Strasbourg, 22 December 2006

CDL-AD(2006)038
Or. Engl.

Opinion no. 397 / 2006

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

OPINION ON AMENDMENTS TO THE LAW ON THE HUMAN RIGHTS DEFENDER OF ARMENIA

Adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006)

On the basis of comments by:

Mr Ledi BIANKU (Member, Albania)
Mr Marek Antoni NOWICKI (Expert, Directorate General of Human Rights of the Council of Europe, Former International Ombudsperson in Kosovo)
Mr Hjörtur TORFASON (Member, Iceland)

Table of contents

1. By letter dated 15 September 2006 addressed to the Secretary General of the Parliamentary Assembly of the Council of Europe, the Speaker of the Parliament of Armenia (the Azgayin Zhoghov), Mr. Torosyan, requested an opinion inter alia on the Law on Amendments (CDL(2006)092) to the Law on the Human Rights Defender of Armenia (CDL(2006)091), which entered into force on 7 July 2006. The Secretary General of the Parliamentary Assembly referred the matter to the Secretary General of the Council of Europe, who requested the Venice Commission and the Directorate General of Human Rights to provide an opinion.

2. The Commission invited Messrs Bianku and Torfason to act as rapporteurs. Their comments figure in documents CDL(2006)093 and 094 respectively. The Directorate General of Human Rights of the Council of Europe invited the former International Ombudsperson in Kosovo, Mr. Nowicki, to provide comments (document CDL(2006)088). The present joint opinion of the Venice Commission and the Directorate General of Human Rights takes into account the comments by all three rapporteurs.

3. This opinion has been adopted at the 69th Plenary Session of the Venice Commission (Venice, 15-16 December 2006).

General Remarks

4. The Law presented for consideration (referred to herein as the "Amending Law") was adopted by the National Assembly on 1 June 2006 and entered into force upon its promulgation. The Law refers to the Law of the Republic of Armenia on the Human Rights Defender, which was adopted by the National Assembly on 21 October 2003 and entered into force on 1 January 2004. The opinion set forth below chiefly relates to the provisions of the Amending Law itself, but for coherence also includes remarks with respect to the comprehensive Law as now amended.

5. Briefly, the institution of Human Rights Defender or Ombudsman was first established within the Armenian legal system by the above Law entering into force on 1 January 2004. At the time of its preparation, the Armenian people were engaged in a revision of the Constitution of the Republic adopted in 1995 (cf. the Venice Commission's CDL (1995) 62). During this or her process of constitutional reform, the introduction of the Human Rights Defender or Ombudsman in Armenia was also being independently considered, and a draft Law on this institution was referred to the Venice Commission for review in 2001 (CDL (2001) 22) and was commented on by Mrs. Maria de Jesus Serra Lopez (CDL (2001) 26) on its behalf.

6. At the time, the question whether the institution would be sufficiently introduced by means of parliamentary legislation or whether its establishment should wait until it could be squarely embedded on the constitutional level within a revised Constitution was being discussed as a major issue, as reflected in the said comments. One reason for concern in this regard was that under the Constitution of 1995, the appointment of high public officials such as an Ombudsman was to be made by the President of the Republic, whereas the dominant view among European countries has been that the Ombudsman should be selected by the legislative power on the basis of a consensus sufficiently broad to ensure his or her independence and impartiality and the credibility of the institution towards the general public.

7. When it became apparent that the constitutional revision would take a longer time than initially anticipated, it was resolved to look into pragmatic ways of overcoming the difficulties which might ensue for the progress of other legislative reform. The Venice Commission participated in the discussion of this matter through a Working Group which subsequently reported on conclusions arrived at in its meeting with the Armenian Authorities in July 2002 (CDL (2002) 109). As there related, it was thought preferable to proceed with the adoption of a

Law on the Human Rights Defender prior to the anticipated reform of the Constitution, on the understanding "*that this Law should provide that the appointment of the Defender is done by the President in consultation with the political forces represented in parliament*". In other words, the conclusion was that a compromise might be sought between the existing constitutional rule and the above general view in favour of selection by the National Assembly.

8. In the result, a new draft Law was prepared and also referred for review to the Venice Commission (CDL (2003) 62), which rendered its opinion on the basis of new comments by Mrs. Serra Lopez (CDL-AD (2003) 6). Among other changes, it included a provision whereby the appointment of the Defender was to be effected "*by the National Assembly by a vote of more than 3/5 of the general number of deputies from candidates nominated by both the President of the Republic and at least 1/5 of the National Assembly deputies*". This text accorded with the above conclusion and also with suggestions included within CDL (2001) 26, and became a part of the Law as adopted (Article 3, para. 2). By a transitional provision, however, it was decided that the paragraph would not become effective until the entry into force of constitutional amendments relating to the Defender, and that for the intervening period, a first Defender would be appointed by the President of the Republic under observation of the principle reflected in the report above quoted. This procedure was then followed in due course.

9. The process of constitutional reform has since been completed by the adoption of a new Constitution in 2005, on the basis of a national referendum held on 5 December that year. In its Article 83.1, the Constitution explicitly provides for the presence of a Human Rights Defender as a basic part of the Armenian legal system, and lays down the principles governing his or her election/appointment (para. 1), qualifications for office (para. 2), security of tenure (para. 3) and general status and scope of activity (para. 4). In Article 18.3, the Constitution also provides a guarantee of access to the Defender ("*Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his or her rights and freedoms on the grounds and in conformity with the procedure described by law*").

10. Further, in Article 101 concerning access to the Constitutional Court of Armenia, the Defender (in subpara. 8) is endowed with standing to apply to the Constitutional Court on the issue of compliance of normative acts as listed in Article 100 (i.e. laws and resolutions of the National Assembly, orders and decrees of the President of the Republic, and resolutions/regulations of Government) with the provisions of Chapter 2 of the Constitution, which deals with fundamental human and civil rights and freedoms.

