Submission by the OHR as amicus curiae to the HRC BiH in case no. CH/01/7248

Submission by the Office of the High Representative as *amicus curiae* to the Human Rights Chamber of Bosnia and Herzegovina in case no. CH/01/7248 "ORDO"- RTV "Sv. Georgije" v. Bosnia and Herzegovina

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1. When and in what manner was the Decision of the High Representative establishing the Communications Regulatory Agency (CRA), as well as the Procedure for Handling Cases, Broadcasting Code of Practice, Guidelines on Reporting Provocative Statements, and Rules of the Independent Media Commission (IMC) brought to the applicant's attention?

The Decision of the High Representative combining the competencies of the Independent Media Commission and the Telecommunications Regulatory Agency was published in the Official Gazette of Bosnia and Herzegovina 8/01 on 2 March 2001. While the Office of the High Representative does not know when the Applicant became aware of the Decision, publication in the Official Gazette is deemed to be sufficient notification to all citizens of Bosnia and Herzegovina.

The Office of the High Representative does not know when the applicant became aware of the Procedure for Handling Cases and the other codes and guidelines referenced in the question. However, the Office of the High Representative has knowledge of several regional advisory fora organised by the Independent Media Commission where the regulatory framework was discussed. It further understands that most if not all broadcasters attended at least one of these sessions.

2. Have the IMC Broadcasting Code of Practice, the IMC Guidelines on Reporting Provocative Statements, and the IMC Rules been published in the Official Gazette?

The Independent Media Commission, as a Commission set up under Annex 10 of the GFAP, did not publish its codes and rules in the Official Gazette of Bosnia and Herzegovina.

3. Apart from the procedures set forth in Article 10 paragraph 3 of the IMC Procedure for Handling Cases, are there any other more detailed applicable rules of procedure for decisions by the Enforcement Panel? Moreover, apart from the procedures set forth in Article 12 paragraphs 3 and 4 of the IMC Procedure for Handling Cases, are there any other more detailed applicable rules of procedure for decisions on appeal by the CRA Council?

The IMC adopted regulations on 16 September 1998, which were amended on 8 September 1999 and 21 October 1999.

4. What is the scope of review by the CRA Council on appeals of decisions by the CRA Enforcement Panel?

Article 2.3 of the CRA Decision, provides that the Council of CRA, in addition to functioning as the strategic and rule-making organ of the Agency, "shall serve as an appellate body for CRA decisions." This provision, which forms the basis of the appellate system of the Agency, does not in any way restrict the scope of the Council's appellate review.

Should the Human Rights Chamber consider the scope of the Council's review to be less than full review, the Office of the High Representative draws the Human Rights Chamber's attention to the standard of review used in the United Kingdom, which served as a model for the Independent Media Commission. According to the 1996 Broadcasting Act, the decisions of the Broadcasting Standards Commission ("BSC") are only subject judicial review, i.e. there is no right of appeal. This solution was chosen due to the highly technical

nature of the complaints before the BSC, a specialist body similar to the Enforcement Panel. Furthermore Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that anyone whose rights and freedoms are violated should have an effective remedy before a national authority. There is no requirement that the remedy has to be before a court established by law.

5. Article 6 of the European Convention on Human Rights provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …" In your opinion, does Article 6 of the Convention apply to the proceedings before the CRA Enforcement Panel and the CRA Council? If Article 6 applies to these proceedings, do these proceedings meet the requirements set forth in Article 6 (fairness, publicity, independence, impartiality)?

In order to determine if a civil right is at stake, to which Article 6 of the ECHR would apply, it must first be determined whether an underlying right exists to which the distinction "civil" can be applied.[1]

Does the case concern a "right"?

It is the opinion of the Office of the High Representative that an argument can be made that the present case does not concern a "right".

The High Representative's Decision of 11 June 1998 on the establishment of the Independent Media Commission provides that the IMC shall establish a regulatory regime for broadcasting and other media (Article 2) and that all broadcasters shall be subject to the Codes of Practice issued by the IMC (Article 3). The Decision also provides that IMC shall establish a licensing regime for broadcasters (Article 4). The fundamentals of these regulatory and licensing regimes

in terms of content and conditions are discernable from Article 5 of the Decision, which provides that the IMC shall have the function and responsibility to, among other things:

- licence all broadcasters,
- draw up such Codes of Practice for broadcasters […] as it considers appropriate,
- manage and assign spectrum for broadcasting purposes,
- ensure adherence to license conditions and Codes of Practice.

