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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

**ON SOME ASPECTS
OF THE FUNCTIONING
OF OMBUDSMAN INSTITUTIONS
IN BOSNIA AND HERZEGOVINA**

Comments by

**Mrs Maria de Jesus SERRA LOPES
(Member, Portugal)**

By letter of 1st December 1999, Amb. Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, requested the Commission's opinion on the interpretation of some provisions of the draft Law on the State Ombudsman of Bosnia and Herzegovina, in particular as regards the relations between Ombudsman institutions in that State. Mrs Maria de Jesus Serra Lopes, Rapporteur, gave the following replies to the Ombudsperson's request.

1. *If the applicant, residing in the Republika Srpska claims to be a victim of a violation of human rights by the authorities of the Federation of Bosnia and Herzegovina, which Ombudsman institution should s/he approach ?*
2. *If the applicant, residing in the Federation of Bosnia and Herzegovina claims to be a victim of a violation of human rights by the authorities of the Republika Srpska, which Ombudsman institution should s/he approach ?*

The applicant's "residence" does not seem to be determinant for the distribution of competences among Ombudsman institutions in Bosnia and Herzegovina.

The Constitution of the Federation of Bosnia and Herzegovina provides, in its Chapter II.B, Article 5, that "The Ombudsman may examine the activities of any institution in the Federation, Canton, or Municipality, as well as any institution or person by whom human dignity, rights or liberties may be negated". The Draft shall Law on the Federation Ombudsman similarly states that the Ombudsman of the Federation of Bosnia and Herzegovina shall examine "government activity of any institution in the Federation".

The newly adopted Law on the Ombudsman of the Republika Srpska contains a similar provision according to which the Ombudsman of the Republika Srpska shall monitor Government activity "of any institution of the Republika Srpska".

It follows from the above that the applicant's residence is not a criterion for the competence of the entities' Ombudsman institutions. The only criterion is the nature of the authority concerned: When the authority whose act complained of is an authority of an entity its is the Ombudsman of this entity that should be approached by the applicant, irrespective of the applicant's residence in this or in the other entity.

Of course, in some cases, access of the applicant from one entity to the Ombudsman institution of the other entity might be difficult and potential applicant may be discouraged. Co-operation between the Ombudsman institutions of the entities will be necessary in some cases and the Sstate Ombudsman's competence to "promote co-operation among Ombudsman institutions" and to "facilitate co-ordination of action" (see Article 13 of the draft law on the State Ombudsman) will be instrumental in this respect.

3. *Would the State Ombudsman be competent to deal with the proper conduct of the State or also of the entities' institutions?*

The State Ombudsman has exclusive competence to deal with cases and complaints concerning the State institutions. Moreover, under the conditions set out in the draft Law the Ombudsman may be competent to deal with cases concerning the conduct of entities institutions.

As stated in the draft Law on the State Ombudsman, the latter shall have “exclusive competence to deal with cases concerning any institutions, authorities or agencies of the State of Bosnia and Herzegovina” and cases “concerning at the same time an institution, authority, or agency of an entity and an institution, authority, or agency of the State (Article 5, para 1, of the Draft Law). The word “exclusive” indicates that no other Ombudsman institution shall have competence to deal with these cases.

However, the State Ombudsman’s competences go beyond the above and includes entity institutions in the following cases .:

In accordance with Article 5 para 1 in fine of the above-mentioned draft Law, the State Ombudsman shall also have exclusive competence to deal with cases which do not concern any State authority but rather “ at the same time institutions authorities or agencies of both entities”. The purpose of this provision is to avoid that entity Ombudsman institutions and entity authorities refuse to deal with a case on the ground that the situation complained of is due (or mainly due) to the conduct of the authorities of the other entity. The intervention of the State Ombudsman will be necessary in such cases.

Under Article 5 para. 2 of the draft Law, the State Ombudsman has competence to deal with cases concerning the conduct of an entity institution, whenever the outcome of the case is, in the Ombudsman’s opinion, of particular importance for the effective protection of Human Rights in Bosnia and Herzegovina as a whole. In this respect, the Working Group on the Ombudsman institutions in Bosnia and Herzegovina stated in its final Report, that “the jurisdiction of the “State Ombudsman” will in principle be confined to cases concerning the State of Bosnia and Herzegovina and cases simultaneously involving both entities; questions concerning a single entity will in the medium term have to fall within the exclusive ambit of the Ombudsmen of the entities. In the interim however, the Ombudsperson will have to have parallel competencies to those of the Ombudsmen of the entities.”

Furthermore, the explanatory report to the draft Law (CDL-INF (99) 10) clearly indicates the following :

The State Ombudsman shall also continue to have competence to deal with any cases in Bosnia and Herzegovina, even a case concerning authorities of one entity, as is the situation now, under Annex 6 to the Dayton Agreement. This is considered necessary for ensuring a coherent Ombudsman praxis all over Bosnia and Herzegovina and for enabling the State Ombudsman to give guidelines and transfer the institution’s know-how to the new Ombudsman institutions of the entities, in particular the Ombudsman of the RS. The draft organic law provides that the State Ombudsman shall use this competence whenever “it finds that the outcome of this case is relevant for effective enjoyment of individual rights and freedoms in Bosnia and Herzegovina as a whole”. Since clear entity cases can be dealt with by the entities’ Ombudsman institutions, the State Ombudsman is expected to make a careful use of this power, intervening in these clear entity cases only when this appears absolutely necessary. Quite naturally, the transitional State Ombudsman may make a frequent use of this power in order to

ensure the coherent Ombudsman praxis wished. However, it is to be expected that in the long run, when the smooth functioning of all Ombudsman institutions in Bosnia and Herzegovina will be achieved, such interventions will be very exceptional.”

4. *The Draft Law does not regulate the issue of locations of the State Ombudsman Offices Should Article III para 3 of Annex 6 be followed ?*
5. *Should equal accessibility of the Office of the State Ombudsman be guaranteed to persons residing in both entities and how would it be secured ?*
6. *What should be done in order to respond to the special legal status of the Brcko district? Opening an office in Brcko or directing applications to Sarajevo and Banja Luka ?*

The above questions concerning the location of the Ombudsman offices are rightly not regulated in the draft Law as the Commission finds that they do not need a strict legal regulation but rather a practical and realistic approach. The Ombudsman should address these questions in the institutions internal rules and not in the organic Law. What is essential here is to ensure that access of potential applicants to the State Ombudsman is secured. This may be achieved by opening of several separate offices, or by setting antennas within the Entities' Ombudsman Offices, or by other means as appropriate.