

Strasbourg, 19 June 1998
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CDL-INF (98) 12

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**INTERIM REPORT ON THE DISTRIBUTION
OF COMPETENCES AND STRUCTURAL
AND OPERATIONAL RELATIONS IN THE OMBUDSMAN
INSTITUTIONS IN BOSNIA AND HERZEGOVINA**

**Prepared by the Working Group on
Ombudsman institutions in Bosnia and Herzegovina
composed of
Mr J.-C. SCHOLSEM (Belgium), Mr Ph. BARDIAUX (France),
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**and approved by the Commission at its
35th Plenary Meeting (Venice, 12-13 June 1998)**

1. Introduction

In the course of its work on the setting up of an Ombudsman institution in the Republika Srpska (Bosnia and Herzegovina) and the drafting of a law instituting the Ombudsman of the Federation of Bosnia and Herzegovina, the European Commission for Democracy through Law (Venice Commission) was requested by Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, to give an opinion on the distribution of competences between the Ombudsman institutions in Bosnia and Herzegovina. The Working Group set up by the Venice Commission and the Directorate of Human Rights to study the Ombudsman institutions in this country was entrusted with this task. The Working Group, composed of Mr J.C. Scholsem, Vice-President of the Venice Commission, Mrs Serra-Lopes, member of the Commission, Mr Gil Robles Gil Delgado, former *Defensor del Pueblo* in Spain, and Mr Bardiaux, who is in charge of international relations in the Office of the French *Médiateur de la République*, has held two meetings, one in Strasbourg, on 19 and 20 May 1998 and one in Paris, on 27 May 1997. At these meetings it heard Mrs Gret Haller, Human Rights Ombudsperson for Bosnia and Herzegovina, Mrs V. Jovanovic, Mrs B. Raguz and Mr E. Muhibic, Ombudsmen of the Federation of Bosnia and Herzegovina, and Mrs M. Picard, President of the Human Rights Chamber of Bosnia and Herzegovina.

The Working Group would like to underline from the outset that the Ombudsman institutions in Bosnia and Herzegovina are still in a state of flux. The Human Rights Ombudsperson is now halfway through its first five-year term, and it has not yet been decided in what manner it will continue its work; the Ombudsman institution of the Republika Srpska is still at the project stage; finally, an Act defining the *modus operandi* of the Ombudsmen of the Federation of Bosnia and Herzegovina is currently in preparation. It is not possible at this time, therefore, to present a final report on the distribution of competences and structural and operational relations of these changing institutions. The conclusions contained in this interim report are therefore the provisional findings of the Working Group. They may be reviewed in the light of future developments.

2. The institutions and their functions

- The Human Rights Ombudsperson

The Ombudsperson of Bosnia and Herzegovina (instituted in conformity with Annex 6, Part B of the Dayton Agreement) is an independent institution constituting one of the two branches of the Human Rights Commission (provided for in Article II, para 1 of the BH Constitution and in Annex 6 of the Dayton Agreement, Chapter II, Part A), the other branch being the Human Rights Chamber. The two institutions are jointly responsible for investigating manifest or alleged violations of human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, and discrimination in the exercise of fundamental rights enshrined in other relevant instruments.

The Office of the Ombudsperson is empowered to investigate alleged or manifest violations of human rights. Upon receipt of a complaint, it may inform the accused party and ask it to comment. The applicant then has an opportunity to respond to these comments, following which the Ombudsperson invites the parties to reach a friendly agreement. If no such agreement is

forthcoming, the Ombudsperson then drafts a report stating whether or not there has been any violation of human rights, and if so, it may make recommendations with a view to securing fair satisfaction. The party at fault must then state how it intends to comply with the findings of the Ombudsperson. Should that party fail to reply or refuse to comply, the Ombudsperson publishes its report and submits it to the High Representative and the Presidency. It may also refer the matter to the Human Rights Chamber. For the purposes of its investigation, the Ombudsperson must have access to all official documents, even those which are confidential. It may open an investigation at its own initiative (Annex 6, Article V, para 2). Under Article V, para 5 of Annex 6, the Ombudsperson may decide, at any stage in its examination of an allegation, to refer a case to the Chamber. According to Article 37 b), adopted in September 1996, it may also refer to the Chamber “any case referred to it for this purpose by the Ombudsmen of the Federation of Bosnia and Herzegovina or by an equivalent institution of the Republika Srpska”.

The Human Rights Chamber (instituted by Annex 6, Part C, Articles VII to XIII) is a court composed of fourteen members. Complaints of human rights violations are referred to it by the Ombudsperson, on behalf of the complainant, or directly by the complainant. It examines the admissibility and the level of priority of the complaints it receives and decides whether the complainant has exhausted the available domestic remedies. The rulings of the Chamber are final and binding.

The organisation of the Commission is similar in some respects to that of the European Human Rights Convention, the Ombudsperson being comparable to the European Commission of Human Rights and the Human Rights Chamber to the European Court of Human Rights. While Article VIII, para 1 authorises cases to be referred directly to the Human Rights Chamber, in principle all the complaints referred to the Human Rights Commission are first presented to the Ombudsperson (Article V, para 1), which may refer them to the Chamber when it considers that there has been violation of human rights.

