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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT OF THE WORKING GROUP OF THE VENICE COMMISSION AND THE DIRECTORATE OF HUMAN RIGHTS ON OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Adopted by the Working Group at its meeting in Paris on 11 May 1999

INTRODUCTION

Very soon after the Washington and Dayton peace agreements, the Council of Europe realised the need to define the structure and working methods of the ombudsman institutions in Bosnia and Herzegovina, as bodies responsible for the protection of human rights in that country. In November 1996, at the request of the Parliamentary Assembly of the Council of Europe, the European Commission for Democracy through Law (Venice Commission) adopted its Opinion on the institutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery (CDL-INF(96)9); as a result of this opinion, the Working Group on Ombudsman institutions in Bosnia and Herzegovina was set up in April 1997. It consisted of Mr Jean Claude Scholsem and Ms Maria de Jesus Serra Lopez, members of the Venice Commission for Belgium and Portugal respectively, and MM Alvaro Gil Robles, former Defensor del Pueblo (Spain) and Philippe Bardiaux, Foreign Relations Adviser to the Médiateur de la République (France). MM Gerard Batliner et Rune Lavin, members of the Venice Commission for Liechtenstein and Sweden respectively, contributed to the group's work.

The working group wished to involve the authorities concerned in its work. The Ombudsperson for Bosnia and Herzegovina, the staff of this office and the Ombudsmen of the Federation of Bosnia and Herzegovina took an active part in the work concerning them. On two occasions, in Banja Luka, the members of the group met Ms Plavsic and Mr Poplasen, Presidents of the Republika Srpska, and judges of the RS Constitutional Court of the RS to discuss the Ombudsman. Lastly, the Office of the High Representative and the OSCE took an active part in preparing the drafts at every stage.

The group also wishes to thank the French *Médiateur de la République* and the Portuguese *Providor de Justiça* for all their assistance with its work.

I. FRAMEWORK

The ombudsman institutions now functioning in Bosnia and Herzegovina, namely the Human Rights Ombudsperson for Bosnia and Herzegovina and the Ombudsmen of the Federation of Bosnia and Herzegovina, were established by the peace agreements. The Constitution of the Federation of Bosnia and Herzegovina (hereinafter "FBH") was drawn up under the terms of the Washington Agreements of March 1994 and provides for the setting up of an ombudsman institution in the FBH. The Dayton Agreements, which came into force on 15 December 1995, established the State of Bosnia and Herzegovina (hereinafter "BH") as the continuation of the Republic of Bosnia and Herzegovina, consisting of two entities, the FBH and the Republika Srpska (hereinafter "RS"). Annex 6 to the agreements provides for the establishment of the Office of the Human Rights Ombudsperson as one of the two components of the Commission on Human Rights, the other being a judicial institution, the Human Rights Chamber.

There is as yet no ombudsman institution in the RS. The idea of setting up such an institution was muted in the above-mentioned Opinion of the Venice Commission on the constitutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery. The working group's first task was to draw up a preliminary draft law on the Ombudsman of the Republika Srpska. The group's work, albeit seriously hampered by the constitutional crisis that shook the RS in summer 1997, nevertheless resulted in the drawing up of a preliminary draft text which was presented to the Venice Commission and approved in March 1998 (CDL(98)12fin). The draft was transmitted to the Office of the High Representative in Bosnia and Herzegovina, the OSCE Mission in Bosnia and Herzegovina and the authorities of the Republika Srpska.

Meanwhile the OSCE Mission in Bosnia and Herzegovina asked the Council of Europe to assist in drawing up a draft organic law for the Ombudsmen of the FBH. The Constitution of the FBH requires a law on the appointment of the Ombudsmen of the FBH to be adopted three years after the entry into force of the Constitution (May 1994). This task was assigned to the working group, which transmitted the requested draft to the OSCE in March 1999, after it had been approved by the Venice Commission.

