in partnership with Aarhus Center Sarajevo, Eko-forum Zenica and individual Bosnian experts and lawyers. These actors have come together to share their common take on the successes and deficiencies of Aarhus Convention implementation in Bosnia and Herzegovina. Much of the report is based on the assessment of concrete case studies, so as to recall some of the crucial and most contested issues BiH had been facing, and evaluate the functionality of particular Convention provisions in practice.

The output of the joint work has been discussed extensively with non-governmental organizations from different regions of Bosnia and Herzegovina, and their remarks were included in the final text. Public authorities were also invited to comment on the draft report in writing as well as in person at workshops organized in Sarajevo and Banja Luka in June 2017, though unfortunately these met with the minimal interest and participation of their representatives.

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<sup>3</sup> See a list of National Focal Points, <https://www.unece.org/env/pp/nfp.html>.

## Administrative map of BiH



Source: wikipedia.org

### 3) BiH administrative structure and system of governance

More than twenty years into the conclusion of the Dayton Peace Agreement<sup>4</sup> which marked the end to the war in Bosnia and Herzegovina, the asymmetric multi-tiered administrative structure and system of governance which was established remains practically intact. What has on one hand reflected a genuine effort of the international community

in cooperation with representatives of the three so-called constitutive nations (Bosniaks, Croats, Serbs) to find a fair and acceptable post-war settlement based on devolution of power and an elaborate system of checks and balances, on the other hand poses great challenges for the practical everyday functioning of public institutions. Strenuous and long-lasting efforts are required for the adoption of a piece of necessary legislation or a policy change, and only too often do such situations lead to a deadlock. Citizens cannot be reasonably expected to grasp a working understanding of a system which continues to baffle international experts. Apart from being cumbersome, BiH's administrative setup is also extremely costly to sustain.

<sup>4</sup> General Framework Agreement For Peace in Bosnia and Herzegovina, signed in Paris on 14 December 1995, <https://www.osce.org/bih/126173>.



Photo © Haris Čalkić

## Difficult legacy

**Bosnia and Herzegovina is a country rich in natural resources of all kinds. In socialist Yugoslavia, BiH became the cornerstone of the federation's heavy industry, mining vast amounts of coal, burning it in thermal power plants, producing iron, and other metals<sup>5</sup>, but also bearing the bulk of the environmental damage associated with such industries. Up until the breakup of Yugoslavia, virtually no efforts were undertaken to modernize its outdated dirty industrial technologies. This unfavourable legacy was further significantly aggravated by the civil war that ensued and in the course of which BiH became not only affected by huge amounts of dangerous explosives of various kinds, but also ended up as the dumpsite for much of Europe's waste. It is estimated that the remediation of all of the wartime environmental impact would cost at least 50 billion US dollars.<sup>6</sup>**

<sup>5</sup> 70% of Yugoslavia's production of iron, aluminium, lead and zinc, as well as 50% of Yugoslavia's energy, was done on the territory of BiH. Pejičić, Zoran T. "Ekološke politike u Bosni i Hercegovini: Limitirajući faktor tranzicionog i podijeljenog društva." SVAROG, no. 9 (2014), 125.

<sup>6</sup> Ibid., 129.

In a country of mere 3,5 million people, aspiring for future membership in the EU and struggling with numerous substantial issues starting with youth unemployment exceeding 65 %<sup>7</sup> all the way to extreme air pollution<sup>8</sup>, this system

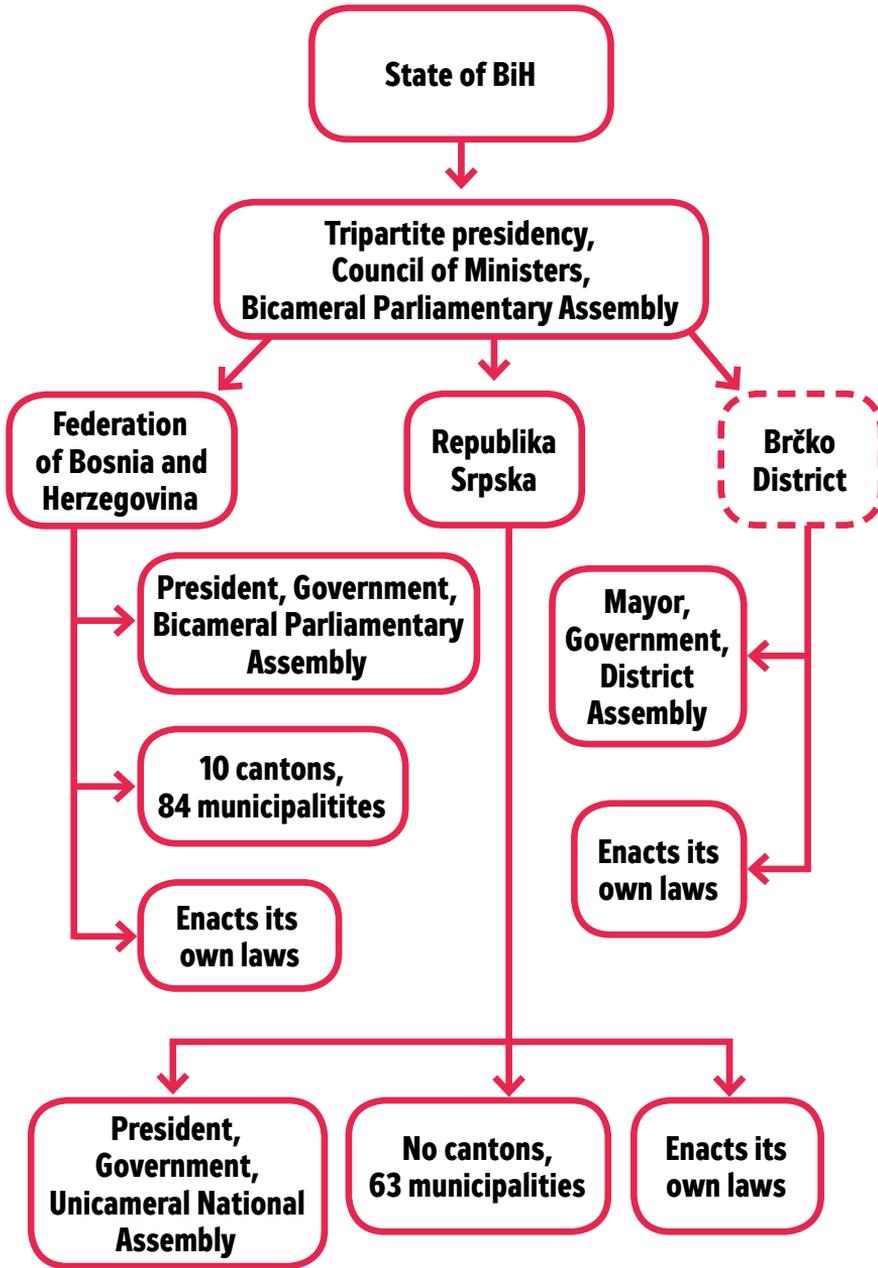
<sup>7</sup> Unemployment, youth total (modeled ILO estimate), <http://data.worldbank.org/indicator/SL.UEM.1524.ZS?locations=BA>.

<sup>8</sup> Extreme air pollution. Arnika, 8 Dec 2014, <http://english.arnika.org/bosnia-and-herzegovina/>

of governance makes any progress all the more difficult to achieve.

In terms of environmental management, it has to be emphasized that the state level has no authority over it and there is no central ministry of the environment. As a result, each of the two entities – Federation of Bosnia and

# Administrative structure of BiH



Source: Havránková, Šárka (ed.), *Assessing information and public participation in environmental decision-making and administrative processes in BiH*. Arnika – Center for Environment, Prague/Banja Luka, 2016.

Herzegovina (FBiH) and Republika Srpska (RS) + the Brčko district (BD) – is by itself responsible for the adoption and enforcement of environmental legislation. The practical consequence is that a relevant international convention, which would be concluded and binding for the country as a whole, may end up transposed very differently in each entity. In relation to the Aarhus Convention, it also means that there is no natural focal point. The Federal Ministry for Environment and Tourism, which serves as the institutional focal point, has no formal competence over RS and BD.

On the territory of Bosnia and Herzegovina, four so-called Aarhus Centres are

currently in operation, located in Sarajevo<sup>9</sup>, Tuzla<sup>10</sup>, Zenica<sup>11</sup>, and Banja Luka<sup>12</sup>. Three of those were set up within existing and previously established environmental organizations, whereas the one in Sarajevo was founded thanks to the support of and initial funding by the OSCE. They are tasked with support for the practical implementation of the Convention, including helping the public exercise their rights stemming therefrom, participation in lawmaking, involvement in environmental decision-making, and promoting justice by bringing cases before courts.<sup>13</sup>

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<sup>9</sup> Aarhus Centar Sarajevo, <http://aarhus.ba/sarajevo>.

