

**Council of Europe**  
**Conseil de l'Europe**



Strasbourg, 14 May 1998  
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CDL (98) 12 Def

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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**PRELIMINARY DRAFT LAW**  
**ON THE OMBUDSMAN**  
**OF THE REPUBLIKA SRPSKA**  
**(BOSNIA AND HERZEGOVINA)**

**and**

**Introductory Note**

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## **PRELIMINARY DRAFT**

### **I. Nature**

#### **Article 1**

The Ombudsman of the Republika Srpska shall be an independent institution set up in order to protect the legitimate rights and interests of natural and legal persons, as enshrined in particular in the Constitutions of Bosnia and Herzegovina and the Republika Srpska and the international treaties appended thereto, monitoring to this end government activity, in accordance with the provisions of the present law.

### **II. Powers**

#### **Article 2**

The Ombudsman shall have the power to admit, follow up or investigate any complaint whatsoever made to it about the poor ordinary functioning of, or the violations of human rights committed by, any government department, authority or official or any other agency performing public services.

The Ombudsman's competence shall comprise the power to investigate all complaints made about the dysfunctioning of the judicial system.

It also comprises the competence to ensure that the military administration functions properly and respects human rights.

The Ombudsman has the power to refer complaints to the Human Rights Chamber, provided for in Appendix VI to the Dayton Agreement, but must do this through the Human Rights Ombudsperson for whom provision is made in the same Appendix.

The Ombudsman also has the power to refer complaints to the Constitutional Court of the Republika Srpska in cases of alleged violations of human rights.

### **III. Appointment and Resignation**

#### **Article 3**

1. Three persons shall compose the institution of the Ombudsman, belonging to the constituent peoples of Bosnia and Herzegovina as defined in the Preamble of the Constitution of Bosnia and Herzegovina,. They will be elected by Parliament by a three-quarters majority, following a joint proposal by the President of the Republic, the President of the Parliament and the Prime Minister.

2. The election shall be held no more than three months after the candidature is deposited with Parliament, and, in any case, no more than three months after the date on which the vacancy occurs or on which one or all three of the members of the Ombudsman institution cease their functions for a reason provided for by this law.

3. Until the new election has been held, the Ombudsmen who are to be replaced, for any reason provided for by law, shall continue to perform their duties on an interim basis.

#### Article 4

The Ombudsmen shall be elected for a period of five years and may be re-elected only once.

Any Ombudsman elected following the resignation, or in replacement, of another shall only serve for that part of the five-year term of office remaining.

#### Article 5

Any citizen of the Republika Srpska of recognised prestige and high moral stature who is of age and enjoys full civil and political rights may be elected as an Ombudsman.

#### Article 6

1. An Ombudsman's duties shall terminate for any of the reasons below:

- a. His/Her resignation;
- b. Expiry of his/her term of office, except as provided in Article 3.3;
- c. His/Her decease or incapacity following an accident;
- d. Action by him/her with conspicuous negligence in discharging his/her obligations and duties;
- e. His/her conviction, and final sentencing, for of an intentional offence.

2. An Ombudsman's post shall be declared vacant by the President of the Parliament in the event of decease, resignation, expiry of the term of office, or final conviction. In other circumstances, the decision that a post is vacant shall be taken by a two-thirds majority of Parliament, after a debate and following a hearing of the person concerned.

3. Once a post is vacant, the procedure for appointing a new Ombudsman shall be started within one month.

4. When one of the three Ombudsmen's posts becomes vacant for a reason for which there is statutory provision, the remaining Ombudsmen, in the order of seniority, shall provisionally perform his/her duties.

#### **IV. Prerogatives and Incompatibilities**

##### Article 7

1. The Ombudsman shall be under no specific orders. Within the framework of his/her constitutional and legal competences, the Ombudsman shall not be given instructions by any authority. The Ombudsman shall perform his/her duties independently, on the basis of his/her own criteria.
2. The Ombudsman shall not be prosecuted, subjected to investigation, arrested, detained or tried for the opinions expressed or for the decisions taken while exercising the powers associated with his/her duties.
3. In all other circumstances, and insofar as he/she performs his/her duties, the Ombudsman may not be arrested or detained, save in case of *flagrante delicto* relating to an offence punished with imprisonment of more than five years. Decisions to prosecute, to detain or to refer the Ombudsman to a court charged with a criminal offence shall be taken after the National Assembly has lifted the above immunity. He/she shall be tried solely by the Criminal Chamber of the Supreme Court.

