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COMMENTS ON DRAFT
"LAW ON HUMANITARIAN ACTIVITY
AND HUMANITARIAN ORGANIZATIONS"

Ministry of Social Policy, Displaced Persons and Refugees
Republic of Bosnia and Herzegovina
Federation of Bosnia and Herzegovina

July 1996

The International Center for Not-for-Profit Law (hereinafter "ICNL") is pleased to submit this report on the proposed "Law on Humanitarian Activity and Humanitarian Organizations," drafted by the Ministry of Social Policy, Displaced Persons and Refugees of the Republic and Federation of Bosnia and Herzegovina (hereinafter the "Draft"), in response to a request by the World Bank.

ICNL is engaged in projects worldwide to promote a sound legal and fiscal environment of the not-for-profit sector, including humanitarian organizations. ICNL regularly provides comments on legislation, and always stresses the importance of considering legislation within the context of local needs and conditions. This is particularly true for legislation governing humanitarian assistance, which often has profound political and social ramifications and concerns complex, even emergency, circumstances in the life of the country in question. For these reasons, ICNL will provide only general comments on the Draft, and will not deal with technical details, which are better addressed by persons with broader familiarity with humanitarian assistance in the specific circumstances encountered in the Federation of Bosnia and Herzegovina.

Introductory Remarks

The need for a sound legislative framework governing humanitarian (as well as other non-governmental, not-for profit) organizations is clear. Without such a framework, such organizations, ostensibly organized for the betterment of and service to society, particularly in stressful social conditions, can operate beyond the effective scrutiny of government and fail to employ proper operating practices. As a result, abuse, corruption, and misdirection of materials is possible, creating a general distrust of humanitarian organizations, and rendering even legitimate, well-run operations less effective.

At the same time, the importance of humanitarian organizations (and other non-governmental, not-for-profit organizations) to the rebuilding and development of the social and physical infrastructure in the Federation of Bosnia and Herzegovina should not be underestimated. The legal framework adopted to govern such organizations must not place undue or impractical burdens either on the organizations themselves or on the governmental bodies that will exercise responsibility for their regulation.

The Draft addresses these concerns by establishing procedures for registration of entities which may provide humanitarian assistance, supervision of humanitarian activities performed by such

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organizations, and sanctions for improper activities on their part. Our comments are intended to assist in assuring that the Draft accomplishes these objectives effectively and in conformance with generally accepted international principles. While the Draft is very inclusive, one should also consider its relationship to more broadly focused legislation, such as tax and associations laws, affecting humanitarian organizations in Bosnia and Herzegovina.

A few words are in order with respect to the scope of review of the Draft that led to the preparation of the comments below. The comments were prepared by ICNL staff, with significant input from ICNL consultant Timothy R. Lyman. The comments' drafters had only an English language translation of the Draft with which to work, forwarded to us by World Bank staff in Sarajevo. The translation was unclear in a variety of respects, some of which are noted in the comments below. ICNL looks forward to an opportunity to review and compare the original Bosnian language version with the assistance of Mr. Lyman, who has some familiarity with Bosnian. It is likely that some of the questions raised in the comments below could be resolved through such a comparative review. It is also likely that such a review would bring to light additional issues worthy of further discussion and consideration.

General Comments

Use of the Term "Founder" Instead of "Governing Body"

The Draft gives the founder of a humanitarian organization authority to take action on behalf of the organization in various contexts (e.g. Article 42, under which the founder of a foreign humanitarian organization may voluntarily terminate its activity in the Federation). In all such cases, it would be wise also to give the authority in question to the governing body of the organization, as the founder may no longer be available or involved in the organization's affairs. Please see the comments regarding Article 15 as to the need to describe the governing body of each humanitarian organization in its statutes.

Lack of Clarity as to Which Specific Governmental Body is Referred to

The Draft lacks clarity in a large number of instances as to what the specific governmental body it is that is being referred to in different contexts. This lack of clarity is particularly problematic where it leaves doubt about whether the type of authority in question is to be exercised by a single governmental body at the Federation level, by a separate governmental body in each canton of the Federation, or some combination. Examples include the registrational court and other governmental authorities referred to throughout Section III and those referred to throughout Section V. Some parts of the Draft handle this question more clearly, such as, for example, Article 52, in which the respective scope of jurisdiction of the federal and cantonal inspectors is set forth relatively unambiguously. The drafting approach taken in this section could be used elsewhere in the Draft, where the intended scope of jurisdiction is not presently so clearly stated.

