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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT OPINION ON CERTAIN ISSUES
RELATED TO THE OMBUDSMAN INSTITUTIONS
IN BOSNIA AND HERZEGOVINA
AND ON THE INTERPRETATION OF CERTAIN COMMITMENTS
UNDERTAKEN BY BOSNIA AND HERZEGOVINA
UPON ACCESSION TO THE COUNCIL OF EUROPE**

on the basis of comments by:

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Mr Philippe BARDIAUX (Expert, France)

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Introduction

1. *By letter dated 25 January 2002, the OSCE Mission to Bosnia and Herzegovina requested the opinion of the Venice Commission on a number of issues related to the Ombudsman institutions existing in Bosnia and Herzegovina and the accession commitments of this country with respect to these institutions, as defined in Opinion no. 234 (2002) of the Parliamentary Assembly of the Council of Europe.*
2. *At its 50th Plenary Session (Venice, 8-9 March 2002) the Commission appointed Ms Serra Lopes, Mr Bardiaux and Mr Christopoulos as rapporteurs on this issue and decided to approach the various institutions concerned with a view to organising exchanges of views with representatives of each.*
3. *Exchanges of views were held in Vilnius on 5 and 6 April 2002 between the rapporteurs and representatives of the entity Ombudsman institutions: Ms Jovanović and Ms Raguz on behalf of the Ombudsmen of the FBH, and Mr Crnjać, Mr Osmić and Ms Slavnić, (then) Ombudsmen of the Republika Srpska. An exchange of views was held between the rapporteurs and Mr Orton on 27 June in Paris.*
4. *The following opinion takes account of the views expressed on these occasions.*

I Interpretation of sub-paras (a), (c), (e) and (f) of para. 15(v) of Assembly Opinion no. 234 (2002) related to human rights, as regards their impact on the Ombudsman institutions currently operating in Bosnia and Herzegovina, with particular reference to sub-para. (c).

Wording of Opinion no. 234 (2002)

5. According to sub-para. 15(v)(c) of Opinion no. 234 (2002): “The Parliamentary Assembly...notes that Bosnia and Herzegovina undertakes to honour the following commitments...with respect to human rights: ... to work towards establishing multi-ethnic Ombudsmen and to consider establishing, in the long term, a single, unified Human Rights Ombudsman’s Office at state level, which would include the present Ombudsmen institutions at entity level”.
6. Two clear conclusions may be drawn from the wording of this paragraph: first, there is no concrete obligation to establish a single, unified institution at state level; there is rather an obligation to consider doing so, in the long term. Second, there *is* an obligation to work towards establishing multi-ethnic institutions. In the latter respect it may be noted that multi-ethnic institutions have now been established in each of the entities. At the level of the state, however, the position of Ombudsman is currently attributed to an international.
7. In its discussions with the various institutions concerned, the Commission noted that all considered that a single, unified institution at state level should not be created until or unless the state institution is established as a national, multi-ethnic institution. The Commission shares this view. Indeed, the contrary would mean that responsibility was removed from nationals of Bosnia and Herzegovina in the entity institutions and returned to the international community, running counter to the “ownership” doctrine advanced by Mr Petritsch in his role as High Representative

and constituting a step backwards in the process of transfer of responsibilities from the international community to local actors.

8. Sub-para. 15(v)(f) refers to a commitment: “to implement the legislation to guarantee the independence of the Ombudsman institutions at the state as well as entity levels including amendments to the Federation of Bosnia and Herzegovina Ombudsman Law drafted by the Venice Commission”. This commitment, the effect of which will be the strengthening of each of the institutions, provides a further indication that sub-para. 15(v)(c) does not require the abolition of the entity institutions in the short term.

Modalities of a possible transition

9. Given that the establishment of a single institution is only required to be considered in the long term, it may appear premature to discuss modalities of a merger between institutions at this stage. Furthermore, there is no rule prohibiting the existence of Ombudsman institutions at both state and entity level within a federal state. Indeed, such a model takes account of the Ombudsman’s function as a link between the individual and the public authorities and is designed to ensure that such a link is maintained at each level at which public power is exercised. In Bosnia and Herzegovina, where public power remains concentrated at the level of the entities and there is a relative lack of power at the level of the state, citizens continue to need protection at the entity level, at which most power is exercised; it therefore appears important that the link between the individual and the public authorities be maintained at this level.

10. On the other hand, an advantage of establishing a single, unified institution at the level of the state may be that it avoids any risk of confusion for individuals in terms of the body to which they should address their claims, although such confusion can of course already be resolved by the existing institutions, through referring cases to each other as appropriate. (This question is discussed further below, at II and IV). The creation of a unified institution may also be seen as desirable as itself furthering the process of consolidating institutions at the level of the state.