<sup>10</sup> Centar za ekologiju i energiju, <http://ekologija.ba/>.

<sup>11</sup> Udruženje Eko-forum Zenica, <http://ekoforumzenica.ba/aarhus/eindex.php>.

<sup>12</sup> Centar za životnu sredinu, <http://czzs.org/>.

<sup>13</sup> See this introduction to the Aarhus Centres, <https://www.unece.org/env/pp/acintro.html>.

## Overview of laws relevant to the environment

FBiH	Spatial planning	<p><b>Laws:</b> Law on Spatial Planning and Land Use</p> <p><b>Secondary legislation:</b> Methodology for preparation of spatial planning documents</p>
	EIA	Law on Environmental Protection
	Environmental permitting	<p><b>Laws:</b> Law on Environmental Protection</p> <p><b>Secondary legislation:</b> Regulation of plants and installations for which Environmental Impact Assessment is obligatory and of those plants and installations which may be constructed and commissioned only if they receive an environmental permit</p>
	Construction	Law on Construction
	Environmental protection	<p>Law on Waters</p> <p>Law on Waste Management</p> <p>Law on Air Protection</p> <p>Law on the Protection of Nature</p> <p>Law on the Fund for Environmental Protection</p>

RS	Spatial planning	<p><b>Laws:</b> Law on Spatial Planning and Construction</p> <p><b>Secondary legislation:</b> Ordinance on the content creation and adoption of spatial planning documents</p>
	EIA	<p>Law on Environmental Protection</p> <p>Decree on EIA</p>
	Environmental permitting	Law on Environmental Protection
	Construction	Law on Spatial Planning and Construction
	Environmental protection	<p>Law on Waters</p> <p>Law on Waste Management</p> <p>Law on Air Protection</p> <p>Law on the Protection of Nature</p> <p>Law on the Fund for Environmental Protection and Energy Efficiency</p>

Brčko District	Spatial planning	Law on Physical Planning and Construction
	EIA	Law on Environmental Protection
	Environmental permitting	
	Construction	Law on Physical Planning and Construction
	Environmental protection	Law on Waste Management Law on Air Protection Law on Nature Protection Law on Water Protection

Source: *Assessing information and public participation in environmental decision-making and administrative processes in BiH.*

## 4) Legislative framework

As mentioned above, in BiH, environmental matters are not subject to decision-making on the state level. This stems directly from the 1995 BiH Constitution which enumerates the responsibilities of central institutions.<sup>14</sup> Accordingly, all particular acts pertaining to environmental management, protection, public participation in environmental matters, etc. are adopted at the level of the two respective entities, and the Brčko District. Nevertheless, certain general relevant laws at the state level do exist. These include, first and foremost, the Law on Administrative Procedure<sup>15</sup> and the Law on Administrative Disputes<sup>16</sup>. Moreover, there is the Freedom of Information Act<sup>17</sup> which in the absence of a special information act on the environment implements the first pillar of the Aarhus Convention. The table on following page summarizes the rele-

vant laws currently in effect on the level of the respective entities.

From an overall point of view, it can be stated that Bosnia and Herzegovina's legislative framework is in compliance with the provisions of the Aarhus Convention, and that it allows for reasonable environmental governance. However, and as is sadly only too often the case with BiH, a weak institutional framework, the incompetence of public officials as well as a lack of political will, along with nepotism and high levels of corruption<sup>18</sup>, hinder the proper enforcement of domestic laws, and therefore also the implementation of the Convention. After all, nothing demonstrates the state's failure to adhere to its essential obligations better than BiH's inability/unwillingness to draft and submit a national report or even to appoint a National Focal Point.

<sup>14</sup> Annex IV. to the Dayton Agreement, Constitution of BiH, art. III. (1). <http://hrlibrary.umn.edu/icty/dayton/daytonannex4.html>.

<sup>15</sup> Official Gazette of BiH, No. 29/02.

<sup>16</sup> Official Gazette of BiH, No. 19/02.

<sup>17</sup> Official Gazette of BiH, No. 28/00.

<sup>18</sup> In Transparency International 2016 Corruption Perceptions Index, BiH ranked 83. See [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table).

## Questionnaire response rate

Type of institution	Questionnaires sent	Responses received	Response rate
State ministries and central institutions	7	5	71 %
Ministries and central institutions in FBiH	10	6	60 %
Cantonal ministries in FBiH	18	4	22 %
Cantonal courts in FBiH	10	9	90 %
Municipalities in FBiH	5	2	40 %
Ministries and central institutions in RS	7	2	29 %
Courts in RS	4	3	75 %
Municipalities in RS	5	2	40 %
Institutions in Brčko District	1	1	100 %
Total	67	34	51 %

Source: Arnika/Center for Environment/Aarhus Center Sarajevo, 2017. Note that NGOs are exempt from this chart.

## 5) Implementation of the three pillars

In order to gain as comprehensive an insight into Aarhus Convention-related developments between 2014 and 2016 in BiH, authors of this report took both a qualitative and a quantitative approach.

The qualitative part in practice consists of in-depth consultations with partner NGOs in Bosnia and Herzegovina, leading to an analysis of the legislative framework, its development and especially practical experience with its application, as well as the identification of specific cases which are on one hand of significant relevance for environmental governance in the country as such, while on the other hand also telling with regard to the implementation of each

of the three pillars of the Convention: 1) access to environmental information, 2) public participation in environmental decision-making, 3) access to justice in environmental matters.

The quantitative analysis is based on a questionnaire drafted specifically for NGOs, courts of justice, municipalities, and other institutions, respectively.<sup>19</sup> The structure of the questionnaire logically followed the three-pillar structure of the Convention. It was then sent out both electronically and by postal mail to a large number of stakeholders with a deadline of several weeks. A majority of those who hadn't responded on time were then notified once again.

Assessing the response rate of public institutions, it becomes clear that courts are the most diligent respondents,

<sup>19</sup> Full text of questionnaires can be found in appendix 1.

whereas central institutions in Republika Srpska, along with Cantonal ministries in the Federation, showed very low levels of cooperation. The unresponsiveness of certain of the most relevant institutional actors (e.g., the Regional Court in Banja Luka, the Republika Srpska ministries of agriculture, and of environmental protection), along with frequent incomplete or chaotic responses (e.g. filling in a simple YES/NO instead of the requested number of cases) undermine the interpretative potential of the results. Nevertheless, the questionnaires have proven instrumental to the overall understanding of the situation, as is apparent from the following assessment of each of the pillars of the Convention.

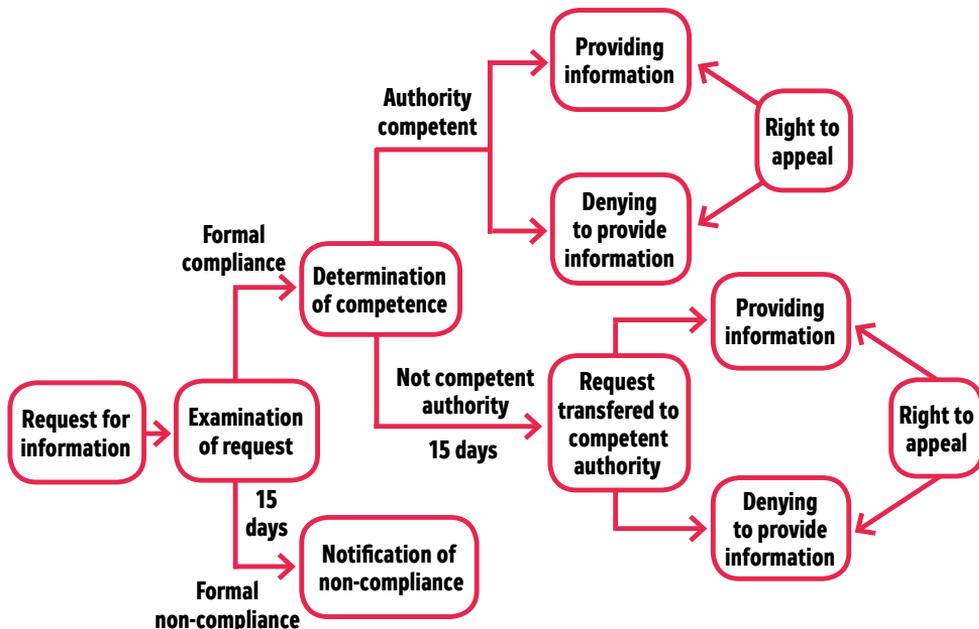
As for NGOs, the questionnaires were distributed widely to many civil associations as well as to local activists. Altogether, thirteen responses were received, out of which eleven were from entities based in the Federation (with just two actors taking up over 95 % of all the reported activities), one from the Brčko District and only one from Republika Srpska. The three Aarhus Centers of Bosnia and Herzegovina established by the OSCE, along with Aarhus Center Zenica (established by Eko-forum Zenica with the support of Arnika and Transition Promotion Programme of the Czech Republic) remain the most active CSO players in relation to the monitoring of the Aarhus Convention in BiH. It should be further noted that a majority of environmental NGOs operate on local, regional or, at most, entity level. Only a few are fully professionalized, adequately staffed, and have sufficient funding to ensure the sustainability of their activities. A national network of environmental NGOs is clearly lacking.