Ambiguity as to Limitations, if any, on Economic or "Industrial" Activities

The English translation of the Draft refers in a number of places to "industrial" activities in a manner that suggests such activities are not appropriate for humanitarian organizations, or at least that they are only appropriate if structured in a certain fashion. An example is the third numbered sentence

in Article 56, which provides monetary penalties for an organization that "performs industrial or any other activity contradictory to the regulations of this law . . .." We have interpreted the use of the term "industrial" to be a reference to what might be termed "economic" activities, that is, activities involving the production and sale of goods or services. Such activities are an absolutely vital source of potential operating revenues for humanitarian organizations and should not be prohibited. If there is concern that allowing humanitarian organizations to undertake such activities will have an adverse impact on the development of the commercial sector in the Federation or will result in a loss of tax revenues to the Federation, such concerns should appropriately be addressed in the fiscal laws of the Federation. Please see the comments also with respect to Article 9 and Article 12, which also address this point.

Potentially Burdensome Requirements for Governmental Consent and Reporting

The Draft contains a relatively large number of provisions calling for humanitarian organizations to seek governmental consents or permission with respect to their activities and to report on such activities with great frequency. These requirements include not only registration of organizations (a requirement common to comparable laws in many countries), but also advance approval of the specific planned activities of registered organizations (an unusual requirement). The Draft also provides potentially significant penalties for failing to obtain the various permissions or consents or failure to make the various reports. Such provisions can be extremely burdensome, both for the humanitarian organizations and the governmental authorities involved. Where there is confusion or ambiguity as to what governmental body or level of government has jurisdiction, the burden is increased. This can have an extremely detrimental effect on the overall level of humanitarian activity. The government's important interest in supervising the activities of humanitarian organizations to prevent illegality and abuse may generally be achieved through much less frequent filings that focus on disclosure of activities conducted by registered organizations rather than prospective approval of such activities.

Short Time Allowed for Appeal

In several instances in the Draft, a humanitarian organization is granted a right of appeal to a higher or different level of governmental authority regarding an administrative decision. An example is found in Article 45, where a decision of the registrational court to terminate a humanitarian organization may be appealed to the Supreme Court of the Federation. In each of these cases, the time for filing the appeal is very short. In many cases, it may be difficult even to convene a meeting of the governing body of the organization within the time allotted to file an appeal. In such short time frames, effective assistance from legal counsel will be virtually impossible to obtain.

Comments Specific To Certain Sections Or Articles

Section I

The provisions of Articles 1-4 define "humanitarian activity" in terms of a variety of kinds of assistance (financial, services, and in-kind) provided to "citizens of the Federation" who are "in need," also defined in Article 2. The activities described in these Articles broadly encompass a range of assistance which reflects virtually all kinds of services performed by NGOs generally, albeit with a

certain emphasis on *emergency needs*. But it should be noted that the definitions are largely inclusive, not exclusive.

In addition, this Section lacks a Section heading or caption.

Article 2

The words "without repayment" should be modified to read "generally without repayment" or should be removed entirely. Although humanitarian assistance will generally be provided in the form of a grant of money, other property or in-kind services, the loan of humanitarian assistance is also possible, and such loans are an important source of financing for humanitarian assistance around the world. Examples include loaned equipment and loaned capital -- often for below-market interest or interest free.

One particular phrase in Article 2 is not clear: the final portion of the first paragraph includes "providing direct financial help to industrial and other subjects ..." as a humanitarian activity. Presumably, this provision is intended to mean that humanitarian activities are not limited to support for individuals or groups of individuals, but also includes support for industry and other structural entities. Clarification of this point would be helpful.

Article 3

It is good that this article is broadly worded and includes the provision of credit and support services, as well as the possibility of "other activities." It would be helpful to clarify the sixth example of humanitarian activity listed in Article 3. Its meaning and scope, at least in the English translation, are somewhat ambiguous. The example should make clear that it includes credit of all types used to generate economic development, and is not limited to interest-free credit, nor to projects providing employment to certain types of people such as invalids or single parents.

