



Strasbourg, 13 August 1999

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Diffusion restreinte

CDL (99) 53

Or.Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**PRELIMINARY DRAFT LAW
ON THE OMBUDSMAN
OF THE REPUBLIKA SRPSKA
(Bosnia and Herzegovina)**

- revised version -

drafted by the Working Group
of the Venice Commission
and the Directorate of Human Rights
on Ombudsman Institutions
in Bosnia and Herzegovina

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 of any institution of the Republika Srpska, in accordance with the provisions of the present law and in co-operation with Ombudsman institutions in Bosnia and Herzegovina.

II. Powers

Article 2

The Ombudsman shall act either on receipt of a complaint or on its own initiative.

The Ombudsman shall have the power to admit, follow up or investigate cases involving the poor functioning of, or violations of human rights and liberties committed by any government department, authority, or official or any other agency, including private agency, performing public services.

The Ombudsman shall have the power to recommend the appropriate individual and/or general measures.

Article 3

The Ombudsman's competence shall include the power to investigate all cases about violations of rights and freedoms allegedly committed by the military administration, by security services, including secret services, and to investigate cases concerning detained persons whatever the reason for their detention and irrespective of the authority of the Republika Srpska responsible for the detention and recommend the appropriate individual and/or general measures.

Article 4

The Ombudsman's competence shall include the power to investigate all cases about the poor functioning of the judicial system of the Republika Srpska and recommend the appropriate individual and/or general measures.

The Ombudsman shall not interfere with the judicial functions of courts and tribunals in the Republika Srpska. The Ombudsman can make recommendations to a governmental body party to proceedings or be consulted by the parties.

The Ombudsman of the Republika Srpska may, whenever it finds that such action is strictly necessary for the effective performance of its duties, bring a case before the Constitutional Court of the Republika Srpska.

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

Article 5

The Ombudsman of the Republika Srpska shall co-operate with and promote co-operation among Ombudsman institutions in Bosnia and Herzegovina and shall facilitate the co-ordination of action taken by the Ombudsman institutions in Bosnia and Herzegovina.

If, at any stage of the procedure, the Ombudsman of the Republika Srpska finds that a case falls within the exclusive competence of another Ombudsman institution in Bosnia and Herzegovina it shall refer the case to that Ombudsman institution.

Article 6

The Ombudsman may refer cases of alleged human rights violations to the highest judicial authorities of Bosnia and Herzegovina competent in human rights matters, pursuant to the rules concerning these authorities.

Article 7

The activity of the Ombudsman shall not be interrupted while the legislature is not in session, whether it has been dissolved or its term has expired or for any other reason.

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

III. Appointment and Resignation

Article 8

Three persons shall compose the institution of the Ombudsman of the Republika Srpska, 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 two-thirds majority, following a joint proposal by the President of the Republic, the President of the National Assembly and the Prime Minister.

The election shall be held no more than three months after the candidature is deposited with the National Assembly, 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.

Article 9

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 and may be reelected only once.

Article 10

Any citizen of the Republika Srpska of age, enjoying full civil and political rights who has a demonstrated experience in the field of human rights and is of recognised prestige and high moral stature may be elected as an Ombudsman.

Article 11

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;
 - c. His/her manifest inability to perform his/her duties ;
 - d. Failure to give up an incompatible position ;
 - 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 National Assembly in the event of 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. Where a post or posts become vacant because of the expiration of office, the Ombudsman or the Ombudsmen whose term has expired shall continue on an interim basis to perform his/her/their duties until the appointment has been completed.
5. When one of the three Ombudsmen's posts becomes vacant for a reason other than the expiration of his/her term of office, the remaining Ombudsmen shall provisionally perform his/her duties until the appointment of a new Ombudsman has been completed.

Article 12

The three Ombudsmen co-operate in the exercise of their functions. In carrying out their activities, they will follow, to the furthest extent possible, the principle of personal contact with the applicants. Investigating activity can be carried out individually by each Ombudsman, but distribution of tasks among them shall not rely on the criterion of ethnic origin of the applicant.