11. In accordance with the above transitional provision, a new Defender was duly appointed for a full term following the entry into force of the Constitution. However, the governing principles declared therein resulted in certain inconsistencies between the Constitution and the Law on the Human Rights Defender, primarily with respect to the procedure for the election/appointment of the Defender, the qualifications required for the office, and the scope of the powers vested in the institution. The Amending Law clearly has been prepared and adopted for the purpose of eliminating these inconsistencies in favour of the Constitution, and the scope of the actual amendments appears to have been limited accordingly. This clearly is to be commended as a laudable action. It is proper to note that the initiative for the amendments was made by the Defender's office as now constituted, and there is no indication that views expressed on his or her part were disputed by the National Assembly members in processing the actual Law.

12. The further issue whether the opportunity might have been used to adopt more extensive changes in the rules applicable to the Human Rights Defender of Armenia, or whether a future effort towards such changes might be desirable, will be touched upon briefly in relation to some of the amendments and to some of those Articles of the Law which have not been amended, as well as within the Further Remarks and Conclusions below.

Provisions of the Law by Article

13. The Articles of the Amending Law and of the comprehensive Law will now be commented on in order. According to the text in English translation of the Amending Law presented to the Commission (CDL(2006) 092), its articles are numbered not in continuous sequence, but by the number of those Articles of the Law to which the respective amendments relate.

Article 1 – General Provisions

14. This Article as now amended states that the Law "*defines the procedure of election and dismissal of the Human Rights Defender, as well as the powers, the terms and the guarantees of his or her activity*". The sole change is the replacement of the prior word "*appointment*" by the word "*election*", which is logical in view of the terms of Article 83.1.1 of the Constitution. Although the change was perhaps not unavoidably necessary, it serves to underline the fact that the Defender appropriately is an elected official.

15. Considering the content of the law, the term ***"functioning"*** could be added as one of the aspects of the Defender's activity defined by the law.

16. The use of the broad term "*dismissal*" to denote a termination of the tenure of the Defender is not objectionable in this context and has not been criticised in prior comments by the Venice Commission on the Law. Perhaps the term ***"termination of the Defender's powers"*** as used in the title of Article 6 of the Law would be more appropriate, though.

Article 2 – Human Rights Defender

17. This Article now states (in the translation) that the Human Rights Defender is "*an independent and unchangeable official, who implements the protection of human rights and fundamental freedoms violated by the state and local self-governing bodies or their officials*", and thus has been brought exactly into line with Article 83.1.4 of the Constitution. This general description of the Defender's mandate represents a simplification from the prior text, which also referred to the Defender as acting "*pursuant to the Constitution and Laws of the Republic*" as well as "*recognised principles and norms of International Law*". The deletion of these references clearly involves no change in substance, especially since similar references are contained within Article 7. In fact, the simplification should serve to widen rather than narrow the general concept of the scope of the Defender's powers, since a plain statement such as now set forth in the Constitution and this Article obviously invites a broad interpretation.

18. In order to facilitate the necessary broad interpretation of the mandate of the Human Rights Defender, it would be of advantage to have the Law include not only the term "protection" but also **"monitoring" and "promotion".** However, the term "protection" does not stand alone in the text but is preceded by the verb "implement", which already has a wide connotation. At the same time, the function of monitoring the administration by way of being able to issue recommendations is so basic to the role of the Ombudsman institution as generally perceived among nations that it clearly must be seen to belong to the mandate of the Defender as now declared in the Armenian Constitution.

19. In relation to the "state and local self-governing bodies and their officials" that would be subject to the Human Rights Defender's jurisdiction, it is worth stressing that the respective provisions should be interpreted in a manner that allows for the **broadest possible spectrum of public bodies** to fall under the jurisdiction of the Human Rights Defender.

20. Finally, this Article should also explicitly refer to **violations by omission** in the light of the decision of the European Court of Human Rights in the case of Egmez v. Cyprus (Reports of Judgments and Decisions 2000-XII), in which the Court recognised that the complaint to the Ombudsman for allegation of ill-treatment by the police would have to be considered as an effective remedy for the purposes of Article 13 ECHR. The fact that the referral of the complaint by the Ombudsman to the Prosecutor did not lead to an investigation by the latter was held to be a violation of Article 13 ECHR.

Article 3 – Election of the Defender

21. In this Article (previously entitled "Appointment"), **para. 1** describes the qualifications of eligibility of the Defender. The text has been changed so as to bring the Law into line with Article 83.1.2 of the Constitution, which states plainly that "*[a]ny person held in high esteem by the public and corresponding to the requirements envisaged for a Deputy of the National Assembly may be elected as a Human Rights Defender*." From the qualifications required of a Deputy according to the Constitution (Article 64 of the Constitution), it follows that the Defender must be a citizen of the Armenian Republic having had residence in Armenia for the preceding five years and having electoral rights, and must have attained the age of 25 years. The originally stipulated age limit of 35 has thus been removed in deference to the limit for Deputies, and the former requirements for the person having a university degree and having knowledge and experience in the field of human rights and fundamental freedoms have also been deleted.

22. The **reduction in the age limit** does appear correct in consequence of the impact of the Constitution and accordingly **is acceptable**. The same applies to the requirement for a university degree, which similarly has a formal connotation. There is perhaps some **question whether it also was necessary to remove the reference to knowledge and experience in the field of human rights**, seeing that such requirement allows for flexibility and lies very close to the core of the Defender's mission. In general terms, however, it may be said that the main significance of having references such as those here deleted is to lend support to the essential requirement of the person of the Defender enjoying high respect and trust in the community, which is of extreme importance and is of course proclaimed in the Constitution as a primary condition for eligibility.

