



## **DECISION ON ADMISSIBILITY AND MERITS**

**Case no. CH/02/10476**

**Risto LUGONJIĆ**

**against**

**BOSNIA AND HERZEGOVINA**

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 10 September 2004 with the following members present:

Mr. Jakob MÖLLER, President  
Mr. Miodrag PAJIĆ, Vice-President  
Mr. Želimir JUKA  
Mr. Mehmed DEKOVIĆ  
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar  
Ms. Olga KAPIĆ, Deputy Registrar  
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 67 of the Commission's Rules of Procedure:

## I. INTRODUCTION

1. The applicant complains of violations of his human rights stemming from the termination of his employment as a police officer based on a decision by the International Police Task Force ("IPTF") Commissioner to withdraw his provisional authorisation to exercise his police powers. The applicant asserts that the decision was based on an erroneous factual background and that he was not afforded proper procedures to challenge his termination and the evidence against him.

2. The case raises issues under Articles 6 and 13 of the European Convention on Human Rights ("the Convention").

## II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was received on 10 May 2002 and registered on the same day. The applicant requested, as a provisional measure, that the Chamber: (1) nullify the Brčko District Mayor's decision terminating his employment; (2) order his assignment to other positions commensurate with his previous rank, qualifications, and salary; and (3) keep such orders in place until the completion of proceedings before the Chamber.

4. On 3 June 2002 the Chamber (Second Panel) considered the case, rejected the request for provisional measures, and decided to transmit the case to the respondent Party under Articles 6 and 13 of the Convention.

5. The Registry transmitted the case to Bosnia and Herzegovina on 11 June 2002. The respondent Party's observations were due on 11 August 2003. The respondent Party did not submit its observations within the set time limit (see paragraph 11 below).

6. On 7 October 2002 the Chamber received correspondence from the applicant indicating that IPTF had initiated review proceedings in his case. The applicant also stated that he had entered into an annex to his work contract with the Mayor of Brčko District, but that he had not yet been summoned to work. The applicant attached copies of the work contract annex and correspondence related to the review proceedings.

7. On 16 October 2002 the Chamber transmitted the applicant's 7 October 2002 submission to the respondent Party for comment.

8. The Chamber (Second Panel) again considered the case on 5 February 2003, 6 March 2003, and 1 April 2003. On the latter date it adopted a decision declaring the application inadmissible.

9. On 5 December 2003, acting upon the applicant's request for review, the Chamber issued a decision accepting the request for review, revoking the decision of its Second Panel to declare the application inadmissible, and restoring the application to the list of cases for further consideration.

10. On 13 January 2004, 14 January 2004, and 15 January 2004 the Commission considered the merits of the case, as well as the admissibility and merits of nine similar applications submitted by decertified police officers. On 15 January 2004 the Commission decided to invite the United Nations-Mission in Bosnia and Herzegovina ("UNMIBH"), the Office of the High Representative ("OHR"), the Organisation for Security and Co-operation in Europe – Mission to Bosnia and Herzegovina ("OSCE"), and the European Union Police Mission in Bosnia and Herzegovina ("EUPM") to participate in the proceedings as *amici curiae* and submit written observations. On 27 February 2004 EUPM submitted its *amicus curiae* brief. On 3 March 2004 OHR submitted its brief. UNMIBH and OSCE did not accept the invitation to participate in the proceedings as *amici curiae*.

11. On 3 February 2004 the applicant submitted additional information. On 29 March 2004 the respondent Party for the first time submitted its observations in the case. On 5 May 2004 the respondent Party submitted additional information.

12. The Commission considered the merits of the case on 13, 14, and 15 January 2004, 4 and 5 March 2004, and 9 and 10 September 2004. On the latter date the Commission adopted the present decision.

### III. THE FACTS

13. The applicant was employed as a police officer from 1 August 1978 to 3 January 2002. During his 24-year career, he performed various duties, and his last position was Deputy Head of the Police Station Seonjaci in the Brčko District of Bosnia and Herzegovina. In 1997 he served as the Head of the Criminal Police at the Public Security Centre in Brčko. On several occasions during his career he was recognised for special service and dedication in performing his duties.

14. On 13 December 2001 the IPTF Commissioner decided to withdraw the applicant's provisional IPTF authorization to exercise police power. By this action the applicant was excluded from "participating in any aspect of police function, currently and in the future, anywhere in Bosnia and Herzegovina".

15. This decision arose from reports that the Bijeljina Crime Department, under the applicant's supervision, failed to take basic investigative actions in one particular case, and that the applicant engaged in unprofessional and partial behaviour.

16. On 5 January 2002 the applicant filed an appeal to the IPTF against the Commissioner's decision.

17. On 18 January 2002 the Mayor of Brčko District issued a decision terminating the applicant's employment. The decision stated that the applicant's employment was terminated as of 3 January 2002, and that the IPTF Commissioner's letter formed the basis for the decision. In the reasoning, it is stated that the Mayor based his decision on Article 74, paragraph 1 of the Brčko District Law on Labour, the IPTF Commissioner's letter, and the proposal of the Head of the Brčko District Police.

18. On 21 January 2002 the applicant filed an appeal to the Mayor against the 18 January 2002 decision terminating his employment. On 25 April 2002 the Mayor sent a letter to the applicant informing him that no appeal is provided for by the Law on Labour in cases where an employee considers his rights to have been violated. Regarding the applicant's suggestion that he could be assigned to other duties commensurate with his qualifications, the Mayor invoked the IPTF Commissioner's decision, in which it is stated that the applicant is unsuitable for work in the police forces of Bosnia and Herzegovina. In his letter, the Mayor states: "With respect to IPTF's letter and the authority they have in the territory of Bosnia and Herzegovina as well as in the Brčko District, as envisioned in Annex 11 of the Agreement on International Police Force, in which Article IV provides for full cooperation with IPTF and Article V prescribes sanctions for failure to cooperate, you understand what effect the IPTF Commissioner's letter has, and the Mayor has issued a decision in accordance with it, and in accordance with his authority under Article 9 of the Law on Executive Power of the Brčko District, which you have contested."

19. On 24 June 2002 the applicant and the Mayor signed an Annex to the applicant's work contract, under which the conditions of the applicant's work were made more specific. However, it appears that the applicant has never been summoned to work under this contract.

20. On 23 August 2002 the IPTF Commissioner sent a letter to the applicant and the Chief of the Police of Brčko District, recommending that the proceedings on termination of the applicant's

employment be suspended until the proceedings upon the applicant's request for review (see paragraph 16 above) are finished. On 10 October 2002 the IPTF Commissioner informed the Chief of Police that his decision on removing the applicant's temporary authorisation was upheld and the case was considered finished.

21. The applicant has not initiated any court proceedings in this matter.

#### **IV. RELEVANT LEGAL FRAMEWORK**

##### **A. Annex 11 to the General Framework Agreement for Peace in Bosnia and Herzegovina ("GFAP") and subsequent implementing acts**

###### **1. Annex 11 to the GFAP**

22. The GFAP and its Annexes came into force on 14 December 1995. Annex 11 contains an Agreement on the International Police Task Force and was signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska. Article I of Annex 11 is entitled "Civilian Law Enforcement" and reads, in relevant part:

"1. [T]he Parties shall provide a safe and secure environment for all persons in their respective jurisdictions ...

"2. To assist them in meeting their obligations, the Parties request that the United Nations establish ... a U.N. International Police Task Force (IPTF) to carry out, throughout Bosnia and Herzegovina, the program of assistance the elements of which are described in Article III below."

23. Article II of Annex 11 is entitled "Establishment of the IPTF" and provides, in relevant part:

"5. The IPTF shall at all times act in accordance with internationally recognised standards and with respect for internationally recognised human rights and fundamental freedoms, and shall respect, consistent with the IPTF's responsibilities, the laws and customs of the host country."

24. Article III of Annex 11 is entitled "IPTF Assistance Program" and provides, in relevant part:

"1. IPTF assistance includes the following elements ... :

...

d. facilitating, within the IPTF's mission of assistance, the Parties' law enforcement activities;"

25. Article IV of Annex 11 is entitled "Specific Responsibilities of the Parties" and provides, in relevant part:

"1. The Parties shall co-operate fully with the IPTF and shall so instruct all their law enforcement agencies."

26. Article V of Annex 11 is entitled "Failure to Co-operate" and provides, in relevant part:

"1. Any obstruction of or interference with IPTF activities, failure or refusal to comply with an IPTF request, or other failure to meet the Parties' responsibilities or other obligations in this Agreement, shall constitute a failure to co-operate with the IPTF.

"2. The IPTF Commissioner will notify the High Representative and inform the IFOR Commander of failures to co-operate with the IPTF. The IPTF Commissioner may request that the High Representative take appropriate steps upon receiving such notifications, ...."

27. The mandate of IPTF expired on 31 December 2002. As of 1 January 2003, its tasks and responsibilities have in part been taken over by EUPM.

## 2. The Bonn-Petersberg Agreement of 1996

28. On 25 April 1996 an "Agreement on Restructuring the Police [of the] Federation of Bosnia and Herzegovina" ("the Bonn-Petersberg Agreement") was signed by representatives of the Federation of Bosnia and Herzegovina and the Deputy Commissioner of the IPTF at Petersberg, near Bonn, Germany.

29. The Parties to the Bonn-Petersberg Agreement made the following basic commitments:

"1. We acknowledge that under the General Framework Agreement for Peace in Bosnia and Herzegovina, we are committed to creating police organisations, predicated on the advice of the Commissioner of the United Nations International Police Task Force (UN IPTF), that are structured and operate according to generally accepted international standards for policing and guarantee respect for internationally accepted human rights.

"2. In furtherance of our commitments and obligations under the General Framework Agreement for Peace in Bosnia and Herzegovina, we have, at the request of the Commissioner of the UN IPTF, created a Commission designed to provide input to him in his formulation of directives concerning the restructuring of Federation policing structures necessary to ensure compliance with our obligations. We have met today in the first substantive session of the full Commission."

30. The Parties also agreed on the following concrete steps:

"1. We pledge that the restructuring will proceed on a phased basis, Canton by Canton, according to the following schedule which we have agreed to today:

"A. On 6 May 1996 the Commission will begin reviewing draft proposals for restructuring prepared by the UN IPTF Plans Department.

"B. By 12 May 1996, the Commission will finalise its recommendations including the structure and staffing of the newly reorganised police forces, the process by which individuals will be vetted into the new forces, and an implementation schedule.

...