11. It must be recognised, however, that a number of issues will have to be clearly addressed before a unified institution can be established. First, there is the question of how such a permanent transfer of competences from the entities to a single institution at the level of the state is to be achieved. Appropriate amendments to entity and state laws as well as to the Constitution of the Federation of Bosnia and Herzegovina will need to be examined. The question of the composition of such an institution must also be decided. As mentioned above (§ 7), the appointment of national, multi-ethnic Ombudsmen is essential in terms of continuing the process of transfer of responsibilities from the international community to local actors. The number of such national Ombudsmen and the criteria for their selection will have to be determined, bearing in mind both the need to ensure that the composition of the institution is balanced as well as the fact that the greater the number of Ombudsmen, the harder it may be to achieve a consensus among them. Any transfer of powers must also be accompanied by an appropriate transfer of financial resources, for which provision will also have to be made. These issues, amongst others, will need to be considered in detail before any unified institution is actually established.

12. It is thus clear that a change such as the establishment of a single, unified Ombudsman institution at the level of the state of Bosnia and Herzegovina will require a significant amount of consultation and negotiation, involving all relevant institutions. Furthermore, it is crucial that there in the meantime be no interference in the functioning of the existing institutions, whether at state or entity level. These institutions must continue to operate without hindrance until such

time as they may be replaced by a new structure, and there must be no lowering of the level of protection of individuals as a result of this process.

II Co-operation between the State and Entity Ombudsmen

13. The Commission, in its Interim Report on the distribution of competences and structural and operational relations in the Ombudsman institutions in Bosnia and Herzegovina (CDL-INF (98) 12), emphasised the need for arrangements for communication, mutual information and consultation between the Ombudsman institutions, especially in cases where it appeared that the institution to which a case had been referred lacked jurisdiction. (Cases of overlapping jurisdiction are dealt with below, at IV.) Noting that the flexibility and informal nature of Ombudsman institutions should favour such developments, the Commission suggested that regular meetings be held between the institutions in order to determine the form such co-operation should take and, where necessary, decide on joint action to be taken.

14. This consideration was again emphasised in the Report of the Working Group on Ombudsman Institutions in Bosnia and Herzegovina (CLD-INF (99) 10) and given concrete form in Article 13 of the Law on the State Ombudsman, which provides that “the Institution shall co-operate with and promote co-operation among the Ombudsman institutions in Bosnia and Herzegovina and shall facilitate the co-ordination of action taken by the Ombudsman institutions in Bosnia and Herzegovina”. Similar provisions are included in the laws on the entity Ombudsmen. For as long as they continue to co-exist, all institutions are thus subject to a legal obligation to co-operate with and promote co-operation with the other institutions, and to facilitate the co-ordination of their action.

15. The State institution is subject to certain additional obligations relating to co-operation and co-ordination in the work of the three Ombudsman institutions, in accordance with Article 13 of the relevant Law, which provides further that:

In this respect the Institution shall in particular:

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

16. The question of the representation of the various Ombudsman institutions in international fora is dealt with below, at III. As regards the other points, according to the information received by the Commission, a network of liaison officers has been set up. Seminars and workshops have also been held. The Commission is aware that a number of meetings between all three institutions were organised by the Ombudsman of Bosnia and Herzegovina. However, the last such meeting was held in late 2001. It is not clear whether there is any intention of renewing these meetings. The Commission emphasises once again the importance of ensuring that there is regular and constructive co-operation and co-ordination between the institutions, as this is an effective means of securing the appropriate level of protection for individuals.

III Relationship between the institutions and independence among them

17. Whereas it is natural that the State (central) institution should take a leading role in matters relating to co-operation between institutions and the co-ordination of their work, the Commission has consistently taken the view (CDL-INF (98) 12; CDL-INF (99) 10) that the institutions should exercise their powers independently. This is not only a logical corollary of the fact that by law, the institutions are competent to deal with matters related to the exercise of power by different authorities (on this point, see also section IV below on possible overlaps in jurisdiction); it is also essential to the nature of the institution that its functions be carried out independently. Furthermore, the Commission emphasises, as it has previously had occasion to state (CDL-INF (98) 12; CDL-INF (99) 10), that there should be no hierarchical relationship between institutions. In particular, it reiterates that there must be no possibility of appealing to the Ombudsman at the level of the state against the decisions of the entity Ombudsmen.

18. With respect to the more specific questions asked by the OSCE regarding appointment procedures for entity Ombudsmen and policy issues directly involving the work and structure of the entity Ombudsmen, the Commission considers that these questions fall outside the scope of the present opinion. However, it notes that such matters could be dealt with in the context of ordinary co-operation between institutions, leaving the entity institutions to deal directly with the relevant entity authorities as necessary on points specifically concerning them.

