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(VENICE COMMISSION)

**REVISED
INTRODUCTORY AND EXPLANATORY NOTE
ON THE PRELIMINARY DRAFT LAW
ON THE OMBUDSMAN OF THE REPUBLIKA SRPSKA**

**prepared by
the Secretariat of the Venice Commission**

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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 Srpska. 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 de la République*, 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 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, then President of the Constitutional Court of the Republika Srpska. 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).

The Preliminary Draft Law on the Ombudsman on the Republika Srpska was submitted to the Venice Commission, at its 34th Plenary Meeting (Venice, 6-7 March 1998). The Commission approved the draft (CDL (98) 12 F).

Following the approval by the Venice Commission it was agreed that the OSCE Mission in Bosnia and Herzegovina and the Office of the High Representative would be entrusted with the task of carrying out further negotiations with the RS authorities with a view to adopting this law during 1998. Several mainly editorial changes to the initial draft were made by the OSCE in April 1998. Moreover, several meetings were held with officials of the Republika Srpska, including Prime Minister Mr Dodik, the then President of the Republika Srpska, Mr Poplasen, and the Vice Prime-Minister, Mr Kremenovic.

The Working Group continued its work concerning the Ombudsman institutions in Bosnia and Herzegovina in 1999 and prepared two further preliminary draft laws: A draft organic law on the Ombudsman of the Federation of Bosnia and Herzegovina and a draft organic law for the State Ombudsman of Bosnia and Herzegovina.

A revised version of the preliminary draft law on the Ombudsman of the Republika Srpska, taking into account the existence and the wording of the two other draft laws was forwarded to the authorities in Bosnia and Herzegovina on 13 August 1999. The following observations and notes refer to the revised draft.

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.

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 found 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*).

Relations with the judiciary

The Ombudsman should not interfere with pending court proceedings and should not challenge the legality of court judgements. His role should not be to supervise the judiciary and to impose his own interpretation of the law. However, in proceedings between State institutions and private persons, the Ombudsman should be able to make recommendations to the State body party to the proceedings (and not to the court) with a view to a friendly settlement of the case (Article 4 of the Preliminary Draft Law).

Moreover, the Ombudsman should be able to initiate legal proceedings before the Constitutional Court (see Article 4 of the Preliminary Draft Law), 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.

The Ombudsman should be able to intervene in the execution of court decisions and to supervise the functioning of the judicial administration (e.g. undue prolongation of the proceedings, unreasonable delays, loss of files etc).

Pursuant to Article 6 of the draft law, the Ombudsman of Republika Srpska should also be able to refer cases to the highest judicial authority in Bosnia and Herzegovina competent to deal with human rights issues, in accordance with the rules concerning this authority (i.e. the Human Rights Chamber provided for in Annex VI to the Dayton Agreement through the Ombudsperson described in the same Annex and/or the Constitutional Court of Bosnia and Herzegovina). The importance of this possibility was emphasised by the working group. Submissions to the highest judicial authority in Bosnia and Herzegovina competent to deal with human rights issues by the Ombudsman of Republika Srpska will contribute to easing the existing imbalance between the two entities as regards human rights protection mechanisms. Moreover this 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.

Relations to the legislator

The Ombudsman has not legislative power nor power of legislative initiative. Nevertheless, it should be possible for the Ombudsman to propose in his report to the National Assembly amendments to a law, when the implementation of the law leads to inequitable results (Article 30, para.4).

Recommendations and Report of the Ombudsman

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 the Republika Srpska to prepare a report for an international institution, as is the case for the Federation Ombudsmen pursuant to the Federation Constitution. The Ombudsman of the Republika Srpska should present his annual report to the Government and the Parliament. Of course the Ombudsman shall send copies to the High Representative and the OSCE.

- 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 be 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 had to overcome some serious constitutional crises.

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 National Assembly should appoint the three Ombudsmen of the Republika Srpska. The President of the Republic, the Prime Minister and the President of the National Assembly would jointly propose three candidates to the Assembly, which could adopt the nomination by a two-thirds majority (a level which would require negotiation and would also offer the Ombudsman broad democratic legitimacy). Parliament must then appoint 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 (see Article 38 ff).

3. Observations on some provisions of the Preliminary Draft

Articles 1 and 2

The term "governmental activity" in Article 1 must be understood *lato sensu* and should not be limited to the executive. Articles 2 to 4 make 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 judgement, including the activity of court registries, notaries, bailiffs, as well as delays, administrative handling of files etc), the security services 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.

Article 10:

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.

Articles 19 and 41:

The one year time-limit in Article 19 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.

The date of 15 December 1995 (date of the entry into force of the Dayton Peace Agreement) aims at preventing the institution from examining facts that occurred during the war. It should not prevent the institution from examining situations which started before that date but continue after it (continuing violations).

Article 37:

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