4. "4. We understand and agree that those persons who are not selected to serve as police in the restructured Federation police force will not be allowed to perform law enforcement duties and will not be permitted to carry arms."

## 3. The Banja Luka Agreement of 1998

31. On 9 December 1998, a "Framework on Police Restructuring Agreement, Reform and Democratisation in the Republika Srpska" ("the Banja Luka Agreement") was signed by the representatives of the Republika Srpska, the UN Special Representative of the Secretary-General, and the IPTF Commissioner in Banja Luka.

32. The Parties to the Banja Luka Agreement agreed to the following:

"15. Rigorous standardized procedures for selection, training and certification of existing officers, as well as for recruitment, selection, training and certification of new officers must be applied and adhered to, in accordance with the IPTF's advisory role in organising an effective and professional civilian law enforcement agency in the Republika Srpska under the GFAP, Annex 11, Article III(f), and also in order to further develop a professional police

force. We agree to ensure the implementation of all standards and procedures established by the IPTF in each of those areas.

16. We acknowledge that the certification will be done by the IPTF and that certification is requirement for new or continued employment as a police officer in Republika Srpska. The standards for certification are set by the IPTF [...]

17. [...] We affirm that any applicant who fails to successfully complete or meet such requirements is ineligible for selection or certification as a Republika Srpska police officer.

21. [...] the IPTF Commissioner has designed procedures to bring failures to cooperate to the attention of the RS MUP so that appropriate remedies may be undertaken

22. To further assist the Republika Srpska, pursuant to GFAP, and meet the IPTF obligations thereunder, the IPTF Commissioner has established procedures for the decertification of police officers. On the basis of IPTF records and findings, the IPTF Commissioner may issue instructions to the RS MUP to investigate, suspend, and, if required by the IPTF, to dismiss the offending officers. We understand that decertified officer is no longer eligible to exercise police powers in the Republika Srpska....

23. We affirm that IPTF policies and instructions are designed to promote more democratic police practices, and to instill public confidence. In accordance with GFAP, in particular Annex 11, the RS MUP shall take all necessary steps to fully implement all such instructions and policies [...]"<sup>1</sup>

#### **4. United Nations Security Council Resolutions**

33. On 12 December 1996 the Security Council of the United Nations adopted Resolution No. 1088 (Document no. S/RES/1088). The Resolution refers to the situation in Bosnia and Herzegovina, and also to the efforts of the IPTF to restructure the police forces within the country. The Security Council, in paragraph 28 of the Resolution,

*"[r]equests the Secretary-General to report to the Council ... on the IPTF, in particular its work in assisting the restructuring of law enforcement agencies, ... investigating or assisting with investigations into human rights abuses by law enforcement personnel, as well as to report on progress by the authorities in Bosnia and Herzegovina in regard to such issues, in particular their compliance with IPTF-prescribed guidelines including their taking prompt and effective action, which could include dismissal where appropriate, in respect of any officer notified to them by the IPTF Commissioner as failing to co-operate with the IPTF or adhere to democratic policing principles;...."*

34. Afterwards, the Security Council issued several Resolutions that called upon all parties to the Dayton Peace Agreement to implement all aspects of that Agreement, to comply with their relevant obligations, and to fully cooperate with the IPTF on all relevant matters and instruct their respective responsible officials and authorities to do so. The last of these resolutions was adopted on 12 July 2002. By resolution No. 1423 (Document S/RES/1423), the Security Council decided to extend the mandate of the UNMIBH, which includes IPTF, and

*"also decides that, during that period, the IPTF shall continue to be entrusted with the tasks set out in Annex 11 of the Peace Agreement, including the tasks referred to in the Conclusions of the London, Bonn, Luxembourg, Madrid and Brussels Conferences and agreed by the authorities in Bosnia and Herzegovina;...."*

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<sup>1</sup> The State of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina have not signed the agreements on the restructuring of the police force. However, Brčko District was established on 8 March 2000 by adopting the Statute of the Brčko District of Bosnia and Herzegovina, on the basis of the Arbitral Tribunal's final award of 5 March 1999. Until then, the territory of the present Brčko District belonged to the Republika Srpska and the Federation of Bosnia and Herzegovina.

## 5. The Madrid Peace Implementation Council Declaration

35. On 16 December 1998 the Peace Implementation Council ("PIC") met in Madrid. During its meeting, the PIC proclaimed a "Peace Implementation Agenda" with an Annex that forms an integral part of the Agenda. In paragraph 16.7 of the Annex, PIC member countries welcomed

"efforts by the High Representative and UNMIBH to speed up implementation by Federation officials of their commitments as set out in the Bonn-Petersberg Agreement on Restructuring the Federation Police.... The Council calls on the High Representative to use his authority to ensure compliance with obligations in co-operation with the parties.... [I]t welcomes the determination of the UN IPTF Commissioner to apply strictly the IPTF's non-compliance reporting and certification procedures, to make robust use of his powers to decertify police officers who violate provisions of the General Framework Agreement and related documents.... The Council makes clear that decertified officers may be deprived of the right to serve in any public function in BiH...."

## 6. IPTF Policies regarding the vetting process of police officers

### a. Policy no. P02-2000

36. IPTF Policy no. P02-2000 is entitled "Registration, Provisional Authorisation and Certification" and entered into force on 15 May 2000. The Policy set out that:

"1. This policy outlines the UNMIBH/IPTF procedures for registration, provisional authorisation and certification of law enforcement agents. In accordance with its mandate, UNMIBH/IPTF convokes and registers law enforcement personnel. All registered persons enter a preliminary screening process to determine if they meet the criteria for provisional authorisation to exercise police powers. Those who meet the criteria are provisionally authorised and receive an UNMIBH/IPTF identification card. Once provisionally authorised, they enter the comprehensive assessment process for certification.

"2. The registration of personnel of law enforcement agencies consists of two steps. First, the person being registered fills in a registration form and signs it, affirming the accuracy and veracity of the information provided. Second, UNMIBH/IPTF assigns a sequential registration number to the person being registered. The registration number is the unique and permanent identifier of that person."

37. The Policy further sets out criteria for provisional authorisation of police officers:

"5. If a registered person meets the criteria for provisional authorisation according to information known to UNMIBH/IPTF at the time of registration, the IPTF Commissioner provisionally authorises him/her to exercise police powers within the jurisdiction of a specific Ministry of Interior. Beyond these minimum criteria, provisional authorisation does not indicate a comprehensive assessment by UNMIBH/IPTF of the calibre and/or quality of the person holding provisional authorisation.

"6. Positive criteria: These criteria must be fulfilled by the candidate in order to be eligible for provisional authorisation to exercise police powers:

- Minimum age of 18 years;
- Citizen of Bosnia and Herzegovina;
- Name of applicant appears on the personnel list provided by the Ministry (April 1999 lists for Federation police forces, September 1999 list for the RS Ministry of Interior);
- Applicant passed the UNMIBH/IPTF police standards test;
- Applicant took the UNMIBH/IPTF psychological test;
- Applicant is currently exercising police powers; and
- Applicant fully complied with the UNMIBH/IPTF registration procedures (completed the registration form, picture and fingerprint taken).

7. Negative criteria: If the candidate falls in any of the following categories, s/he is precluded from being provisionally authorised to exercise police powers:

- Applicant is publicly indicted by ICTY;
- Applicant has a criminal record known to UNMIBH/IPTF at the time of registration (excluding minor offences);
- Applicant has been de-authorized or disqualified by the IPTF Commissioner;
- Applicant made a deceptive statement in the context of the registration process;
- Criminal proceedings against the applicant have been commenced by a domestic court for serious crimes or war crimes, the latter in accordance with the Rules of the Road; and
- Name of the applicant appears on the list of a former police anti-terrorist unit, and has not completed or has not passed the special UNMIBH/IPTF selection procedures.

38. The policy further prescribes that provisionally certified police officers will remain under the scrutiny of IPTF, and it prescribes the consequences for non-compliance:

“12. Persons provisionally authorised to exercise police powers remain under the scrutiny of UNMIBH/IPTF and enter the certification process. UNMIBH/IPTF actively assesses and records whether these persons meet, at any given point in time, the UNMIBH/IPTF eligibility requirements to carry out law enforcement duties. At the conclusion of the certification process, UNMIBH/IPTF will make a final determination to assess who meets the standards (professional qualifications and backgrounds) necessary to serve in a restructured police force in accordance with internationally accepted principles of democratic policing. Those who meet these standards will be certified.

...

“15. Any failure to adhere to this policy constitutes an act of non-compliance with UNMIBH/IPTF, in accordance with Article V of Annex 11 of the General Framework Agreement for Peace, and may lead to removal of provisional authorisation and removal from office. Such acts of non-compliance include but are not limited to:

- Providing false or incomplete information on the registration form;
- Failure to display or carry the UNMIBH/IPTF identification card;
- Other misuse of the UNMIBH/IPTF identification card; or
- Failure to provide full, complete and timely updates on changes of registry information.”

**b. Policy no. P05-2001**

39. IPTF Policy no. P05-2001 entered into force on 15 February 2001 and was named “Performance Assessment Policy”. It set out the procedure for issuance of non-compliance reports and the obligations of the local law enforcement agencies:

“1. This policy applies to law enforcement officials who are authorised by the IPTF Commissioner to exercise police powers, in accordance with IPTF Policy P02/2000. Law enforcement officials who are provisionally authorised to exercise police powers enter the certification process. UNMIBH/IPTF actively assesses and records whether they meet the UNMIBH/IPTF eligibility requirements to exercise police powers. Through its advisory, training, monitoring and assessment programmes, UNMIBH/IPTF ensures that law enforcement officials have the competence and integrity necessary to serve in a restructured police force and in accordance with democratic policing principles. Those who meet these standards will be certified.

2. This policy outlines the UNMIBH/IPTF procedures to record acts of inadequate performance, advise and train law enforcement officials to improve their performance, and to

sanction acts of serious misconduct by UNMIBH/IPTF. This process does not preclude the obligations of domestic authorities to initiate disciplinary and criminal proceedings if required.

...

7. Non-compliance Reports are issued for a serious violation of duty or law. These include but are not limited to: human rights violations (e.g. arbitrary arrest and detention, ill-treatment during questioning or detention, failure to adequately investigate human rights violations); serious violation of the Criminal Code, the Criminal Procedure Code or Disciplinary Rules; refusal to allow IPTF immediate and full access to any site, person, activity or record; serious violation of IPTF policies, in particular the Policy on Registration, Provisional Authorisation and Certification (e.g. allow non-authorised persons to exercise police powers); serious threat to a member of an international organisation; failure to meet the responsibilities and obligations in the Dayton Agreement; and ordering a subordinate to commit such acts, or failing to supervise when such acts are committed.