The High Representative's Decision of 2 March 2001 combining the competencies of the Independent Media Commission and the Telecommunications Regulatory Agency provides in Article 6 paragraph 1 that the responsibilities and obligations ascribed to the IMC are transferred to the CRA. The CRA now carries out these duties as a domestic regulatory agency on the state level (Article 1 paragraph 2 of the Decision).

When IMC became operative on 1 August 1998, the electronic media situation in Bosnia and Herzegovina was extremely chaotic with close to three hundred radio and television broadcasters, clearly too vast a number for a country of Bosnia and Herzegovina's size and economic strength. In addition to the problems resulting from the war in terms of profuse hate speech and propaganda, and damage to infrastructure, many new broadcasters had appeared in the period immediately following the war and occupied frequencies at will without consideration of any consequences, such as interference. In order to be able to manage this highly disorganised situation, therefore, the IMC initiated a process entitled Phase One whereby all broadcasters in Bosnia and Herzegovina were given *provisional* licences to broadcast provided they furnished the regulator with certain information regarding their technical operations. At the same time, the broadcasters undertook to abide by the programme content-related Codes and rules of the IMC.

The provisional broadcasting licence issued to a broadcaster was valid until such time as the IMC *either* re-licensed the broadcaster, in what is termed "Phase Two", provided the broadcaster fulfilled strict programme content, financial, and technical criteria, *or* decided to deny a Phase Two licence application. The intention behind Phase Two was to eventually create a viable and competitive media market in Bosnia and Herzegovina. Phase Two was initiated towards the end of 2000 and the process is still underway today. The appeals of Phase Two licence denials and the issuance Applicant of technical annexes to the new broadcasting licences are to be finalised within the coming months.

It is important to note that broadcasting makes use of a scarce natural resource, the radio frequency spectrum, which is the fundamental reason for permitting regulation of the use thereof. Licensing of broadcasting operations, therefore, clearly differs from licensing of other activities, such as the running of a medical clinic or the serving of alcoholic beverages. The necessary consequence of this is that even if an operator were to fulfil all the criteria for a licence it would still not be awarded a licence unless there was an available slot in the radio frequency spectrum. It is therefore clear that there is no *right* to obtain a broadcasting licence. One can turn this argument around and examine what would happen if such a right were considered to exist – the result would be chaos and anarchy with technical interference, not only between domestic broadcasters, but also between Bosnia and Herzegovina and neighbouring countries. Consequently, a right to a broadcasting licence would make impossible the creation of a viable, well-functioning, and competitive media market with a reasonable number of actors in which viewers could be provided with professionally produced and delivered programme content. A right to a broadcasting licence would also by necessity mean that Bosnia and Herzegovina would violate its international obligations as a member of the International Telecommunication Union and other

international organisations within the areas of electronic media and telecommunications.

While the Office of the High Representative does not wish to comment on the merits of CRA's decisions to suspend and revoke the Applicant's provisional licence, it notes that it is an aspect of the regulation of the use of the radio frequency spectrum in Bosnia and Herzegovina that CRA as a state body, by virtue of Annex II to the Constitution, is under an obligation to comply with certain international conventions. Article 20 of the International Covenant on Civil and Political Rights[2] provides that:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Moreover, Bosnia and Herzegovina is also bound by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination[3], which provides that:

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> > (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic

origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

This provision is interpreted by the Committee on Racial Discrimination as a positive obligation, meaning that the state's obligation is "not only to enact appropriate legislation but also to ensure that it is effectively enforced."[4]

The Office of the High Representative need not remind the Human Rights Chamber that the contested programme was broadcast by the Applicant after the violent clashes in Banja Luka, which occurred during the Ferhadija cornerstone laying ceremony. The Chamber is well aware of the contentious nature of this issue. Bearing in mind this country's recent history and the role played by the media in fuelling the ethnic tension that ravaged it, the Office of the High Representative therefore believes that the need to regulate any use of the ether for racist or other illegal objectives must be considered an important aspect of a purported right to a broadcasting licence.

The necessity to balance the right to freedom of expression against the obligations to protect the advocacy of national, racial or religious hatred was thoroughly considered by the Supreme Court of Canada in the case of Regina –v- Keegstra[5]. The Supreme Court of Canada considered the conflict between the offences against dissemination of racial

hatred contained in the Criminal Code and the rights of freedom of expression in the Canadian Charter of Rights and Freedoms. The Court concluded that although the criminal offence was inconsistent with the Charter it was justified as a reasonable limit to freedom of expression.

