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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT CONSOLIDATED OPINION ON FREEDOM OF EXPRESSION AND FREEDOM OF ACCESS TO INFORMATION AS GUARANTEED IN THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

I. Introduction

1. On 30 July 1999 the High Representative invited the State of Bosnia and Herzegovina and Entity governments and parliaments to start the preparation of the legislation on freedom of information[1]. This law would purport to guarantee and enforce human rights, and therefore falls under the competence of both the State of Bosnia and Herzegovina and its Entities. In April 2000, the OSCE mission to Bosnia and Herzegovina suggested that the Venice Commission consider the relation between the freedom of expression and the freedom of access to information in the context of the constitutional regime of Bosnia and Herzegovina.

2. The first question put to the Commission in this respect is whether the freedom of expression as mentioned in the enumeration of rights in Article II.3.h of Annex 4 of the General Framework Agreement for Peace (hereafter, GFAP) includes freedom of access to information.

3. The second issue raised is whether a national law establishing a right of any natural or legal person to access to information in the control of a public authority and a corresponding obligation to disclose such information is an element of the obligation to "ensure the highest level of internationally recognized human rights and fundamental freedoms" as established in Article II. 1 of Annex 4 GFAP.

4. At its 42nd plenary meeting (Venice, 9 June 2000), the Commission designated Messrs Helgesen, Lavin and Van Dijk as rapporteurs on this issue.

II. Relevant provisions in the Dayton Agreement.

5. Article II "Human Rights and Fundamental Freedoms" of the Constitution of Bosnia and Herzegovina provides in paragraphs 1 and 2 that:

> ***"1. Human Rights.*** *Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms […].*
>
> ***2. International Standards.*** *The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law[…]."*

Article II, para. 3 provides that *"All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and freedoms referred to in paragraph 2; these include:… h) freedom of expression"*.

6. Furthermore, the Annex to the Constitution of Bosnia and Herzegovina sets out a list of "Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina" which includes *inter alia* the International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto.

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[1] *Decision on Freedom of Information and the Decriminalisation of Libel and Defamation. High Representative. Sarajevo, 30 July 1999, para 3 (Appendix I to this report).*

7. It follows from the above that the basic rights and freedoms as enshrined in international human rights instruments are directly applicable in the legal order of Bosnia and Herzegovina and both Entities with priority over domestic law and that their scope must correspond to that given by international bodies entrusted with their authoritative interpretation. As regards freedom of expression, the instruments directly applicable in the legal order of Bosnia and Herzegovina are the European Convention on Human Rights (Article II para. 2 of the Constitution of Bosnia and Herzegovina) and the 1966 International Covenant on Civil and Political Rights

8. Considering the above-mentioned provisions of the Constitution of Bosnia and Herzegovina, this report will examine the interpretation given to freedom of expression by the European Court of Human Rights and by competent bodies of the United Nations concentrating on:

a) whether the freedom of expression as a basic human right recognised by international law includes the right of access to information;

b) whether there are direct obligations of public authorities in the scope of freedom of access to information.

9. The first issue concerns the right to have access to information without any interference by the authorities other than under those restrictions are provided by law and necessary in a democratic society for the protection of certain public interests and the reputation and interests of orders. This right serves to promote free flow of information and to prevent monopolies of certain information streams.

10. As far as access to information held by the authorities is concerned, this report will deal with *public access*, i.e. the entitlement of all members of the public at large to government information in order to promote transparent administration and citizen participation within the democratic process. This is to be distinguished from both *private access*, in other words, the entitlement of a person to access to his or her personal information and that of *official access* meaning the entitlement of public authorities, including Parliament and courts, to government information.

III. The interpretation of freedom of expression in international law

A. The European Convention on Human Rights. The European Court on Human Rights

- Freedom of expression and freedom of access to information

11. As already mentioned in paragraph 5 of this report, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable in Bosnia and Herzegovina according to its Constitution with priority over domestic law. Freedom of expression is protected under Article 10 of the European Convention for the Protection of Human Rights, which reads:

> "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This*

article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

12. From the second sentence of para. 1 of the Article 10 it is evident that the right to *receive and impart* information is considered as an integral part of freedom of expression.

- **Obligation of a public body to disclose information**

13. The European Commission of Human Rights has held that the right of freedom of public access to government information was connected with the right of freedom of expression under Article 10 of the Convention in so far as the information concerned was generally accessible under domestic law. At the same time the Commission took the stand that the right to access information concerns mainly the access to general sources of information and aims at prohibiting a Government to prevent anyone from receiving information that others wished or might have been willing to impart to him[2].

14. The European Court of Human Rights has considered the question of interpretation of Article 10 in the context of protecting access to information in several occasions.

15. In the cases of *Observer and Guardian v. United Kingdom* and *Autronic v. Switzerland*[3] the Court clearly held that under Article 10 of the European Convention on Human Rights, freedom of expression indeed includes a right to impart and receive information.

16. The judgement of the European Court of Human Rights in the case of *Guerra and others v. Italy* reveals the Court's current position in relation to the right to seek information. In this case the Court reiterated "*that the freedom to receive information, referred to in Article 10.2 of the European Convention, basically prohibited a Government from preventing a person from receiving information that others wished or might have been willing to impart to him*". In making specific reference to *Guerra and others v. Italy* case[4], it was held that freedom to receive information could not, however, be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. Thus, as indicated in this judgement, the Court:

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[2] Application N° 11854/85, *Clavel v. Switzerland*, 15 October 1987 .

[3] *Observer and Guardian v. United Kingdom* (26 November 1991, Series A, n° 216), and *Autronic v. Switzerland* (22 May 1990, Series A, n° 178).

[4] *Guerra and others v. Italy* (19 February 1998). A summary of the case (as published in the Bulletin of Constitutional Law, Edition 1998, 1) appears in Appendix II to this report.

a) considered that Article 10 primarily contains for the authorities the obligation to refrain from restricting access to information, which others wish to impart.
b) recognised that Article 10 may also imply certain positive obligations to make effective the right to receive information.
c) did not accept as a general rule that there is a positive obligation for the State to collect and disseminate information of its own motion (although Judge Palm and six other judges delivered a concurring judgement[5] in which they held that a State might have such an obligation under certain circumstances).

17. It follows from the above that the case-law of the European Court of Human Rights has not yet given a clear answer as to whether Article 10 entails a general obligation for the authorities to disseminate information of their own motion. It would seem to imply, however, an obligation to provide information on request, subject, of course, to the limitations set forth in Article 10 para. 2 of the Convention.

18. The Parliamentary Assembly of the Council of Europe in its Recommendation of 23 January 1973 on Mass Communication Media and Human Rights[6] proposed to extend Article 10 of the European Convention by expressly securing freedom to seek information with a corresponding duty of the authorities to make information available on matters of public interest subject to appropriate limitations. The recommendation did not however, result in an amendment to Article 10.

19. The Committee of Ministers of the Council of Europe in a Declaration of 29 April 1982 on the Freedom of Expression and Information expressed the intention of member States to pursue an open information policy in the public sector, including the access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters. Access to information is not however referred to as a right included in Article 10 of the European Convention on Human Rights.

20. It can be concluded from the above that although no binding rules on this matter may be drawn from the Convention or the case law of the European Court of Human Rights, there is a certain tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration - information which must be made public at a specific request and subject to the usual grounds of limitation.

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21. It should be noted that a number of democratic States have in the recent past moved from the traditional system of official secrecy to a regime of freedom of official information. Certain countries such as Sweden or Belgium adopted a number

[5] *Concurring opinion of Judge Palm, joined by judges Bernhardt, Russo, Macdonald, Makarczyk and Van Dijk (Appendix I).*
[6] *Rec. 0582 (1973).*

of legal instruments[7] granting the right to freedom of information that go far beyond the requirements of the European Convention on Human Rights (a regime of "open government" provides that a document is "public" if it is kept by a public authority and if it has been received, prepared or drawn up by an authority)[8].

22. The European Convention on Human Rights encourages its signatories to further promote human rights through the adoption of specific national legislation that gives additional protection to certain rights or by signing other international agreements. Article 53 provides that "*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under in laws of any High Contracting Party or under any agreements to which it is a Party*". By the virtue of this provision the Convention can by no means be interpreted as restricting the adoption of national legislation, granting additional protection to the right of access to information or implementation of any other international treaties where they apply.

B. United Nations. Committee on Human Rights. Economic and Social Council. The Commission on Human Rights

- **Freedom of expression and freedom of access to information**

23. The Human Rights Committee of the United Nations adopted at its nineteenth session in 1983 a General Comment on freedom of expression (Article 19 of the International Covenant on Civil and Political Rights). As for the protection of the right to freedom of expression, it pointed out in para. 2 that this concept included "*not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice*".

24. More recently the United Nations Commission on Human Rights treated the issue of the right to freedom of opinion and expression and its connection to freedom of information in its Resolutions 1996/39, 1998/42 and 2000/38. The report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain (E/CN.4/2000/63) also dealt with the same issue. Resolutions of the Commission on Human Rights do not refer to the "freedom of access to information" but use a more narrow approach promoting the right "to seek, receive and impart information". The notion of "access to information" appears in recommendations contained in the report of the Special Rapporteur. These sources, although, cannot be considered as binding norms, they do have a value of interpretation of international instruments for the protection of the right to freedom of expression and freedom to seek, receive and impart information.