19. As regards participation in international fora, it may be noted that the Law on the Ombudsman of Bosnia and Herzegovina provides (Article 13(d)) that “the Institution shall...represent the Ombudsman institutions of Bosnia and Herzegovina in international fora as appropriate.” Quite logically this gives the State Ombudsman the primary role in representing the Ombudsman institutions of Bosnia and Herzegovina vis-à-vis the international community. However, it does not appear to preclude the entity Ombudsmen from representing the country where appropriate. Moreover, in its explanatory notes on the preliminary draft organic law on the State Ombudsman of Bosnia and Herzegovina (CDL-INF (99) 10), of which the adopted text remains unchanged in this respect, the Commission stated that the Ombudsman at the level of the state “shall take the necessary steps to ensure that the entities’ Ombudsmen...participate or are adequately represented in all relevant international *fora*”.

IV Possible overlapping of jurisdiction

20. Article 5(1) of the Law on the Ombudsman of Bosnia and Herzegovina gives this institution exclusive competence to deal with cases concerning government bodies of Bosnia and Herzegovina; concerning at the same time a government body of an entity and a government body of Bosnia and Herzegovina; or concerning at the same time a government body of both entities.

21. Under Article II.B.5 of the Constitution of the Federation of Bosnia and Herzegovina, the Ombudsmen may examine the activities of any institution of the Federation, Canton, or Municipality, as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects. In accordance with Article 3, para. 4 of the Law on the Ombudsman of the Federation of Bosnia and Herzegovina,

The Ombudsman shall have the power to admit, follow up or investigate *inter alia* cases involving the poor functioning of, or violations of human rights and liberties committed by any authority of the Federation of Bosnia and Herzegovina (hereinafter: “the Federation”), Canton, town or municipality, as well as any other agency performing public services.

22. According to Article 1 of the Law on the Ombudsman of the Republika Srpska:

The Ombudsman of the Republika Srpska shall be an independent institution set up in order to protect the legitimate rights and interests of natural and legal persons, as enshrined in particular in the Constitutions of Bosnia and Herzegovina and the Republika Srpska and the international treaties appended thereto, monitoring to this end government activity of any institution of the Republika Srpska, in accordance with the provisions of the present law and in co-operation with Ombudsman institutions in Bosnia and Herzegovina.

23. It therefore appears that overlaps in jurisdiction may occur in cases concerning only one entity, since in addition to the competence of the entity institutions in such matters, the state institution may also deal with cases concerning a government body of an entity (Article 5(2)). It should be noted that the Law on the Ombudsman of Bosnia and Herzegovina was drafted before an institution had been established in the Republika Srpska. The inclusion of this provision was thus a means of ensuring at that stage that individuals in the Republika Srpska had some means of access to an Ombudsman institution with Bosnia and Herzegovina.

24. The full text of Article 5(2) of the Law on the Ombudsman of Bosnia and Herzegovina, as adopted, provides that: “The Institution may also deal with cases concerning a government body of an entity, in particular where it finds that the outcome of a case is of particular relevance for the effective enjoyment of individual rights and freedoms in Bosnia and Herzegovina as a whole.” The Commission stated, in its explanatory report on the draft, that:

since clear entity cases can be dealt with by the entities’ Ombudsman institutions, the state Ombudsman is expected to make careful use of this power, intervening in these clear entity cases only when this appears absolutely necessary. . . [I]t is to be expected that in the long run, when the smooth functioning of all Ombudsman institutions in Bosnia and Herzegovina will be achieved, such interventions will be very exceptional.

Furthermore, it must be emphasised that the entity Ombudsmen are competent *only* to deal with matters concerning the entity in which they are established. Primary jurisdiction over clearly entity matters must therefore belong to the entity institutions, and for as long as they continue to operate, the competence of the state institution in matters concerning only one entity should be understood as secondary.

V Conclusions

25. The Commission reaches the following conclusions with regard to the interpretation of the relevant commitments of Bosnia and Herzegovina upon accession to the Council of Europe:

- in line with the clear wording of Assembly Opinion no. 234 (2002), it is apparent that there is no commitment on the part of the authorities of Bosnia and Herzegovina to establish a single, unified Human Rights Ombudsman’s Office at state level; however, there is a commitment to consider, in the long term, establishing such an institution;

- an essential element that must be taken into account by the authorities in their consideration of this matter is the establishment of such an institution as a fully national, multi-ethnic institution; other elements include but are not limited to the constitutional and legislative amendments needed to achieve a transfer of competences from the entity to the state level, the composition of the institution and the necessary transfer of financial resources;
- until such time as a single, unified institution may be established, co-operation and co-ordination in the work of the existing bodies remain essential and there should continue to be no hierarchical relationship between these institutions;
- any steps taken towards creating a single institution at the level of the state must not interfere with the work currently carried out by each; indeed, there is a firm commitment by the authorities of Bosnia and Herzegovina to guarantee the independence of the existing institutions at each level.

26. The Commission remains at the disposal of the relevant bodies to examine these questions in further detail if so required.