Lastly, the provisional character of the licence must be borne in mind. All broadcasters issued Phase One licences were aware that they would have to reapply in order to be awarded Phase Two licences. The necessary conclusion to be drawn from this is that a provisionally licensed broadcaster had no right to either the provisional licence or to the longer term Phase Two licence.

The Applicant's licence revoked by the CRA on 27 July 2001 was a provisional broadcasting licence issued on the basis of the 11 June 1998 Decision. As there was no right to a licence, it is the opinion of the Office of the High Representative that Article 6(1) of the European Convention does not apply to the proceedings by which the licence was revoked.

Does the case concern a "civil right or obligation"?

If the Human Rights Chamber is of the opinion that the Applicant had a right to a provisional broadcasting licence then the question arises whether this is a civil right ("de caractère civil") so as to make Article 6(1) applicable to the proceedings by which the licence was revoked.

The Office of the High Representative is aware that the European Court of Human Rights in its practice has adopted a liberal interpretation of "civil rights and obligations". In particular, the Court has held that the "character of the legislation which governs how the matter is to be determined … and that of the authority which is invested with jurisdiction in the matter … are … of little consequence" for the qualification of a right as civil.[6] In the *König* case, the Court also held that "the concept of 'civil rights and

obligations' cannot be interpreted solely by reference to the domestic law of the respondent State".[7] On the issue of whether Article 6 of the European Convention is applicable to proceedings, the Court has held that if the proceedings are "decisive for the relations in civil law" between two parties then that is enough for it to examine whether the proceedings complied with the requirements of Article 6(1).[8] However, it must be noted that the Court, in the *Le Compte* case, established that the proceedings must be "directly decisive" and that a "tenuous connection or remote consequences do not suffice."[9]

In line with the above quotation from the *König* case and bearing in mind the volatile situation in the country, any right to a provisional broadcasting licence must be considered as primarily characterised by the various international obligations incumbent upon Bosnia and Herzegovina, and therefore upon the broadcaster in question, as a result of the Constitution and of international agreements to which Bosnia and Herzegovina is a party. Thus, regardless of the administrative character of the CRA or of the rules issued or enforced by the CRA, such a right must be considered to have a non-civil character.

The objective of the proceedings by which the provisional licence was revoked was to enforce the regulatory scheme created by the regulator according to the 11 June 1998 and the 2 March 2001 Decisions. Hence, the revocation proceedings aimed at securing compliance with internationally accepted principles and rules that all domestic broadcasters have agreed to follow by virtue of their broadcasting licences. True, as a result of the revocation the Applicant was unable to perform any activities relating to the actual broadcasting of programming content. However, again, the revocation only concerned a provisional broadcasting licence and therefore did not have a conclusive impact on the Applicant's ability to obtain a permanent Phase Two licence at a later stage.

Moreover, also without the provisional broadcasting licence the Applicant would still be permitted to produce and sell programming to other domestic and international broadcasters. Consequently, it is not possible to consider the proceedings as directly decisive for the relations in civil law between the Applicant and any third party. In this context, the Office of the High Representative contends that the European Court cannot have intended that its dictum in the *König* case would have such far-reaching consequences that it would affect also such third parties as suppliers or advertisers, an argument which the *Le Compte* case supports. It must also be remembered that this was at all times a **provisional** licence which was at all times subject to the conditions that pertained to all such licences. It can be argued strongly that such conditionality is necessary in a democratic society for the proper functioning and regulation of the airways. A broadcaster who enters into contractual relations with other parties brings to such dealings its conditionalities and therefore, parties who do business with a broadcaster must respect the implied conditions inherent in the terms of any contract.

If Art 6 is applicable

Should the Human Rights Chamber consider that Article 6(1) is applicable to the revocation proceedings at issue in the present case, the Office of the High Representative would like to draw the Chamber's attention to the following.

Article 6 requires the existence of an **independent and impartial tribunal established by law**. As regards the requirement that the tribunal must be established by law it is sufficient to point out that Decisions by the High Representative have the force of law in Bosnia and Herzegovina and that therefore both the Enforcement Panel and the Council have been set up in compliance with this requirement.

The meaning of "independent" in Article 6(1) is that the tribunal must be independent of the executive and also of the

parties.[10] A tribunal would not be independent where it would seek and accept as binding advice on a topic by any other body or member of the executive.