23. In recent opinions of the Venice Commission on the Ombudsman institution (such as CDL-AD(2004)041 concerning Serbia), the view has been expressed that the criteria for his or her eligibility should not be too restrictive, and that e.g. a **university degree in law** is not a necessary prerequisite (although that criterion is widely relied on, e.g. among the Nordic countries). At the same time, it may be noted that the conditions of eligibility as stated in the original Article 3.1 of the Law were favourably commented on in the above opinion CDL-AD(2003)006. There is no uniform approach to this issue among the Council of Europe's member states.

24. The key matter here is that the qualifications of the Defender as now declared in the Constitution and affirmed in the Law are acceptable as long as it may be assumed that the primary condition of the person being held in high respect/esteem by the public at large is given a strong interpretation, consistent with the general purpose of the Law. On such interpretation, this declared condition does indicate respect not only based on renown for achievement, but also on a reputation for sagacity and integrity (which similarly is indicated by the degree of consensus envisaged for his or her election to the office). Such qualities are of immense value as a pillar of the effectiveness and authority of the Defender both towards the administration being monitored and the members of the public plying for his or her assistance (especially during a period of consolidation of the position of the Defender within the democratic system), as well as for his or her independence.

25. **Para. 2** of this Article lays down the principles for the election/appointment of the Human Rights Defender and now provides, in conformity with Article 83.1.1 of the Constitution, that the Defender shall be elected by the National Assembly by at least 3/5^{ths} of the total number of Deputies, for a term of 6 years. The Law further provides that the election shall take place among candidates proposed by at least 1/5th of the total Deputies in the Assembly. The change thus affirmed, necessitated by the impact of the Constitution, is that the President of the Republic is no longer expected to participate in the nomination of candidates, while the minimum number of Deputies required to support a nomination remains the same.

26. The **amended version of this Article is to be welcomed**, and the principle of having the ultimate selection of the person of the Human Rights Defender supported by such qualified majority as required by the Constitution and the Law is in accord with views expressed in general and specific relations within opinions of the Venice Commission and statements of the governing organs of the Council of Europe, as well as the OSCE/ODHIR.

27. The paragraph spells out the oath to be sworn by the Defender upon his or her appointment or taking of office pursuant to the election result. The text of the oath appears not to have been amended and is appropriate. However, the reference at the end of its former sentence to both "*individuals and citizens*" for purposes of protection of rights perhaps raises a question, since a differentiation between citizens and others presumably is not intended. Under the Constitution, as by accepted standards, **"*everyone*"** whose rights and freedoms are under threat is entitled to seek the assistance of the Defender, i.e. all individuals finding themselves within the territory of Armenia.

28. If the reason for the twofold reference is that the protection of the Defender is expected to extend to citizens staying or residing outside of Armenia, it would be preferable to have this clearly stated. However, the scope of the activity of the Human Rights Defender can relate only to Armenian authorities. Accordingly, this matter would mainly concern Armenian consular authorities abroad, which would be covered anyway by Article 2 of the Law. The twofold reference similarly appears in Article 7.1 of the Law.

29. The term of six years of tenure for the Human Rights Defender seems reasonably chosen. It was so determined in the Law and is now guaranteed in the Constitution as above noted. In **para. 3** of this Article in the original Law, the possibility of re-election/appointment for a second term (but no more) was allowed for, but that provision has now been deleted, presumably in view of the fact that the possibility is not referred to in the Constitution. There may be reason to **question whether the Constitution is to be interpreted so as to exclude a further term**, but the principle of a single term does in any case provide a safeguard contributing to the Defender's independence and precluding the risk of accusations to the effect that his or her activities or recommendations might be influenced by an interest for gaining re-election. On the other hand, since the Defender is neither a member of the judiciary nor an official of the executive power, there may be technical problems with offering him security of employment on an objective basis after the end of this term, and this is not dealt with in the Law.

30. The new **paras. 3 and 4** inserted into Article 3 by the Amending Law provide useful instructions relating to the timing of the regular election of the Defender and of the assumption of office by the Defender following his or her election.

Article 4- Restriction on Other Activities of the Defender

31. The possibility for the Human Rights Defender to perform other activities should be more limited than it is in the law. Obviously, this limitation results from the condition that an Ombudsman should be independent, but also from the obligation that the office-holder should be able to focus on duties related to this very demanding office. A solution could be, to make an

exception of a general the prohibition of other activities for the post of university professor (like for example in Poland).

32. Moreover, holding office in an independent manner also requires the Defender not to be a member of any labor union and to **refrain from performing any public activity that cannot be reconciled with his or her status as the Human Rights Defender.**

Article 5 – Independence of the Defender

33. The Amending Law adds a new **para. 3**, stating that the Defender's **decisions do not constitute administrative acts and are not subject to appeal**. This may be seen as a **useful clarification for the sake of good order**.

34. The unamended **para. 1** of this Article appropriately provides that "*the Defender shall be independent in executing his or her power and shall be guided only by the Constitution and the Laws of the Republic of Armenia, as well as recognised norms and principles of International Law*". – The paragraph further contains a second sentence stating that the Defender "*shall not be subordinated to any state or local self-governing official*". This may perhaps be useful as a clarification for the sake of good order in a first Law on the Defender, but should in fact not be necessary.

35. The unamended **para. 2** appropriately provides that the Defender shall not be obligated to clarify/disclose the nature of a complaint or document in his or her possession. A second sentence addresses the question of to what extent he/she may approve of making them accessible for examination, but the text as presented in English version is very unclear.