- The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen – a Bosnian, a Croatian and one “other”, currently a Serb – are appointed for a term of office similar to that of the President and judges of the Supreme Court. Each appoints one or more assistants, with the approval of the President. In particular, they must appoint assistants at municipal level where the composition of the local population does not reflect that of the whole canton. The Ombudsmen form an independent institution. They are empowered to examine the activities of any federal, canton or municipal institutions, as well as complaints from people whose dignity, rights or freedoms have allegedly been violated, particularly by or in the wake of ethnic cleansing. In order to accomplish their task, Ombudsmen must have access to all official documents, even confidential ones. They may bring proceedings before the competent courts and take steps to settle pending cases. The Ombudsmen present their annual report to the Prime Minister and Deputy Prime Minister of the Federation, to the President of each canton and to the OSCE; at any time they may present special reports and enjoin the local institutions to reply.

- The Ombudsman of the Republika Srpska

The Ombudsman of the Republika Srpska has not yet been instituted. A preliminary draft law drawn up by the Venice Commission and the Directorate of Human Rights of the Council of

Europe, with the help of the OSCE and the Office of the High Representative, has been submitted to the authorities of the Republika Srpska for consideration (CDL (98) 12 def). The comments in the present report are based on this draft law. It provides for the institution to be composed of three Ombudsmen, belonging to the constituent peoples of Bosnia and Herzegovina. The Ombudsman of the Republika Srpska has competences both in the human rights field and in administrative affairs. Without being structurally related to the Ombudsperson of Bosnia and Herzegovina, it should (according to the draft law) be able to refer matters to the Human Rights Chamber via the Ombudsperson.

The Venice Commission proposed setting up this institution in its Opinion on the constitutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery (CDL-INF (96) 9). According to the Commission, setting up such an institution, equivalent to the Ombudsmen of the Federation of Bosnia and Herzegovina, will help to establish a balanced, coherent system of human rights protection throughout Bosnia and Herzegovina.

3. The parallel functioning of the ombudsman institutions in Bosnia and Herzegovina

In terms of their functions, there are as many similarities as there are differences between the three institutions mentioned above. All three may receive complaints from individuals or initiate investigations *ex officio*.

The Ombudsmen of the Federation and the Ombudsperson of Bosnia and Herzegovina are more human-rights-oriented, whereas the Ombudsman of the Republika Srpska also has the more conventional role of monitoring the proper functioning of the administration.

The Ombudsmen of the entities have dealings with all the administrative authorities in their respective entities, while the Ombudsperson of the Bosnia and Herzegovina has dealings only with the entities and the state, as such.

The Ombudsmen of the entities are competent only in matters concerning the administrative authorities of the entities concerned, while the Ombudsperson also deals with affairs concerning the state authorities of Bosnia and Herzegovina.

Whereas the powers of the Ombudsmen of the Federation seem to be unlimited in time, those of the Ombudsperson (and according to the Venice Commission's draft law, those of the Republika Srpska Ombudsman) apply only to events which occurred subsequently to the Dayton Agreement.

The main difference between the Ombudsmen of the entities and the Ombudsperson of Bosnia and Herzegovina, however, is the latter's special relationship with the Human Rights Chamber, within the framework of the Human Rights Commission.

Indeed, the main activity of the Ombudsmen of the entities consists in seeking solutions acceptable to the parties in certain cases of human rights violation or maladministration. Although the FBH Ombudsmen are empowered to take matters before the ordinary courts and the RS Ombudsman may refer a case to the Constitutional Court, and both may refer cases to the Human Rights Chamber, their main activity is to seek settlements acceptable to the parties,

in a spirit of respect for human rights. They tend to resort to the justice system only in exceptional cases, generally expressing their disagreement with the authorities' reactions to their work by publishing reports, particularly special reports. So their action is mainly of a non-judicial nature.

The Ombudsperson of Bosnia and Herzegovina, on the other hand, is a hybrid institution. Set up very shortly after the peace agreement, the Office of the Ombudsperson was for a long time the only institution responsible for introducing the European Human Rights Convention into the legal system in Bosnia and Herzegovina. Whatever those who drafted Annex 6 had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. The Ombudsperson thus rules on the admissibility of the complaints it receives, seeks a friendly solution, investigates and communicates its findings to the party allegedly at fault and, if it is not satisfied with that party's response, refers the matter to the Chamber. At the same time, at the hub of the human rights machinery provided for in Annex 6, the Ombudsperson has a non-judicial activity when it decides, of its own accord, to conduct investigations and draw up special reports.