##### Article 8

1. The position of Ombudsman is incompatible with the holding of any representative office; with any political activity or office or propaganda; with continued activity in government service; with membership of a political party or with the exercise of leadership of a political party, trade union, association, foundation, or religious organisation or with employment by any of these; with performance of the duties of a judge; and with any activity in an occupation or profession, in commerce or in employment.
2. The Ombudsman who is a civil servant enjoys the guarantee of reintegration in his service at the end of his/her term of office.
3. The Ombudsman shall, within ten days of his/her appointment, and before taking up his/her office, forgo any position of potential incompatibility, failing which he/she shall be regarded as having declined the appointment.
4. Where incompatibility arises after they have taken up their duties, it is understood that they shall give up their duties on the date on which it arises.

#### **V. Investigation Procedure**

##### Article 9

1. The Ombudsman shall take action either on receipt of a complaint or *ex officio*.
2. Any natural or legal person claiming a legitimate interest may apply to the Ombudsman without any restriction. Nationality, citizenship, residence, gender, minority, legal incapacity, imprisonment of any kind, and, in general terms, a special relationship with, or dependence on,

a government department or authority may not restrict the right to lodge a complaint with the Ombudsman.

3. No administrative body or authority or legal person of public law may complain to the Ombudsman about matters within its remit.

#### Article 10

The activity of the Ombudsman shall not be interrupted while Parliament is not in session, either because it has been dissolved or because its term has expired.

Emergency situations shall not interrupt the Ombudsman's term of office.

#### Article 11

1. Any complaint must be signed and submitted by the person concerned, who shall indicate his/her surnames, first names and address, in a document stating his/her grounds, written on plain paper, within a maximum of six months from the time when he/she became aware of the facts complained of.

2. All the work of the Ombudsman is free of charge to the person concerned and does not require the assistance of counsel or a solicitor.

#### Article 12

1. Correspondence addressed to the Ombudsman from places where individuals are held in detention, in imprisonment or in custody may not be the subject of any kind of censorship.

2. Conversations between Ombudsman or people delegated by the Ombudsman and any of the persons listed in the previous paragraph may not be monitored or interfered with.

#### Article 13

1. The Ombudsman shall register and acknowledge receipt of the complaints submitted, whether they are declared admissible or rejected. When The Ombudsman rejects a complaint, he/she shall do so in writing, explaining the grounds and informing the person concerned of the most appropriate means of taking action, if any exist, leaving it to the person concerned to use those which he/she considers most suitable.

2. The Ombudsman shall reject anonymous complaints and may reject complaints which he/she considers to have been made in bad faith, which are ill-founded, which include no claim or which entail damage to the legitimate right of a third party. No appeal lies against the decisions of the Ombudsman.

#### Article 14

Without prejudice to the provisions of Articles 2 and 24 par. 3 of this Law, the Ombudsman cannot interfere with pending court proceedings nor can he/she challenge the legality of a

decision by a court or tribunal, but has the power to make recommendations to the governmental body party to these proceedings.

#### Article 15

1. Once a complaint has been received, the Ombudsman shall conduct a summary and informal investigation to elucidate the details of the case. In all cases, he/she shall advise the body or administrative service concerned of the material part of the application, so that the person in charge can submit a written report within a time-period indicated by the Ombudsman. This time limit may be extended when circumstances so require.

2. A refusal or negligence by the official or his/her superiors responsible for submitting the requested initial report may constitute a hostile attitude impeding the Ombudsman's duties. In this case the Ombudsman shall publicise this immediately and underline this attitude in the annual or, if applicable, a special report to Parliament, without prejudice to the criminal action which he/she could bring.

3. Where the competent authority fails to take action, the Ombudsman may, in substitution for this authority, institute disciplinary proceedings against the official responsible or, where appropriate, bring the case before a criminal court.

### **VI. Obligation to co-operate with the Ombudsman**

#### Article 16

1. Governmental, judicial and all public authorities are obliged to provide the Ombudsman with preferential and urgent assistance in his/her investigations and inspections.

2. During the investigation of a complaint, or where a matter is investigated by the Ombudsman *ex officio*, the Ombudsman or the person to whom he/she has delegated the task may present himself/herself at any office of a government department, attached to it or assigned to a public service in order to check all the requisite information, conduct personal interviews or study the necessary files and documents.

3. The Ombudsman may not be denied access to any file or administrative document or to any document relating to the activity or service under investigation, without prejudice to the provisions of Article 19 of this law.

#### Article 17

1. When the complaint under investigation concerns the conduct of persons employed in government service and is connected with the duties they perform, the Ombudsman shall advise the person concerned and either his/her superior or the body to which he/she is attached.

