



Ombuds Institutions for the Armed Forces: Selected Case Studies



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The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is one of the world's leading institutions in the areas of security sector reform and security sector governance. DCAF provides in-country advisory support and practical assistance programmes, develops and promotes appropriate democratic norms at the international and national levels, advocates good practices and conducts policy-related research to ensure effective democratic governance of the security sector.

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Introduction

Ombuds institutions are key actors in establishing good governance and implementing democratic controls. Among the various types of institutions that fit within this category, such as national human rights institutions or auditing authorities, are ombuds institutions for the armed forces. Subject of numerous DCAF publications, these institutions have been specifically tasked to protect the human rights and fundamental freedoms of armed forces personnel, as well as to provide oversight and prevent maladministration of the armed forces. In the OSCE area, there are dozens of institutions that share this mandate, although they each possess distinct approaches in addressing human rights violations and maladministration. These approaches can be roughly categorised into three models, which are:

- General ombuds institutions;
- Specialised ombuds institutions with exclusive jurisdiction over the armed forces; and
- Internal ombuds institutions operating within the armed forces.

By receiving, investigating, reporting and issuing recommendations on complaints, ombuds institutions ensure that all branches of the armed forces operate with integrity. They also address individual and systemic issues violating the rights of armed forces personnel through mechanisms and instruments that help increase transparency and accountability.

The impact of these functions on the security sector is significant and extensive, as it affects individuals and institutions alike. Nonetheless, this impact is dependent on an ombuds institution's ability to remain effective, independent, transparent, responsive and accountable – traits that are greatly dependent on the capacity and enabling environment of an ombuds institution. For this reason, the issue of institutional capacity development becomes crucial to the matter of how ombuds institutions are addressing rights violations and maladministration.

Capacity development is part of an institutional development process that is relevant to all ombuds institutions, old and new. For old, established institutions, it represents an opportunity to assess their strengths and weaknesses, and adapt to their shifting environment; for new institutions, it provides the tools to develop a “blueprint” for institutional capacity. In this sense, capacity development has a two-fold purpose. It aims to improve both technical aspects of the institution, such as skills and systems, as well as the political standing of ombuds institution *vis-à-vis* citizens, the armed forces and other branches of government.

Ombuds institutions in the OSCE region date as far back as 1809, when the Parliamentary Ombudsman was established in Sweden. Other states followed in the creation of complaints-handling institutions for the armed forces, primarily during post-conflict transitions, and often in response to calls for reform or improvement of the armed forces. On account of the circumstances leading to their establishment and institutional development, ombuds institutions in the OSCE region showcase a number of different traits and experiences relevant to oversight and good governance of the armed forces, as well as different stages of capacity development. As such, a catalogue of good practices can be derived from their varied experiences, in the hopes that it proves valuable for countries seeking to develop an existing or new ombuds institution. This publication intends to serve this purpose by highlighting good practices and lessons learned in seven case studies from different OSCE states: Bosnia and Herzegovina, Canada, Finland, Georgia, Kyrgyzstan, Ukraine and the United Kingdom.

The country case studies included in this book focus on the functioning of ombuds institutions for the armed forces in the context of good

governance. In all of them, capacity development has been highlighted as crucial to assess the status, success and limit of their functions. To expand on this point, the case studies adopt a good governance perspective to analyse the functioning of ombuds institutions and capacity needs arising from it. The case study authors assess the extent to which ombuds institutions abide by principles of good governance, and whenever these are not met, and they evaluate which capacities are in need of strengthening. The good governance principles that guide the analysis echo the United Nations Human Rights Council's definition of Principles of Good Governance (resolution 2000/64) and reflect the core values considered to be central to the work of democratic institutions, and are as follows:

1. Transparency (in its functioning and reporting about its work)
2. Accountability (in that it contributes to the accountability framework of the armed forces)
3. Effectiveness (of its decisions and recommendations)
4. Independence (from the authorities or bodies it oversees)
5. Responsiveness (to the complaints of its constituents)

In gathering a wide range of experiences from different types of ombuds institutions, this compilation provides a deeper and more discerning picture of the current challenges ombuds institutions face in the fulfilment of their mandate. It addresses the underlying capacity needs for selected ombuds institutions in the OSCE region, and the scope of impact that capacity development has on the fulfilment of their mandate. In each of these chapters, the authors offer a look at how ombuds institutions are overcoming challenges in their enabling environment and limitations in their institutional design. Through an analysis of the strengths and weaknesses, the authors study the jurisdiction, discretion, complaints-handling mechanism, investigative powers, reporting ability and cooperation schemes that constitute an ombuds institution. More importantly, each chapter identifies and assesses the tools and approaches employed by ombuds institutions in the development of their own institutional capacity, and in reducing the distance between themselves and the armed forces.

From their research, the authors provide a thorough overview of the challenges that keep an ombuds institution from fully exercising their functions. Examples often mentioned in the chapters include shortages in resources; lack of independence; difficulty in collecting information or problems with reporting and the implementation of recommendations, to name a few. For the Ukrainian ombuds institution, the chapter dwells on the difficulties presented by a complex environment and destabilising factors, where the role of the ombuds institution is challenged by regional tensions and ultimately, conflict. In Bosnia and Herzegovina, the author argues that the ombuds institution is in need of cementing its legitimacy and authority when addressing complaints arising from systemic socioeconomic disparities.

For other case studies, the focus on capacity development implies re-examining the independence of the institution in terms of its relationship with the armed forces and other public authorities. The case for the Service Complaints Commissioner for the Armed Forces in the United Kingdom examines the process by which it identified its own institutional weaknesses, how it successfully reformed its mandate to become more flexible and responsive to the needs of service personnel. The chapter for Kyrgyzstan stresses how the Ombudsman's office does not prioritise the oversight of the armed forces despite possessing a strong legal mandate guaranteeing its independence and powers. Instead, personnel have to rely on internal mechanisms within the armed forces. In Finland, on the other hand, Ombudsman struggles with the issue of achieving effectiveness despite backlogs and meeting citizen expectations as a "powerful" institution in the eyes of citizens.

Once having identified their institutional capacity needs, the authors provide insight on how capacity development impacts on ombuds institutions, members of the armed forces and victims of human rights violations or maladministration. By engaging in internal and external capacity development, ombuds institutions are reducing perceptible gaps between armed forces personnel, citizens and public authority; they are training and better informing actors on how to observe human rights; they are creating awareness for their own institutional importance and they are improving accountability in the chain of command. For example,

most of the case studies in this publication found that having sufficient institutional power was matter of crucial importance for the fulfilment of their mandates. Therefore, they called for the strengthening of legal mandates and constitutional provisions for the powers and independence of ombuds institutions. On some occasions, where institutional expansion was neither desired nor viable, some authors recommended the creation of external or adjacent organizational units as the most effective measure to manage complaints related to the armed forces.

The adoption of capacity development measures gives credence to the process as an invaluable exercise in institutional growth, which can be multidimensional and cross-cutting depending on the situation and context of each institution. Capacity development enables ombuds institutions to identify and later address problems in the governance of the armed forces. It also gives them the opportunity to operate in an effective and efficient manner. Bearing this in mind, this book aims to demonstrate how capacity development can be undertaken by sharing and imparting good governance practices with other ombuds institutions. It hopes to provide an overview of approaches and options that can be further explored by ombuds institutions within the framework of international cooperation schemes, and outside of them.

With all of these factors taken into account, the authors finally identify good practices of each ombuds institution and recommendations to further strengthen the institution. While these good practices derive from the distinct approaches of each of the seven ombuds institutions examined, many of these practices are more broadly relevant and instructive for all ombuds institutions. Common issues among almost all ombuds institutions pertain to cooperation with legislative bodies and the Ministry of Defence, as well as building relationships with individual armed forces personnel, and developing specialised expertise and internal capacity. Nonetheless, while there are still considerable challenges and room to improve, these seven institutions, and many others like them in the OSCE region and around the world, provide a vital contribution to democratic oversight of the armed forces. It is hoped that the following case studies will illustrate this contribution.



The Military Commissioner of Bosnia and Herzegovina

Bosnia and
Herzegovina

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1. Introduction

The institution of the Military Commissioner of Bosnia and Herzegovina (MCBiH) was established by the Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina, which entered into force on July 7, 2009.¹ In this way, an independent institution was created to strengthen the rule of law and the protection of the human rights and freedoms of military personnel and cadets in the Armed Forces of Bosnia and Herzegovina (AFBiH) and the Ministry of Defence of Bosnia and Herzegovina (MoDBiH), as stipulated in the Constitution and international agreements. The MCBiH operates independently, and does not advocate, protect, or undermine the interests of any political party, registered organisation or association, or any group of people in BiH. The institution is meant “to build stronger trust in the military sector by introducing greater transparency in the entire administrative process implemented by the MoDBiH and the AFBiH, without questioning the military hierarchy, authority of the military chain of command, or reducing military readiness.”²

Ombuds institutions for armed forces are considered “essential to democratic governance.”³ They contribute to good governance through the practice and promotion of transparency, responsibility, accountability, participation, and responsiveness – the five attributes of good governance identified by the United Nations Commission on Human Rights in Resolution 2000/64. This study seeks to analyse the case of BiH by answering two central questions: 1) to what extent does the MCBiH function in accordance with the above criteria? and, 2) to what extent do the capacities of the MCBiH need to be strengthened in order to better function in line with those criteria?

This study is structured so as to examine how the MCBiH affects the current human rights situation in the AFBiH, including the impact of: the establishment of the institution; its legal framework; the functioning of the MCBiH in terms of receiving complaints, conducting investigations, and making recommendations to competent institutions; and the cooperation of the MCBiH with international, regional, and national institutions. The aim is to identify strengths and weaknesses of the institution, and how they relate to the ability of the MCBiH to meet the criteria of good governance. Another focus of this study is to clarify the ways in which the MCBiH manages to overcome obstacles to effective strengthening of the rule of law and protection of the human rights of military personnel and cadets. Finally, good practices are highlighted, relevant conclusions drawn, and recommendations made for possible improvements to the MCBiH.

II. Background and Context

The human rights situation for military personnel and cadets in BiH reflects the very complex economic and social situation of the country. Complaints filed with ombuds institutions for the armed forces can be roughly divided into three categories – related to human rights protection, the prevention of maladministration, and compliance with criminal and international humanitarian law.⁴ Those filed specifically by members of the MoDBiH and AFBiH with the MCBiH are most often linked to concerns over social and economic rights, such as non-salary compensation, meals, and accommodation and living conditions in the AFBiH barracks. As Serbian Ombudsman Saša Janković has noted, “economic and social rights depend on the economy, which in our country is obviously not in such great shape. It is then extremely important in the case of economic scarcity to have what is available distributed fairly in accordance with the law, according to [basic] needs and without arbitrariness.”⁵ Yet, social and economic rights – known as positive rights, which oblige state action – are not addressed adequately through court procedure, and related laws are incomplete, or so-called *lex imperfecta*, lacking legal penalty.⁶ Ultimately, this means that violations to their social and economic rights have a very real negative impact on the protection of the human rights and freedoms of members of the AFBiH and MoDBiH.

Overviews of the human rights situation of military personnel and cadets of the AFBiH and MoDBiH, as presented in reports of the MCBiH, vary depending on the reporting period. For example, in 2010, no systematic violations of human rights and freedoms were reported, and the year was positively assessed.⁷ However, during investigations that year, the MCBiH did find that some individuals had been denied their right to national orientation, since the AFBiH based this designation on whether they had transferred in from the former army of the Federation of BiH or the former army of the Republika Srpska – a matter that raises concerns from the perspective of establishing a stable AFBiH force.⁸ Further, the MCBiH also determined that the names of some barracks were not representative of all the constituent peoples and ethnic minorities in BiH, such as those named for the Seventh Muslim Brigade in Zenica or for Miloš Obilić in Pale, and recommended that the Joint Committee of Bosnia and Herzegovina (JCBiH) should initiate changes to these names.⁹

Many complaints filed with the MCBiH are indirectly related to the problem of political transition in BiH and to the post-conflict organisation of the state, as seen in the complaints of violations of the human rights of members of the AFBiH or MoDBiH.¹⁰ The Inspector General of the MoDBiH, Enes Husejinović, has called the protection of human rights “a very significant issue that requires a comprehensive approach, as [it] is a matter of resource management (human, logistic, and financial), a matter of military professionalism, a matter of morality, and of the future of the AFBiH. Considering these facts, in general, there is more room for improvement to bring [the Army] to a higher level by engaging everybody in the chain of command and control.”¹¹

Along with protecting human rights and freedoms, the MCBiH is explicitly mandated with establishing the rule of law, and so it is unsurprising that many complaints are also related to maladministration and questions of compliance with criminal and international humanitarian law. The largest number of maladministration complaints filed with the MCBiH have been linked to instances when one of the relevant institutions “is not functioning in accordance with the law, does not respect principles of good governance, or violates human rights.”¹² These complaints relate to financial issues (salaries and benefits), employment and deployment from

service, issues of status and rank (promotion, training, or desired career), and living conditions in AFBiH barracks.¹³ Another contributing factor to the state of human rights is the handling of complaints regarding gender-related issues. While women members of the AFBiH and MoDBiH have filed some complaints since the inception of the MCBiH, no violations of their human rights and freedoms have been linked to gender.¹⁴

III. Mandate and Legal Framework

The MCBiH is an independent institution established in 2009 by the Law on the MCBiH.¹⁵ This Law regulates the selection, appointment, and dismissal of MCBiH competencies, as well as the methodology of the work and other issues relevant to the work and administration of the office. Funding for the MCBiH is ensured through the budget of the BiH Parliamentary Assembly (PABiH), but the MCBiH is nonetheless considered independent.¹⁶ A systematisation of posts within the institution of the MCBiH has yet to be adopted by the PABiH, forcing the MCBiH to solicit the engagement of additional staff who are supported by international organisations. Currently, one MCBiH employee is paid by an international organisation – the Geneva Centre for the Democratic Control of Armed Forces (DCAF) – for a position regulated by a Memorandum of Understanding that is signed on a yearly basis.

The Military Commissioner of BiH is selected by the PABiH upon the proposal of the BiH Joint Committee for Defence and must fulfil general selection criteria, such as: extensive parliamentary experience, a high-standing reputation, and good knowledge of defence-related matters.¹⁷ The MCBiH may not be a member of a political party and may not follow the instructions of political parties.¹⁸ Their mandate lasts five years, with the possibility of one reappointment, and includes the authority to request information and gain access to relevant records, although this may be denied for reasons of confidentiality. The MCBiH is expected to consider instructions from the PABiH or the JCBiH alongside personal assessments in any circumstance in which a violation of the human rights and freedoms of military personnel and cadets may have occurred.¹⁹

The MCBiH may provide an opportunity for a competent institution to resolve an issue and, in that way, establish co-operation with the BiH Ombudsman for Human Rights. The MCBiH has the authority to issue appropriate recommendations to competent institutions or to transfer the complaint to bodies responsible for criminal or disciplinary proceedings; but only the MCBiH has the right to visit units and commands of the AFBiH and the MoDBiH at any time and without prior notice. Further, the MCBiH may attend the sessions of the PABiH or the JCBiH and request reports from the MoDBiH.²⁰

The role of the MCBiH in preventing violations of human rights and maladministration in BiH is very important within the wider framework of security sector reform. BiH is one of many countries facing the challenges of transitioning towards a democratic regime – characterised by representative democracy, an independent judiciary, a multi-party system, a market-based economy, and the effective protection of human rights and freedoms. Within this context, various sources of human rights violations and maladministration can emerge. One prominent view is that part of the problem lies in fact that the security reform process has resulted in personnel with “in some cases, missing qualifications, which is an issue when it comes to the unification of standards for all member of the AFBiH.”²¹ Other problems are related to “living and working conditions, and solving the personnel and status issues of AFBiH members.”²² According to an adviser to the JCBiH, the role of the MCBiH in the prevention of human rights violations and bad governance is “very well recognised,” and the ability of the MCBiH to make recommendations and supervise their implementation “definitely prevents bad governance.”²³ As MCBiH funding increases, the institution continues to establish and develop international partnerships; and with the assistance of the international community, it continues to educate and conduct training on key issues.

The current Military Commissioner of BiH, Boško Šiljegović, believes the office of the MCBiH has been successful regarding transparency. He notes the very close co-operation between the MCBiH and the BiH Human Rights Ombudsman; though, he emphasises that only two complaints were filed by professional military staff to the BiH Human Rights Ombudsman before the MCBiH was established, while 132 were

filed in first year of the MCBiH's work in 2010, suggesting that military personnel and cadets view the MCBiH as more reliable. In Šiljegović's opinion, the prospect of opening new investigations into specific cases of retaliation against people who filed complaints to the MCBiH is having a positive effect on good governance, especially in terms of accountability and responsiveness to the complaints of military staff. Furthermore, while he admits he sometimes faces instances of bad governance and human rights violations – for example, relating to the nutrition provided to professional armed forces staff – he rates the overall human rights situation as satisfactory.

Šiljegović sees the institution of the MCBiH as an “affirmation of the state and of the BiH Parliament,” and something that the country can be recognised for in the region. Still, he does feel that “the extremely bad condition of the Bosnian state negatively impacts the protection of the human rights and freedoms of the professional armed forces.” Although the recommendations of the MCBiH are largely implemented, Šiljegović sees some resistance to his position, opinions, and conclusions from within competent institutions. A mechanism for identifying officials who do not respect the conclusions or follow the recommendations of the MCBiH does exist, and Šiljegović holds that such behaviour has a negative impact on the protection of human rights and freedoms in general. Nevertheless, he stressed that the human rights situation in the AFBiH is better than that in the state at large, and said there is need for “reforms at the state level, in order to avoid jeopardizing the state and the protection of human rights of the professional armed forces.”²⁴

Military personnel in the AFBiH and MoDBiH are very satisfied with the work of the MCBiH, as reflected in letters written by a Sergeant and a Brigadier expressing appreciation, respectively, that “there is someone... that can be directly contacted and who will be dedicated to protect and fight for the rights of AFBiH members,”²⁵ and “that there is an institution such as yours that can be contacted when all others fail to fulfil their mission.”²⁶ The MCBiH has contributed to the improvement of living and working conditions for these forces, especially at the Centre for Basic Training in Pazarić. After a field visit, a number of measures were undertaken there to correct existing systemic problems.²⁷ The Žarko

Zgonjanin barracks in Prijedor were also improved after a MCBiH field visit that recommended “reconstruction and adaptation of premises unacceptable for the normal work of military personnel.”²⁸

IV. Functions, Powers, and Institutional Capacity

The first and primary function of the MCBiH is complaints-handling. This function is reviewed in this section, highlighting the features and characteristics of the reporting periods of 2011, 2012, and 2013. Example cases are provided to illustrate good practices present in the functioning of the institution as well as any shortcomings that limit the exercise and promotion of good governance.

In accordance with the Law on the MCBiH, any military personnel or cadet in the AFBiH has the right to directly contact the MCBiH, without the mediation of official bodies, to file a complaint. Anonymous complaints are not considered, but a complainant cannot be the subject of any disciplinary measures or discrimination for filing a complaint. Also, when acting on a complaint, the MCBiH is restricted from revealing this information publicly if the complainant requests anonymity and this request is not in conflict with legal provisions. On the other side, the MoDBiH and AFBiH are obligated to ensure that all military personnel and cadets have access to information on the competencies of the MCBiH, including information on how to file a complaint that communicates the protection afforded to the complainant from any disciplinary measures or discrimination.²⁹

Pursuant to Article 2, paragraph 2, of the Law on the MCBiH, the PABiH has adopted the Rules of Procedure of the MCBiH, which regulate general provisions, the parties in proceedings, complaints, the complaints procedure, as well as decisions, recommendations, and reports of the MCBiH.³⁰ In exercising his/her authority and competencies in individual complaints (*ex officio*), the MCBiH is governed by the instructions set forth in Article 3(a) of the Rules of Procedure.

The submission of complaints is regulated by Article 14 of the Rules of Procedure. Complaints are to be filed with the MCBiH in writing and

submitted directly to the Registry Office of the PABiH. Exceptionally, a complaint may be filed by a third person – a legal representative or agent. Complaints may also be filed by a group of military personnel or cadets in cases of an alleged violation of rights and freedoms based on the same grounds, under the condition that the submission to the PABiH names all complainants and designates who among them will act as their joint representative.³¹ If several complaints are related to the same factual status or to the same source of an alleged violation of human rights and freedoms, the MCBiH may also make the decision to group such complaints into a single case.³²

The MCBiH may reject any complaint for which it lacks authority or jurisdiction, and forward it instead to a competent body. In some cases, a complainant may be required to supplement their complaint within 15 days of its filing, and authorities may reject the complaint on the grounds that it is incomplete, unfounded, or untimely.³³ When investigations are opened, they are to be conducted in accordance with the Law on the MCBiH and the Rules of Procedure, whereby the AFBiH and MoDBiH are informed about the allegations in a complaint in order to submit a response in writing within 15 days.³⁴ Failure on the part of authorised representatives to submit a response within this time does not affect the right of the MCBiH to continue considering the complaint.³⁵

A range of tools are employed to manage complaints, including mediation between the parties by the MCBiH during the proceedings to encourage resolution of the case by agreement, by which a decision is issued on the termination of proceedings when a solution is reached.³⁶ The MCBiH can issue decisions to: initiate an investigation; reject a complaint due to lack of authority or because it is unfounded, incomplete, or untimely; and terminate proceedings, and offer recommendations and conclusions.³⁷

Appeals cannot be filed against decisions of the MCBiH, but this does not exclude the right to initiate proceedings before other bodies, including in court.³⁸ However, few people have addressed these issues to the courts in BiH, which seems to indicate that the MCBiH is successful in functioning in accordance with criteria of good governance. When an investigation is finalised, the MCBiH may make recommendations to the AFBiH, the MoDBiH, or other relevant institutions aimed at eliminating deficiencies

linked to violations of human rights and freedoms. These bodies have an obligation to provide a written response within 30 days to inform the MCBiH about the implementation of the recommendations. If appropriate measures are not taken by the set deadline, or the MCBiH is not informed about why recommendations have not been implemented, the MCBiH may advise the BiH Presidency, the PABiH, and the JCBiH about developments in the case and the recommendations that were made. The reports of the MCBiH – an annual report submitted to the PABiH and individual reports submitted to either the PABiH and/or the JCBiH – must include the names of responsible persons in the AFBiH and MoDBiH that failed to act in accordance with the recommendations of the MCBiH.³⁹

During the reporting period for 2010, the role of the MCBiH in strengthening the principles of the rule of law and the protection of human rights and freedoms of military personnel and cadets was emphasised in terms of good governance and, especially, transparency. In 2010, the majority of complaints received by the MCBiH fell into the following categories: status issues related to the termination of professional engagement with the AFBiH (48 complaints); the process of promotion of members of the AFBiH through rank conferring (31 complaints); application of the Law on Salaries and Allowances in BiH institutions, especially relating to the compensation of accommodation and transport costs (23 complaints); and complaints by civilian personnel engaged with the AFBiH (23 complaints).

In the *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina for 2010*, the MCBiH noted obstacles to the work of the institution that included an insufficient number of employees and a lack of financing to support regular activities.⁴⁰ Still, the extent of the impact of these challenges is better viewed through the outcomes achieved by the MCBiH. In 2010, the human rights situation was assessed as “good” and “the willingness of the management of the MoDBiH and the AFBiH to eliminate all procedural failures and observed irregularities in favour of members of the AFBiH was encouraging and confirmed that there was no systematic violation of human rights.”⁴¹

During the reporting period for 2011, the MCBiH received a total of 58 complaints, of which 22 were resolved. In turn, 36 cases remained open and were carried through to the following year. In 2011, problem areas

included: the promotion process for professional military personnel, the evaluation of professional military personnel's work, the conduct of disciplinary procedures within the AFBiH, by-laws, compensations other than salaries, and the meals of AFBiH members, as well as accommodation and living conditions in the AFBiH barracks.⁴²

It is important to emphasise that the MCBiH received rather complex complaints in 2011, each with several grounds for submission. As such, these complaints required detailed analysis, a collation of documentation from different sources, and extensive investigative actions to appropriately resolve. Additionally, it was found that the presence of the MCBiH at locations where AFBiH members deploy was recognised as good practice for building trust in the work of the institution and in its independence in protecting the human rights and freedoms of officers and cadets.⁴³

One of the characteristics of the reporting for 2011 is that complaints from female members of the AFBiH were kept separately. Per the Law on Gender Equality in BiH, all institutions are obligated to keep separated registries of gender-related issues.⁴⁴ The MCBiH received 19 complaints from female members of the AFBiH during the 2011 reporting period. Nonetheless, a violation of the gender rights of these female members was not observed. Female members of the AFBiH filed claims in the areas of promotion and status (4 complaints), salaries and benefits (3 complaints), and other issues (9 complaints).⁴⁵

In 2012, the MCBiH received 57 complaints in total, of which 22 were resolved and 35 remained ongoing. That year, there was only one complaint from a female member of the AFBiH in a case categorised as related to "other issues," and the annual report did not indicate any violation of the human rights of female military staff. The MCBiH reported on the following areas in 2012: the obligation of medical staff on guard duty, the rejection of the coverage of travel expenses to work and from work, violation of the Law on Service in the AFBiH, problems with heating in AFBiH facilities, issues with nutrition in the AFBiH, non-compliance with regulations while appointing military professionals as acting staff, remarks to the newly adopted Book of Rules on promotions, intensifying the criteria in the MoDBiH for early promotion, and intervention by the

MCBiH on the internal vacancy announcements for the promotion of officers in the AFBiH.⁴⁶

One example of good practice in the work of the MCBiH in 2012 was the Commissioner's intervention regarding the right of compensation for transport expenses, which resulted in the MoDBiH reversal of a decision that had been violating the rights of military professionals. Sometimes, though, the MCBiH faces some resistance, and specifically, a failure by competent institutions to act in accordance with MCBiH recommendations. One example of this involves the violation of the Law on Service in the AFBiH relating to temporary deployments and assignments to positions of a lower rank, noted by the MCBiH in the 2012 Report. In that case, the response of the Joint Staff of the AFBiH to the recommendations of the MCBiH was that it was not possible to implement the ordered changes.⁴⁷ Implementation can be a measure of effectiveness for the MCBiH and "if corrective action is slow it may indicate that relevant stakeholders do not make recommendations by the ombuds institution a priority."⁴⁸ In the 2012 Annual Report, the MCBiH made an official note that the Joint Staff of the AFBiH did not fulfil the obligations outlined in its recommendations.⁴⁹ In such cases, one alternative for ombuds institutions is to initiate court proceedings if the legality of an act or regulation is in question.⁵⁰

Another feature of good practice relates to the principle of transparency, which is often prioritised by the MCBiH. For example, the institution drew special attention to shortcomings regarding regulations on promotions, stating that the right to effective legal remedy was violated when new regulations were adopted but were not announced in the Official Gazette of BiH. On this occasion, the MCBiH suggested that the new regulations should be announced on the notice boards of the AFBiH and MoDBiH, to help support transparency in the adoption of these documents.⁵¹

In 2013, 80 complaints were received by the MCBiH (and 37 were carried over from 2012), 97 were resolved, and 20 remained in process. This reporting period was characterised by the resolution of complaints in favour of complainants. Indeed, out of the 97 complaints resolved, 59 (60% of the total) were resolved in the complainant's favour. The gender dimension of complaints was again limited, as it had been in previous years, with just one claim from a female member of the AFBiH, which

was submitted on behalf of civilian personnel of the AFBiH and was not related to gender issues. The complaint was not submitted by an authorised person and the MCBiH was thus not authorised to act.⁵² The MCBiH did participate as an observer at a preliminary hearing requested by military personnel, which indicates the case was referred to the Court of BiH.⁵³

V. Capacity Building and International Co-operation

The MCBiH has adopted a Rule Book on Co-operation with the MoDBiH, the General Inspectorate within the MoDBiH (GIBiH), and the AFBiH, related to the implementation of parliamentary controls on activities concerning the protection of human rights and freedoms of military personnel and cadets.⁵⁴ As per this rule book, which is cemented in law, co-operation is inherent in the functions of the MCBiH – which, in considering complaints, works with other institutions, such the GIBiH, to resolve the issue, or forwards it to a competent authority. The MCBiH can also visit AFBiH units and commands without prior notice, can request reports from the MoDBiH, and may be present to examine documents in the case of disciplinary proceedings.⁵⁵

The MCBiH has also adopted guidelines for co-operation with the BiH Human Rights Ombudsman.⁵⁶ These guidelines relate to the exchange of cases, which provide for the Ombudsman to refer cases to the MCBiH for further procedure and the MCBiH to transfer civilian complaints to the Ombudsman, as well as for the Ombudsman and the MCBiH to conduct simultaneous and independent investigations on the same case.⁵⁷ Good co-operation has also been achieved with the Agency for Gender Equality of BiH, resulting in the development of a guide for effective measures to prevent gender-based harassment and sexual harassment in BiH institutions.⁵⁸

The level of co-operation the MCBiH has achieved at the domestic level has resulted in positive relationships with the MoDBiH, the Joint Staff and General Inspectorate of the AFBiH, and significant support from the Joint Collegium of both houses of the PABiH, as well as from the JCBiH and the Secretariat of PABiH. The MCBiH also co-operates with

international organisations such as the United Nations Development Programme (UNDP), the Geneva Centre for the Democratic Control of Armed Forces (DCAF), and the Organization for Security and Cooperation in Europe (OSCE) Mission to BiH.⁵⁹

International organisations play an important role in providing valuable technical assistance to the MCBiH. This assistance began at the establishment of the institution, with support of the United States Agency for International Development (USAID) via its Parliamentary Strengthening Project in BiH, and has continued through the development of its by-laws and the execution of its competencies and authorities. Financial support for equipping the office of the MCBiH was also provided by the Swiss Ministry of Defence, Civil Protection, and Sports. And, the capacity of the MCBiH was further strengthened by financial assistance from DCAF, which has financed the work of one MCBiH officer.⁶⁰

International and regional conferences on capacity building have played an important role for the MCBiH as well. The institution has participated in numerous events, but has also organised conferences with the support of organisations such as UNDP, DCAF, OSCE, and others. These conferences have involved the participation of various foreign guests, including military ombudsmen from other countries, members of ministries of defence and armed forces, and representatives of international and regional organisations and the non-governmental sector. These participants have actively shared experiences and knowledge gained in their own countries – for example, good practices in the protection of the human rights and freedoms of members of the armed forces – and have in that way contributed to strengthening the capacity of the MCBiH.

The 2013 Best Practices in Protecting the Human Rights of the Members of the Armed Forces Conference, a regional conference hosted by the MCBiH, emphasised the role of ombuds institutions for armed forces “in ensuring transparency in the management of the armed forces,” as well as their contributions “to the strengthening the rule of law and respect for the human rights and freedoms of members of the armed forces.” But the MCBiH acknowledged that “rules, regulations, and other relevant by-laws [were still needed] to further improve the impacts of joint efforts.”⁶¹ The importance of this kind of co-operation and joint

capacity development was also articulated by BiH Minister of Defence Zekerijah Osmić, who noted that “due to the closed and traditional system of their operations, the problems of professional [military personnel] usually remain within the system without broader social engagement to address these problems;” but he stressed the commitment of the MoDBiH and the AFBiH to human rights and “to monitoring and continuously strengthening the protection of rights...[and] safeguard mechanisms.”⁶² Similarly, Inspector General of the MoDBiH Enes Husejnović asserted that “if the AFBiH wish to effectively serve the society, then there is no room for socially unacceptable behaviour, including discrimination and other forms of human rights violations.”⁶³

Given that “parliamentary oversight of the armed forces and the accompanying protection of fundamental rights of the members of the armed forces is one of the pillars of a democratic system that the European Union expects from applicant countries,”⁶⁴ some shortcomings in BiH must still be addressed. The MCBiH has recognised this, saying, “It has become even more imperative to take measures to address the generally recognised need to strengthen state institutions that are currently too weak to allow for BiH’s further integration into Europe.”⁶⁵

To this end, the MCBiH assesses its own capacity in several ways. First, based on the total number of complaints received and resolved. Between 2010 and the end of 2013, the MCBiH received 459 complaints, of which 439 were resolved and 20 were pending resolution.⁶⁶ These numbers indicate the institution’s capacity to effectively perform its functions. Also important is the number of complaints resolved in favour of the complainants, which would signal that they were well-founded complaints. Of a total of 97 complaints resolved in 2013, 59 (over 60%) were resolved in favour of the complainant, while 38 were determined to be unfounded (unproven or frivolous).⁶⁷

Second, the MCBiH evaluates its capacity based on the number of recommendations implemented and procedures instituted by the MoDBiH and AFBiH. From 2010 to 2013, the MCBiH issued a number of recommendations that these institutions did not enact.⁶⁸ This kind of resistance puts the work of the MCBiH in question as it relates to

the principles of strengthening accountability, effectiveness, and responsiveness.

Third, assessment of the MCBiH comes from external actors, including from the PABiH, the public, and representatives of the international community. This also includes media reporting on the status of human rights in the MoDBiH and AFBiH, which can be quite varied. Often, the media focuses on soldiers who evaluate the work of the MCBiH in a negative way, arguing for instance that the MCBiH “is a good cover to satisfy formalities,” and that “soldiers who complain can end up worse off than if they kept their mouth shut.”⁶⁹ Some members of the JCBiH have also voiced dissatisfaction with the work of the MCBiH, citing among other concerns, questions about transparency.⁷⁰

The extremely complex and dysfunctional constitutional arrangement of the state of BiH brings ever new and complicated challenges.⁷¹ One is the inability of soldiers deployed outside their place of residence to access health care. Deputy Minister of Defence Živko Marjanac has claimed that this does not violate their rights “because soldiers are received by all hospitals in emergencies regardless of where they are located.” But Commissioner Šiljegović insists that problems with access to medical care and treatment “could be characterised as a systemic and collective human rights violation.”⁷²

The MCBiH has faced many obstacles since its establishment, not the least of which has been cementing its legitimacy and authority. Initially, even requesting documentation from the AFBiH was perceived as unacceptable, but this perception has shifted as the MCBiH has been increasingly viewed as a crucial element in the system of checks and balances. Given current concerns about certain practices within the AFBiH, the value of the MCBiH is likely to persist. For example, there are 4,940 commissioned and non-commissioned officers commanding 4,151 soldiers in the AFBiH, and the MCBiH finds it concerning that military personnel continue to be appointed to higher positions than their rank merits, and has raised the question of whether appointments have been made for material gain.⁷³

VI. Good Practice

This analysis of the functioning of the MCBiH has revealed certain good practices that are crucial to the improvement and development of the fundamental attributes of good governance, namely transparency, accountability, effectiveness, and responsiveness:

To exercise its mandate, the MCBiH must:

- remain fully independent of the bodies it supervises;
- secure adequate funding to perform its functions; and
- raise awareness of its functions via promotional materials, media, conferences, seminars, meetings, and other forms of outreach.

To improve complaints-handling, the MCBiH should:

- implement measures such as establishing an anonymous survey to gather feedback from members of the armed forces, comparing the number of received complaints with data from the anonymous survey, and introducing an online electronic complaint form;
- pay special attention to complaints regarding contractual issues, such as salary and benefits, hiring and termination, and status and positions;
- ensure appropriate conditions in the workplace, such as access to accommodation, food, and equipment;
- supervise compliance with military operations and deployment of military forces abroad; and
- ensure the option of pursuing review of complaints in the courts or legislature.

To enhance its reporting and recommendations, the MCBiH should:

- offer analysis of data contained in complaints;
- disclose any refusals to co-operate in public reports;
- detail any restrictions to accessing information, accompanied by written reasoning;
- exercise its competence in giving policy and legislative recommendations, to prevent repetition of practices that lead to violations of human rights and freedoms;

- establish effective monitoring for the appropriate and timely implementation of its recommendations;
- notify the public whenever its recommendations are not implemented; and
- include conclusions and recommendations as well as follow-up measures and explanations for relevant parties in its reports.