The requirements of independence and impartiality are closely connected to the requirement of a fair hearing. In its practice, the European Court of Human Right has concerned itself both with the subjective and objective elements of independence and impartiality. As regards the former, i.e. whether the personal conviction of a judge raises doubts about his or her independence or impartiality, the Court presumes this to be the case unless there is evidence to the contrary. In the present case, there is no reason to suspect that any member of either the Enforcement Panel or the Council was biased either towards or against the Applicant.

In applying the objective test, the question to ask is, in the Court's words in the *Belilos* case, whether the applicant could, "legitimately have doubts as to the independence and organizational impartiality of the [body in question]".[11] There is a presumption that a judge or member is impartial until there is proof to the contrary.[12]

Relevant factors in determining the independence of a body are the manner and duration of appointment of the members, the existence of guarantees against outside interference, and the appearance of independence. In this respect, the Office of the High Representative wishes to emphasize the following:

The members of the Enforcement Panel and the Council are appointed by the High Representative on the basis of their knowledge of and experience in their respective fields. They are appointed for a set term of office. The Enforcement Panel and the Council have a significant involvement of foreign members who are not based in Bosnia and Herzegovina, there are also guarantees against outside interference. In this vein, note also that the members of both the Enforcement Panel and the Council are protected from removal by the executive during

their term of office by virtue of having been appointed by the High Representative. In addition, the practice of both Enforcement Panel and Council members of excusing themselves from decision-making in situations where doubt as to their impartiality arises, clearly supports a conclusion that both bodies are well aware of the requirements of independence and impartiality.[13] This last point also establishes that both organs have a public appearance of independence and impartiality. In short, the Office of the High Representative does not have any reason to question the independence or the impartiality of the Enforcement Panel or the Council.

As to organisational independence of the enforcement/appeals system, it must be noted that there is no overlap in membership between the Enforcement Panel and the Council. The Council's function as an appellate instance is provided for in Article 2(3) of the 2 March 2001 Decision. It is true that both the Enforcement Panel and the Council are part of the same organisation, however that in itself does not lead to a conclusion that the Council is not independent in its function as an appellate instance. The 2 March 2001 Decision does not provide for a link between the two organs. More importantly, the wording of the 2 March 2001 Decision of the High Representative does not restrict in any manner the extent, nature, content, form or scope of any appeal to the Council. Essentially, as far as the Decision of 2 March 2001 is concerned the relationship between the two organs is left open to be decided in internal procedural rules.

Article 11(1) of the Procedure for Handling Cases provides for an unrestricted approach to appeals: "All decisions on cases and refusal of licences may be appealed to the Council." The Procedure goes on to provide in Article 12(4) that:

> "Cases shall be decided on written or received material. Oral evidence may be heard in exceptional circumstances. Any requests for oral hearings are to be decided upon by the Chairman of the Council."

Also this provision is open-ended in that it does not direct the Council to only consider certain aspects of an appeal. This is supported by Article 11(7) of the CRA Regulations originally adopted by the IMC on 16 September 1998 and amended on 8 September 1999 and 21 October 1999, which provides that:

> "The Council may review decisions by the Director General and the Enforcement Panel."

This provision also provides for an unlimited scope of review of the Council. For these reasons, the Office of the High Representative is of the opinion that the Council is in no way bound by the previous instance decision and that it consequently is independent in discharging its functions as appellate instance.

Article 6(1) also requires there to be a **public hearing**. In determining whether there has been a public hearing, the proceedings as a whole must be considered. The Office of the High Representative wishes in this context to focus the Chamber's attention on the regulation of hearings before the Enforcement Panel and Article 10(3) of the Procedure for Handling Cases, which is very similar to Article 12(4) referred to above:

> "Cases shall be decided on written or received material. Oral evidence may be heard in exceptional circumstances. All parties concerned are to be given reasonable time to present and state their case and submit information or make representations."

These two provisions do not prevent public hearings before either the Enforcement Panel or the Council, but are concerned with the delivery of written and/or oral evidence. It should be emphasised again that these provisions must be interpreted in the light of the Decision of the High Representative of 2 March 2001 which created the CRA and this Decision does not restrict in any manner the extent, nature, content, form or

scope of any appeal to the Council. The Office of the High Representative does not, therefore, have reasons to believe that hearings before either the Enforcement Panel or the Council are "not open to the public."