2. The official concerned shall reply in writing and submit all the documents and evidence which he/she considers relevant, within the time limit indicated to him/her. Upon request, the time limit may be extended.



3. The Ombudsman may check the veracity of the elements submitted and propose a hearing of the official involved in order to obtain further information. Officials who refuse this hearing may be required by the Ombudsman to give a written explanation of the reasons for their refusal.

4. The information provided by an official during an investigation through personal evidence is confidential, without prejudice to the provisions of the criminal legislation on the denunciation of acts which may be of the criminal nature.

#### Article 18

Superior officials or bodies which prohibit officials subordinate to them or in their service from responding to a request from the Ombudsman or from having a hearing with the Ombudsman shall declare that they have done so in a written document, stating their grounds, sent to the official and to the Ombudsman. The Ombudsman shall then approach the said superior in respect of all the operations necessary to the investigation.

### **VII. Confidential and Secret Documents and Duty of Discretion**

#### Article 19

1. The Ombudsman may require the public authorities to hand over documents he/she considers necessary to perform his/her duties, including those classified as confidential or secret in accordance with the law. In such cases, the Ombudsman shall apply the requisite discretion to these and shall not make them available to the public.

2. Investigations conducted by the Ombudsman and the Ombudsman's staff, and procedural measures, shall be conducted with the greatest discretion, where both individuals and public services and bodies are concerned, without prejudice to the considerations which the Ombudsman finds it appropriate to include in the reports to Parliament. Special protective measures shall be taken in respect of documents classified as confidential or secret.

3. Where the Ombudsman believes that a document classified as confidential or secret and not handed over by the government could be crucial to the proper conduct of the investigation, he/she shall advise Parliament of this fact.

### **VIII. The Responsibility of Authorities and Officials**

#### Article 20

When the investigation reveals that an abuse, an arbitrary procedure, a discrimination, an error, a negligence or an omission complained of was perpetrated by an official, the Ombudsman may communicate his/her finding in this respect to the official concerned. On the same date, he/she shall transmit the same document to the official's superior and set down the suggestions he/she considers pertinent.

Article 21

1. If a hostile attitude or an attitude impeding the investigation of the Ombudsman is maintained by a body, officials, holders of positions of responsibility or members of a public service, this may be the subject of a special report, and it shall also be drawn to attention in the corresponding part of the annual report.

2. Where an official impedes an investigation by the Ombudsman by refusing to send documents required by him/her, or through negligence in the sending of such documents or by refusing him/her access to administrative files or documents necessary to the investigation, the Ombudsman shall send the relevant file to the State Prosecutor's Office for the appropriate action to be taken, in accordance with the law.

Article 22

When the Ombudsman in the exercise of his/her duties becomes aware of conduct or acts which seem to be offenses, he/she shall immediately advise the competent judicial authority.

**IX. Resolutions**

Article 23

1. The Ombudsman has no power to amend or annul government measures or orders, but may suggest the amendment of the criteria used in their drafting.

2. When, following the examination of a case, the Ombudsman finds that the implementation of a Law leads to iniquity, he/she may address to the competent governmental body any recommendation capable to set a fair solution to the situation of the complainant, suggest to the competent authority the measures likely to remedy to the complainant's situation, including payment of damages, and propose those amendments to Laws and regulations that he/she finds appropriate.

3. If the activities complained of have been carried out on the occasion of services provided by private persons under a contract of concession of public service, the Ombudsman may ask the competent administrative authorities to exercise their powers of inspection and punishment.

Article 24

1. The Ombudsman may, when conducting investigations, make recommendations and suggestions to government authorities and officials with a view to the adoption of new measures. In every case the authorities and officials are obliged to reply in writing and inform the Ombudsman of the effect given to the recommendations within a period indicated by the Ombudsman.

2. If, once recommendations have been made, the administrative authority concerned does not take appropriate measures within a reasonable time, or if it does not inform the Ombudsman of the reasons for not doing so, the Ombudsman may draw the attention of the Minister responsible for the department concerned or of the highest authority of the government department concerned to the course of the case and to the recommendations made. Should the Ombudsman, following this, obtain no satisfaction in a case where he considers that it would have been possible to find a positive solution, he/she shall include the matter in the annual or in a special report, mentioning the names of the authorities or officials taking this attitude.

3. In case of non-execution of a court judgment, the Ombudsman may order the department concerned to give effect to the judgment within a time-limit indicated by the Ombudsman. If the order is not followed, the non-execution of the court judgment shall be included in the annual or a special report to the National Assembly.