VII. Conclusion

The institution of the MCBiH, formed with the aim of strengthening the rule of law and protecting the human rights and freedoms of military personnel and cadets in the AFBiH and MoDBiH, has been largely successful in fulfilling its mandate in accordance to the principles of good governance. While there was initial resistance to the establishment of an ombuds institution, its role has become better accepted. This is due to the fact that the MCBiH has gained legitimising experience in providing the protections it is tasked with monitoring, and because the AFBiH and MoDBiH have begun to accept parliamentary oversight of their sphere of jurisdiction, relinquishing the internal controls previously in place to address human rights violations and maladministration.

As explained previously, the MCBiH is an independent institution, separate from the bodies it supervises and from the Parliament. This independence constitutes one of the most important principles of good governance. And, in order to successfully perform its functions, the MCBiH has been endowed with powers that allow it to operate without restrictions in requesting information and investigating complaints, which are key to functioning with transparency and effectiveness.

A vital development stemming from these powers is reflected in the capacity of the MCBiH to issue recommendations, to remedy or mitigate the harmful effects of poor decisions or, in some cases, policies or laws. While it is in this area that the MCBiH faces the greatest resistance from competent institutions, in terms of undue influence by executive bodies or the military chain of command over the content of reports or the timeline of their publication – which directly affects all five

principles of good governance – the MCBiH has an option to inform the Presidency of BiH, the PABiH and the JCBiH about the course of a case and the recommendations given. Furthermore, the ability of the MCBiH to address the public has helped exert additional pressure on responsible authorities, and strengthen the capacity of the institution to work in accordance with the principles of good governance.

It is important to point out that, despite these powers, good governance does not depend only on the work of the MCBiH and other competent institutions; indeed, it is closely related to the democratic transition process of the state. Therefore, the obligation of the state in helping institutions achieve a standard in good practice cannot be disregarded, as it is crucial to securing the rights and obligations safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁴ At the same time, this implies that BiH must continue to work towards its democratic goals.

In this process of democratic transition, the MCBiH has played a key role in contributing to the establishment of the principle of rule of law, and in doing so has brought important issues into the light and has involved important actors along the way. The principle of the rule of law and, generally, the protection of human rights is not yet universally accepted and applied in BiH. The ability of military personnel and cadets to file complaints that are brought to successful resolution contributes generally to the improvement of the application of rule of law. Just one example of this is the issue raised by the MCBiH related to access to healthcare – or lack thereof – which is linked to the residential status of military personnel. Denouncing it as a human rights violation, the MCBiH has called on several competent institutions to resolve this issue, which resonates with the population as a whole.

The good practices of the MCBiH need to be further cultivated, but experts say that the fact that both houses of Parliament discuss the Annual Reports of the MCBiH, and the Law on the MCBiH is a good foundation that is expanding through the rule books, are indicative of a well-developed institution, a mere five years after it was established.⁷⁵ As such, it is important that there is support from both governmental and non-governmental actors for the MCBiH to work effectively and in accordance

with the principles of good governance. It is especially important that all state institutions operate in accordance with these principles, as the work of the MCBiH will not be transparent, accountable, and effective if the institutions of the state are not functioning in line with these values. This primarily means that modern, legal, and democratic institutions must be further developed in BiH, including accompanying legislation that is harmonised with European standards. Only when the citizens of BiH express a profound cultural and political commitment to these values and accept them as their own can we expect full progress, both in the work of the MCBiH and in the state of BiH.

ANNEX

I. OMBUDS INSTITUTION

Name of Institution: Military Commissioner for Bosnia and Herzegovina (MCBiH)

Size and Organisational Structure: The office of the MCBiH has three (3) staff members.

Budget: Funding for the work of the MCBiH is provided for in the budget of the PABiH and indicated in a separate chapter in accordance with Article 12, paragraph 2, of the Law on the MCBiH. The MCBiH obtains and manages its funds independently from any institution and shall have an obligation to submit a financial report on expenditures to the Joint Committee and the Joint Committee for Administrative Affairs of the PABiH no later than March 31 of the current year for the previous year.⁷⁶

Due to a lack of systematisation in the MCBiH, the institution it is not financially independent. Currently, one officer is paid by Geneva-based DCAF, in accordance with a Memorandum of Understanding between the PABiH and DCAF.

Relationship to Ministry of Defence or Parliament: The relations of the institution of the MCBiH with the MoDBiH and PABiH are regulated by the Law on the MCBiH, the Rules of Procedures related to the work of the MCBiH,⁷⁷ and the Book of Rules on co-operation of the MCBiH with the MoDBiH and the AFBiH.⁷⁸ For any issues not regulated by this Law, The Law on Ministries and other administrative bodies of BiH and the Law on Administration apply.⁷⁹

Complaints:

Type and number of complaints received from members of the AFBiH, 2011-2013

Year	Total Complaints	Resolved	Pending
2011	116	79	37
2012	94	60	34
2013	117	97	20

II. OTHER INDEPENDENT OVERSIGHT BODIES

Name: The Institution of Human Rights Ombudsman of Bosnia and Herzegovina

Type of Ombuds Institution: Status A accredited by the International Coordinating Committee of the National Mechanism for Human Rights Protection, an independent mechanism for the protection of human rights, a state institution.

Mandate: The Institution of Human Rights Ombudsman in Bosnia and Herzegovina is intended to promote good governance and the rule of law, and to protect the rights and freedoms enshrined, particularly, in the Constitution of Bosnia and Herzegovina and international treaties appended thereto.⁸⁰ Besides the competences and authorities of the Ombudsman stipulated by the Law on the Institution of Human Rights Ombudsman of BiH, Article 2, the institution also has the power “to investigate all complaints concerning violations of human rights and freedoms allegedly committed by military administration.”⁸¹

Structure: The Institution of Human Rights Ombudsman in BiH is composed of three ombudsmen, with headquarters in Banja Luka and offices in Mostar, Sarajevo, and the Brčko District; and if necessary, more offices can be opened in different locations in BiH.⁸²

Budget (2013): The approved budget was 2,374,000 BAM (1,350,000 USD), plus a reserve of 34,171 BAM (19,500 USD), making the final corrected budget 2,408,171 BAM (1,370,000 USD). Expenditures for the same period were 2,333,416 BAM (1,330,000 USD).⁸³

NOTES

1. Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina, Official Gazette of BiH, No. 51/09, December 24, 2009.
2. Office of the Parliamentary Military Commissioner of Bosnia and Herzegovina, *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina for 2010*, March 31, 2011, 1.
3. Benjamin S. Buckland and William McDermott, *Ombuds Institutions for the Armed Forces: A Handbook* (DCAF 2012), 5.
4. *Ibid.*, 24.
5. Saša Janković, "There is still fear from filing complaints" in *Proceedings of the Best Practices in Protecting the Human Rights of Members of the Armed Forces Conference, March 21 and 22, 2013*, Publication No. 83 (Sarajevo: BiH Parliamentary Assembly Editions, 2013), 18.
6. Smiljko Sokol and Branko Smerdel, *Constitutional Law* (Zagreb: Informator, 1998), 67.
7. *Report on the Work of the MCBiH for 2010*, 9.
8. *Ibid.*, 8.
9. *Ibid.*, 11.
10. Office of the Parliamentary Military Commissioner of Bosnia and Herzegovina, *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina for 2013*, February 12, 2014, 32.
11. Enes Husejinović, Inspector General of the MoDBiH, interview July 7, 2014.
12. For more on this, see the website of the European Ombudsman, at: <http://www.ombudsman.europa.eu/en/home.faces> (accessed June 30, 2014).
13. *Report on the Work of the MCBiH for 2013*, 19. During an unannounced visit to the Liaison Battle Group, at the Miloš Obilić barracks in Pale, the MCBiH said the conditions in this particular barracks were unacceptable for normal work, especially related to hygiene and health and the very poor state of the building. The MCBiH expressed concern that the existing condition could seriously threaten the health of military personnel.
14. *Report on the Work of the MCBiH for 2013*, 16; *Report for 2012*, 13; and *Report for 2011*, 17.
15. See: Official Gazette of BiH, No. 51/09.
16. *Ibid.*, Article 2(4).
17. Candidates for the Military Commissioner are to be proposed by the Joint Committee, caucuses in the House of Representatives, and caucuses in the House of Peoples of the PABiH per Article 9(2) of the Law on the MCBiH.
18. Law on the MCBiH, Article 10.
19. *Ibid.*, Article 3.
20. *Ibid.*, Article 4.
21. Sead Muratović, Assistant Minister for Personnel Management, MoDBiH, interview, July 8, 2014.
22. Husejinović, interview.
23. Željko Grubešić, Adviser to the Joint Committee for Defence and Security in BiH, and Secretary of the PABiH delegation in the Parliamentary Assembly of NATO, interview, July 6, 2014.
24. Boško Šiljegović, Parliamentary Military Commissioner of BiH, interview, July 7, 2014.
25. Željko Mikavica, Staff Sergeant I class, letter of thanks, March 6, 2012.
26. Izet Mahić, Brigadier, letter of thanks, September 27, 2012.
27. Information from the MoDBiH.
28. D. Kovačević, "Sanirani nehumani uslovi za rad vojnika," *Nezavisne novine*, September 7, 2011, 7.
29. Law on the MCBiH, Article 8.
30. Rules of Procedure of the Parliamentary Military Commissioner of BiH, Official Gazette of BiH, No. 8/10, February 2, 2010.
31. Rules of Procedure of the MCBiH, Article 17.
32. *Ibid.*, Article 18.
33. *Ibid.*, Article 21.
34. After that period, the response of authorised representatives is to be submitted to a complainant within 8 days of the day of receipt.

35. Rules of Procedure of the MCBiH, Article 25. 22-23.
36. *Ibid.*, Article 26. 59. *Ibid.*, 22.
37. *Ibid.*, Article 28. 60. *Report on the Work of the MCBiH for 2010*, 16.
38. *Ibid.*, Article 29. 61. *Proceedings of the Best Practices in Protecting the Human Rights of Members of the Armed Forces Conference, March 21 and 22, 2013*, Publication No. 83 (Sarajevo: BiH Parliamentary Assembly Editions, 2013), 4-5. The MCBiH has also made several study visits to military ombuds institutions in numerous European countries.
39. *Ibid.*, Articles 30 and 31.
40. *Report on the Work of the MCBiH for 2010*, 5.
41. *Ibid.*, 9.
42. Office of the Parliamentary Military Commissioner of Bosnia and Herzegovina, *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina for 2011*, February 28, 2012.
43. *Ibid.*, 2.
44. *Ibid.*, 17.
45. *Ibid.*
46. Office of the Parliamentary Military Commissioner of Bosnia and Herzegovina, *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina for 2012*, February 22, 2013, 4.
47. *Ibid.*, 5.
48. Buckland and McDermott, *Ombuds Institutions for the Armed Forces*, 153.
49. *Report on the Work of the MCBiH for 2012*, 5.
50. Buckland and McDermott, *Ombuds Institutions for the Armed Forces*, 155.
51. *Report on the Work of the MCBiH for 2012*, 8.
52. *Report on the Work of the MCBiH for 2013*, 16-17.
53. *Ibid.*, 26.
54. Law on the MCBiH, Article 14(1).
55. Rule Book on Co-operation of the Parliamentary Military Commissioner of BiH with the Ministry of Defence of BiH, the General Inspectorate within the Ministry of Defence of BiH, and the Armed Forces of BiH, Articles 1-4.
56. See: Law on the MCBiH, Article 14(1).
57. Guidelines on Co-operation of the Parliamentary Military Commissioner of BiH with the Institution of Human Rights Ombudsman of BiH, Articles I-III.
58. *Report on the Work of the MCBiH for 2013*, 22-23.
59. *Ibid.*, 22.
60. *Report on the Work of the MCBiH for 2010*, 16.
61. *Proceedings of the Best Practices in Protecting the Human Rights of Members of the Armed Forces Conference, March 21 and 22, 2013*, Publication No. 83 (Sarajevo: BiH Parliamentary Assembly Editions, 2013), 4-5. The MCBiH has also made several study visits to military ombuds institutions in numerous European countries.
62. *Ibid.*, 8.
63. *Ibid.*, 10.
64. Fritz Guenther, Deputy Parliamentary Military Commissioner of the Federal Republic of Germany, in *Ibid.*, 11.
65. Council of Europe Parliamentary Assembly, "Constitutional reform in Bosnia and Herzegovina," Resolution 1513 (2006), para. 4.
66. *Report on the Work of the MCBiH for 2013*, 15.
67. *Ibid.*, 16.
68. *Report on the Work of the MCBiH for 2012*, 5-6.
69. Željka Domazet, "Vojni povjerenik samo paravan," *Glas Srpske*, August 5, 2011, http://www.glassrpske.com/novosti/vijesti_dana/Vojni-povjerenik-samo-paravan/lat/61648.html (accessed July 5, 2014).
70. The Chairperson of the JCBiH, Dužanka Majkić, is not opposed to the existence of the institution of the MCBiH but believes that "the way [the MCBiH] works is not transparent, and there is a great deal of dissatisfaction among those who complain of treatment in the AFBiH, while the MCBiH does nothing to protect them." See: Željka Domazet, "Vojnici traže da ih zaštite od Šiljegovića," *Glas Srpske*, http://www.glassrpske.com/novosti/vijesti_dana/Vojnici-traze-da-ih-zastite-od-Siljegovica/lat/61578.html (accessed July 5, 2014).
71. For more on this, see: Council of Europe PA, Resolution 1513, para. 2.
72. Davud Muminović, "Liječenje pripadnika OS BiH: Samo povjerenik vidi kršenje ljudskih prava," *Nesavisne novine*, <http://www.nezavisne.com/novosti/bih/Lijecenja>

pripadnika-OS-BiH-Samo-povjerenik-
vidi-krsenje-ljudskih-prava-122119.html
(accessed July 13, 2014).


73. "BiH ima više oficira i podoficira nego vojnika," Klix.ba, <http://www.klix.ba/vijesti/bih/bih-ima-vise-oficira-i-podoficira-nego-vojnika/130720004> (accessed July 5, 2014).
74. See Article 1 of the Convention
75. Željko Grubešić, interview, July 6, 2014.
76. Rules of Procedure of the MCBiH, Article 7.
77. Ibid.
78. Rule Book on Co-operation of the MCBiH with the MoDBiH, the GIBiH within the MoDBiH, and the AFBiH, Article 3.
79. Law on the MCBiH, Article 1(3).
80. Law on the Ombudsman for Human Rights in Bosnia and Herzegovina, Official Gazette of BiH, No. 32/00, 35/04 and 32/06, Article 1.
81. Ibid., Article 3.
82. Ibid., Article 1(3).
83. *Annual Report on Results of the Activities of the Human Rights Ombudsman in BiH for 2013*, Annex I, 173-174.



Office of the Ombudsman for National Defence and Canadian Forces

Canada

Mary McFadyen, Ombudsman and Public Interest
Disclosure Commissioner, Province of Saskatchewan



I. Introduction

The Office of the Ombudsman for National Defence and Canadian Forces (hereinafter, the Office) began its operations in June 1999. Given that the Office is approaching its twentieth anniversary, this is an opportune time to look at how it has evolved, how it carries out its mandate in the context of the principles of good governance, and how it contributes to ensuring good governance within the Canadian military.

This case study will review the functioning and capacity needs of the Office in terms of the guiding criteria of good governance, confirmed in Resolution 2000/64 of The Commission on Human Rights.¹ These are the principles of: 1) Transparency, 2) Accountability, 3) Effectiveness, 4) Independence, and 5) Responsiveness.

In practical terms, “good governance” means that an organisation should govern itself in a meaningful and open manner, and that its operations and resulting decisions – and in the case of an ombuds institution, its operations, investigations, findings, and recommendations – are well founded and based only on relevant information. Good governance is linked to the promotion and protection of human rights, as stated in Resolution 2000/64, and transparent, responsible, accountable, and participatory government is responsive to the needs of the people and is the foundation on which good governance rests.

Keeping these criteria in mind, this study will provide some background and context with respect to the human rights situation in Canada and in the Canadian Forces. It will also briefly discuss the reasons for the establishment of the Office of the Ombudsman, which came in response to a situation that demonstrated a need to protect human rights and correct maladministration within the Canadian military. It will then focus

on the legal framework and mandate of the Office, how it functions, and its role in preventing and addressing human rights violations and maladministration within Canada's Department of National Defence and its military. The capacity of the Office to fulfil its mandate, given the limits of its legal framework, will also be reviewed, and possible solutions that could improve its capacity to address human rights issues will be introduced along with steps that could be taken to improve its transparency, accountability, effectiveness, independence, and responsiveness.

Finally, this study concludes by answering the following questions: First, is the Office functioning in accordance with good governance criteria? And, are there any capacities of the Office that need to be strengthened in order to better function in line with these criteria?

II. Background and Context

Before detailing the current state of human rights within the Canadian Forces, it is important to provide some basic information about Canada's government and legal system and about how human rights are protected and discrimination prevented in Canada.

Canada

Canada's democratic system of government is based on the British parliamentary system. Legislative powers are divided between the federal government and the provincial (and territorial) governments. Each level of government has exclusive areas of responsibility and legislative competencies. Section 91 of the Constitution Act of 1867 gives the federal government exclusive jurisdiction over "Militia, Military and Naval Service, and Defence."²

In Canada, human rights laws are derived from many sources, including from common law that extends from custom and judicial decisions. Canada is also a signature party to many international agreements, whereby certain principles of international human rights law are incorporated into Canadian law. In addition, numerous human rights acts and codes at the federal, provincial, and territorial levels prohibit

discrimination on the part of employers and service providers under the relevant government's authority. Special human rights considerations in Canada include the fact that Canada is a bilingual (French and English) country with a multicultural population, and aboriginal peoples are afforded unique status.³

The most important legal instrument setting out the protection of human rights in Canada is The Canadian Charter of Rights and Freedoms.⁴ The Charter establishes and guarantees the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

The Charter further identifies democratic rights (such as the right to vote), mobility rights (such as the right of citizens to enter, remain in, and leave Canada, and to pursue a livelihood in any province), and legal rights (such as the right to life, liberty, and security and the right not to be deprived thereof), equality rights, and language rights. Under equality rights, the Charter prohibits discrimination on the grounds of "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability." The Courts have held that this is not an inclusive list and have extended those grounds to include sexual orientation and marital status.⁵

The Canadian Military

Military matters fall under the jurisdiction of the federal government in Canada. The National Defence Act establishes the Department of National Defence and sets out the structure and role of the Canadian Forces.⁶ The Minister of National Defence, who is a member of the federal cabinet, manages and directs the Canadian Forces and all matters relating to national defence. The Chief of the Defence Staff is directly responsible for the command, control, and administration of the Canadian Forces and is accountable to the Minister of National Defence. The Deputy Minister of National Defence, also accountable to the Minister, is responsible for the civilian Department of National Defence.

The Department of National Defence and the Canadian Forces make up the largest federal government department wherein military members work alongside civilian employees. It is comprised of approximately 24,000 civilians, 68,000 full-time military members, and 27,000 part-time military members.⁷ The mandate of the Canadian Forces is to:

1. Protect Canada and defend its sovereignty.
2. Defend North America in co-operation with the United States.
3. Contribute to international peace and security through operations around the world, most often in partnership with allies from other countries.⁸

Individual Human Rights in the Canadian Military

The Canadian Forces is a voluntary, professional military organisation. While military service has been compulsory in the past in Canada, it is not now. World War II was the last time conscription was used in Canada.

The Canadian Forces comprise three services: the Royal Canadian Air Force, the Canadian Army, and the Royal Canadian Navy. To be considered for service in the Canadian Forces, applicants must hold Canadian citizenship, be at least 17 years of age, and have completed at least Grade 10 (or *Secondaire IV* in Quebec). Applicants choose which of the three services they wish to join. Citizens from across Canada join the Canadian Forces, both male and female, and from all ethnic origins. Recruiting information from the Canadian Forces reflects that it accepts applicants from all genders, religions, ethnicities, and sexual orientations, and that it has a zero-tolerance policy against discrimination of any kind. As a commitment to this openness to diversity, the Canadian Forces “respects and accepts cultural dress and traditions and has adapted uniform standards to accommodate various beliefs and practices.”⁹

It should be noted that when a citizen joins the Canadian Forces, he or she serves at “the pleasure of the Crown” (the government). Once a citizen joins, he or she is only eligible to leave the Canadian Forces in accordance with relevant regulations and orders. Subsection 23(1) of the National Defence Act stipulates that the “enrolment of a person binds the person to serve in the Canadian Forces until the person is, in accordance with regulations, lawfully released.” The Courts have confirmed this

principle, and have ruled that there is no contract of employment for military personnel *per se*, and that the Crown does not assume the usual responsibilities and obligations that an employer would assume towards an employee in a normal employer-employee relationship.¹⁰ The nature of this relationship does limit the ability of military personnel to address discriminatory treatment that could arise as a result of his or her military service, and while some soldiers have questioned this limitation in the courts, the principle has been upheld. Still, the Canadian government has assumed certain obligations towards members of the Canadian Forces, as set out in the National Defence Act and in various regulations and policies.

Restrictions on Protected Rights Due to Military Service

The basic human rights of all Canadians are guaranteed by UN treaties signed by Canada, and set out in the Charter and in legislation. These apply to Canadians even if they volunteer for military service; however, some of these rights may be modified due to military requirements. In other words, what could normally be considered discriminatory practice by an employer may not be a discriminatory practice in the military context. For example, discrimination based on disability may be allowed in the military, if there is a military justification.

Per the National Defence Act, a Regular Force (full-time) member is required “at all time to perform any lawful duty.”¹¹ All members, regardless of their position within the military, are obliged to be ready for active service at any time, to be ready to deploy, and to perform any military duties assigned to them. Further, the “principle of universality of service” holds that all personnel must be capable at all times of performing a broad range of general military tasks, and common defence and security duties, as well as the specific duties associated with their occupations. They are “soldiers first,” regardless of their career path in the military.¹² However, the Canadian Forces make efforts to accommodate soldiers, accepting that every standard associated with universality of service must not only be objectively and reasonably necessary but must provide for individual accommodation.

Regular Force members are routinely transferred to live in locations throughout Canada and are sent on deployments outside of Canada. Thus, their entire lives, and those of their spouses and children, are affected by their military service requirements. The view of the Canadian Forces is that from the moment someone starts a military career, they – and their family – “become part of the larger Forces family.”¹³ While soldiers may have preferences as to where they are posted, given the nature of military service, they must move where they are ordered to deploy.

In recent years, the Office of the Ombudsman has been particularly focused on unfair treatment of military families and Reserve Force (part-time) members, as well as on the mental health of and treatment available for all Canadian Forces members.¹⁴

III. Mandate and Legal Framework

The first Ombudsman for the National Defence and Canadian Forces was appointed in June 1998, in response to various reports, including that of the Somalia Commission of Inquiry. The Inquiry investigated the military chain of command system, the leadership, discipline, actions and decisions of the Canadian Forces, and the actions and decisions of the Department in respect to the participation of Canadian Forces in the United Nations peacekeeping mission in Somalia in 1992-1993.¹⁵

On March 25, 1997, in a *Report to the Prime Minister on the Leadership and Management of the Canadian Forces*, the Minister of National Defence recommended instituting an ombudsman, to “provide informal information, advice and guidance to all personnel, military and civilian, in need of help or who believe they have been treated improperly.” The Minister indicated that the appointment of an ombudsman was “a clear demonstration of the continuing commitment to action by the Minister of National Defence and the [Canadian Forces] leadership to strengthen the effectiveness and transparency of oversight mechanisms, as well as to improve fairness and openness in the [Canadian Forces].”¹⁶

André Marin was appointed as the first National Defence and Canadian Forces Ombudsman, and his first task was to propose a mandate and

a framework under which the Ombudsman would operate. In his January 1999 report, *The Way Forward – Action Plan for the Office of the Ombudsman*, Marin proposed an operational framework for the Office.¹⁷ In 1999, after lengthy negotiations with legal advisors from the Department for National Defence and the Canadian Forces, the first mandate for the Ombudsman was established by the Minister of National Defence in Ministerial Directives, which were reviewed and updated in 2001 and have not been changed since.¹⁸

The Ombudsman is appointed by the Governor in Council (the federal cabinet). The Ombudsman's term of service is not set out in legislation, but has typically been five (5) years, on good behaviour, and may be renewed. Currently, the Ombudsman is appointed under subsection 127.1(1)(c) of the Public Service Employment Act, which provides for the appointment of a "special adviser to a minister."¹⁹

The Ministerial Directives set out the duties and functions of the Ombudsman and are enforced as a Defence Administrative Order and Directive (DAOD) within the Canadian Forces, meaning they are an order that applies to all military members and a directive that applies to civilian employees of the Department of National Defence.

The Ombudsman has a mandate to:

1. Act as a neutral and objective sounding board, mediator, investigator, and reporter on matters related to the Department of National Defence and the Canadian Forces;
2. Act as a direct source of information, referral, and education to support individuals in accessing existing channels of assistance and redress within the Department of National Defence and the Canadian Forces;
3. Serve to contribute to substantial and long-lasting improvements in the welfare of employees and members of the Department of National Defence and Canadian Forces community;
4. Review how complaints are handled under internal review mechanisms, to ensure that individuals are treated in a fair and equitable manner;

5. Conduct investigations into matters in order to identify and substantiate systemic problems and make recommendations to contribute to improvements in the welfare of members of the National Defence and Canadian Forces community;
6. Report annually to the Minister of National Defence on trends in the complaints and issues facing members of the National Defence and Canadian Forces, which shall be made public by the Ombudsman; and
7. Issue other public reports concerning investigations, or on any other matters within the Ombudsman's mandate, if it is considered in the public interest to do so.

Any of the following persons have the right to bring a complaint to the Ombudsman:

- Current and former Canadian Forces members;
- Current and former civilian employees of the Department of National Defence;
- Current and former members of the cadets;
- Current and former employees of the Staff of Non-Public Funds, Canadian Forces;²⁰
- Persons who apply to become members of the military;
- Members of the immediate families of any of the above; and
- Members from other military, attached or on secondment to the Canadian Forces.

The Ombudsman has broad powers, in that he or she can accept any complaint that relates directly to the Department or the Canadian Forces. Likewise, the Ombudsman is given significant discretion in determining how to deal with complaints. Complaints may be resolved informally, at the lowest level within the chain of command, rather than conducting a full investigation, for instance. While filing a complaint with the Office is a last resort, meaning that a complainant should use internal mechanisms to attempt to resolve his or her complaint first, the Ombudsman can review any matter right away if there are "compelling circumstances." What constitutes "compelling circumstances" is at the discretion of the Ombudsman, but considerations include whether accessing internal

mechanisms would cause “undue hardship” and whether the complaint raises systemic issues.²¹

Since its establishment, the Office of the Ombudsman has received over 20,000 complaints, and has dealt with most of those informally. The Office has prioritised trying to identify systemic issues, or those that affect many people and not just an individual, and bringing those issues to the attention of the chain of command and the public. The Ombudsman has used his or her discretion to issue Special Reports on any matters within the mandate of the Office if doing so “is in the public interest,” issuing at least 35 such reports since 1998. The Ombudsman has also made numerous recommendations since 1998, intended to lead to improvements in the quality of life and well-being of Canadian Forces members; and in most cases, those recommendations have been accepted by the chain of command.

IV. Functions, Powers, and Institutional Capacity

To be effective in carrying out its mandate, any ombuds institution must be independent from the organisation for which it has oversight, be impartial and objective in its work, operate in a confidential manner, and have an effective and credible review process.²² As with most ombuds institutions, the core functions of the National Defence and Canadian Forces Ombudsman are to receive and investigate complaints, make findings and recommendations, issue reports, and to ensure that the internal review mechanisms of the organisation it is mandated to oversee are functioning properly. If, after thorough and unbiased investigation, the Ombudsman determines that a government organisation has acted unfairly, recommendations may be made to the government to rectify the problem.

With respect to military members, the Office of the Ombudsman represents an opportunity to have allegations of unfair treatment or maladministration reviewed independently, outside the chain of command structure. The Office is a neutral third party with the ability to review issues that the organisation could not resolve internally through its internal complaint mechanisms. Given its main role of receiving and

reviewing complaints, the Office provides objective and independent insight into issues facing Canadian Forces members today. And in general, the Ombudsman ensures that the human rights of Canadian Forces members are promoted by:

- Resolving complaints quickly, at the lowest possible level within the military chain of command;
- Reviewing existing internal complaint review mechanisms and administrative processes to determine if they are fair;
- Recognizing trends (for example, a significant number of complaints on a certain matter may be indicative of an unfair policy, the unfair application of a policy, or a discriminatory practice, to which the Ombudsman can alert relevant authorities and recommend reconsiderations of a policy or its application);
- Tracking complaints and trends to identify when policies or practices might need to be updated, so that they better account for changes to society in general or for the evolution of legal and human rights principles (for example, related to the evolving concept of what constitutes a family in Canadian society, wherein most provinces now recognise same-sex marriages); and
- Giving military personnel the opportunity to have their allegations of unfair treatment heard and reviewed by a neutral party, and serving as an advocate for fairness.

The Ombudsman is required to issue an annual report that provides a summary of the work of the Office over the year, discusses trends in complaints, and outlines the issues facing members of the National Defence and Canadian Forces community. This is a public account of these issues and trends and offers the wider population information with which to evaluate the military. The Ombudsman may also issue reports concerning investigations or any other matters, if doing so is determined to be in the public interest. This is a powerful tool that allows the Ombudsman to make his or her findings and recommendations public and thereby bring to light unfair or discriminatory practices. Focusing public attention on a situation can often pressure the chain of command to act when it was not inclined to do so.

Internal complaint review mechanisms for the Canadian Forces are designed to resolve issues of unfair treatment and maladministration. Complaints should be filed with the Ombudsman only as a last resort, unless there are compelling circumstances. But, the Ombudsman is tasked with ensuring that these internal complaint mechanisms function properly and as intended; and so it is within his or her purview to review how complaints are handled by these mechanisms, and to ensure that individuals are treated in a fair and equitable manner.²³

Canadian Forces Redress of Grievance Process

Canadian Forces members are not permitted to form unions and cannot submit grievances collectively, but individual members can engage the Canadian Forces grievance system, created under the National Defence Act, which allows members to challenge any “decision, act or omission in the administration of the affairs of the Canadian Forces” that causes them to feel aggrieved, subject to certain exceptions.²⁴ There are two levels of review within the process: Initial Authority and Final Authority. If a complainant is not satisfied with the decision of the Initial Authority, they can forward it to the Final Authority – the Chief of the Defence Staff – for decision; a power that can be delegated by the Chief of the Defence Staff to the Director General of the Canadian Forces Grievance Authority.²⁵

Some grievances are required to be forwarded by the Final Authority to the Military Grievance External Review Committee. The role of the Committee is to review every grievance referred to it and provide findings and recommendations to both the Final Authority and to the complainant. While the Final Authority is not bound by the findings or recommendations of the Committee, in order to reject them, it must provide reasons.²⁶

Matters typically dealt with by Canadian Forces members under the Redress of Grievance process include: financial issues such as entitlement to certain benefits or miscalculations of benefits, issues linked to relocation, release from the military, and denial of promotion, and allegations of harassment and discriminatory treatment.

Complaints Concerning Military Police²⁷

Any person, including a Canadian Forces member, may make a complaint about the conduct of the military police in the performance of their police duties or functions. A military police officer may make an interference complaint if, when supervising a military police investigation, they believe on reasonable grounds that a Canadian Forces member or any senior official at the Department of National Defence has improperly interfered. The National Defence Act sets out the process for receiving and reviewing these complaints and establishes the Military Police Complaints Commission, which has a mandate to review complaints about conduct and to examine complaints about interference.

Conduct complaints, investigated by the Canadian Forces Provost Marshal, are monitored by the Commission. The Commission may assume responsibility for the investigation, or hold a public hearing, at any time during the process if it is deemed to be in the public interest to do so. Complainants can also request the Commission review their complaint if they are unsatisfied with the results of the Provost Marshal's investigation or disposition of the complaint. With respect to interference complaints, the Commission has the sole authority to handle them. At the completion of any complaint review, the Commission sends a report to the Minister, the Chief of the Defence Staff, and the Provost Marshal, to detail findings and recommendations. In the case of interference complaints, the Commission also sends findings and recommendation to the Deputy Minister and Judge Advocate General.²⁸

Ultimately, complainants who are not satisfied by the military police complaints process have the right to file a complaint with the Ombudsman; however, the power of the Ombudsman to investigate matters under or related to a military police investigation is limited.²⁹

The Canadian Human Rights Commission

Canadian Forces members can bring matters to the Canadian Human Rights Commission under the Canadian Human Rights Act.³⁰ The Act prohibits discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for an offence for which a pardon has been

granted or a record suspension has been ordered. Still, Section 15 of the Act provides that it is not discriminatory if a practice is based on a bona fide occupational requirement, in which case, it must be established that accommodation of the needs of an individual or a class of individuals would impose undue hardship on the person accommodating those needs, considering health, safety and cost. The Section specifically acknowledges the universality of service principle of the Canadian Forces.

While this external mechanism is available to Canadian Forces members, as it is to all individuals, it should be noted that the Act itself provides the Commission with the discretion to refuse to deal with a complaint if an internal grievance process is available by which the complainant can address the matter.³¹ Therefore, Canadian Forces members must usually exhaust the internal Canadian Forces grievance process before the Commission will entertain their complaint.

V. Capacity Building and International Co-operation

Since the creation of the Office, the following have been raised by various Ombudsmen as issues that limit the capacity of the Office to fulfil its mandate:

1. The Mandate Is Not Entrenched in Legislation

When the first Ombudsman, André Marin, proposed a mandate for the Office, he reviewed various military oversight models and ombuds principles.³² He was asked to negotiate with legal advisors to shape a mandate under which the Office could operate, and after lengthy negotiations, the Ministerial Directives were approved by the Minister of National Defence, under which the Office was to operate for its first six months. It was agreed that after six months of operation, the Directives would be reviewed and amended as required, before being incorporated into Regulations under the National Defence Act. In December 1999, at the end of the six-month period, the Ombudsman issued a report entitled *A Regulatory Regime for the Ombudsman*, outlining the first six months of operation and recommending changes that needed to be made to the Directives.³³ The Directives were finally reviewed and updated in 2001, but most of the recommendations were not followed and the Office was

not given the statutory or regulatory foundation that had been promised.

The Office continues to operate under the Ministerial Directives from 2001. Two Ombudsmen have formally recommended that the mandate and structure of the Office be entrenched in legislation, which would give the Office enduring protection. As it stands, the Office could be eliminated or its mandate changed by the Minister of National Defence very easily.³⁴

2. Greater Organisational Separation from the Department of National Defence is Needed

While the Office of the Ombudsman operates at arm's length from the Department of National Defence, it still is organisationally part of the Department. The Ministerial Directives provide that the Ombudsman "shall be independent from the management and chain of command of the DND and CF and shall report directly to and be accountable to the Minister."³⁵ However, in practical terms, the Office is required to follow the financial and administrative policies and procedures of the Department and the Ombudsman receives his or her financial and human resources delegations and authorities through the Departmental structure.³⁶ This could be resolved if the Office was made a separate entity and the position of Ombudsman was given status as the Head or Chief Executive Officer of the entity.

The Office does its best to operate at a distance from the Department, and has its own legal advisors and human resource and administrative employees to carry out basic corporate services; but this is not guaranteed in its operational framework as set out in the Ministerial Directives. The Directives only provide that the Office shall be responsible for its own communications and media relations.³⁷ What's more, the Ombudsman's employees are employees of the Department of National Defence. While all employees take an oath of secrecy when they commence employment, complainants could perceive the Office as part of the organisation they feel has treated them unfairly, which could lead them to distrust that it is impartial and independent.