Should the Human Rights Chamber be of the opinion that the above provisions only permit public hearings in exceptional circumstances and upon the request of an applicant, the Office of the High Representative wishes to draw the Chamber's attention to the case of *Håkansson and Sturesson v Sweden*, of which the findings in paragraph 67 are directly applicable to the present case.[14] The European Court concluded that a public hearing need not be held if the applicant waives his right to a public hearing so long as the waiver is done "in an unequivocal manner" and there is no "important public interest" consideration that calls for the public to be present. In that case, a violation of Article 6(1) was not found when the applicant failed to ask for a public hearing before a court that by law conducted its proceedings in private unless a public hearing was considered by it to be necessary. In the present case, the Applicant participated by giving oral evidence at the 7 June 2001 Enforcement Panel hearing and was expected to participate at the hearing on 27 July 2001 before the Council but that failed to show up, a fact that must be understood as an unequivocal waiver of his right to a public hearing.[15]

6. Given that the Court of Bosnia and Herzegovina, established by the Law on the Court of Bosnia and Herzegovina (OG BiH no. 29/00), does not yet appear to be operative yet, what courts, if any, are competent to decide upon an administrative dispute challenging a final decision of the CRA?

At the time the Applicant filed its application with the Human Rights Chamber, no other court was competent to decide upon administrative disputes challenging a final decision by the CRA. The Human Rights Chamber has correctly noted that the Court of Bosnia and Herzegovina, which would be competent, is

not yet operational.

7. According to Article 7 of the IMC Procedure for Handling Cases, "any broadcaster who violates any provision of the IMC Broadcasting Code of Practice or any other code promulgated by the IMC or any license conditions" is liable to the sanctions set out in the Article, proportionate to the nature and gravity of the violation. These sanctions range from the requirement to publish an apology to the termination of the broadcasting license. What has been the practice of the CRA in specifically tailoring sanctions to established violations? What standards does the CRA apply in determining the specific sanction for established violations?

This is a question that lies within the competence of CRA to answer. It can be noted however that in the Additional Submission of the CRA they set out a history of violations and sanctions imposed against the broadcaster. It is submitted that it is open to the CRA, in its capacity as Enforcement Panel or in its capacity as Council hearing an appeal, and after it has satisfied itself of the commission of a further breach of the conditions attached to a provisional licence, to have regard to the previous conduct of a broadcaster. As the body charged with the regulations of the airways it is open to the CRA to suspend and ultimately revoke such a provisional licence for consistent breaches.

8. What are the responsibilities of the broadcaster when a public guest or caller violates the IMC Code of Practice and how are these responsibilities defined in the applicable law?

This is a question that lies within the competence of the CRA to answer. It can be noted however that in the Additional Submission of the CRA they set out at paragraph 8 on the last page of the submission a clear statement of the obligations of a broadcaster.

Notes:

[1] *Diennet v France*, Judgment of 31 August 1995, para. 27; *Konig v Germany*, Judgment of 28 June 1978, para. 24; *Benthem v Netherlands*, Judgment of 30 September 1985, para. 33; *Kraska v. Switzerland*, Judgment of 24 March 1993, para. 87.

[2] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

[3] U.N.T.S. 195, *entered into force* 4 January 1969.

[4] General Recommendation XV of the Committee on Racial Discrimination "Organized violence based on ethnic origin (Art. 4), 23 March 1993, para. 2.

[5] *Regina v Keegstra*, 3 S.C.R. (1990) and 1 S.C.R. (1996).

[6] *Ringeisen v Austria*, Judgment of 16 July 1971, Series A, No. 13, para. 94.

[7] *König v Germany*, Judgment of 28 June 1978, Series A, No. 27, paras. 88-89.

[8] *Ibid*.

[9] *Le Compte, van Leuven and de Meyere v Belgium*, Series A, No. 43, Judgment of 23 June 1981, para. 47.

[10] *Ringeisen v Austria*, Judgment of 16 July 1971, para. 95.

[11] *Belilos v Switzerland*, Judgment of 29 April 1988.

[12] *Le Compte, van Leuven and de Meyere v Belgium*, Judgment of 23 June 1981, para. 58.

[13] In this case, reference may be made to the self-exclusion of the Council Member, Mr. Matic when he was appointed

Chairman of the Council of Ministers.

[14] *Håkansson and Sturesson v Sweden,* Judgment of 23 January 1990.

[15] *Ibid*, para 67.