Section II

In Section II (concerning "Humanitarian Organizations") the relationship between Article 5 and Article 12 needs clarification. For example, what distinguishes a permissible "humanitarian organization" founded by a religious union and an impermissible one is not clear, at least in the English version of the Draft. Unless the original is clearer, these Article 12 categories of what are *not* "humanitarian organizations" should be made clearer.

Article 5

It is good that this Article permits juridical persons and foreigners to found humanitarian organizations.

Article 6

It might be better to state that humanitarian organizations are intended to "encourage" voluntarism, to be consistent with the existence of paid staff. Perhaps this Article should be incorporated into the first sentence of Article 5.

Article 8

This Article might benefit from the addition of some examples of work performed by humanitarian organizations aimed at the rebuilding of the country, both in terms of physical infrastructure and in terms of social services.

Article 9

Although the English translation of this Article is somewhat unclear, it appears to be aimed at the important question of economic activity by humanitarian organizations, that is, the production and sale of goods or services. The Article appears to permit such activity, but seems to suggest a requirement that revenues from such activities should not exceed the costs, so that no net profits are generated. This principle is both impossible to achieve in practical terms and would deny humanitarian organizations access to one of the most important potential sources of revenues for humanitarian activities. If there is concern that humanitarian organizations should not be treated preferentially with respect to the production and sale of goods or services, this concern may be addressed through the fiscal laws of the Federation, which could provide for the taxation of some or all net profits earned by humanitarian organizations from the production and sale of goods or services.

Article 12

The English translation of the second numbered sentence in this Article is unclear on a matter of vital importance to humanitarian organizations. The lack of clarity relates to the limitations intended (if any) regarding economic activities (that is, the production and sale of goods or services) engaged in by or for the benefit of a humanitarian organization. It appears from the English translation that this sentence might intend to prohibit such activity only if the financial and material accounting for the activity is not kept sufficiently separate from the financial and material resources devoted directly to the humanitarian activity that is the purpose of the organization in question. If this interpretation is correct, the sentence requires rephrasing. If this is not the intended meaning of the sentence, then its meaning, at least in the English translation, cannot be discerned.

The second numbered sentence of this Article, as currently phrased, may cast doubt on whether an organization the purpose of which is to encourage economic development by making credit available on a small scale to persons and groups starting or developing businesses could be considered a humanitarian organization. In many parts of the world this type of activity is one of the most common and successful means of creating employment. Moreover, so-called micro-credit is a humanitarian activity for which many internationally active organizations will have funding available for distribution in the Federation. Accordingly, care should be taken to make sure that this Article does not prohibit humanitarian organizations in the Federation from engaging in this type of activity.

Section III

In general, the provisions for creating and registering humanitarian organizations are clear and appear relatively easy to administer -- both extremely important characteristics of effective NGO legislation. We are particularly impressed with the deadlines provided for decision-making on the part of authorities (for example, in Article 23, for cantonal authorities), and provisions for appeal of administrative decisions (for example, in Article 20).

Article 13

Thirty citizens is a high minimum threshold number for the creation of a humanitarian organization, when compared with the comparable laws of many countries. It also seems that sentences number 1 and 2 are inconsistent, at least in the English language version. It is not clear in what cases one founder would be sufficient, as opposed to when thirty would be required.

We presume that the various other types of entities referred to in this Article are or will be defined elsewhere in the laws of the Federation.

Article 15

It should be noted that Articles 15 and 16 are appropriately liberal in the freedom and flexibility of action permitted organizations to structure themselves and join with others to perform their humanitarian activities in ways commensurate with the circumstances in which they are operating. By avoiding the tendency to "micromanage" the form and manner of operating of these organizations, the Draft renders them better able to respond efficiently and effectively to particular needs and circumstances.

In addition to the matters listed in this Article, the statutes of a humanitarian organization should also describe generally the means by which the organization will be governed, and in particular, the body that is to be the governing body of the organization.