3. The Office Lacks a Proceedings Privilege

An important role of ombuds institutions is to represent an alternative, free of charge method to examine a matter outside of formal judicial

proceedings. This role is investigative rather than adjudicative. The mandates of most Ombudsman thus apply a “proceedings privilege” to the Ombudsman and his or her employees, meaning that no legal proceedings shall be commenced against them for anything that is done or fails to be done, in good faith, in the performance of the duties of the Office. Mandates usually also provide that neither the Ombudsman nor any member of their staff should be compelled to give evidence in any judicial proceedings related to anything coming to his or her knowledge in the exercise or performance of his or her powers and duties.

In Canada, under the Ministerial Directives, the Office and the Ombudsman lack this protection. In fact, an employee of the Office was subpoenaed in 2012 to appear in front of the Military Police Complaints Commission to provide evidence.³⁸ While this was opposed by the Ombudsman, the Chairman of the Military Police Complaints Commission ruled that the investigator could be summoned to attend the hearing and provide evidence.³⁹

4. Confidentiality Is Not Guaranteed

Anyone seeking the assistance of the Ombudsman should be able to do so knowing that anything they say will remain confidential. Indeed, an ombuds institution cannot be effective if complainants are reluctant to bring forward a complaint for fear of reprisal or retaliation. They need to know that their contact with the institution will be kept confidential and will be safeguarded until or if they give specific permission for that information to be released. For this reason, the institution needs to control the information gathered during an investigation.

Most ombuds institutions are thus exempt from freedom of information and privacy legislation in their jurisdiction. Otherwise, anyone could make a request to obtain information held in complaint files, and, subject to certain exemptions, the Ombudsman would have to provide that information. Nonetheless, the Ombudsman of National Defence and Canadian Forces is subject to the federal Access to Information Act and Privacy Act.⁴⁰ As a consequence, the Office does receive requests for information and is required to respond to them. This means that when any complainant or witness provides evidence or documents to the Ombudsman or to Office staff, it must be clearly explained that the

confidentiality of the information gathered may not be guaranteed.

5. Third Party Contractors Cannot File Complaints

While the list of constituents served by the Ombudsman is broad, it could be broader. The Department of National Defence and Canadian Forces commonly contracts with private companies or outside service providers for services typically provided by a military member or a civilian employee of the Department. This results in military members working alongside contractors in military operations; yet these contractors are not allowed to bring complaints to the Ombudsman, even though their work puts them in a position to witness actions that directly affect the welfare and quality of life of Canadian Forces members and/or their families. The Ombudsman has recommended that the mandate of the Office be amended to allow contractors to bring complaints.⁴¹

6. The Investigative Process of the Office is Limited

The authority of an Ombudsman to investigate should be clearly established in law. Usually, an ombuds institution is given the power to enter the premises of any organisation subject to its jurisdiction, as well as to issue subpoenas and summon and examine anyone under oath, and compel the production of documents. While the Ministerial Directives state that the Ombudsman shall “thoroughly investigate” any complaint determined to warrant an investigation, the Ombudsman has been given no specific powers to do so.⁴² This has led to problems during certain investigations.

When the Office first began conducting investigations, officials from the Department of National Defence suggested that the Ombudsman should get no more access to information than any member of the public would if they made a request under the Access to Information Act (i.e. certain information would be redacted). Eventually, the Department agreed that because the Ombudsman was in fact acting as a delegate of the Minister, he or she should be entitled to complete information. Still, this issue continues to arise from time to time.⁴³ The Directives do provide that if he or she feels access to information has been unjustifiably denied, the Ombudsman can raise an objection to the competent authority; and if the explanations they provide are unsatisfactory, the Ombudsman can report on that denial of access.⁴⁴ However, ultimately it is preferable for

the investigative powers of the Ombudsman to be clearly established in its mandate.

7. The Office Has No Power over Veterans Affairs Matters

In Canada, the Department of National Defence is separate from the Department of Veterans Affairs, and the Ministerial Directives stipulate that the Ombudsman for National Defence and Canadian Forces shall not deal with any complaint that falls within the jurisdiction of Veterans Affairs Canada or the Veterans Review and Appeal Board. Yet, in practice, it can be very difficult to clearly draw jurisdictional lines. For example, if a current or a former member makes an application for a disability pension (for an injury relating to military service) to Veterans Affairs, and the current or former member is not satisfied with the decision and feels they were treated unfairly, the member cannot complain to the Ombudsman. However, if the application for a disability pension was rejected by Veterans Affairs because certain medical information was not provided or was deemed insufficient for the purposes of assessing the claim, the medical information concerning the injury would be held by the Canadian Forces. If the Canadian Forces did not forward proper information to Veterans Affairs so that it could assess the claim properly, and if the current or former member was having an issue getting this medical information from or correcting certain information held by the Canadian Forces, then the member *could* seek the assistance of the Ombudsman to obtain that information.

In 2006, André Marin submitted that the Office should be able to deal with complaints concerning Veterans Affairs.⁴⁵ It was his opinion that the Departments of National Defence and Veterans Affairs are so intertwined that the mandate of the Ombudsman should be expanded. This did not happen. Instead, a Veterans Ombudsman was created in 2007 and its mandate set out in an Order in Council.⁴⁶

Nonetheless, while the Ministerial Directives are imperfect, the Office has accomplished much since its creation and has ably served its constituents. Though short on actual investigative powers, past co-operation in conducting investigations and in dealing with the Canadian Forces has been cultivated through personal relationships. The Ombudsman and his or her staff often meet with military and civilian leaders to foster

those relationships; and given that officers typically change positions within the Canadian Forces every three years, the Ombudsman often has to educate the next incumbent on the role of the Office and on why it is important and necessary to co-operate during investigations. The Office is aware that outreach and education about its role and functions are essential.

The Ombudsman also appears before various parliamentary standing committees to discuss issues that affect the well-being and human rights of Canadian Forces members. The 2012-13 Annual Report of the Ombudsman noted two appearances before the Standing Committee on National Defence – to contribute to its study of a bill amending the National Defence Act and to report on the findings of *Fortitude Under Fatigue*, the Office's third follow-up analysis of the ability of the Canadian Forces to respond to the challenge of post-traumatic stress disorder and other operational stress injuries. The Ombudsman was also invited during that reporting period to testify at the Standing Committee on the Status of Women as part of its examination of sexual harassment in the federal workplace.⁴⁷

The Ombudsman also participates in the International Conferences of Ombuds Institutions for the Armed Forces (ICOAF). This offers the opportunity to share best practices and lessons learned between established military ombuds institutions and newer institutions or countries seeking to establish such institutions to promote and improve the human rights of their military personnel.

VI. Good Practices

This section will examine each of the good governance criteria that were identified in the Introduction in the context of whether the Office of the Ombudsman is meeting those criteria and whether there are areas where it could improve its performance. Respect for those criteria make the Office more responsive to its constituents, and better able to fulfil its role of ensuring that the Department of National Defence and Canadian Forces is also transparent, effective, accountable, and responsive to its members, the government, and the public.

Transparency

As part of the Canadian federal government, the Office of the Ombudsman is required to be transparent in its functioning and reporting. It spends public funds, and thus must follow rules and procedures in the Financial Administration Act.⁴⁸ Further, certain information – such as travel and hospitality expenses or contracts over \$10,000 – is required to be publicly available. As an organisation subject to access to information laws, the financial and administrative practices of the Office may be sought by any citizen or permanent resident of Canada.⁴⁹

The operations of the Office are also subject to outside scrutiny. The Ministerial Directives provide that the Ombudsman must produce an Annual Report and may also issue other reports on any investigations or other matters falling under the Ombudsman's jurisdiction.⁵⁰ This makes information about the work of the Ombudsman available to the government, constituents of the Office, and the public.

One area where transparency is less evident is with respect to the internal processes of the Office. How a complaint is reviewed internally and how and when an investigation is conducted are details not readily available in the public domain. This should perhaps be addressed, as complainants and the public must have confidence that these internal processes are fair and transparent.

Accountability

The Office of the Ombudsman accounts for its work and activities through public reporting. The Office also assists in holding the Department of National Defence and Canadian Forces transparent and contributes to the larger accountability framework of the Canadian Forces. Complaints reviewed by the Ombudsman deal not only with individual issues, but may also look at broader systemic problems and make recommendations therein. After an investigation, the Ombudsman may recommend, for instance, that “a law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed.”⁵¹

Additionally, when policies are unfair, or are applied unfairly, the Ombudsman can make recommendations to the Canadian Forces

to improve the situation. A look at the many reports issued by the Ombudsman since 1998 demonstrates that it has fulfilled its role in ensuring fair policies and procedures. The Office has clearly worked to make the chain of command accountable for their decisions, actions, and policies.

Effectiveness

An important role of any ombuds institution for the military is to make recommendations. However, it is equally important that the institution follows up to ensure that those recommendations are implemented, and if they are not, that the military explains why. The Office of the Ombudsman has demonstrated its dedication to following up on the recommendations it has made, and to reporting on progress made by the Canadian Forces in implementing them. This is an important function of the Office that allows it to measure and review the quality of its work and the of the recommendations it makes.

Independence

Given that the Office is legitimised in Ministerial Directives, it does, from a good governance perspective, lack independence from the Department of National Defence and the Canadian Forces. The Ombudsman reports to and is responsible to the Minister, who in turn is responsible for all matters relating to national defence; and the Minister has the power to change the mandate and authority of the Ombudsman. While the Office of the Ombudsman has sought to attain operational and administrative independence as best it can, it would be preferable if the authority of the Ombudsman was clearly established in legislation to ensure the formal existence and powers of the Office.

Responsiveness

The Ombudsman must be responsive to those who seek assistance in order to be viewed as reliable. While the website of the Office of the Ombudsman provides clear information on how to file a complaint, more information could be made available to all stakeholders. For example, the process used to review complaints, including example timelines, could be

provided to complainants. Statistical information could also be valuable in demonstrating how long it takes for complaints to be handled. By making any such information available, the Office is more responsive to the public. The Office represents a reassurance to the public that if bad conduct or human rights violations are found to have occurred within the Canadian military, that conduct can be dealt with by an independent mechanism in an effective, ethical, and fair manner.

VII. Conclusions

Human rights considerations in the military go beyond ensuring that soldiers are treated properly, to taking care that appropriate controls are in place so that the military as an organisation remains accountable to a democratically elected government. The Canadian system recognises the role of Parliament and other civilian controls to ensure that this accountability exists. This not only protects military personnel from arbitrary or unfair treatment, but safeguards the human rights of individuals who are not in the military as well. An ombuds institution serves to assure the public that their military functions in a way that promotes fair and ethical conduct, and is accountable and transparent; civilian oversight is seen as more independent and impartial than internal monitors within the military itself.

The value of the Ombudsman to the Canadian Forces is that he or she is able to resolve problems quickly, which is cost-effective and good for morale. Most complaints are handled informally, at the lowest level of the chain of command possible. When the Ombudsman makes recommendations as the result of a formal investigation, the resulting changes can be positive for soldiers and can enhance respect for their human rights. The interest of the Ombudsman is in assuring that laws, policies, and procedures are adhered to and that outcomes are fair. Since its inception, the Ombudsman has made recommendations to:

- improve/modernise policies;
- improve the recruiting of soldiers;
- improve medical care for soldiers;
- improve the treatment of military families;

- ensure fair and just working conditions for military and civilian staff; and
- improve internal complaint mechanisms to ensure they are functioning properly.

To meet expectations and carry out its duties and functions, the Office of the Ombudsman must operate in a manner that promotes confidence, meaning it must govern itself in an accountable way, use resources wisely and fairly, and serve the public interest in a transparent manner. The Ombudsman has little place to criticise an organisation for bad policies, practices, and procedures if the Office itself does not adhere to these standards.

The two questions posed at the start of this study were: Is the Office functioning in accordance with good governance criteria? And, are there any capacities of the Office that need to be strengthened in order to better function in line with these criteria? This analysis indicates that the Ombudsman for National Defence and Canadian Forces does function largely in accordance with good governance criteria; though there is some room for improvement.

The Office could be more accountable and transparent by providing additional information to the public regarding how complaints are dealt with internally. Currently, the Office lacks independence because its mandate is not entrenched in legislation, leaving it at risk of fundamental change by the Minister of Defence without consultation or notice. Because the Office operates within the financial, administrative, and human resources framework of the Department of National Defence, its employees are employees of the Department – which could lead to the perception that the Office is not really an impartial body. The Office also lacks strong investigative tools and the protections usually provided to ombuds institutions so that they can carry out investigations thoroughly and confidentially.

Despite these limitations, the Office has carried out its mandate with success and its value as a civilian oversight mechanism cannot be ignored. The Canadian Forces, like all military organisations, have the capacity to affect almost every aspect of members' lives, and the lives of their

families. The existence of the Ombudsman is a pledge to the general public that the Canadian military functions in a way that promotes fair and ethical conduct, that the human rights of military members are protected, and that the military operates in accordance with the good governance criteria of transparency, accountability, effectiveness, independence, and responsiveness.

ANNEX

OMBUDS INSTITUTION

Name of Institution: Office of the Ombudsman for National Defence and Canadian Forces

Legal Framework:

- The Ombudsman is appointed by the Governor in Council for a term of 5 years on good behaviour under section 127.1(1)(c) of the Public Service Employment Act. This term can be renewed.
- The duties and functions of the Ombudsman are set out in Ministerial Directives dated September 5, 2001, which are enforced as a Defence Administrative Order and Directive (DAOD), meaning they are an order that applies to members of the Canadian Forces and a directive that applies to employees of the Department of National Defence.

Relationship to Minister of National Defence:

- Under the Public Service Employment Act, the Ombudsman is a special adviser to the Minister of National Defence.
- The Ministerial Directives stipulate that the Ombudsman carries out his or her duties on “the Minister’s behalf;” and that the Ombudsman “shall be independent from the management and chain of command of the DND and CF and shall report directly to and be accountable to the Minister.”

Reporting Requirements:

- The Ombudsman is required to report annually to the Minister on activities, and at such other times as the Minister may require.
- The Ombudsman may issue reports concerning any investigations or other matters within the mandate of the Ombudsman.

Budget:

- In 2012-2013, the Minister of National Defence approved a budget of 6.7 million CAD (5 million USD) for the Ombudsman.
- Actual expenditures reported in its 2012-13 Annual Report were 5.8 million CAD (4.3 million USD), of which 4.7 million CAD (3.5 million USD) was related to salaries.
- The budget included a one-time funding allocation of 200,000 CAD (150,000 USD) for the Ombudsman to host the 4th International Conference of Ombuds Institutions for the Armed Forces. The actual expenditures for this event were reported as 100,000 CAD (75,000 USD).⁵²

Organisational Structure:

- The Office has 58.5 positions (measured in FTE – Full Time equivalent)⁵³
- Office staff includes investigators, complaint analysts, and intake officers.
- The Office also has its own communications staff, administration staff, and legal advisors.

Complaint Statistics:

Complaints received, by type, 2010-2013			
	2010-11	2011-12	2012-13
Total new complaints received	1,454	1,412	1,539
Top seven complaints by type	Benefits: 444 Release: 137 Medical: 102 Recruiting: 88 Posting: 73 Redress of Grievance: 73 Harassment: 59	Benefits: 351 Release: 154 Medical: 105 Recruiting: 99 Redress of Grievance: 80 Posting: 66 Harassment: 65	Benefits: 471 Release: 221 Medical: 116 Posting: 86 Recruiting: 84 Harassment: 78 Redress of Grievance: 61

Definitions:

- Benefits: denial of benefits and forced repayment of monies by members due to an administrative error.
- Harassment: abuse of authority.
- Medical: inadequate medical treatment and/or follow-up care.
- (Military) postings: denial of compassionate and cost-contingency posting requests.
- Recruiting: unfair rejection of applications and delays in the recruiting process.
- Redress of Grievance: delays and the unfair denial of financial compensation.
- Release (from military service): members who felt they were being unjustly released and those whose voluntary release requests were delayed.

NOTES

1. These principles are drawn from the UN Human Rights Council's definition of good governance. For more on this, see: UN Office of the High Commissioner of Human Rights, "Good Governance and Human Rights," <http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> (accessed November 3, 2016).
2. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), March 29, 1867. Available online at: <http://laws-lois.justice.gc.ca/eng/const/page-1.html> (accessed November 3, 2016).
3. *Ethnic Diversity Survey: portrait of a multicultural society*, No. 89-593-XIE (Statistics Canada, 2003). Available as a pdf at: <http://publications.gc.ca/Collection/Statcan/89-593-X/89-593-XIE2003001.pdf> (accessed November 3, 2016).
4. *Constitution Act, 1982*, Part I, April 17, 1982. Available online at: <http://laws-lois.justice.gc.ca/eng/const/page-15.html> (accessed November 3, 2016).
5. See: *Egan v. Canada* [1995] 2 S.C.R. 513 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1265/index.do>; and *Miron v. Trudel* [1995] 2 S.C.R. 418 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1264/index.do>
6. *National Defence Act*, R.S.C., 1985, c. N-5. Available online at: <http://laws-lois.justice.gc.ca/eng/acts/N-5/index.html> (accessed November 3, 2016). In the Act, the military is referred to as both the "Canadian Forces" and the "Canadian Armed Forces." Since 2013, it has been referred to in government publications as the "Canadian Armed Forces," but the shorter "Canadian Forces" is used in this study.
7. National Defence and the Canadian Armed Forces, "About the Department of National Defence and Canadian Armed Forces," May 23, 2014, <http://www.forces.gc.ca/en/about-us.page> (accessed November 3, 2016).
8. National Defence and the Canadian Armed Forces, "About the Canadian Armed Forces," July 18, 2016, <http://www.forces.gc.ca/en/about/canadian-armed-forces.page> (accessed November 3, 2016).
9. National Defence and the Canadian Armed Forces, "Life in the Forces," <http://www.forces.ca/en/page/lifeintheforces-75> (accessed November 3, 2016).
10. For example, see: *McClelland v. Canada (Minister of National Defence)*, 2002 FCT 244. Available online at: <http://canlii.ca/t/l7p> (accessed November 3, 2016).
11. *National Defence Act*, Ss. 33(1).
12. See: National Defence and the Canadian Armed Forces, "Fit To Serve: Universality of Service And Related Support Programs," Backgrounder, No. BG-11.006, March 25, 2011, <http://www.forces.gc.ca/en/news/article.page?doc=fit-to-serve-universality-of-service-and-related-support-programs/hnps1vfl> (accessed November 3, 2016).
13. National Defence and the Canadian Armed Forces, "Life in the Forces."
14. Special Reports on these topics may be found at: National Defence and Canadian Forces Ombudsman, "Investigative Reports and Analyses," October 13, 2016, <http://www.ombudsman.forces.gc.ca/en/ombudsman-reports-stats-investigations/index.page> (accessed November 3, 2016).
15. A paper copy of this report may be ordered through Government of Canada Publications (<http://publications.gc.ca/site/eng/70385/publication.html>). A pdf copy is available at this non-government website: <http://nkitson.files.wordpress.com/2010/01/somalia-inquiry-report1.pdf> (accessed November 3, 2016).
16. National Defence and the Canadian Armed Forces, "DND/CF Ombudsman," Backgrounder, No. BG-98.025, June 9, 1998, <http://www.forces.gc.ca/en/news/article.page?doc=dnd-cf-ombudsman/hnlhlgz> (accessed November 3, 2016).
17. André Marin, *The Way Forward – Action Plan for the Office of the Ombudsman*, January 20, 1999, Ottawa. Available as a pdf: http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/wf-aa.pdf (accessed November 3, 2016).
18. National Defence and Canadian Forces Ombudsman, "Ministerial Directives," August 17, 1999, <http://www.ombudsman.forces.gc.ca/en/ombudsman-about-us/>

- ministerial-directives.page#construction (accessed November 3, 2016). While these Directives remain in force, some Ombudsmen have recommended to the Minister of National Defence that the Office have a stronger foundation, for instance under legislation. For example, see: André Marin, *Overhauling Oversight*, white paper, March 30, 2005. Available as a pdf at: http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/overhauling.pdf (accessed November 3, 2016). Also see: National Defence and Canadian Forces Ombudsman, "A Sniper's Battle – A Father's Concern," April 2007, <http://www.ombudsman.forces.gc.ca/en/ombudsman-reports-stats-investigations-a-snipers-battle/snipers-battle.page#sb-conclusion> (accessed November 3, 2016).
19. *Public Service Employment Act*, S.C. 2003, c. 22, November 7, 2003. Available online at: <http://laws-lois.justice.gc.ca/eng/acts/P-33.01/FullText.html> (accessed November 3, 2016).
 20. Non-Public Funds provides personnel support programs that provide goods, services, and recreational facilities to Canadian Forces personnel.
 21. Ministerial Directives, Subsection 13(2).
 22. These qualities were set out as the necessary underlying principles needed to establish the first mandate of the Ombudsman for National Defence and Canadian Forces in: Marin, *The Way Forward*.
 23. Ministerial Directives, Subsection 3 (iii).
 24. *National Defence Act*, Section 29.
 25. *Queen's Regulations and Orders for the Canadian Forces (QR&Os)*, Volume I, Chapter 7, "Grievances." Available online at: <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/toc-07.page> (accessed November 4, 2016).
 26. *National Defence Act*, Section 29.13.
 27. See: *National Defence Act*, Part IV, "Complaints about or by military police."
 28. For more information, see: Military Police Complaints Commission of Canada, "About Us," September 20, 2013, <http://www.mpcc-cppm.gc.ca/01/100/100-eng.aspx> (accessed November 4, 2016).
 29. Section 15 of the Ministerial Directives stipulates that the Ombudsman will not purport to perform the function of the military police in investigating allegations of criminal activity.
 30. *Canadian Human Rights Act*, R.S.C. 1985, C. H-6. Available at: <http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html> (accessed November 4, 2016).
 31. *Ibid.*, Subsection 41(1).
 32. Marin, *The Way Forward*.
 33. Office of the Ombudsman for National Defence and Canadian Forces, *1999-2000 Annual Report*, June 2000. Available as a pdf at: <http://publications.gc.ca/collections/Collection/D70-2000E.pdf> (accessed November 4, 2016).
 34. See: Marin, *Overhauling Oversight*; and National Defence and Canadian Forces Ombudsman, "A Sniper's Battle."
 35. Ministerial Directives, Section 3(2).
 36. In its 2015 Spring Report, the Auditor General of Canada examined the internal controls that the Office of the DND/CF Ombudsman had in place to safeguard public assets and to ensure public funds and resources were used economically and efficiently. The Auditor General concluded, *inter alia*, that the Department of National Defence had not fully defined its roles and responsibilities *vis à vis* the Ombudsman to ensure these safeguards were in place. The Auditor General also noted that these monitoring activities should not impede the operational independence of the Ombudsman. See: http://www.oag-bvg.gc.ca/internet/English/att__e_40388.html
 37. Ministerial Directives, Section 6.
 38. See: Military Police Complaints Commission of Canada, "Fynes Public Interest Hearing – Witness List, Week of June 25, 2012," <http://www.mpcc-cppm.gc.ca/03/303/c-eng.aspx> (accessed November 4, 2016).
 39. Military Police Complaints Commission, *Ruling on the Motion by Complainants to Summon Patrick Martel to Attend and Give Evidence*, June 14, 2012. Available as a pdf at: <http://mdlo.ca/wp-content/uploads/2013/05/2012-06-14-Decision->

- Motion-to-Summons-Patrick-Martel-as-a-Witness.pdf (accessed November 4, 2016).
- national-defence-canadian-forces.page (accessed November 4, 2016).
40. See: *Access to Information Act*, R.S.C. 1985, C. A-1, <http://laws-lois.justice.gc.ca/eng/acts/A-1/>; and *Privacy Act*, R.S.C. 1985, c. P-21, <http://laws-lois.justice.gc.ca/eng/acts/P-21/index.html> (accessed November 4, 2016).
 41. See: National Defence and Canadian Forces Ombudsman, "Workplace Conflict at the Halifax Operational Trauma and Stress Support Centre," 2003, <http://www.ombudsman.forces.gc.ca/en/ombudsman-reports-stats-investigations-workplace-conflict/report.page#wc-team> (accessed November 4, 2016).
 42. Ministerial Directives, Section 20(1).
 43. See: National Defence and Canadian Forces Ombudsman, "A Sniper's Battle."
 44. Ministerial Directives, Section 24.
 45. See: Marin, *Overhauling Oversight*.
 46. Order No. P.C. 2007-530, April 3, 2007. For more, see: Veterans Ombudsman, "Order in Council," <http://www.ombudsman-veterans.gc.ca/eng/about-us/ombudsman/order> (accessed November 4, 2016).
 47. Office of the Ombudsman for National Defence and Canadian Forces, *Annual Report 2012-2013*, April 2013. Available as a pdf at: http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/annualreport-2012-2013.pdf (accessed November 4, 2016).
 48. *Financial Administration Act*, R.S.C. 1985, c. F-11. Available online at: <http://laws-lois.justice.gc.ca/eng/acts/f-11/page-1.html> (accessed November 4, 2016).
 49. *Access to Information Act*, Section 4(1).
 50. Ministerial Directives, Section 38(1).
 51. Ministerial Directives, Section 36(d).
 52. See: Office of the Ombudsman, *2012-2013 Annual Report*.
 53. National Defence and the Canadian Forces, "Department of National Defence – Departmental Performance Report 2012-13," <http://www.forces.gc.ca/en/about-reports-pubs-departmental-performance/2013-section-iv-office-ombudsman-department->



Parliamentary Ombudsman of Finland

Riina Turtio

I. Introduction

The history of the Parliamentary Ombudsman of Finland is almost as long as the history of the Finnish armed forces. The law of the Parliamentary Ombudsman was passed in the summer of 1919 and came into effect in 1920, while the armed forces were created in 1918 – less than two months after Finland became independent from Russia. The creation of both institutions was thus part of the very foundation of the Finnish state, and they have since formed an important part of it. But, the institution we know today has evolved over time.¹

The Parliamentary Ombudsman has overseen the legality of the armed forces since 1933, when it was given a special role in handling complaints about the forces, and in monitoring the treatment of conscripts.² This study revisits the role of the Parliamentary Ombudsman of Finland in the 21st century, advancing a country-specific example within a comparative framework on the functioning and development of ombuds institutions. This case study analyses how effective, responsive, transparent, and independent the functioning of the Ombudsman is. In addition, it looks at how the Ombudsman has contributed to the accountability of the Finnish Defence Forces.

This study begins by exploring how the Ombudsman has responded to challenges in cases in which citizens believe their rights have been violated or they have been treated unfairly. In recent years, the easy access provided by modern technology, and the high expectations that citizens have of public services and of the Ombudsman, have contributed to an increasing number of complaints, leading to case backlogs. In some cases, complaints have been pending for more than a year. This study will examine good practices used successfully by the Ombudsman in carrying

out its mandate but also seeks to identify remaining weaknesses as well as avenues through which the Ombudsman could function in better accordance with the international criteria of good governance.

The Parliamentary Ombudsman of Finland, a general ombuds institution, is mandated to receive complaints about all state agencies as well as other parties performing public acts. Complaints are received from anyone who believes that any such party (courts of law, other legal authorities or officials, employees of public bodies) has acted unlawfully or neglected a duty in the performance of their tasks.³ The breadth of this mandate has its advantages and disadvantages.

The long history of the Ombudsman and the resources at its disposal make it a powerful social actor. Deputy Ombudsman Jussi Pajujoja feels that the weight of the institution enables it to deal with the Finnish Defence Forces as it would any other state organisation; there is no need for special treatment, and “no walking on eggshells.”⁴ Even if the issues at hand are sometimes different, the procedures are always the same. Yet, one significant difference between state institutions and the military is the complaints threshold. Filing a complaint in a hierarchical and enclosed institution like the armed forces, where there is an emphasis on conformity and obedience, can be difficult.⁵ This highlights just how important the functions of the Ombudsman – such as own-motion investigations, complaints-handling, and inspections – are to effectively addressing human rights challenges in the Finnish Defence Forces.⁶ In addition to these functions, the Ombudsman also oversees the legality of the armed forces and protects the human rights of conscripts and permanent staff.

II. Background and Context

Unlike many other European countries, Finland has a conscription army. Over 22,000 men complete their military service yearly, or approximately 75% of men in each age group.⁷ Since 1995, Finland has opened service for women, and each year approximately 300-400 women complete military service.⁸

In 2013, the Finnish Defence Forces employed around 13,700 people, 38% of whom were civilians.⁹ By 2015, that number was reduced to 12,000 in accordance with defence reform, which required structural changes to the armed forces in both the number of units as well as personnel.¹⁰ Still, 2014 and 2015 saw a positive development, with the highest number of female applicants for voluntary military service to date.¹¹

In general, during peace time, soldiers in Finland hold the same rights as other Finns; although there are limitations to their freedom of movement, participation in politics, and behaviour in public places.¹² In recent years, the most tangible complaints lodged by conscripts to the Ombudsman have been related to healthcare, housing conditions, and service safety. According to the Conscript Committee and Conscript Union, the biggest challenge to the conditions and human rights of the conscripts is their socioeconomic situation. Specific challenges vary between service locations, but are linked by a lack of support and advisory services. Both the Committee and the Union emphasise that uniformity in service conditions should be assured.

When the human rights situation in Finland has been evaluated in international arenas, different issues have been raised regarding the armed forces, concerning universal conscription and the conditions for people who choose civil service. Amnesty International, for example, has expressed concerns over the treatment of conscientious objectors and the comparative length of service for persons opting for civil over military service.¹³

The human rights issues that have most strongly resonated in Finnish society relate to the treatment of women, discrimination, or xenophobic and racist attitudes, and these issues are also reflected in the Finnish Defence Forces. A study carried out in 2012 by three researchers from the University of Tampere reported on experiences of bullying and discrimination by male and female conscripts, and investigated how gender equality was actualised among the permanent personnel of the armed forces. The results showed that 56% of female conscripts had experienced bullying during their service, and 32% of their male colleagues reported the same.¹⁴ Also reporting higher incidences of bullying were national minorities of Roma and Sami people; more than half of them

had experienced bullying during their military service. However, bullying experienced by conscripts from immigrant backgrounds occurred at only a slightly higher rate than the overall numbers for male conscripts.¹⁵

The study found that sexual harassment of female conscripts was usually at the hands of fellow conscripts, rather than permanent personnel of the armed forces, and that the most commonly reported form of sexual harassment was the use of offensive language.¹⁶ The 35% of female conscripts who indicated having experienced harassment was considerably higher than the 14% of male conscripts who did.¹⁷ And the study suggested that a number of other challenges to achieving gender equality among the permanent personnel of the Finnish Defence Forces remain. For instance, civilian women working in expert roles continue to have their work undervalued, to the extent that they have not been included in meetings about their field of expertise.¹⁸

What makes these negative phenomena harder to address is that they often go underreported. According to the study, male conscripts often did not relate their experiences of bullying or harassment to anyone, while female conscripts talked about it mostly to their peers, family, and friends.¹⁹ Only 10-12% of female conscripts reported bullying to their group leader or the permanent staff of the armed forces, and just 14-16% reported cases of harassment to their superiors.²⁰

Underreporting significantly impacts the work of the Ombudsman, and in recent years, very few complaints related to bullying or harassment have been reported to institution.²¹ This may be due in part to the apparent preference of the Finnish Defence Forces that these issues be dealt with internally. In directions to conscripts, they are advised to report bullying to their supervisors, the Conscript Committee, a healthcare worker, or the military priest; but the Ombudsman is not mentioned except in the case of seeking redress for disciplinary measures.²² According to the Defence Forces Principal Legal Advisor, Tuija Sunberg, these directions do not preclude conscripts from filing complaints about bullying or harassment with the Ombudsman, but rather encourage them to seek the most efficient path by which to redress grievances, which is through internal mechanisms.²³

Unlike in the cases of bullying and harassment, issues of unequal treatment are often raised with the Ombudsman.²⁴ For example, the Ombudsman has addressed issues related to length of service – as some conscripts were made to complete a longer service against their will²⁵ – and with regards to holidays and free time, the standards for which vary significantly among units.²⁶ Indeed, the study carried out by the University of Tampere reported that cases of unequal treatment were common among conscripts, with 55% of female conscripts experiencing unfair treatment during their service, 91% of whom felt that this discrimination was grounded in gender.²⁷

III. Mandate and Legal Framework

The Parliamentary Ombudsman is one of two main oversight bodies in Finland; the other is the Chancellor of Justice, and the mandates of the two institutions run parallel. Both oversee the legality of the acts of the government and president, but a 1991 law divides tasks between the Chancellor and the Ombudsman, making the Chancellor responsible for overseeing the Minister of Defence and the Ombudsman responsible for guarding basic human rights and monitoring the legality of institutions, including the armed forces.²⁸ Consequently, the Chancellor often transfers complaints about the armed forces to Ombudsman, but handles complaints about the Minister and Ministry of Defence.

The model for the Parliamentary Ombudsman of Finland came from Sweden, where the institution has operated since 1809. However, when the Office of the Ombudsman was first established, its main goal was not related to human rights protection or oversight of state officials but to regulating relations between different state organs. It took time for the Ombudsman to gain legitimacy, and its first years were so difficult that proposals to dissolve the institution were made in both 1921 and 1932. Still, various legislative changes continued to shape the framework of the Office of the Ombudsman. In the 1920s, the independence of the Office was enhanced by making the Ombudsman ineligible to serve as a parliamentarian. Then, in the 1950s, the position was opened to women.

Even if the role of the Ombudsman was once different, its functions were always very similar: handling complaints and initiating own-motion investigations and inspections. Over time, as complaints have become more numerous, own-motion investigations and inspections have been reduced. The nature of complaints has changed, too.²⁹ During the first half of the 20th century, complaints received by the Ombudsman were typically connected to the law and order functions of the state, such as issues related to the courts, prisons, and police, and with how punishments were carried out.³⁰ During the Winter War from 1939 to 1940 and the Continuation War from 1941 to 1944, complaints about the armed forces became prevalent. In recent years, complaints continue to concern police officials, courts, and prisons; but responsibilities undertaken by the Finnish state in the second half of the 20th century, by which citizens have grown to expect the provision of more and better services from the state, have led to an increase in complaints related to healthcare and social security. These are among the most frequent types of complaints today.³¹

The role of the Ombudsman in improving the rights of Finnish Defence Forces personnel and conscripts was particularly salient in the 1970s and 1980s. During those decades, the Ombudsman played an active part in working to eliminate bullying from the armed forces, and generally in overseeing the human rights of conscripts and permanent staff, for example with frequent inspections.³² This proactive approach was also reflected in the high number of own-motion investigations carried out by the Ombudsman from 1975 to 1985, when 15 such investigations were initiated each year, on average.³³ Before this period, the Ombudsman had relied mostly on reports from the Defence Command and other military leadership on the prevalence of bullying, but from the mid-1970s onwards, more emphasis was put on the views of conscripts themselves.