8. Non-compliance Reports are issued officially by the IPTF Commissioner based on the observations of UNMIBH staff. Copies are provided to the immediate supervisor and the head of the respective law enforcement agency. The UNMIBH/IPTF Local Police Registry records one copy in the file of the violating law enforcement official.

9. A Non-compliance Report, issued after the date of entry into force of this policy, represents a warning. If a law enforcement official receives a second Non-compliance Report, s/he is automatically considered for de-authorisation. Non-compliance Reports issued in the past will be reviewed for appropriate corrective action.

10. The issuance of a Non-compliance Report obliges the law enforcement agency to take disciplinary action, or when merited, commence criminal investigations and prosecutions. Failure to do so constitutes another act of non-compliance by the responsible official.

### **c. Policy no. P10-2002**

40. IPTF Policy no. P10-2002 is entitled "Removal of Provisional Authorisation and Disqualification of Law Enforcement Agency Personnel in BiH" and was applied as of 24 May 2002. The Policy sets out that

"2. [T]he IPTF Commissioner shall remove a law enforcement agency employee's provisional authorisation to exercise police powers when UNMIBH/IPTF has sufficient evidence to establish that the officer's conduct results in serious violations of law and/or duty. This conduct includes, but is not limited to, the commission or omission of acts, association with the commission or omission of acts by others, and/or association with policies that result in serious violations of law and/or duty. Removal of provisional authorisation precludes such officer from holding any position within a law enforcement agency in BiH. The following circumstances define the substantive basis for the permanent removal of provisional authorisation:

- (a) Conviction of a serious breach of law, and the law enforcement agency in which the officer is employed has failed to take appropriate actions/sanctions in conformity with domestic law;
- (b) Conviction by a disciplinary panel of a serious breach of duty, and the penalty assigned does not correspond to the severity of the misconduct of the officer;
- (c) In the context of investigations conducted under Security Council resolution 1088, UNMIBH/IPTF has obtained independent evidence that an officer has committed a serious breach of duty that would obligate a law enforcement agency and the judiciary to take action under domestic law;

- (d) An officer has committed a pattern of minor offences that demonstrate disregard for upholding the law;
- (e) In the context of investigations conducted under Security Council resolution 1088, UNMIBH/IPTF has obtained independent evidence that an officer committed a serious breach of duty that would obligate a law enforcement agency to take action under domestic law and rulebooks on disciplinary procedure;
- (f) An officer has been issued two substantive non-compliance reports as outlined in UNMIBH/IPTF "Performance Assessment Policy" (IPTF-P05/2001);
- (g) An officer has made a material misrepresentation to UNMIBH that fundamentally affects consideration of suitability to exercise police powers;
- (h) An officer, whose acts and/or omissions, and/or functions from the period of April 1992 to December 1995, demonstrate the inability or unwillingness to uphold internationally recognised human rights standards."

41. Regarding the procedure for removal of provisional authorisation, Policy P10-2002 envisages the following steps:

"3. The IPTF Commissioner officially notifies the relevant authorities of the law enforcement agency that an officer's provisional authorisation has been removed. This notification is accompanied by a formal letter of notification of the removal of provisional authorisation that must be delivered/served expeditiously by the relevant authorities through the proper chain of command to the officer concerned. A copy of this letter is forwarded by the IPTF Commissioner to the Principals, and the respective IPTF Liaison Officer or Senior Adviser.

"4. Within seven days of receipt/service of this letter, the concerned officer must turn over his/her uniform, police-issued sidearm, and UNMIBH/IPTF identification card to the law enforcement agency in the presence of the IPTF Liaison Officer.

"5. Within seven days of the receipt of notification of the removal of provisional authorisation, the head of the relevant law enforcement agency must initiate measures to terminate the officer's employment under appropriate disciplinary or legal provisions. The head of the law enforcement agency must also present to the IPTF Commissioner a written explanation of why such provisions and/or termination of the employee had not been initiated by the appropriate law enforcement agency personnel including the officer's supervisors, prior to the removal of provisional authorisation notification.

"6. The IPTF Commissioner, based on the information provided as required in paragraph 5, will consider whether further action should be taken against any additional officers and/or supervisors for failure to take action."

42. Specifying the consequences of disqualification of the concerned police officer, Policy P10-2002 states as follows:

"9. As authorised by the Peace Implementation Council, paragraph 16.7 of the Annex to the Madrid Declaration of the Peace Implementation Council (16 December 1998), the removal of provisional authorisation or disqualification by the IPTF Commissioner precludes the officer from holding any position within any law enforcement agency in BiH. 'Any position' includes, also, those positions that do not require the authority to exercise police powers and are considered administrative in nature."

**d. Policy no. P11-2002**

43. IPTF Policy no. P11-2002 is entitled "Certification of Law Enforcement Agencies Personnel" and was applied beginning 15 August 2002. The Policy describes the basic principles of the vetting process as follows:

"5. With regard to personal integrity, UNMIBH will conduct a review of the personal background of each officer using such indicators such as non-compliance reports, performance reports, pending and past criminal convictions, disciplinary records. UNMIBH/IPTF will conduct a more in depth background check ... when deemed necessary (e.g.: filling out a questionnaire). The above-mentioned indicators will be used by UNMIBH/IPTF to determine whether an officer has demonstrated her/his ability to uphold human rights and/or abide by the law and therefore his eligibility for certification.

...

**"7. Officers must comply with the certification process and give true, complete and correct information to the best of their knowledge when requested to fill out a questionnaire or when giving a statement."**

44. Policy P11-2002 continues to describe in more detail the requirements that shall be met in order for police officers to obtain final certification:

"8. Positive criteria:

- Demonstrated ability to perform police powers;
- Proof of citizenship of Bosnia and Herzegovina (original or certified copy of the certificate will be accepted);
- Valid educational credentials;
- Completed Human Dignity and Transitional Course;
- Proof that no criminal case is pending (Certificate from the court: original or certified copy will be accepted);
- Compliance with the property legislation.

"Certification is conditioned upon compliance with all positive criteria."

"9. Negative criteria:

- Failure to have demonstrated ability to uphold human rights and/or abide by the law (e.g., pattern of abuses, of violations of law and/or of duty);
- Officer made a deceptive statement in the context of the registration process and/or certification process;
- Criminal proceedings against the officer have been commenced by a domestic court, in case of war crimes (in accordance with the Rules of the Road);
- Non-compliance with the property legislation, when an officer has been identified as:
  - (1) an illegal occupant, or
  - (2) a multiple occupant, or
  - (3) having an expired deadline specified in a court or administrative decision (i.e. 15 and 90 day), or
  - (4) occupying claimed property where there is a) housing authority and/or b) CRPC decision, and s/he has failed to vacate within 30 days from receipt of the notification sent by the IPTF Commissioner;

"Certification is not granted if any of the negative criteria applies.

"10. An officer whose provisional authorisation is removed under policy IPTF-P10/2002 para. 2(a) to 2(h) at the time the certification procedure is finalised by UNMIBH/IPTF will be denied certification."

45. Regarding the consequences of failure to meet the above-mentioned criteria, Policy P11-2002 provides as follows:

"11. The provisionally authorised officer who does not meet the requirements as listed under 'Certification Criteria' in this Policy will not be certified by UNMIBH/IPTF to exercise police powers. The certified officer, who by his/her acts or omissions, would fall within the scope of application of Policy IPTF-P10/2002 para. 2(a) to 2(h) will be decertified. Non-certification and de-certification precludes the local police officer from holding any position within a law enforcement agency in BiH."

46. Policy P11-2002 also provides for an internal review procedure in case of refusal of final certification, as specified under the following terms:

"13. An officer who has been refused certification by the IPTF Commissioner and who may have information not previously made known to IPTF that could justify a reconsideration of his/her case, may send his/her request within eight days....

"14. Decisions for non-certification by the IPTF Commissioner are effective immediately upon receipt of notification. Submission of a request for reconsideration by the concerned Local Police Officer does not extend the status of provisional authorisation. UNMIBH/IPTF will respond to requests in accordance with internal guidelines, and applicants will be notified of final decisions. A request for reconsideration shall suspend all obligations of the law enforcement agency to initiate procedures as required to terminate the officer's employment, pending a determination of the request for reconsideration."

## **7. Relevant correspondence**

47. On 28 May 2003 the United Nations Under-Secretary General for Peacekeeping Operations wrote to the High Representative, replying to a prior request for confirmation of the position of the United Nations on the certification of law enforcement personnel by UNMIBH. The Under-Secretary-General stated in part:

"I can confirm that we fully endorse the comprehensive process of police certification, developed and implemented by UNMIBH IPTF. I firmly believe that this process fell squarely within the purview of the programme of assistance described in Annex 11 of the General Framework Agreement and was an essential element of UNMIBH's mandate. ... I should also stress that decisions by the Commissioner of the IPTF, in relation to police certification, remain final and binding. ... I am certain that you would also agree that an attempt to reverse this process would amount to wilfully undermining a central component of the efforts of the international community to bring peace and prosperity to the people of Bosnia and Herzegovina."

48. On 6 June 2003, the Senior Deputy High Representative made this letter available to the prime ministers of the entities of Bosnia and Herzegovina, all MUP's, and all Ministries of Justice at the entity and cantonal levels. In an accompanying letter, the Senior Deputy High Representative wrote:

"The High Representative strongly endorses the points made in the Under-Secretary-General's letter. He expects all relevant authorities in Bosnia and Herzegovina to implement the police certifications completed by UNMIBH. As the United Nations has made clear, this obliges them to uphold fully and completely the decisions reached in that process. Any other course of action would inflict grave damage on the integrity of the foundations that have

been laid for democratic law enforcement in this country. That is not something which Bosnia and Herzegovina or the international community could afford to accept.”

49. On 10 October 2003, the United Nations Under-Secretary-General for Peacekeeping Operations wrote to the Members of the Tri-Partite Presidency of Bosnia and Herzegovina. His letter states in part:

“I am writing to voice my serious concern about efforts to undermine the achievements of the United Nations Mission in Bosnia and Herzegovina (UNMIBH).

“As you may already know, there have been recent attempts to challenge the outcomes of the police certification process that was developed and implemented by [IPTF]. A number of first instance courts in Bosnia and Herzegovina recently ordered the reinstatement of at least five former police officers who failed to meet the standards required under the provisions of the certification process.