## **a)** access to environmental information

Access to information on environmental matters in BiH is regulated by the general state-level Freedom of Access to Information Act as well as by analogous entity-level laws. On paper, these are in conformity with the provisions of the Aarhus Convention. However, more than fifteen years into the act's existence, its enforcement still suffers from significant practical setbacks. First of all, public institutions have generally made few efforts to publish the relevant information pro-actively in a manner easily accessible to the public. For instance, the Constitutional Court of BiH remains the only judicial institution to date running an online database of its rulings. Second, responses to individual information requests remain unsatisfactory. Whereas the surveyed public authorities, practically without exception, have stated that they have given out information upon request in full, data provided by environmental NGOs substantially contradicts such claims. In fact, civil society actors reported that they filed 462 requests for information in the 2014 – 2016 monitoring period. Out of these, 254 (55 %) were reported to be complied with in full, 84 (18 %) in part, whereas in 95 (21 %) cases the relevant institution gave no answer whatsoever (so-called "administrative silence"), and the request was outright rejected 29 (6 %) times.

According to NGO sources, the most common violations of freedom of access to information include not respecting procedural deadlines, not including the obligatory disclaimer on the right to appeal in written decisions, unfounded exemptions from the right to access information as well as rejection of requests due to alleged lack of competence. The reasons for such setbacks may be sought in the lack of will to comply with binding legal

## Access to information procedure



Source: *Assessing information and public participation in environmental decision-making and administrative processes in BiH.*

provisions as much as in ignorance of the law by public administration officials. Individuals as well as organizations seeking information are only too often required to make their case at higher administrative or judicial levels, to put much energy into such efforts, and also to foresee significant delays.<sup>20</sup>

In addition to obligations stemming directly from the Aarhus Convention, BiH is also a signatory<sup>21</sup> to the Kiev Protocol on Pollutant Release and Transfer Registers (PRTR) which came into force in 2009. Its objective is to enhance public access to information through the

establishment of coherent, integrated, national registers, which could facilitate public participation in environmental decision-making and also contribute to the prevention and reduction of pollution. According to the Protocol's provisions, the responsible authority (in BiH's case the Federal Ministry for Environment and Tourism) has to collect data from owners of stationary industrial and agricultural sources of pollution and make it publicly available on an annual basis.

However, even though, in 2009, the EU financed a 1 200 000 EUR project to implement the EU PRTR Directive in BiH<sup>22</sup>, its enforcement is far from satisfactory. A new server and software were purchased, but only a single employee of the

<sup>20</sup> The issue of access to information in environmental decision-making in BiH has been analyzed in detail in a recently published study: Havránková, Šárka (ed.), *Assessing information and public participation in environmental decision-making and administrative processes in BiH*. Arnika – Center for Environment, Prague/Banja Luka, 2016.

<sup>21</sup> Even though it was already signed in 2003, as of 2017, BiH still has not ratified the document.

<sup>22</sup> Project N. 2009/228-439, Publication reference EuropeAid/126648/C/SER/BA. Tender number: EC/BIH/08/013 "Support of the Implementation of the "Integrated Pollution Prevention and Control" Directive".

Federal Ministry of Environment and Tourism was entrusted with the password to access the data. Instead of publishing the information from the register in a publicly accessible manner, access to it is limited to individual requests filed with the Ministry. Requests are usually answered after long delays, and applicants often receive

the information too late to be able to use it in decision-making procedures. Moreover, the system only covers FBiH while RS and BD are developing self-standing schemes. It is of grave concern that no progress has been noted throughout the reporting period.

## Nafta case

In 2015, the Banja Luka-based environmental NGO Center for Environment (CZZS) petitioned the Republika Srpska Ministry of Industry, Energetics and Mining in relation to a license agreement on the exploration and use of hydrocarbons (crude oil and natural gas) on the territory of RS. Referring to provisions of the Freedom of Access to Information Act, it requested a disclosure of the agreement. In response, the Ministry formally invited the claimant to examine the requested documents on its premises, however, at the same time it banned it from making photocopies.

CZZS was not satisfied with such a restrictive decision, for which reason it filed a legal action, initiating an administrative dispute. In it, a provision of the law was referred to which states: *"[I]f access to information is granted either in full or in part, the competent authority shall inform the applicant in a written letter. In the letter it a) informs the applicant about the possibility of personal access to information on the premises of the competent authority, and b) informs the applicant about the possibility of photocopying, its estimated costs, and whether the photocopying would only be allowed upon payment."*

In its action, CZZS claimed that the cited provision regulates the issue of approval accurately and in full, and underlined the presence of the word "and" between both parts. It asserted that the competent authority must inform the petitioners how they can visit its premises in person, and to enable them to photocopy the requested documents or use other modern technologies to process the granted information. Having in mind that in its decision, the competent Ministry only allowed for an "examination" of the documents without photocopying them, CZZS was of the opinion that this made such decision unlawful.

Upon receipt of the action, the Ministry made use of its right to revoke the original decision, and issued a new decision which allowed for access to the information in full, as well as for the photocopying of the relevant documents.

**CONCLUSION: This case (along with many others in which the information requested was made accessible only after the applicant appeals to a higher authority), points out the fact that the authorities responsible have not thus far developed a good practice in disclosing information. Certain provisions of the law are still being interpreted arbitrarily, giving rise to malpractice in its implementation. Such cases require the applicant to invest certain financial resources because of costs related to court fees. These could be easily avoided by granting access to information in full in conformity with the law.**

## **b) public participation in environmental decision-making**

Public participation in environmental matters consists of two essential aspects. On the one hand, it is the opportunity of the broad public to practically and efficiently take part in administrative procedures, leading to a decision or the issuance of a permit. This aspect thus relates first and foremost to spatial planning (and related processes), and is put into practice typically via written comments and public hearings.<sup>23</sup> On the other hand, there is

the aspect of (the representatives of) the public being consulted in relevant legislative and policy-making processes. In both aspects, regulation is undertaken at the level of the respective entities. Whereas the former is exhaustively explained in the following table, in relation to the latter, the situation depends on the level of governance, and most of all on political will. The rules of procedure of the Parliament of BiH do not require it to consult the public in any case, unless it decides to do so. To the contrary, both entity Parliaments should, in the course of regular procedure, undertake public consultation. However, often they bypass this obligation by declaring an urgent procedure.

<sup>23</sup> For detailed insight, we once again refer to Šárka Havránková's recently published study.

### Overview of public participation in environmental decision-making in BiH

Process	Public participation
Spatial planning	Open for public participation
Urban permitting	Not open for public participation (not even as an intervener)
EIA	Open for public participation
Environmental permitting	Open for public participation
Construction permitting	The public can participate only as an "intervener"
Use permitting	Not open for public participation (not even as an intervener)

Source: *Assessing information and public participation in environmental decision-making and administrative processes in BiH.*

With regard to public participation in lawmaking, the questionnaire data reported by NGOs show the following picture: the 2014 – 2016 period saw only 2 cases of relevant public consultation at state level, 18 cases at the entity level, 4 cases at the cantonal level and 6 cases at the municipal level. Of these 30 cases, in 12 (40%) it was reported that public suggestions were, for the most part, adopted.

## E-Consultations

**An example of good practice in terms of public participation in lawmaking at the state level is the government-run website eKonsultacije.gov.ba. This platform aggregates and publishes information on ongoing legislative processes, and also enables the public to submit their ideas and suggestions. Unfortunately, its scope remains limited to central institutions where very few environmental matters are decided upon.**

As far as the EIA issuing procedure is concerned, the questionnaire data is insufficient, since the competent ministry in RS did not respond at all, and the Federal Ministry of Environment and Tourism submitted an incomplete report in which it did not include even the overall number of requests for EIA. According to civil society sources, it is very likely that the ministries do not have such essential data available at all. Given that EIA procedures constitute the backbone of environmental decision-making, this is rather lamentable.

