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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW
ON AMENDMENTS TO THE LAW
ON OMBUDSMAN FOR HUMAN RIGHTS
IN BOSNIA AND HERZEGOVINA**

on the basis of comments by

Mr Kaarlo TUORI (Member, Finland)
Mr Dimitris CHRISTOPOULOS (Expert, Greece)

I. Introduction

1. *In November 2003, Mr Dragan Covic, Chairman of the Presidency of Bosnia and Herzegovina, requested the assistance of the Venice Commission as regards the reform of the Ombudsman institutions in Bosnia and Herzegovina.*

2. *A working group, composed of a representative of the Minister of Human Rights and Refugees, the three Human Rights Ombudsmen of Bosnia and Herzegovina, the three Ombudsmen of the Federation of Bosnia and Herzegovina, the two Ombudsmen of the Republika Srpska and representatives of the Ministries of Justice of the State and the two Entities, was set up at the beginning of 2004 by the BiH Council of Ministers with a view to preparing the reform.*

3. *The Venice Commission appointed Mr Kaarlo Tuori, member, and Mr Dimitris Christopoulos, from the office of the Greek Ombudsman, to act as rapporteurs.*

4. *The Venice Commission organised a working meeting with representatives of the working group in order for them to identify and agree upon the main aims and agenda of the reform. This meeting, which took place at the Council of Europe in Strasbourg on 19 April 2004, reached a certain number of conclusions (CDL (2004) 028rev). These conclusions covered both the principles upon which the reform should be based and the procedure and time-frame to be followed.*

5. *A Preliminary Draft Outline Plan for Restructuring Ombudsman Institutions in Bosnia and Herzegovina was prepared by the Ministry for Human Rights and Refugees and submitted to the Venice Commission on 13 May 2004. The rapporteurs' comments on this plan were conveyed to the Assistant Minister for Human Rights and Refugees, Mr Nagradic, in a letter dated 24 May 2004.*

6. *The Ministry for Human Rights and Refugees subsequently prepared a draft Law on Amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina (CDL (2004) 063, "the draft Law"). On 30 June 2004, the Minister for Human Rights and Refugees, Mr Kebo, requested the Venice Commission's opinion on this draft.*

7. *The present opinion was adopted by the Commission at its ... Plenary Session (Venice, ...).*

II. General remarks

8. The conclusions agreed upon at the end of the meeting on 19 April 2004 ("the April conclusions") provide the framework within which the reform should be carried out.

9. The April conclusions recognised the need to "restructure" the ombudsman institutions in Bosnia and Herzegovina within a reasonable time, while continuing to secure the current level of human rights protection. They provide that the number of ombudsmen should gradually be reduced from 9 to 3 and then from 3 to one, over a

transitional period during which the three institutions will co-exist, each one with one ombudsman and two deputies. Furthermore, the principle of multi-ethnicity will be maintained in the resulting single institution through the appointment of deputy ombudsmen, possibly rotating on the post of ombudsman.

10. The draft Law also needs to be analysed in the light of Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on the institution of ombudsman, which lists certain characteristics which are essential for any ombudsman institution to operate effectively.

11. Overall, the Venice Commission welcomes the draft Law, which takes good account of the April conclusions and proposes some good additional amendments (see below). It notes that there is also a need for an action plan to deal with the practical and technical aspects of the preparation for the merger. More specific comments on the draft Law will now be detailed.

III. Specific analysis of the draft Law

12. Article 3 clearly provides for the establishment of a single ombudsman institution, composed of an ombudsman and two deputies, as agreed in the April conclusions. Article 3.2 is to be particularly welcomed, providing as it does for an ad hoc commission for the nomination of the ombudsman and two deputies, an open competition for posts and public proceedings. Taking account of Article 3.3 which provides that there shall be more nominees than positions available, the appointment procedure is transparent (in line with Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe) and allows for real choice.

13. As regards appointment, it would seem necessary to clarify that the Parliamentary Assembly will appoint at the same time three persons, each to serve for six years, two years as ombudsman and four years as deputy, and will also decide on their schedule of rotation on the positions of Ombudsman and Deputy. Unless a post becomes vacant for other reasons than the expiry of the mandate, there will accordingly be nomination procedures in accordance with Article 8(1) of the Law every six, and *not* two years. Article 12 § 3 of the Law (as amended by Article 7 of the draft law) would accordingly seem superfluous.