“These efforts to overturn the certification process are in violation of Bosnia and Herzegovina’s international obligations. The certification project was based on Annex 11 of the General Framework Agreement for Peace (GFAP). As I am sure you are aware, Annex 11 of the GFAP and the conclusions of successive meetings of the Peace Implementation Council (PIC) obliged the parties to the Agreement to cooperate fully with the IPTF. I understand that it was on this basis that at least 10 other courts in Bosnia and Herzegovina recently found that they were not competent to review the decisions of the IPTF.

“You would be aware that the parties were similarly required to ensure that relevant legislation remained in compliance with Bosnia and Herzegovina’s international obligations. The lacunae in Bosnia and Herzegovina’s domestic law, allowing for the reinstatement of those who failed to meet internationally recognised standards of policing, call into question your country’s respect for international law.

“I would like to add that attempts to reinstate those individuals deemed ineligible for certification threaten the basis for the rule of law in Bosnia and Herzegovina. Certification, which was endorsed by both the Security Council and the PIC, was based on a comprehensive and rigorous vetting procedure designed to create a police force comprised entirely of personnel meeting internationally recognised standards of personal integrity and professional performance, and so establish a police force fit, not only for the people of Bosnia and Herzegovina, but also for Europe.

“Acting under Chapter VII of the Charter of the United Nations, the Security Council has repeatedly called on the parties to the GFAP to fulfil their commitment under the Agreement and its Annexes to cooperate fully with all entities involved in its implementation, including the IPTF. In accordance with Bosnia and Herzegovina’s international obligations, I would therefore be grateful if you could take the necessary steps to set aside the judgements challenging the validity of the certification process and to ensure that no similar decisions are taken in the future.”

## **8. Statement by the UN Security Council**

50. On 25 June 2004 the President of the UN Security Council for June, Ambassador Lauro L. Baja, Jr. of the Philippines, on behalf of the Council, made the following statement:

“The Security Council recalls its relevant resolutions and its support for the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (collectively the Peace Agreement, S/1995/999, annex). The parties to the Peace Agreement had the responsibility to cooperate fully with, and to instruct their respective responsible officials and authorities to provide their full support to, the IPTF during its mandate on all relevant matters. The Council affirms that such responsibility included giving full and immediate effect to the decisions issued by the IPTF, including decisions to deny certification. The Council also affirms that Bosnia and Herzegovina has the obligation to respect fully and to promote the fulfilment of its responsibilities under the Peace Agreement.

"The Security Council reaffirms the legal basis in the Charter of the United Nations on which the IPTF was given its mandate. The Council recalls that during its mandate the IPTF was entrusted with the tasks set out in Annex I of the Peace Agreement, including the tasks referred to in the Conclusions of the London, Bonn, Luxembourg, Madrid and Brussels Conferences and agreed by the authorities in Bosnia and Herzegovina.

"The Security Council affirms that the certification process was carried out pursuant to the mandate of the IPTF and fully endorses this process. The comprehensive and rigorous vetting procedure was designed to create a police force comprised entirely of personnel meeting internationally recognized standards of personal integrity and professional performance.

"The Security Council expresses concern at the failure of the competent authorities in Bosnia and Herzegovina to take due steps to implement decisions to deny certification. The Council notes that this failure has already led to several challenges before the courts in Bosnia and Herzegovina brought by persons whose employment in Bosnia and Herzegovina's law enforcement agencies was terminated pursuant to a denial of certification by the IPTF.

"The Security Council further notes that in some cases such persons have been re-instated following decisions of some local courts. The Security Council calls upon the Bosnia and Herzegovina authorities to ensure, including through the adoption or amendment of domestic legislation, that all IPTF certification decisions are fully and effectively implemented and that the employment of persons who were denied certification by the IPTF be terminated, and that such persons will be precluded from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina."

## **B. Domestic Law and Practice**

### **1. The regulations on labour relations**

51. The Law on Labour of Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of Bosnia and Herzegovina ("OG BD BiH") no. 7/00 and 8/03) entered into force on 8 December 2000. It contained the following relevant provision:

#### Article 74

"The employer may terminate the employee's work contract without the obligation to give a notice prescribed under Article 80 of this Law, in case the employee is responsible for a serious offense or a serious violation of work duties as stated in the work contract, or if the employment is of such nature that it would not be reasonable to expect that the employer would continue his work relation with the employee.

#### Article 88

"An employee who considers that the employer violated any of his rights deriving from labour relations can request the employer to enable him to exercise that right.

...

"If an employee believes that his right or rights obtained through his contract on work from the employer have been violated, the employee may file a lawsuit before the court for violation of rights under the labor relation within three (3) years as of the date on which, according to the applicant, the right was violated i.e. within three (3) years as of the date he found out that his right or rights established under the contract on labor have been violated.

52. Article 72 of the Law provides reasons and conditions for termination of employment. There is no condition for termination of the employment on the basis of the decision of an international body, such as IPTF.

## **2. Regulations on civil service**

53. Brčko District did not enact a law on civil service, but the labour relations, status, rights and obligations of civil servants were governed by the Book of Rules on the Work of Civil Servants in the Bodies of Brčko District of Bosnia and Herzegovina, enacted by the Mayor of the Brčko District of Bosnia and Herzegovina on 29 October 2001 and amended on 26 February 2003. (OG BD BiH nos. 5/02 and 6/03). In relevant part it regulated the labour relations of civil servants and their right to access to court, as follows:

### Article 3

"Hiring, assignment to posts and termination of the employment of Civil servants and employees in the bodies of Brčko District BiH will be conducted in accordance with the Law on Labour of Brčko District.

...

### Article 9

"(1)The contract on labor will be terminated in cases provided for in the provisions of the Law on Labour.

"(2)The notice will be given in written form with the reasoning."

...

### Article 33

"Provisions of this Book of Rules and the Law on Labor of the Brčko District of BiH shall be applied until a law on public officers of the Brčko District is passed."

## **3. The Law on Police of the Brčko District of Bosnia and Herzegovina**

54. The Law on Police of Brčko District of Bosnia and Herzegovina (OG BD BiH nos. 2/00, 5/01, 2/02, 17/02 and 6/03), regulates the rights of the police officers. Article 48 of the Law provides that:

"The Laws, ... other regulations ... governing the labour relations, salaries, health and pension insurance of the civil servants and employees... in District administration organs, apply also to employees of the District Police, unless this law otherwise provides..."

55. The Law does not regulate the question of access to court against decisions affecting a policeman's employment status. Therefore, access to judicial remedies against a decision affecting a policeman's employment is the same as under the Law on Labour.

## **4. The Book of Rules on Disciplinary and Material Responsibility of the Employees of the Police of Brčko District**

56. The Book of Rules on Disciplinary and Material Responsibility of the Employees of the Police of Brčko District (OG BD BiH no. 6/01) regulates disciplinary measures and proceedings against the members of the Police of Brčko District. There is no provision addressing a decision by an international body as a reason for termination of employment. In its relevant part it provides as follows:

## DISCIPLINARY MEASURES

### Article 7

"(1) For a serious violation of work duties, the employee shall be given a disciplinary measure: monetary fine, temporary assignment to other work tasks and duties, and termination of working relation.

## DISCIPLINARY COMMISSION

### Article 11

"(1) A Disciplinary Commission is established within the Brčko District Police as the first-instance disciplinary organ for determination of disciplinary responsibility and pronouncement of disciplinary measures.

## POLICE COMMISSION

### Article 16

"(1) A Police Commission is established within the Brčko District Police as the second-instance disciplinary organ for deciding on the employee's objection.

## DISCIPLINARY PROCEEDINGS

### Article 29

"(1) Disciplinary Commission shall give disciplinary measures by procedural decision or reject requests for conducting disciplinary proceedings.

...

"(3) An employee, his/her defense counsel and the claimant have the right to file an objection against the procedural decision by the Disciplinary Commission within 8 working days from the day the procedural decision is received.

"(4) The Police Commission must decide on the objection within 20 days from the day the objection is filed."

## **5. Domestic court decisions**

57. In similar cases concerning the removal of police officers by MUP decisions based on preceding decisions by the IPTF, the affected officers have filed lawsuits before the domestic courts complaining against their dismissal. The courts have dealt with these complaints in different ways.

58. One set of judgments indicates that the domestic courts are not willing to review a decision of the MUP based on an IPTF ruling to terminate the employment of a police officer. For instance, on 10 September 2002 the Municipal Court in Tuzla rejected a lawsuit lodged by a removed police officer, Amir Bašić, considering his complaint ill-founded because decisions within the IPTF's mandate were not subject to review by the Court (case no. P.219/03). On 2 June 2003 the Municipal Court in Travnik rejected an action that Nisvet Gasal, a police officer from Bugojno, directed against his dismissal. In its judgment, the Court declared itself incompetent to examine an act of the MUP issued on the basis of an IPTF decision (case no. P.162/03).

59. In other instances, however, domestic courts have issued judgments finding that the MUP decisions on termination of employment were unlawful. On 27 February 2003, 4 March 2003, and 11 March 2003 the Municipal Court in Zenica issued judgments annulling the respective decisions of the MUP of the Zenica-Doboj Canton to dismiss Kemal Kobilica, Amir Deljkić, and Fahrudin

Deraković from their employment as police officers, and ordering the MUP to reinstate the second and third plaintiffs into employment. The Municipal Court reasoned that the MUP should have first conducted disciplinary proceedings against the plaintiffs to establish their wrongdoing. Moreover, it held that the domestic laws did not allow a decision of the IPTF to remove provisional certification as police officer to serve as grounds for termination of employment. However, the court, in its judgement upon Amir Deljkić's action, held that in disciplinary proceedings the MUP would have issued the decision on disciplinary responsibility of the plaintiff on the basis of IPTF decision, which (the IPTF decision) would not have been reviewed in disciplinary proceedings. In the cases of Kemal Kobilica and Fahrudin Deraković, upon appeal of the MUP, the Cantonal Court in Zenica on 1 August 2003 upheld the first instance decision, which thereby became final and binding. However, in these decisions the Municipal Court in Zenica stated that, in accordance with the Bonn-Petersberg Agreement, IPTF is given a role in the police selection process and persons not authorised by IPTF cannot serve in law enforcement and that IPTF is exclusively competent to issue and take away permits to exercise police functions. Neither the defendant MUP nor the courts are competent to do so (*the Kobilica judgement*). Persons not authorised by IPTF cannot exercise police functions.