In addition, cases were reported of applicants bypassing EIA procedures. This pertains in particular to the construction of hydropower plants on BiH's rivers, a highly contested environmental issue of recent years. According to the law, only plants exceeding 5 MW of installed

power require an EIA permit. In order to avoid this, investors aim at building a number of small power plants which in cumulative capacity exceed the limit, but as single facilities are not subject to EIA. Worse still, investors sometimes submit applications for sub-limit installment power and once they acquire all the permits, apply for an increase in installment power. Commonly, the authorities give their consent without EIA, relying on past documentation.

It should be further noted that in 2009, Bosnia and Herzegovina acceded to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). Likewise, as soon as in 2003 it signed the related Protocol on Strategic Environmental Assessment (SEA Protocol) though its ratification is still pending, similarly to the PRTR Protocol mentioned above. Practice shows that besides commonly omitting EIA procedures and/or ignoring the objections of the public, SEA procedure remains weak and is rarely followed, while a majority of SEAs are produced only for spatial planning documentation.

An analysis of public hearing mechanisms at the local level undertaken by the Center for Environment has shown that in most cases these are in compliance with the minimum requirements set by the Aarhus Convention and domestic legislation. The picture is rather mixed when it comes to implementing EU legislation, such as the Directive on Integrated Pollution Prevention and Control (see next chart). Even though in a majority of cases the local administration strives to inform the public using various channels (internet, newspapers, official notice board, etc.), the practical efficiency of many such attempts remains low. The official internet pages of local administration bodies usually do not promote information about public hearings in an adequate and user-friendly manner, hiding it instead under various sub-sections.

## Transposition and implementation of the EU IPPC Directive<sup>24</sup> in BiH

IPPC Directive requirement	Transposition and implementation in BiH	Note
Integrated prevention and control of pollution arising from the activities listed in Annex I	Not transposed	The environmental permitting process is not integrated. Separate permits are issued for the pollution of air, water, soil, and even for activities that extend beyond those listed in the IPPC Directive.
No new installations may operate without an integrated permit.	Not transposed	New installations require a permit, but not an integrated one, and the law requires a permit even for installations that do not fall under the IPPC Directive.
Contents of the permit application	Transposed	
Existing installations must operate in accordance with the IPPC Directive.	Not transposed	Existing installations, if permits are issued for them, operate in accordance with the law and conditions not compliant with the IPPC Directive.
The conditions of the permit shall be determined and the installation operated through the application of the best available techniques.	Transposed, but not fully applied in practice	The law contains a definition of the best available techniques as a basis for setting the emission values and conditions for the operation of the installation. However, BAT has been developed only for the food industry and no other.
Substantial changes in the operation require a permit.	Not transposed correctly	The law states that substantial changes in BAT require a permit review, but remains silent on obligations of both the operator and the competent authority if substantial changes in the operation occur.

<sup>24</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC). The codified version, following several amendments, was issued in the form of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control that was later recast by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), see <http://ec.europa.eu/environment/industry/stationary/ied/legislation.htm>.

Access to information and public participation	Not fully transposed	The law vaguely transposes the procedure for the purposes of public participation set out in Annex V to the Directive; how and where the information on particular stages of the permitting procedure is accessible is not always clear.
Access to justice	Transposed restrictively	The IPPC Directive requires that anyone is enabled to challenge the legality of decisions, acts, or omissions subject to the public participation provisions of the IPPC Directive; the law, however, restricts this right only to participants in the procedure.*
Exchange of information	Not transposed	No current obligation to send the Commission the limit values according to the specific category of activities set in the IPPC Directive (Annex I), and BAT derived therefrom, exists.

\* The wording of the law is unfortunate. While it allows the public concerned to initiate a review of the legality of decisions, acts, or omissions, it also states that the members of the public concerned can do so only if they have already participated in the first instance procedure, thus, giving this right only to participants of the procedure. In practice, even entities not constituting participants to the procedure file for review and their submissions are accepted, though, the truth remains that the submissions may not be addressed nor the review conducted duly and in a timely fashion.

*Source: Assessing information and public participation in environmental decision-making and administrative processes in BiH.*

Even when all the formal requirements of public participation are met, only too often is the substantial aspect of public participation left behind, thus undermining the overarching goals of public participation in environmental decision-making as defined by the Aarhus Convention. Competent administrative bodies only rarely really take into account comments and suggestions made by representatives of the public, and instead rather formally task the authors of mandatory studies and other relevant documents to provide crude statements of acceptance or rejection. All in all it appears that the real impact of public participation remains substantially limited. In face of the fact

that the public usually does not have access to the minutes from public hearings, and that it is not being informed on how its comments and suggestion were resolved, trust in public authorities remains very low.



*ArcelorMittal Zenica*

Photo © Haris Čalkić

## ArcelorMittal case

ArcelorMittal Zenica (formerly Željezara Zenica) is one of the biggest steel mills in southeastern Europe. In 2008, it restarted integrated steel production that had been shut down during the Bosnian war. Analysis of the air quality conducted shortly thereafter at several locations in the town of Zenica revealed substantially higher than permitted levels of Sulphur dioxide and other polluting substances. It is no exaggeration to claim that the levels of pollution reached in Zenica would not be thinkable in most of Europe. Throughout 2008, SO<sub>2</sub> concentrations exceeded 125 µg/m<sup>3</sup> during 91 days of the year, in spite of both EU and local regulations allowing for the exceeding of this threshold during an annual maximum of three days. In 2014, 2015 and 2016, levels of this toxic gas exceeded EU safe limits for 252, 177 and 156 days, respectively.

Upon acquisition, ArcelorMittal had promised that, by 2012, its Zenica factory would implement the best environmental techniques and adhere to EU standards. Citizens actively participated in the process and submitted dozens of comments to all documents published for consultation in 2009. Although the company was obliged to obtain the necessary permits before the end of 2008, the Federal Ministry of Environment and Tourism, caught by surprise by the number of comments and the depth of the controversy, prolonged the deadline until 2011. As a result the steelworks won several years of production without having environment permits; emitting tons of dust and chemicals. Environmental Inspection could not punish the polluter as there were no binding limits set on paper. Critical levels of pollution propelled the local people to take to the streets. More than 10 000 gathered in downtown Zenica and marched to the headquarters of ArcelorMittal in December 2012. Their demand was for the company to follow the same standards as applied in the EU countries.

ArcelorMittal's failure to comply with environmental regulations along with extreme levels of pollution led the local NGO Eko-forum Zenica to take legal measures. In September 2015 Eko-forum filed criminal charges against both ArcelorMittal and the federal authorities, citing the continuously excessive levels of air, water and soil pollution – the first indictment for environmental crimes in Bosnia and Herzegovina to date. As of March 2017, the case was still being reviewed by the prosecutor's office, who justified the delay with an alleged lack of expert capacities to cope with environmental issues.

In December 2014, 5 out of 9 environmental permits of ArcelorMittal's steelworks in Zenica expired, but the authorities failed to respond. The Federal Ministry of Environment and Tourism (FMoIT) did not initiate a new permitting procedure; Environmental Inspection did not impose any fines. By the end of 2015, all the remaining permits expired, and the factory continued to operate without any legal title.

The environmental permit renewal procedure was, from the very beginning, marked by controversy. Only two of ArcelorMittal's operational facilities (a blast oxygen furnace – BOF and an electric arc furnace – EAF) applied for a renewal of environmental permits in January 2015. Public participation was provided for in February 2015 in such a way that the company's request for renewal was open to interested parties' access at the Ministry. However, the government official who was at that time also the national contact point for the Aarhus Convention, denied access to documentation to environmental activists citing reasons that "they did not announce their visit to the Ministry" and "they will use it for further legal cases against the Ministry". When environmental activists finally came into possession of the materials, they submitted a broad list of comments. However, after the draft permit was issued at the end of May 2015, it turned out that none of the comments raised by experts and civil society organizations were adopted. Shortly thereafter, the Minister of Environment and Tourism resigned, leaving the relevant documents unsigned.

*Mittal is poisoning us!*

Photo © Adelina Grafika





*Protests against industrial pollution in Zenica*

Photo © Adnan Dzonlić

After the new Minister had taken office, permits for BOF and EAF were issued in November 2015, disregarding comments previously raised by civil society organizations. In December 2015, both Eko-forum Zenica and the mayor of Zenica initiated a court case against the illegal environmental permit. Substantially, the main shortcomings of the new permit were related to limits for PM<sub>10</sub> emissions. In the new permit, ArcelorMittal was allowed to have PM<sub>10</sub> emissions as high as 100 mg/m<sup>3</sup> <sup>25</sup>, while the valid EU limit is now 20 milligrams and the BiH limit 50 milligrams. Moreover, the permit allowed for the avoidance of the measurement of benzene and other organic pollutants emissions. Finally, the complete procedure was conducted in violation of due process because no public hearing was organized.