## **X. Notification and Communication**

### Article 25

1. The Ombudsman shall inform the person concerned of the result of his/her investigations and activities and of the reply given to it by the government department or the official concerned, unless the reply, by its nature, is to be considered as confidential or secret.

2. The Ombudsman shall communicate the positive or negative findings of the investigations to the authority, official or administrative department concerned.

3. The Ombudsman may decide to publish his/her general recommendations in the Official Gazette.

4. All other recommendations of the Ombudsman shall be accessible to the public, except in cases where they relate to matters which are confidential or secret, or where the complainant expressly requested that his/her name and the circumstances of the complaint should not be revealed.

## **XI. Reports to the National Assembly**

### Article 26

1. The Ombudsman shall communicate to the National Assembly each year the result of the institution's administration in a report submitted to Parliament during an ordinary session.

2. Where the public prominence or urgency of the facts so require, the Ombudsman may submit a special report.

3. Annual reports and any special reports shall be published.

#### Article 27

1. In the annual report, the Ombudsman shall state the number and nature of the complaints received, indicate which were rejected, and the reasons thereof, and which were the subject of an investigation, and the findings of this; the Ombudsman shall also specify those suggestions or recommendations accepted by the government.
2. The report shall contain no personal data enabling the persons involved in the investigation procedure to be publicly identified, without prejudice to the provisions of Article 21.1.
3. The report shall also contain an appendix intended for Parliament, which shall show the liquidation of the institution's budget during the period covered.
4. The Ombudsman shall give an oral presentation of the report to the National Assembly and the parliamentary groups shall be able to state their position.

### **XII. Rules of Procedure**

#### Article 28

The rules governing the operation of the Ombudsman institution shall be laid down in compliance with the provisions of this law by the Ombudsmen themselves, in Rules of Procedure of which Parliament shall be informed and which shall be published in the Official Gazette.

### **XIII. Staffing and Equipment**

#### Article 29

The Ombudsman may freely appoint the advisers needed, in accordance with the Rules of procedure and within the budgetary limits.

#### Section 30

1. The advisers shall be automatically dismissed when a new Ombudsman appointed by Parliament takes up his/her duties; they may be re-appointed.
2. The advisers who are civil servants enjoy the guarantee of reintegration in their service at the time of their dismissal.

#### Article 31

Upon proposal by the Ombudsman, the financial appropriation necessary to the functioning of the institution shall be included in the budget of Parliament.

### **TRANSITIONAL PROVISIONS**

#### **Article 32**

On the entry into force of the present Law, the Human Rights Ombudsperson for Bosnia and Herzegovina shall appoint, after consultation with the President of the Republic, the President of Parliament and the Prime Minister, three persons to exercise provisional, for a period of twelve months, the powers of the Ombudsman. The persons thus appointed shall remain in office in accordance with Article 3.3.

#### **Article 33**

Five years after the present law comes into force, the Ombudsman institution may propose to Parliament, in a report containing reasons, the amendments which it considers should be made to it.

### **FINAL PROVISION**

The present Law does not apply to facts prior to 15 December 1995.

**INTRODUCTORY NOTE**  
**PREPARED**  
**BY THE SECRETARIAT**  
**OF THE VENICE COMMISSION**

**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<sup>1</sup>. 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.

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<sup>1</sup> *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)."*

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 Titium, 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, President of the Constitutional Court of the Republika Srpska<sup>2</sup>. 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).

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<sup>2</sup> *CDL (97) 25 "The Introduction of the Office of Ombudsman in the Republika Srpska"*.

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.

## **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 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*).

### **Relations with the judiciary**

The Ombudsman should not interfere with pending court proceedings and should not challenge the legality of court judgments. His role should not be to supervise the judiciary and to impose his own interpretation of the law (see Article 14 of the Preliminary Draft Law). However, in litigations 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 14 in fine of the Preliminary Draft Law).

Moreover, the Ombudsman should be able to initiate legal proceedings before the Constitutional Court (see Article 2 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 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,<sup>3</sup> 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.

Finally, the Ombudsman should be able to intervene in the execution of court decisions (see Article 24 para. 3) and to supervise the functioning of the judicial administration (e.g. undue prolongation of the proceedings, unreasonable delays, loss of files etc).

#### 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 iniquity (Article 23, para.2).

#### 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 Republika Srpska to prepare a report for an international institution, as is the case for the Federation Ombudsmen. 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.

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<sup>3</sup> *see 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'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 15, 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).