## **V. COMPLAINTS**

60. The applicant alleges a violation of Article 6 of the Convention. In particular, he asserts a violation of the "equality of arms" principle, because he was not provided an equal opportunity to present his arguments and reply to the IPTF. He also states that he was not allowed to examine the underlying case file, which is in the Police Archives, for the purpose of preparing his defence and presenting exculpatory evidence. The criminal investigation of the Bijeljina Crime Department in the particular case at issue, for which the applicant was held responsible, was performed in 1997, and the applicant is therefore unable to recall most of the actions of the Police. Requests by the applicant and his advocate to examine the case file and photocopy certain documents have been denied by the Police Station in Bijeljina.

61. The applicant further alleges a violation of his right to an effective remedy under Article 13 of the Convention. He states that a disciplinary proceeding has neither been initiated nor conducted in his case in accordance with the Rules of Procedure on Disciplinary and Material Responsibility of Brčko District Police employees, which regulates minor and serious violations of work duties, establish methodologies for disciplinary responsibility and procedures for issuance of decisions terminating employment.

## **VI. SUBMISSIONS OF THE PARTIES**

### **A. The respondent Party**

62. The respondent Party considers the application inadmissible. The respondent Party states that, "according to paragraph 9 of IPTF Policy no 10A/2002, UN Security Council Resolution No. 1088, and Annex 16.7 to the PIC Madrid Declaration", removal of temporary authorisation or disqualification by the IPTF Commissioner excludes the possibility for an employee of a law enforcement agency to perform any duty in the Law enforcement Agencies in Bosnia and Herzegovina, including administrative posts.

63. The respondent Party further states that Bosnia and Herzegovina did not sign the Agreement with United Nations on restructuring the police forces that would correspond to similar agreements signed by the Federation of Bosnia and Herzegovina and the Republika Srpska (see paragraphs 28-32 above). It recalls, however, that at the time these agreements were signed, Brčko District was not yet established; the Police of Brčko District was established in 2000. It asserts, however, that it did not influence the legal basis for certification of police officers that the

UN IPTF mission exercised on the basis of Annex 11 of GFAP and related Resolutions of the UN Security Council.

64. The respondent Party further states that the “Steering Board of Police Institutions “ reached a conclusion that the courts do not have competence to re-examine the “deciding process”. The respondent Party further argues that this conclusion does not mean that a citizen who considers that his rights have been violated cannot request the court to protect his rights. However, what the court will decide with regard to its competence depends exclusively on the court’s decision.

## **B. The applicant**

65. The applicant maintains all his complaints. He states that he has never initiated court proceedings against the termination of his employment because the Mayor, in his response to his appeal, stated that an appeal against the Mayor’s decision is not allowed by the law.

66. The applicant also states that the Police of Brčko District consisted of policemen from the Republika Srpska and policemen from the Federation. Therefore, he considers that the Framework Agreement on Restructuring and Democratisation of the Police of the Republika Srpska (see paragraphs 31-32 above) is applicable to his case.

## **C. *Amici curiae***

67. *Amici curiae* EUPM and OHR consider the present application (as well as all similar applications) inadmissible *rationae personae* and *ratione materiae*.

68. They argue that the IPTF was mandated to issue decisions on non-certification of police officers under Annex 11 to the GFAP and under the UN Security Council resolutions. Therefore, the State of Bosnia and Herzegovina has an obligation to fully cooperate with IPTF and to give full effect to such decisions. The nature and the scope of Bosnia and Herzegovina's obligations under GFAP and the Security Council resolutions cannot be unilaterally modified by the possible adoption (or failure to adopt) domestic legislation determining the manner in which these obligations shall be implemented. Therefore, the failure of Bosnia and Herzegovina's authorities to comply with IPTF requests would constitute “a failure to cooperate with the IPTF”; and could therefore lead to the consequences provided for in Article IV, Annex 11 of the Dayton Agreement; and would constitute a breach of Bosnia and Herzegovina's international obligations.

69. *Amici curiae* further argue that, according to Bosnia and Herzegovina's international obligations, the IPTF decisions were final and binding in nature, and no options were provided to any domestic authorities to argue about the validity of individual decisions. Certification was not a legal disciplinary procedure, but an administrative recruitment process designed “to ensure that all law enforcement personnel meet democratic standards of professional competence and personal integrity”. Therefore, in its submission, EUPM states that the term “disciplinary measures” mentioned in IPTF policy no P10-2002 did not impose an obligation upon the respondent Party to conduct disciplinary proceedings; that would have rendered the entire IPTF certification process redundant and superfluous. Therefore, the domestic authorities had no margin of appreciation in the certification process, and the decision on the applicant’s dismissal issued by the local authorities was only of a declarative nature because they were compelled to follow the IPTF decision on removal of the applicant's authorisation and termination of his employment. The competent local authorities were bound to execute IPTF decisions without further examination into the merits.

70. In the shared opinion of *amici curiae*, the domestic courts similarly lack jurisdiction to review IPTF decertification decisions, either directly or indirectly (i.e. by challenging the local authorities’ decision on termination of employment). Therefore, a decision rendered by a local court cannot overturn the substance of a decision issued by IPTF. Such decisions could not have the effect, either directly or indirectly, of authorizing a non-certified police officer to exercise police

powers or allowing him to be employed, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina. According to *amici curiae*, such a decision would place the State of Bosnia and Herzegovina in breach of its international obligations.

71. Regarding possible friction between the obligations of domestic authorities to terminate the employment of non-certified police officers under UN Security Council resolutions and Bosnia and Herzegovina's obligations stemming from other international conventions, OHR argues that the UN Charter holds a special status in the international sphere and takes precedence over any obligations under any other international agreement.

72. *Amici curiae* also opine that the Commission lacks competence *ratione materiae* to consider applications of this kind. Relying on the European Court of Human Rights jurisprudence in the *Pellegrin* case, *amici curiae* view the Chamber's 3 December 2003 decision declaring this application admissible as a departure from a clear ruling of the European Court, because the termination of employment of police officers falls outside the scope of the application of Article 6, paragraph 1 of the Convention.

73. As to a possible violation of the applicant's right to access the court, citing the case law of the European Court of Human Rights (see *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no.26083/94, ECHR Reports of Judgments and Decisions1999-I), EUPM states that this is not an absolute right and may be subject to limitations. Such limitations, however, must pursue a legitimate aim, and a reasonable relationship of proportionality must be struck between the means employed and the aim sought to be achieved, as well as between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The EUPM asserts that both of these requirements have been met. First, the process of police certification developed and implemented by IPTF was "a central component of the efforts of the international community to bring peace and prosperity to the people of Bosnia and Herzegovina", which constitutes a legitimate aim that justifies limitations on the right of access to court. Second, EUPM asserts that the measures taken by IPTF, which were binding upon the respondent Party, and which were taken pursuant to generally recognised rules of public international law, cannot be regarded as imposing a disproportionate restriction on the individual right of access to court.

## VII. OPINION OF THE COMMISSION

74. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the application in the merits by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on it. The Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

### A. Admissibility

75. Before considering the merits of the case, the Commission must decide whether to accept the application, taking into account the admissibility criteria set out in Article VIII of the Agreement. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept [...]. In so doing, the [Commission] shall take into account the following criteria: [...] (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

76. The respondent Party considers the application inadmissible as manifestly ill-founded, arguing that the respondent Party has not violated the applicant's rights under Article 6, paragraph 1 of the Convention. In its submissions the respondent Party states that the domestic authorities had to comply with the IPTF's decision on the applicant's decertification and dismiss him. It further

points out the conclusion of the Steering Board of Police Institutions (see paragraph 64 above) that the courts do not have competence to re-examine the “deciding process” (of IPTF and the Mayor’s decisions in connection with it). The respondent Party additionally states, however, that this does not mean that citizens are deprived of the possibility to seek court protection of their rights, but that it depends on the courts whether they will declare themselves competent to deal with such cases. In its submissions the respondent Party simply fails to determine whether its courts are competent to examine the decisions on the applicant’s dismissal from his employment, which is the main issue in this case. The Commission finds these arguments too contradictory and too vague to support the assertion of the respondent Party that the application is manifestly ill-founded.

77. The Commission notes that the applicant, as former police officer (and a civil servant) complains of a violation of his rights under Article 6, paragraph 1 of the Convention in relation to the proceedings in which the decisions on termination of his employment were issued. The Commission further notes the submissions of *amici curiae*, who argue that the application is inadmissible *ratione materiae*.

78. The Commission recalls that the Second Panel of the Chamber, deciding upon the application in the present case, first declared the application inadmissible on the grounds propounded by *amici curiae*, finding that “because the dispute concerns the applicant’s position as a police officer, the application does not concern the determination of the applicant’s “civil rights” within the meaning of Article 6 of the Convention”. Deciding upon the applicant’s request for review, however, on 5 December 2003 the Plenary Chamber issued a decision accepting the request for review, revoking the decision declaring the application inadmissible, and restoring the application to the list of cases for further consideration. The Chamber, mindful of its decision in *E.Ž.* (see paragraph 86 below), held that “considering that the applicant’s case was declared inadmissible pursuant to a restrictive interpretation of Article 6 which the Plenary Chamber has in the meantime departed from, the whole circumstances justify reviewing the Second Panel’s admissibility decision”.

79. Having regard to the Plenary Chamber’s action in revoking the decision in this case declaring the case inadmissible, as well as the Chamber’s decision on admissibility and the Commission’s decision on the merits in case *Džaferović* (see CH/03/12932, *Džaferović v. The Federation of Bosnia and Herzegovina*, Decision on Admissibility of 3 December 2003 and Decision on the Merits of 7 May 2004) the Commission will consider the application on the merits and establish whether the respondent Party is responsible for possible violations of the applicant’s rights under Articles 6 and 13 of the Convention.

80. The Commission finds that this case raises important questions of law as to whether the application falls within the scope of Article 6(1), and whether the respondent Party could bear any responsibility toward the applicant in that regard. It therefore decides to declare the application admissible in relation to Article 6, paragraph 1 and Article 13 of the Convention.

## **B. Merits**

81. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for in the Convention and the other treaties listed in the Appendix to the Agreement.

## 1. Article 6 of the Convention

### a. Whether the application falls within the scope of Article 6

82. Having decided that it should declare the application admissible because it raises an important question of law, the Commission will now consider whether Article 6 of the Convention is applicable. The applicant complains that he has not enjoyed a fair hearing on the occasion of the termination of his employment, as guaranteed by Article 6, paragraph 1 of the Convention. In relevant part, this provision reads as follows:

“In the determination of his civil rights and obligations..., everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law.”