Former Deputy Ombudsman Jukka Lindstedt explains that advances made in reducing bullying were due partly to changing attitudes among both conscripts and military leadership; but even this was linked to the proactivity of the Ombudsman. As bullying began to be considered unacceptable, practices once considered a normal part of the training or practice of the forces were interpreted as bullying. And this new

recognition was largely a result of written statements by the Ombudsman on the topic.³⁴

Studies have determined that it is usually Finnish Defence Forces conscripts, rather than permanent staff, who engage in bullying. However, since the mandate of the Ombudsman is to oversee only the *conditions* of conscripts, their actions cannot be addressed by the Office. Instead, the Ombudsman can oversee the response of permanent staff to the actions of their subordinates.³⁵ The position of the Conscript Union is that it is not this response to known cases of bullying that can be problematic, but the fact that bullying may not be reported to the permanent staff at all. As such, both the Conscript Union and the Conscript Committee hold that the key to reducing bullying in the armed forces is leadership training of conscripts.³⁶

The case of bullying sheds some light on the responsibilities and tools that constitute the legal basis of the Parliamentary Ombudsman, as established in the Finnish Constitution and Ombudsman Act of 2002.³⁷ These texts mandate that the Ombudsman receive complaints from anyone who thinks that a party performing public acts has acted unlawfully or neglected a duty in the performance of their task.³⁸ The Ombudsman, together with two deputy Ombudsmen, is appointed to the Office by the Parliament for a period of four years.³⁹ The main requisite is that the Ombudsman has an excellent knowledge of law.⁴⁰ The Parliament is permitted to dismiss the Ombudsman for extremely serious reasons, by a two-thirds vote.⁴¹

In the Ombudsman Act, several clauses ensure the independence and impartiality of the Office of the Ombudsman: during his or her term, the Ombudsman cannot hold any other public office or have any “public or private duties that may compromise the credibility of their impartiality as overseers of legality or otherwise hamper the appropriate performance of their duties as Ombudsman or Deputy Ombudsman.”⁴² Further, the Ombudsman and the Deputy Ombudsmen are required to declare their interests immediately after their appointment, including providing information on any “business activities, assets and duties and other interests which may be of relevance in the evaluation of his or her activity as Ombudsman or Deputy Ombudsman.”⁴³ Ombudsmen are also obligated

to notify the Parliament if there is any change to what is contained in their declaration, which strengthens institutional transparency.⁴⁴

It is not only the appointment and dismissal of the Ombudsman that is dependent on Parliament; the budget of the Office also comes from Parliament. Nevertheless, the Ombudsman does participate in decision making about its own budget by submitting an estimate to Parliament, where the final decision is made. Over the last decade, the budget of the Ombudsman has steadily increased; and since 2008 it has been over 5 million Euro (5.5 million USD). The budget for 2015 was 5.8 million Euro.⁴⁵ The Ombudsman does not report on how these appropriations are used, but according to Deputy Ombudsman Jussi Pajuoja, 90% of funding for the institution goes towards the salaries of personnel.⁴⁶

The increase in the budget and in number of personnel for the Office of the Ombudsman has been part of the effort to keep up with a constantly increasing number of complaints. From 2003 to 2013, personnel increased just over 10%, from 54 to 60 individuals, while the number of complaints grew by 42%.⁴⁷ In 2013, the Ombudsman received 5,043 new complaints. Combined with own-motion investigations and complaints carried over from the previous years, this amounted to 7,199 cases to handle.⁴⁸

All complaints to the Ombudsman must be submitted in writing, and no anonymous complaints are accepted.⁴⁹ Complainants must also specify the subject of their complaint, so that the Ombudsman may send a request for clarification to the appropriate authorities.⁵⁰ The Ombudsman will not investigate a complaint if it is already pending elsewhere or if a possibility of appeal exists through regular channels. In 2006, two researchers from the University of Joensuu set out to study the effectiveness of the Office of the Ombudsman in complaints-handling. They found that the increase in complaints has possibly reduced the institution's effectiveness. The study determined that the number of complaints received by post or fax had decreased in recent years, but the number received online had increased nearly every year.⁵¹ In 2015, 65% of complaints arrived by email.⁵²

Filing online complaints is easy and accessible. This is a positive development in terms of responsiveness, but it also brings an increased number of groundless complaints, creating case backlogs.⁵³ By 2008, over

500 complaints had been pending for more than a year.⁵⁴ To remedy this situation, the Ombudsman has made substantial efforts to effectively and successfully reduce backlogs. And, partly in response to the increasing number of complaints, legislative changes were made to the Parliamentary Ombudsman Act. The Act had stipulated that the Ombudsman “shall not investigate a complaint relating to a matter more than five years old,”⁵⁵ and this was amended in 2011 to two years, except in cases where there is “a special reason for the complaint being investigated.”⁵⁶ This change has not decreased the number of complaints received by the Ombudsman, though it may have simplified investigations.

One more shortcoming of the legal framework for the Office of the Ombudsman that came to light due to the high volume of complaints was related to the discretion of the institution to investigate complaints. Originally, the Parliamentary Ombudsman Act stipulated that the Ombudsman investigate any complaint “if the matter to which it relates falls within his or her remit and if there is reason to suspect that the subject has acted unlawfully or neglected a duty.”⁵⁷ Under this provision, the Ombudsman lacked the full discretionary powers to assess complaints before investigating them. However, changes in the Act in 2011 gave the Ombudsman the right to take “measures that he or she deems necessary from the perspective of compliance with the law, protection under the law or implementation of fundamental and human rights”⁵⁸ – which has been interpreted to mean that the Ombudsman is no longer obligated to investigate complaints considered frivolous or groundless.

This change is important to increasing the effectiveness of the Office given that the institution has at least two other key tasks on top of receiving and investigating complaints, for which it also needs resources: initiating own-motion investigations and undertaking inspections.⁵⁹ The Parliamentary Ombudsman Act emphasises that the Ombudsman “shall carry out inspections in prisons and other closed institutions to oversee the treatment of inmates, as well as in the various units of the Defence Forces and Finnish peacekeeping contingents to monitor the treatment of conscripts, other military personnel and peacekeepers.”⁶⁰ And, the value of inspections and own-motion investigations with regards to the armed forces and the conditions of conscripts has continuously been noted by the Ombudsman in its Annual Reports.

IV. Functions, Powers, and Institutional Capacity

Investigations and Inspections

The Ombudsman investigates complaints and makes inspections in accordance with the specific enforcement powers and access to information he or she is afforded. The Ombudsman does not have full discretionary powers to refuse complaints, but does have enforcement powers that other ombuds institutions lack, and may order a police inquiry or preliminary investigation to clarify any issue under scrutiny.⁶¹ The Constitution of Finland also allows the Ombudsman to press criminal charges, access the premises of all public institutions, and request that public officials provide information relevant to any investigation, including classified documents.⁶²

In recent years, approximately three-quarters of complaints received about the Finnish Defence Forces have been investigated by the Ombudsman.⁶³ According to Annual Reports issued by the Office, conscripts often complain about issues that the Ombudsman does not investigate, such as the length of service, promotions, training, and service locations. In these cases, the Ombudsman reviews the procedures but not the content of decisions, and emphasises that these issues should be dealt with in the collective bargaining process between employees and employer.

Beginning in 2010, and echoing the Swedish system for complaints-handling, the Ombudsman implemented a more streamlined process to immediately handle complaints that aren't deemed to require investigation.⁶⁴ These include complaints that exceed the time limit, are groundless, are non-specific, fall outside the purview of the Ombudsman, are pending elsewhere, or are identical to previous complaints. In any of these cases, if it becomes clear that the complaint is unsuitable for immediate handling, it is handled in the standard manner.⁶⁵ Since this system for immediate handling started in 2010, 16% to 21% of complaints have been handled in this way, shortening overall processing times.⁶⁶ Despite growing numbers of complaints, the average processing time has been continuously reduced over the last six years.⁶⁷ Furthermore, in 2013, the Ombudsman succeeded in achieving a long-term goal to limit the

maximum processing time of any complaint to one year. By the end of that year, no pending complaints were over a year old; something that had not been true for 20 years.⁶⁸

Another measure adopted by the Ombudsman to make complaints-handling more efficient derives from amendments made to the Parliamentary Ombudsman Act in 2011, which gave the Ombudsman the right to transfer complaints to another competent authority without the consent of the complainant.⁶⁹ The Ombudsman has also made an effort to reduce overlap in investigations by different authorities, in particular the Chancellor of Justice, and the two institutions share information to ensure they are not investigating the same complaints. As to whether complaints are being handled by internal mechanisms of the armed forces, the Ombudsman sends a request for clarification to the Defence Command to determine if complaints it receives are already being processed.⁷⁰

Once the Ombudsman decides to investigate a complaint, he or she must determine whether the subject (the party performing public acts) has acted unlawfully or neglectfully. If the Ombudsman concludes this is the case, one of four measures can be taken to address the violation. The harshest of these, a criminal charge, is very seldom used.⁷¹ This suggests that the Ombudsman supports and develops good governance over instigating prosecution.⁷² Outside of criminal charges, the Ombudsman can issue reprimands, opinions, and recommendations.⁷³ The Ombudsman issues relatively few reprimands overall, and in recent years has given very few to members of the Finnish Defence Forces.⁷⁴ A more common measure taken by the Ombudsman is the issuance of opinions on “what constitutes a proper observance of the law.”⁷⁵ Over the last decade, the Ombudsman has issued approximately 11 opinions to the armed force each year.⁷⁶ According to the effectiveness study carried out in 2006, officials do not usually differentiate between reprimands and opinions, and have called for the Ombudsman to make a clearer distinction between them.⁷⁷

Lastly, the Ombudsman can make recommendations to the government or to officials “that an error be redressed or a shortcoming rectified.”⁷⁸ If a problem is related to laws and regulations rather than to their interpretation, the Ombudsman can “draw the attention...to defects in legislation or official regulations, as well as make recommendations

concerning the development of these and the elimination of the defects.”⁷⁹ Over the last decade, the Ombudsman has made eight recommendations to the Finnish Defence Forces.⁸⁰

The number of complaints relating to issues within the armed forces has remained relatively stable, despite the volatility in numbers of complaints overall.⁸¹ These complaints come from conscripts and permanent staff, but mostly from civilians. The majority of those from civilians address noise made at firing ranges and by military flights, and religious practices within the Forces. The Deputy Ombudsman notes that civilian complaints are often based on newspaper articles and other information they absorb through the media. Comparatively, complaints made by permanent staff are concerned primarily with recruitment and, recently, the new electronic wage payment system. And conscripts complain largely about healthcare, or seek to transfer to civil service. The Ombudsman has received very few complaints about the civil service, which are handled by the Deputy Ombudsman responsible for social security.⁸²

The Ombudsman has repeatedly raised issue with the time frame in which conscripts and armed forces personnel are permitted to file complaints; the allowance is so long that many conscripts file only after their military service has ended. Still, complaints related to the armed forces are often well-founded, as seen in the proportion of measures taken for each complaint, which is higher than the average taken for all complaints.⁸³

It is important to note that the Ombudsman is more likely to take action in cases featuring own-motion investigations and inspections.⁸⁴ Over the last decade or so, the Ombudsman has initiated an average of five own-motion investigations per year in cases related to the armed forces.⁸⁵ Compared to the 1970s and 1980s, own-motion investigations of the Finnish Defence Forces have been rare in recent years; but those investigations have been based on individual complaints related to the possibility of religious practice in the armed forces, the safety of explosives storages, and unequal treatment that favours athletes in conscription.⁸⁶ It would make sense for the Ombudsman to also use own-motion investigations in cases where a trend in human rights abuse is persistent or apparent. An investigation of this sort may have been advisable, for example, in light of the 2012 research that suggested Roma

and Sami minorities, as well as women, experienced unequal treatment more often than other conscripts.⁸⁷

While complaints often involve and resolve individual issues, own-motion investigations resonate more broadly on systemic trends. Even if the number of Sami and Roma people in the Finnish Defence Forces is small and the situation for most women in the Forces is good, problems connected to unequal treatment, bullying, or harassment cannot be ignored. The question is who should address these issues.

The Defence Command may be seen as best positioned to do so, not least because the resources of the Ombudsman are already overstretched. Indeed, the Defence Command has demonstrated its openness to address these issues by ordering the 2012 study on equity cited herein. Thus, the argument could be made that problems with equal treatment may be best dealt with by mechanisms within the armed forces, without interference from the Ombudsman. Yet, after conducting a number of interviews, the authors of the equity study concluded that harassment and bullying should be addressed by an effective and independent mechanism through which grievances could be raised with no fear of retaliation.⁸⁸ Though they suggested that such a body be created within the armed forces, they may as well have been describing the role of the Ombudsman. And, changes to the Parliamentary Ombudsman Act have made that role even more proactive by giving the Ombudsman the right to hire independent experts to investigate issues.⁸⁹

In 2010, the right to carry out inspections was expanded to the Ombudsman's staff; a task previously limited to only the Ombudsman or Deputy Ombudsmen. This has not changed the nature of inspections, which always involve more than one person from the Office and consist of both male and female staff in order to ensure that bringing possible grievances to light is not hampered by a gender bias.⁹⁰ Over recent years, the Ombudsman has made approximately ten visits a year to various units of the Finnish Defence Forces.⁹¹ During these visits, conscripts and permanent personnel have the right to address the Ombudsman without the permission of their superiors. However, Deputy Ombudsman Jussi Pajuoja reports that very few take this opportunity.⁹² For this reason, the Ombudsman has underscored the importance of meeting

with representatives of the Conscript Committee, and social welfare and healthcare officers, as well as priests, in order to fully understand both broader human rights challenges and specific problems within the armed forces. Sometimes, issues are discussed more freely by these representatives than by the individuals personally affected by them, which helps reduce the threshold for bringing grievances to the attention of the Ombudsman.⁹³

During inspections, the Ombudsman also procures information via requests for records of disciplinary actions and orders of damages, as well as on the healthcare of conscripts, the numbers of conscripts who discontinued their service in last the three years, and information on how many conscripts have been ordered against their will to continue their service for longer than the minimum period. At the end of every inspection, the Ombudsman meets with the Brigade Commander, during which smaller matters may be brought up and possibly resolved on the spot.⁹⁴

Both the Conscript Union and the Conscript Committee consider the meetings the Ombudsman has with individual conscripts and representatives of the Conscript Committee to be most important.⁹⁵ The Conscript Union also suggests carrying out inspections without prior notice, to seek a stronger preventive effect.⁹⁶ This suggestion is further supported by the Institute Officers Union, which estimates that the Ombudsman could undertake more inspections per year.⁹⁷ Currently, the Office of the Ombudsman aims to inspect all domestic units of the Finnish Defence Forces once within every four-year Ombudsman's term.⁹⁸

There is no similar objective for inspections abroad; and in fact, the Ombudsman has rarely carried out inspections abroad despite the mandate to monitor Finnish peacekeepers, as it did in 2009 in Kosovo.⁹⁹ However, the number of Finnish peacekeepers abroad has decreased in recent years and the Ombudsman receives very few complaints from peacekeepers, at most five per year.¹⁰⁰ The Peacekeepers Association of Finland feels this reflects the improved conditions of Finnish peacekeepers as well as improved communication between the Association, peacekeepers, and the Defence Forces.¹⁰¹

Overall, military and conscripts' unions report that both the Ombudsman and internal complaints-handling mechanisms work well. Many unions especially emphasise internal complaints-handling because this is often the quickest and easiest way to address possible shortcomings in the armed forces. The Ombudsman can be viewed as a more difficult and time-consuming path to seeking redress. Complaints to the Ombudsman may also be hampered by fears of stigmatisation. As such, it is incumbent upon the Ombudsman to: provide clearly argued decisions; always hear from any official in question, rather than rely on the Defence Command; and improve other features of the complaints-handling process to achieve greater effectiveness. Military and conscripts' unions in Finland suggest that improvements to impartiality and effectiveness could be made by ensuring that decisions on complaints are not made by individuals who are immediate superiors to the complainant or otherwise close to either the complainant or the subject of the complaint.¹⁰²

Ombuds institutions are important because they are impartial actors, and when decisions made by internal mechanisms within the armed forces are unsatisfactory to complainants, the role of the Ombudsman is particularly essential. Yet, unlike many ombuds institutions in other countries, the Parliamentary Ombudsman of Finland does not mediate disputes between parties. In recent years, however, the Ombudsman has highlighted that mediation is the fastest and most effective way for a complainant to settle his or her grievance. In statistics of the Office of the Ombudsman, these cases are listed as "matters redressed in the course of an investigation." Mediation occurs approximately twice a year.¹⁰³

When it comes to redress for damages, the Ombudsman cannot order officials to financially compensate the harm done to a complainant or force other officials to order it, but he or she can recommend that the institution or agency in question compensate the complainant. This recommendation is rarely refused, but there is some concern that if the Ombudsman did have the right to order financial compensation from individuals, the number of complaints could skyrocket.¹⁰⁴

Reporting and Recommendations

The second set of functions exercised by the Ombudsman, namely reporting and making recommendations, is closely bound to the issuance of an Annual Report to Parliament. These reports contain information on activities of the Ombudsman, the state of public administration, and defects observed in legislation, “with special attention to implementation of fundamental and human rights.”¹⁰⁵ Annual reports also include details about the mandate, organisation, and functioning of the Office of the Ombudsman as well as the number of complaints received and processed, and the number that fell outside the institution’s remit. Since 2012, the Annual Report of the Ombudsman has included the size of the annual budget, although the amount was previously reported as part of the Parliamentary budget, and was thereby easily accessible.

Because the Ombudsman is a general ombuds institution that receives complaints about all parties performing public acts, information included in the Annual Report specific to the Finnish Defence Forces is neither extensive nor exhaustive. The operating environment of the armed forces is described in brief, along with the most common sources of complaints, summaries of visits to military units, and featured cases. A breakdown of reasons for complaints about the armed forces is not included, only their total number; as such, it is unclear how the Ombudsman has followed-up on its recommendations and whether they have been accepted by the Forces. In practice, the Ombudsman follows-up recommendations by first requesting clarification from Defence Command on their implementation, and if they do not provide a satisfactory response to the Ombudsman within a set time limit, the Ombudsman sets a new deadline for resolution.¹⁰⁶

At the discretion of the Ombudsman, he or she can also submit special reports to Parliament.¹⁰⁷ Furthermore, the Ombudsman can issue press releases regarding cases that are deemed important, and can publish decisions considered to be of legal interest, on its website. Finnish newspapers very often re-publish press releases made by the Ombudsman. But publicity is a double-edged sword for the Ombudsman. On one hand, it can engender trust, put pressure on officials to implement decisions, and have a preventive effect. On the other, it can create false expectations

of the capacities of the Ombudsman, and can increase the number of groundless complaints or complaints that fall outside the purview of the Office.¹⁰⁸

V. Capacity Building and International Co-operation

Some of the measures taken by the Ombudsman to respond to difficulties encountered in fulfilling its mandate have already been discussed, including reducing backlogs by reducing the processing time for complaints, transferring complaints to other competent authorities, and selecting some complaints for immediate handling. As mentioned, the Ombudsman has also made an effort to better co-ordinate activities with the Chancellor of Justice and other similar authorities. In addition, the Office of the Ombudsman has sought to provide training for its staff on a multitude of issues, building institutional capacity on a variety of levels.¹⁰⁹ Moreover, the responsibilities of the Ombudsman and the Deputy Ombudsmen are subdivided so that they can acquire expertise on specific issues related to the armed forces. These are not the only measures in place, but they underpin the core of capacity development.

In 2001, the Office of the Ombudsman started providing legal advice to individuals wishing to file a complaint. The Advisor helps in drafting complaints, and if the issue at hand does not fall within the jurisdiction of the Ombudsman, they direct an aggrieved person to the proper official. However, the Advisor does not give general legal counsel. The number of clients counselled yearly by the Advisor – approximately 2600 phone calls and 150 visits – reflects on the considerable need for their services. In general, the Advisor always recommends a potential complainant make an administrative complaint to the corresponding authority, as the quickest and most efficient way to seek redress.¹¹⁰ In the past, backlogs at the Office of the Ombudsman have meant that, while complainants awaited decision from the Ombudsman, the time to appeal to other authorities ran out.

The 2007 effectiveness study, referred to frequently in this paper, shed some light on how the Office of the Ombudsman evaluates itself. In addition to self-evaluation, the Ombudsman receives feedback

from external stakeholders with whom it has continuous contact. The Ombudsman also receives yearly reports on its media visibility. Notably, though, the Ombudsman has yet to reach out to complainants to evaluate user satisfaction with the Office. The Ombudsman also does not gather information on the demographics of complainants, and does not collect or aggregate data based on their gender, ethnicity, social class, or religion. Given that many other ombuds institutions gather disaggregated data from complainants to better identify groups whose rights are being violated, or to spot systemic trends, it would be wise for the Ombudsman to explore this option.

Both international and domestic co-operation are key to the operations of the Office of the Ombudsman. Domestically, complaints related to the work of the military are handled by the Chancellor of Justice and through the internal complaints-handling mechanism of the Finnish Defence Forces. The Chancellor of Justice often relays complaints about the armed forces to the Parliamentary Ombudsman, and both institutions share information to ensure that complaints are properly handled by one of them. The relationship between the Ombudsman and the internal complaints-handling mechanism of the armed forces is different; the Ombudsman does not co-ordinate in real time to determine whether a complaint is already under internal investigation by the Forces, although it can transfer complaints to the internal mechanism without asking the permission of complainants. In turn, the Defence Command reports annually to the Ombudsman about complaints received during the year. The Ombudsman also meets with military representatives every year to discuss complaints, inspections, and other concerns related to overseeing the legality of the Finnish Defence Forces.¹¹¹

The staff of the Ombudsman participates in conferences, meetings, and seminars about the armed forces on a regular basis, including military lawyers' consultation days organised by the Defence Command, seminars for military judges, and conferences for military prosecutors. The Ombudsman does not commonly meet with military, conscripts, and peacekeepers associations; and the effectiveness of such meetings has been questioned, as discussions often centre on issues the Ombudsman cannot influence.¹¹² Some unions thus consider it more ideal to be in

direct contact with the armed forces to address possible shortcomings, though most do seek to organise meetings with the Ombudsman meant to improve the functioning of the Office with regards to the armed forces.¹¹³

Union representatives have suggested that engaging in more grassroots activities could bring the Ombudsman closer to conscripts and permanent personnel of the Finnish Defence Forces, increasing their trust in the institution and thereby helping to reduce delays that characterise complaints submissions.¹¹⁴ For example, lectures, presentations, and talks on previous cases and how they were handled by the Ombudsman could help increase awareness about and knowledge of complaints handling by the Office.¹¹⁵ Still, conscripts and military unions interviewed for this study all agreed that the Ombudsman has succeeded in improving the conditions and human rights situation of conscripts.¹¹⁶ The Union of Institute Officers expressed, though, that the Ombudsman could focus more on the conditions and rights of permanent personnel of the armed forces, whom it views as having insufficient knowledge of the Ombudsman, as well as how to how they could file a complaint.¹¹⁷ Of course, the unions themselves could also play a more active role in informing their members about the mandate and functions of the Ombudsman.¹¹⁸

Finally, the Parliamentary Ombudsman also co-operates with international actors for oversight of the armed forces. Staff of the Office of the Ombudsman have participated, for example, in the International Conference of Ombuds Institutions for Armed Forces (ICOAF), and the Ombudsman frequently meets with representatives from ombuds institutions in Nordic and Baltic countries and the European Union. In recent years, discussions in international meetings has revolved around the rights of children, prisons, and police, and oversight of the armed forces has rarely been brought up. Yet, overseeing the military is something that many general ombuds institutions have in common; and some ombuds institutions could certainly benefit from Finnish experiences in pursuing own-motion investigations and inspections, among others. In the hierarchical and closed world of the armed forces, the proactive approach of the Parliamentary Ombudsman of Finland in developing and expanding its own functions has enabled the safeguarding of human rights for both armed forces personnel and conscripts, without overlooking the needs of civilians.

VI. Good Practices

Mandate

1. The Ombudsman makes proposals to review its own mandate, which enhances effective functioning of the Office.
2. The Ombudsman has sufficient powers to investigate complaints and to take on measures to address any violations or maladministration, in case a party performing public acts has acted unlawfully or neglected a duty.
3. The Ombudsman ensures that information about its mandate is clear and easily available to conscripts and armed forces personnel, and that the knowledge of conscripts and armed forces personnel is increased through grassroots engagement.

Independence

4. The legal basis of the Office of the Ombudsman is guaranteed by the Constitution of Finland and the Parliamentary Ombudsman Act.
5. The Ombudsman and the Deputy Ombudsmen do not have other responsibilities outside of their functions that might compromise their credibility or impartiality.

Complaints-handling

6. The Ombudsman has sufficient human and financial resources to handle complaints received.
7. The Ombudsman has the discretionary power to investigate complaints even after the timeframe for filing has expired, when exceptional circumstances call for such actions.
8. The Ombudsman has the discretionary power to transfer complaints to another competent authority, as well as to select complaints for immediate handling.
9. The Office of the Ombudsman includes a legal advisor who can help complainants in drafting complaints or direct them to another competent authority if the complaint does not fall under the jurisdiction of the Ombudsman.

10. The Ombudsman can mediate between parties when it is the fastest and most effective way to settle a dispute.

Inspections

11. The Ombudsman can visit all units of the armed forces and has access to all information, including classified documents, for the purposes of investigations.
12. The Ombudsman inspects all military units in Finland within their four-year mandate.
13. During inspections, any conscript or member of permanent personnel can meet with the Ombudsman, who also meets with representatives of conscripts, and with social workers and priests.
14. Inspection and investigation teams consist of both male and female members.
15. Prior to inspections, the Ombudsman may request information on disciplinary records and orders of damages made against conscripts, as well as information on the healthcare and wellbeing of conscripts.

Own-motion investigations

16. The Ombudsman has frequent contact with different stakeholders and monitors relevant media to assess the human rights situation within the armed forces.
17. The Ombudsman has sufficient financial and human resources to undertake own-motion investigations. If needed, the Ombudsman can hire external experts to assist with investigations.

Recommendations

18. The Ombudsman can make both specific and general recommendations to the armed forces, and has mechanisms in place to follow-up and oversee their implementation.
19. The Ombudsman can make recommendations to Parliament, to draw their attention to or recommend the elimination of possible defects in legislation.

Reporting

20. The Ombudsman issues annual and thematic reports, which are easily accessible and contain information on the mandate, function, activities, and resources of the Office.
21. The Ombudsman can address the media and the public without requesting permission from any state authority.
22. The Ombudsman publishes recommendations, and their follow-up, in annual reports.

Cooperation

23. The Ombudsman exchanges information with various authorities to reduce overlap in investigations.
24. The Ombudsman has frequent contact and exchanges with relevant stakeholders involved in the oversight of the armed forces.
25. The Ombudsman shares its good practices during international meeting and seminars, especially with regards to inspections and own-motion investigations.

Capacity building

26. The Ombudsman receives feedback from its users and seeks to improve evaluations of effectiveness and user satisfaction of the Office.
27. The responsibilities of the Ombudsman, Deputy Ombudsmen, and Legal Advisors, are divided to enable them to specialise in issues related to the armed forces.

VII. Conclusions

Although good practices for democratic governance and the protection of human rights can be shared internationally, every national institution reflects a unique national context. Indeed, these institutions evolve within society and adapt to prevailing norms, values, and structures. This is certainly true for the Parliamentary Ombudsman of Finland, an institution that was formed in 1919 as part of larger state-building

process in newly independent Finland, alongside the Finnish Defence Forces, established in 1918. The Ombudsman is not the only oversight body in Finland, though, sharing this task with the Chancellor of Justice; although the Ombudsman is specifically mandated with monitoring the legality of the Defence Forces, and the conditions of conscripts and permanent personnel of the armed forces and peacekeepers.

The Ombudsman has a presiding role in overseeing public actors and safeguarding human rights in the exercise of their functions. The reach of the institution is not limited to Finnish citizens, and anyone can address a complaint to the Ombudsman. The legal basis of the Office of the Ombudsman gives it considerable power in carrying out its functions and in redressing shortcomings in maladministration. The Ombudsman also has enforcement powers that make it even more effective and competent in its basic functions, namely investigations, reporting, and recommendations. The division of responsibilities within the Office, enabling the staff to acquire specialist knowledge on issues concerning the armed forces, also adds to institutional effectiveness. Nonetheless, the capacity of the institution is often assessed and modifications are made whenever obstacles to its functions arise.

The Parliamentary Ombudsman Act has been amended on multiple occasions in response to an increasing number of complaints. Amendments have decreased the time frame within which complaints can be made, to two years; allowed for complaints to be transferred to competent authorities; and increased the discretion of the Ombudsman in handling complaints. These amendments were proposed by the Ombudsman and passed by the Parliament, underscoring the role of the Office of the Ombudsman in expanding its own mandate. Although the Ombudsman is reliant on Parliament for appointments, dismissal, and its budget, the long history of the institution and the role it has played in society has granted it the credibility and weight to act independently and impartially.

This credibility has also enabled the institution to address potential shortcomings in the armed forces. For the Ombudsman, the armed forces are one institution among many within its purview. The military receives no special treatment from the Office and own-motion investigations and inspections have been particularly important in ensuring this. From

the handling of individual complaints to inspections and own-motion investigations on systemic issues, the Ombudsman has mapped the human rights situation in the armed forces. While some concerns have been raised that increasing numbers of complaints have led to case backlogs that strain the resources available for own-motion investigations and inspections, these mechanisms have proven particularly important in bringing forward human rights issues that might not otherwise have come to Ombudsman's attention or been addressed. This is particularly important as it relates to human rights issues in armed forces. Still, the true success of the Ombudsman has been the ability of the Office to bring about positive change by shifting attitudes among both conscripts and military leadership.

NOTES

1. Riitta-Leena Paunio, "Objectives and challenges – 90 years of the Ombudsman's oversight of legality," in *Parliamentary Ombudsman 90* (Sastamala, 2010) 7-9.
2. Ibid.
3. *Parliamentary Ombudsman Act, 197/2002*, April 1, 2002. Available as a pdf at: <http://www.finlex.fi/en/laki/kaannokset/2002/en20020197.pdf> (accessed November 5, 2016).
4. Jussi Pajuoja, Deputy Ombudsman, interview, June 27, 2014.
5. Jukka Lindstedt, "Eduskunnan oikeusasiamies ja varusmiesten oikeudet," *Tiede ja Ase* 46 (1988): 130-159.
6. Own-motion investigations are started not by a complaint, but when the Ombudsman identifies that it is in the public interest to investigate a matter.
7. See: Finnish Defence Forces, *Annual Report 2013*, 35. This report is not available in electronic form.
8. Ibid., 34. Notably, the number of women who have reportedly applied for military service has been much higher than the number who complete; for example, 818 in 2014, 648 in 2013, 716 in 2012, and 682 in 2011.
9. Ibid.
10. See: General Staff of the Finnish Defence Forces, "Personnel Strategy of the Finnish Defence Forces," 2015. Available as a pdf at: <http://puolustusvoimat.fi/documents/1948673/2267766/PEVIESTOS-HESTRA-Esite-ENG.pdf/cb4f5758-0bf9-4d32-8fd1-dcb8879009d6> (accessed November 5, 2016).
11. Jussi Virkkunen, "Ennätysmäärä naisia haki asepalvelukseen," *YLE*, March 2, 2016, <http://yle.fi/uutiset/3-8713746> (accessed November 5, 2016). In 2015, a record 842 women applied, topping the 818 that applied in 2014.
12. The Criminal Code of Finland is available as a pdf, in English, here: <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (accessed November 5, 2016). See Chapter 45. The Institute Officers Union of the Finnish Defence Forces and the Border Guard (known in Finnish as *Päälystölaitos*) has tried for years to remove limits to the right of soldiers to belong to political parties. The Union has also argued that the Ombudsman should concentrate its attention on human rights problems such as the obligation of permanent personnel to limit soldiers' behaviour in public even when off duty. Sakari Vuorenpaa, Päälystölaitos ry, interview, July 28, 2014.
13. Non-military service lasts 347 days, while the shortest military service term is 165 days. Many countries raised questions about the treatment of conscientious objectors during Finland's April 2008 and May 2012 Universal Periodic Reviews in the United Nations Human Rights Council.
14. The study found that the most common forms of bullying were: unfriendly treatment, the spreading of false rumours and name calling, and exclusion from the group. Female conscripts tended to feel that main reason for bullying was their gender, while male conscripts thought they were bullied because of their position in the military, their personal qualities or opinions, or their level of physical fitness. Minna Leinonen, Risto Nikkanen, and Katri Otonkorpi-Lehtoranta, *Sukupuoalten tasa-arvo puolustusvoimissa: Kehittämistarpeiden näkökulma asepalvelusta suorittavien ja henkilöstön kokemuksiin*, working paper, No. 88/2012 (University of Tampere, 2012), 35. Available as a pdf at: https://tampub.uta.fi/bitstream/handle/10024/66376/sukupuoalten_tasa_arvo_puolustusvoimissa_2012.pdf (accessed November 6, 2016).
15. Ibid., 42-44.
16. Ibid.
17. Ibid.
18. Ibid.
19. In cases of unfair treatment, bullying, or harassment, approximately 35-46 % of male conscripts and approximately 25% of female conscripts did not report it to anyone. Ibid., 45-48.
20. Ibid.

21. Response of the Parliamentary Ombudsman of Finland to the 2013 International Conference of Ombuds Institutions for Armed Forces (ICOAF) questionnaire titled, "Gender and Ombuds Institutions."
22. The Soldier's Handbook of the Finnish Defence Forces is printed only in Finnish. See: Puolustusvoimat, *Sotilaan käsikirja 2015* (2014). Available as a pdf at: <http://puolustusvoimat.fi/documents/1948673/2258487/PEVIESTOS-SKK2015.pdf/bafdd566-cf69-4cb8-b985-40f3f24e439c> (accessed November 5, 2016).
23. Tuija Sundberg, Principal Legal Advisor, Finnish Defence Command, interview, August 7, 2014.
24. See: Parliamentary Ombudsman of Finland, *Summary of the Annual Report 2013*, April 3, 2014. Available as a pdf at: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=zx19214134114436&cmd=download> (accessed November 5, 2016).
25. *Ibid.*, 85.
26. Parliamentary Ombudsman of Finland, *Summary of the Annual Report 2012*, April 12, 2013. Available as a pdf at: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=qd28213093323334&cmd=download> (accessed November 5, 2016). The longer report, in Finnish, contains details about this issue, on pages 153-154.
27. Leinonen, Nikkanen, and Otonkorpi-Lehtoranta, *Sukupuohten tasa-arvo puolustusvoimissa*, 67.
28. *Law on the division of tasks between the Chancellor of Justice and Parliamentary Ombudsman*, 21.12.1990/1224. These tasks are also emphasised in changes made to the *Parliamentary Ombudsman Act* in 2013 (No. 495/2013).
29. Paunio, *Tavoitteita ja haasteita*, 7-9.
30. *Ibid.*
31. Analysis of the 2003-2013 Annual Reports of the Ombudsman.
32. Lindstedt, "Eduskunnan oikeusasiamies ja varusmiesten oikeudet."
33. Statistics provided by Legal Counsellor of the Parliamentary Ombudsman Raino Marttunen. Interview, July 27, 2014.
34. Lindstedt, "Eduskunnan oikeusasiamies ja varusmiesten oikeudet."
35. Pajujoja, interview, June 27, 2014.
36. Ville Blom, Conscript Union, interview, July 28, 2014; and Sami Hänninen, Secretary-General, Conscript Committee, interview, July 31, 2014.
37. *The Constitution of Finland*, June 11 1999, 731/1999, <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (accessed November 6, 2016); and *Parliamentary Ombudsman Act*, 197/2002.
38. *Ibid.*
39. The constitutional committee evaluates candidates and makes a statement to Parliament, where the final decision is made.
40. *The Constitution of Finland*, Section 38.
41. *Ibid.* The Parliament must also obtain an opinion from the Constitutional Law Committee to be able to dismiss the Ombudsman.
42. *Parliamentary Ombudsman Act*, 197/2002, Section 17.
43. *Ibid.*, Section 13.
44. *Ibid.*
45. Parliamentary Ombudsman of Finland, *Summary of the Annual Report 2015*, April 1, 2016, 50. Available as a pdf at: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=dg29116163758950&cmd=download> (accessed November 6, 2016).
46. Pajujoja, interview, June 27, 2014.
47. Analysis of the 2003-2013 Annual Reports of the Ombudsman. There were just 28 permanent employees of the Office in 1990. See: Kalle Määttä and Anssi Keinänen, *Näkökulmia oikeusasiamiesinstituution vaikuttavuuteen* (Helsinki: Yliopistopaino, 2007), 36.
48. This includes 68 complaints that were transferred to the Ombudsman from the Chancellor of Justice. Parliamentary Ombudsman, *Summary of the Annual Report 2013*, 36.

49. *Parliamentary Ombudsman Act 197/2002*.
50. Pia Wirta and Jaana Romakkaniemi, "Customer service at the Office of the Parliamentary Ombudsman" in *Parliamentary Ombudsman 90* (Sastamala, 2010), 190.
51. Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution vaikuttavuuteen*, 35.
52. Parliamentary Ombudsman, *Summary of the Annual Report 2015*, 34.
53. Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution*, 35-37.
54. Parliamentary Ombudsman of Finland, *Summary of the Annual Report 2009*, 30. Available as a pdf at: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=mj33410103951779&cmd=download> (accessed November 6, 2016).
55. *Parliamentary Ombudsman Act, 197/2002*, Section 3, Article 2.
56. *Parliamentary Ombudsman Act, 535/2011*, Section 3, Article 2.
57. *Parliamentary Ombudsman Act, 197/2002*, Section 3, Article 1.
58. *Parliamentary Ombudsman Act, 535/2011*.
59. *Parliamentary Ombudsman Act, 197/2002*, Sections 4 and 5.
60. *Ibid.*, Section 5, Article 2.
61. *Ibid.*, Sections 5-7.
62. *Ibid.*, Section 8; and the Constitution of Finland.
63. Pajujoja, interview; and Marttunen, interview, June 27, 2014.
64. *Ibid.*
65. Parliamentary Ombudsman, *Summary of the Annual Report 2012*, 35-36.
66. Analysis of 2010-2015 Annual Reports of the Ombudsman.
67. *Ibid.*
68. Parliamentary Ombudsman, *Summary of the Annual Report 2013*, 36.
69. *Parliamentary Ombudsman Act, 535/2011*.
70. Pajujoja, interview; and Marttunen, interview, June 27, 2014.
71. Analysis of 2010-2015 Annual Reports of the Ombudsman; and Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution*, 44. According to Määttä and Keinänen, criminal charge was used as a measure 14 times from 1990 to 2006, and half of these cases related to armed forces.
72. Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution*, 48.
73. *Parliamentary Ombudsman Act, 197/2002*, Section 10, Article 1.
74. Analysis of the 2005-2015 Annual Reports of the Ombudsman.
75. *Parliamentary Ombudsman Act, 197/2002*, Section 10, Article 2.
76. Analysis of the 2005-2015 Annual Reports of the Ombudsman.
77. Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution*, 45. Former Ombudsman Jukka Lindstead has observed that an opinion might be issued, even if a reprimand is suitable, to avoid offending anyone. If the Ombudsman perceives that an official has tried to act in accordance with the law, however mistaken his or her interpretation might have been, an opinion is the *only* correct measure to take. See: Määttä and Keinänen, 47.
78. *Parliamentary Ombudsman Act, 197/2002*, Section 11, Article 1.
79. *Ibid.*, Section 11, Article 2.
80. Analysis of the 2006-2015 Annual Reports of the Ombudsman.
81. Analysis of the 2003-2015 Annual Reports of the Ombudsman.
82. Pajujoja, interview; and Marttunen, interview, June 27, 2014.
83. Analysis of the 2005-2013 Annual Reports of the Ombudsman.
84. Määttä and Keinänen, *Näkökuomia oikeusasiamiesinstituution*, 182.
85. Analysis of the 2003-2015 Annual Reports of the Ombudsman.
86. Pajujoja, interview; and Marttunen, interview, June 27, 2014.
87. Leinonen, Nikkanen, and Otonkorpi-Lehtoranta, *Sukupuolten tasa-arvo*

- puolustusvoimissa*, 42-44.
88. *Ibid.*, 167.
89. See: *Amendment to the Parliamentary Ombudsman Act*, 28.6.2013/495.
90. Marttunen, interview, June 27, 2014.
91. Analysis of the 2003-2013 Annual Reports of the Ombudsman.
92. Pajuoja, interview; and Marttunen, interview, June 27, 2014.
93. *Ibid.*
94. *Ibid.*
95. Blom, interview, July 28, 2014; and Hänninen, interview, July 31, 2014.
96. Blom, interview, July 28, 2014.
97. Vuorenmaa, interview, July 28, 2014. Nonetheless, the Finnish Officers' Union and the Principal Legal Advisor of the Defence Command say that the current number of inspections is sufficient. Sundberg, interview, August 7, 2014; and Ville Viita, Chief Union Representative, Finnish Officers' Union, interview, August 11, 2014.
98. Parliamentary Ombudsman, *Summary of the Annual Report 2013*, 18.
99. Parliamentary Ombudsman, *Summary of the Annual Report 2009*, 115.
100. Pajuoja, interview; and Marttunen, interview, June 27, 2014.
101. Juha Jalkanen, Legal Advisor, Peacekeepers Association of Finland (*Suomen Rauhanurvaajaliitto*), interview, August 8, 2014.
102. Vuorenmaa, interview, July 28, 2014; Blom, interview, July 28, 2014; Hänninen, interview, July 31, 2014; Jalkanen, interview, August 8, 2014; Viita, interview, August 11, 2014.
103. Analysis of the 2005-2013 Annual Reports of the Ombudsman.
104. Määttä and Keinänen, *Näkökulmia oikeusasiamiesinstituution*, 175-176.
105. *Parliamentary Ombudsman Act*, 197/2002, Section 12, Article 1.
106. Pajuoja, interview; and Marttunen, interview, June 27, 2014.
107. *Parliamentary Ombudsman Act*, 197/2002, Section 12, Article 2.
108. Pajuoja, interview; and Marttunen, interview, June 27, 2014.
109. The Office of the Ombudsman provides training on human rights, gender and religious issues, complaint handling skills and procedures, international humanitarian law training, data collection and analysis skills, report writing, and mediation.
110. Wirta and Romakkaniemi, "Customer service," 184-186.
111. Pajuoja, interview; Marttunen, interview, June 27, 2014; and Sundberg, interview, August 7, 2014.
112. Pajuoja, interview; and Marttunen, interview, June 27, 2014.
113. Blom, interview; Vuorenmaa, interview, July 28, 2014; Jalkanen, interview, August 8, 2014; and Viita, interview, August 11, 2014.
114. Blom, interview, July 28, 2014; Hänninen, interview, July 31, 2014.
115. Hänninen, interview, July 31, 2014.
116. Blom, interview, July 28, 2014; Hänninen, interview, July 31, 2014; and Vuorenmaa, interview, July 28, 2014.
117. Vuorenmaa, interview, July 28, 2014; Jalkanen, interview, August 8, 2014; and Viita, interview, August 11, 2014.
118. Viita, interview, August 11, 2014.



The Public Defender of Georgia

Tamar Patariaia

I. Introduction

Ombuds institutions in the post-communist countries of Central and Eastern Europe have played an important role in facilitating the democratic transition of these countries. In addition to human rights protection, these institutions have promoted good governance based on democratic principles, government integrity and the rule of law, and the reform and transformation of security sectors to conform with democratic standards. Most importantly, ombuds institutions in Eastern Europe have helped eliminate widespread human rights violations by security sector institutions under authoritarian regimes and have facilitated transition towards greater respect for the rule of law.¹

Responsibilities vested in ombuds offices, namely oversight and control, are particularly important for strengthening civilian and democratic oversight of the armed forces. Alongside parliamentary supervision, ombuds institutions facilitate improved monitoring of decision-making processes in the security sphere, streamline procedures and practices for the adoption of national security policy, and ensure better protection of the rights of military personnel. They also enable timely implementation of necessary reforms to strengthen democratic governance of the security sector, prevent abuses of power or maladministration on the part of security agencies, and increase public trust in security institutions. Nonetheless, the experience of transitional democracies in Central and Eastern Europe shows that ombuds institutions can be hampered from fully exercising their authority by factors including: insufficient effectiveness of the legislative base or legislative restrictions that limit the functions of the Ombudsman, for example restrictions on visiting/inspecting military barracks and monitoring the rights of soldiers; and increased levels of corruption and lack of integrity in state institutions,

which may undermine public trust in these state institutions and damage their profile.²

This study evaluates the human rights mandate and overall jurisdiction of the Public Defender of Georgia. Particular attention is given to the mandate of the Public Defender in the security sector and to the current situation regarding the protection of rights of armed forces members. First, the establishment of the Office of the Public Defender (PDO) is reviewed within the political context that facilitated the development of its legislative and institutional basis. Then, the general characteristics of the PDO and its role in ensuring the protection of human rights is clarified, along with the legislative means at its disposal.

The study then focuses on the practical implementation of the rights, responsibilities, powers, and institutional capacities of the PDO. To understand the activities of the Office and measures taken in recent years, an analysis of the mechanisms by which the PDO accepts, examines, and responds to complaints related to human rights abuses and maladministration by security institutions is presented. Oversight by the PDO of the protection of rights of service members and the operation of the security sector is also analysed. These analyses are the basis to evaluate the institutional and operational capacities of the PDO, as well as its relations with various international actors, and ways it can strengthen international co-operation with the aim of becoming more transparent, accountable, efficient, independent, and responsive.

Conclusions to this study will also be drawn from interviews with PDO employees and experts in the field and analysis of good practices used by the Office, and emphasise how the PDO can increase its engagement in protecting the rights of military personnel. These conclusions also touch on practices that can enhance the functions, powers, and institutional capacities of the PDO, to better defend the rights and freedoms of soldiers and, in general, establish democratic governance in the security sector in Georgia.

II. The Public Defender of Georgia

By definition, an ombuds institution has the power to exercise oversight over the public administration, ensuring that public actors observe good governance principles and practices by dealing with complaints from the public regarding decisions, actions, or mistakes of the public administration.³ As it relates to security and defence, two main responsibilities could be singled out among those of an ombuds institution as particularly important. First, as an oversight mechanism for security institutions that ensures representatives of these institutions respect the rule of law, promote transparency and accountability in security and defence structures, and respond to problems that arise when their forces abuse their powers and violate the human rights of civilians. Second, the human rights of the members of the armed forces themselves must be protected. The protection of those rights requires the development and implementation of domestic legislation that, for example, ensures that recruitment and call-up practices are consistent with human rights commitments and introduces appropriate legal and administrative procedures to protect the rights of military personnel through the courts or other independent means, such as an ombuds institution.⁴

Democratic countries have responded to the challenge of protecting human rights in different ways. Most do not have ombuds institutions especially assigned to oversee the military, but all countries face the difficult task of ensuring a high level of integrity and professionalism among military personnel and meeting the requirements of international humanitarian laws.⁵ In Georgia, an approach to ensuring democratic control over the functioning of security and defence institutions and the protection of the rights of military and security personnel has not been straightforward.

After the new constitution of independent Georgia came into force in 1995, the Office of the Public Defender was established by adoption of the Organic Law of Georgia on the Public Defender of Georgia, in May 1996.⁶ Although protected by constitutional guarantees from 1997 onwards, the PDO has struggled to maintain neutrality and independence from political processes. Indeed, Public Defenders tend to resign voluntarily

upon changes of government, even if their term has not expired.⁷ This could be seen as a systemic problem and a deficit of democracy in the political system, as it has persisted since the office was created. On this question, experts point to a lack of balance in the political system, wherein the executive and legislative branches of government are dominated by the ruling political force, while parliamentary and judicial powers are relatively weak.

The legislative framework regulating the mandate of the PDO covers the protection of the rights of “every person”, including soldiers, and oversight of the functioning and administration of “public institutions and officials,” such as security sector institutions.⁸ This model, which makes the Public Defender responsible for overseeing the protection of the rights of soldiers and the human rights record of security agencies, can have certain advantages:

1. The Public Defender represents an important and well-known figure in the political system and it is difficult to ignore his/her recommendations;
2. The wide mandate of the Public Defender means that civilians and military personnel can be given equal attention and the same standards can be applied to both, ensuring that their interests are represented in a balanced manner; and
3. The concentration of powers in a single institution is more cost-effective.⁹

As is true of ombudsmen in other countries, the Public Defender of Georgia enjoys a rather high level of popularity. However, the PDO is not particularly familiar with the needs of the military or the security sector and has demonstrated only minimal interest, experience, and engagement with the protection of the rights of service members. And, as this analysis will show, the Public Defender of Georgia has not paid sufficient attention to complaints voiced by the military.

Since the establishment of the PDO, there has been heated debate in media and political circles about whether the Georgian Armed Forces require a specialised military ombudsman. Advocates usually draw attention to the experience of democratic countries where a deputy within the Office of

the Ombudsman specialises in military issues (for instance, Sweden).¹⁰ As a rule, these discussions have intensified when new political forces come to power (such as in 2004 and 2012). Still, once a Public Defender has been replaced in the wake of changes in administration, issues related to security sector reforms and the development of defence institutions tend to rise to the top of political agenda and the question of a military ombudsman is de-prioritised.

In 2004, the position of Deputy Public Defender was established and was tasked, among other things, with overseeing the rights and freedoms of military personnel. The Deputy complained about insufficient powers to oversee procurement deals of the Ministry of Defence (MoD) and made allegations about potential corruption in the security sector. He resigned in December 2004 demanding reforms of the MoD and the Georgian Armed Forces; and though the position of Deputy Public Defender remains, he or she has not overseen the protection of the rights of military personnel since.¹¹

Fresh attempts to address the question of the need for a military ombudsman were made after the 2012 parliamentary elections. The Public Defender at the time, Giorgi Tughushi, resigned before his term expired and, as a new Public Defender was elected to replace him, the newly empowered ruling bloc declared that it intended to establish an independent military ombudsman's office. Yet, despite several public statements on this subject by Minister of Defence Irakli Alasania, his words never translated into deeds and no specific steps have ever been taken to follow through.¹² The establishment of an independent body for the supervision of the military requires broad consensus among politicians and the public. In fact, Parliament must adopt special constitutional amendments; and presently, this is not an easy task for the ruling party, as it does not hold a constitutional majority.

Further, there is no consensus among the public on this issue. In discussions about the role of the PDO within the political reality of Georgia, civil society organisations and independent experts have been quite critical of the idea to create yet another such institution. Doing so would require additional funding from the state budget.¹³ Furthermore, these analysts

argue that it would be more effective to expand the existing mandate of the Public Defender or to establish a special department within the PDO.¹⁴

Civil society organisations have also held that human rights violations occur not only within the Georgian Armed Forces but in other parts of the security sector; for instance, the rights of prisoners have been violated in recent years.¹⁵ There is concern that “if we accept the idea of creating a special Military Ombudsman position, then, by the same logic, we should set up separate human rights bodies in every other sphere of human rights. This would cause serious confusion in society and complicate the whole institutional landscape of human rights protection in the country.”¹⁶ In contrast, experts in the protection of the rights of service members argue that the challenges and problems faced by the military in the exercise of their duties are not widely understood. For this reason, they insist on the need for a separate specialist body, affiliated with or independent from the PDO, that is equipped and empowered to efficiently ensure protection of the rights of conscripts and other military personnel.¹⁷

For all practical purposes, a lack of public interest in a military ombuds institution has meant that debate on the topic in Georgian media and among civil society representatives has come to an end. The political elite also eventually lost interest and shelved the idea. Meanwhile, the PDO lacks specific capacities to protect the rights of military personnel. To address this shortcoming, the has PDO submitted a request to the Georgian government to increase the budget of the Public Defender so that a special department can be created to oversee the protection of human rights in the Georgian Armed Forces.¹⁸

III. Mandate and Legal Framework

The legislative framework regulating activities of the PDO entitles the Public Defender to monitor the performance of armed/security forces and to address individual complaints related to the operations of defence and security institutions, such as cases of misconduct or inhumane behaviour by representatives of those institutions. The PDO is given full and unrestricted access to military installations and prisons, pre-

trial detention centres, and other detention facilities for the purposes of monitoring their conditions. To ensure that its reports are impartial and accurate, the PDO is also granted the right to invite external experts to take part in its oversight activities. Still, Georgian legislation has some flaws that weaken the power and capacities of the PDO compared to ombuds institutions in more developed democratic states. In particular, the PDO does not have the right to conduct independent investigations, and investigative power, in general, was never viewed as among the responsibilities of the Office. This raises the question of whether existing regulations are sufficient to ensure that the PDO can implement its activities effectively.

The prime responsibility of the Public Defender is to oversee the protection of human rights and freedoms in Georgia. Article 43 of the Constitution of Georgia stipulates that the Public Defender is to be elected by the Parliament through a majority vote, for a five-year tenure, and that the same person may be elected to the position only for two consecutive terms.¹⁹ A parliamentary faction, or a group of at least six MPs who are not affiliated with any faction, can nominate a candidate.

The fact that the main rights and responsibilities of the PDO are defined by the constitution guarantees it a certain level of independence, stability, and sustainability. The Organic Law on the Public Defender also reflects that he or she is independent in his or her activities – which are guided by the Constitution of Georgia, international agreements and accords, universally recognised legal principles and norms, and any relevant law or other legislation. Any attempt to exert influence on or interfere in these activities is punishable by law.²⁰ Accordingly, the Public Defender cannot be prosecuted, arrested, or imprisoned, or his or her property (home, car, etc.) searched or confiscated, without approval of the Parliament. Though, this immunity does not apply if the Public Defender is caught in the act of committing an offence.²¹

The PDO does not fall under any branch of government and the term of the Public Defender is not linked with the four-year terms of MPs, further ensuring the independence of the Office. And the powers of the PDO, as defined by the Organic Law on the Public Defender, are not to be interrupted even by the declaration of a state of emergency or martial law.

In other words, such a declaration could not be used by other authorities to impede the work of the PDO.

Within the scope of his or her duties, the Public Defender of Georgia is obliged to present an annual report to the Parliament every March, including a full review of the situation of human rights and freedoms in the country.²² The Public Defender is also expected to report its conclusions and recommendations. These annual reports are unclassified and are published in the press, whereas special reports can only be published with the consent of the Public Defender.

According to the Constitution, the Public Defender is authorised to expose human rights violations and abuses and to inform appropriate agencies and individuals about its findings. The Constitutional Court of Georgia attaches a special status to the Public Defender because the Court is authorised to consider the constitutionality of relevant normative acts on the basis of appeals by the Georgian president and other official institutions, including the PDO. Upon receiving relevant complaints, the Public Defender makes independent decisions regarding how to follow up and as to oversight of state government agencies, local municipalities, and other public institutions and officials. In July 2009, the Parliament gave the Public Defender even greater responsibility in monitoring prisons and other penitentiary institutions and permitted the inclusion of independent experts in these efforts.

Within his or her remit, the Public Defender is tasked with responding to human rights abuses in a timely manner, both in response to relevant complaints and on his or her own initiative. The PDO is obliged to examine cases that deal with decisions concerning public organisations, human rights violations during court proceedings, and the violation of the rights of detained or imprisoned persons or military service members. The Public Defender also ensures the compliance of normative legislative acts with the basic rights and freedoms afforded to Georgian citizens in Chapter Two of the Constitution, as well as the constitutionality of norms regulating referendums and elections and the constitutionality of the elections held on the basis of these norms.²³ Further, the PDO is authorised to consider complaints regarding violations of human rights

and freedoms that are protected by international agreements to which Georgia is a signatory.

Given the wide purview of the PDO, it is significant that in October 2010, the Public Defender also assumed the powers of the National Preventive Mechanism (NPM), as envisaged by the Optional Protocol to the UN Convention against Torture (OPCAT).²⁴ For this purpose, the PDO cooperates with relevant UN agencies and mechanisms, as well as relevant international, regional, and national institutions. However, it is crucial to note that the Public Defender is not authorised to conduct independent investigations, which significantly weakens the power of the institution.

In ensuring the protection of human rights and freedoms, the Public Defender can:

- Submit proposals, notices, and recommendations regarding legislation and bills to the Parliament of Georgia or other relevant agencies;
- Send proposals and recommendations to state and local government bodies, public organisations, and other officials in order to restore violated rights and freedoms;
- Appeal to relevant investigative agencies demanding they investigate human rights violations and prosecute those responsible;
- Urge relevant agencies to take disciplinary or administrative measures against persons whose actions have led to violations of human rights and freedoms;
- Act as a friend of the court (*amicus curiae*) in judicial proceedings, including in the Constitutional Court of Georgia;
- Address the Constitutional Court with constitutional appeals;
- Petition the president and prime minister in writing regarding insufficiencies in the measures available to the Public Defender; and
- In special circumstances, propose that the Parliament set up an interim investigative commission and ensure that a matter in question is considered.

One of the most important functions of the PDO in defending the rights and freedoms of Georgian citizens is undertaking educational efforts, and the Office organises events and campaigns that engage various purpose groups to raise awareness about human rights.²⁵ The Public Defender is also free to make direct statements to the press to ensure that reports and recommendations released to the public are not censored. Still, the Public Defender has never been granted the explicit right to investigate abusive practices by members of defence and security forces, or complaints of mistreatment, harassment, or bullying by those forces. The Office is further limited by its inability to start own-motion investigations, as is the practice of many ombuds institutions in democratic states.²⁶

IV. Functions, Powers, and Institutional Capacity

Any number of issues and circumstances arising from service in military or security institutions can be brought to the attention of the Public Defender. In response, the PDO can:

1. gain unimpeded access to any bodies of state or local government, including military units, prisons and detention facilities, and other places;
2. access documents and information and demand that state and local governments, public organisations, and officials provide all appropriate documents and other necessary materials within 10 days;
3. hear witnesses and experts and demand that any government official or public servant provide written clarification regarding relevant issues;
4. inspect military units of the Georgian Armed Forces at home and abroad; and
5. conduct research and/or prepare relevant conclusions, and invite experts to carry out consultation work and prepare special reports.

Monitoring and Complaints-handling

The annual and special reports of the PDO, addressed to the Parliament, are the key documents prepared by the Public Defender. The Parliament

devotes special parliamentary sessions to debate these reports and assess the outcomes of the work of the PDO, specifically to the examination of and response to complaints. These reports are organised around the following topics:

1. The activities of the National Prevention Mechanism
2. The Public Defender and constitutional oversight
3. The judiciary and human rights
4. Law enforcement agencies and human rights
5. Civil and political rights
6. Social and economic rights
7. The co-operation of state bodies with the Public Defender
8. Response to existing problems

The protection of the rights of military members is viewed in the context of several topics on this list, and from 2009, these issues have been within the remit of the NPM. Before that, they were given less prominence in the annual reports of the PDO. An analysis of reports from 2004-2013 reveals how the Public Defender has responded over time to the human rights situation in the armed forces, even with limitations to its mandate. Large-scale reforms to the Georgian Armed Forces were initiated in these years, followed by increased military funding.²⁷ Authorities declared improvements in food supplies, clothing, and living and social conditions for the military; and yet, the annual reports of the PDO show that the Public Defender was unable to conduct regular monitoring of the military, although it always responded appropriately to complaints. During this period, bullying of soldiers by their fellow service members, as well as regionally-specific feuds and the oppression of lower-rank soldiers were observed among the forces. Human rights abuses recorded in the reports of the PDO included cases in which the illnesses of soldiers were disregarded, soldiers were treated in a degrading manner, or conflicts emerged between soldiers on ethnic grounds. There were also instances of army deserters being returned to their barracks as a result of interference by the Public Defender.²⁸

According to these reports, soldiers tended to avoid speaking out about violations of their rights or the reasons behind them, and did not file complaints in writing for fear of further complications or reprisals from

other service members. Soldiers also told the Public Defender that confrontation was common in military units and admitted that a so-called “rule of silence” was widespread, preventing them from discussing problems within their ranks.²⁹ Beyond this, the PDO conducted checks of military guardhouses (solitary confinement), in particular in early 2007, and reported that cells required repairs, and that inmates had limited access to essential items and no opportunity to receive letters. In response, the PDO recommended that it carry out systemic monitoring of solitary confinement facilities, but these recommendations were not taken up and the PDO reported “interference...from the side of the Ministry of Defence,” noting that service members had prevented representatives of the PDO to enter detention cells and had demanded they leave the premises.³⁰ This obstruction actually violated the provisions of the Organic Law on the Public Defender, but the violation was not addressed by the government.

In 2008, the annual report of the PDO focused on the alternative labour service, the conscription of members of certain religious denominations, and the postponement of compulsory military service. Then, in the first half of 2009, the Public Defender filed two appeals with the Constitutional Court addressing the Law on Occupied Territories and the Organic Law on Military Reserve Service. The latter demanded that persons who refused military reserve service on religious grounds should still be subject to it. In December 2011, the Constitutional Court satisfied the appeal that dealt with the unconstitutionality of the Law on Military Reserve Service, acknowledging the right to conscientious objection.

During reforms of the Georgian Armed Forces, professional military service was adopted. This led to substantial improvements in the conditions of soldiers, as well as increased salaries and benefits packages. Consequently, the number of conscripts drafted into compulsory service fell significantly as the forces began to be staffed mainly by professional soldiers, who serve on a contractual basis. These service members have now taken part in international missions in Iraq, Kosovo, and Afghanistan. Still, despite better working conditions, protection of the social and political rights of soldiers have come under public scrutiny on more than one occasion in the years since reforms began. However, this is not always adequately reflected in the annual reports of the Public Defender.

A review of the reports from 2004-2012 shows, for instance, that they did not record issues related to the widespread practice of dismissing professional soldiers from their service. Nor did they detail cases of violations of service members' contracts. Military sources have revealed that it was common practice to cut the salaries of professional officers as punishment for poor performance; yet, while these issues were occasionally exposed and discussed in the media, they were never reflected in the annual reports prepared by the PDO.³¹ And, according to one human rights defender working within the Ministry of Defence, some 4,000 professional soldiers and officers were unlawfully discharged or transferred to reserve status from 2004 to 2012, on the basis of their political affiliation, level of loyalty to their superiors, or level of support for the ruling party. During the same period, around 800 officers were discharged several months prior to their contractual end of service. The same source acknowledged, though, that just over 1,500 professional officers returned to military service after the 2012 change of government in Georgia.³²

In the midst of reforms, the non-governmental sector engaged in academic research alongside Western partner organisations in an attempt to examine issues related to the protection of service members' social and political rights, including the rights of soldiers serving in foreign missions. To this end, it was necessary to conduct interviews with acting and former military officers, but MoD leadership at the time officially rejected co-operation and prevented researchers from doing this work.

In 2011, there was also a case when the government or its agents committed arbitrary or unlawful killings of military servicemen, and was not reflected in the annual report of the Public Defender, which shows the weak institutional capacity of PDO to address all systemic vulnerabilities, as well as remain free from political influences. Opposition political party members raised concerns regarding the death of military officer Sergo Tetradze, who was detained by Ministry of Defence officials on charges of espionage.³³ Shortly, after his family was informed he died in custody. According to the official version he died of a heart attack, but the newly elected government reopened the investigation, and charged a number of former officials, including the former head of the Military Police

Department of the Ministry of Defence, with sexual assault and torture in the officer's death.³⁴

The military is not the only security sector actor to be monitored by the Public Defender, and the annual reports of the PDO also deal with abuses of power by police. In the 2009 report, their use of rubber and plastic bullets during the breakup of protests in May of that year was specifically addressed. While the Public Defender recognised the right of police to use physical coercion, special measures, and firearms during their service, in the instance of the protests in May, the PDO asserted that the law prohibited the police from using rubber or plastic bullets. According to the Public Defender, by using means not envisaged by the law and thus banned, law enforcement agencies exceeded their powers, constituting an abuse of power as defined by the Criminal Code.³⁵ The PDO recommended that the Office of the Chief Prosecutor of the Ministry of Justice, and the Ministry of Internal Affairs (MIA), ensure a speedy and transparent investigation of the case. One noticeable omission from the 2009 Annual Report of the PDO was the so-called mutiny that took place at Mukhrovani military base in May 2009, which the MIA claimed was organised by former senior military figures.³⁶

The 2011 annual report of the Public Defender also focused on the breakup of a public rally by police. In May 2011, MIA units dispersed a protest outside the Parliament in Tbilisi, and the PDO charged that this constituted a violation of international standards and of the norms of Georgian law, leading to a violation of the rights of a number of individuals. The Public Defender appealed to the Chief Prosecutor demanding that an investigation be launched into this abuse of power. However, the Office of the Prosecutor concluded that the actions of law enforcement were not criminal and only warranted disciplinary measures, a decision with which the Public Defender expressed dissatisfaction. In its annual report, the PDO said that information provided by MIA indicated that 16 police officers had faced punishment and four were dismissed, but the Public Defender asserted that such cases need to be more appropriately addressed.³⁷

An important way in which the Public Defender exercises his or her authority is by responding to complaints in defence of the human rights

of armed forces personnel, professional soldiers, and conscripts. The Department of Justice within the PDO caters to military veterans, their family members, and relatives; however, the Public Defender reports that the number of complaints submitted by active military personnel or their family members is usually quite small, a trend seen especially since 2004. For example, in 2013, only two such complaints were submitted to the PDO. The Public Defender attributes this to several causes, but most importantly to a lack of trust in the PDO in general, linked to the absence of a dedicated individual responsible for addressing human rights violations in the armed forces.³⁸

This analysis reveals that the level of independence of the Public Defender is sufficient, but the power of the PDO to effectively respond to issues related to the protection of human rights in the Georgian Armed Forces and to excessive use of force by law enforcement institutions is limited. Efforts by the PDO to make relevant recommendations to government bodies that would restore violated rights and freedoms, as well as to spur investigations into human rights violations and prosecute those responsible, are mostly ignored by executive agencies. Parliament has also failed to respond adequately to the reports of the Public Defender in urging relevant agencies to take disciplinary or administrative measures against those responsible for violation of human rights and freedoms.

Authority to Prepare Special Reports

Within the PDO, the Prevention and Monitoring Department (PMD) is charged with preparing special reports. The PMD acts on behalf of the Public Defender and represents the National Prevention Mechanism in Georgia, regularly providing information to the UN Subcommittee on the Prevention of Torture regarding the situation within its sphere of competence. In this role, the PDM prepares reports and recommendations on the basis of unrestricted visits to closed facilities and confidential interviews conducted there. In this way, the PMD, alongside other civil organisations, monitors military units and military detention wards.

The PMD is an important instrument in the PDO arsenal. However, experience has shown that the authority it is afforded is still insufficient in terms of allowing the PDO to fully and effectively exercise its powers

as it relates to the armed forces and high-security facilities. In its 2010 Report on Human Rights Practices in Georgia, the US State Department identified the need to increase the authority of the PDO in this area, noting that the Organic Law on the Public Defender does not “explicitly state that the NPM can use audio and video equipment” in its inspections.³⁹ Then, in July 2014, the Public Defender submitted an initiative to Parliament to give the NPM permission to make video and audio records.⁴⁰ In 2015, changes to the Imprisonment Code finally granted the PDO this right.⁴¹

Public Defender Ucha Nanuashvili pushed hard for the right of the NPM to effectively exercise its functions. It has not been uncommon, even when torture and inhumane treatment is documented in Georgia, that it is not thoroughly investigated on the grounds that there is lack of evidence.⁴² In any number of European countries, including the Czech Republic, Germany, Poland, Serbia, Sweden, and many more, National Prevention Mechanisms successfully use photographic and video records in their monitoring process; and this made it even more of a prerogative of the Georgian Parliament to take appropriate measures to amend the law.

The effectiveness of the PMD can be assessed in part through the special reports it prepares after, on the basis of a complaint, the Public Defender launches an examination. For example, the number of prisoners in Georgia has significantly increased since 2007 and, in the public interest, the PDO has brought special focus to the human rights situation in prisons and temporary detention facilities across the country. Special reports in 2010, 2011, 2012, and 2014 detailed the complaints made by detainees about the conditions of their imprisonment or against guards or other staff.⁴³

In December 2014, the Public Defender issued a special report about an alleged abuse of power by the Georgian Special Forces during a domestic special operation conducted in Lapanquri in the summer of 2012, leading to the death of seven militants and three Georgian soldiers. The evolution of the report illustrates the dynamics that can be at play in the work of the PDO. The 2012 Annual Report of the Public Defender had included a chapter about the operation – a product of PDO fact-gathering and analysis – and when the report was presented to the Parliament in the spring of 2013, the Public Defender demanded that an interim

investigative commission be established to look into the matter. The PDO had uncovered new evidence that contradicted the official theory, which was based on an investigation by the previous government. By October 2013, the Public Defender was advocating for the creation of a 12-member public council to collect information and facts about the Lapanquri incident and respond to public queries about it.

Despite a failure by Parliament to respond to this initiative, the Public Defender used his authority to establish an apolitical public council to prepare a special report on the incident. Due to the sensitivity of the issue and in order to secure public trust, the Public Defender personally took on the responsibility of choosing experts for the council and invited several lawyers and analysts, as well as representatives of the Council of Elders from villages of the Pankisi Gorge, near where the incident occurred. The work of the council was published in the December 2014 report, including recommendations to the government and the public. This report is an exceptional benchmark for Georgia, representing the first attempt by the PDO to address human rights issues in the Georgian Armed Forces without complaint. Indeed, the special motions initiated by the Public Defender to create the public council is a unique example of the PDO exercising its full power to monitor the performance of security and defence units.

The Right to Access to Information

The ability of the Public Defender to act independently does not necessarily guarantee the effectiveness of his or her work. The right of state agencies to withhold certain information (for example, if it is classified) or provide incomplete information to the PDO makes it difficult to adequately respond to complaints and systemic problems. And, it may leave the public with the wrong impression about the integrity, accountability, and transparency of the Public Defender.⁴⁴

The legislative framework for the PDO generally obligates public servants to provide the Public Defender with all necessary information and PDO staff have the right to enter the premises of military units to conduct monitoring at any time. However, as cases outlined above have demonstrated, the PDO has been denied such access in the past; and

this constraint has not been addressed by the executive government or the Parliament. The Public Defender is unable to fully exercise his or her authority if the information needed to conduct examination into specific cases is inaccessible, and if the only recourse is to voice his or her concern before executive officials and highlight these incidents in an annual report. Currently, though, the law gives the Public Defender no other options.

Experts contend that part of the problem is that, while the Organic Law on the Public Defender stipulates that “information containing national, commercial or other kind of classified information protected by law shall be submitted to the Public Defender in conformity with the Georgian legislation,” Georgian legislation does not actually define how these procedures are to be regulated.⁴⁵ In general, the right of unrestricted access to information requires taking on special responsibilities and measures to protect confidential information. The Organic Law on the Public Defender does include a clause noting that the Public Defender and members of the Special Preventive Group are obligated not to disclose classified and/or confidential information, or information about brutal, inhumane, or degrading treatment of an individual unless the individual consents.

In Georgia, the legislative framework regulating access to confidential information only partially meets Western standards and fails to ensure full access for the Public Defender. It is at the discretion of the prime minister to determine who is authorised to receive or have access to classified information.⁴⁶ Amendments to the law adopted in 2014 simply transferred this power from the president to the prime minister and drew strong criticism from civil society groups. Civil society representatives believe it is important that the provisions of the law, which are based on the Soviet model, are changed so that all constitutional officials – including the Chairman of the Parliament, the head of the Audit Chamber, the Chairman of the Supreme Court, and the Public Defender – can access confidential information.

In established democracies, ombuds institutions should enjoy a high level of freedom in exercising their authority and have unrestricted access to any information they need. If restrictions apply in special circumstances, it is preferable that:

1. The purpose of these restrictions be clearly defined by the law,
2. The restrictions are adequately justified in detail in each case, and
3. The ombuds institution has an opportunity to challenge the restrictions in court or the parliament.⁴⁷

In this respect, the right of the Public Defender of Georgia to have unimpeded access to information requires further consideration and specification.

V. Capacity Building and International Co-operation

The main role of Public Defender to compile and review information related to the protection of civil, political, economic, social, and cultural rights, as well as universal freedoms, is substantially influenced by ongoing policy developments in the human rights field and new policy initiatives of the government. Over the last decade, the Georgian government has undertaken reforms in the areas of justice, freedom, and security, and has developed a National Human Rights Strategy for 2014 to 2020, all of which impact the activities, capacity building needs, and framework for international co-operation of the PDO. The goal of these efforts is to develop “a progressive and unified cross-sector policy, aimed at strengthening the protection of human rights within state organs and promoting ‘better governance’ in the country as a whole,” and to this end, the PDO certainly has a key role to play.⁴⁸

Current Challenges to Human Rights Protection in Georgia

The establishment of the rule of law, an independent judiciary, and the protection of human rights have been crucial issues for a majority of Georgian citizens in recent years, and have had a direct impact on political developments in Georgia. The political bloc that won the October 2012 parliamentary election pledged during their campaigning to address human rights issues in a timely manner, specifically promising

to depoliticise the judicial system, end politically motivated prosecutions, free illegally detained people, punish officials responsible for violations of basic human rights and freedoms, promote a truly multi-party system, and ensure a balanced media environment. Many politicians, international consultants and organisations, and local NGOs have attempted to evaluate the aims and actual steps taken by the government since 2012, to help the government plan and continue relevant reforms and implement new initiatives to depolarise Georgian society. Their reports suggest that, among other efforts, the liberalisation of the criminal justice system can be regarded as one of the most important achievements of recent years.

Policy shifts in the criminal justice sector have moved Georgia away from a “zero tolerance” policy that caused a massive increase in the prison population. In April 2013, the Parliament also amended the Criminal Code to stop the mandatory practice of cumulative sentencing.⁴⁹ Jury trials were also introduced in a few selected cities, though further efforts are still required to ensure adequate adversarial procedures. Changes introduced to the Law on Common Law Courts made it possible once again to make photographic, video, and audio recordings of court proceedings. Despite opposition from a segment of the public, in May 2014, the Parliament adopted a framework law on protection against discrimination, which meets EU standards.⁵⁰

Still, despite these positive steps, some decisions of the government and the Parliament have hampered reform of the judicial system. For example, Parliament did not amend provisional regulations on the questioning of witnesses and postponed the launch of the new Criminal Procedural Code. Practically, this put the brakes on implementing a significant and important change – ensuring that witnesses are questioned in a court of law only. Apart from this, civil society organisations and foreign experts have reservations regarding enforcement of the anti-discrimination law, given that it does not impose strict financial sanctions on offenders, as recommended. Critics also point out that the bill was not accompanied by an increase of state funding for the body responsible for supervising implementation of the legislation, namely the Office of Public Defender. While the financial resources of the Office were augmented in 2015, according to the Public Defender, flaws in the bill mean the PDO is unable to effectively supervise its implementation, since it does not extend the

authority of the Public Defender to alleged violations by individuals and does not allow the Office to request documents related to cases under review.⁵¹

Reports addressing the current human rights situation in Georgia offer recommendations to the Georgian government regarding its future work. Among the most noteworthy of these is the 2013 report by EU Special Advisor Thomas Hammarberg, which identified needs in Georgia's human rights sphere and stressed the importance of consolidating democratic institutions and supporting PDO activities related to implementation of anti-discrimination laws and institutional and legislative reforms to secure freedom of religion and avoid the marginalisation of the minorities.⁵² Indeed, the main recommendations of the report were aimed at strengthening the Office of the Public Defender.

According to activity reports of the PDO, complaints submitted to the Office have increased significantly over the last few years, with over twice as many submitted in 2015 (8517) as in 2012 (4291).⁵³ This is a clear indication of increased public awareness and expectations of the PDO, as well as an enhanced atmosphere of freedom in Georgia. A 24-hour hotline established in November 2015 provides even easier access to the PDO for citizens, and is aimed at "ensuring timely response to violation of rights and enhancing trust towards the Public Defender's Office."⁵⁴

This kind of initiative reflects some of the proposals put forth by Hammarberg in his report. Though he fell short of recommending that the mandate of the Public Defender be strengthened by granting him or her investigative powers; he did recommend the establishment of a fully independent investigatory body that could contribute to building trust between the population and law enforcement institutions by responding to complaints against the police and prosecutors. This would require a professional, separate mechanism that understands policing and prosecutorial realities but remains independent from these structures, and acts as an impartial representative of the public (like an ombudsman).⁵⁵ A 2014 report of the UN Human Rights Committee also recommended that Georgia "establish an independent and impartial body to investigate allegations of abuse by police and other law enforcement officers."⁵⁶

The National Human Rights Strategy for Georgia that was adopted in 2014, along with a two-year Action Plan, were strongly shaped by Hammarberg's report. The Strategy outlines specific tasks of government agencies and defines top human rights priorities and strategic directions of the government.⁵⁷ But, the Strategy and the Action Plan pay little attention to the protection of the rights of military personnel specifically, and, like Hammarberg's report, fail to address the question of granting investigative powers to the Public Defender. Nonetheless, recent policy initiatives by the government have been directed at improving standards and mechanisms for the protection of the social and economic rights of soldiers.⁵⁸ This makes the work of the Public Defender even more important, especially the ability of the PDO to respond in a timely manner to alleged human rights violations.

The Office of the Public Defender: Opportunities and Needs

Numerous innovations and reforms aimed at strengthening human and technical capacity have been introduced in PDO, with support from international donor organisations. For example, to improve accessibility and effectiveness, a joint electronic operating system was established that improved co-ordination among staff. Individuals can access quality legal advice and legal documentation can be compiled with at a greater level of competency. Systematisation of the archive of the PDO has also been undertaken and the PDO website has been redesigned. Further, the vast PDO database has been brought into line with modern standards and national legislation. Now, people interested in human rights protection mechanisms in Georgia, both at home and abroad, can access comprehensive information by various means – in person, online, and by telephone.

The 2015 budget for the PDO was just over 4,700,000 GEL (1,900,000 USD), up from approximately 2,570,000 GEL (1,000,000 USD) in 2014.⁵⁹ Still, this included targeted grants (of 732,000 GEL, or 297,000 USD, in 2015) that have constituted as much as a third of the total budget in recent years. When state funding has been insufficient for the full and effective work of the Office, the PDO has been financed by contributions from donor organisations, including:

- The EU
- Open Society Georgia Foundation
- The UN Children's Fund (UNICEF)
- The UN Development Programme
- Oxfam
- The UN Women
- The Eurasia Partnership Foundation
- The Council of Europe
- The United Nations High Commissioner for Refugees (UNHCR)
- The UN Association of Georgia
- The United States Agency for International Development (USAID)

The international profile of the PDO contributes to attracting donor support. In 2013, the Public Defender was elected as a member of the co-ordination committee of the European Human Rights National Institute Group for a three-year term. This allows the PDO to take part in the work of national human rights institutions, hold a position at the International Co-ordination Committee, and take part in Human Rights Council sessions.

Apart from financial needs, the increased number of applications accepted by the Public Defender has increased the need for human resources. Over the last several years, staff numbers at the PDO have risen in response.⁶⁰ Annual reports indicate that regular trainings have been held in: monitoring places of confinement, practical instruments of monitoring, migration and human rights, European human rights standards, monitoring the penitentiary system, gender equality, and labour rights. To learn from international experiences, educational visits by PDO staff have been made to countries including France, Latvia, the Czech Republic, and Sweden.

These measures reflect efforts to strengthen the human capacity of the PDO; however, the protection of the rights of military personnel has yet to attract the specific focus of either local actors or foreign donor organisations. In fact, despite the greater involvement of experts and other human resources in the National Prevention Mechanism in recent years (40 experts were selected from the nongovernmental sector by an independent commission to form a multi-disciplinary team including a

lawyer, a psychiatrist, a psychologist, a social worker, a discrimination identification expert, a disabled person, and a juvenile delinquency expert), the military sphere has been left without attention.⁶¹

Therefore, it is important that the PDO becomes more active in protecting the rights of service members through the establishment of a specialised department within the PDO. This structure will help ensure that complaints-handling for and monitoring of the Georgian Armed Forces are carried out by someone trusted by military personnel. Heightened attention towards the military sphere could also be reflected through other initiatives. A Gender Equality Department was created at the PDO in 2012, making it the first state institution to address gender equality issues; however, a Gender Equality Strategy and Action Plan for 2013 to 2015 did not prioritise the defence of gender equality principles in the armed forces, despite the fact that legislation in Georgia guarantees the right of women to participate in decision-making in the sector.⁶²

The Strategy is an important development for Georgia, where many challenges related to gender require the government's attention. In the defence and security sectors, traditional gender stereotypes prevail. Women are restricted from active military service, which excludes them largely from the decision-making process. It is important to introduce gender-sensitive approaches in all state agencies, including defence institutions, because gender issues are still widely misunderstood and viewed as an exaggerated problem.

VI. Conclusions and Recommendations

Despite significant progress, Georgia is still characterised by a lack of experience with human rights protection within the armed forces and the security sector in general. However, the PDO could contribute more significantly to preventing human rights violations and maladministration in defence and security institutions. The constitutional power of the Public Defender, as well as the legislative framework regulating the PDO, make the Office independent and its work transparent and accountable. No other agency has a right to hamper the work of the Public Defender.

Further, the discretion of the Public Defender to examine and gather information about problematic issues is an important authority that secures his or her independence.

While the powers and instruments at the disposal of the PDO enable the Public Defender to monitor human rights violations and systemic irregularities related to abuse of power by executive government bodies, it is important that the Public Defender has enough power to expand the activities of the PDO to improve the monitoring and complaints mechanisms for members of the armed forces and their families. Both Parliament and international donors could support the Public Defender in this initiative.

There are also other areas where the power of the Public Defender is limited. For example, in a number of cases, the PDO has been denied access to military units and military guardhouses; and Georgian legislation does not clearly define the right of the Public Defender to access operational or classified information. As such, the Public Defender can be prevented from conducting its investigative activities. Still, on the recommendation of international experts that the Georgian government establish a body that can independently and impartially investigate violations of human rights that may involve law enforcement agents, the government has discussed the creation of a professional and independent mechanism to deal with such cases, and this is reflected in the Human Rights Strategy developed in 2014. The Public Defender supports this initiative and believes that an independent investigative unit responsible for investigating ill-treatment and torture should also be established, independently from the PDO.⁶³

To further strengthen the resources and capacity of the Office of the Public Defender, and to improve the effectiveness of its performance, this research has determined that the following measures should be taken:

1. Set up a specialised department within the PDO responsible for protecting the rights of armed forces personnel by defending those rights and studying incidents of abuse of power;
2. Conduct active monitoring of human rights in the armed forces, not only in confinement cells but also in military units and barracks;

3. Improve complaints-handling by empowering the PDO in protecting the political, social, and economic rights of soldiers and veterans, and initiate legal proceedings when appropriate;
4. Overcome the Soviet legal legacy in terms of access to information and grant powers to all relevant constitutional officials to have unimpeded access to confidential information;
5. Empower the Public Defender to access information by contractually obligating civil servants and members of the armed forces to satisfy requests for information or interviews by the PDO, and matching this obligation with explicit penalties for refusal;
6. Recruit and train professionals to a higher standard, strengthening their capacity to fully exercise their power in terms of the protection of the rights of the military personnel;
7. Ensure full implementation of the anti-discrimination law, including in places of confinement and military units, through strengthened monitoring and preventive measures in the armed forces;
8. Introduce gender-sensitive attitudes in closed facilities, including closed facilities in the armed forces; and
9. Invite international donor organisations to partner in accomplishing these initiatives.

NOTES

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4. *Ibid.*, 30.
5. *Ibid.*, 231.
6. *The Organic Law of Georgia on the Public Defender of Georgia*, 230-IIS, May 16, 1996. Available as a pdf at: <http://www.ombudsman.ge/uploads/other/2/2058.pdf> (accessed November 8, 2016).
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14. *Ibid.*
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21. *Ibid.*, Article 5.
22. *Ibid.*, Article 22.
23. See: *The Constitution of Georgia*, Chapter Two.
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- "National Preventive Mechanisms," <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (accessed November 10, 2016).
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The Akyikatchy of the Kyrgyz Republic

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Central Asia

I. Introduction

The Akyikatchy of the Kyrgyz Republic (the Ombudsman) is the only national, parliamentary human rights institution in Kyrgyzstan; and yet, based on research undertaken for this study, the armed forces are not a priority area for the Office of the Ombudsman. National legislation regulating the armed forces mirrors legislation from the Soviet era, restricting professional and serving officers from addressing complaints to external oversight bodies and stipulating they first be reported to direct supervisors. Consequently, the number of appeals and complaints submitted by members of the armed forces to internal structures far exceeds the number addressed to external oversight bodies such the Ombudsman or Parliament. Moreover, complaints to external institutions are mostly filed by family members, because military personnel are concerned that their direct involvement might damage their career or relationship with senior officers. This is especially a concern for conscripts.

Overall, members of the armed forces are not well-informed about the mission, role and services of the Office of the Ombudsman. This further hinders them in approaching the institution. At the same time, the Ombudsman does not enjoy high levels of trust among military officers, owing to the low number of cases brought to positive resolution. As result, only 3-4 complaints on average are received annually by the Ombudsman from military personnel, their family members, and veterans.

While national legislation regulating the armed forces is rooted in decades old thinking, the legislation regulating complaints-handling is, in stark contrast, rather advanced. It affords the Ombudsman a significant degree of independence, autonomy, and freedom. Still, the Office of the Ombudsman is not yet a fully-functioning institution, and it lacks

efficiency in both handling complaints and conducting investigations. For this reason, the Office is not seen as a strong partner for civil society organisations (CSOs) and government agencies in preventing human rights abuses. This is largely due to poor staffing capacity, a lack of reform-minded leaders in the past, structural constraints, and cumbersome internal processes.

In this light, important steps need to be taken to consolidate an effective national human rights institution in Kyrgyzstan. First, the Office of the Ombudsman should be organisationally reconfigured to better focus on thematic sectors. Within this structural reform, the armed forces should be given more attention so that human rights abuses in this sector are addressed. Second, the capacity of the staff of the Office needs to be strengthened, including through training that introduces specific knowledge on the armed forces. Processes and procedures must also be improved to make complaints-handling, investigation, and reporting more responsive and results-oriented. Moreover, partnerships with CSOs and Parliament should be strengthened, to collectively address human rights violations.

As for the armed forces, closer engagement between these institutions and the Ombudsman is necessary, through joint monitoring inspections, research, trainings, and outreach. Until now, though, little progress has been made in Kyrgyzstan in protecting the rights of armed forces members. This is partly because the Office of the Ombudsman remains rather undeveloped. But it is also because the armed forces remain less prone to democratic governance. A new military doctrine adopted in 2013 led to some structural changes, but the sector, owing to the legacy of its recent Soviet past, continues to lack transparency and accountability.

Kyrgyzstan has been in the process of forming its national armed forces since declaring independence in 1991. But the political system remained largely semi-authoritarian until 2010, which restricted the implementation of elements of good governance in the public sector, including in the armed forces. Still, Kyrgyzstan has established bodies such as the Office of the Ombudsman in response to demands by local civil society organisations and international agencies. The creation of the Office in late 2002 made it the first and only such body commissioned by

the Parliament to promote and protect human rights, including the rights of military personnel.

This study aims to assess the capacity and operation of the Ombudsman in protecting the rights of armed forces members in Kyrgyzstan in the context of good governance, examining elements such as effectiveness, independence, accountability, and transparency. It also identifies capacities of the Ombudsman that need to be enhanced with regards to monitoring, reporting, preventing, and protecting human rights in the sector. As background, the human rights situation in the Armed Forces of the Kyrgyz Republic will first be set out, with some major violations highlighted. The legal framework that establishes the powers, autonomy, and functions of the Ombudsman is then described.

The capacity of the Ombudsman to fulfil key functions – such as complaints-handling, investigation, reporting, and data gathering and analysis – is evaluated, along with the main constraints encountered by the Ombudsman in performing these tasks. The organisational structure, staff composition and capacity, and training needs, as well as lessons learned through domestic and international co-operation, are also presented. Changes that need to be brought about to strengthen the prevention of and protection against human rights abuses are then reviewed.

This research included interviews with 16 people representing the Office of the Ombudsman, the Ministry of Defence, human rights and other civil society groups, and international organisations, conducted in July and August 2014. Moreover, desk research was used to analyse national legislation, the annual reports of the Ombudsman, specialised publications, and articles from media.

II. Background and Context

Like all security sector institutions in Kyrgyzstan, the armed forces remain closed, meaning they are non-transparent institutions. Thus, the armed forces are not inclined to provide the public with regular reports about internal human rights violations. At the same time, the number of civil

society organisations overseeing the protection of human rights in the armed forces is very small, and they do not issue monitoring reports in a systematic manner.

The Office of the Ombudsman does not regard the armed forces as an important strategic area and reports on human rights violations in this sphere only very infrequently; though its 2012 Annual Report did depict some serious violations. However, there is no historical statistical information illustrating trends of human rights abuses in the sector. Thus, it is difficult to ascertain whether the human rights situation in this field is changing for the better or not.

The 2012 Annual Report indicated that monitoring inspections undertaken in 13 bases of the Defence Ministry and six units of the Border Control Agency had revealed a number of human rights violations.¹ First of all, military personnel had limited access to information during their service. The internet is inaccessible on most military bases, and service members mostly obtain information from newspapers. Moreover, junior conscripts were subject to humiliation, bullying, and brutalisation by senior conscripts. According to the Report, some conscripts had even reported in interviews that physical assault and torture had taken place, albeit rarely. To address this, the Ministry of Defence issued a resolution in 2012 to transition to a system in which all new conscripts serve in a single combat company, thereby limiting interaction with senior conscripts. A Bishkek-based NGO known as Soldiers' Mothers, which monitors the Defence Ministry, has noted that this new policy resulted in a decrease in reports by conscripts of physical assaults.²

Suicide by members of the armed forces is another serious problem. From January 2010 to October 2013, there were 26 suicides among service members.³ NGOs have emphasised that a lack of psychologists on military bases to help conscripts during their service is a troubling deficiency. Human rights group Kylym-Shamy, which provides free legal aid, reports that legal proceedings have been initiated in the deaths of some military personnel; however, many lawsuits have been discontinued or the defendants found not guilty. Moreover, family members have not received compensation from the government for the deaths of their relatives that occurred during military service.⁴

Violations of the social rights of armed forces members are a pressing issue as well. Accommodation for serving military personnel and their family members is not fully provided, and spouses of military personnel working in remote areas often remain unemployed or have limited access to good medical services and schooling for their children. Overall, the armed forces are underfunded by the government, which puts at risk the socio-economic rights of military officers and their family members, as well as those of veterans.

III. Mandate and Legal Framework

The Office of the Ombudsman was created in 2002, when the Parliament adopted a Law on the Ombudsman on June 25, 2002.⁵ Five months later, on November 21, 2002, members of parliament selected the first Ombudsman of Kyrgyzstan. The predecessor to the Ombudsman was the Commissioner for Human Rights, founded by presidential decree in 1998. The Commissioner was appointed by the President and had an advisory body consisting of representatives from civil society as well as known public figures. It was a civilian institute with limited power and autonomy, and lacked the necessary staff, office, infrastructure, and financial resources to function effectively. The Commissioner and the advisors worked on a voluntarily basis and their activities were regulated only by presidential decree and not by law. Formally, the Commissioner for Human Rights existed until 2008, but this was true only on paper for a long time. In 2008, it was finally merged with the Office of the Ombudsman, which had already been playing a key role in the protection of human rights.

The Parliament in Kyrgyzstan has established a sound legal foundation for the Ombudsman. The Constitution defines the mission and mandate of the Ombudsman and the Law on the Ombudsman specifies the powers, functions, and operation of the institution.⁶ The Office of the Ombudsman is the only national body explicitly commissioned by Parliament to promote and protect the human rights of all Kyrgyz citizens, including members of the military. The Ombudsman is elected for a five-year term, but can be dismissed by Parliament before this period expires.

The Law on the Ombudsman, which has been amended several times since its adoption in 2002, empowers the Ombudsman to carry out oversight functions with a view to protect human rights, prevent violation of these rights, and counteract any forms of discrimination. It also tasks the Ombudsman with assisting Parliament and the executive government in law-making so that national legislation complies with international human rights standards and norms. The Office of the Ombudsman is considered a government body, but not a civilian one, and its staff are regarded as public officers.⁷ The Law provides the Ombudsman with significant independence and autonomy within the mandate of human rights protection. Article 6 specifies that the Ombudsman is independent of any government or government officials; and furthermore, forbids any intrusion or interference from any governmental or non-governmental organisation into the activity of the institution.⁸

The Ombudsman also enjoys extensive access; he or she has the right to be immediately received by the President, Chairman of the Parliament, Prime Minister, cabinet members, Chairmen of Supreme Court and Constitutional Chamber, the Prosecutor General, senior leaders of the armed forces, and heads of other government bodies; can appeal to the Constitutional Chamber for recognition that a law or legal act concerning human rights is unconstitutional; and has an unrestricted right to visit any military unit or base of the armed forces, detention centres, police cells, and prisons without prior notice.⁹ The Ombudsman has been given ample powers to oversee judicial institutions as well, such as the right to attend any court session, including closed proceedings, and to have meetings with court staff to clarify issues. The Ombudsman is further authorised to initiate investigations – both upon his or her own initiative as well as on the basis of complaints received – and has extensive rights in the investigatory process. For example, the Ombudsman can request any pertinent information or documentation from a government body and can call on a relevant institution, such as the police or Chief Prosecutor's Office, to launch a separate investigation. The Ombudsman can also appeal for the creation of a parliamentary commission to investigate specific cases of serious human rights violations or convene a parliamentary session to discuss issues of maladministration.¹⁰

When any violation of human rights and freedoms is identified by the Office of the Ombudsman, it sends a statement – called an Act of Reaction – to a relevant government body to demand that it takes adequate measures within one month. This can serve as a proposal by the Ombudsman that the relevant body launch a disciplinary process.¹¹ The Office of the Ombudsman is entitled to monitor how those bodies, including law enforcement institutions and the armed forces, ensure the protection of human rights in their spheres.

The Ombudsman can also send proposals to government bodies to improve administrative procedures. However, he or she lacks the right to submit legislative initiatives. Nevertheless, the Ombudsman can make proposals to members of parliament and the executive government so that they initiate a bill or amend current legislation.

In 2012, the Office of the Ombudsman was accredited by the International Coordinating Committee (ICC) of the National Institutions for the Promotion and Protection of Human Rights, with a ‘B’ status. This means that the institution does not fully comply with the Paris Principles.¹² Among weaknesses identified by the ICC in the Office of the Ombudsman were: lax co-operation with civil society organisations, the lack of a mandate to promote the ratification of international treaties and agreements, and a lack of full financial independence.

IV. Functions, Powers and Institutional Capacity

Complaints-handling and Investigation

As in any ombuds institution, complaints-handling is a key function of the Ombudsman in Kyrgyzstan, to which the Law on the Ombudsman provides broad powers for handling complaints and conducting investigations. The Office of the Ombudsman can receive complaints from citizens on any human rights violation, except those that are being investigated or examined by a court. Pursuant to Article 10(4) of the Law, complaints sent to the Ombudsman by citizens being held in detention centres, pre-trial prisons, or prisons are confidential, and thus their review by other bodies is forbidden.¹³

Once the Ombudsman decides on the admissibility of a complaint, information concerning the case is relayed to the organisation that is the subject of the complaint. That organisation has 30 days to provide an explanation on matters in question. When these entities neglect to respond within this time, the Ombudsman can report on this in his or her annual report or in a special report.¹⁴ Indeed, the Law on the Ombudsman obliges government agencies to assist the Ombudsman in investigations and inspections; and during the complaints-handling and investigation processes, the Office of the Ombudsman has the right to visit any government body and interview public officers in order to clarify issues or examine necessary papers.¹⁵

Despite the fact that complaints-handling is crucial to addressing human rights violations, helping citizens rehabilitate their rights, and identifying key areas of maladministration, civil society representatives interviewed for this study all said that the Office of the Ombudsman does not diligently and effectively process complaints.¹⁶ A 2013 UNDP review of the Office also emphasised its minimal efficacy in complaints-handling.¹⁷ Although this function remains the predominant operational area for the Office, the percentage of complaints it resolves positively is quite low. For example, of a total 2,466 complaints received in 2013, only 384 (15.6%) were settled by the Ombudsman in favour of the complainant. Meanwhile, the remaining cases were referred to other government agencies for follow-up, found inadmissible, partially resolved, or oral consultations were provided.¹⁸

“The Office of the Ombudsman has become like a post office when it registers complaints; trying to re-addresses them to other government bodies for further processing.”

Representative, local civil society organisation

This lack of effectiveness of the Ombudsman in handling complaints and conducting investigations does not seem to have led to any significant decrease over time in the number of complaints received. Over the last five years, 2,100-2,800 complaints have been received per annum.¹⁹ This indicates a relative stability in the use of non-judicial mechanisms by

Kyrgyz citizens to protect their rights. Still, the 2013 Annual Report of Ombudsman showed that only 25 Acts of Reaction were issued by the Office of the Ombudsman; a very small number considering that more than 2,000 complaints were submitted to the Ombudsman that year, including human rights violations reported by local and international CSOs on torture, domestic violence, and abuses of the economic rights of migrants and the political rights of opposition members and civic groups.²⁰

Complaints-handling and the investigation process are closely linked; and the low rate of case resolution by the Office of the Ombudsman indicates the minimal effectiveness of the investigation process as well. As one interviewee who wished to remain anonymous pointed out, investigation is not a primary focus for the Office because it entails significant amounts of time and effort to carry out. “Keeping correspondence with other government agencies is the core activity of the Office of the Ombudsman, not investigation,” he explained.²¹ Instead, staff of the Office seek to refer complaints to other bodies, encourage complainants to take their grievances to the courts, or classify cases as partially resolved.

“If our organisation had the same funding and number of staff members as the Office of the Ombudsman, we alone could do a lot more for human rights protection in the country than the Ombudsman does now.”

Representative, local human rights organisation

The failings of the Office of the Ombudsman when it comes to complaints-handling are largely explained by weak staff capacity, and this has been reported by interviewees from both non-governmental and donor organisations. A non-competitive and non-transparent staff recruitment process, low staff motivation driven by small salaries and unattractive benefit packages, a lack of merit-based pay, and high staff turnover all contribute to this deficit. Additionally, unprofessional interaction between the Office of the Ombudsman and Parliament, as well as feeble oversight from the latter regarding the work of the Ombudsman has resulted in somewhat flimsy accountability.

Complaints Submitted by Members of the Armed Forces

The number of complaints submitted to the Ombudsman by members of the armed forces, their family members, and veterans is extremely small; only four such complaints were received in 2013, and this is representative of recent years in general.²² In the same time period, the Parliamentary Committee on Defence and Security has received a far greater number of complaints, requests, and appeals from the armed forces – 1,488 in 2012 and 2013 alone – regarding remuneration, pension, housing and living conditions, unlawful dismissals, and the wrongful and illegitimate actions of senior military officers.²³ The receipt of such a small number of complaints by the Ombudsman compared to the Parliament would suggest that the Office of the Ombudsman is either not trusted or not well known by service members. And in fact, information about the mandate and services of the Ombudsman is poorly disseminated within the armed forces, so that military personnel are not well informed of its role and how to file a complaint.²⁴

Although every military base has an information and announcements desk, there is no information about the Ombudsman at most of them²⁵. The chairwoman of the NGO Soldiers' Mothers has underlined the problem of the scarce information available in military units about the Ombudsman.²⁶ Limited information about the institution combined with a lack of positively resolved cases in favour of military personnel help explain the reluctance of service members to approach the Ombudsman with complaints.

"We visit many military bases and meet soldiers there, but there is no information about the Office of the Ombudsman in the majority of these bases."

Uulkan Baigubatova, Director, Soldiers' Mothers

Another significant reason why military personnel rarely approach the Office of the Ombudsman is that the Law on Military Service Regulations stipulates that all military personnel are to submit proposals, complaints, and requests firstly to their direct senior officers (supervisors).²⁷ The number of appeals and complaints sent by service members to the Ministry of Defence (MoD) is thus substantially higher than the number submitted

to parliament, the president's office, or the Ombudsman. Functionally, this normative procedure prevents armed forces personnel from engaging external oversight bodies. Furthermore, relatives of service members, rather than the members themselves, mostly submit complaints – both to the MoD and external oversight bodies. For example, the MoD revealed that it received only 13 complaints directly from members of the armed forces from 2011 to 2013.²⁸

Other armed forces of the Kyrgyz Republic adhere to the same normative practice, a legacy of the notoriously closed Soviet era. In general, orders of senior officers in the Armed Forces of the Kyrgyz Republic are to be strictly obeyed and are not the subject of discussion. This upholds a closed environment and creates an atmosphere of non-transparency. The relatively high number of appeals, requests, and complaints sent by members of the armed forces to the Parliamentary Committee on Defence and Security is partly due to the fact that its chairman during 2010-2015 was the former Minister of Defence, and thus, was more well-known and more trusted by military personnel than the Ombudsman. Moreover, members of parliament are more vocal than the Ombudsman with committee sessions being broadcasted widely, so citizens are more aware that parliament wields power and is in a position to solve their problems.

Owing to the 2010 shift in Kyrgyzstan from a super-presidential to a parliamentary-presidential system, the Parliament has also been delegated greater oversight functions, including in the security sector. In this role, Parliament has started to exert more control over the armed forces. This has resulted in more enquiries sent to military leadership, frequent monitoring visits, an increased number of special parliamentary commissions to investigate specific cases, and regular appearances by senior military leaders in parliamentary sessions; activities which are broadly publicised through media.

Reporting and Recommendation

Pursuant to the Law on the Ombudsman, the Ombudsman is to submit annual reports describing the protection of human rights by government agencies, local municipal bodies, non-governmental organisations (NGOs) and business entities, serious violations of human rights, and legislation

shortcomings to parliament by April 1 of each year.²⁹ In these reports, the Ombudsman must also specify the main themes of complaints and list government agencies and NGOs that have violated human rights or ignored the recommendations of the Ombudsman; and propose new recommendations related to human rights protection. The Ombudsman also has a right to prepare special reports devoted to any serious or massive violations of rights, and to present them to parliament.³⁰

Draft annual reports are discussed publicly before presentation to the parliament, allowing CSOs to provide comments and participate in hearings, in an inclusive process. However, annual reports of the Ombudsman are not built on the analysis and recommendations of the previous year's document, and thus fail as far as follow-up and consistency is concerned. This lack of systematisation, continuity, and integrity in reporting limits the coherence, too, of the monitoring, prevention, and protection of human rights. Moreover, there is no standard structure for annual reports, which differs year-to-year.

Annual reports of the Ombudsman include recommendations to government institutions, including courts, to strengthen human rights protections in the country. While some recommendations are well-elaborated and include concrete steps, there is no analysis provided to contextualise the progress made in implementing previous recommendations. Thus, it is unclear which of these recommendations have been ignored or fulfilled. Analysis of this sort would provide the Ombudsman and members of parliament with a tool to strengthen oversight of government agencies that disregard recommendations.

In some annual reports, there is no information at all regarding the protection, promotion, or monitoring of the rights of military officers. Special reports, which are not issued by the Ombudsman with any regularity, have never addressed the protection of the rights of armed forces members. This is due to inadequate capacity among the staff to develop in-depth analytical reports, weak relationships between the Office of the Ombudsman and CSOs, and little oversight of the Ombudsman by parliament to compel the Office to prepare special reports.

Within the Office of the Ombudsman, the Consolidated Analysis and Control Unit is tasked with preparing annual and special reports. In other words, it is not the obligation of all Office staff to collect, consolidate, and analyse data for these reports; and this has made the annual reports detached and stand-alone documents.³¹ Furthermore, the collection and analysis of data for creation of the annual report starts only a few days before the internal deadline of February 1, after which the Consolidated Analysis and Control Unit and other staff compose the report in haste.³² This affects the quality of annual reports, which many interviewees described as ill-developed.

Data Collection and Analysis

To collect, analyse, and report on data related to cases and complaints, the Office of the Ombudsman maintains a database; however, access to this system is limited to a small number of personnel. When these staff members are unavailable, other staff cannot use the database to extract, modify, or share information. This practice hinders both internal and external information exchange and prevents the efficient use of data in planning, analysing, monitoring, and reporting. Further, it inhibits the use of data in the development of future strategies or in obtaining a picture of the overall human rights environment in the country.

The Ombudsman should seek to establish a consolidated database that can help identify recurring complaints, and can segregate complaints by topic, time, and status (e.g., resolved, in process, etc.). Access to this database should be broadened. The Office should also establish timelines within which staff are expected to process complaints.

Ultimately, the Office must work to build staff capacity, to fully function as mandated. Many interviewees expressed that staff of the Office of the Ombudsman, especially in provincial branch offices, lack the analytical skills to prepare well-grounded reports. As a result, annual and special reports of the Office are not strongly backed by the government, CSOs, or the international community.

V. Capacity Building, and Domestic and International Co-operation

Staff Capacity

In 2013, 101 staff members worked in the Office of the Ombudsman, including 80 professional officers, 11 administrative officers, and 10 support staff, including personnel from both the central office and 7 provincial branches.³³ Among the staff of the Office, there is a gender disparity, with approximately twice as many men employed as women. The Office has four different sectoral units responsible for monitoring, investigation, and policy support in the following thematic areas:

- protection from domestic violence and gender discrimination;
- rights of children and youth;
- protection of social and economic rights, including the rights of the disabled and minorities; and
- observance of human rights by law enforcement agencies and at detention facilities.

Each of these units has four staff members, including unit heads. Complaints and issues related to the armed forces are handled by the Social and Economic Rights Unit, which also addresses complaints regarding education, health, the environment, social welfare, employment, disability rights, and the rights of ethnic minorities. Meanwhile, the remaining three sectoral units are specialised around one field, such as gender or children. This gives them an advantage in terms of thematic expertise, as well as a much narrower mandate than that of the Social and Economic Rights Unit, which is also staffed by only four officers.

The broad portfolio of the Social and Economic Rights Unit is divided among its four staff along thematic lines, with just one officer – who also covers other fields – in charge of the armed forces. However, neither that officer nor any other staff in the unit has any work experience in the armed forces. Staff of the Unit make visits to bases of the Defence Ministry, Border Service, and troops of the Interior Ministry as well as to military registration and enlistment offices during fall and spring conscription periods. During these visits, they monitor observance of

the rights of conscripts, soldiers, and serving members; however, these inspections are infrequent due to the shortage of human resources in the Unit and the lack of financial resources. A lack of funding for travel to more remote areas makes monitoring visits to these areas particularly uncommon.³⁴

The staff of the provincial branches of the Office also rarely inspect the armed forces bases in their regions. They, too, claim this is due to a lack of travel funds. But, local human rights organisations say that monitoring the armed forces is simply not perceived as a priority.³⁵ Many CSOs attribute shortcomings in staffing to the lack of an open and competitive selection process. Personnel of the Office of the Ombudsman are regarded as public officers within the government, a sector heavily criticised in general for its non-transparent and corrupt recruitment process.

The staff of the Office, like other public employees, are also poorly paid. Indeed, the 2013 Annual Report of the Ombudsman highlighted that, despite salary raises in many government agencies – including courts and the Office of the Chief Prosecutor – salaries of staff of the Office of the Ombudsman remained unchanged, and had for six years.³⁶ As a result, Office staff salaries are almost half of those in some other government agencies.³⁷ This leads to high staff turnover, even among trained officers. Moreover, the Office lacks a merit-based pay system that is in place in other government agencies to reward staffers that are performing well. Overall, there are few incentives for staff of the Office of the Ombudsman to improve their performance and the quality of the services they provide. There is also a popular perception that the Office is a good entry point by which to start a professional career in the public sector, so that when officers find more attractive positions in other ministries, they do not hesitate to leave.