Following the meeting of all stakeholders (ArcelorMittal, the Federal Ministry of Environment and Tourism, Environmental Inspection, the prosecutor's office, the Zenica authorities) organized by the NGO Eko-forum Zenica in December 2015, the company submitted a new request, this time for an integrated environmental permit which would cover all 9 facilities. The Ministry then formed a team of experts, inviting representatives of the municipality, the local communities and Eko-forum to take part. Its mission was to assess the request and the supporting documentation, to perform site visits and to give an opinion to the Ministry. Experts submitted their comments in May 2016. In response, ArcelorMittal changed the initial request, the expert team assessed it again and they sent their opinions to the Ministry in September 2016.

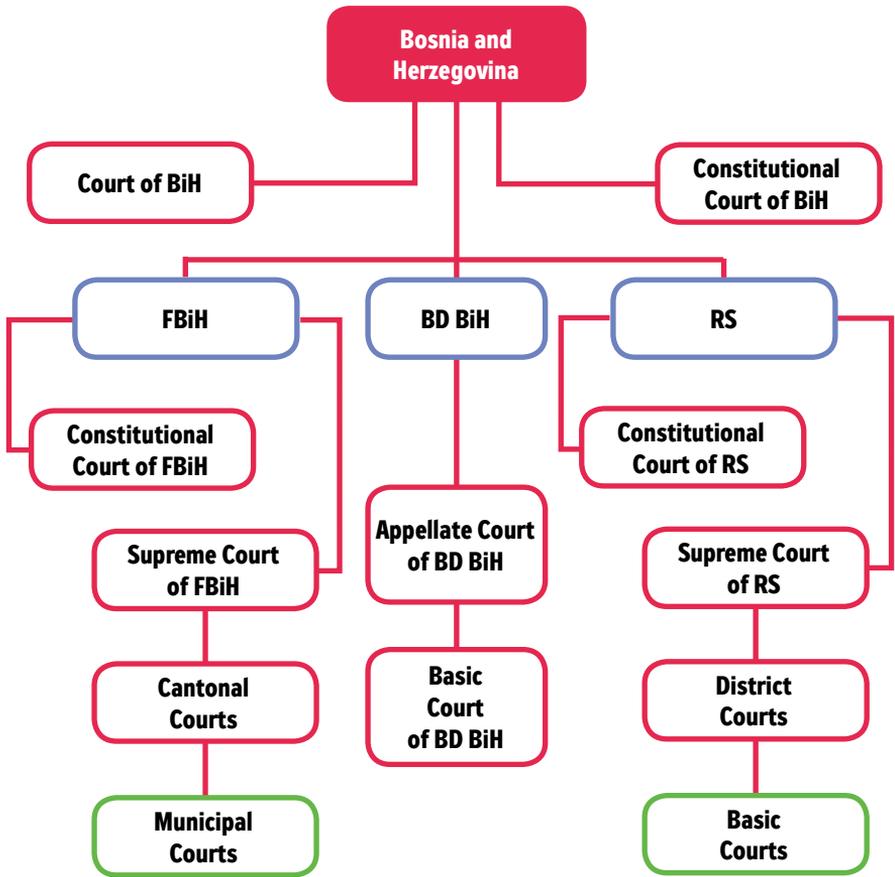
The draft permit was prepared in January 2017. It contained the same shortcomings as the previous one, while in addition, the Ministry ignored the expert's request for an

<sup>25</sup> See Rješenje: integralna okolna dozvola. FBiH Ministry of Ecology and Tourism, 3 Apr 2017, pp. 59-62, <https://www.scribd.com/document/349485125/Integralna-okolinska-dozvola-ArcelorMittal-Zenica>.

Environmental Impact Assessment. The “integrated permit” is actually only a “collective permit” for the 9 departments, not covering impacts on all environmental matrixes which is a typical attribute of integrated environmental permitting used in the EU: water and waste management permits were once again issued separately. Furthermore, the Ministry tried to convince both the mayor and Eko-forum to withdraw their lawsuits against the original permit. As of spring 2017, the process remained open-ended.

**CONCLUSION: ArcelorMittal Zenica will quite certainly remain one of the most contested environmental topics in the upcoming years. The case shows instances of the violation of Aarhus Convention provisions by the authorities, be it in terms of non-disclosure of requested information, or in terms of failing to satisfy the requirement of public participation in environmental decision-making. It is very much in the interest of the public (not least from Zenica) that the factory swiftly undergoes much-needed modernization and that it adheres to stricter pollution limits reflecting EU-standards. The authorities must not let ArcelorMittal operate without valid permits as they have in the past, putting the health and lives of thousands of people in jeopardy.**

# Judicial system of BiH



Source: *Environmental Democracy: Limping Along*. Arnika, Eko-forum Zenica. Prague/Zenica 2015.

## **C) access to justice**

Access to justice proves paramount when it comes to the enforcement of the Aarhus Convention. It serves to remediate the flaws and insufficiencies of administrative bodies' decisions. In BiH, administrative court disputes may be initiated, provided that an administrative appeal has not been successful or is not available, and that the legal action is filed within 30 days since the issuance of the final administrative decision. In a broader

sense, access to justice may also encompass civil and penal court proceedings related to environmental matters.

The judgments of BiH domestic courts in administrative disputes generally have a remedial character. Court practice concerning the environment has shown that judgments issued in administrative court cases are almost always based on pointing out procedural errors – if present – and returning the case to the competent authority with instructions on how should the administrative decision be recast. Apart from that, there are the still rather

rare instances of courts engaging in the substance of the case, eventually ruling in a way that fully replaces the original administrative decision. Such rulings were issued by the District Court in Banja Luka in February 2015 (see further), as well as by the Cantonal Court in Sarajevo in March 2017<sup>26</sup>.

In general, the impact of the courts system on the implementation of the Aarhus Convention in Bosnia and Herzegovina is positive, significantly remediating the mistakes and inaction of the competent administrative bodies. The office of the ombudsperson also plays a substantial role in the sense of submitting recommendations to public administration authorities. Although these are not legally binding, the pressure the ombudsperson may exert upon public administration does yield results in terms of its compliance with the law.

What clearly stems from the received questionnaires, however, is that there is in fact a very low overall number of court cases in environmental matters. Multiple reasons for this can be identified. First of

all, structural barriers exist in access to courts (a 50 EUR default payment for a legal action to be at all admitted; the risk of having to compensate for the adverse parties' legal representation in the case of losing the case; no possibility for NGOs to obtain free legal representation, etc.). In addition, it points towards the limited capacities of NGOs engaged in environmental matters. Last but not least, it may be seen as a result of public distrust in institutions, the complexity of administrative procedures and the shortage of free-of-charge legal advice for citizens.

Moreover, environmental civil society cites the lack of competent specialized lawyers which is also a result of the fact that BiH's law schools do not include environmental law in their curricula. In face of this situation, the Center for Environment, in collaboration with Arnika, has organized a pilot educational program for young lawyers – the "Environmental Law Clinic" – aiming to enhance their knowledge of as well as interest in environmental law. It took place in 2016 at the Faculty of Law in Banja Luka, and involved 34 advanced students out of which five later undertook an internship in the Center for Environment, supporting the work of local communities using legal tools, and producing case studies.

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<sup>26</sup> In this case, members of the local council have even directly collaborated with a local environmental association, see *Presuda – dokaz da su vijećnici SDP-a bili u pravu!* SDP Lukavac, Mar 2015, <http://www.sdplukavac.ba/2017/03/presuda-dokaz-da-su-vijecnici-sdp-a-bili-u-pravu>.

## Hrčavka river case

In terms of struggle for environmental protection in Bosnia and Herzegovina, the Hrčavka case can be perceived as unique for multiple reasons. Most importantly, there is the still-disputed granting of a licence for the construction of five small hydropower plants (SHPP) in the Sutjeska National Park. In addition, it sparked the first-ever citizens' initiative which aimed to have the intent to build SHPPs in Sutjeska proclaimed as being without (strategic) importance for Republika Srpska. Finally, this case demonstrated that courts are beginning to truly grasp the gist of environmental protection. For the first time, a court in BiH investigated the content of an Environmental Impact Assessment (EIA), establishing a precedent for future decision-making.

The case has its origin in 2013 when a public hearing was held over a draft EIA for SHPPs at the Hrčavka river. The Center for Environment (CZZS) used its right stemming from the second pillar of the Aarhus Convention, submitted its comments and thus

made sure it would be considered a party in the ensuing proceedings. Upon completion of the public review and the public hearing, the competent Ministry for Spatial Planning, Civil Engineering and Environment of Republika Srpska ordered that the draft EIA be amended according to comments of the public, after which the EIA for SHPP Hrčavka 1 (SH1), 2 (SH2) and 3 (SH3) would be issued.

