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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE STATUS AND RANK
OF THE HUMAN RIGHTS OMBUDSMAN
OF BOSNIA AND HERZEGOVINA**

on the basis of comments by

Mr Hans-Heinrich VOGEL
(Substitute member, Sweden)

Introduction

1. By a letter dated 13 January 2004, the Human Rights Ombudsman of Bosnia and Herzegovina asked the Commission to prepare an opinion on whether the status of the institution of Ombudsman of Bosnia and Herzegovina should be equated to that of a high judicial authority rather than to that of a senior civil servant.

2. Mr Hans Heinrich Vogel was appointed as rapporteur on this issue. The present opinion, which was drafted on the basis of his comments, was adopted by the Commission at its 58th Plenary Session (Venice, 11-12 March 2004).

I. Background

3. The Ombudsman institution for Bosnia and Herzegovina (hereinafter: “Ombudsman of B&H”) was established under Annex 6 of the Dayton Peace Agreements as one of the two branches of the Commission on Human Rights (Article II, Para. 1 of the Constitution of B&H and Annex 6 of the Dayton Agreements, Chapter II, Part A)¹. The first Ombudsman, Mrs Gret Haller, took her functions in 1996². For the period 1996 to 2002, financial resources necessary for the functioning of the institution as well as for the remunerations of the Ombudsman were ensured by the foreign donors as well as the EU and OSCE. Since 2002, the funding of all Ombudsman institutions in Bosnia and Herzegovina depends on the domestic governments and parliaments.

4. On 3 January 2001, the Law on the Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter: “the 2001 Law”) came into force. It replaced the relevant part of Annex 6 of the Dayton Peace Agreements and gave the current legal basis for the Ombudsman of B&H. The first domestic Ombudsman of B&H (Mr Mariofil Ljubic, Mr Safet Pasic and Ms Snezana Savic), was appointed by the B&H Parliamentary Assembly, on the proposal by the B&H Presidency on 27 and 28 November 2003. The new institution started its work on 1 January 2004.

5. The 2001 Law provides that “*the salary of an Ombudsman shall be the same as the Chair of the Council of Ministers of B&H*” (Article 10.3). The status and rank of the Ombudsman of B&H are therefore equated with that of members of the Presidency of the Council of Ministers of B&H.

II. Status and rank of Ombudsman institutions in Europe

6. The Venice Commission has had the occasion to deal with the status and rank of Ombudsman institutions in 2002, in respect of the request for an opinion on the status and rank of the institution of Ombudsman of the Federation of Bosnia and Herzegovina (CDL-AD(2002)8). Within the framework of this request, the Commission undertook a comparative study on the issue of the status and rank of Ombudsman institutions in Council of Europe member states with the aim to ascertain whether there was a European standard in this field.

¹ The other one being the Human Rights Chamber.

² In accordance with Annex 6 of the Dayton Agreement, the first Ombudsman was to stay in office for five years, until the transfer of responsibility has taken place. He or she could not be a citizen of B&H or of any neighbouring state. The second foreign Ombudsman, Mr Frank Orton, was appointed on 30 April 2000.

7. The study undertaken showed that there are a variety of ways of establishing the status of the Ombudsman. Some countries establish the status, rank and subsequently remuneration of their ombudsmen institution with reference to the judiciary (e.g. Malta, Norway or Sweden); some other countries equate the Ombudsman's status with that of different institutions on a similar level such as high public officials, a judge of the Constitutional Court, a minister (Croatia), the President or the Parliament (Estonia), and the Vice-President of the Council of State (Netherlands). In Austria, the Ombudsman has an extraordinary rank, equivalent to members of Parliament, while a number of countries do not formally provide for the rank of the Ombudsman (see Paragraphs 7-10). Similar variations exist also at the sub-national level (see Paragraph 11).

8. Whatever status the Ombudsman institution is assimilated with - the judiciary or public officials - it is always given an appropriately high rank. The high rank is one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently.

III. Status and rank of the Ombudsman of B&H

9. As it was precedently mentioned, the 2001 Law assimilates the financial status of an Ombudsman to that of the Presidency of the Council of Ministers of B&H.

10. In the light of the variety of solutions existing in Europe, this choice of Bosnia and Herzegovina is not, in itself, contrary to any European standard.

11. Nevertheless, when ombudsman institutions exist at different levels in the same country, as is the case in Bosnia and Herzegovina, it is extremely important that the status and rank of these institutions should be decided in a consistent manner³. A difference in status would indeed be difficult to justify, in particular when a significant difference in remuneration would be the consequence of such difference. This difference in remuneration would risk to undermine the credibility of the less paid institution. Further, it would inevitably tend to lead to tensions and difficulties in the coordination and co-operation of the ombudsman institutions at the different levels, which would undoubtedly be unwarranted and bring prejudice to the country.

IV. Conclusion

12. There is no European standard as to the status of the Ombudsman. Indeed, there are a variety of ways of establishing such status in Europe. However, whatever status the Ombudsman institution is assimilated with - the judiciary or public officials - it is always given an appropriately high rank, which is also reflected in salary levels. The issue of setting

³ There are at present three ombudsman institutions functioning in Bosnia and Herzegovina; one for each entity and one state-level institution: the Ombudsman of the Federation of B&H, and the Ombudsman of the Republika Srpska (for two entities), and the Human Rights Ombudsman of the B&H (at the state level). The Federation Ombudsman has been operating since January 1995, and the State Ombudsman since early 1996. The Republika Srpska Ombudsman started functioning in 2000. As regards the status and rank of the Ombudsman of the Federation of B&H, although the Law on the Ombudsman of the Federation of B&H itself does not make specific reference to this issue, it clearly results from the provisions of the Constitution of the Federation of B&H and the Memorandum of Understanding concluded between OSCE and the Federation, that its status is assimilated to that of judiciary, and the rank and salary to that of the President of the Supreme Court. As to the Ombudsman of the Republika Srpska, their rank and salary are assimilated to that of a judge of the Supreme Court of Republika Srpska.

the ombudsman's remuneration is not only an issue of public respect but also of independence of the institution.

13. In the light of the foregoing, the Commission considers that the choice of equating the status of the Ombudsman of Bosnia and Herzegovina to that of senior civil servants is not contrary to European standards. Nevertheless, the Commission wishes to underline the importance of ensuring consistency in the status and remuneration of all ombudsman institution in Bosnia and Herzegovina and to warn against possible prejudicial consequences that a significant difference in remuneration among such institutions may provoke as concerns their credibility and their good co-operation.