



## **OBSERVATIONS OF JASMINKA DZUMHUR, THE HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND HERZEGOVINA ON THE IMPLEMENTATION OF THE UN CONVENTION ON ECONOMICAL, SOCIAL AND CULTURE RIGHTS (CESCR) IN BOSNIA AND HERZEGOVINA**

### **I – INTRODUCTION**

- Institution of Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter referred to as: the Ombudsman) was accredited by the International Coordinating Committee of National Human Rights Institutions (ICC) with „A“ status as a national human rights protection mechanism in Bosnia and Herzegovina (BiH). In the framework of its mandate, the Ombudsman is following-up and providing protection of the rights of the citizens of BiH including the rights guaranteed by the UN Convention on economical, social and culture rights (hereinafter: CESCR) and regularly submit its observations thereon to the relevant UN bodies.
- Observations on the implementation of CESCR in BiH (hereinafter: Observations) are primarily focused to the experience of Jasminka Dzumhur as one of three Ombudsmen for human rights of BiH gained through handling of individual and group complaints lodged to the Ombudsmen Institution and through ex officio investigations made by the Ombudsman which are related to the protection and promotion of human rights enshrined by the CESCR. Particular attention is dedicated to the analysis of the implementation of the Concluding comments of the CESCR<sup>1</sup> with an overview of the legislative and institutional framework and procedures aimed at securing the implementation of the international standards in BiH in the field of the economical, social and culture rights.
- According to relevant indicators, it could be concluded that, in comparison with the initial submission to the Committee, an insignificant improvement in the area of protection of economical, social and culture rights has been recorded, which is, in a very small measure, reflected to implementation of the Conclusions and Recommendations issued by Committee (hereinafter: CESCR Recommendations). Implementation of the Recommendations is mainly of partial character, while a strategic and systemic approach to regulation of the right to protection of economical, social and culture rights is completely absent. Such approach is particularly problematic, having in mind that BiH is post-conflict country in transition, country with a great number of torture victims whose status is still not defined.

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<sup>1</sup> The Committee on Economic, Social and Cultural Rights considered the initial report of Bosnia and Herzegovina on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/1990/5/Add.65) at its 41st to 43rd meetings, held on 14 and 15 November 2005 (E/C.12/2005/SR.41-43), and adopted, at its 58th meeting held on 25 November 2005, the following concluding observations.

## II – GENERAL COMMENTS

- Enjoyment of economical, social and culture rights in BiH cannot be regarded as an issue isolated from other issues pertaining to human rights. Complaints received by the BiH Ombudsman indicate to an increasingly complex situation related to human rights which includes, in addition to the factors recognized by the Committee as causes of human rights violations, aggravated economic and social situation and weakened role of the institutions. Inefficiency of court protection mechanisms in cases violation of economical, social and culture rights additionally victimize victims of violence.
- In BiH there is a lack of application of international standards, including the ICESCR, particularly in cases where domestic legislation is not harmonized with international standards. The State has not ensured that judges, prosecutors, lawyers and other staff become fully aware of international commitments provided for by the Convention and that fair treatment should prevail in all court procedures, and that independency of judiciary should be fully guaranteed and protected, particularly in the proceedings related to protection of minorities and returnees. It can be concluded that in BiH there is still an absence of application of the Covenant by the courts of the State party.
- In BiH is not established a national strategy for human rights as frame in according to which should operate all institutions. At the same time, there have been adopted many strategic documents related to particular human right (action plan for children, minority, poverty) and so often those documents are not harmonized and contain contradict measures.