At the same time, the Ombudsperson for BH asked the working group to look into the distribution of competencies between the ombudsman institutions in BH. An interim report on the subject was adopted by the working group and approved by the Venice Commission in June 1998 (CDL-INF(98)12). On the basis of the conclusions of the interim report, the Ombudsperson asked the working group to draw up a preliminary draft organic law on the functioning of the institution of Ombudsperson for BH after the end of the transitional period provided for by the Dayton Agreements (December 2000). The group completed its preparation of the requested draft in March 1999.

Lastly, the group considered it advisable to revise details of the preliminary draft law on the Ombudsman of the RS in order to bring it into line with the draft laws on the ombudsman institutions of BH and the FBH. The revised draft was transmitted to the OSCE and the authorities of the RS.

The three preliminary draft laws and their explanatory notes are appended to this report.

II. OMBUDSMAN INSTITUTIONS IN A POST-CONFLICT SOCIETY IN TRANSITION

The operation of an ombudsman institution in Bosnia and Herzegovina is surrounded by not only technical but also conceptual and therefore political difficulties.

The idea that ombudsman institutions are part of human rights protection machinery is now familiar to everyone. It is beyond doubt that alongside highly developed judicial systems for protecting human rights, ombudsman institutions are in a position to provide a parallel, non-judicial form of protection which is equally effective and necessary. Of course, the Ombudsman cannot be a substitute for judicial machinery protecting individual rights. Its contribution to the system for protecting those rights is a consensual rather than conflictual dimension, an authority with a more ethical basis and a set of flexible procedures that can adapt to different situations. The key feature of the Ombudsman's work is that the Ombudsman is not, like the courts, bound by strictly legal considerations but can base its action on considerations of equity; in addition, as a mediator, it has no power to impose the solutions it recommends without the agreement of the parties concerned; its action is thus confined to making recommendations, and its effectiveness depends on the ability to convince and a high degree of moral authority; lastly, unlike the courts, it can suggest amendments to laws and regulations where it considers this appropriate. In other words, the Ombudsman's activity parallels and to some extent complements that of the judicial system.

In societies in transition the Ombudsman's activity is of course much less discreet. Faced with a state apparatus undergoing profound changes, the ombudsman institution's task is not only to deal with cases of maladministration, but to promote or protect the values of society, including human rights, which also mean the rule of law. While targeted in theory at the administration, its activity in the transition process not only parallels that of the judicial system, but may often take

the form of judicial action. Its function is then to disseminate a certain legal culture both among the state institutions and among the population. In a transition situation, the Ombudsman's work focuses more on applying the law and the Ombudsman tends to become a fully-fledged player in the judicial system, exercising a quasi-judicial function based on influence. This trend is reflected in the broad scope afforded to ombudsman institutions in several central and east European countries for referring matters to the courts, including the highest courts.

This trend, albeit justified, does have repercussions on the concept of ombudsman. The ombudsman institution may well be viewed as an opponent of the administration, parliament or courts and consequently lose its image as a mediator. Its effectiveness could also be undermined.

Lastly, it is certainly an unusual idea to use an ombudsman-type institution in a society in conflict or post-conflict society where the state machinery is not only new but also - and above all - particularly weak. Many critics in fact describe the ombudsman institution as too sophisticated to perform a stabilising function in a society in conflict. However, some features of the ombudsman institution can be acknowledged to be of great use in a fragile society: an approach free of the constraints imposed by an incomplete or defective legal system, the use of mediating (rather than adversarial) procedures and the structural and operational flexibility of an institution which by definition keeps red tape to a minimum are so many features warranting the setting up of an Ombudsman institution in a society in conflict or post-conflict society.