Training

The Office of the Ombudsman has co-operated in recent years with several international donor organisations to provide training to staff. Among them are UN agencies in Kyrgyzstan that have established a joint project. Yet, there have been no specifically-tailored comprehensive training programs in the area of the armed forces. Still, in the summer of 2014, the OSCE

did support a new project of the Kylym-Shamy human rights organisation that included a five-day training on international and national standards regarding the rights of military personnel.³⁸ The training was attended by Office staff, as well as representatives from the National Centre on Torture Prevention, the Ministry of Defence, the Ministry of Interior, the Border Service, the State Penitentiary Service, the Military Prosecutor's Office, and several NGOs.³⁹ The need for more training addressing the rights of armed forces members has been articulated by the Ombudsman.

Domestic Co-operation

Officers from the Social and Economic Rights Unit have characterised the relationship of the Unit with the Ministry of Defence and other armed forces as co-operative; and representatives of the Ministry have in turn described their work with the Office of the Ombudsman as collaborative.⁴⁰ But, the agencies actually have no active partnership and this co-operation is limited to the exchange of mail correspondence. They engage in almost no joint activities, such as trainings, inspections, or outreach. One exception is the new project implemented by Kylym-Shamy, mentioned above, under which monitoring visits to armed forces bases have been jointly carried out by the Office of the Ombudsman, the Ministry of Defence, Kylym-Shamy, and other armed forces representatives.

In annual reports, the Ombudsman has emphasised that not all government agencies support the activities of the Office; they do not properly address Acts of Reaction and often delay their official responses. The Ombudsman has also reported that, despite the right of the institution to access detention facilities at will, the internal rules of some law enforcement bodies (e.g., the National Security Service) require even the Ombudsman to provide written notification prior to visiting. Clearly, this limits the access of the Ombudsman to these sites, and NGOs have pointed out that this reflects the lack of credibility of the Ombudsman among government agencies, which do not regard the Office of the Ombudsman as a partner in promoting human rights. This is largely due to low case resolution rates by the Office, as well as the unpopularity of previous Ombudsmen – who were very politicised, and lacked sound managerial and leadership skills.

Co-operation between NGOs and the Ombudsman is also minimal, and there are no mechanisms established within the institution to encourage collaboration. Non-governmental organisations that specialise in issues related to the armed forces do not closely cooperate with the Office at all; and only those working on addressing torture, children's issues, and gender rights have developed a working relationship with the Office. This is also true in the provinces between staff of the regional branches and CSOs in those areas.

There were attempts to establish and maintain Councils of Human Rights at the central and provincial branches of the Office of the Ombudsman, with the aim of creating space for regular dialogue and cooperation with NGOs. One of these councils was set up in 2012 to specifically protect the human rights of members of the armed forces and was composed of 19 members, mostly veterans of different armed divisions. However, this and other councils have disintegrated without support from the Ombudsman for their recommendations and initiatives.

A few of these councils now function as independent entities or networks, monitoring human rights in the country. The Council of Human Rights Activists of Kyrgyzstan is one such network, originally created by the Ombudsman, and has been a vocal and influential group. Members of another council formed by the Ombudsman, the Council on the Human Rights of Armed Forces Members, has also established itself as an NGO – the Military Ombudsman Institute. The Head of the Institute explained that it sought independence after the Ombudsman failed to support any of its proposals.⁴¹

International Co-operation

The Office of the Ombudsman has closely co-operated in recent years with international organisations such as the UNDP Office in Kyrgyzstan, the UN Office of the High Commissioner on Human Rights, and Freedom House. These agencies have assisted in convening public hearings on various human rights issues, preparing new legislation, and building staff capacity. But no international donor organisation has focused its support on issues related to the armed forces, though the Ombudsman is highly

interested in enhancing the knowledge of Office staff in this sphere through joint projects with international actors.

VI. Good Practices and Recommendations

Since its creation in 2002, the Office of the Ombudsman has achieved some progress in supporting human rights in Kyrgyzstan, but changes must yet be brought about to enhance its capacity to prevent human rights violations in the country. These changes primarily concern supporting good practices through legislation, human resources policies, management procedures, and internal and external co-operation. Closer collaboration must particularly be established with the armed forces to better protect the rights of military personnel. The following recommendations will help to enhance the ability of the Office of the Ombudsman to achieve more progress in fulfilling its mandate:

- The national legislation on the Ombudsman of the Kyrgyz Republic is the most advanced in Central Asia, but it requires some modifications to improve the effectiveness of the institution. Most importantly, selection procedures for the position of Ombudsman must be streamlined. Otherwise, it is difficult to build a well-functioning organisation in a country where the public sector performs poorly as a whole. Some previous Ombudsmen have either lacked experience in human rights or were not oriented towards creating a sustainable organisation, instead politicising the position and using the institution as a vehicle of self-promotion. Detailed selection benchmarks should be developed for the position by amending the Law on the Ombudsman.
- The Office of the Ombudsman must establish closer interaction with Parliament and particularly, with parliamentary committees, including the Committee on Human Rights, Constitutional Legislation and Government Systems, the Committee on Judicial Issues and Rule of Law, and the Committee on Defence and Security. Beyond the annual reports of the Ombudsman, the Office could provide these committees with policy papers and special reports that inform parliamentarians about recurring human rights violations and frequent violators among executive and judicial government bodies,

and advise them on oversight or legislative actions to improve the human rights situation. In addition, joint monitoring inspections could be undertaken. Such collaboration will compel the Office of the Ombudsman to be more accountable to Parliament.

- Rehabilitation of the councils formerly created by the Ombudsman, or the creation of new advisory structures within the Office of the Ombudsman, could also serve as a tool of strong accountability, and would engage the participation of CSOs. Building active partnership with CSOs through joint activities such as sectoral research, monitoring inspections, advocacy and information campaigns, public hearings, roundtables, and trainings will add further to the accountability of the Office and, moreover, help improve the transparency of the Office.
- A structural re-organisation of the Office is also necessary to balance the division of various thematic areas among staff and lighten the load on the Social and Economic Rights Unit. Further, the armed forces should be made a more central focus of the Ombudsman, perhaps by assigning one of the two Deputy Ombudsmen to take responsibility for issues arising in this area.
- Staff capacity of the Office must be strengthened through trainings, online courses, and workshops as well. International organisations could assist in delivering these, and could especially introduce important information on the specific issues facing members of the military. To reduce staff turnover, an open and transparent selection process should be implemented and more significant job incentives should be introduced.
- To improve responsiveness, complaints-handling processes, investigations, reporting, and data analysis should be streamlined. The Ombudsman should introduce more stringent checks on the progress or resolution of cases, and set a higher target for numbers of cases resolved. The Office of the Ombudsman should also re-strategize so that complaints processing is linked to identifying priority areas based on recurrent human rights violations. Systematic violations can then be addressed more effectively.
- The database of the Office, and policy surrounding it, must also be improved. All staff members should have access to the database

so that they can enter, update, modify, and extract information. To achieve this, relevant internal policies must be amended and staff should be trained on how to use the database.

- Information campaigns are required to raise awareness among citizens about the mandate, functions, and services of the Office of the Ombudsman. Mass media, social media, and a more interactive website can be used to reach out to more constituents. People in rural areas, where around 60% of the population lives, are particularly poorly informed about the Ombudsman. Regional branches must be more actively involved in outreach to these citizens.
- Protection of the rights of military personnel must be prioritised, and co-operation with armed forces institutions enhanced. This could be achieved through joint planning and various collaborative activities, including monitoring exercises, joint publications, outreach, and trainings and seminars.

VII. Conclusions

The Ombudsman of the Kyrgyz Republic is the only national body mandated by Parliament to monitor, promote, and protect human rights in the country, including the rights of armed forces personnel. Legislation grants the Office of the Ombudsman significant independence to carry out its functions and the unrestricted right to access information, detention facilities, judicial institutions, and to meet with national leaders. Still, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights has given the Ombudsman a 'B' status, meaning it does not yet fully comply with the Paris Principles.

Despite some achievements of the Ombudsman in protecting human rights and freedoms, it is still not regarded as a well-functioning and effective body among the CSOs and citizens of Kyrgyzstan either. The Office of the Ombudsman has a low rate of case resolution and its capacity to handle complaints, investigate violations, prepare reports and recommendations, and analyse data is weak. Thus, many governmental and non-governmental agencies do not perceive it as a strong partner, and recommendations of the Ombudsman are not always fulfilled by

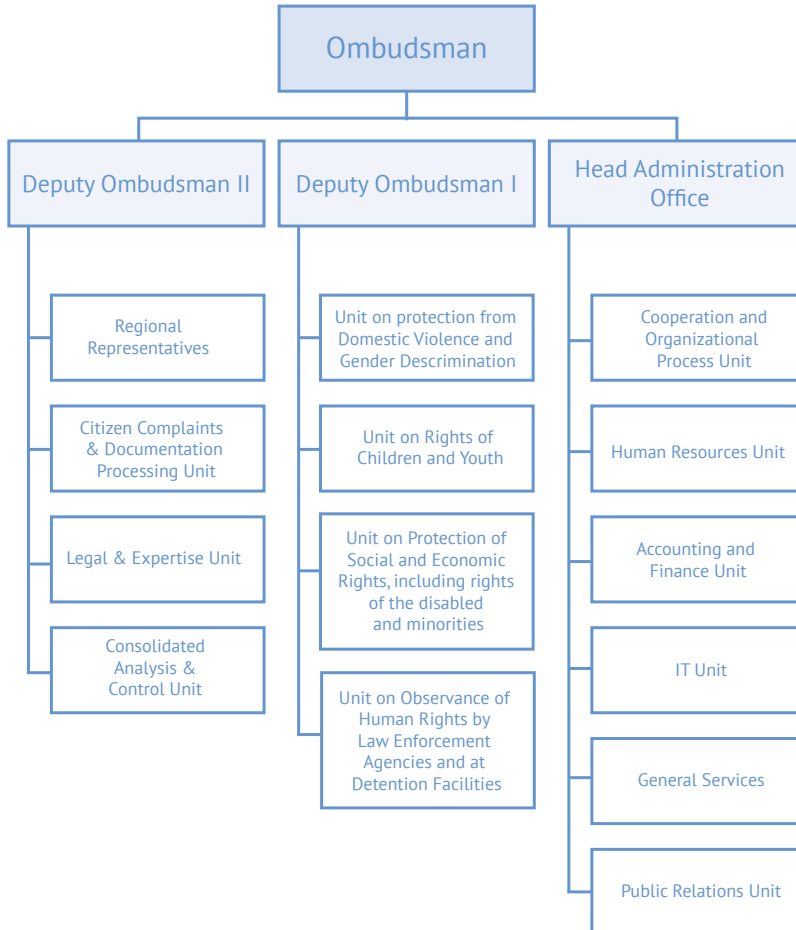
government officials in a timely manner or are completely ignored. This is coupled with inconsistent and disorganised follow-up procedures by the Ombudsman related to monitoring the implementation of these recommendations, which limits the ability of the institution to identify chronic human rights violators and tackle the root causes of their abuses. This diminishes the role of the Office in preventing human rights violations.

The Office of the Ombudsman only loosely co-ordinates with the armed forces and military personnel are poorly informed about its services. As a result, the number of complaints received from members of the armed forces is incredibly small; on average, only 3-4 complaints are submitted annually. The Ombudsman's Social and Economic Rights Unit has an overly broad mandate that encompasses monitoring not only the armed forces, but also issues related to education, health, employment, the environment, the disabled, and ethnic minorities. The Unit is understaffed for this workload and has just one person, who lacks hands-on professional military experience, addressing the rights of armed forces personnel. Specific knowledge of the armed forces is needed in the Unit, and in the Office of the Ombudsman in general.

Collaboration between the Ombudsman and Parliament, CSOs, and international organisations is rather weak as well. Civil society groups, which once sat on the internal advisory Human Rights Councils no longer play this role. This may be linked to why international agencies are decreasingly inclined to co-operate with the Ombudsman.

ANNEX

Organisational Structure of the Office of the Ombudsman



Office of the Ombudsman, 2013 Staff⁴²

(Central and Provincial Offices)

Position	Senior Managers	Administrative Managers	Professional Staff	Administrative Staff	Office Support	Total
Number of staff	3	1	76	11	10	101

2013 Annual Budget⁴³

Budget Line Item	Projected Amount (in KGS, or Kyrgyz Som)	Expenditures (in KGS)
Salaries	20,256,000	18,984,000
Payment to Social (Pension) Fund	2,873,500	2,788,200
Travels	982,500	986,700
Utilities and Communication Costs	1,452,500	1,254,900
Rental Fee	62,000	52,000
Transportation Costs	1,087,200	1,000,300
Purchase of Other Services	1,402,800	1,285,600
Purchase and Renovation of Offices	0	0
Vehicles and Equipment	0	0
Others costs	246,000	291,800
Reserve Fund	208,700	208,700
TOTAL	28,363,400	26,852,200

Number of complaints received from members of the armed forces,
2011-2013⁴⁴

Year	Number of complaints
2011	0
2012	5
2013	4

NOTES

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3. S 2010 goda v Voorujennyh silah KR zaregistrovano 50 smertei voennosluzhashih, iz nih 26 suitsidov, - Voennaya prokuratura [Starting from 2010 there were 50 deaths registered with the Armed Forces of the Kyrgyz Republic, including 26 suicides as reported by the Military Prosecutor's Office], Akipress, November 26, 2013, <http://svodka.akipress.org/news:134898> (accessed August 11, 2014).
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5. Seong-Pil Hong, *A Comparative Study on Ombudsman Institutions in the Asian Region*, Anti-Corruption & Civil Rights Commission, Republic of Korea, 2011.
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7. *Law on the Ombudsman (Akyikatchy)*.
8. *Ibid.*, Article 6.
9. *Ibid.*, Article 8.
10. *Ibid.*
11. *Ibid.*
12. The Paris Principles provide a framework for the operations of National Human Rights Institutions around the world and recommend: a broad mandate based on universal human rights standards, autonomy from government, independence that is guaranteed by statute or constitution, pluralism, adequate resources, and adequate powers of investigation. For more, see: United Nations General Assembly, *National institutions for the promotion and protection of human rights*, A/RES/48/134, December 20, 1993, Annex. Available as a pdf at: <http://www.un.org/documents/ga/res/48/a48r134.htm> (accessed July 12, 2014).
13. *Law on the Ombudsman (Akyikatchy)*, Article 10(4).
14. *Ibid.*, Article 10.
15. *Ibid.*, Article 12.
16. Interviews were conducted with representatives of six different civil society organisations.
17. United Nations Development Programme, *2013 Functional Review of the Kyrgyz Ombudsman Office*, provided by staff of the Office of the Ombudsman.
18. *Ibid.*
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20. See: United Nations General Assembly, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 6/21: Kyrgyzstan*, A/HRC/WG.6/21/KGZ/1, December 5, 2014. Available as a pdf at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/234/56/PDF/G1423456.pdf?OpenElement> (accessed July 18, 2014).
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 29. *Law on the Ombudsman (Akyikatchy)*, Article 1.
 30. Ibid., Article 11(7).
 31. UNDP, 2013 *Functional Review of the Kyrgyz Ombudsman Office*.
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 33. *Report of the Ombudsman of the Kyrgyz Republic for 2013*.
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 37. Ibid.
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 41. Anvar Sartayev, Head, Military Ombudsman Institute, interview, August 20, 2014.
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Ukrainian Parliament Commissioner for Human Rights

Bogdan Kryklyvenko, Head of Secretariat, Ukrainian
Parliament Commissioner for Human Rights

I. Introduction

The principle of universal respect for human rights and fundamental freedoms set forth in the Charter of the United Nations is key for the successful development of societies and nations; and the armed forces play a key role in enabling a security environment that allows people to enjoy their rights and freedoms. The Armed Forces of Ukraine not only deter or rebuff armed aggression and protect Ukrainian territory, they also carry out peacekeeping functions under certain conditions. Ukraine's entire history of statehood is closely linked with the establishment and development of various military formations. Given the important role of the Armed Forces, it is necessary to secure the rights and freedoms of their personnel so that they can be effective in carrying out their duties.

Thus, this study focuses on the functioning and capacity needs of the Ukrainian Parliament Commissioner for Human Rights (the Commissioner), who is charged with exercising parliamentary control over the military in order to observe and promote respect for the human rights and freedoms of all citizens, and in the context of good governance. The study examines the means employed by the Ombudsman in monitoring the adherence of state authorities to human rights in the armed forces, and in making recommendations for improvement.

II. Human Rights in the Armed Forces of Ukraine

After proclaiming independence in 1991, Ukraine inherited one of the most powerful military forces in Europe, equipped with nuclear weapons and large stores of conventional weapons and military equipment. At the time, there were some 780,000 military personnel. From this fragment of the former Soviet Army, the Armed Forces of Ukraine were formed by a

Resolution of the Verkhovna Rada (Parliament) of Ukraine on August 24, 1991. The establishment, formation, and development of the Forces were accompanied by a significant reduction in military structures, as well as a decrease in personnel, weapons, and military equipment.

The Armed Forces are tasked with implementing measures for martial law and states of emergency, enhancing protection of the state border and the maritime zone, responding to natural and man-made emergency situations, providing military assistance to other states, and participating in international military co-operation and peacekeeping operations. Military command structures ensure strict compliance with the Constitution of Ukraine, so that the Armed Forces are not used to restrict the rights and freedoms of citizens, overthrow the constitutional order, or subvert or obstruct state authority. In fact, no circumstances, orders, or commands can be the basis for illegal actions against the civilian population, its property, or the environment.

But, the Armed Forces of Ukraine have faced a new challenge in recent years, participating in a large-scale conflict for the first time in the 25-year existence of the institution. In 2014, Ukraine was confronted with a violation of its territorial integrity and a de-facto military invasion when the Autonomous Republic of Crimea, a part of Ukraine, was occupied by Russia. In the eastern part of Ukraine, an anti-terrorist operation was launched in response; within the framework of which, forces engaged in reinforcing the border and in combating illegal armed groups, which aimed for broader autonomy for or the separation of the two eastern regions the country.

In this difficult climate, systemic problems within the Armed Forces of Ukraine have surfaced, including claims of violations of the rights of military personnel. Problems that were already present are deepening and, due to maladministration, new ones are arising. This makes the role of the Ombudsman crucial, because he or she is entrusted with exercising oversight of human rights and freedoms, particularly in the Armed Forces. Subject to the Constitution of Ukraine, the Ombudsman carries out systemic monitoring of measures taken to prevent abuse of the civil and personal rights of military service members, including concerning life and health, protection of honour and dignity, personal integrity and

security, and just and favourable conditions of service.¹ The purpose of democratic civilian control is to ensure compliance by the military with the Constitution and with national laws concerning the rights and freedoms of citizens conscripted for military service, those who undergo service or are in reserve units, and retired service members and their families.

In response to security challenges in the eastern part of the country, the Armed Forces of Ukraine have implemented a number of mobilisations. Mobilising armed forces implies taking certain measures towards the organisation and staffing of a state of war. Such measures, inter alia, call on people who are subject to military service.

In the first waves of mobilisation in Ukraine, a reportedly large number of human rights violations took place, commonly related to failures to conduct medical examinations and the submission of medical opinions on eligibility for service without the observance of established procedures. This practice risks creating a situation in which military units are equipped with personnel who are unable to perform their duties due to poor health, leading to a significant weakening of military capabilities. The conscription of ill persons also contradicts Article 18 of the Law on General Military Duty and Military Service, which defines exemptions to service.²

While failing to complete medical examinations could lead to unfit service members, illness is also sometimes invented by fit people to avoid conscription. Corruption in the military registration and enlistment offices is widespread and citizens subject to mobilisation are prone to pay bribes for a medical opinion that will render them unsuitable for service. Indeed, the low pay of armed forces personnel acts as an incentive or stimulating factor for this kind of corruption.

Other violations have occurred in calculating the period of service of military personnel. Despite the fact that the start of military service should be counted from the day of departure to a military unit, relevant documents list later dates. This violates the socio-economic rights of armed forces personnel. Another very concerning issue is the humiliation to which junior soldiers are subjected (also known as hazing) when

their education and training is conducted by more senior soldiers and sergeants. Cruel conditions can dominate some units, in which the dignity of soldiers, their personal integrity, and even their lives are at stake.³

Annual reports of the Commissioner have noted that the most prevalent problems among armed forces members relate to the protection of their honour and dignity, the protection of their personal immunity and safety, the protection of their life and health, and issues with fair and favourable conditions of service. The social and professional adaptation of armed forces personnel after discharge from military service is also increasingly relevant. Given these conditions, it is urgent that measures are taken to increase public awareness of the rights of the population during mobilisation. For it is only by ensuring the rights of armed forces personnel that the state can count on their faithful implementation of obligations and can develop the Armed Forces of Ukraine into a highly professional and competitive army.

It should be mentioned that the involvement of civil society in monitoring the observance of human rights and freedoms in the armed forces has not been sufficient in recent years. To address existing problems, their involvement is very important. Partnering with these organisations allows for broader monitoring and evaluation of systematic problems.

III. Mandate and Legal Framework

The Office of the Ukrainian Parliament Commissioner for Human Rights was established by the Constitution of Ukraine.⁴ The Law on the Ukrainian Parliament Commissioner for Human Rights (hereinafter, the Law on the Ombudsman) was adopted on December 23, 1997 and entered into force on January 15, 1998.⁵ On April 14, 1998 the Parliament elected a Commissioner for Human Rights for the first time.

The Commissioner is an autonomous constitutional agent exercising parliamentary control in the oversight of human rights and freedoms in Ukraine, with national jurisdiction for the duration of his or her five-year term. The Commissioner observes the upholding of the constitutional rights and freedoms of Ukrainian citizens – both in Ukraine and beyond

its borders – as well as those of foreigners and stateless persons on the territory of Ukraine.⁶ Even though the Commissioner is elected by Parliament, he or she is not accountable to any public body or official. In fact, the Commissioner is independent from other state agencies in the exercise of his or her functions, and the Commissioner's authority cannot be terminated or restricted even if parliament's term of authority expires or it is dissolved.⁷ Explicit legal restrictions on interference from other parties, and on permissible outside activities of the Commissioner further guarantee the independence of the institution. This high level of independence is particularly important when it comes to initiating actions or proceedings related to the armed forces.

The Commissioner provides Parliament with an annual report on the human rights situation in Ukraine, including relevant recommendations. Any weaknesses uncovered in legislation related to human rights and freedoms are also reported.⁸ One important feature of the role of the Commissioner is that he or she is not obligated to provide details of cases that he or she has settled or is involved in, and enjoys the right to immunity during the entire period of his or her authority.⁹ The only circumstances under which the Commissioner may be terminated is if he or she refuses or is unable to perform the duties of the office, is found guilty of charges, or is deceased. Since the post was created, there have been no cases of dismissal.

IV. Functions, Powers, and Institutional Capacity

As mentioned, all categories of human rights and freedoms fall within the purview of the Commissioner, who is empowered to oversee the observance of these rights by all Ukrainian state bodies.¹⁰ The Commissioner is guided by the Constitution, the laws of Ukraine, and international treaties to which the country is a signatory. The Commissioner exercises parliamentary control for the following purposes; to:

1. Protect the rights and freedoms envisaged by the Constitution of Ukraine, the laws of Ukraine, and international treaties;
2. Prevent violations of these rights and freedoms or facilitate their restoration;

3. Facilitate the introduction of legislation on these rights and freedoms in accordance with the Constitution and international standards;
4. Improve and further develop international co-operation related to the protection of these rights and freedoms;
5. Prevent any form of discrimination in the fulfilment of a person's rights and freedoms; and
6. Promote awareness among the population of the law and of confidentiality.¹¹

The Commissioner has a broad mandate and is entitled to a wide range of rights that help him or her ensure the effective consideration and investigation of complaints related to human rights violations. The Commissioner has the right to be received, without delay, by all state officials in order to address issues of concern almost immediately without bureaucratic delays. The right to attend parliamentary sessions, meetings of cabinet ministers, proceedings of the Constitutional and Supreme Courts of Ukraine and other higher specialised courts, and collegiums of offices of prosecutors allows the Commissioner to access updated information on any initiatives and practices.¹² That the Commissioner can attend court sessions of all instances, including those held behind closed doors, is an important power. Judicial practice is a crucial element in restoring violated rights and the attendance of the Commissioner at hearings allows him or her to monitor such practice.

In cases of non-compliance with legislation, the Commissioner can apply to the Constitutional Court of Ukraine to appeal the conformity of such acts with the Constitution. And if needed, the Commissioner can make proposals for improvements to legislation in the sphere of human rights protection.¹³ Legislation is the main basis for guaranteeing human rights, and the opportunity of the Commissioner to be involved in drafting legislation allows him or her to integrate international standards and implement best practices.

While exercising his or her functions, the Commissioner can visit all state bodies without hindrance, review classified documents, receive copies of documents, and demand explanations from officials relevant to cases under investigation. These rights to access are embedded in law, so that

in situations when state bodies refuse to provide requested information, legislative provisions support the initiative of the Commissioner. When the Commissioner finds that rights have been violated, he or she can submit that respective measures be taken; the implementation of which is monitored by the Secretariat (Office) of the Commissioner.

On July 12, 2006 Ukraine ratified the Optional Protocol to the Convention against Torture (OPCAT).¹⁴ However, it was not implemented for over 6 years despite efforts by the Commissioner to amend legislation so that he or she was vested with the function of the National Preventive Mechanism (NPM).¹⁵ In November 2012, Parliament finally did approve new legislation and the Commissioner was tasked with implementing OPCAT.¹⁶ After public debate that included the participation of well-known domestic and international experts, an “Ombudsman+” model was decided upon for the NPM, which envisions joint monitoring of custodial settings, in particular those under the jurisdiction of the Ministry of Defence, by staff of the Office of the Commissioner and civil society activists. This has been successfully implemented.

As NPM, the Commissioner has the right to inspect any place in which people are forcibly detained in accordance with court or administrative decisions, including temporary detention rooms, cells in internal affairs facilities, facilities holding foreigners and stateless persons illegally in Ukraine, cells for temporarily detained service members, and pre-trial detention centres. Further, the Commissioner can access psychiatric institutions, boarding houses for veterans of war and labour, and social and rehabilitation centres. The Commissioner has the rights to interview the people staying in these places and obtain information regarding their treatment and living conditions.¹⁷

Any person “deprived of liberty” can appeal to the Office of the Commissioner in writing, and this correspondence is to be dispatched to the Commissioner within 24 hours. Moreover, correspondence addressed to the Commissioner from people who are detained, arrested, held in custody, or in various types of prison and medical facilities shall not be subject to any censorship. These provisions are meant to protect human rights even in the process of appealing to the Commissioner.¹⁸

The Office of the Commissioner is one of the bodies with authority in the sphere of equal rights and opportunities for women and men. The mandate of the Commissioner includes monitoring the observance of these rights, considering petitions regarding gender-based discrimination, and summarising the situation regarding the observation of equal rights and opportunities for women and men in his or her annual reports. All investigations undertaken by the Commissioner are also analysed with an eye for gender-based violations.¹⁹

The Commissioner is further tasked with oversight of military and law enforcement agencies.²⁰ While exercising this control, the Commissioner:

- oversees the observance of the constitutional rights and freedoms of conscripts and service members, reservists, people discharged from military service, and their families;
- may request and receive documents, materials, and explanations from leadership of the Armed Forces of Ukraine, other military formations, and law enforcement bodies;
- has the right to be received immediately by officials of the Armed Forces, other military formations, and law enforcement bodies;
- has the right to make unhindered visits to military bases and units, and to attend meetings of the collegiate bodies of the Armed Forces, other military formations, and law enforcement bodies when discussions of relevant issues take place; and
- reports annually on the observance of the constitutional rights and freedoms of military personnel, and offers proposals to strengthen the rule of law, correct shortcomings, and address violations by the military and law enforcement bodies.²¹

Ukrainian legislation also empowers the Commissioner with the important function of preventing and combating discrimination in general. To that end, any privileges or restrictions related to race, religious beliefs, ethnic origin, financial status, or other such factors are forbidden when petitioning the Commissioner. In addition, the Commissioner considers the submissions of Ukrainian citizens, foreigners, and stateless people alike.²²

In addressing complaints, the Commissioner may:

1. initiate proceedings to investigate a violation of rights and freedoms;
2. explain to a complainant what measures to take;
3. submit an appeal to the body competent to consider a case; or
4. decline consideration of the complaint.²³

The decision of the Commissioner to accept or refuse a complaint for consideration is submitted in written form to the complainant, and all refusals are to be well-grounded.

V. Capacity Building and International Co-operation

The Office of the Commissioner is the only body in Ukraine explicitly mandated to promote and protect human rights. Upon taking office in April 2012, current Commissioner Valeriya Lutkovska noted that openness, transparency, co-operation with CSOs, and depoliticising the Office would be key to the institution moving forward. In practice, the Commissioner has developed efficient and constructive co-operation on a domestic level, with actors including the Parliament, the executive government, local self-government agencies, judicial actors, and more. Such co-operation is jointly beneficial as it facilitates the development of policies and legislation influenced by best human rights practices discovered by the Commissioner. Co-operation of the Office of the Commissioner with relevant parliamentary committees, especially with the Committee for Human Rights, National Minorities and Interethnic Relations, has been very intensive and effective. The current Commissioner and her staff regularly participate in Committee meetings to discuss draft laws on issues of human rights. And this co-operation is codified in legislation that demands different actors assist the Commissioner.²⁴

In addition to domestic co-operation, the Commissioner places a high priority on partnering with international organisations. In its daily activities, the Office of the Commissioner engages with the UNDP, UNICEF, the UNFPA, OSCE, and the UNHCR on various projects. These agencies also regularly invite staff of the Office to take part in seminars,

workshops, and conferences they organise. For example, in co-operation with the UNDP, the Commissioner hosted an international conference and training for representatives of regional ombuds institutions in November 2012. And in 2013, the UNDP in Ukraine launched the Democratization, Human Rights and Civil Society Development Programme, with financial support from the Ministry of Foreign Affairs of Denmark through 2016. The Commissioner is a partner in the project, which includes a focus on developing the capacities of the institution.

The Commissioner also co-operates with the Geneva Centre for the Democratic Control of the Armed Forces (DCAF), participating in activities such as its International Conference of Ombuds Institutions for Armed Forces (ICOAF). Recommendations issued by DCAF are always considered by the Commissioner; and the Commissioner participates in preparing reports on human rights that are submitted by Ukraine to international organisations in accordance with international agreements. The Commissioner also actively participates in international networks of National Human Rights Institutions (NHRIs), including the International Ombudsman Institute, the European Ombudsman Institute, the European Network of Ombudspersons for Children, and the European Network of National Human Rights Institutions within the ICC. The staff of the Office of the Commissioner regularly attend meetings of these organisations, which are crucial for sharing experiences and exchanging ideas.

The Commissioner participated as a partner in a number of projects within the framework of the Council of Europe 2011-2014 Action Plan for Ukraine as well. The main areas of co-operation in this instance were fighting ill-treatment and impunity, criminal justice reform, combating discrimination, strengthening and protecting children's rights, good governance and fights against corruption, and supporting free and fair elections. Various OSCE projects in recent years have addressed similar issues, focusing on strengthening the capacity of public authorities and civil society organisations (CSOs) and on developing strategic and regulatory frameworks for interaction between these actors.

The Office of the Commissioner worked jointly with CSOs, with the support of international agencies, to launch a 2013 campaign to raise public awareness of the law. Over 100 public events were held, including

roundtables, conferences, and trainings – all of which were widely covered in the media. Joint efforts with CSOs and international organisations have also facilitated trainings for armed forces personnel aimed at raising their awareness of legal issues related to their service. Monitoring conducted by the Commissioner suggests that there has been a positive effect stemming from the introduction of legal education.

It is worth noting that the development of the Office of the Commissioner is impossible without the active participation of civil society, especially given the limited resources with which the Commissioner must operate. The involvement of CSOs is a testament to the openness and accessibility of the Office, and contributes towards ensuring its full transparency. Reflecting the importance of this collaboration, in 2012, Article 10 of the Law on the Ombudsman created an Advisory Council of CSO representatives to provide consultative support, undertake scientific research, and study proposals to improve the protection of human rights and freedoms. The Council currently includes renowned human rights defender Yevhen Zakharov.²⁵

The activities of the Advisory Council are aimed at improving the function of the Commissioner, especially related to personal data protection, realisation of the NPM, the observance of socio-economic and humanitarian rights, protection of the rights of children, and issues of non-discrimination and gender equality. The Council also contributes to monitoring the activity of the Office of the Commissioner, and publicises its findings in order to ensure the transparency of the Office.

Civil society actors have also been instrumental in studies undertaken with support of the UNDP to assess the capacity of the Commissioner. Research conducted in 2012 represented a first attempt to measure the opinions of CSO representatives regarding the effectiveness of the Office of the Commissioner. The study was based partly on a written survey that captured the views of civil society representatives on various issues, from how transparent and open the Office is to how well the Commissioner communicates with stakeholders.²⁶ Another report, issued in 2014 under the framework of the UNDP's Democratization, Human Rights and Civil Society Development Programme offered further analysis of the work of the Commissioner, examining the effectiveness of the Office and offering

recommendations for improvement. Some of these recommendations, especially related to capacity building, were considered and taken up by the Commissioner.²⁷

VI. Good Practices

Civil society representatives and UNDP experts have assessed that key strengths of the Office of the Commissioner include the availability of its strategy for development; its systematic approach to problem solving; and the openness, accessibility, and transparency with which it carries out activities. The Office has undertaken internal evaluations as well, and has examined positive features of its work in the context of good governance, and has identified practices that enhance its ability to best exercise its functions, in terms of:

Transparency

- A well-developed webpage
- Easy access for the public to information about its activities
- Clarity regarding which structures within the Office address various areas of activity
- Information about human rights activities provided in mailings to citizens

Openness

- Co-operation in various areas and involvement in many activities of human rights NGOs
- A transparent public communication policy
- Relations with NGOs
- An Advisory Council and other advisory bodies
- Representatives of the Commissioner responsible for specific areas of activity

Co-operation with NGOs

- High level of constructive and effective collaboration
- Numerous joint activities with NGOs
- Formation of Advisory Council and other councils of community experts

Accessibility

- Responsiveness to petitions
- Efficiency in dealing with complaints and inquiries
- Easy electronic communication with the Office via email, Skype, and a free hotline
- Regional offices

Evaluations of the Commissioner by civil society reflect the view that the Office is fully independent from any other agencies and bodies. This level of independence is confirmed by an 'A' status accreditation from the International Coordinating Committee of National Human Rights Institutions. Still, insufficiencies of human and financial resources pose a problem. Thus, the Commissioner has implemented the good practice of filling human resource gaps through the involvement of civil society actors, particularly in the tasks of the NPM.

VII. Conclusions

The protection of human rights and freedoms is a prerequisite for the sustainable development of Ukraine; indeed, it is elemental to building a democratic and legal society and state. The Armed Forces of Ukraine are an integral part of that state, designed to protect the welfare and development of citizens. To protect the rights and freedoms of those citizens, it is the Ukrainian Parliament Commissioner for Human Rights that plays a key role. The experience of other democracies shows that ombuds institutions, given their special status and extensive powers, can actively influence the dynamics of democratic consolidation and help develop civil society.

The Ukrainian model of the Ombudsman is characterised by:

1. Constitutional status for the Commissioner, secured in Articles 88, 85 and 101
2. Independence from any state authority or local self-government
3. Broad jurisdiction that extends to state bodies, including courts
4. Ample powers to conduct inquiries and inspections, including at the discretion of the Commissioner, and monitor compliance with human rights and freedoms

5. The right to initiate petitions for review, along with recommendations to rectify violations of human rights and freedoms, to state bodies, local self-government, NGOs, enterprises, and institutions, as well as their officers and officials
6. Accessibility to everyone to petition directly to the Commissioner
7. Flexible and informal procedure and freedom of action

The fact that the Constitution stipulates that the powers of the Commissioner may not be terminated or restricted is an important guarantee of the continued functioning of the Commissioner. Under the mandate of the Commissioner, any number of activities play a positive role in the protection of human rights and freedoms, including: systematic monitoring of the observance of human rights, assessment of compliance with international standards, international and regional co-operation, restoration of the rights of citizens, efficient aid to citizens in extreme situations, and effective co-operation with civil society.