## III – POSITIVE ASPECTS

- Cessation of functioning of entity-level Ombudsman institutions, institutional reforms and appointment of new Ombudspersons resulted in establishment of the merged Ombudsman Institution at the state level. Institutions merger process was finalized in 2010 and it pre-supposed financial consolidation and consolidation of human resources. In financial part it is important to emphasize that the total budget of three institutions (Institution of the BiH Ombudsman, Institution of the FBiH Ombudsmen and the Institution of the Ombudsman of the Republic of Srpska) prior to merger in 2010 amounted at 5,080.881.00 BAM, while allocated budget for the merged Ombudsman Institution for 2011 amounted at 2,473,406.00 BAM.
- In the reporting period, BiH saw certain improvements that could be conditionally regarded positive and this is primarily related to the adoption of the Law on Prohibition of Discrimination that entered in force on 05 August 2009. In addition to the prohibition of different treatment, the Law makes distinction between the direct and indirect discrimination and introduces new forms of violence such as: harassment, sexual harassment, mobbing, segregation, instruction to discriminate, assistance to others in discrimination and victimization. The Ombudsman experience shows importance for prevention of human rights violations in working places to have prescribed mobbing and victimization as forms of discrimination. The Law defines the Ombudsman as a central institution for the protection of discrimination and provides administrative and court proceedings for the protection from

discrimination and penal/minor offence provisions for actions made in violation of this Law including non-compliance with the Ombudsman's recommendations.

- In January 2009, the Ombudspersons being aware of the importance of the establishment of a strong mechanism for the prevention of all forms of discrimination, but also having in mind importance to provide the protection of economical, social and culture rights, reached a decision to establish the Department for Elimination of all Forms of Discrimination and the Department for protection of economical, social and culture rights.

#### **IV – MAIN CONCERNS**

- The constitutional framework of Bosnia and Herzegovina is still a serious obstacle in enjoyment of economical, social and culture rights what particularly prevents returnees, civilian war victims in enjoyment of those rights. Limited responsibility of the Government at the State level in according of the Dayton Peace Agreement (DPA) in the area of economic, social and culture rights and a complex administrative structure result with the lack of harmonization and implementation of laws and policies and finally prevent people in enjoyment of those rights and creates discriminatory practices. Inability to make transfer of recognised economical, social, culture rights from one territorial unit to other (between entities and cantons) prevents return of internally displaced persons to pre-war living places what violates Annex VII of DPA. Additionally, there have been registered cases of police intervention which have prevented returnees to regulate residency status, identification number and identification card in pre-war living places. This is particularly visible in Srebrenica.
- In practice, there is a policy to ensure the rights of constituent people as a collectivity, which often results in neglecting the rights of other collectivities as are women, but also individuals from the category of "others". The "Sejdic-Finci" decision of the European Court for Human Rights recognized this as a discriminatory practice.
- Considering the economical, social and culture rights, the BiH Ombudsman express concern related to complexity of legislative framework. Main characteristic of legislation is exposure to frequent amending, without publishing of consolidated text. At the same time necessary by-laws, enabling application of such legislation, are neither adopted nor applied. Altogether it creates confusion and aggravates exercise of the rights, and following up of application of legal provisions.
- There is the established practice in BiH that laws are easily adopted, but without the efficient measures for the implementation. An example of this is Article 7 paragraph 5 of the Law on Prohibition of Discrimination pursuant to which the budget of the BiH Ombudsman needs to have a special budget line necessary for functioning of a special Department for combating discrimination. Unfortunately this provision has not been implemented so that funds in budgets 2010, 2011 and 2012 which prevented implementation of the activities related to the promotion of the Law on Prohibition of Discrimination, follow-up of court proceedings related to discrimination, research and surveys related to discrimination and law harmonization.
- Gender based discrimination is still existing, which is a result of lack of harmonization of the laws with the Law on Gender Equality. The deadline for this was six months following the adoption of this Law in

June 2003.<sup>2</sup> This is particularly related to the Election Law in BiH, since the election results after the general elections held in BiH in 2010 show that participation of women in legislative bodies decreased. Women in BiH, unfortunately, despite their presence on candidate lists, do not get positions as they would according to quotas system so that percentage of women's participation in BiH could be compared to that in countries where quotas have not been implemented at all. This is also result of non-efficiency in implementation of Article 15 of the Law on Gender Equality which reads "that the relevant state authorities at all the levels and local self-government bodies will ensure and promote equal gender participation in administration, decision-making process and representation". Election results indicate that goal promoted by this legal provision has not been achieved.<sup>3</sup>

- This raises the issue of sophisticated discrimination of women in political life in BiH, as well as the lack of political culture that is particularly manifested in election campaigns when political parties do not pay equal attention to male and female candidates. During the pre-election campaigns mostly male candidates address the public as they are represented in the promotion materials, in media and public addresses. Women are mostly candidates for the positions to which they would not be elected and everybody knows that.
- Gender inequality is particularly present in economy and natural resources management, which could be proven by the fact that management structures of telecommunication, hydro-potential, natural and financial resources management companies mostly comprise men.
- When it comes to the employment rate in BiH it is obvious that there is a difference between sexes, from the low rate of 43 % among men to the extremely low rate of 24 % among women. Furthermore, imbalance can be observed among youth. Younger men are twice more employed than young women, which means that only one of ten young women in the age 15-24 is employed. Such low participation of women in employment is partially a consequence of low education level and the fact that the least educated women do not even try to find employment.
- Analyzing the case-law of the Ombudsman in context of the violation of the rights to work and benefits arising there from, Ombudspersons find that the right to work is violated mostly toward pregnant women, especially when they have temporary engagement contracts with their employers. In such cases employers often do not extend their work contracts in order to avoid its legal obligations toward the future mothers. This is particularly the case in private sector, while the situation in the public sector had improved from the reactions of the Ombudsman in 2009 to the decision of the Constitutional Court in 2010.<sup>4</sup> Following this decision the Council of Ministers regulated this issue by its Decision on methods

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<sup>2</sup> Unfortunately even 9 after the adoption of the Law on Gender Equality full implementation of Article 32 paragraph 2 of the Law according to which all the state and entity laws and other relevant regulations should be brought in line and harmonized with the provisions of the Law within 6 months following its entry into force.

<sup>3</sup> In the Parliamentary Assembly of BiH, women are represented by 11 seats, or 19,2%. In the National Assembly of the Republic of Srpska after the last elections women have 18 seats, which is 21,68% out of 83 seats in total, while the Parliament of FBiH has 33 seats for women out of the total of 156 seats. Even the members of the Election Commission of BiH have not been nominated pursuant to the provisions of the Law on Gender Equality since they have only one woman out of 7 members. Semi-open lists system in combination with quotas system apparently is not a mechanism enabling the equal representation of men and women in authority bodies.

<sup>4</sup> Issue of compensation during maternity leave was put before the Constitutional Court of BiH upon which it delivered a decision that Article 35 of the Law on Salaries and Compensations in the Institutions of BiH was discriminatory and in contravention to Article II/4. of the BiH Constitution. In addition to that the Constitutional Court of BiH re-confirmed that „ maternity leave is particularly related to the right of women not to be discriminated and to enjoy appropriate work conditions “.

and procedure for realization of the right to compensation during maternity leave in the institutions of BiH. Also, there is permanent increasing the mobbing cases.

- However, despite this Decision of the Constitutional Court, it cannot be confirmed that all the pregnant women in BiH are finally in the same position. Regulation of these rights falls within the mandate of the entities, cantons and Brčko District and it depends on their available funds and allocation of their budgets to which degree this decision would be complied with. Significant number of women in BiH, unfortunately, fails to enjoy this right as the budgets are not gender sensitive. Funds are rather allocated to other lines with „higher priority“. Analyzing the impacts of the current legal solution governing the compensation during the maternity leave, it could be concluded that the enjoyment of this right depends on the place of residence that is, the place where contributions are paid. Due to the administrative distribution of mandates pursuant to the Constitution of BiH and constitutions of the BiH entities, there is as much as 12 different models of realization of this right. Therefore the payment of complaints during maternity leave is not harmonized, and there are cantons where this right is not guaranteed at all. The right to compensation during maternity leave based on place of residence after the adoption of the Law on Salaries and Compensations in the Institutions of BiH had led to significant differences for people employed in BiH institutions. It could be concluded from the above that BiH failed to fulfill its obligations related to securing the right to compensation during maternity leave for all the citizens without discrimination.
- Reform of criminal justice system was done in 2003 bringing the amendments particularly related to the status of the parties to the court proceedings (prosecutor and suspect that is, accused) that changed position of injured party as well in a way that it created stronger dependence of the injured party's position of the prosecutor's actions. Reform has failed in segment of injured party's protection to fully reconcile traditional and new solutions related to criminal processing institutes, international human rights standards and case-law. Interests and legal position of the injured party are only a marginal issue.
- Victims still do not have support according to the international standards, which raises particular concerns for women victims of war, camp survivors, and family members of disappeared people. They still face the problem of recognition of the status. BiH has not adopted the law to regulate torture in accordance to the recommendations of the UN bodies, which is a main reason of problems they suffer after the war. Partial activities undertaken by competent organs of BiH are visible and targeted to regulation of issues of victims of war, however, such activities, in the end, are not of significant impact to complete improvement of position of this category. As most of legislative interventions were results of pressure of certain groups of citizens, and frequently such interventions were not mutually coordinated, additional complicity appeared in this area. Legislation still does not recognize status of former inmates of concentration camps.
- It could be concluded that BiH legislation has still not ensured reparation for victims of war since, up to date, the Law on Victims of Torture has not been adopted. In BiH, as post-conflict and country in transition, clear definition of victims of war is not established and different terms are used for different categories of persons, such as: missing persons and members of their families, inmates of concentration camps and other imprisoned persons, raped women, victims of torture, etc.
- In the period 2001-2010 in BiH important activities were taken on the prevention of trafficking in human beings which was the reason for the USA State Department to transfer the State from the group

III to the group II, and subsequently to the group I. This means that efforts of the authorities resulted in putting the human trafficking under control. Unfortunately aggravated situations in this area, especially from the aspect of child exploitation in form of begging and non-efficient processing of child traffickers lead to recent classification of BiH into the group II.

- The Ombudsman notes the practice that responsible organ, including courts assign compensation to temporary users of property for investment to the property in higher amount than is value of the property, although they use and invest in this property without permission of owner or a responsible organ. During of war and in post war period many internally displaced persons used temporarily property of others and sometimes they reconstructed that property with aim to ensure minimum standards of living. The Office of the High Representative (OHR) issued the Instruction that temporary users can be compensated only for necessity costs. Unfortunately, it is present practice that responsible organs ignore this OHR instruction and assign compensation in higher amount than is value of property. The result of this practice is that owner of property who is often returnee does not have money to compensate temporary user and a responsible organ decides to sell property and buyer is a temporary user. This practice has serious influence to return process and though this practice returnee staying without own property and without home, although any action has not been taken by owner.
- The Issue of the ombudsmen independency was again raised by the Sub Committee for Accreditation (SCA) of the International Coordination Committee of National Human rights Institutions in the process of accreditation of the Ombudsmen Institution. The SCA postponed taking of decision on status of Ombudsman Institution until the next session to be held from 13 to 17 May 2013 and issued Recommendations. These recommendations request the Ombudsman Institution to undertake the measures for ensuring of adequate financing and financial independency necessary for undisturbed functioning of BiH Ombudsman Institution and to initiate activities targeted to changes of the Law on Human Rights Ombudsman of BiH in it is part related to composition and appointment of the ombudsmen in order, in this process, to ensure pluralism and increased transparency. Parallel with the process of re-accreditation, Ombudsman Institution and its functioning was subject to observation by various international bodies. Commissioner for EU Enlargement, Mr. Štefan Füle, therefore through his reminding of key elements from the Map of the Road for submission for accession of BiH in EU, under political criteria contained in his letter of 30 October 2012, emphasized importance of ensuring of adequate financial and human resources for effective functioning of Ombudsman Institution and stressed its importance role in application of the Law on Prohibition of Discrimination.
- The access to social protection, health care, school education and other economic, social and cultural rights for returnees and their children still have not been provided what has a great impact on their sustainable return to their pre-war living places. In practice, there are still exist "two schools under one roof". Also, in many schools are present religion items and schools have names of religion dignitaries by which cannot be identified all pupils from the school.
- The supervision system of implementation laws is still very weak. Increasing the number of cases in the Ombudsmen institution shows that inspection organs, particularly in the area of labor are not sufficient and effective. The situation related to inspection organs in BiH is worse than in previous period.
- In BiH, there have been developed programs of employment with particular attention on the employment of youth and women, but there is no information on effectiveness of those programs.

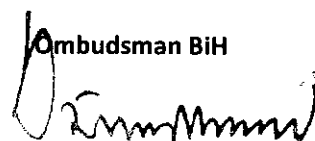
- Ombudspersons would like once more to indicate difficult situation of social welfare centers in BiH, as well as the fact that municipal authorities allocate (too) small amounts of money for realization of the rights pertaining to social and child care, which, directly or indirectly, diminishes the importance of social welfare centers and limits their possibilities to normally carry out their duties and functions.

## V – RECOMMEDATIONS

1. BiH should create a strategic approach to human rights aiming to publicize the provisions of the Covenant, but also all other international standards inter alia. This should include:
  - a. Adoption of a national action plan for human rights
  - b. Establishment of an institute for international public law and human rights law
  - c. Improve training for judges, prosecutors and lawyers on the application of the Covenant.
2. There should be taken action with aim to harmonize the quota system of the Election Law with the requirements of the Gender Equality Law and take special measures in addition to statutory quotas to enhance the representation of women in all legislative and executive bodies.
3. There must be taken strategic approach under of the coordination of the BiH Ministry of Civil Affairs to strengthening capacities and position of centers for social welfare.
4. An Assessment of effectiveness of employment programs for youth and women must be taken.
5. Peaceful enjoyment of property rights of returnees should be provided and the state must follow criteria of compensation only necessity coasts to temporary users.
6. BiH finally must take effective measures with aim to solve problems from the past; including primarily adoption of legislation on torture victims and improve position of injured party in court procedure.
7. The state party should ensure that the compensation for maternity leave is provided for all women in equal amount.
8. The state activities in providing returnees with their rights must be more effective and administrative harassment of them must be eliminated. The State party should remove administrative obstacles in order to ensure that all returnees have access to personal documents, including birth certificates, place residency, ID number and card which are necessary for them to have access to health insurance, social security, education and other basic rights.
9. The State party should take effective measures to eliminate such discriminatory practices related to present of religion symbols in schools and finally eliminate a practice “two schools under one roof”.

10. The State party should ensure that appointment of ombudsmen is more transparent with full respect of the Venice Commission Opinion.<sup>5</sup> The financial autonomy and functional effectiveness of the Office of the Ombudsman should be also provided in accordance with the Paris Principles of 1993.

Sarajevo, April 2013

Ombudsman BiH  


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Jasminka Dzumhur

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<sup>5</sup> CDL(2004)064 , para 29: „The Venice Commission considers that the draft Law should clarify that the Parliamentary Assembly will appoint at the same time three persons, each to serve for six years, two years as ombudsman and four years as deputy, and will also decide on their schedule of rotation on the positions of Ombudsman and Deputy. The provision of the draft Law which states that the ombudsman and two deputies shall be appointed from persons of “Bosniak, Serb and Croat nationality” should be mended to ensure that persons who belong to the category of “others” are not prevented from being appointed ombudsman or deputy ombudsman.“