In their recommendations, resolutions and reports the Ombudsmen act jointly.

IV. Prerogatives and IncompatibilitiesArticle 13

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 its duties independently, on the basis of the institution's own criteria.

Article 14

1. The Ombudsmen 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.
2. In all other circumstances, and insofar as he/she performs his/her duties, an 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.
3. Decisions to prosecute, to detain or to refer an Ombudsman to a court charged with a criminal offence shall be taken after the National Assembly has lifted the above immunity. In such a case he/she shall be tried solely by the Criminal Chamber of the Supreme Court.
4. Persons holding any office or appointment under the Ombudsman shall not be prosecuted, subjected to investigation, arrested, detained or tried for any action, opinion or decision taken while performing their duties upon the Ombudsman's instructions. In all other circumstances, whenever persons holding an office under the Ombudsman are arrested, detained or tried, the prosecuting authorities shall duly and promptly inform the Ombudsman.

Article 15

1. The position of Ombudsman is incompatible with the holding of any representative office; with any political activity or office; 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. An Ombudsman who is a civil servant enjoys the guarantee of reintegration in his service at the end of his/her term of office.
3. An 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 an Ombudsman has taken up his/her duties, it is understood that he/she shall resign within the meaning of Article 12 on the date on which the incompatibility arises. The decision as to whether the position taken is incompatible shall be taken by the National Assembly.

V. Investigation Procedure

Article 16

Any natural or legal person claiming a legitimate interest may apply to the Ombudsman without any restriction. Nationality, citizenship, place of residence, gender, minority, ethnicity, religion, 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.

Applying to the Ombudsman or the latter's intervention shall not entail for the applicant any criminal, disciplinary or other sanction or any disadvantage or discrimination.

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

Article 17

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. A complaint presented in a less formal manner may be accepted where the Ombudsman finds that circumstances so require.

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 18

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.

Conversations between Ombudsman or people delegated by the Ombudsman and any of the persons listed in the previous paragraph may never be monitored or interfered with.

Article 19

The Ombudsman shall register and acknowledge receipt of the complaints submitted, whether they are admissible or not. When the Ombudsman decides not to pursue a complaint, it 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.

The Ombudsman may refuse to pursue anonymous complaints and complaints which the Ombudsman considers to have been made in bad faith, which are ill founded, which include no claim, which entail damage to the legitimate rights of a third party, or which were lodged with the Ombudsman more than one year after the facts, events or decisions complained of.

Article 20

No appeal lies against any action or decision of the Ombudsman, including decisions to investigate or not to investigate a complaint.

Article 21

When the Ombudsman decides that a complaint or a matter considered *ex officio* offers sufficient grounds for investigation, it shall inform the body or administrative service concerned of the material part of the case, so that the person in charge can submit a written statement and any information or document requested by the Ombudsman within a time-period indicated by it. This time-limit may be extended when circumstances so require.

Article 22.

Where, during the investigation, the Ombudsman finds that the execution of a decision of the administration can result in irreparable prejudice for the rights of the complainant, it can suggest that the competent authority suspend the execution of the challenged measure until the expiry of a period of no more than ten days. The authority concerned may refuse to comply with the suggestion, explaining, in a written document addressed to the Ombudsman, within three days from the receipt of the suggestion and in any case before the execution of the challenged measure, the reasons thereof, failing which, the suggestion becomes mandatory for the authority.

VI. Obligation to co-operate with the Ombudsman

Article 23

1. Governmental, judicial and all public authorities and agencies of the Republika Srpska, including private agencies performing public functions, are obliged to provide the Ombudsman with preferential assistance in the Ombudsman's investigations and inspections.

2. During the investigation, the Ombudsman, or a person to whom the Ombudsman has entrusted investigation tasks, may present himself/herself at any governmental office or agency or 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 26 of this law.

Article 24

1. When the case under investigation concerns the conduct of persons employed in government service and is connected with the duties they perform, the Ombudsman shall inform 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 that may be of a criminal nature.