This difference between the institutions accentuates the confusion as regards their competences *ratione personae, materiae, temporis* and *loci* and the various means of action they tend to privilege (reports; referral to the competent courts; negotiations with political authorities, etc.). It also renders the structure of the whole ombudsman apparatus in Bosnia and Herzegovina particularly complex. The Venice Commission has already established that the human rights protection machinery in the legal system of Bosnia and Herzegovina is, on the whole, unusually complex. The co-existence, side by side, of judicial bodies responsible for specific human rights tasks, courts expected to rule on cases of alleged human rights violations which are brought before them, and non-judicial institutions for the protection of individual rights, evidently results in some overlapping of competences which, along with the large disparities in the human rights protection systems in the two entities, may undermine the efficacy of the protection provided. To guarantee a balanced and coherent system for protecting human rights throughout Bosnia and Herzegovina requires a certain equilibrium between the legal systems of the two entities, and a clear definition of the respective competences of the institutions operating within the legal systems of the entities and the state.

4. Proposals concerning the distribution of competences and relations between the ombudsman institutions

4.1 The brief but conclusive experience of how the ombudsman institutions function in Bosnia and Herzegovina clearly shows how useful these institutions can be in a society still haunted by the trauma of war. By their flexibility and the flexibility of their procedures, and their multi-ethnic or international composition, the ombudsman institutions are able to react promptly and effectively to the urgent situations created by human rights violations.

4.2 The ombudsman structures of the constituent entities need to be more similar in terms of their composition, powers and means of action. As the laws governing these institutions are currently being drafted, care must be taken to avoid disparities in the manner in which they operate.

4.3 In the not-too-distant future, however, and if possible before the end of the

Ombudsperson's first term of office, a structural reorganisation of its *modus operandi*, and consequently that of the Human Rights Chamber, must be undertaken. The quasi-judicial sorting role now performed by the Office of the Ombudsperson should in fact be taken over by the judicial body responsible for protecting human rights. This would be in keeping with the trend in the organs of the European Convention on Human Rights, where the original Court and Commission have been merged into a single organ, the European Court of Human Rights provided for in Protocol No 11 to the Convention. The Ombudsperson could then concentrate more on its more conventional mediation functions, without so many procedural constraints (application deadlines, exhaustion of other remedies), which are uncharacteristic of the ombudsman's work. This should not prevent the Ombudsperson from referring cases to the proper courts (the Human Rights Chamber or even the Constitutional Court of Bosnia and Herzegovina).

Reorganising the work of the Ombudsperson in this way does raise certain practical difficulties.

The Chamber will have to be given the powers of investigation and examination currently enjoyed by the Ombudsperson, particularly the power to investigate and prepare cases brought before it. This means extending the powers of the Chamber (investigation, hearing of cases referred by the Ombudsmen of the entities, *locus standi* of same) and also its wherewithal (large secretariat with a good knowledge of the ECHR, judges to report on investigations). Indeed, such a move seems not only recommendable for the coherency of the ombudsman system but actually necessary for the functioning of the Chamber itself; many of the cases brought before the Chamber even now are brought not through the Ombudsperson but directly by the applicants.

4.4 The competence of the Ombudsperson should also be confined to matters concerning the State of Bosnia and Herzegovina and "inter-entity" questions. Clearly as the state institutions are gradually set in motion and begin effectively to exercise their powers under the Constitution of Bosnia and Herzegovina, the citizens will be increasingly concerned by the decisions of those institutions. Similarly, the co-operation required in numerous areas under the Dayton Agreement -between the entities themselves or between the entities and the state - seems to point to a likely increase in the number of cases involving both entities. It is in this field that the Ombudsperson will have to develop its activities, while in the medium term questions concerning only one entity should fall within the exclusive ambit of the Ombudsmen of the entities.

In the interim, however, the Ombudsperson will have to have parallel competences to those of the Ombudsmen of the entities.

4.5 Clearly, therefore, there will be no hierarchical relationship between the three institutions; they will each function independently. In particular, there must be no possibility of appealing decisions of the Ombudsmen of the entities before the Ombudsperson.

4.6 However, the Ombudsperson must be empowered to organise co-operation and consultation between the institutions. It is important that there should be arrangements for communication, mutual information and consultation, or even co-operation in certain cases, particularly when a case is brought before the wrong institution, or where it emerges in the course of proceedings that an institution lacks jurisdiction. Regular meetings of the Ombudsmen

of the entities and the Ombudsperson should be held in order to determine what form co-operation should take and, where necessary, decide on joint action to be taken. The initiative to convene these meetings and the form they should take, as well as the procedure for taking decisions and their scope, could be agreed jointly. The flexibility and the informal nature of the ombudsman institutions should favour this development.

4.7 The reform broadly outlined above will, of course, require the amendment of certain fundamental texts of the institutional apparatus in Annex 6. One should note, in this respect, that provision is actually made, in Article XIV of Annex 6, for revision of the *modus operandi* of the institutions concerned, starting five years after the entry into force of the Dayton Agreement. As responsibility for the continuation of the institutions provided for in Annex 6 lies, in principle, with the institutions of Bosnia and Herzegovina, it seems that the most appropriate means of carrying out the reform would be an organic Law to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina.