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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

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

**Adopted by the Working Group
at its meeting in Paris on 11 May 1999
and approved by the Commission
at its 39th Plenary meeting
(Venice, 18-19 June 1999)**

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**RAPPORT DU GROUPE DE TRAVAIL
DE LA COMMISSION DE VENISE
ET DE LA DIRECTION DES DROITS DE L'HOMME
SUR LES INSTITUTIONS DE MEDIATURE
EN BOSNIE ET HERZEGOVINE**

**Adopté par le Groupe de travail
lors de sa réunion du 11 mai 1999, à Paris
et approuvé par la Commission
lors de sa 39e réunion plénière
(Venise, les 18 et 19 juin 1999)**

INTRODUCTION

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

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

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

I. FRAMEWORK

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

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

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

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

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

The three preliminary draft laws are appended to this report.¹

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

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

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

¹ Only the draft law on the State Ombudsman of Bosnia and Herzegovina and its explanatory notes are appended to this provisional edition.

In societies in transition the Ombudsman's activity is of course much less discreet. Faced with a state apparatus undergoing profound changes, the ombudsman institution's task is not only to deal with cases of maladministration, but to promote or protect the values of society, including human rights, which also mean the rule of law. While targeted in theory at the administration, its activity in the transition process not only parallels that of the judicial system, but may often take the form of judicial action. Its function is then to disseminate a certain legal culture both among the state institutions and among the population. In a transition situation, the Ombudsman's work focuses more on applying the law and the Ombudsman tends to become a fully-fledged player in the judicial system, exercising a quasi-judicial function based on influence. This trend is reflected in the broad scope afforded to ombudsman institutions in several central and east European countries for referring matters to the courts, including the highest courts.

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

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

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

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

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

The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen - a Bosnian, a Croat and an "other", currently a Serb - have been appointed under the Constitution of the FBH. The Office of the Ombudsmen is an independent agency.

The Ombudsmen are empowered to examine the activities of all institutions of the Federation, cantons and municipalities and all institutions or persons whose dignity, rights and freedoms may be breached, particularly by ethnic cleansing or the preservation of its effects. To perform their task, the Ombudsmen of the Federation are empowered to initiate proceedings before competent courts and to intervene in pending proceedings.

The Constitution of the FBH makes it clear, if only by its structure, that the Ombudsmen are not a supplementary, accessory or parallel institution, but one of the key players in the state. The chapter on the Ombudsmen is strategically placed in the Constitution, immediately after the list of fundamental rights and before any reference to the entity's institutions, whether the President, the Parliament, the Government or the courts. This position reflects the importance assigned by a war-torn society to the ombudsman institution and explains the expectations the latter has aroused. It also explains the institution's distinctive features, including its extensive powers and special relations with the judicial system. This suggests that the purpose of the institution extends well beyond monitoring the functioning of the administration: it is in fact a device for rehabilitating a society in crisis.

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

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

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

The Human Rights Ombudsperson for Bosnia and Herzegovina

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

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

Here too, difficulties stemming from the conceptual problems surrounding the institution have had to be dealt with during the first few years of its operation. The Office of the Ombudsperson was set up very soon after the conclusion of the peace agreements and was for a long time the only operational institution of those provided for by Annex 6 to the Dayton Agreements²; it took on the task of introducing the ECHR into Bosnia and Herzegovina's legal system, precisely to help BH comply with its commitments under the Convention, which is directly applicable in BH. Whatever the authors of Annex 6 had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. Yet this too seems hard to reconcile with the intrinsically non-judicial nature of all ombudsman institutions.

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

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

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

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

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

² *The Human Rights Chamber gave its first judgment on 11 July 1997, whereas the Ombudsperson issued its first decision on 3 May 1996. By the end of 1997 the Human Rights Chamber had given 19 judgments, as against more than 300 decisions issued by the Ombudsperson.*

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

At the end of the day, the key to the success of ombudsman institutions in BH seems to be their ability to adapt to society's expectations and demands. It is essential for them to gear their action and thinking both to changes in society and to the development of other institutions' capacities. The Ombudsmen will make greater use of their extensive and often unusual powers (provisional measures, applications to the Chamber or the Constitutional Court, intervention in pending proceedings) as long as they consider the organs of the state and the entities, including the courts, to be functioning unsatisfactorily. However, as soon as the judicial and administrative systems show signs of being able to function regularly and satisfactorily, in line with the principles of the rule of law, the ombudsman institutions will have to gradually reduce their involvement with the courts and allow the institutions concerned to assume their rightful place and regain the people's trust. Normalisation of the institutional situation in BH necessarily entails a decrease in the Ombudsmen's powers; at the same time, there can be no institutional normalisation as long as the Ombudsmen wield exceptional powers. The success of the reconstruction of institutions governed by the rule of law in BH will depend largely on the Ombudsmen's capacity to gradually adapt their functions to changes in those of the other institutions.

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

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

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

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

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

V. INDEPENDENCE AND IMPARTIALITY

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

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

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

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

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

The jurisdiction of the Ombudsperson (henceforth called "State Ombudsman") will in principle be confined to cases concerning the state of Bosnia and Herzegovina and cases simultaneously involving both entities; questions concerning a single entity will, in the medium term, have to fall within the exclusive ambit of the Ombudsmen of the entities. In the interim, however, the Ombudsperson will have to have parallel competencies to those of the Ombudsmen of the entities.

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

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

VII. IN THE LONGER TERM...

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

**PRELIMINARY DRAFT ORGANIC LAW
FOR THE STATE OMBUDSMAN
OF BOSNIA AND HERZEGOVINA**

**prepared by the Working Group
on Ombudsman-Institutions in Bosnia and Herzegovina**

Nature

Article 1

The State Ombudsman of Bosnia and Herzegovina (the State Ombudsman) shall be an independent institution set up in order to protect the rights and liberties of natural and legal persons, as enshrined in particular in the Constitution of Bosnia and Herzegovina and the international treaties appended thereto, monitoring to this end the activity of state and entity institutions in Bosnia and Herzegovina, in accordance with the provisions of the present law.

Powers and jurisdiction

Article 2

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

The State Ombudsman may undertake general investigations.

The State Ombudsman may recommend the appropriate individual and/or general measures.

The State Ombudsman shall not consider cases concerning decisions, facts or events prior to 15 December 1995.

Article 3

The State Ombudsman's competence shall comprise the power to investigate all complaints about violations of rights and freedoms allegedly committed by the military administration.

Article 4

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

Without prejudice to its power to refer cases to the highest judicial authority of the State competent in human rights matters, the State Ombudsman can neither interfere with pending court proceedings nor challenge the legality of a decision by a court or tribunal. This shall not prevent the State Ombudsman from making recommendations to the governmental body party to the proceedings or to be consulted by the parties

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

Article 5

The State Ombudsman shall have exclusive competence to deal with cases

- concerning any institutions, authorities or agencies of the State of Bosnia and Herzegovina;
- concerning at the same time an institution, authority or agency of an entity and an institution, authority or agency of the State of Bosnia and Herzegovina;
- concerning at the same time institutions, authorities or agencies of both entities.

The State Ombudsman may also deal with cases concerning an institution, authority or agency of an entity, whenever it finds that the outcome of a case is of particular relevance for the effective enjoyment of individual rights and freedoms in Bosnia and Herzegovina as a whole.

If, at any stage of the procedure, the State Ombudsman finds that a case does not fall within its competence, as described above, it shall refer the case to the entity Ombudsmen.

Article 6

The State Ombudsman may refer cases of alleged human rights violations to the highest judicial authorities of the State competent in human rights matters, pursuant to the rules concerning appeals to these authorities, whenever it finds that this is strictly necessary for the effective performance of its duties under Article 1 of this law.

Article 7

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

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

Composition, appointment and resignation

Article 8

Three persons shall compose the institution of the State Ombudsman.

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 suggestions, resolutions and reports the three Ombudsmen act jointly.

Article 9

The three Ombudsmen shall be appointed by the House of Representatives and by the House of Peoples by a two-thirds majority of each House, following a joint proposal by the Presidency.

The appointment shall be held no more than three months after the joint proposal 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 State Ombudsman institution cease their functions.

Article 10

The three Ombudsmen shall be appointed 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 re-elected only once.

Article 11

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

Article 12

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 as set forth in Article 17 para 4;
- e. His/her conviction, and final sentencing, for of an intentional offence.

An Ombudsman's post shall be declared vacant by the President of the House of Representatives 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 the House of Peoples and the House of Representatives, after a debate and following a hearing of the person concerned.