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[7] *In a number of countries, legislative work is still going on (Germany, Norway, Poland, Sweden, Russian Federation and United Kingdom). Important political developments are taking place in the Netherlands where the right of access to official information will be included in the human rights' chapter of the Dutch Constitution [as is already the case in Sweden and Belgium].*

[8] *See also: European Commission for Democracy through Law. Implementation of constitutional provisions regarding mass media in a pluralist democracy. Nicosia, 16 – 18 December 1994. Collection Science and technique of democracy, N° 13. Reports by Mr Arthur F. Plunkett, Barrister-at-Law, Deputy Senior Legal Assistant, Office of the Attorney General, Dublin. Pp. 102 –115 and by Prof Paul Lewalle, Professeur ordinaire at the University of Liège, Pp. 116-144.*

25. Resolutions 1996/39 and 1998/42 both take note of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information adopted by a group of experts after convening in South Africa on 1 October 1995[910]. The 'Johannesburg principles' make a clear link between the freedom of expression and the freedom of access to information in Principle 1 (b):

> *"(b) Everyone has the right to* ***freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds****, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice"*.

26. Resolution 1998/42 also establishes a clear link between the freedom of expression and the freedom of information also in the field of modern technologies as it emphasises the need to "*raise awareness about all aspects of the interrelationship between the use and the availability of new media of communication, including modern telecommunications technology, and the right of freedom of expression and information […]*",

27. In Resolution 2000/38 the right to freedom of expression appears in connection with the "freedom to seek, receive and impart information". States are urged not to impose restrictions on this right although they have a margin of appreciation under certain circumstances as defined by law.

28. From the above it can be concluded that the freedom to seek, receive and impart information is an integral part of the freedom of expression. Considering the content of Article II.1 of the GFAP, which refers to the "*highest level of internationally recognised standards*", the freedom of expression mentioned in Article II.3.h must include the freedom to seek, receive and impart information as it directly refers to Article 19 of the International Covenant on civil and political rights and to its scope as defined in Resolutions of the Human Rights Commission.

- **Obligation of a public body to disclose information**

29. As it appears from the Covenant and the General comment to Article 19, under that provision States do not have an obligation to disclose information to natural or legal persons. Nevertheless, the jurisprudence of the Human Rights Committee shows that a limitation of access to information may amount under certain circumstances to an infringement of Article 19 of the Covenant.

30. In Communication N° 633/ 1995[11] the Committee considered the issue whether the restriction of access to press facilities in Parliament amounts to a violation of the right protected under Article 19 of the Covenant, to seek, receive and impart information. The Committee referred to the right to take part in the conduct of public affairs, as laid in Article 25 of the Covenant and in particular to General

[9] *E/CN.4/1996/39, annex.*
[10] *The text of the Resolution appears in Appendix IV to this report.*
[11] *Canada. 05/05/99. CCPR/C/ 65/ D/ 663/1995.*

Comment N°25 (57)[12]. According to the Committee Article 25 "*read together with Article 19, implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members*"[13]. However, neither the above mentioned case nor any other case-law of the Committee allow to draw the conclusion that Article 19 enshrines an obligation for States to disclose information to natural and legal persons.

31. In his report, Mr. Abid Hussain, Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression (E/CN.4/2000/63), finds the following : « *The right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself. As such, it is one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate which has been acknowledged as fundamental to, for example, the realization of the right to development*[14]". The Special Rapporteur expressed concern: "*about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs in that the decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent*[15] ". Finally, he "*directed the attention of Governments to a number of areas and urged them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles*[16]".

32. It follows from the above that although United Nations treaties do not contain any provision expressly guaranteeing freedom of access to information in the control of a public authority, there is a clear tendency in the practice of UN and its specialised bodies to encourage national authorities to grant their citizens the right of free access to public information through national legislation.

IV. Conclusion.

The Venice Commission is of the opinion that:

a. Freedom of expression as mentioned in the enumeration of rights in Article II.3.h of Annex 4 of the General Framework Agreement for Peace includes freedom of access to information.

b. The United Nations Human Rights instruments as well as the European Convention on Human Rights do not impose on Member States an obligation to grant any natural or legal person a right of access to information in the control of a public authority, nor do they impose on public authorities a corresponding obligation to

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[12] *The General Comment N°25 reads in part "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential". General Comment N°25, paragraph 25, adopted by the Human Rights Committee on 12 July 1996.*
[13] *Communication N° 633/ 1995. Canada. 05/05/99. CCPR/C/ 65/ D/ 663/1995, page 14.*
[14] *Report of the Special Rapporteur Mr. Abid Hussain on the protection and promotion of the right to freedom of opinion and expression (E/CN.4/2000/63, 18 January 2000), p. 7 para. 42.*
[15] *Idem, para 43.*
[16] *Idem (Appendix V).*

disclose information, at least not on their own motion. Therefore it cannot be concluded that the freedom of expression as mentioned in Article II.3.h of the annex 4 GFAP gives automaticaly such protection. Nevertheless, national legislators increasingly do grant and regulate a right to access to information in the control of public administration and impose on public authorities a corresponding obligation to disclose information under certain conditions and with certain exceptions. This evolution is to a certain extent reflected in international and European law as both United Nations and Council of Europe bodies' recommendations promote and encourage such legislative measures.