Article 6 – Termination of the Defender's Powers

36. This Article deals with the highly important issue of termination of the mandate of the Human Rights Defender, and proceeds from the principle of his or her irremovability as declared in Article 83.1.3 of the Constitution and Article 2 of the Law. It also connects with the Defender's immunity under the Constitution, which is dealt within Article 19.

37. Para. 1 makes a slight adjustment in the prior rule concerning the expiry of the regular term of tenure, stating that it will terminate on the same calendar day of the 6th year following the Defender's taking of his or her oath of office.

38. Para. 2 provides for those specific events or instances by or upon which the Defender's mandate may be terminated prior to the expiry of its term, by listing them in an exhaustive manner. In the original Law, the list provided for seven grounds, of which two have been deleted by the Amending Law. The former of these related to a breach by the Defender of Article 4 of the Law (providing restrictions against his or her engaging in other activities and forbidding membership of a political party and engagement in elections), while the latter referred to prolonged absence from duty for reasons of health. **Both deletions are to positive effect as regards security of tenure**, although the removal of the grounds without other adjustment may perhaps result in a certain lack of clarity or remedy, such as in the case of **failing health,** where the remedy of having a Deputy Defender is now not provided for (cf. Article 22).

39. The provisions in five subparagraphs on the remaining **five grounds have been partially amended, and to positive effect.** Thus a loss of citizenship (subpara. 2) does now not constitute a ground for removal of the Defender unless it is due to his or her resignation of citizenship or acquiring citizenship in another country. And in the event of the Defender tending a statement of resignation to the National Assembly (subpara. 3), he/she is required to resubmit the statement within 10 days if it is to become effective. In subpara. 4, the ground stated is the

event of the Defender being "*declared incapable, missing or deceased by an effective decision of the Court*", with a reference to "partially disabled" being deleted. However, the description of the ground under subpara. 1 (i.e. that "*a **verdict of the Court** convicting the Defender enters into legal force*") remains the same, although it appears **too open-ended, as it does not provide a clarification or qualification of the subject matter of the "conviction"** of the Defender, which seemingly could include for example a simple traffic offence. It should also be specified whether "the Court" is a highest court or any court of law; probably the latter is intended. This may be a question of translation, though.

40. With respect to the procedures to be followed upon an early termination of the Defender's mandate, **para. 3** now provides that the Chairman of the National Assembly shall inform the Deputies of the advent of the termination and the presence of the pertinent ground therefore under para. 2. This clearly means that it is for the National Assembly to check whether the grounds exist, which is appropriate. However, the recourse of putting the issue of termination to a vote in the Assembly (and then deciding upon it by a vote of more than one-half of the Deputies), which was provided for in the former para. 3, has now been deleted. Accordingly, the Law now appears to be based on the principle that since the grounds are being listed in a manner making them objectively ascertainable, a vote will not be necessary, and that the opinion of the Chairman of the Assembly as to the presence of the pertinent ground will prevail. This principle of an **objective approach to the termination may be seen as a positive feature of the Law,** which depoliticises the issue. However, **it should be possible for the Defender to contest such a decision** (presumably by way of a court proceeding).

41. **Para. 4** provides as before that in the event of an early termination, a new Defender shall be elected within one month after the position becomes vacant. The former reference to a Deputy Defender assuming the position during the interval has been abandoned together with the previous Article 22. The time limit seems acceptable, though it is perhaps on the short side considering the weight of the institution.

42. While it seems to be intended that the new Defender should be elected for a full 6-year term, this preferably should be stated expressly.

Article 7 – Complaints that are Subject to the Defender's Consideration

43. In this Article, the first of two paragraphs or parts within **para. 1** describes the scope of the powers of the Defender, in line with Article 83.1.4 of the Constitution, and has not been amended. It appropriately speaks of a duty to "*consider the complaints of individuals (including citizens) regarding violations of human rights and fundamental freedoms provided by the Constitution, laws and international treaties of the Republic of Armenia as well as by the principles and norms of International Law, caused by the state and local self-governing bodies and their officials*".

44. The second part provides as before in its first sentence that the Defender "*cannot intervene in judicial processes*", and thus expresses the principle that the Defender should not engage in supervision of the functions of the judiciary, which again appears consistent with Article 83.1.4 of the Constitution. In general terms, the question whether and to what extent an ombudsman / human rights defender may intervene in court cases represents a very sensitive issue. The direction in which solutions related to this question will point depends on a political decision of the legislator. One may however discuss the extent of the Human Rights Defender's intervention in cases dealt with by prosecution offices and courts but limited to ensuring that these cases are conducted within a reasonable time limit and that court decisions are taken within a reasonable time and are diligently and properly executed. In some models, like the one existing in Poland, the Ombudsman's powers in this area are significantly broader.

45. The related question of to what extent the Defender might be able to address the courts of law with requests for information and eventually with comments or recommendations was dealt with in the second sentence in this second part of Article 7.1. This sentence has now been radically amended, in deference to judgment no. DCC-563 of the Constitutional Court of Armenia on 6 May 2005 by which it was declared unconstitutional. The Judgment, which may be found in the Commission's CODICES database [ARM-2005-2-001], presumably is one of the major causes for the Amending Law.

46. In its former version, the sentence provided that the Defender should be able to ask for information on any case which is under trial and address recommendations/comments to the court, for the purpose of guarding the rights of citizens to a fair trial as guaranteed under the Constitution and norms of International Law. Briefly, the Constitutional Court decided that the right thus proclaimed for the Defender was too far-reaching to be found constitutional, that it created an inter-legislative contradiction, and that it was not in fact supported by the need to secure independent and impartial justice. In particular, the Court referred to those Articles of the Constitution of 1995 (39, 91 and 97.1) which provided that everyone should be entitled to a fair trial by an independent and impartial court, that justice should be administered solely by the courts, and that when administering justice, judges should be independent and subject only to the Constitution and the Law. The Court felt that an unrestrained application of the disputed clause, referring to "information" in an apparently wide sense and permitting comments on cases in progress, might affect the independence of judges and the judicial process, as well as the equality between the parties before the court. The Court, referring to Articles 10.1, 12.1.5 and 17.1 of the Law on the Human Rights Defender, concluded that his or her right to request information from the courts should be satisfied if the request did not interfere with judicial proceedings, did not concern the administration of justice in a concrete case, and did not concern the material and procedural issues for examination in the case under judicial consideration.

47. In line with the judgement expressed by the Constitutional Court, this second sentence of the second part of Article 7.1 has now been amended so as to state substantially that the Defender shall be entitled to request information from the courts in relation to and in observance of the applicability of the aforesaid Articles 10.1, 12.1.5 and 17.1 of the Law. The indication thus is (a) that the Defender should act consistently with his or her duty to refrain from considering complaints which "*must be settled only by a court*" and to discontinue consideration if the subject matter of a complaint is brought before the courts, (b) that he/she can examine a potential violation of rights in matters which already have been decided by a court and matters on which no proceedings have been instituted, and (c) that he/she can request information for purposes of his or her annual report. In any case, although the formulation perhaps might have been made more clear, the amendment is easily understandable in the light of the above judgment.

48. It remains to be noted that the said second part of Article 7.1 also contained a third sentence, stating that the Defender should have the right to provide advice to those who wish to appeal court decisions or judgments. It does not seem clear whether this sentence now has been deleted in the course of the above amendment, but its contents were not directly in issue or passed upon in the case before the Constitutional Court.

49. Again, it may generally be said that the second part of para. 2 of Article 7 (and also the first sentence of para. 1 of Article 10 of the Law, which has not been amended) deal with issues which are very sensitive, in seeking to draw a proper line between the powers of the Human Rights Defender and the role and functions of the courts of law. Under the new Constitution, the people of Armenia have clearly opted for a Defender or Ombudsman whose mandate does not extend to supervision of the courts and whose activities should be carried out under due respect for the independence of the judiciary, as reflected in the judgement of the Armenian Constitutional Court. This structure of the Defender/Ombudsman institution is also the most

widely accepted, and corresponds with the statement in Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe that "*the role of intermediary between individuals and the administration lies at the heart of the ombudsman's functions*", which again implies that the Defender/Ombudsman's capacity for neutrality will be his or her strongest asset.

50. Although the powers of the Armenian Defender vis-à-vis the courts accordingly should be strictly limited, it is also necessary not to use an excess of caution in drawing the line. Among other things, **the existence of a legal remedy should not prevent a person from filing a complaint with the Defender, and the Defender should have the right and obligation to advise the complainant about legal remedies within bounds of neutrality, and to comment thereon in cases where the subject matter of complaint appears to require recourse to the courts and the complaint should be dismissed for that reason**. Also, the **Defender should be able to issue recommendations on general matters related to court proceedings**, such as the granting of free process.

51. According to **para. 2** of Article 7, which has not been amended, the Defender shall not consider complaints concerning actions of non-governmental bodies and organisations or their officials. While this is appropriate as a general principle, it **should not preclude having the mandate of the Defender extend to such parties in cases where they have been endowed by law with a public power to make decisions regarding the rights or obligations of person in similar manner as ordinary governmental authorities.** Perhaps these cases may be regarded as included.

Article 8 - The Right to Appeal to the Defender

52. In this Article (which has not been amended), para. 1 provides for the Human Rights **Defender's access to all places where individuals deprived of their liberty** are detained in order *"to get/receive complaints from the applicants"*. However, the Human Rights Defender **should be guaranteed** free access **at any time**, without the need to receive consent from any agency and without prior warning. The Defender should be guaranteed the opportunity to visit and inspect such places in connection with concrete complaints or on his or her own initiative. This is one of the most important safeguards for the effective operation of this type of institution and it should be written explicitly in the Law.

53. This para. 1 of Article 8 cannot be limited to ensuring the Defender or his or her representatives unconstrained contact with detainees but must also be seen to include a guarantee for these individuals. A detained person must have the opportunity to **freely communicate, without any supervision,** with the Human Rights Defender or his or her representative. This matter is addressed in subparagraph 4 of Article 8.1 of the Law, which should be taken to indicate that the contact is not limited to conversations, but that it also covers all other means of communication. Moreover, it should be clearly understood that it relates to two-way correspondence: to correspondence to and correspondence from the Human Rights Defender.

54. In paragraph 2, the **right of legal entities to lodge a complaint** to the Ombudsman should also include situations where the **rights of those very entities are being violated** (e.g. right to property). The existing provision appears to provide for this possibility only indirectly if the owners of the legal persons are natural persons. In this respect, one should also regulate the situation of groups of individuals as a separate question.

55. The provision of paragraph 5 limiting the right of state officials to complain to the Defender to cases of violations of human rights does not seem sufficiently clear. It is obvious that **State officials** (how about other officials?) **maintain their rights as individuals**. If these rights

(which may include social rights) are under threat or violated, they must be entitled to receive assistance from the Human Rights Defender, as all other people.

Article 10 – Complaints that are not subject to the Defender's Consideration

56. The first paragraph providing that the Defender ***"shall not consider those complaints that must be settled only by Court"*** **does seem too narrowly phrased**, even following the judgement of the Constitutional Court referred to above. The interpretation by the European Court of Human Rights of the term "civil rights and obligations" of Article 6 ECHR requiring access to court reaches wide into fields classically considered to be part of administrative law, which is the major field of the activity of the Human Rights Defender. The exclusion of such matters from the competence of the Defender would unduly limit his or her mandate. In line with the second sentence of paragraph 1 of Article 7, **the Defender should be in a position to deal with a case until it has been taken up by a court**. Of course, the Defender should inform the complainant about the judicial remedy and refer the complainant to it.

