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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**The Preliminary Draft Law
instituting the Ombudsman
of the Republika Srpska
(Bosnia and Herzegovina)**

Note by the Secretariat

1. Introduction

In its Report on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, the European Commission for Democracy through Law (Venice Commission) recommended, inter alia, the creation of an Ombudsman institution in the Republika Srpska¹. A working Group was set up to this end comprising the Commission's Rapporteurs and experts appointed by the Directorate of Human Rights of the Council of Europe.

The Venice Commission Rapporteurs, Mr G. Batliner, Mr. J.-C. Scholsem and Ms M. Serra-Lopes, met on 24 April 1997, in Strasbourg with Mr A. Gil Robles, former Defensor del Pueblo in Spain and Mr P. Bardiaux, from the office of the French Médiateur, experts of the Directorate of Human Rights of the Council of Europe. The Group made the following observations:

- there was a general consensus within the international community on creating this position quickly
- for this purpose, consideration had to be given to the judicial systems for the protection of human rights in Bosnia and Herzegovina, characterised by the complexity in the Federation of Bosnia and Herzegovina and the simplicity, if not non-existence, in the Republika Srpska; the need to give some immediate thought to the nature of the long-term relationship between the Ombudsman structure in the Republika Srpska and the existing Ombudsman structures in Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, as well as the relationship between these structures and the judicial apparatus.

Following this meeting, the Secretariat of the Commission had contacted the authorities in Republika Srpska, and on 3 June 1997, Mr Gil Robles, together with Mr Giakoumopoulos, Deputy Secretary of the Venice Commission, and Mr Titun, of the Directorate of Human Rights, met in Banja Luka, on 3 June 1997, with Ms Plavsic, President of Republika Srpska, and Mr Mijanovic, President of the Constitutional Court, in Banja Luka. This meeting confirmed that Republika Srpska was interested in instituting the office of Ombudsman and that representatives from the Republika would take part in the Group's work.

Indeed, representatives from Republika Srpska were present at the 31st Plenary Meeting of the

¹ See *Annual Report of activities for 1996*, pp. 44-60 (p.52): "Moreover, the creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the FBH, will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in BH in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of BH, as provided by Rule 37 b) of the Office's Rules of Procedure (this Rule already mentions that the Ombudsman of BH will refer to the Chamber cases communicated for this purpose by the Ombudsmen of the FBH or "any equivalent institution in the Republika Srpska"). Of course, in order to ensure the necessary impartiality of the institution in a post conflict situation, one should seriously consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation (e.g. the OSCE may nominate the three Ombudsmen and support substantially the functioning of their office)."

Venice Commission (Venice 20-21 June 1997) and presented the outlines of their plans for creating the office of Ombudsman:

The Ombudsman would be nominated by the National Assembly by qualified majority. The Ombudsman would examine those cases presented by individuals according to a non-judicial procedure. He will control both the functioning of the administration and complaints of violation of human rights. The Ombudsman should be able to initiate certain procedures (e.g. before the Constitutional Court), in particular cases of violation of human rights. However, he should not appear to be a substitute for the judicial apparatus. His competences should be limited in the case of *res judicata*. In addition to his role of defender of individual rights, the Ombudsman could also be competent in matters of public moral and corruption. Recommendations made to the authorities by the Ombudsman should be available to the public. The person nominated as Ombudsman should have high moral qualities. His mandate should be of reasonable length. The status of Ombudsman should be incompatible with carrying out other functions. The Ombudsman of the Republika Srpska will take due account of the activities of the Human Rights Ombudsperson of Bosnia and Herzegovina and the Ombudsmen of the Federation of Bosnia and Herzegovina.

A second meeting of the working group and representatives from Republika Srpska was initially planned for 24 June 1997. However, due to the constitutional crisis in Republika Srpska, this meeting could not take place.

The Working Group further met in Venice, on 16 October 1997. It decided to pursue its work on the basis of the outline of the project for the creation of Ombudsman institution of the Serb authorities as this was communicated to the Commission by Mr. G. Mijanovic, President of the Constitutional Court of the Republika Srpska². The Group considered in particular the Ombudsman's powers, the nature of Ombudsman institution and the procedures before it, as well as to the questions of appointment and the structure of the Ombudsman's Office.