Article 25

Superior officials or bodies which prohibit officials subordinate to them or in their service from responding to a request from the Ombudsman or from being heard by the Ombudsman shall declare that they have done so in a written document, stating their grounds. This document shall be communicated to the official and 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 26

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

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. Special protective measures shall be taken in respect of documents classified as confidential or secret.

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 the National Assembly of this fact.

VIII. The Responsibility of Authorities and Officials

Article 27

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

Article 28

When the Ombudsman in the exercise of its duties becomes aware of conduct or acts which seem to be offences, it shall immediately advise the competent judicial authority.

Article 29

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 shall be mentioned in the corresponding part of the annual report.
2. Where an official impedes an investigation by refusing to send documents required by the Ombudsman, or through negligence in the sending such documents or by refusing the Ombudsman access to administrative files or documents necessary to the investigation, or otherwise displays a hostile attitude or impedes the investigation, the Ombudsman shall send the relevant file to his/her superior or to the competent Prosecutor's Office for the appropriate disciplinary or penal action to be taken, in accordance with the law.
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.

X. Recommendations

Article 30

1. The Ombudsman may make recommendations 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. The Ombudsman has no power to amend or annul government measures or orders, but may suggest the amendment of the criteria used in their adoption.
4. When, following the examination of a case, the Ombudsman finds that the manner in which a rule is implemented leads to inequitable results, it may address to the competent governmental body any recommendation capable of leading to a fair solution to the situation of the affected individual. The Ombudsman may suggest to the competent authority the measures likely to remedy the complainant's situation, including payment of damages, and propose in the institution's annual or special report those amendments to laws and regulations that the Ombudsman finds appropriate.
5. 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.

XI. Notification and Communication

Article 31

1. The Ombudsman shall inform the person concerned of the result of its 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 the 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.

XII. Reports to the National Assembly**Article 32**

1. The Ombudsman shall each year communicate a report on the institution's activities to the National Assembly.
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 33

1. In the annual report, the Ombudsman may state the number and nature of the complaints received, indicate which were not pursued and the reasons thereof, and which were the subject of an investigation, and the findings of this; the Ombudsman may 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 29 para.1.
3. The report shall also contain an appendix which shall show the expenditure of the institution's budget during the period covered.
4. The Ombudsman may give an oral presentation of the report to the National Assembly.

XIII. Rules of Procedure**Article 34**

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 the National Assembly shall be informed and which shall be published in the Official Gazette.

XIV. Staffing and Equipment**Article 35**

1. The Ombudsman may freely staff the institution's offices and appoint the advisers as needed, in accordance with the Rules of procedure and within the budgetary limits.
2. The Ombudsman may open field offices and appoint deputies by common decision of the three Ombudsmen. The authority and work of the deputies shall be regulated in the Rules of Procedure.

Section 36

1. The advisers and deputies shall be automatically dismissed when a new Ombudsman appointed by Parliament take up 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 37

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

XV. TRANSITIONAL PROVISIONS

Article 38

1. 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, the High Representative and the Head of Mission of the OSCE in Bosnia and Herzegovina, three persons to exercise provisionally, for a period of twelve months, the powers of the Ombudsman.
2. The provision set forth in paragraph 1 above applies solely to the initial appointment of the Ombudsman.
3. Following the expiration of the twelve month period referred to in paragraph 1 above, the National Assembly may appoint the Ombudsman in accordance with the provisions of Article 8 of the present law. Until the appointment by the National Assembly, the serving Ombudsman shall continue to perform its duties, in accordance with Article 11 paragraph 4 of this law.
4. An Ombudsman appointed provisionally under paragraph 1 of this Article may be subsequently appointed by the National Assembly under Articles 8 to 11. In such case, the term he/she has served as provisional Ombudsman shall not be taken into consideration for the purposes of the re-appointment provision of Article 9 paragraph 1.

Article 39

The provisions in this Law concerning budget appropriation, appointment of staff within budgetary limits and reports to the National Assembly on budgetary expenditure, shall not apply with regard to the contributions by international organisations to the institution's functional costs.

Article 40

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

Article 41

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