57. In this Article, **para. 2** has been amended so as to address in a more neutral manner the issue whether the Defender should consider complaints that are anonymous or complaints that do not relate to recent events (a limit of one year from the time at which the complainant became or should have become aware of the alleged violation/problem is here introduced as a measure), or complaints that are not indicative of a violation or are otherwise lacking proper ground. The wording adopted is that the Defender "*may or may not consider*" such complaints.

58. The possibility of anonymous complaints in Article 10 must be read as *lex specialis* in relation to Article 9.2, which requires the name and address of the complainant for the application.

Article 11 - Reception of Complaints

59. The provision in Article 11.4, which does appear to give the Defender the **competence to act *ex officio*** in addition to accepting nominative and anonymous complaints, is to be welcomed as a distinct and important category of activities for the Human Rights Defender. Narrow limitations for complaining about human rights violations with the Defender limit the very essence of his or her role and mission.

60. Paragraph 6 seems to indicate that the Defender could ask government agencies or officials to do an investigation on his or her behalf. The Human Rights Defender indeed can and should turn to various offices and institutions for information, materials and explanations. However, he or she cannot entrust them to examine complaints lodged with him or her, regardless of whether the case concerns the offices and institutions to which the complaint relates, or different ones. This would contradict the nature of the institution of the Human Rights Defender and its independent role in protecting human rights. **Persons who lodge complaints expect them to be examined in an independent and impartial manner directly by the Human Rights Defender** (or from his or her staff)..

Article 12 – Examination of Issues Raised in a Complaint

61. This Article deals with the important matter of the Defender's powers of examination, including power to require access to facilities and institutions and to obtain documentary or other information and statements of clarification of circumstances relating to a complaint. The description of the scope and conditions for these powers has not been altered, but the introduction in **para. 1** to the enumeration of the actions in issue has been simplified to the advantage of the Defender, i.e. by stating that he or she "*shall have the right*" to make these requirements, instead of relating them directly to the Defender's acceptance of a complaint for consideration. The amendment thus is to positive effect.

62. Under the concluding sentence of para. 1 the **powers of the Human Rights Defender** listed in sub-paras. 1, 2, 5 and 6 may also be exercised by his or her staff upon written authorisation. However, it may be **questioned whether there is reason to grant similar powers to the Expert Council or Councils**, especially since these are supposed to be groups of individuals providing advice to the Human Rights Defender, which they will do merely on a voluntary basis.

63. The power under Article 7.1.4 to instruct relevant state agencies to carry out expert examinations etc. should not be regarded as restraining the Defender from seeking expert opinions by other means, as there is no reason for such a restriction. In certain situations, the opinion **of a non-governmental organisation or institution or of independent experts** could be very important. The Human Rights Defender should have an extensive margin of appreciation in this respect.

64. As a general remark here (and further to the comment in paragraph 59 above), it may perhaps be seen as a weakness that Article 12 does not explicitly provide that the **Defender should be able to address instances of maladministration or human rights violation on his or her own initiative**, such as by stating that a decision by the Defender to dismiss a particular claim or not to consider an anonymous claim will not prevent the Defender from taking the matter up with the (pertinent) authorities on his or her own initiative. Also, it may be recalled that in the opinion CDL-AD(2003)006, it was stated that the limitation in Article 8.3 against complaints being made by persons other than family members or representatives of the chiefly interested person was overly restrictive and deserved a broader formulation. However, an overview of the Law and the straightforward phrasing of Article 83.1 of the Constitution points to the conclusion that the said power of initiative for the Defender is in fact included within the scope of the Law. The above changes by the Amending Law in Articles 10 and 12 of the Law are significant because they tend to strengthen that conclusion.

65. This Article 12.2 should also precisely determine the principles of the Defender's **access to classified information**. The general reference to statutory procedure and the word "can be familiarised" do not guarantee such access. **Full access should be the rule** and confidentiality only a rare exception.

Article 13 - Clarifications given by the State and Local Self-governing Bodies on the subject of the Complaint

66. This provision shows that institutions or officials, against whom the complaint is directed, have the opportunity to take a stand both during the course of the complaint examination, as well as directly after its completion. Article 13 does not, however, indicate the necessary procedure to be applied when this occurs during the course of examining the complaint, or the form in which the result of the complaint's examination should later be delivered to the institutions or officials concerned, along with a request for possible comments and explanations.

Article 15 – The Defender's Decisions

67. In article 15.1.1, the Human Rights Defender should not "propose" but "recommend" to the authorities. This may be an issue of translation, though.

68. The Amending Law here introduces in para. 1 a new subpara. 3 according to which the Defender may decide to terminate the consideration of a complaint (by reasoned comment) in cases where an examination of the matter reveals grounds indicating that the complaint should not be considered or its further handling not be continued. The addition of this clause to the enumeration of types of decision in para. 1 has been made at the suggestion of the Defender,

with reference to the frequency of instances in the daily practice of the institution where the grounds for declaring a complaint inadmissible are brought out in the process of its consideration. The clause does seem to fill a gap in the enumeration, and thus is to positive effect.

69. At the same time, the prior text of subpara. 3, which **enabled the Defender to decide to apply to the Constitutional Court** over issues of violations of human rights and freedoms, has been deleted. The reason for the deletion is that this highly important facility for the Defender is now directly dealt with in Article 101, subpara. 8 of the Constitution, as noted above. The reason clearly is valid as such, but on the other hand, it **might have been preferable to reiterate the constitutional declaration within the Law** (in this Article or elsewhere) in order to render the Law a more complete source of information on the mandate of the Defender.