Once a post is vacant, the Presidency shall make a proposal for appointing a new Ombudsman within one month.

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 as provided for by Article 9 has been completed.

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.

Co-operation with Ombudsman institutions of the entities

Article 13

The State Ombudsman 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. In this respect the State Ombudsman of Bosnia and Herzegovina shall in particular

- establish a network of liaison officers to disseminate information about the activities of the Ombudsman institutions in Bosnia and Herzegovina among them, in particular information on pending cases;
- organise regular meetings of the Ombudsman institutions in Bosnia and Herzegovina;
- organise seminars and workshops;
- represent the Ombudsman institutions of Bosnia and Herzegovina in international *fora* as appropriate.

Article 14

The State Ombudsman shall refer, in accordance with article 6, to the highest judicial authority of the State competent to deal with human rights issues, any case referred to it for this purpose by the Ombudsman institutions of the entities. When referring such cases the Ombudsman shall also ensure that the views of the entity Ombudsman institution is adequately presented to the judicial authority concerned.

Immunities and Incompatibilities

Article 15

The State Ombudsman shall be under no specific orders. Within the framework of his/her constitutional and legal competencies, each Ombudsman shall not be given instructions by any authority. Each Ombudsman shall act independently, on the basis of the institution's own criteria.

Article 16

An Ombudsman shall not be prosecuted, subjected to investigation, arrested detained or tried for the opinions expressed or for the decisions taken in the exercise of powers associated with their duties.

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.

Decisions to prosecute, to detain or to refer an Ombudsman to a court charged with a criminal offence shall be taken after the House of Representatives and the House of Peoples have lifted the above immunity. Solely a court at the level of the State of Bosnia and Herzegovina shall be competent to try him/her.

Persons holding any office or appointment under the State 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 State Ombudsman's instructions. In all other

circumstances, whenever persons holding an office under the State Ombudsman are arrested, detained or tried, the prosecuting authorities shall duly and promptly inform the State Ombudsman.

Article 17

The position of Ombudsman is incompatible with the holding of any representative office; with any political activity or office or responsibilities of 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.

An Ombudsman who is a civil servant enjoys the guarantee of reintegration in his service at the end of his/her term of office.

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.

Where incompatibility arises after an Ombudsman has taken up his/her duties, it is understood that he/she shall give up his/her duties, within the meaning of Article 12, on the date on which the incompatibility arises.

Investigation Procedure

Article 18

Any natural or legal person claiming a legitimate interest may apply to the State Ombudsman without any restriction. Nationality, citizenship, 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 State Ombudsman.

Applying to the State 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 State Ombudsman about matters within its remit.

Article 19

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 State Ombudsman finds that circumstances so require.

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

Article 20

Correspondence addressed to the State 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 an Ombudsman or persons delegated by the State Ombudsman and any of the persons listed in the previous paragraph may never be monitored or interfered with.

Article 21

The State Ombudsman shall register and acknowledge receipt of the complaints submitted, whether it considers that they should be pursued or not. When the State 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 State Ombudsman may refuse to pursue anonymous complaints and complaints which it 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 State Ombudsman more than 12 months after the facts, events or decisions complained of.

Article 22

No appeal lies against the decisions of the State Ombudsman.

Article 23

When the State Ombudsman decide that a complaint or a matter considered *ex officio* offer 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 within a time-period indicated by the State Ombudsman. This time limit may be extended when circumstances so require.

The State Ombudsman may demand at any time any document it deems necessary for the investigation.

Article 24

Where, during the investigation, the State 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 the competent authority to 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 State Ombudsman, within three days from the receipt of the suggestion and in any case before executing the challenged measure, the reasons thereof, failing which, the suggestion becomes mandatory for the authority.

Obligation to co-operate with the Ombudsman**Article 25**

Governmental, judicial and all public authorities and agencies in Bosnia and Herzegovina and the entities, including private agencies performing public functions are obliged to provide the State Ombudsman with preferential assistance in its investigations and inspections.

During the investigation, the State 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.

The State 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 28 of the present law.

Article 26

When the case under investigation concerns the conduct of persons employed in government service and is connected with the duties they perform, the State Ombudsman shall inform the person concerned and either his/her superior or the body to which he/she is attached and may demand written statements.

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.

The State 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 State Ombudsman to give a written explanation of the reasons for their refusal.

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 27

Superior officials or bodies which prohibit officials subordinate to them or in their service from responding to a request from the State Ombudsman or from being heard by it shall declare that they have done so in a written document, stating their grounds. This document shall be communicated to the official and the State Ombudsman. The State Ombudsman shall then approach the said superior in respect of all the operations necessary to the investigation.

Confidential and Secret Documents and Duty of Discretion**Article 28**

The State 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 State Ombudsman and its staff, including 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 State 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 State 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 Presidency of this fact.

The Responsibility of Authorities and Officials

Article 29

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 State Ombudsman may communicate this finding to the official concerned. On the same date, it shall transmit the same document to the official's superior and set out the recommendations it considers pertinent.

Article 30

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

Article 31

If a hostile attitude or an attitude impeding the investigation of the State 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.

Where an official impedes an investigation by refusing to send documents required by the State Ombudsman, or through negligence in sending such documents or by refusing the State Ombudsman access to administrative files or documents necessary to the investigation, the State Ombudsman shall send the relevant file to his/her superior or to the competent prosecuting authorities for the appropriate disciplinary or penal action to be taken, in accordance with the law.

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.

Recommendations

Article 32

The State 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 State Ombudsman of the effect given to the recommendations within a period indicated by the State Ombudsman.

If, once recommendations have been made, the administrative authority concerned does not take appropriate measures within the time indicated by the State Ombudsman, or if it does not inform the State Ombudsman of the reasons for not doing so, the State 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 State Ombudsman, following this, obtain no satisfaction in a case where it considers that it would have been possible to find a positive solution, it shall include the matter in the annual or in a special report, mentioning the names of the authorities or officials taking this attitude.

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

When, following the examination of a case, the State 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 State 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 it finds appropriate.

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.

Notification and Communication

Article 33

The State 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.

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

The State Ombudsman may decide to publish its general recommendations in the Official Gazette.

All other recommendations of the State 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.

Reports

Article 34

The State Ombudsman shall each year communicate the result of the institution's activities in a report to the House of Representatives, the House of Peoples and the Presidency of Bosnia and Herzegovina.

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

Annual reports and any special reports shall be published.

Article 35

In the annual report, the State 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 State Ombudsman may also specify those suggestions or recommendations accepted by the government.

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 31.

The report shall also contain an appendix intended for the Presidency, which shall show the expenditure of the institution's budget during the period covered.

Rules of Procedure

Article 36

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

Staffing and Equipment

Article 37

The State Ombudsman may freely staff the institution's office(s) and appoint advisors as needed, in accordance with the Rules of Procedure and within the budgetary limits.

The State Ombudsman staff shall be appointed and dismissed by the State Ombudsman.

Article 38

The State Ombudsman advisers shall be automatically dismissed when the new Ombudsman appointed by the House of Representatives and the House of People take up duties. They may be re-appointed.

Members of the State Ombudsman staff who are civil servants enjoy the guarantee of reintegration in their service at the time of their dismissal.

Article 39

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

TRANSITIONAL PROVISIONS

Article 40

As from the entry into force of the present law, the Office of the Human Rights Ombudsman (Human Rights Ombudsperson) provided for in Annexe 6 to the Dayton Agreement shall be called "Office of the State Ombudsman of Bosnia and Herzegovina" and shall perform its duties in accordance with the provisions of this law.

Article 41

Until 31 December 2003, there shall be one State Ombudsman of Bosnia and Herzegovina (the transitional State Ombudsman), appointed by the Chairman in office of the OSCE after consultation with the Presidency, the Chairman of the House of Representatives and the Chairman of the House of Peoples of Bosnia and Herzegovina. The transitional State Ombudsman may not be a citizen of Bosnia and Herzegovina or any neighbouring state.

Any person performing the duties of the Human Rights Ombudsperson of Bosnia and Herzegovina at the time of the entry into force of the present law may be appointed as transitional State Ombudsman of Bosnia and Herzegovina in accordance with the provision of the previous paragraph, provided that his/her term of office as a whole does not exceed five years.

The transitional State Ombudsman shall continue to perform his/her duties until the appointment of the Ombudsman pursuant to the provisions of Chapter III of the present Law.