Article 17

Questions arise with respect to the issuance of the certificate of registration, as provided in Article 17. It is not clear whether the certificate is issued immediately after the action of registration is completed, or if there is a delay, in which case some reasonable time limit should be provided. Further, the Article 17 process of and criteria for obtaining "permission" from cantonal authorities is unclear. If the "permission" referred to in Article 17 is the same as the "consent" provided in Article 23, this cross-reference should be spelled out; if not, the "permission" procedure should be expressed clearly. If this Article is meant to describe the delegation of responsibilities to local authorities, this intention, and some guidelines for same, should be stated more clearly.

Article 18

Article 18 attempts to govern the question of name and logo, but does not state *who* makes the determination that a duplication exists. Also, the phrase in the English translation of this Article "violation of citizens moral and behavior" is ambiguous and problematically vague, allowing too much discretion by governing authorities.

Section IV

The heading or caption for this Section appears in the English translation of the Draft in two places: before Article 23 and before Article 26. This leaves doubt as to whether Articles 23, 24 and 25 are intended (as they appear to be) to cover both domestic and foreign humanitarian organizations.

Articles 23 - 25

If these Articles apply to both foreign and domestic organizations, they require preclearance and report filing that is probably necessary given the organizations' functions, but might be too burdensome in light of the broad scope of activities covered by the law. One might question whether approval for every project is necessary.

Article 24

The reporting requirement contained in Article 24 is vague as to both form and substance. Even a specific requirement of reports once every three months seems overly burdensome. Especially when combined with other reporting requirements, it could result in organizations' spending all of their time doing paperwork instead of programs. A clearer and more streamlined delineation of authority among governing bodies would ease both oversight and compliance. (In this case, as well as other reporting requirements not spelled out in detail in the law, reasonable regulations and forms provided by the authority to whom reports must be made would assist affected humanitarian organizations to comply.)

Article 27

The regulation of *foreign humanitarian organizations* is relatively clear in the Draft. The "double registry" required in Article 27, while normally not encouraged, does make sense given the specific areas of governmental responsibility and concern involved and the international implications for the government of foreign organizations performing work within the country.

The first sentence of the English translation of this Article is ambiguous as to whether foreign humanitarian organizations are required to file their request for registration before their arrival or within ten days after their arrival.

Articles 27, 28 and 29

At least in the English translation of these Articles, the protocol for registering a foreign humanitarian organization is ambiguous in that it is not clear what order the various steps in the registration process are to occur. The last sentence of Article 28 appears to require a certificate from the "authorized court" before the "authorized ministry" may issue the required "opinion." However, under Article 29, the "authorized court" must have received the "opinion" of the "authorized ministry" before it may register the organization. These provisions might give too much discretion to the "authorized ministry."

[Note: The last sentence of Article 28 is duplicated in Article 32, apparently for no reason.]

Article 33

The timing of registration and permission are unclear. It appears that foreign organizations might have to go to the ministry twice.

Articles 35 and 37

It is not clear whether these Articles apply just to foreign humanitarian organizations or to all humanitarian organizations. If they are intended to apply to all organizations, perhaps they should be moved into a new Section rather than remaining in Section IV, which, according to its caption, applies only to foreign organizations.

In any case, if the "tax," or fee, applies only to foreign organizations, we wonder why. And on what is the amount of such a "tax" based? Further, it seems that this inappropriately permits the ministry to charge for its services.

In addition, the second sentence of the English version of Article 37 is not clear. If it means that vacancies in humanitarian organizations should be posted in local employment offices in order that unemployed people might have an opportunity to apply for the position, that process should be clearly provided.

Article 39 and 40

We assume these Articles are meant to apply only to foreign humanitarian organizations. It would be helpful for this to be stated clearly in the language of these Articles.

While these provisions are fairly complex and discretionary, they might be all right given the nature of the regulated activity. However, it would be helpful if these provisions were somewhat modified. For instance, is the ministry's required response a final decision, or simply initial comments? And where does the respective ministry's opinion fit into this time frame? Also, a twenty-one day wait might be a bit excessive.

Articles 42 and 43

It is not clear whether the decision of an authorized court requires immediate termination of an organization's activities. If the court's decision is based on technical reasons, it might be better if the organization were allowed to correct the technicality, or continue working while appealing the decision.

At least in the English language translation, Article 42 does not appear to provide a mechanism for voluntary termination of a domestic humanitarian organization.

A provision would be helpful governing what happens to the property and obligations of a humanitarian organization that terminates its activities voluntarily.