The Working Group further met in Venice, on 11 December 1997. A part of this meeting was devoted to the hearing of the Ombudsmen of the Federation who explained their working methods. On 4 February 1998, the Group met in Paris. It considered and finalised the preliminary draft law instituting the Ombudsman of the Republika Srpska (CDL(98)12) on the basis of a working document drafted by Mr Gil Robles (CDL (97) 56) and the comments of the members of the Working Group and Mr R. Lavin (CDL (97) 64).

2. General observations

- The powers of the Ombudsman of Republika Srpska

As regards the powers of the Ombudsman of Republika Srpska, the working group considered that, as well as examining complaints about human rights violations, he should also supervise the proper functioning of the administration. This wide range of powers was considered necessary in view of the fact that it was not possible for individuals to lodge petitions with the Constitutional Court.

² CDL (97) 25 "The introduction of the Office of Ombudsman in the Republika Srpska".

On the other hand, the working group considered that the Ombudsman should not deal with "public morality and corruption", in addition to his role as defender of individual rights. The working group believed that the notion of public morality was too vague and was likely to weaken the Ombudsman's role by making it too political. The working group further considered that it was normally the role of the courts to examine accusations and cases of corruption.

- **Nature of the institution and procedures**

With regard to the nature of the institution and procedures before it, the working group was of the opinion that the Ombudsman should examine cases submitted to him by natural and legal persons through a non-judicial process.

He should also be able to act on his own initiative (*ex officio*).

The Ombudsman should be able to initiate legal proceedings (for example, before the Constitutional Court), particularly in cases of human rights violations. However, referring cases to the Constitutional Court should not be his main task and his role should not appear to be an alternative to the courts. His powers should be restricted in cases of *res judicata*, but he should be able to intervene in the execution of court decisions. He should also be able to supervise the functioning of the judicial system.

The Ombudsman of Republika Srpska should also be able to refer cases to the Human Rights Chamber provided for in Annex VI to the Dayton Agreement through the Ombudsperson described in the same Annex. This is already provided for in the Rules of Procedure for the Ombudsperson, and similar provision should be made in the law on the Ombudsman of Republika Srpska. The importance of this possibility was emphasised by the working group. Submissions to the Chamber of Human Rights by the Ombudsman of Republika Srpska will not only contribute to easing the existing imbalance between the two entities as regards human rights protection mechanisms,³ but would also amount to going beyond the legal system of Republika Srpska to the courts of the State of Bosnia and Herzegovina, as the office of Ombudsman would be acting beyond the limits of the entity's jurisdiction. Of course, before addressing the Human Rights Chamber, the Ombudsman of Republika Srpska would have to ensure that domestic remedies had been exhausted.

In principle, the Ombudsman's recommendations to the authorities should be accessible to the public. However, the public need not be informed about all his activities. It should be possible to maintain confidentiality about actions and decisions taken by the Ombudsman in the course of his enquiries, as well as about those concerning secret information, for example, relating to national security. In the same way, it ought to be possible for the Ombudsman not to disclose the identity of those who contact him, if they so request.

The working group did not consider it necessary for the Ombudsman of Republika Srpska to prepare a report for an international institution, as is the case for the Federation Ombudsmen.

³see the Report by the Venice Commission on the constitutional situation in Bosnia and Herzegovina, with particular regard to human rights protection mechanisms, *supra* note 1.

The Ombudsman of Republika Srpska should present his annual report to the Government and the Parliament. If he wished, he could of course also send a copy to the High Representative of Bosnia and Herzegovina.

- **Nomination and mandate**

On the subject of the Ombudsman's appointment, the working group noted firstly that the Serb plan made no provision for protecting the Ombudsman from dismissal. It was generally accepted that the Ombudsman could only be dismissed in cases of mental disorder. The draft law should also rule on issues such as the Ombudsman's immunity, and the possible waiver of this immunity, as these are important factors in preserving the institution's independence. The working group indicated its support for the proposal, included in the plan, that the person selected for the role of Ombudsman should be seen to have high moral qualities.

The Ombudsman's mandate should be fairly long. The working group considered that a mandate of five years, renewable once, was sufficient to guarantee the institution's independence.

The exercise of other functions, whether public or private, should be incompatible with that of Ombudsman. In particular, the Ombudsman should have no political position, and should not be a member of a political party.

The Working Group also considered that the Ombudsman Office should have two major characteristics:

First, the Ombudsman should appear as an institution of confidence in the service of the people. Having regard to the recent trauma caused by the ethnic war in Bosnia and Herzegovina, the Ombudsman should not only function in an impartial manner and place himself subjectively above all ethnic, political, religious or other considerations, but should also objectively appear as an institution sufficiently independent and representative at the same time. Citizens must see in the Ombudsman an ally in their applications to the administration.