83. The Commission recalls that, in its jurisprudence the European Court of Human Rights has held that disputes relating to the recruitment, careers and termination of service of civil servants are, as a general rule, outside the scope of Article 6, paragraph 1 of the European Convention (European Court of Human Rights, *Massa v. Italy*, judgement of 24 August 1993, par. 26; and *Neigel v. France*, judgement of 17 March 1997, par. 43).

84. In later jurisprudence the European court clarified the criteria for the applicability of Article 6, paragraph 1 in such cases and held that Article 6 is not applicable where an applicant has exercised powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. (European Court of Human Rights, *Pellegrin v. France*, judgment of 8 December 1999). The *Pellegrin* decision makes it clear that police officers fall within this category:

“The Court therefore rules that the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police.” (*Pellegrin* case, par. 66.)

85. The Commission further recalls that the Human Rights Chamber in its jurisprudence also held that Article 6(1) is not applicable in these cases because “disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6, paragraph 1 of the Convention” relying fully on the case law of the European Court of Human Rights expressed in its *Pellegrin* decision (see, e.g., CH/01/6796, *Halilagić v. The Federation of Bosnia and Herzegovina*, Decision on Admissibility of 7 March 2001, Decisions January-June 2001).

86. However, in its latest decisions in this matter, the Chamber departed from that practice and declared applications admissible in relation to Article 6(1) of the Convention (see case nos. CH/99/3375, *E.Ž. v. The Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits of 5 November 2003, Decisions July-December 2003; and CH/02/12932, *Džaferovic v. the Federation of Bosnia and Herzegovina*, Decision on Admissibility of 3 December 2003). In these cases the Chamber held, *inter alia*, that when domestic laws provide for access to judicial proceedings in a certain matter, “it is incompatible with the concept of rule of law in a democratic society that the most basic rules of fair trial should not apply to the relevant proceedings”. The Chamber further held, relying on the case law of the UN Human Rights Committee (see *Casanovas v. France*, Communication 441/1990 (10 August 1994), (CCPR/C/51/D/441/1990); and *Muñoz Hermoza v. Peru*, Communication 204/1986 (4 November 1998), that the

“broad scope of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which encompasses suits at law concerning the employment, the career and the

termination of civil servants, as provided for in the ICCPR, also argue against the exclusion of the applicant's case from the scope of Article 6 of the Convention".

The Chamber finally concluded that

"while Article II(2)(b) [of the Agreement ] gives the Chamber jurisdiction to consider alleged violations of the ICCPR only in conjunction with discrimination, the Chamber finds that a consistent interpretation of the Agreement warrants that, in interpreting the Convention, the Chamber take into account also the Parties' commitment in Article I of the Agreement to respect rights guaranteed in the ICCPR. "

87. Having regard to the above, the Commission recalls that, under the Agreement, it has competence to consider

"alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or ... alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to [Annex 6], where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ. "

In that context, the Commission notes that it can consider the alleged violations of human rights protected under the Convention and in accordance with the established case law of the European Court of Human Rights and the Chamber. The Commission notes that the present case raises the question of legal interpretation of the Commission's competencies and the provisions of the Convention, with particular regard to the meaning of the autonomous concept of "civil rights and obligations" in Article 6, paragraph 1 of the Convention.

88. The Commission notes that the Chamber, in its latest decisions, departed from its own case law and the case law of the ECHR and decided that when domestic laws provide for access to judicial proceedings in a certain matter the protection of Article 6(1) should apply to those proceedings. The Commission recalls, however, that the European Court has considered problems concerning Article 6, paragraph 1 of the Convention on numerous occasions, and has always held that it applies only to the proceedings which "are decisive for private rights and obligations". The European court, however, always applied an autonomous meaning of this concept, and it consistently held that this provision does not apply to certain kind of proceedings, such as disputes relating to the recruitment, careers and termination of service of civil servants (see, e.g., *Neigel v. France*, judgment of 17 March 1997, Reports of Judgments and Decisions 1997-II, p 410, paragraph 43; and *Huber v. France*, judgment of 19 February 1998, paragraph 36). Furthermore, in *Pellegrin* and later decisions (see, e.g., *Frydlender v France*, Judgement of 27 June 2000), it made it clear that Article 6, paragraph 1 does not apply to labour disputes initiated by policemen.

89. It is undisputable that domestic law may provide citizens with rights that go beyond the rights secured under the Convention. The Convention certainly does not limit such rights, as is made clear in Article 53 of the Convention. However, broader rights provided by the legislation of contracting states are not protected by the Convention, but by the domestic law of the particular state. Domestic law in Bosnia and Herzegovina provides citizens with access to court in order to challenge decisions on the termination of their employment, regardless of their character, i.e. regardless of whether they are civil servants or not (see, e.g., paragraphs 51, 53, and 54 above). But this protection provided by domestic law cannot expand the scope of Article 6 of the Convention; such disputes do not fall within the autonomous concept of "civil rights and obligations" developed by the European Court.

90. OHR, in its *amicus curiae* brief, argues that

"a State cannot unilaterally and irreversibly change the content of its obligations under the Convention through its own legislation. Such a position would recognise the asymmetrical application of the European Convention at the international level. Based on that argument, the obligations of a State under the Convention would be less or more stringent than those of another State depending on their respective legislation"

and, with respect to cases involving decertified police officers, OHR asserts that

"the fact that the State of BiH has adopted legislation which may grant some of the rights protected by Article 6 to certain civil servants means that the relevant authorities must guarantee these rights pursuant to domestic law but does not mean that the State of BiH has an obligation to guarantee those rights pursuant to Article 6 of the European Convention."

91. The EUPM, in its *amicus curiae* brief, states that the Chamber's mandate only covers Annex 6 of the Dayton agreement, and, as such, it is bound to apply the Convention and follow the European Court's jurisprudence. It is not clear which parts of the Dayton Agreement impose such a requirement upon the Chamber or the Commission.

92. The Commission certainly recalls that decisions of the European Court of Human Rights are not formally binding on it, and that it is not bound by the European Court's jurisprudence, because no provision of the Agreement or other regulations confines it in such a manner. Therefore, the Commission could give a different interpretation to Article 6(1) of the Convention, as the Chamber did in its latest decisions (see paragraph 88 above). However, having in mind the importance of legal certainty, as well as the earlier decisions of the Human Rights Chamber, the Commission considers that it is necessary to follow the consistent practice of the European Court rather than the latest decisions of the Chamber in its *E.Ž.* and *Džaferović* decisions. These issues have been carefully considered and decided by the European Court in its long-standing jurisprudence. Moreover, as stated in the dissenting opinions of three judges of the Chamber in the *E.Ž.* decision, the Commission finds that it would be wrong to "give the Convention a different interpretation in Bosnia and Herzegovina to that which it bears in the other States Parties to it. The Convention is a multilateral international treaty and it would be wrong in principle to hold that it bore different meanings from state to state."

93. Therefore the Commission considers that, in relation to this matter, it should follow the case law of ECHR as well as the previous case law of the Human rights Chamber.

94. With regard to the Chamber's reasoning in *E.Ž.* and *Džaferović* that Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") required it to give a broader interpretation to Article 6(1), the Commission considers that Article II(2)(b) of the Agreement does not allow it to consider possible violations of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, including ICCPR, without relation to alleged or apparent discrimination, which is not present here.

95. Both *amici curiae* in their briefs stress the necessity that the Dayton Peace Agreement be interpreted in the light of the rules set out in the Vienna Convention of 1969, which in Article 31 prescribes the general rules of interpretation of international treaties and provides:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

...

" 3. There shall be taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.”

96. The Commission notes that Article I of the Agreement regulates the obligations of the contracting parties with respect to the rights they are obliged to secure to all persons within their respective jurisdictions. Article II(2) of the Agreement, however, clearly confines its competence and limits the Chamber (and now the Commission) to consideration of alleged violations of rights guaranteed under the international instruments listed in the appendix to the Agreement, such as ICCPR, only in conjunction with discrimination. The Commission considers that it is simply not competent to consider applications beyond the scope set out in Article II(2).

97. This conclusion is compounded by EUPM's *amici curiae* submission, which argues that “The parties to the Dayton Agreement did not only envisage the Human Rights Chamber to uphold human rights in BiH... [but] also provides for Constitutional Court” and that “the Chamber’s *ratione materiae* competence extends to alleged discrimination in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix to Annex 6. The [Constitutional] Court’s *ratione materiae* competence covers exactly the same agreements as listed in Appendix I to the Constitution, but is not limited to a finding of discrimination”.

98. Therefore, having also in mind the Chamber’s previous case law (before the *Džaferović* and *E.Ž.* decisions), wherein it consistently held that it was limited to decide on violations of rights provided in the international instruments listed in the appendix to the Agreement only in conjunction with discrimination, the Commission considers that the argument set out in *E.Ž.* and *Džaferović* decisions—that it can interpret the Agreement in a way that also warrants that “in interpreting the Convention, the Chamber take into account also the Parties’ commitment in Article I of the Agreement to respect rights guaranteed in the ICCPR.”—cannot be accepted.

99. Further, the argument that Article 14 of the ICCPR justifies a broader reading of Article 6(1) does not find any support in the case law of the European Court. As the Commission has already concluded above, it should follow that jurisprudence in this context (see paragraph 93 above).

**b. Regarding the possible responsibility of the respondent Party**

**(1) Whether the applicant received a fair hearing**

100. Notwithstanding the reasoning expressed in the previous section concerning the scope of Article 6(1) in relation to this case, and assuming *arguendo* that Article 6 could apply, the Commission finds that the question of possible responsibility of the respondent Party is a serious issue that affects the protection of human rights in Bosnia and Herzegovina and that it must examine whether there has been a violation of the applicant’s right to a fair hearing. In this regard, the Commission notes that the application raises issues similar to those addressed in the Commission’s recent decision in case no. CH/03/12932, *Rusmir Džaferović v. the Federation of Bosnia and Herzegovina* (Decision on admissibility and merits of 7 May 2004).

101. The Commission will now examine whether there has been a violation of the applicant’s right of access to a court. In the case of *Golder v. U.K.*, the European Court of Human Rights held that Article 6 “embodies the right to a Court” wherein the other rights guaranteed under Article 6 are respected (*Golder v. U.K.*, judgment of 21 February 1975, Series A vol. 18, page 18). In reaching this conclusion, the Court noted the importance given to the concept of the “rule of law” throughout the European Convention of on Human Rights. In the preamble of the Convention, the signatory governments declare that they are

“resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration of 10 December 1948”.