However, there are major risks. While the ombudsman institution's role in a society in transition is to safeguard or promote values in the face of a changing state apparatus, it could, where the state institutions are weak or lacking, be granted powers enabling it to replace the defective state agency. This could pose problems: firstly, the ombudsman institution would lose its distinctive features and become too similar to the standard institutions of the executive; secondly, the broad scope of its activity could be seen as infringing the separation of powers; its flexibility could be considered arbitrary; and by further relieving the defaulting authorities of the need to take responsibility, its action could undermine the process of setting up effective democratic institutions and introducing the rule of law.

III. CONCEPTUAL PROBLEMS SURROUNDING THE OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina faces a combination of the difficulties described above. Society is both undergoing a transition to a new political, economic and legal system and recovering after a long war. The question is how to define the position of the ombudsman institutions in this context.

The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen - a Bosnian, a Croat and an "other", currently a Serb - have been appointed under the Constitution of the FBH. The Office of the Ombudsmen is an independent agency. The Ombudsmen are empowered to examine the activities of all institutions of the Federation, cantons and municipalities and all institutions or persons whose dignity, rights and freedoms may be breached, particularly by ethnic cleansing or the preservation of its effects. To perform their task, the Ombudsmen of the Federation are empowered to initiate proceedings before competent courts and to intervene in pending proceedings.

The Constitution of the FBH makes it clear, if only by its structure, that the Ombudsmen are not a supplementary, accessory or parallel institution, but one of the key players in the state. The chapter on the Ombudsmen is strategically placed in the Constitution, immediately after the list

of fundamental rights and before any reference to the entity's institutions, whether the President, the Parliament, the Government or the courts. This position reflects the importance assigned by a war-torn society to the ombudsman institution and explains the expectations the latter has aroused. It also explains the institution's distinctive features, including its extensive powers and special relations with the judicial system. This suggests that the purpose of the institution extends well beyond monitoring the functioning of the administration: it is in fact a device for rehabilitating a society in crisis.

The question that arises at the outset is how an ombudsman institution, which by definition lacks means of enforcement, can fulfil this task. On the other hand, if it is granted such means, the question is whether it does not then cease to be an ombudsman institution.

The first few years of operation are fairly indicative of the difficulties encountered by the Ombudsmen of the Federation in the performance of their duties, due to the conceptual problems outlined above. The Ombudsmen have repeatedly approached the FBH authorities with requests for the adoption of measures.

The US State Department Report on Human Rights for 1995 states that "the Ombudsmen have done some impressive work monitoring the human rights situation and bringing cases of abuse to the Bosnian and Croatian governments. However, the Ombudsmen have no enforcement power and authorities treat them with varying degrees of indifference and hostility. They say that were it not for the international backing, the Federation authorities would disband them immediately". In their annual activity report for 1996, the Ombudsmen state that despite repeated assurances to the contrary, the authorities resisted their efforts to monitor respect for human rights.

The Human Rights Ombudsperson for Bosnia and Herzegovina

The Ombudsperson for Bosnia and Herzegovina, established under Annex 6 of the Dayton Agreements, is a hybrid institution. As indicated above, it is one of the two branches of the Commission on Human Rights (provided for by Article II, para.1 of the Constitution of BH and Annex 6 of the Dayton Agreements, Chapter II, Part A), the other 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 ("ECHR") and its protocols, and instances of discrimination in the exercise of fundamental rights enshrined in other human rights instruments. The Ombudsperson is therefore an institution empowered to receive and investigate complaints and rule on their merits. It draws up a report stating whether there has been a violation of human rights or not, and if so, may make recommendations for securing just satisfaction. If the party at fault fails to reply or refuses to comply with its conclusions, the Ombudsperson transmits its report to the High Representative and the Presidency and may also refer the matter to the Human Rights Chamber.

The Ombudsperson's mandate gives rise to a broad range of interpretations. The institution's powers, tasks and options are in fact sometimes incompatible with one another. Annex 6 does not prevent the Ombudsperson from issuing findings that there have been human rights violations (even without giving reasons) or from frequently exercising the power to make recommendations, which may be coupled with the threat of enforcement by the High Representative. This would make the Ombudsperson's function comparable to that of a powerful executive body, but it seems doubtful whether such an approach is consistent with the institution's stated purpose (to assist the parties in complying with the ECHR).