14. Article 3.5 provides that “the ombudsman and two deputies shall be appointed from the three different constituent peoples, Bosniak, Serb and Croat nationality”. This provision aims to ensure the multi-ethnicity of the ombudsman institution. However, it should be noted that, as it stands, this provision would exclude the possibility for a person of any other ethnicity to be appointed to the position of ombudsman. While it is highly likely that the three positions will be filled by persons of Bosniak, Serb and Croat nationality, persons belonging to the category of “others” should not necessarily be prevented from being appointed ombudsman or deputy ombudsman. It would therefore be advisable to change Article 3.5 to read: “The Ombudsman and two Deputies shall be *citizens of Bosnia and Herzegovina and shall be appointed*”

15. In Article 4, reference to the election of the ombudsman and deputy ombudsmen should be deleted, since they are appointed, not elected. The time-limits provided for in this article appear short.

16. Article 10 of the Law provides that the salary of the ombudsman shall be equal to the salary of a BiH Constitutional Court judge, and that of the deputy ombudsmen shall be equal to the ombudsman's salary reduced by 10%. Comparative study has shown that the status and rank of Ombudsman institutions, and corresponding salary levels, are established in a variety of ways in Council of Europe member states (see the Venice Commission's opinion on the status and rank of the institution of Ombudsman of the Federation of Bosnia and Herzegovina (CDL-AD(2002)8)). What is important, however, is that the ombudsman should be given an appropriately high rank, since this is one of the essential factors that guarantees the Ombudsman's independence from political interference and enables that institution to function effectively and efficiently. Equating ombudsman salaries with those of a constitutional court judge fulfils this criterion and is fully in line with European standards in this field. The salaries of ombudsman's staff should however be determined in accordance with applicable legislation.

17. In Article 10.5 of the Law, it should be clarified that "deputy" refers to the current deputies and would not be applicable to the two deputy ombudsmen (see paragraph 21 below).

18. The second paragraph of the new Article 12.a created in Article 8 of the draft Law should be modified to read: "they *may* investigate individually", which is the wording in Article 8.2 of the present Law on the Ombudsman of Bosnia and Herzegovina (CDL (2000) 110, "the present Law"), to allow the possibility for the ombudsman and deputy ombudsmen to investigate together where appropriate. The phrase "and consult each other" should be deleted since it is dealt with in the third paragraph of the new Article 12.b.

19. The second paragraph of the new Article 12.a deals with two important but different matters and it would be advisable to split them into two separate paragraphs.

20. The third paragraph of the new Article 12.a imposes an important obligation on the ombudsman to take note of the written opinions of the deputy ombudsmen, but may prove inflexible in its current wording. This paragraph obliges deputy ombudsmen to provide written opinions where so requested by the ombudsman, although there may be cases where they would not wish to do so. It also imposes rather inflexible time limits, and there may well be cases where waiting 8 days for a written opinion would be too long. It is therefore suggested that the provision could be changed to read as follows:

"The Ombudsman shall make his/her recommendations, decisions and reports independently but he/she shall *provide his/her deputies with the opportunity of submitting written opinions within an appropriate deadline. Such opinions shall be taken into account by the Ombudsman.*"

21. The different nature of deputy ombudsmen as they are today and the two deputy ombudsmen which will exist in the future needs to be underlined. Deputy ombudsmen are currently appointed by the ombudsman and are part of the ombudsman's staff. In the draft Law, they will be appointed by the Parliamentary Assembly of Bosnia and Herzegovina with a view to serving two terms as deputy ombudsman and one term as ombudsman.

22. Notwithstanding the above, the ombudsman and deputy ombudsmen will not exercise their functions jointly. For any two year period, there will be one ombudsman and two deputy ombudsmen. The role of the deputy ombudsmen should be to support and assist the ombudsman in the carrying out of his or her functions. The draft Law does not specify this clearly enough. It is therefore suggested that in Article 10, which amends Article 15 of the present Law, should contain a first paragraph setting out the respective functions of the ombudsman and deputy ombudsmen. A new Article 15.1 of the present Law could read:

“The Ombudsman has overall responsibility for the institution and its functioning, as set out in Article 1. The Deputy Ombudsmen shall assist the Ombudsman in this task.”