70. The special reports referred to in paragraph 5 are crucial instruments, which should be subject to more detailed regulation. The Law does not indicate what the special reports of the Human Rights Defender are about or how they are prepared. There is also the question of who should be the addressee of such reports; whether it should be the Parliament or also the President. Since the Human Rights Defender is an institution linked to the Parliament, both the annual report as well as special reports should consequently be addressed to the Parliament. This does not prevent the Human Rights Defender from officially informing the President and other important State institutions about such reports.

71. Paragraph 6: In principle, with the exception of special situations, not only "special information", but also all other decisions and recommendations issued by the Human Rights Defender should be presented to the public. The best solution would be a provision regarding all significant issues related to the publication of reports and decisions. Publicity is one of the most important tools that the Human Rights Defender can have at his or her disposal.

Article 17 – The Defender's Report

72. The **annual report should be officially addressed to the Parliament and become the subject of a parliamentary debate**. The Defender should send a copy of the annual report to the President and other important State institutions. The report should also promptly be made publicly available to the widest possible audience (including via Internet).

73. The Law should e.g. clearly indicate the difference between a "special report" and an "unscheduled public report".

Article 19 – The Defender's Immunity

74. In general terms, both the Human Rights Defender and his or her staff should have immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity. Such immunity should continue to be accorded even after the end of the Human Rights Defender's mandate or after the staff cease their employment with the Human Rights Defender institution. This immunity should also include baggage, correspondence and means of communication belonging to the Human Rights Defender. One could consider a different scope of immunity with regard to the staff (e.g. waiving by the Defender for his or her staff).

75. In the Amending Law, the first two paragraphs of this Article have been joined in a single paragraph with some changes in wording. A change which is clearly positive and important is that the immunity of the Human Rights Defender from prosecution or criminal proceedings is now expressed as persisting not only during his or her term of office, but also thereafter. This accords with the principle of the Constitution that the Defender shall be endowed with the immunity envisaged for a Deputy of the National Assembly (Article 83.1.6 of the Constitution),

and the new phrasing of the Article appears to have been modelled in most part upon the constitutional provision regarding Deputies (Article 66). However, it may be questioned whether the extent of the immunity is sufficient. There is no reference here to the **staff of the Defender**, but under Article 23.5, they are endowed with immunity during their period of tenure in respect of their conduct while performing their responsibilities under the Defender's instructions. This **immunity should be more extensive**. The Law also **lacks sufficiently precise provisions on the procedure for waiving immunity**.

76. In order to enhance the independence of the Defender, guarantees as to the **inviolability of the institution's possessions, documents and premises**, etc. are also very important. An example could be UNMIK Regulation 2006/06 on the Ombudsperson Institution in Kosovo, which in Section 12.2 provides that *"The archives, files documents, communications, property, funds and assets […], wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action*".

Article 22 – The Deputy Defender

77. This Article providing that the Defender should have a Deputy, appointed upon his or her proposal, in order to perform the responsibilities of the Defender during his or her absence and having the same rights as the Defender in that capacity, has now been deleted from the Law. The reason may be that a Deputy is not provided for in the Constitution, although the absence of his or her being mentioned should not necessarily be preclusive. In any case, the presence of a permanent Deputy Defender is not imperative, and the solution adopted involves more of a political decision than a question of solidity of the institution.

Article 23 – The Status of the Defender's Staff

78. Considering the exceptional role of the institution of the Human Rights Defender and its responsibilities, as well as the necessary safeguards for its independence, the staff, if it is not to be included under Civil Service, **should have a distinct special status** regulated by this Law. A solution merely stipulating that members of the staff should be contract employees is insufficient.

Article 24 – Financing the Defender's Activities

79. In the Amending Law, the contents of this Article have been rephrased and amplified in a manner which appears to clarify rather than weaken the position of the Defender's budgetary requirements and financial management, but the change in substance is limited.

80. In order to increase the financial independence of the Defender it might be appropriate to consider additional safeguards such as the **principle that the budget for the Defender could be reduced in relation to the previous financial year only by a percentage not greater than the percentage the budget of the Parliament, President and Government is reduced**.

81. Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, a provision could be added stating that **public authorities shall not use the budgetary process** for allocating funds from the budget **in a manner that interferes with the independence of the institution of the Human Rights Defender.**

82. In order to guarantee the proper functioning and development of the Human Rights Defender's activities, it is important to create an **opportunity for the Institution to receive additional subsidies from international donors**. The grants received may not, however, threaten the institution's independence or affect the amount of financial means available from the State budget.

Article 26 – The Expert Council

83. Under this Article, the Defender is authorised to establish an Expert Council composed of persons of his or her own choosing in order to benefit from advisory assistance. It is assumed that these persons will be engaged on a voluntary basis and perform their activities without compensation. The question of the role of these expert assistants is left quite open in the Law, although it appears from the concluding paragraph of Article 12.1 that their activities are not entirely internal and directed towards the institution, seeing that the Defender can authorise them by instrument in writing to carry out examination assignments in the same manner as members of his or her staff proper. The change brought by the Amending Law appears to be solely to the effect of enabling the Defender to establish more than one Council, which presumably is oriented towards affording him/her greater flexibility. This feature of the Law appears to be positive, but it must remain clear that the Defender is in full control of the arrangement, and that no attempt at outside interference with the Defender's activity is implied.

Further remarks

84. For further reinforcement of the position and authority of the institution of the Human Rights Defender of Armenia, the **Law should include**:

- a provision specifying the **location of the institution's headquarters** as well as a provision stipulating the possibility to establish, if necessary, **additional offices throughout Armenia**.