Using its right under the third pillar of the Aarhus Convention, CZZS filed a lawsuit against the Ministry's decision. In it, it stressed that a valid spatial plan for the location was lacking. In addition, the lawsuit pointed out that the EIA did not include all the necessary analyses, and it enumerated all the animal and plant species that would be affected by the construction, omitted in the original study. In 2014, without any public consultation, the Ministry issued a decision amending the original EIA approval, agreeing to a change in the installment power of the SHPPs. In response, the CZZS complemented its lawsuit claiming that the change in installment power constitutes additional environmental impact, and thus requires a new EIA.

In early 2015 the court issued a decision. The decision approving EIA was repealed, and the court asserted that the lack of a binding spatial plan for National Park Sutjeska was an aspect which had to be taken into account in the procedure. According to the court decision, the Ministry thus lacked legal grounds for approving the EIA, and it was ordered to adopt measures for the protection and development of each of the three zones separately. Had the EIA decision been confirmed, it would have created a situation in which the new Spatial Plan would have to conform with pre-approved construction activities. Besides, the court based its decision on the fact that the Law on National Parks stipulates that in No. 1 areas, strict protection has to be enforced, enabling the spontaneous development of natural processes, the conservation of habitats, ecosystems, animals and plants, limiting the impact of human presence to a minimum. The court pointed out that, according to the EIA, dam construction would have a significant impact on fish habitats. The court further stipulated that the expected changes would manifest themselves in the loss or reduction of certain species which require freely flowing water streams in order to migrate in breeding periods.

According to the findings of the court, the final EIA left out a detailed analysis of the impact of construction on animal species, thus making the EIA flawed and leading to incompletely and incorrectly established facts. Moreover, while commenting on the EIA amendment, the court had claimed that the Ministry was obliged to undertake a new assessment of the extent to which the change in installment power would affect the environment. Following the court decision, the Ministry suspended the proceeding on the grounds that the EIA would only be adopted following the adoption of a spatial plan for the territory of National Park Sutjeska.

However, the CZZS filed a lawsuit against such decision, claiming that the Ministry was obliged to revoke the EIA for SHPPs on the Hrčavka river instead of merely suspending the proceeding. At the same time the Ministry initiated a review procedure of the court decision, arguing that the (lacking) adoption of a spatial plan had no impact on the EIA since the Law on National Parks of Republika Srpska allowed for the construction of power plants if in the interest of RS, and therefore it wasn't necessary to determine in what exact regime of protection the facilities would be. Moreover, the Ministry claimed that the court baselessly linked the EIA with a spatial plan.

At present, two court proceedings are underway. The first one – heard before the District Court in Banja Luka – is against the decision of the Ministry suspending the proceeding until the adoption of a spatial plan. The second one – dealt with by the RS Supreme Court – is against a ruling by the District Court which revoked the EIA

decision. In any case, the Hrčavka case is a precedential one, for a court had read and analyzed the substance of an EIA decision.

Parallel to the court proceedings, in 2015, CZZS decided to go a step further and initiated a citizens' initiative demanding that the National Assembly of RS declare that the construction of SHPPs in National Park Sutjeska is not in the public interest. It was the first-ever such initiative on the territory of Bosnia and Herzegovina. The initiative gathered 6 000 signatures which was enough for the matter to be put on the Assembly's agenda. However, just a day before it was due it was removed from the agenda.

**CONCLUSION: Awarding licenses for the construction of SHPPs in National Park Sutjeska is seen by the environmental civil society as an example of the systematic destruction of protected nature, especially given that this is the location of the virgin forest Perućica. The campaign attempts to prevent the construction of 5 SHPPs in particular, and to emphasize the significance of the national park. Local activists assembled in CZZS used various means to prove that the intended construction is not in the interest of Republika Srpska, as well as to point out the necessity of consulting the public in environmental matters. Launching a citizens' initiative demonstrates a progress in the articulation of citizens' rights and interests. At the same time the case set a positive judicial precedent of analyzing the subject matter of an EIA. The next step forward should now be the adoption of a special spatial plan, following which the EIA procedure may be launched once again.**

## 6) Persecution of environmental activists

Article 3 (8) of the Aarhus Convention states that "[e]ach Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement." Experience shows that this provision is by no means redundant. Quite to the contrary, it may deserve more attention than it currently attracts.

In practice, individuals and civil society organizations engaged in environmental protection – especially when conflicting with the interests of politicians, local businesspersons or large companies

– are frequently perceived as unwanted intervenors whose activities undermine a striving for the "greater good" (that usually being someone's profit). In the best of cases, their comments are ignored and all effort is made to sidetrack them within the relevant proceedings. In other instances, however, they are publicly denounced as "enemies of the state", become subject to threats or are even outright criminalized. Bosnia and Herzegovina's track record in this respect does not justify optimism. There are even multiple reported cases of activists facing threats and blackmail. However, most of those people are reluctant to go public for fears for their personal safety. The following cases provide an illustrative if not an extensive insight into the hardships environmental activists face in BiH.



House of Željko Vulić in the vicinity of the construction site

Photo © Majda Slámová

## a) the Park is Ours: Banja Luka

The Park is Ours (“Park je naš”) case resulted in several activists being arbitrarily prosecuted before the Basic Court of Banja Luka for road traffic offences allegedly committed during a protest march that had taken place in June 2012 in defense of a public park against an intended construction development.

Activists insisted that no offences were committed, simply because they followed the directions of policemen who accompanied them in their cars, on motorcycles and on foot along the way and gave traffic instructions. According to laws of Bosnia and Herzegovina, everyone is obliged to respect the orders of police officers, even if this means deviating from general traffic rules. Another issue raised was that no police approached any of the activists on the spot, informing

them of the fact that they had violated the law. Charges for violation of public order were filed only 15 days later.

Nevertheless, in January 2014 the Basic Court of Banja Luka found several activists guilty of traffic offences and sentenced them to fines and the obligation to bear the costs of the proceedings. Some of the activists pleaded guilty at the beginning and were sentenced to a milder sentence. Three of the activists then filed an appeal to the District Court of Banja Luka. Acting upon the activists’ appeal, in June 2014 the District Court of Banja Luka revoked the Basic Court’s decision due to the statute of limitations.

The aforesaid proceedings were not the only ones related to the “Park je naš” case. Another one concerned Željko Vulić, the owner of a house and property in the vicinity of the construction works, who considered his family and property in danger. He was charged with prevent-



*Public demonstrations against construction*

Photo © Boro Marić

ing officials from carrying out an official action and for inflicting severe bodily injury. Throughout the proceedings, the defense asserted that relevant police actions could not be considered legal, as conditions set by the Law on Administrative Procedure for a construction to be launched had not been met. In spite of this, in October 2016, the Basic Court of Banja Luka sentenced him to three months of imprisonment. It took the

court until April 2017 to serve the convict the decision in writing (i.e. 2.5 years after the crime was committed – exceeding what could be considered as reasonable). At present, Mr. Vulić is awaiting an appellate decision of the District Court in Banja Luka.



Željeznica river

Photo © Majda Slámová

## **b)** prosecution of anti-dam activists: Fojnica

The case of SHPP on the Željeznica river is the only one noted so far in which environmental activists actively and directly interfered in the construction of a small hydropower plant. Its roots lay in 2012 when activists prevented the investor – Company Peeb, Ltd., Travnik – from launching construction works. Villagers were virtually camping at the river bank for 325 days, including through Christmas. As a result, the company filed a lawsuit for trespassing, demanding that the activists pay the costs of the proceedings.

With regard to such accusation, the court is required to ascertain merely two things: whether there was unlawful harassment or trespassing, and whether the

claimant is in fact the owner of the given estate. The key issue here was whether the trespassing was unauthorized. When trespassing is ascertained, the court provides protection according to the latest state of the property, and the form of trespassing, not taking into account other particularities of the property holder.

The citizens had undertaken their action at multiple locations in the form of road blocking. They used private cars to create traffic jams in the direction of the construction site, disabling the passage of trucks and excavators. Later, they also used their bodies to block vehicles' entry. At the same time at another place, a second group of activists blocked the passing of official cars by setting benches on the road and beating cars with their hands. In the course of the action, the activists claimed that the company had no authority to build the SHPP. During a related court proceeding, the construc-



*Protests against hydropower plant construction*

Photo © Ekološko-humanitarna udruga Gotuša

tion permit was cancelled, making the intended construction illegal.

Both the first level court and later, in 2016, the appellate court, concluded that the citizens' actions amounted to trespassing, and as a result ordered the activists to cover the costs of the proceedings amounting to 6,500KM (ca. 3,250 EUR). This unique case for BiH shows that there are activists in the country who are willing to go to great

lengths and even endanger their well-being in order to protect the environment. Nevertheless, their actions don't enjoy the protection of institutions which rather tend to secure other parties' interests. On the other hand, direct actions brought about success – the investor gave up its plan and the river remains free of the controversial dam.