Article 42

The transitional State Ombudsman shall be accorded all privileges and immunities specified in Article III, para 4 of Annexe 6 to the Dayton Agreement.

Article 43

The provisions in this law concerning budget appropriation, appointment of staff within budgetary limits and reports to the Presidency on budgetary liquidation shall not apply to the transitional State Ombudsman.

Article 44

The transitional State Ombudsman shall communicate his/her annual and special reports to the Presidency, the House of Representatives and the House of Peoples and to the Office of the High Representative

Article 45

Five years after the present law comes into force, the State Ombudsman may propose to the Parliamentary Assembly of Bosnia and Herzegovina, in a report containing reasons, the amendments which it considers should be made to it.

**Explanatory notes
on the preliminary draft organic law
on the State Ombudsman of Bosnia and Herzegovina**

1. Context

The proposed draft organic law is to be read in conjunction with article XIV of Annex 6 to the Dayton Peace Agreement. This provision stipulates that five years after the entry into force of the Agreement, the responsibility for the continued operation of the Human Rights Ombudsman shall transfer from the parties to the institutions of Bosnia and Herzegovina. The draft organic law aims at providing the legal framework for the operation of an Ombudsman institution at the State level, under the responsibility of Bosnia and Herzegovina.

2. Appellation

The Working Group has found the appellation “State Ombudsman of Bosnia and Herzegovina” to be more suitable for a permanent Ombudsman institution than the actual “Human Rights Ombudsman” (or “Ombudsperson”) used in the Dayton Peace Agreement and in practice. The activities of the future permanent Ombudsman institution should cover but not be limited to human rights violations. They should cover all kinds of mal-administration, even when they do not amount to human rights violations. Moreover, as explained in the general report, it is primarily for the judicial institutions of Bosnia and Herzegovina and its entities to protect individual human rights, the Ombudsman being in this respect a parallel and supplementary, although necessary, means for protection.

The term “State Ombudsman” also underlines the fact that the Ombudsman of Bosnia and Herzegovina is the central Ombudsman institution of this State, in contrast with the Federation Ombudsmen and the future Ombudsman for the Republika Srpska who are entities’ institutions. This is also important for the co-ordination and representation tasks that the State Ombudsman shall have under the proposed law.

3. “Three persons shall compose the institution of State Ombudsman”

As indicated in the general report, the “multi-ethnic” composition of the institution is an essential element of its impartiality and, consequently, of its effectiveness. Article 8 of the draft law, by providing that three persons compose the institution, makes the “multi-ethnic” composition possible and necessary. The Working Group has not find it necessary to refer expressly in the law to the constituent peoples of Bosnia and Herzegovina. It is a matter of common sense and of elementary political responsibility to guarantee in the composition of the institution the equilibrium necessary for its effective functioning.

4. “the Ombudsman”, “an Ombudsman”, “the Ombudsmen”

In the draft, the term “Ombudsman” or “State Ombudsman” is used to designate the institution as a whole; “an Ombudsman” is used for one of the three persons composing the institution; “the Ombudsmen” is used to designate the three persons composing the institution.

5. *“Decisions, facts, or events prior to 15 December 1995”*

In accordance with the proposed Article 2, *in fine*, the State Ombudsman shall not consider cases concerning decisions, facts or events prior to 15 December 1995 (date on which the Dayton Peace Agreement has entered into force). This does not of course prevent the State Ombudsman from dealing with cases, which relate to decisions, facts or events which occurred before the above date but whose effects continue after that date (continuing situations).

6. *Time limit for individual applications*

Article 21 para 2 provides that the State Ombudsman may refuse to pursue complaints that are lodged with it more than 12 months after the decisions or facts complained of. This time-limit, which appears necessary in order to guarantee legal security and the rights of others, does not prevent the Ombudsman from taking up the same case *ex officio*, when it finds that circumstances so require.

7. *Relations between the State Ombudsman and the entities’ Ombudsman institutions*

Because it is the Ombudsman institution of the State of Bosnia and Herzegovina, the State Ombudsman is entrusted with the task of co-ordinating the activities of the entities’ Ombudsman institutions and of representing all Ombudsman institutions in Bosnia and Herzegovina as appropriate. Of course, a close co-operation between the State Ombudsman with the entities’ Ombudsman institutions is indispensable. In particular, as regards international representation, the State Ombudsman shall take the necessary steps to ensure that the entities’ Ombudsman are participate or are adequately represented in all relevant international *fora* (see Article 13).