- a provision stating that the **Human Rights Defender may cooperate with other similar institutions** and with other organizations and institutions dealing with human rights and human rights monitoring, protection and promotion.

- a provision stating that the Human Rights Defender and his or her staff **shall maintain the confidentiality** of all information and data obtained, with special attention being given to the protection of the safety of complainants, injured parties and witnesses.

- a provision indicating that the Human Rights **Defender shall adopt his or her own Rules of Procedure**.

Conclusions

85. It is an undisputed fact that institutions like the Ombudsman hold a strong, important and permanent position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights. Recently, more and more such institutions are being established, among which the Human Rights Defender of the Republic of Armenia now constitutes an example. The possibility for this type of institution to play an appropriate role within the State depends on many political, social and legal factors. Such an institution must assume its proper place within the constitutional system, posses a sufficiently broad scope of competence as well as a range of legal instruments allowing it to effectively stimulate the legal sphere and practice in significant human rights areas. An important characteristic of an effectively operating institution of this type must be its independence, particularly with relation to the executive power. Accordingly, special significance should be given to its constitutional and statutory safeguards, including those involving the institution's budget. The success of such institutions depends to a significant degree on its moral and professional authority within the structures of the State and within society. Thus, it is of utmost important to establish *inter alia* appropriate criteria and an adequately transparent procedure for appointing or electing the

Human Rights Defender as well as guarantees towards supporting high professional qualifications among his or her staff. This opinion has been set forth with this in mind.

86. The Amending Law has been adopted in order to effect certain changes in the first Law (adopted in October 2003) on the Human Rights Defender of the Republic of Armenia, in the wake of the entry into force on 8 December 2005 of the revised new Constitution of the Republic and of the subsequent election of the first Defender instated for a regular 6-year term. The amendments in issue appear to be made mainly in order to ensure an alignment between the text of the Law and the declarations of the Constitution, and also to adjust some of the provisions relating to the activities of the Defender, apparently towards reinforcing and clarifying his or her position. Further, a specific change in article 7.2 of the Law has been made in order to achieve conformity with a judgement of the Constitutional Court of Armenia pronounced on 6 May 2005.

87. The institutional structure for the Armenian Human Rights Defender is **in general in conformity with accepted European standards** and is based on the model most widely followed, namely a Defender/Ombudsman who is an independent official elected by the legislative power having the primary role of acting as intermediary between the people and the state and local administration and being able in that capacity to monitor the activities of the latter by issuing recommendations on the basis of equity to counter human rights violations and instances of maladministration. At the same time, the Defender's role does not include a power of supervision in relation to the courts of law.

88. In order to guarantee the independence of the Defender he or she should not to be a member of a trade union and should **refrain from performing any public activity that cannot be reconciled with his or her status as the Human Rights Defender**. With the exception of university teaching, there should be a general prohibition of other activities.

89. The general mandate of the Defender is stated primarily in terms of implementing protection against violations of human rights and freedoms by the executive power. The question may be raised whether his or her **authority to monitor the administration and promote the observance of human rights might be expressed in stronger terms**, such as by using those exact words. As in the opinion CDL-AD(2003)006, it also may be asked whether the **Defender's mandate could be strengthened by listing his or her fields of action in more specific terms than in the Law**. Also, the **mandate should also explicitly refer to violations by omission.** However, the straightforward description of the Defender's general mandate and purpose embedded in the Constitution and now followed in the Law clearly invites a broad interpretation ensuring that the essential function of monitoring is in fact included. Under the assumption of such broad interpretation, the role envisaged for the Armenian Defender does appear fully acceptable.

90. The generally accepted principle of having the Defender elected by the National Assembly with a high qualified majority ($3/5^{ths}$) is now squarely in place. The stated conditions of eligibility for election are relatively liberal, and are quite acceptable by European standards as long as the primary condition of general respect or esteem in the society is regarded on a basis of strong interpretation.

88. The amendments made in deference to the Constitution include the principle that the Defender will be elected for a single term of 6 years, and the possibility of re-election for a second term is not envisaged. Although the single term constitutes an advantage from the point of view of independence, it may perhaps be **questioned whether the Constitution does in fact preclude a second term**.

89. These amendments also include a revised description of the Defender's immunity (Article 19), which is basically made equal to the immunity of Deputies of the National Assembly. While

it is now clearly stated that the **immunity** of the Defender in office will persist **after the end of his or her term**, this **does not apply to the staff** (Article 23). There remains perhaps some question whether the **immunity needs to be strengthened**, under the principle that the Defender and his or her staff should be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity and within the limit of their authority. An immunity of the property and premises of the Defender's office should also be provided for.

91. The concept of having a Deputy Defender (the former Article 22) has been abandoned, which is acceptable.

92. The provisions for early termination of the Defender's mandate (Article 6) have been tightened to positive effect. The Law now follows the principle that the issue of early termination will not need to be put to a vote in the National Assembly, which also is positive.

93. The amendments relating to the position of the Defender towards the courts of Law have mainly been made in deference to the above judgement of the Constitutional Court (Article 7), which has been appropriately accepted. There remains perhaps a question whether the limits between the mandate of the Defender and the judicial power may need further clarification. **The existence of a legal remedy should not prevent a person from filing a complaint with the Defender**, and the Defender **should have the right and obligation to advise the complainant about legal remedies** within bounds of neutrality, and to comment thereon in cases where the subject matter of complaint appears to require recourse to the courts and the complaint should be dismissed for that reason. Also, the **Defender should be able to issue recommendations on general matters related to court proceedings**.

94. The amendments otherwise made to clarify and strengthen the Defender's position are mainly to positive effect (Articles 10, 12 and 15). A remaining question is whether it may be assumed that the power of the Defender to take actions of recommendation upon his or her own initiative is clearly enough provided for.