The Commissioner also oversees the observance of the rights of armed forces personnel and veterans – an area where a number of challenges need to be addressed. The Commissioner has taken measures to confront some of these problems by placing her analysis of violations of social and economic rights of military members within the context of the Law on the Ombudsman – which provides for unconditional fulfilment of state obligations in terms of the social protection of military servants, military pensioners, veterans of war and military service, and members of their families. The Ombudsman has also taken on the important task of promoting awareness of law among citizens, both in the armed forces and in general. After all, it is only by changing the culture and consciousness of society as a whole that it is possible to lay the groundwork for a new system of values based on the principles of democracy, rule of law, and respect for human rights.

Considering the importance of the Ukrainian Parliament Commissioner for Human Rights, especially under current security conditions, which feature counter-terrorist operations in the eastern part of the country, the Office of the Commissioner must be further developed and its productivity enhanced. Amendments to the Law on the Ombudsman could be aimed at strengthening the binding nature of decisions of the Commissioner;

guaranteeing their implementation by state agencies, local governments, and their officials and officers; and providing the Office with additional human and financial resources. The conflict in Ukraine has also uncovered the need to develop new security frameworks and new mechanisms of human rights protection, especially new standards of conduct for combatants that arise from the civilian population after weapons are distributed among them and incitement to action is widely broadcast. The experience of the Ukrainian population has highlighted that the world still lacks universal tools to address struggles for territory as they take on new shapes; thus, the development of updated instruments of international human rights protection should occur within the framework of the OSCE and the UN.

NOTES

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6. *Ibid.*, Article 1.
7. *Ibid.*, Article 4.
8. *Ibid.*, Article 18.
9. *Ibid.*, Article 20.
10. *Ibid.*, Article 1.
11. *Ibid.*, Article 3.
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13. *Ibid.*
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15. The Protocol stipulates that “Each State Party [to the Protocol] shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).” See: *Ibid.*, Article 3.
16. See: *Law on the Ukrainian Parliament Commissioner*, Article 19-1.
17. *Ibid.*
18. *Ibid.*, Article 21.
19. *Ibid.*, Article 7.
20. *Law on Democratic Civil Control over Military Organization and Law Enforcement Bodies of the Country*, No. 975-IV, June 19, 2003. Available in Ukrainian at: <http://zakon4.rada.gov.ua/laws/show/975-15> (accessed November 12, 2016). See: Article 6.
21. *Ibid.*
22. *Law on the Ukrainian Parliament Commissioner*, Article 21.
23. *Ibid.*, Article 17.
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25. *Ibid.*, Article 10. Representatives of CSOs play a role in determining who is on the Council.
26. Allar Jöks, *Capacity Assessment of the Secretariat of the Ukrainian Parliament Commissioner for Human Rights* (Kyiv, 2012). Available as a pdf at: <http://www1.ombudsman.gov.ua/en/images/stories/22082012/OO%20CA%20Report%20July%202012.pdf> (accessed November 12, 2016).
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Service Complaints Ombudsman for the Armed Forces of the United Kingdom

Susan Atkins,
Service Complaints Commissioner, 2007-2015

I. Introduction

The institution of the Service Complaints Commissioner (SCC) was established as the first oversight body for the British Armed Forces by legislation that was brought into force in January 2008. The role of the SCC was limited, as any external oversight was perceived by military leadership as a threat to the chain of command. The legislation gave the SCC two key powers: to oversee the handling of complaints made by military personnel about their treatment in service and to make and publish in Parliament annual assessments of the efficiency, effectiveness, and fairness of the complaints system. The SCC had no formal power to investigate complaints or to intervene where she believed a complaint was not being handled properly. The SCC recommended that the complaints-handling system be simplified and the role changed to that of an Ombudsman with power to issue binding decisions that could more effectively hold Armed Forces structures to account for the treatment of service members.

Those recommendations were eventually accepted. In 2015, the Armed Forces (Service Complaints and Financial Assistance) Act strengthened and reimagined the role of the SCC, who is now known as the Service Complaints Ombudsman (the Ombudsman).¹ There have been two Commissioners, Susan Atkins from 2007- 15 and Nicola Williams from 2015 to her appointment as the first Service Complaints Ombudsman on January 1 2016.

Because this new system started only in January 2016, this study looks not at the operation of the newly established Ombudsman, but of the history and lessons of the SCC. It outlines the background to the establishment of the SCC, the limits to the remit of the institution, and how the first SCC exercised independence from the Armed Forces and developed the role. It

will also discuss how changes in legislation impact on the accountability and governance of the Armed Forces and build the capacity necessary for the Office of the Ombudsman to fully function within its new, enhanced mandate. The UK case demonstrates that much can be achieved even with limited formal powers and that institutions for oversight of Armed Forces can develop over time.

II. Background and Context

In 2006, a report commissioned by the Ministry of Defence recommended establishing an independent external oversight body to monitor the British Armed Forces. *The Deepcut Review* had been undertaken by eminent human rights lawyer Nicholas Blake to examine circumstances surrounding the investigations into the deaths of four trainee soldiers at the Deepcut Army Barracks in Surrey between 1995 and 2002.² Each death, by gunshot, had been the subject of a coroner's inquest, but poor handling of the investigations by the military and civilian police had made it difficult for the coroner to reach a firm conclusion in three of the four cases. A verdict of suicide was issued for the first death and open verdicts for the three subsequent deaths.³

Blake looked into the background of each death, including analysing previous investigations as well as the context within which the deaths occurred. What he found were worrying allegations of bullying, sexual harassment, and other maltreatment of trainee soldiers, and an ineffective complaints system for raising concerns about such improper behaviour. Blake also found systemic weaknesses and failings that included a breakdown in the training process and failures to ensure that all instructors and staff were properly vetted and suitable for their role, which allowed at least one person with a record of criminal sexual conduct to be employed in a supervisory capacity. Beyond this, a high ratio of trainees to staff resulted in very poor levels of supervision, particularly outside the normal working day.

The *Deepcut Review* also gave instances where some complaints to senior staff had been dismissed. For example, one trainee attempted to make a complaint to a Commanding Officer (CO) but was falsely told

by the alleged perpetrator that the CO had laughed it off, and was thus dissuaded from pursuing the complaint. The parents of another trainee made a complaint to a CO who had made enquiries and was assured by those in his chain of command that all was well, even though it was not. Blake therefore recommended that a military ombudsman be created, to whom any member of the Armed Forces or anyone on their behalf could submit a complaint. He envisioned the ombudsman to have the power to undertake research and produce reports, and to initiate prosecutions when, for whatever reason, the chain of command did not to start disciplinary action against someone alleged to have bullied or mistreated another service member.

After a 2005 enquiry into the welfare of service personnel, also spurred by incidents at the Deepcut Barracks, the Parliamentary House of Commons Defence Committee had made a similar recommendation for a military ombudsman with powers to research welfare issues.⁴ As a result of both the Defence Committee report and the *Deepcut Review*, the government agreed to add a provision to the Armed Forces Bill, then before Parliament. Under the constitution, the government must seek parliamentary approval every five years to keep an armed force. The Armed Forces Act of 2006, one of these five-year laws, was an unusually large piece of legislation, as it harmonised and modernised the military justice system.⁵ Previously, each of the three armed services – the Navy, Army, and Air Force – had separate legislative provisions. The 2006 Act introduced a unified disciplinary and complaints system and a single Service Prosecuting Authority, the SPA. For the first time, the SPA was to be headed by a civilian; a senior criminal lawyer of distinction whose consent had to be sought before a Commanding Officer could decide not to take disciplinary action on allegations of serious criminal misconduct. In effect, this provision addressed the recommendation of the *Deepcut Review* for the power of an ombudsman to prosecute.

The 2006 Armed Forces Act (hereinafter, the Act) picked up on other recommendations made by the Deepcut Review as well, establishing the first independent oversight body for complaints of service members. The Service Complaints Commissioner was to have two key roles: to act as a gateway for complaints of armed forces personnel and to present

an annual report to government ministers and members of parliament on the efficiency, effectiveness, and fairness of the complaints-handling system.⁶ Still, the mandate of the SCC was considered inadequate and the Commissioner was labelled a “toothless tiger” by the father of one of the trainees who died at Deepcut because he or she had no power to investigate complaints or in relation to incidents resulting in deaths within the Forces.⁷ Many in the military felt the role of Commissioner was unnecessary at best and had the potential to undermine the chain of command at worst. Nonetheless, the first Commissioner took up her post on December 1, 2007 and opened for business in January 2008.

III. Mandate and Legal Framework

The 2006 Act stipulated that the SCC be appointed by the Defence Secretary, and that the Commissioner could not be a serving military member or civil servant. The Commissioner was not an employee but an office holder, and in the UK, such public appointments are overseen by an independent Public Appointments Commissioner, who certifies that appointments and dismissals are made in accordance with a Code of Practice.⁸ This Code ensures that appointments are made on merit, and in a way that is fair, open, and free from political interference. The Code also includes a set of seven principles of public life – the Nolan Principles – that appointees must demonstrate and which underpin their independence. These are selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. While public appointees cannot be dismissed for the exercise of their professional judgment or for decisions taken within their powers, they can be removed from office for serious misconduct and breach of the Nolan principles. This system strengthens the independence and standards of such office holders.

Since 2008, most public appointments have been subject to scrutiny by a relevant parliamentary committee; but the appointment of the first SCC in late 2007 came before this process of parliamentary scrutiny was in place. Parliament thus seized the opportunity of a debate on the secondary legislation on the SCC, the Regulations concerning the powers of the office, to examine the proposed appointee. Though the

then opposition expressed concern that she had no military background, her appointment was approved by a vote. The appointment of the second Commissioner and current Service Complaints Ombudsman in 2014 was subject to parliamentary scrutiny by the Defence Committee.

The 2006 legislation on the SCC set out a framework for the exercise of powers by the SCC but left the details of how the institution should operate to the Commissioner to determine. The Act enabled the SCC to receive complaints from anyone, not just the service member who was alleged to have been wronged and gave discretion to the Commissioner to refer any complaint to the relevant person in the military chain of command. In turn, the Act obliged the chain of command to provide the SCC with information following the referral of any allegation of bullying, harassment, discrimination, dishonesty, bias, or other improper behaviour. The chain of command was also required to inform the SCC if a service member who alleged wrongdoing decided not to pursue a complaint. The Act was silent as to what the SCC could do if she had concerns as a result of such information or indeed if the chain of command failed to provide the required information. In particular, the Act did not give the SCC the power to investigate complaints. However, this silence left it open to the SCC to develop a way of working with the Services to achieve the purpose envisaged by the Defence Committee and the *Deepcut Review*. The information the SCC gathered as a result and the influence she gained with Parliament, ministers and the Services ultimately lead to an Ombudsman with full powers of investigation. Some limitations remain, such as the fact that the Ombudsman's remit is restricted to service complaints. The 2006 Act defined a "service complaint" as one made by a member or former member of the British Armed forces regarding instances in which they were wronged during their service life, i.e. when they were subject to service law. This definition continues under the new system. This means that former armed forces personnel can make a complaint, but only about something that happened when they were serving. In practice, the complaints system is only available to personnel who have just recently left the Forces, because of a prescribed timeframe within which complaints are to be made after a wrongdoing.⁹

IV. Functions, Powers, and Institutional Capacity

Although the legislative framework provided the SCC with powers to oversee complaints, the only statutory duty of the Commissioner was to produce an annual report for the Defence Secretary, on the powers exercised by the SCC during the calendar year and on the efficiency, effectiveness, and fairness of the complaints system. The Secretary of State was tasked with laying the report before Parliament and was given the freedom to delete any matter he or she believes would endanger service personnel or national security. (This power was never exercised). The Secretary of State could also ask the SCC for a special report at any time on any matter related to the functions of the Commissioner or the workings of the service complaints system. Similar provisions now apply to the Service Complaints Ombudsman.

Since the establishment of the office, the Commissioner used the annual report of the SCC as a mechanism to publicise the strategic direction, values and standards of the institution and account for her work to ministers and Parliament. Parliament, through the Defence Committee used the reports as a basis for reviews of the SCC's work including examining the Commissioner in oral hearings. These reports were helpful in understanding the role and remit of the institution, its values and standards, and in determining the goals of the institution and the means to achieve them. After all, functions are linked to purpose. Setting performance and quality standards is also necessary to enable a body to self-evaluate and be accountable. And in the context of oversight bodies specifically, having clear values is an important aspect of operational independence.¹⁰

In setting up the Office of the SCC, the Commissioner looked not just to the 2006 Act for context, but at the *Deepcut Review* and reports of the Defence Committee, as well as research undertaken by the Ministry of Defence (MoD) with support of the Equal Opportunities Commission – which, at the time, was the official human rights organisation committed to equality between women and men. The MoD surveyed armed forces personnel between 2007 and 2009 about their experiences and understanding of sexual harassment, and asked if they had made a complaint about any improper treatment. If they had, they were asked about their satisfaction

with the complaint system, and if not, the reason why they had not. The results showed that few of the people who believed they had been sexually harassed or bullied had felt confident in making a complaint. Those who did choose to use the system complained about delays and not being kept informed. This gave the SCC good, early feedback from users and potential users about the problems and shortcomings of the system.

This information helped set the aims, values, and strategic direction for the SCC, and with the goal of engendering the confidence of all service members and their families in the complaints system, the Commissioner prioritised several core functions:

- Monitoring individual complaints;
- Holding the Armed Forces to account for the fairness, effectiveness, and efficiency of the complaints system; and
- Working with the Armed Forces and MoD to swiftly and effectively implement remedies.

The SCC also defined the values of the institution as comprising independence of judgment, fairness and justice, integrity, transparency and accountability, respect for diversity, proportionality, outcome focus, and humanity. Then, building on initial strategic assessments, the Commissioner set seven goals for the Armed Forces and the Office of the SCC to achieve by the beginning of 2011. These were related to improving the complaints system but also to addressing the lack of confidence expressed by some who had hoped for a more powerful military ombuds institution.¹¹ The goals were to:

- Develop a complaint system used correctly and consistently by all, which produces statistics that can be relied upon;
- Complete 90% of complaints within timelines set out by the MoD;
- Keep complainants and, where appropriate, their representatives informed and provide them with full explanations for decisions;
- Make substantial and significant improvements to the confidence of individuals in the system and in lessons implemented;
- Close the gap between reported levels of unacceptable behaviour (for example, in annual surveys of service members) and recorded complaints; and

- To be judged by the Armed Forces, government ministers, and Parliament to be playing an effective part in assuring the proper treatment of service members.¹²

Each of the annual reports of the SCC reported on the progress in achieving these goals and assessed them as being fully achieved, partly achieved, or not achieved at all. Along with detailed explanations for each assessment, the reports also set out recommendations for improvements by the MoD and the Armed Forces and reported on whether they had been accepted and whether any progress had been made on their implementation.¹³ Although the majority of recommendations made by the Commissioner were accepted, by the beginning of 2011, none of the goals of the SCC had been fully achieved. The complaints system was still not working as efficiently, effectively, or fairly as hoped; plagued with delays – which the Commissioner attributed to complex, over-engineered procedure – as well as a lack of reliability in recording complaints, communication weaknesses, and a lack of substantial evidence regarding lessons learned so as to tackle the causes of complaints.

The SCC concluded that the powers of the institution were inadequate and should be strengthened. Although she had uncovered the wrongful handling of some complaints she had referred and was overseeing, the Armed Forces were resistant to acting when she brought it to their attention. Concerns about how an independent, external authority undermined the chain of command persisted.

To simplify the complaints system and broaden the powers of the SCC with regards to individual cases, the Commissioner outlined four options to strengthen the role. Most significantly, the Commissioner recommended an ombudsman model. Drawing on the opinions of complainants, subjects of complaints, members of final appeal panels, civil society, lawyers and welfare organisations who represented or supported service members and their families, and parliamentarians, the SCC proposed an ombuds institution similar to that of the Defence Ombudsman in Ireland. This would leave the primary responsibility to resolve workplace grievances among service members with the chain of command; and the Armed Forces would monitor the system to identify inefficiencies and make necessary changes. The Ombudsman would act as a back stop, focusing

on individual justice and holding the Forces to account. Because of issues of confidence and the poor record of the Forces on delayed case processing, the Commissioner recommended that the Ombudsman retain the power to receive and review complaints; and in certain circumstances, to investigate, even if the internal process was not completed. The SCC also recommended that the service complaints system be the subject of a fundamental review aimed at removing one level of appeal, and that the remit of the Ombudsman include all the types of complaints made by service members.¹⁴

In the meantime, the SCC set simplified goals, including that 90% of all complaints be resolved within 24 weeks. An internal review by the MoD and Armed Forces undertaken in 2011-12 confirmed the SCC's conclusion that new complaint cases were subject to delay and the Forces agreed to adopt the 24-week target. They also agreed to interim measures to strengthen the powers of the Commissioner, who would now be informed on a bi-monthly basis of all service complaints that had been or were likely to be in the system for over 24 weeks. Further, the Commissioner was given the ability to report directly to the Secretary of State on any case that was not being dealt with properly, whether due to delays or for any other reason.

The capacity to monitor the reasons for delays, and the action being taken on each case, increased the accountability of the Forces to the SCC. The 24-week reports also provided clear evidence to military leadership and relevant ministers that the system indeed needed to be simplified. In that context, these reports pushed the Forces to be more responsive to the idea of an Ombudsman. In February 2013, a Defence Committee report supported the recommendation of the SCC that the role of the Commissioner be changed to that of an Ombudsman. The idea then gained steady support from military charities, the media, and members of the public, not least because of concerns over several high-profile cases alleging poor treatment of service members, which raised serious doubts about how the current system was working.

From the summer of 2013, the MoD and Armed Forces engaged with the SCC on how to put the Commissioner's recommendations into practice, and in March 2014, the Defence Secretary announced that the service

complaints system would be simplified and the Commissioner would become the Ombudsman. Legislation to that end was introduced into Parliament in June 2014, with cross party support, and was put into law in March 2015.¹⁵

Significantly, although when it was first introduced before Parliament the Bill enabled the Ombudsman to only investigate alleged maladministration in the handling of a service complaint, an amendment was included during its passage through Parliament so that the Ombudsman can also investigate the substance of a service complaint, once it has been finally decided by the chain of command.

The service complaints system now enables service members to make complaints with only one level of appeal. And while the role of the Ombudsman continues to be limited to oversight of the service complaints system, there is now a right to appeal to the Ombudsman anytime a complaint or an internal appeal is not accepted, and the decision of the Ombudsman is final. There is also a right to apply to the Ombudsman at the end of an internal process for an investigation by the Ombudsman into whether there was any maladministration or injustice in the handling of a complaint.

The findings of the Ombudsman are binding but her recommendations are not, as is the norm for public sector ombudsmen in the UK. However, the Defence Council must provide responses to the Ombudsman that explain why recommendations are not adopted. These are included in the annual reports of the Ombudsman, which also include recurring and thematic issues. Although the first Annual Report of the Ombudsman will not be published until spring 2017, she has published quarterly reports which can be found on her website.¹⁶ These and her regular blogs continue to inform, educate and influence the way complaints are dealt with. For instance in December 2016, she reported upholding over half of all complaints to her about the chain of commands refusal to accept a service complaint or application for appeal. The main reason was lack of sufficient reasons in the decision letters. The Ombudsman is thus providing individual justice, holding the Forces to account and hopefully raising standards.

V. Capacity Building and International Co-operation

In the six years before reforms to the institution occurred, the Office of the SCC engaged in three different types of capacity building: developing the role of the Commissioner, developing the resources required for that role, and developing the capacity of the Armed Forces to handle service complaints efficiently and effectively.

Developing the Role of the Commissioner

On paper, the SCC had little formal power. Indeed, potential complainants questioned the value of submitting a complaint to the SCC, if the Commissioner had no power to investigate. In the view of many service members, the SCC would simply pass the complaint back to the chain of command, who were the cause of the problem or who the complainant did not trust to solve the problem.

In reality, though, the SCC had a great deal of soft power, and the Ombudsman continues to use this, together with strengthened formal powers. It was up to the SCC to decide to whom complaints were referred and if a matter appeared to implicate a complainant's CO, it could be referred higher up the chain of command. All referrals were and still are made through a specialist secretariat at the headquarters of each service, the head of which thus has oversight of all allegations and any concerns raised, at the outset. This is especially important in cases in which the health or well-being of a service member may be in question. When staff of the SCC (or Ombudsman) believe there is a risk of harm to the life or health of a complainant, cases are prioritised for urgent action and closer oversight.

The SCC instituted quarterly meetings with senior officers of each service, to discuss systemic issues of concern and, as necessary, individual cases. The Commissioner also more frequently met with the Chief of Defence Personnel, who is responsible for all personnel policy across the sector. The combination of in-depth knowledge, understanding of individual complaints, and strategic oversight given by these regular meetings, facilitated change in the SCC and in the Forces. Three years after its

establishment, military leaders were referring to the SCC as integral to modern defence.

In 2008, the first year in which it was measured in the Armed Forces Continuous Attitude Survey (AFCAS), around half of all military personnel were aware of the SCC – 67% of officers and 43% of other ranks. By 2013, that had risen to 86% of officers and 74% of other ranks, or 76% of service members.¹⁸ Some of this increase was due to outreach work undertaken by the Commissioner that appears to have given confidence to military personnel and their families to speak out about wrongdoing, along with referrals from military charities and welfare agencies or lawyers to whom complainants turned for help. Various activities of the SCC, such as training sessions, Defence Committee appearances, and media interviews, raised awareness of the sorts of issues that could be brought to the Commissioner.

Developing the Office of the SCC

In 2007, the Commissioner was appointed part time, working three days a week in the first year. In subsequent years, this time commitment increased to an average of just over 4 days a week. Eventually, the view of the Commissioner that the post is a full-time position was accepted by the MoD and the second SCC, now Ombudsman, was full-time. The staff of the Office of the SCC also increased over the years, from two in 2008 to seven in 2013, and then even further to 25 to support the new work of the Ombudsman.

Most of the training for staff has been delivered internally, with a special focus on involving them in visits to units across the UK and abroad to gain better first-hand knowledge of service life. The Commissioner, and now the Ombudsman, also belongs to the Ombudsman's Association – for ombudsmen and complaint handlers in the UK and the Republic of Ireland – which holds an annual conference that the staff attend. Staff have also attended the International Conference of Ombuds Institutions for the Armed Forces (ICOAF), gaining both information and support. These workshops share ideas and good practice for the Armed Forces.

As the role of the Ombudsman develops, the capacity of staff caseworkers will grow as well. In the past, many of the skills used by caseworkers were grounded in good customer relations, such as listening to concerns, providing clear and helpful information in a reassuring way, and generally giving confidence to people who may be upset, agitated, or distressed. The staff were in fact very good at this work, and many individuals whose complaints have been resolved have credited the involvement of the Commissioner and the staff of the SCC with a positive outcome.

Some of the more senior staff are tasked with analysis and research aimed at identifying problematic or poor complaints handling, and patterns and trends. They can take concerns on individual cases directly to the Armed Forces central secretariat and provide advice to the Commissioner for raising concerns at a more senior level. These staff deal with the most complex and difficult cases.

As part of the transition into the role of Ombudsman, the SCC began plans for extensive staff training. The Commissioner's Head of Transition visited and consulted with ombuds institutions in the UK and overseas to develop and design training programmes. In addition, as new staff were recruited to meet the demands of the expanded role of the SCC and then the new role of the Ombudsman, posts have been filled with individuals possessing specialist skills. Specialist training has also been provided for example for staff investigating complaints.

Developing the Capacities of the Armed Forces

Much of the capacity building work of the Office of the SCC supported the development of capacities within the Armed Forces. From the establishment of the SCC, the Commissioner laid out a vision for a fair, effective, and efficient service complaints system and the steps the Forces and the MoD should take to realise it. In the first year of the institution, for example, the Commissioner found that there was a problem with the reliability of data collection in the services and requested an audit of the data recording system. When internal auditors at the MoD concluded that the system was not fit for purpose, the Ministry commissioned a new system, the Joint Personnel Administration (JPA), which was introduced in January 2012.

Other significant changes were also made within the Forces in response to recommendations of the Commissioner. Delays were found to be the main challenge to the complaints system working efficiently, effectively, and fairly; one significant cause of delay was the difficulty in finding officers who were trained and could be released from other duties to undertake investigations of complaints about bullying and harassment. In 2009, the SCC recommended that the MoD consider having a dedicated group of Harassment Investigation Officers (HIOs), whose sole duty would be to investigate such claims without delay.

After review and analysis, the MoD agreed in 2010 to a model of Fee Earning HIOs (FEHIOs) who could be called upon to investigate complaints made across the defence sector, whether by military personnel or civilian employees. The FEHIO model was meant to help meet an overall target for completion of investigations and submission of investigation reports of within 30 working days, but very few investigations were this efficient. As the transition from the Commissioner to the Ombudsman approached, half of all completed reports were submitted within 100 working days, but the other half were taking more time than that, prompting the MoD to review the FEHIO scheme once again. Still, although the 30-working day target was not met in all cases, the use of the specialist HIOs did greatly improve processing times. Delays of up to a year from the receipt of a complaint to the completion of an investigation were not unheard of before the appointment of the HIOs. In fact, by the end of 2013, the way service complaints were handled had improved in all three branches of the Armed Forces, especially in the Navy. Improvements have continued in the Navy and the Air Force. Delays are still reported in the Army.¹⁹

In 2011, the Navy proactively sought the advice and involvement of the SCC in training their lawyers and COs, after at first being the service most resistant to the role of the Commissioner, and drastically changed how they approached complaints. Along with some changes in structure and personnel, they shifted their culture from a focus on process to a focus on resolution. And in 2013, 78% of all complaints made by Navy personnel were resolved within 24 weeks. Moreover, unreasonable delay is now a ground on which the Ombudsman can find that maladministration has occurred. If the delay has led to or may have led to injustice, the

Ombudsman can make recommendations to the Defence Council for a remedy. The Ombudsman may also recommend actions to tackle systemic delays. Although the Defence Council can reject a recommendation by the Ombudsman they must give her, and the complainant reasons in writing for doing so and the Ombudsman can comment on this in the Annual Report, which is laid before Parliament.²⁰

The development of the complaints system relied largely on the independence of judgement of the SCC. When the institution was created, the MoD and Armed Forces were unable to say how many service complaints had been made each year, by whom, and about what, although they had information on complaints about bullying, harassment, and discrimination due to an agreement with the Equal Opportunities Commission. The Commissioner required military leadership to provide data about complaints sorted by service, rank, and subject matter and, by the time the 2012 Annual Report was presented, the services produced complaint data disaggregated by gender as well. For the 2013 Report, this data was further disaggregated by ethnicity. In her 2015 Annual Report the SCC raised concerns about the potential disadvantage suffered by women and ethnic minority personnel, indicated by their disproportionate use of the service complaints system. Through their annual reports the Commissioners have increased the accountability of the Armed Forces to Parliament.

Another result of the annual reports of the SCC was that the Armed Forces reviewed and changed the way complaints handling is overseen and monitored. Each service established a properly resourced central secretariat to advise the chain of command on the handling of complaints, oversee the timeliness and propriety with which complaints are decided, and ensure that the SCC, or Ombudsman, receives accurate and timely information. The SCC participated in a number of training and capacity-building events held by the Forces and worked closely with military lawyers, including lecturing at their annual training conferences. The Commissioner also participated in the training of all new commanding officers and future commanders several times a year, so that many of the people now in command positions had direct contact with the Commissioner and heard her speak about the importance of dealing with

complaints of service members under their command as an integral part of their leadership.

VI. Good Practice

This case study of an ombuds institution in transition has highlighted the importance of:

- Setting a vision of the future with clear and measurable outcomes;
- Linking these outcomes to statistical data and other evidential sources;
- Publicising these outcomes to bolster institutional and operational independence and foster co-operation with the military;
- Having clarity regarding these outcomes but flexibility about how to achieve them;
- Being open to learning from others;
- Focusing on public accountability and the question of “who guards the guardians”; and
- Taking the long view.

The SCC benefitted from linking outcomes to measurable data by setting goals drawn directly from what military personnel and their families reported – about delays, poor communication, experiences of bullying and harassment, their lack of confidence in making complaints, and concerns regarding the limited powers of the Commissioner. The SCC was able to add several questions to the Armed Forces Continuous Attitude Survey (AFCAS) and thereby measure awareness and understanding of the institution, as well as the confidence of service members in the complaints system and, when applicable, the reasons they did not make a complaint. The AFCAS also measured trends among military personnel regarding their experiences of bullying, harassment, and discrimination, allowing the SCC to see, for instance, that incidents of such behaviour were increasing in the Army in 2013. The Commissioner recommended that the Army prioritise addressing these behaviours, and the Army soon undertook a sexual harassment survey of all female personnel and approximately 10% of male personnel. This kind of responsiveness is important to the effectiveness of any ombuds institution and, in this case,

was partly the result of trust built between the SCC and the military leaders she oversaw.

The SCC brought a focus to publicising the desired outcomes of the institution and worked to achieve a balance between independence and co-operation. The status of the Commissioner, or Ombudsman, as a public appointee affords the position authority, but the institution is dependent on the MoD for resources and, to a great extent, co-operation. The Commissioner spent a great deal of time visiting military units at home and abroad (including in war zones) to better understand the work of service members and to learn their terminology. She also prioritised meeting key personnel in the MoD, Armed Forces, and Parliament, to share her goals, hear theirs, and discuss how they could support one another. From the outset, the message of the SCC was that good complaints handling came from operational effectiveness, and clear measurable outcomes in the annual reports of the SCC testified to this.

The Commissioner's clarity of vision allowed her to be flexible in terms of how best to achieve the goals of the institution. She found talking to and learning from other ombuds institutions invaluable. The experience of the Irish Defence Ombudsman, one of the newer ombuds institutions and one with a similar constitutional and cultural background, was very helpful in teaching her to take opportunities as they arise. One of the ways this manifested was in a commercial the SCC made to be shown on British Forces TV, which many complainants refer to having seen when they first contact the Office of the Commissioner.

Any external oversight body should pay special attention to its public accountability and be mindful of "who guards the guardians," aiming for particular transparency in order to model the behaviour it seeks to bring about in the institutions it oversees. From the establishment of the Office of the SCC, the Commissioner has provided data about its work, disaggregated by service, rank, gender, and type of complaint. An audit manager was also appointed, to identify issues and gather evidence to support recommendations for systemic change. This was critical to acceptance by the MoD and Armed Forces of the recommendations made by the SCC.

In taking the long view, the Commissioner acknowledged that change takes time. Some early goals were not met in their original three-year timelines, such as seeing substantial and significant improvements in the confidence of individuals in the system. Although the military had a system for capturing and monitoring lessons arising out of operational activity, embedding a similar approach to internal complaints proved difficult. However, by 2014, all three services had dedicated resources within their secretariats for this purpose. In recognition that the work of the SCC, and now the Ombudsman, can require engaging with military leadership over time, the Ombudsman is appointed for a five-year term rather than the three-year term of the Commissioner.

VII. Conclusions

The SCC operated with a high degree of transparency and accountability; and by means of annual reports, also increased the transparency and accountability of complaints handling in the military. The Commissioner was also effective in bringing about change to the complaints system, though less effective in ensuring that service members were treated properly when they made complaints; but this was due to constraints under the 2006 Armed Forces Act that do not apply to the Ombudsman. Indeed, upon recommendation of the Commissioner, the Ombudsman has clear statutory authority to ensure that service complaints are dealt with effectively and fairly, and to make recommendations to tackle systemic weaknesses.

These changes increase the ability of the Ombudsman to be responsive to constituents. While the Commissioner reached out to military personnel – both directly and through wide engagement with military welfare organisations and other representative bodies – so that the work of the SCC was informed by their concerns, limits to the role and its powers meant that some reasonable demands, such as for complaints-handling reviews, could not be met. These experiences, though frustrating at times, provided invaluable evidence for the necessity of reform.

NOTES

1. *Armed Forces (Service Complaints and Financial Assistance) Act 2015*, March 26, 2015. Available as a pdf at: http://www.legislation.gov.uk/ukpga/2015/19/pdfs/ukpga_20150019_en.pdf (accessed November 13, 2015).
2. Nicholas Blake, *The Deepcut Review*, March 29, 2006. Available as a pdf at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228930/0795.pdf (accessed November 14, 2016).
3. After a campaign by the family, a second inquest in 2016 into the death of one of the four trainee soldiers subsequently changed the open verdict to suicide. A second inquest has also been granted into the death of the first trainee soldier to die, for whom the first inquest made a verdict of suicide.
4. See: House of Commons Defence Committee, *Duty of Care: Third Report of Session 2004-05*, vol. 1, March 14, 2005. Available as a pdf at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14_03_05_deepcut_def_cttee.pdf (accessed November 14, 2016).
5. *Armed Forces Act, 2006*, c. 25 (UK).
6. *Ibid.*, Articles 338 and 339.
7. "Army complaints role 'pointless,'" BBC, November 7, 2007, http://news.bbc.co.uk/2/hi/uk_news/england/7083903.stm (accessed November 14, 2016).
8. The Commissioner for Public Appointments, *Code of Practice for Ministerial Appointments to Public Bodies*, April 1, 2012. Available as a pdf at: <http://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2012/02/Code-of-Practice-2012.pdf> (accessed November 13, 2016). This Code is important in protecting the institutional independence referred to in Benjamin S. Buckland and William McDermott, *Ombuds Institutions for the Armed Forces: A Handbook* (Geneva: DCAF, 2012).
9. Older complaints may be accepted for consideration if the chain of command believes it just and equitable to do so.
10. Buckland and McDermott, *Ombuds Institutions for the Armed Forces*, 45–49.
11. For example, see: "Written Evidence from RAF Families Federation (SCC 003)," in House of Commons Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces: Eighth Report of Session 2012-13*, vol. II, Ev w3. Available as a pdf at: <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/720/720vw.pdf> (accessed November 14, 2016).
12. Service Complaints Commissioner for the Armed Forces, *Annual Report 2010*, March 2011, 38. Available as a pdf at: <http://servicecomplaintsombudsman.govsite.com/wp-content/uploads/sites/8/2015/12/SCC-Annual-Report-2010-with-Erratum.pdf> (accessed November 14, 2016).
13. See the 2008-2014 annual reports of the SCC at: <http://www.servicecomplaintsombudsman.org.uk/service-complaints-ombudsman/publications-and-reports/annual-reports/> (accessed November 14, 2016).
14. See: Service Complaints Commissioner, *Annual Report 2010*.
15. *Armed Forces (Service Complaints and Financial Assistance) Act 2015*, March 26, 2015.
16. Service Complaints Ombudsman for the Armed Forces Official Website, <http://www.servicecomplaintsombudsman.org.uk>
17. Ministry of Defence, *Armed Forces Continuous Attitude Survey 2008*, 2009.
18. Ministry of Defence, *Armed Forces Continuous Attitude Survey 2013*, July 25, 2013. Available at: <https://www.gov.uk/government/statistics/armed-forces-continuous-attitude-survey-2013> (accessed November 14, 2016).
19. See the Annual Report 2015 and fact sheets for each Service at servicecomplaintsombudsman.org.uk
20. *Armed Forces (Service Complaints and Financial Assistance) Act 2015*.

Ombuds institutions for the armed forces are key actors in establishing good governance and implementing democratic controls of the security sector. These institutions are tasked with protecting the human rights and fundamental freedoms of armed forces personnel, as well as providing oversight and preventing maladministration of the armed forces. This publication highlights good practices and lessons learned in seven case studies of ombuds institutions for the armed forces from the following OSCE states: Bosnia and Herzegovina, Canada, Finland, Georgia, Kyrgyzstan, Ukraine and the United Kingdom.

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