## C) **harassing a clean air activist: Zenica**

Samir Lemeš, professor at the University of Zenica, is an activist and former president of Eko-forum Zenica, a local environmental NGO. In 2015, his colleague professors sued him for defamation because of an interview he gave for the national newspaper *Oslobođenje*. In the interview, he told a story about a controversial master's thesis defended in 2013 at the University of Zenica, exposing the names of people involved in fraud and cronyism related to environmental issues in Zenica.

The master's thesis in question was written by the then-deputy minister of environment and tourism of Federation BiH, and its main research goal was to estimate how much Zenica-based ArcelorMittal steelworks contribute to air SO<sub>2</sub> concentrations in Zenica, using computer simulation. The three professors who evaluated the thesis were at the same time engaged in the drafting of ArcelorMittal's environmental permits. All in all, whereas in 2009 the deputy minister evaluated their plan of activities for the environmental permit, four years later the professors assessed the deputy minister's thesis.

When the thesis was finally exposed to the public (two weeks before its public defence), it turned out the research "proved" that the ArcelorMittal steelworks were the source of a mere 10 – 15% of the total SO<sub>2</sub> air concentration in Zenica. After careful reading, prof. Lemeš figured out that wrong numbers were used as input data for the simulation; instead of using emissions monitoring results, the amounts included in the environmental permit (plan of activities) were used. In their petition, the claimants later asserted that the emissions data were unavailable in spite of the fact that these data are ultimately public via the national PRTR. The actual emissions were



*Professor Samir Lemeš*

Photo © Eko-forum

much higher than planned and permitted, and the simulation results significantly underestimated the extent of air pollution directly attributable to ArcelorMittal Zenica.

When prof. Lemeš warned his colleagues about these flaws, underscoring the likely misuse of the results by ArcelorMittal as a "scientific proof" that they do not pollute too much, he was ignored. Following a successful defense of the thesis, professor Lemeš filed an appeal with the Ethics Committee of the University of Zenica. In the appeal, he asked the committee to determine whether provisions of the Ethical Code had been breached due to conflict of interest, counterfeiting and fabrication of results. The committee never decided on the appeal, and some of its members even resigned because of it. ArcelorMittal,

however, did misuse the thesis results; in TV coverage about air pollution broadcasted a few months later, the head of ArcelorMittal's environmental department claimed that *"they only contribute 10 to 15% of the total air pollution"* in Zenica.<sup>27</sup>

A journalist from the newspaper "Oslobodenje" interviewed Samir Lemeš in November 2013, asking for more information about this case. Upon the publication of his answers, his colleagues sued prof. Lemeš for defamation, asking 20,000 BAM (ca. 10,000 EUR) in compensation *"because they suffered emotionally, and they were falsely accused for corruption and for business relationships with ArcelorMittal"*.

The court case in front of the Municipal court Zenica lasted almost two years, and the court decided in December 2016 that no defamation had taken place, and that prof. Lemeš was not only allowed

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<sup>27</sup> TV Hayat, "Vijesti u 7", 20 Dec 2013.

to expose this case to the public, but as a president of an environmental NGO and a member of the academic community, he was obliged to do it. The Court cited the provisions of the Aarhus Convention (as implemented in the FBiH Law on Environmental Protection) in its verdict.

An appeal was filed with the cantonal court, which in March 2017 confirmed the verdict, but at the same time ordered the whistleblower to pay court expenses. In May 2017, the claimants submitted an appeal for verdict revision to the Supreme court of the Federation BiH, and this case is still pending.

Samir Lemeš's case demonstrates that any attempt to expose environment-related fraud and cronyism in BiH can have consequences for whistleblowers. In this case, prof. Lemeš was ordered to cover court expenses even if courts at the same time found his actions legal and legitimate.

## **7) Aarhus Compliance Mechanism and BiH**

In order to enhance its enforceability, the Aarhus Convention (Art. 15) had foreseen the establishment of a compliance mechanism. The first meeting of States Parties in 2002 then adopted this mechanism, thus forming a Compliance Committee (ACCC), and introducing concrete methods of compliance review. The compliance mechanism may be triggered in four ways:

1. a Party may make a submission about compliance by another Party;
2. a Party may make a submission concerning its own compliance;
3. the Aarhus Convention Secretariat may make a referral to the Committee;

4. members of the public may make communications concerning a Party's compliance with the convention.

In addition, the Compliance Committee may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements.

Upon the reception of a communication pointing out non-compliance with the convention, the ACCC reviews it and then launches an investigation into the case, which can take varying forms and be of varying length. In its course, the Committee asks for a response of the state party concerned. The outcome

is a decision which includes a detailed explanation. The findings and recommendations are then submitted to the Meeting of the Parties (MOP) held every three years for endorsement. Based on the ACCC's finding of non-compliance, the MOP may adopt a follow-up decision. In cases where a country consistently fails to address its non-compliance, the MOP may issue a "warning". That is the most powerful tool to punish careless governments as the Aarhus Convention does not include any "hard" sanction mechanism (e.g. financial). However, the possible impacts for states' international reputation may be of relevance.

At present, BiH remains among the 18 out of 47 states parties whose citizens

have not so far submitted any communication concerning its compliance with the convention<sup>28</sup>, and neither has there been a submission against BiH by another state party nor any referral by the Secretariat. Hence, despite indisputable setbacks in the implementation of the Aarhus Convention, to date, these have not been translated to any decision of the ACCC. It appears that a more pro-active approach of local NGOs would be key for a critical assessment of the fulfillment of BiH's obligations.

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<sup>28</sup> See full list of communications from the public, <https://www.unece.org/env/pp/cc/com.html>.

## 8) Conclusions and recommendations

Bosnia and Herzegovina's full implementation of the provisions of the Aarhus Convention is not merely a matter of ensuring formal compliance, but also a real obstacle on its lengthy and thorny path towards full EU membership. That is because the convention has become substantially intertwined with the EU acquis over time, mirrored in a number of directives. Then again, analysis has shown us that on paper, BiH stands in compliance with the Convention's substantial provisions. As is often the case, problems arise when assessing implementation and enforcement.

We have observed the substantial gap between laws in books and law in action. It is safe to presume that this gap is not limited only to environmental legislation. The persisting extreme complexity of BiH's public administration hierarchy is coupled with the frequent lack of political will to do things properly, the incompe-

tence of concrete officials, and the pursuance of various side interests. In such an environment not only is qualitative progress hard to find, but even the fulfillment of elementary obligations – such as in this case the appointment of a National Focal Point and drafting a national report – all too easily becomes wishful thinking.

Nevertheless, there are positive developments. Even if building upon only a low amount of environmental caseload, it seems that courts of justice have finally begun exploring the option of engaging actively in the substance of cases, particularly in relation to spatial planning and the granting of environmental permits. Needless to say, court practice and the actions of the public administration are related. In addition, it may also give the necessary boost to environmental civil society to gain confidence when dealing with the authorities, and to bring ever more cases for adjudication. Also, we have noted certain good practices when it comes to engaging the public in consultations and decision-making.

Still, setbacks prevail. Environmental information, particularly when related to large polluters, is predominantly not disclosed in a publicly accessible manner. Online databases and publishing systems are lacking and, as has been shown by practice, even individual information requests are commonly not complied with. Although BiH signed the PRTR Protocol in 2003, data on pollution remains publicly unavailable. Consultations with the public rarely truly lead to the consideration and the ultimate acceptance of their suggestions. EIA procedures are being bypassed or manipulated. Most people only become actively engaged in environmental protection when the matter at hand starts concerning their backyard and even when they do, it is very difficult for them to find and get the help of a lawyer who specializes in environmental matters. Last but not least, environmental civil activists who stand up to those in power may expect harassment and even persecution.

It hardly comes as a surprise that recommendations encompass practical matters rather than legal changes. First and foremost, BiH must designate its National Focal Point for the Aarhus Convention, and it should accordingly draft its belated national report. Much work awaits to be done by the authorities in collecting

and disclosing relevant information in an accessible manner (including the implementation of the PRTR Protocol), as well as engaging the public in environmental decision-making. Large industrial polluters need to be pressured rigorously to obtain all the required permits and to comply with them fully in their operation. To this end, environmental inspection bodies need to be substantially strengthened and become much more proactive in their attitude, in order to really make a difference. Fines for violations of environmental legislation should be increased in order to make them a relevant tool of enforcement. The public administration has to find ways to tame intertwined business and political interests, and to substantially curb the crippling level of cronyism. Law schools should ensure the inclusion of environmental law into their curricula.