23. Responsibility for the protection of human rights and the future shape of the ombudsman institution falls within the competence of Bosnia and Herzegovina under Article iii.5(a) of the Constitution of Bosnia and Herzegovina:

“Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.”

24. The Human Rights Ombudsman, which was provided for in Annex 6 of the General Framework Agreement (Chapter 2, Part B), therefore falls explicitly under the responsibility of Bosnia and Herzegovina. It does not come within “such other matters as are agreed by the Entities”. The Entity Constitutions cannot override the Constitution of Bosnia and Herzegovina in this matter and can only provide their parliaments with such competence which is not reserved to Bosnia and Herzegovina.

25. Nonetheless, it is for the Entities themselves to enact the legislation necessary to comply with the provisions contained in the draft Law. The draft Law should fix a date, for example 1 January 2006, when the single ombudsman institution becomes operational. The draft Law could provide that from the date that it enters into force, the Entities have 90 days to adapt their legislation (which in the case of the Federation of Bosnia and Herzegovina includes the Constitution) to comply with the final and transitional provisions of the draft Law and make provision for the Entity ombudsmen to cease to exist on the date when the single ombudsman institution becomes operational.

Pending adoption of such legislation by the Entities, the Entity ombudsmen would continue to function as now.

26. It may be advisable to include a time frame in Article 19.2, such as one year, in order to ensure that preparations proceed in a timely fashion. Article 19.2 could be amended as follows:

“The Ombudsman of BiH and entity Ombudsmen shall co-operate on a regular basis as long as the latter exist and the cooperation shall include preparation *within a period of one year* of coordinated plans of action, exchanging the experience, bringing the practice in line and drafting the initial framework of future operation of the Institution of Ombudsman of BiH.”

27. Article 34 of the present Law should be amended to include an obligation to report to the Legislature of the Federation of Bosnia and Herzegovina and the National Assembly of the Republika Srpska.

IV. Conclusions

28. The Venice Commission welcomes the draft Law, which takes good account of the framework for reform agreed previously. In addition, the draft Law proposes some improvements to the present Law, such as the appointment procedure for the ombudsman and deputy ombudsmen.

29. The Venice Commission considers that the draft Law should clarify that the Parliamentary Assembly will appoint at the same time three persons, each to serve for six years, two years as ombudsman and four years as deputy, and will also decide on their schedule of rotation on the positions of Ombudsman and Deputy. The provision of the draft Law which states that the ombudsman and two deputies shall be appointed from persons of “Bosniak, Serb and Croat nationality” should be amended to ensure that persons who belong to the category of “others” are not prevented from being appointed ombudsman or deputy ombudsman.

30. The Venice Commission finds that equating the salaries of the ombudsman and deputy ombudsmen with that of a BiH Constitutional Court judge fixes salaries at an appropriately high level to ensure the ombudsman’s independence and is in line with European standards in this field. The salaries of ombudsman’s staff should however be determined in accordance with applicable legislation.

31. Provisions in the draft Law concerning the obligation for the ombudsman to consult with his/her deputies should be made more flexible.

32. The respective roles and functions of the ombudsman and deputy ombudsmen should be set out more clearly, with full respect for the different nature of deputy ombudsmen as they are today and the two deputy ombudsmen which are provided for in the draft Law.

33. Although responsibility for the protection of human rights and the future shape of the ombudsman institution falls within the competence of Bosnia and Herzegovina under the Constitution, the Entities themselves must enact legislation to comply with the provisions contained in the draft Law. The date when the single ombudsman institution would become operational should be fixed in the draft Law.

34. A time frame should be included in Article 19.2, such as one year, in order to ensure that preparations proceed in a timely fashion.

35. The new single Ombudsman should have an obligation to report to the Legislature of the Federation of Bosnia and Herzegovina and the National Assembly of the Republika Srpska in addition to the state parliament.