Here too, difficulties stemming from the conceptual problems surrounding the institution have had to be dealt with during the first few years of its operation. The Office of the Ombudsperson was set up very soon after the conclusion of the peace agreements and was for a long time the only operational institution of those provided for by Annex 6 to the Dayton Agreements[1]; it took on the task of introducing the ECHR into Bosnia and Herzegovina's legal system, precisely to help BH comply with its commitments under the Convention, which is directly applicable in BH. Whatever the authors of Annex 6 had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. Yet this too seems hard to reconcile with the intrinsically non-judicial nature of all ombudsman institutions.

IV. CHANGES IN THE FUNCTIONS OF OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Despite the social, political and legal difficulties confronting the ombudsman institutions in Bosnia and Herzegovina, the results of their work are becoming increasingly visible. In their activity report for 1997 the Ombudsmen of the Federation note that despite the difficulties encountered, the institution is gaining further recognition every day and its recommendations and requests are increasingly complied with and accepted. The 1998 activity report of the Office of the Human Rights Ombudsperson for Bosnia and Herzegovina shows a spectacular rise in the number of cases in which the authorities have complied with its recommendations.

This development is simply the outcome of changes in the functions of Ombudsman institutions in Bosnia and Herzegovina.

The Ombudsmen of the FBH have exercised the powers conferred on them by the FBH Constitution with welcome caution. The fact that they devote much of their work to dealing with individual applications (an option not expressly provided for by the FBH Constitution, but arising from their status as Ombudsmen) best illustrates their capacity to adapt the institution both to the requirements of the present and to its future in a state governed by the rule of law. Their reports increasingly show a genuine concern to convince - rather than compel - with arguments based on both the values and the provisions of the ECHR.

The Ombudsperson was in a position to increase its non-judicial activity and has indeed done so. The working group indicated in its interim report that the Ombudsperson needed to gear its activities to standard mediation tasks, even before the end of the transitional period. This process is now well under way - a welcome development.

Indisputably, a cautious interpretation of their mandates and an approach based on legal analysis of the cases before them are bound to enhance the ombudsman institutions' prestige and credibility and gradually instil a greater awareness and sense of responsibility into other institutions, including the courts, as to the need for consistent application of the ECHR.

At the end of the day, the key to the success of ombudsman institutions in BH seems to be their ability to adapt to society's expectations and demands. It is essential for them to gear their action and thinking both to changes in society and to the development of other institutions' capacities. The Ombudsmen will make greater use of their extensive and often unusual powers (provisional measures, applications to the Chamber or the Constitutional Court, intervention in pending

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[1] *The Human Rights Chamber gave its first judgment on 11 July 1997, whereas the Ombudsperson issued its first decision on 3 May 1996. By the end of 1997 the Human Rights Chamber had given 19 judgments, as against more than 300 decisions issued by the Ombudsperson.*

proceedings) as long as they consider the organs of the state and the entities, including the courts, to be functioning unsatisfactorily. However, as soon as the judicial and administrative systems show signs of being able to function regularly and satisfactorily, in line with the principles of the rule of law, the ombudsman institutions will have to gradually reduce their involvement with the courts and allow the institutions concerned to assume their rightful place and regain the people's trust. Normalisation of the institutional situation in BH necessarily entails a decrease in the Ombudsmen's powers; at the same time, there can be no institutional normalisation as long as the Ombudsmen wield exceptional powers. The success of the reconstruction of institutions governed by the rule of law in BH will depend largely on the Ombudsmen's capacity to gradually adapt their functions to changes in those of the other institutions.

In the draft laws it has drawn up, the working group has tried to avoid hampering this process of change with rigid provisions. As a result, the draft laws place no restrictions on the powers assigned to the ombudsman institutions by the peace agreements, but condition and organise the exercise of those powers while allowing the Ombudsmen broad discretion as to their use.