Further, citing the reasoning of the European Commission of Human Rights, the Court in *Golder* decision explained that

“Article 6 (1) ... is intended to protect in itself the right to a good administration of justice, of which the right that justice should be administered constitutes an essential and inherent element. Further, the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.”

The Court held that Article 6, paragraph 1 of the Convention must be read in light of these principles.

102. Following these principles, any civil claim must be capable of being submitted before a court. The European Court has held in its case law, however, that for the purposes of Article 6, paragraph 1, the State may arrange for certain civil rights disputes to be decided by bodies other than its regular courts; such procedures, however, must comply with Article 6(1) or be subject to review by a court with full jurisdiction. Therefore, the right of access to court would not be violated if the claim can be submitted to a "real" court or administrative body that offers the procedural guarantees offered by a judicial court or tribunal.

**(a) Whether the procedures before IPTF and the Mayor satisfied the requirements of Article 6(1)**

103. The Commission observes that the applicant essentially complains of a violation of Article 6 of the Convention because he has not received a fair hearing in the entire proceedings leading to his dismissal. Noting that the procedures complained of encompassed both a decision issued by the IPTF not to certify him as a police officer and a decision by the Mayor on termination of his employment as a police officer, the Commission observes that the Mayor’s decision explicitly and exclusively refers to the preceding IPTF decision, even stating that it formed an integral part of Mayor’s decision, and it is not based on any findings ascertained in domestic disciplinary or criminal proceedings.

104. The Commission also notes that, on 13 December 2001, the IPTF Commissioner merely sent a letter to the applicant informing him that his temporary authorisation to exercise police powers was withdrawn. The letter informed the applicant that, according to an investigation conducted by IPTF, it was established that the Bijeljina Crime Department, under the applicant’s supervision, failed to take basic investigative actions in one particular case, and that the applicant engaged in unprofessional and partial behaviour (see paragraph 15 above).

105. The applicant essentially complains of a violation of the “equality of arms” principle, because he was not provided an equal opportunity to present his arguments and reply to the IPTF. The Commission notes that the applicant did not have an opportunity to participate in the proceedings before IPTF or the Mayor in the manner envisioned by Article 6(1) of the Convention. He did not have an opportunity to be heard in the proceedings or to challenge the merits of decisions in the first instance. He filed requests for review of the IPTF decision and the Mayor’s decision on termination of his employment. These actions were of no benefit to him, however, because on 10 October 2002 the IPTF Commissioner sent him another letter informing him that the IPTF had established that the previous decision on removing his provisional authorisation was upheld and the case considered finished (see paragraph 20 above). The IPTF decision contained no other reasoning as to why the applicant’s request for review was ill-founded. The Mayor also informed the applicant that there is no right to appeal against the Mayor’s decision provided for in the Law on Labour of Brčko District. The Commission notes that all decisions in relation to the

applicant were issued in administrative or quasi-administrative procedures, without allowing the applicant to challenge them on the merits. It is therefore obvious that IPTF and the Mayor have not provided the applicant with a public, adversarial, impartial, and independent examination of his rights, as required by Article 6(1) of the Convention. Thus, neither IPTF nor the Mayor satisfied the requirements of Article 6(1).

**(b) Whether the applicant had an opportunity to effectively challenge the IPTF and the Mayor's decisions before the domestic courts**

106. The European Court, in the *Umlauf* case (judgment of 23 October 1995, A-328, referring to a series of previous decisions of the Court), held

“that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6(1) of the Convention ... must be subject to subsequent control by a “judicial body that has full jurisdiction.”

“[T]he defining characteristics of a “judicial body that has full jurisdiction” ... include the power to quash in all respects, on questions of fact and law, the decision of the body below.”

(*Umlauf* judgment, para. 39).

107. Having in mind that, in the proceedings concerning the applicant, neither IPTF nor the Mayor satisfied the requirements of Article 6, paragraph 1 of the Convention, the Commission will turn to the question of whether IPTF's and the local authorities' decisions could have been subject to proper review by a “judicial body that has full jurisdiction” before the respondent Party's courts.

108. It is true that the Law on Labour of Brčko District does not provide for an appeal to the competent organ of the employer against a decision on termination of employment. However, the same law gives all employees an opportunity to file an action before the domestic courts in order to challenge the decision terminating their employment (see paragraph 51 above). The Commission notes that the applicant has not initiated any court proceedings with a view to annulling the Mayor's decision on terminating his employment as a police officer. Therefore, he has not used the remedy provided by domestic law to all employees. The Commission need only examine, however, whether this domestic remedy was sufficient and effective, not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, e.g. ECHR *Vernillo v. France* judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27, and the *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, p. 22, § 45). The Chamber in its case law also constantly held that in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the national legal system but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 May 1999, paragraphs 142-143).

109. The respondent Party submits contradictory arguments on its courts' competence to overturn IPTF decisions, as well as the Mayor's decision terminating the applicant's employment. The respondent Party first states that the “Steering Board of Police Institutions” concluded that the domestic courts have no competence to re-examine the IPTF and Mayor's decisions on removal from duty. However, in the very next sentence of its submissions, the respondent Party states that this does not mean that citizens may not seek court protection if they consider their rights have been violated, and that it only depends on the court's decision as to whether the court will declare itself competent to decide on the merits. Thus, the respondent Party, in fact, gave no specific argument on the possible competence of its courts to review the IPTF's and Mayor's decisions on termination of the applicant's employment.

110. Both *amici curiae*, in their briefs, strongly assert that the courts of the respondent Party have no jurisdiction to review IPTF decisions relating to non-certification or decertification, either directly or indirectly (i.e. by challenging the local authorities' decisions on terminating employment, which are only of declarative nature). *Amici curiae* opine that a decision of the domestic courts cannot have the effect, either directly or indirectly, of authorizing a non-certified police officer to exercise police powers or allowing him to be employed, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina. Moreover, according to *amici curiae*, such a decision would place Bosnia and Herzegovina in breach of its international obligations.

111. The Commission notes that the domestic courts, in several cases concerning the removal of police officers by MUP decisions based on IPTF decisions on decertification, have dealt with the cases in different ways (see paragraphs 57-59 above). In some cases the courts rejected the plaintiffs' actions as ill-founded, considering that the decisions issued by the IPTF within its mandate were not subject to review by the court. In other cases the courts declared themselves incompetent to examine MUP's decision issued on the basis of the IPTF decision. In several other cases, however, the Municipal Court in Zenica issued judgements annulling the MUP's decisions terminating the plaintiffs' employment, finding those decisions ill-founded for procedural reasons. Although the Zenica Court held that the MUP should have carried out its own disciplinary proceedings and terminated the applicants' employment only in accordance with domestic law, it conceded in its judgements that IPTF is exclusively competent to issue and take away permits to exercise police functions, and that persons not authorized by the IPTF cannot serve in law enforcement. Thus, no court has held itself competent to examine IPTF or MUP decisions terminating the employment of police officers on the merits, or to act in these cases as a "judicial body that has full jurisdiction" with power to "quash in all respects, on questions of fact and law", the decisions of IPTF or MUP.

112. The Commission finds, having regard to the above, that the present applicant, even if he had initiated proceedings before the domestic courts, would have had no real opportunity to effectively challenge the decision on removal of his provisional authorisation on the merits.

**(2) Whether the respondent Party is responsible for the failure to provide the applicant a fair hearing**

**(a) Regarding a possible conflict between the Agreement and the respondent Party's other international obligations**

113. The respondent Party considers that, by its actions, it has not violated Article 6 of the Convention or Article I of the Agreement.

114. Both *amici curiae* also stress the international obligations of Bosnia and Herzegovina pursuant to various international agreements and instruments (see paragraphs 67-71 above). The respondent Party was obliged to fully cooperate with IPTF in carrying out its mission in Bosnia and Herzegovina. They argue that the local authorities were compelled to follow the IPTF decision removing the certification of the applicant and, thus, to terminate his employment. The respondent Party had no margin of appreciation and was bound to issue termination decisions without further examination into the merits. Therefore, in *amici curiae's* opinion, the local authorities' decision terminating the applicant's employment was only of a declaratory nature.

115. In light of these concerns, the Commission must next examine whether the respondent Party and its authorities had to comply fully with the IPTF decision, or whether they had some margin of appreciation to decide whether or not the applicant should have been dismissed.

116. The Commission notes that IPTF was established under Annex 11 of the GFAP in response to the inevitable need of the Parties to maintain their civil law enforcement agencies

operating in accordance with internationally recognized standards. Under Article I(2) of Annex 11, the task of the IPTF was to carry out, throughout Bosnia and Herzegovina, the program of assistance to the Parties by, *inter alia*, "facilitating, within [its] mission of assistance, the Parties' law enforcement activities" (Article III(1)(d) of Annex 11). The main activity IPTF carried out during its mandate was a certification process of all local police officers. Although it did not directly set up such a certification process, the Commission finds that Annex 11, particularly Article III(1)(d) (see paragraph 24 above), provides a clear legal basis for IPTF's actions in this respect. This provision provided IPTF broad powers and competencies, including its certification activities.

117. The Commission further notes that the competencies of IPTF were later endorsed by PIC at its Madrid conference in December 1998, where it welcomed the IPTF Commissioner's determination "to make robust use of his powers to decertify police officers who violate provisions of the General Framework Agreement and related documents" (see paragraph 35 above). Furthermore, several UN Security Council resolutions confirm that IPTF was entrusted with the tasks set out in Annex 11 of the GFAP, including the tasks specifically referred to by various PIC conclusions. Finally, the UN Security Council in its statement of 25 June 2004 "reaffirms the legal basis in the Charter of the United Nations on which the IPTF was given its mandate" and "affirms that the certification process was carried out pursuant to the mandate of the IPTF and fully endorses this process.... The Security Council expresses its concern over the failure of the competent authorities in Bosnia and Herzegovina to take due steps to implement decisions to deny certification ... and calls upon the Bosnia and Herzegovina authorities to ensure, including through the adoption or amendment of domestic legislation, that all IPTF certification decisions are fully and effectively implemented and that such persons will be precluded from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina" (see paragraph 50 above).