Article 46

This article leaves ambiguity as to the status of a foreign humanitarian organization that intends to appeal an adverse decision against it by the registrational court under Article 44 in the manner provided in Article 45. As in Articles 42 and 43, it might be preferable for the language of Article 46 to make clear that the termination does not occur until to the conclusion of any appeal taken under Article 45.

Article 47

The first point in Article 47 should appear in Section III (with respect to domestic humanitarian organizations) and in Section IV (with respect to foreign humanitarian organizations).

Article 48

We are impressed with the comprehensive list of potential financial resources for humanitarian organizations, including donations from foreign organizations and profits from activities, contained in Article 48. By opening the market to a broad variety of potential sources of funding, the Draft anticipates the possibility of a strong fiscal base for the sector.

It would be helpful for this Article to make clear that humanitarian organizations may borrow money to pursue their activities. This is particularly important because of the availability of low interest credit for many activities of humanitarian organizations. Although borrowed money probably falls within the catch-all phrase "other sources," it is a sufficiently important potential source of operating revenues for a humanitarian organization to warrant being specifically mentioned.

Article 50

We presume that the "service for control of financial management of legal bodies" referred to in Article 50 is a known entity.

Section VI

The provisions of Section VI for supervision and inspection are broadly defined. Beyond the required annual reports, it is unclear what manner and processes the supervising and inspecting authorities may employ to carry out their duties. Without clear guidance in law or regulation, these provisions may provide authorities an unhealthy degree of discretionary latitude, opening possibilities of official harassment and abuse of discretion. We suggest that this Section of the Draft be strengthened substantially through incorporation of procedural guidelines.

For example, we note that there is provision in Article 53 for appeal; however, absent clear procedural standards, a court will have difficulty measuring all but the most flagrant inequities or wrongdoing. Also, in Article 55, it is not clear what constitute "public duties" requiring an annual report. The relationship of this report to the reports called for every three months under Article 24 and Article 38 is also unclear.

Article 54

This Article seems to give authority to both federal and cantonal authorities to issue regulations under the Draft. It is very important for this to be clarified. It must be made clear that regulations issued at the canton level only apply to organizations registered to operate solely within that canton, and the federal level regulations, rather than canton level regulations, apply to all organizations registered at the federal level and operating in more than one canton. Otherwise, differences between canton level regulations will make it impossible for organizations to function throughout the Federation and will give canton level authorities the power, in effect, to determine federal regulatory policy.

Section VII

ICNL notes with approval the graduated penalty provisions contained in Section VII. By application of phased, or differentiated, penalties, the Draft has avoided the harsh extremes often provided in laws governing the sector for what may be minor technical procedural or even inadvertent violations. However, some of the infractions covered in Articles 56 and 57 are not clear (for example, what are the criteria for Article 57 #2?). If an action is deemed a violation, it should be plainly described and should be of sufficient importance to warrant imposition of a penalty.

This Section might be improved by its including an Article permitting the relevant governmental authorities to waive application of the penalties provided for in circumstances where the

imposition of a penalty would be inequitable based upon the violation in question. Provision for such a waiver will be particularly important immediately after the Draft becomes legally effective, because it will take time from both the organizations and the relevant governmental authorities to become accustomed to the application of the Draft's provisions, and inadvertent violations are highly likely to occur.

Article 60

At least in the English translation, Article 60 is mislabeled as Article 52.

[**Note:** *Taxation issues* are not covered by this law, but rather are incorporated by reference in Article 4. Because we do not know what "concrete financial and other concessions by reducing or freeing of all taxes, custom duties, income taxes ...." might be provides elsewhere, we are unable to comment on these issues.]

Conclusions

The Draft addresses a number of issues that must be contained in a law governing humanitarian organizations and activities. The drafters should be commended for the breadth of coverage and the flexibility permitted for organizations to operate and carry out their activities lawfully within Bosnia and Herzegovina. As we have noted, clarification must be undertaken with respect to certain provisions in order that the law, when enacted, may be fairly administered, and that high levels of compliance may be assured on the part of the regulated organizations.

ICNL is willing to provide additional assistance, if requested, to help the government develop and implement a healthy legal regime governing humanitarian organizations and their activities in Bosnia and Herzegovina.