As for the civil society, increased engagement, especially when it comes to bringing their cases before courts may help make a difference. Moreover, given BiH's track record, it remains surprising that there was no case brought by some of the active environmental NGOs before the Compliance Committee. All in all, this may just be the right way to take things a step further.

# Annex: questionnaires

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## QUESTIONNAIRE on the implementation of the Aarhus Convention in Bosnia and Herzegovina

### **A)** Access to information

#### Municipalities and other institutions

Did your institution receive at least one request for environmental information in 2014–2016?

If so, please, fill in the following table with the relevant number of cases:

	2014	2015	2016
Received request for information			
Information provided in full			
Information provided in part			
Request rejected on substantial grounds			
Request rejected on procedural grounds			

## Non-governmental organisations

Did your organization file at least one request for environmental information in 2014–2016?

If so, please, fill in the following table with the relevant number of cases:

	2014	2015	2016
Information requests filed			
Information received in full			
Information received in part			
No response			
Information request rejected			
Appeals filed against the decision			
Appeal successful and information provided			
Appeal rejected			
Appellate procedure underway			

# B) Participation in lawmaking and administrative procedures

## Municipalities and other institutions

Did your institution participate in the 2014–2016 period in the drafting of laws and other regulations which could affect the environment?

Did your institution take part in the 2014–2016 period in public hearings in the course of procedures relevant to the environment?

If you answered YES to either question, please, fill in the following table with the relevant number of cases:

			2014	2015	2016
Other institutions	Municipalities	Adoption of regulations relevant to the environment			
		Participation of the public in environmental lawmaking			
		Procedures for granting environmental permit			
		Public hearing organized within environmental permit procedure			
		Procedures for granting EIA			
		Public hearing organized within the EIA procedure			
		Positive EIA decisions			
		EIA not granted			

Number of cases during which (the majority of) comments or suggestions of representatives of the public in lawmaking were adopted:

Number of public hearings within procedures relevant to the environment during which representatives of the public really submitted comments or suggestions:

Number of cases during which (the majority of) comments or suggestions of representatives of the public in administrative procedures relevant to the environment were adopted:

## Non-governmental organisations

Did your organisation participate in the 2014–2016 period in the drafting of laws and other regulations which could affect the environment?

Did your institution take part in the 2014–2016 period in public hearings in the course of procedures relevant to the environment?

If you answered YES to either question, please, fill in the following table with the relevant number of cases:

	2014	2015	2016
Participation in lawmaking on BiH level			
Participation in lawmaking on entity level			
Participation in lawmaking on cantonal level			
Participation in lawmaking on local level			
Participation in environmental permit procedure where EIA is required			
Participation in environmental permit procedure where EIA is not required			
Participation in spatial planning procedure			
Participation in other proceedings relevant to the environment			

Number of cases during which the (majority of) your comments or suggestions in lawmaking were adopted:

Number of cases during which the (majority of) your comments or suggestions in administrative procedures relevant to the environment were adopted:



## Courts

Did your court in 2014–2016 receive at least one legal action against an administrative procedure or an extraordinary request, related to a procedure relevant to the environment?

If so, please fill in the following table with the relevant number of cases:

	2014	2015	2016
Action against decision rejecting access to environmental information			
Action against decision granting EIA			
Action against decision granting environmental permit			
Motion for a renewal of administrative procedure relevant to the environment			
Request for extraordinary review of a court decision relevant to the environment			
Actions/requests successful			
Action/requests rejected			
Procedure underway			

## Non-governmental organisations

Please fill in the following table with the relevant number of cases:

	2014	2015	2016
Actions filed against administrative decisions relevant to the environment			
Action successful			
Action rejected			
Procedure underway			
Request filed for extraordinary review of a court decision relevant to the environment			
Motion filed for a renewal of administrative procedure relevant to the environment			
Complaint filed with the BiH Ombudsperson			
Cases of using services of a certified lawyer			

## D) Other

Please, provide any other relevant information here:

## About us



### Arnika – Citizens Support Centre (Czech Republic)

Established in 1996, non-governmental organization Arnika has many years of experience promoting information openness, supporting public participation in decision-making, and enforcing environmental justice. Its experts assist various civil society organizations, municipalities, and individuals in solving cases related to environmental pollution and its prevention throughout the Czech Republic. Arnika also participates in international projects focused on environmental protection and strengthening the implementation of the Aarhus Convention in Central and Eastern Europe, Caucasus, and Central Asia. Arnika is a member of the Green Circle – an association of ecological non-governmental organizations of the Czech Republic, European Environmental Bureau, and European ECO Forum.

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### Center for Environment, Banja Luka (Bosnia and Herzegovina)

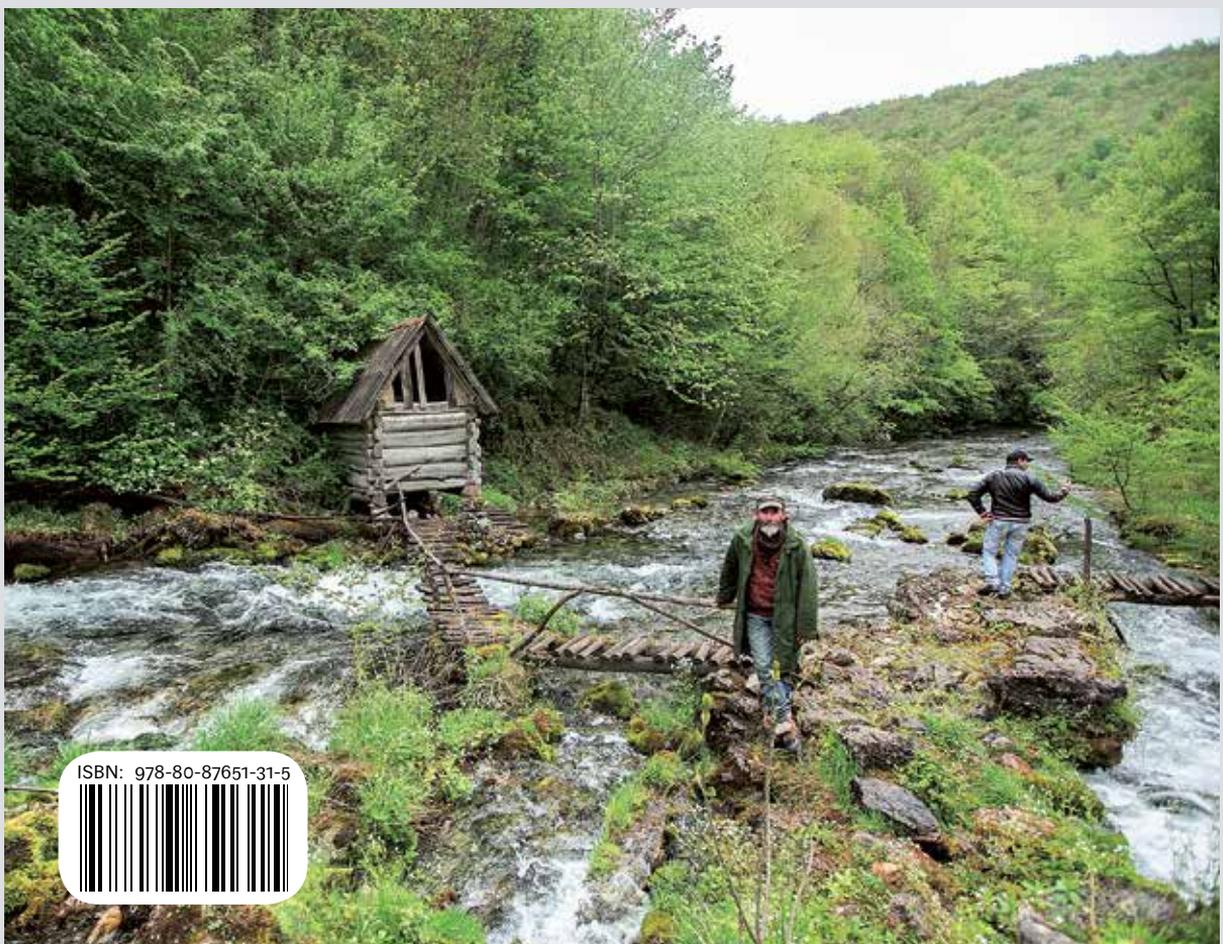
Founded in 1999, the Center for Environment is a non-profit, non-governmental organization dedicated to the environmental protection and promotion of sustainable development through advocacy and civic initiatives. The Center promotes the implementation of Aarhus Convention, namely free access to information held by public authorities and greater public participation in environmental decision-making. It strives to affect relevant environmental policies, raise public awareness of environmental issues and achieve constructive dialogue and cooperation with stakeholders. It is active mainly in Bosnia and Herzegovina.

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