Moreover, if the Ombudsman is an institution trusted by all citizens, it must also at the same time be a outstanding partner of the authorities. Its democratic legitimacy must be significantly high in particular in the case of the Republika Srpska which has only recently overcome a serious constitutional crisis.

The Group thus considered whether it was appropriate to provide for a system comparable to that of the Federation's Ombudsmen (there are three Ombudsmen, one from each of the Bosnian, Croatian and Serb national groups). After observing that several Ombudsmen work in parallel in certain European states (for example, there are three Ombudsmen in Austria and two in Belgium), the Group held that the most appropriate system might be that of three Ombudsmen, one from each national group.

As regards the appointment procedure for the Ombudsmen, the working group came to the following conclusion:

The three Ombudsmen of the Republika Srpska would be elected by Parliament. The President of the Republic, the Prime Minister and the President of the Parliament would jointly propose

three candidates to Parliament, which could adopt the nomination by a three-quarters majority (a level which would require negotiation and would also offer the Ombudsman broad democratic legitimacy). Parliament must elect the three candidates within a period of three months, as provided for and established by the Ombudsman law. The international community's involvement in the appointment should be considered but only on a transitional basis and for a very limited period of time.

3. Observations on some provisions of the preliminary draft

Articles 1 and 2

The term "public administration" in Article 1 must be understood *lato sensu* and should not be limited to the executive. Article 2 makes it clear that the competence of the Ombudsman extends also over two often sensitive areas: the judicial administration (i.e. all activities of the judiciary which do not entail a judgment, including the activity of court registries, notaries, bailiffs, as well as delays, administrative handling of files etc) and the military. With regard to the latter, the preliminary draft underlines that members of the military staff are citizens who can seek protection in their relations with the military hierarchy and the administration.

The possibility offered to the Ombudsman to introduce a case before the Human Rights Chamber of Bosnia and Herzegovina through the Ombudsperson of Bosnia and Herzegovina shall be valid, as long as these institutions exist. Were the competence currently belonging to the Human Rights Chamber to be transferred to the Constitutional Court of Bosnia and Herzegovina, one should envisage whether the Ombudsman should be empowered to bring cases before the latter.

Article 3:

The preliminary draft does not regulate the distribution of competences among the three persons exercising the functions of Ombudsman. This question should be addressed in the Rules of Procedure (Article 28).

Article 5:

The word "citizen" in Article 5 must be understood as comprising persons who have the citizenship of Bosnia and Herzegovina, in accordance with the Law of 16 December 1997 (published in the Official Gazette 4/98), and who are citizens of the Republika Srpska.

Article 7 :

The wording according to which the Ombudsman shall be under no specific orders (Article 7 para 1) indicates that he is not subject to any obligation to abide by orders of court.

Moreover, as regards the Ombudsman's immunity under Article 7 para 2, it must be understood that the acts accomplished by the Ombudsman's staff within the exercise of their functions and in the name of the Ombudsman are also covered by immunity.

Article 11:

The six months time-limit in Article 11 aims at harmonising the procedural requirements for lodging an application with the RS Ombudsman and with the Commission on Human Rights of Bosnia and Herzegovina (Annex VI of the Dayton Agreement). This time-limit shall not apply to cases taken up ex officio by the Ombudsman and should not prevent him from examining cases which are brought to his attention even after the above time-limit has expired, where necessary.

Articles 14, 16 and 24:

The Rules of Procedure can provide for the time-limits that the Ombudsman shall set in principle to the authorities for the submission of the information and reports he may request. However, the Rules of Procedure shall be flexible so as to permit the Ombudsman to adapt the time-limits, where circumstances so require.

Articles 25, 26, 27:

It is obvious that the Ombudsman's Reports to the National Assembly will be signed by all three Ombudsmen. It would be advisable that the Rules of Procedure provide that the Recommendations of the Ombudsman are also signed by the three Ombudsmen.

Article 31:

This provision implies that the Government is not involved in the presentation of the draft Ombudsman budget to the Parliament. It does not preclude that expenses of the Ombudsman institution require a visa by the financial controller.

Final provision

The date of 15 december 1995 (date of the signature of the Dayton Agreements) aims at preventing the institution from examining facts which occurred during the war. It should not prevent the institution from examining cases which concern situations which started before that date but continue after it (continuing situations).