8. *Distribution of competence between the State Ombudsman and the entities’ Ombudsman institutions*

The State Ombudsman has exclusive competence to deal with cases concerning authorities of the State and cases involving at the same time authorities of the State and of an entity or of the two entities (see Article 5).

Of course, pending the creation of the RS Ombudsman, the State Ombudsman will also be exclusively competent to deal with all cases concerning authorities in the RS.

However, the State Ombudsman shall also continue to have competence to deal with any cases in Bosnia and Herzegovina, even a case concerning authorities of one entity, as is the situation now, under Annex 6 to the Dayton Agreement. This is considered necessary for ensuring a coherent Ombudsman praxis all over Bosnia and Herzegovina and for enabling the State Ombudsman to give guidelines and transfer its know-how to the new Ombudsman institutions of the entities, in particular the Ombudsman of the RS. The draft organic law provides that the State Ombudsman shall use this competence whenever “it finds that the outcome of this case is relevant for effective enjoyment of individual rights and freedoms in Bosnia and Herzegovina as a whole”.

Since clear entity cases can be dealt with by the entities’ Ombudsman institutions, the State Ombudsman is expected to make a careful use of this power, intervening in these clear entity cases only when this appears absolutely necessary. Quite naturally, the transitional State Ombudsman may make a frequent use of this power in order to ensure the coherent Ombudsman praxis wished. However, it is to be expected that in the long run, when the smooth functioning of

all Ombudsman institutions in Bosnia and Herzegovina will be achieved, such interventions will be very exceptional.

9. Relations with the judiciary

The State Ombudsman has the power to bring cases before the highest judicial authority competent to deal with human rights violations, i.e. the Human Rights Chamber, as long as it exists. However, the State Ombudsman does not perform any quasi-judicial functions, as the Human Rights Ombudsperson in the Annex 6 to the Dayton Peace Agreement. As indicated in the general report, the relation of the Ombudsman with the judiciary is a delicate issue. The Ombudsman's power to bring cases before courts may be of particular importance in societies in transition but entail the risk of frustrating the confidence that should prevail in the relations between the administration and the Ombudsman.

Consequently, the use of the Ombudsman's power to bring cases before the highest court competent to deal with human rights must be very careful. The Ombudsman is expected to make use of this power only when it finds that this "is strictly necessary for the effective performance of its duties". This may be frequent in the period of transition but it will become less frequent (and at the end exceptional) as the development of democratic institutions and the consolidation of the Rule of Law will progress.

The State Ombudsman shall also refer to the highest court competent to deal with human rights issues cases referred to it for this purpose by the entities' Ombudsman institutions (Article 14). This provision consolidates an already existing practice and allows entity Ombudsman institutions to bring cases before the highest court of the State. Of course, this is to be done through the State Ombudsman and the latter should not be regarded as a mere "post office box". Pursuant to Article 6 (to which express reference is made in Article 14) the State Ombudsman may consider whether the reference of a case to the highest court is necessary for the effective performance of its duties. Naturally, the State Ombudsman shall recognise that the entities' Ombudsman institutions have a margin of appreciation in this respect, but the State Ombudsman must be able to refuse reference whenever it finds that this does not serve the aims of the Ombudsman institutions in Bosnia and Herzegovina.

Whenever the State Ombudsman brings to the highest judicial authority competent to deal with human rights issues cases in accordance with article 14, it shall allow the competent entity Ombudsman to be adequately represented in the proceedings. This will often mean that it will be for the entity Ombudsman to plead the case.

It is of course understood that all the above shall take place in accordance with the rules governing the appeals to the highest judicial authority competent to deal with human rights matters.

10. Transitional provisions

The draft organic law contains several transitional provisions, including provisions on a "transitional State Ombudsman" to ensure transition from the actual Human Rights Ombudsperson into the multi-ethnic State Ombudsman. It is to be noted that, in order to preserve some continuity in the institutions practice, the provisions concerning automatic dismissal of advisers (Article 38) only apply to the State Ombudsman and not to the transitional State Ombudsman. Of course, the transitional State Ombudsman can at any time appoint and dismiss staff, including any advisers, pursuant to Article 37 para. 2.