The draft law on the Ombudsman of the RS takes the same approach. It enables the institution to adapt its functions in the light of the work of the entity's other institutions, but also the activity and especially the experience of the Ombudsmen who have already been operating in BH and the caution and creative sense with which they have carried out their mandates.

The regulations governing relations between the Ombudsmen of the FBH and the courts are a case in point.

The FBH Ombudsmen's relations with the judicial system are one of the thorny issues of the FBH Constitution. The Venice Commission has already expressed its anxiety on this point (see the Commission's opinion on the Washington Constitution in CDL-INF(98)15, pp. 26-29). The working group recognised the importance of the Ombudsman being able to intervene before the courts in the event of manifest injustice. The draft law offers scope for two forms of action consistent with the provisions of the Constitution (assigning the Ombudsman a key role in the matter) and the crucial independence of the courts: the Ombudsman can make recommendations to the administrative departments of the court (or to the Judicial Council of the Federation, when it exists) in cases where the problem concerns the administrative functioning of a court; it can also intervene as a party empowered to appeal when the problem concerns the merits of the case and the Ombudsman considers that this is necessary in order to perform its task of protecting fundamental rights and erasing the consequences of ethnic cleansing. Clearly, the Ombudsman must make use of this possibility in exceptional cases only, before the highest courts of the entity. And in any event it is not for the Ombudsman to make "recommendations" to the courts on the merits of a case or the procedural rights of the parties.

A further example of flexible regulations giving the Ombudsmen substantial room for manoeuvre is the matter of time-limits for lodging applications. The group was in favour of introducing a time-limit for lodging individual applications; this should make the sorting of cases easier, without causing unfair consequences for the applicants or preventing the ombudsman institution, which is empowered to act on its own initiative, from taking up particular cases where it considers that they raise serious problems.

V. INDEPENDENCE AND IMPARTIALITY

The composition of ombudsman institutions must ensure complete independence and impartiality. For the time being, this is achieved by the international community's involvement in the appointment process and by an "international" or multiethnic composition.

International involvement is by nature transitory and the draft laws drawn up by the group include provisions to that effect. In the medium and long term, therefore, the impartiality of the ombudsman institutions will chiefly be guaranteed by their multiethnic composition and the open and balanced nature of the appointment procedures. The provisions included in the draft laws with regard to the composition of the ombudsman institutions and the appointment of Ombudsmen are intended to ensure the broadest possible consensus on the persons concerned. This is the only way of making the institution's impartiality an objective fact, recognisable in the eyes of all citizens.

The individual and institutional independence of the Ombudsmen is also guaranteed by rules on immunity, incompatibilities, staffing and their budgets.

VI. DISTRIBUTION OF COMPETENCIES AND CO-OPERATION BETWEEN OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

The group has reached the following conclusions on the distribution of competencies between the ombudsman institutions in BH.

The jurisdiction of the Ombudsperson (henceforth called "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.

While the Ombudsperson must concentrate more on the area of mediation, it must for some time retain the possibility of referring cases to the highest judicial authority competent to deal with human rights issues, where circumstances so require.

There will be no hierarchical relationship between the three ombudsman institutions in Bosnia and Herzegovina; each will function independently. In particular, there must be no possibility of appealing to the Ombudsperson against the decisions of an entity Ombudsman. The Ombudsperson must be empowered to organise co-operation and consultation between the institutions and to represent the ombudsman institutions of BH in the international arena.

VII. IN THE LONGER TERM…

Lastly, the group wishes to emphasise that it has not been asked to give an opinion on the question of whether it might be possible to consider setting up a single ombudsman institution for the entire administration of Bosnia and Herzegovina and its entities, instead of three separate institutions. It notes that this question is not currently on the agenda, particularly because the two ombudsman institutions set up in BH a few years ago are operating satisfactorily. However, the question might arise in the longer term.