118. On the basis of the powers entrusted to it by these international agreements and resolutions, IPTF issued and applied its own rules and regulations, such as IPTF Policies (see paragraphs 36-49 above). These Policies established the procedures and conditions under which the certification process was conducted. The Policy P 02-2000 outlined the UNMIBH/IPTF procedures for registration, provisional authorisation and certification of law enforcement agents, and set up the criteria for provisional authorisation. Subsequently, the IPTF Policy P05-2001 established the procedures "to record acts of inadequate performance, advise and train law enforcement officials to improve their performance, and to sanction acts of serious misconduct by UNMIBH/IPTF" This Policy established Non-compliance reports for a serious violation of duty or law by provisionally authorised staff of law enforcement agencies, issued officially by the IPTF Commissioner based on the observations of UNMIBH staff. Under Policy P10-2002, the IPTF Commissioner had the power to remove a police officer's provisional authorisation to exercise police powers. The removal of this provisional authorisation precluded that police officer from holding any position within a law enforcement agency in Bosnia and Herzegovina. Furthermore, Policy P11-2002 established positive and negative criteria for certification, providing that the provisionally authorised officer who did not meet the positive criteria, or who met the negative criteria, was no longer allowed to function as a police officer within any law enforcement agency in Bosnia and Herzegovina

119. The Commission notes that, under Article IV of Annex 11, "The parties shall cooperate fully with the IPTF and shall so instruct all their law enforcement agencies" (see paragraph 25 above). Under Article V of Annex 11, "Any obstruction of or interference with IPTF activities, failure or refusal to comply with an IPTF request or other failure to meet the Parties' responsibilities or other obligations in this Agreement, shall constitute a failure to cooperate with the IPTF". If the respondent Party failed to cooperate, the IPTF Commissioner, under Article V(2) of Annex 11, had the right to notify the High Representative and IFOR (later SFOR), requesting the High Representative to take appropriate steps within his or her competence. It is clear to the Commission, therefore, that the respondent Party had no choice but to comply with legitimate IPTF requests. Failure to do so would constitute a breach of Bosnia and Herzegovina's international obligations under GFAP and other international agreements and instruments.

120. The Commission finds that Annex 11 to the GFAP, the Bonn-Petersberg Agreement, and subsequent acts defining the powers of IPTF in vetting police officers likewise oblige the Parties to the Agreement to fully co-operate with the IPTF. There are no explicit statements in these documents that IPTF decisions shall be final and binding and in no case subject to review by domestic authorities. The Commission recalls, however, that decisions issued by any of the international bodies established by GFAP, including the Human Rights Chamber, were, by design, not subject to review by the national authorities, and that the respondent Party's compliance with these decisions cannot be regarded as a violation of human rights engaging its responsibility.

121. The Commission considers that it is in the very nature of the established certification process that IPTF decisions issued in the process of vetting police officers are final and binding and cannot be reviewed by national authorities. The Parties to the Agreement, including the respondent Party, are obliged to implement them without further examination into the merits. This interpretation of the nature of the certification process has been fully backed by the UN Under-Secretary General and by the Deputy High Representative, as stated in their letters (see paragraphs 47-49 above). Therefore, any refusal by the domestic authorities to implement IPTF decisions would certainly constitute a breach of Bosnia and Herzegovina's international obligations under Annex 11 and would invoke the consequences provided for in Article V of Annex 11.

122. The Commission notes that this case raised difficult questions regarding the applicability of Article 6 of the Convention and the applicability of the Agreement to the respondent Party *rationae personae*. Examining the merits of the applicant's claim that his right to a fair hearing was violated, the Commission finds that Annex 11 and the other authorities discussed above mandate a conclusion that IPTF decisions on certification or decertification are final and binding and that the respondent Party, under its international obligations, was left with no legal competence to challenge those decisions.

### **(3) Limitations on the right to a fair hearing**

#### **(a) General considerations**

123. The Commission notes that the right of access to court does not necessarily require a full trial for the examination of civil rights and obligations in all circumstances.

124. In *Golder v. United Kingdom* (judgment of 21 February 1975, Series A no. 18), the European Court of Human Rights held that:

"38. [T]he right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.

"The first sentence of Article 2 of the Protocol (P1-2) of 20 March 1952, which is limited to providing that 'no person shall be denied the right to education', raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that:

"'The right to education ... by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.' (Series A no. 6, p. 32, para. 5).

"These considerations are all the more valid in regard to a right, which, unlike the right to education, is not mentioned, in express terms."

"39. The Government and the Commission have cited examples of regulations, and especially of limitations, which are to be found in the national law of states in matters of access to the courts, for instance regulations relating to minors and persons of unsound mind."

125. In later decisions, the European Court again held that the right of access to court enshrined in Article 6 is not absolute; it may be subject to certain limitations since the right "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (Eur Court HR, *Ashingdane v. United Kingdom*, judgment of 28 May 1985, Series A no. 93, page 24, paragraph 57). Nonetheless, these limitations "must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (id.). "Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (id.). Thus, as with all rights under the Convention where limitations by the State are allowed according to the interpretation of the European Court, possible limitations of the right of access to court must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, Eur. Court HR, *Sporrong and Lönnroth v. Sweden*, judgement of 23 September 1982, Series A no. 52).

**(b) Whether limitations on the right to a fair hearing were justified in this case**

126. The Commission will finally examine whether a limitation on the applicant's right of access to court in the present case is compatible with the general interpretation of Article 6, paragraph 1 limitations, i.e. whether it pursues a legitimate aim and whether there is reasonable proportionality between the means employed and the aim sought to be achieved.

127. The Commission recalls that the situation in post-war Bosnia and Herzegovina was widely considered to be a threat to stability in the region, and that efforts to establish peace and security in the region were needed. The GFAP established the basis for the peace implementation process and assigned the international community a leading role in that process.

128. EUPM, in its brief, submits that the Security Council, when it adopted Resolution no. 1088 on 12 December 1996, which addressed the reporting obligations of Bosnia and Herzegovina's authorities regarding their compliance with IPTF prescribed guidelines in relation to, *inter alia*, the screening process for police officers, acted under Chapter VII of the United Nations Charter. The adoption of resolutions under Chapter VII presupposes the existence of a "breach of the peace or threat to the peace". The resolution determines that the situation in the region continued "to constitute a threat to international peace and security" and that the UN Security Council was determined "to promote the peaceful resolution of the conflicts in accordance with the purposes and principles of the Charter of the United Nations".

129. The Commission considers that the fact that the UN Security Council dealt with Bosnia and Herzegovina under Chapter VII of the UN Charter clearly indicates that the UN perceived an ongoing, unstable post-war situation.

130. The Commission notes that the UN Security Council adopted Resolution No. 1088 in 1996. The notion that a "threat to peace" persisted into the time period relevant to this case, however, follows from the UN Secretary General's report on the United Nations Mission to Bosnia and Herzegovina of 7 June 2001:

"In a war-torn region whose stabilization and recovery depends on resolving the challenges of ethnic reconciliation, democratic institution-building, reconstruction and economic reform as well as the full implementation of human rights for all citizens, Bosnia and Herzegovina is a vital test case. If peace implementation fails there after nearly six years of intensive international effort, the consequences throughout the region and possibly beyond will be

profoundly adverse and even dangerous. The international community cannot afford to lessen its resolve or its commitment to Bosnia and Herzegovina; the consequences for the people of the region and for international peace and security could be incalculable.”

131. Turning to the mission of IPTF, the Commission recalls that IPTF was part of the UN peacekeeping operation set up under Chapter VII of the UN Charter. Immediately after the armed conflict, the police forces in both entities in Bosnia and Herzegovina employed a great number of personnel with inadequate qualifications, many with insufficient respect for the rule of law and human rights. Indeed, some members of those police forces had known or suspected involvement in the commission of war crimes. In these circumstances, action was necessary to purge the law enforcement agencies of Bosnia and Herzegovina of bad actors and to build a democratic police force that would be able to protect society's essential values and establish confidence in the citizens of Bosnia and Herzegovina that their human rights would be respected. This was an important, primary goal of the vetting process set up and carried out by IPTF.

132. The UN Secretary General, in the same 2001 report, also stated that

“[t]he core programme of police reform aims to ensure that all law enforcement personnel meet international standards of personal integrity and professional competence. The individual projects are designed to weed out police personnel who are war or economic criminals, or who occupy housing illegally, and to ensure that each police officer is adequately trained, including in human rights.”

This sentiment was also expressed by the Under-Secretary General in his 28 May 2003 letter to the High Representative, in which he stated that the comprehensive process of police certification, developed and implemented by IPTF was “a central component of the efforts of the international community to bring peace and prosperity to the people of Bosnia and Herzegovina” (see paragraph 47 above).

133. In these circumstances, the Commission considers a) that the facts that the parties to the GFAP signed Annex 11, giving broad powers and competencies to IPTF; b) that IPTF carried out its vetting process pursuant to the procedures provided for in its “Policies”; c) and that the UN Security Council, by its resolutions, strongly supported the IPTF certification process would all strongly support a conclusion that the restructuring of the police forces necessarily required some derogation from the guarantees set forth in Article 6(1) of the Convention. Although such a formal declaration of derogation was never made, the underlying prevailing law enforcement situation, and the respondent Party's entry into legal obligations in response thereto (in concert with the international community), are matters of record that lead the Commission to conclude that, on balance, the treatment of the applicant in this case was proportionate to the aims sought to be achieved, within the meaning of Article 6, paragraph 1 of the Convention.

### **c. Conclusion regarding Article 6**

134. Having regard to the above, the Commission finds that the applicant's claim, challenging his dismissal from the police, does not fall within the scope of Article 6 of the Convention, and that, in any event, no responsibility can be attached to the Bosnia and Herzegovina for a breach of the Agreement from its compliance with its international obligations under Annex 11 of the GFAP and related international instruments. The Commission finds that the situation of the police forces in Bosnia and Herzegovina following the armed conflict, with particular regard to the presence of unsuitable elements in those forces (which problem apparently had not yet been solved at the time IPTF issued its decision on the applicant's decertification) was a sufficient threat to public order and the future integrity of the nation that the severe limitations on the rights under Article 6 of the Convention agreed upon by the respondent Party and the international community were necessary and proportionate measures taken in pursuit of a pressing and legitimate public aim.

## **2. Article 13 of the Convention**

135. The applicant also complains of a violation of his rights under Article 13 of the Convention, which provides as follows:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

136. This article can only apply, however, when an individual has an arguable claim that he has been the victim of a violation of the rights set forth in the Convention. Having regard to the Commission’s conclusions above, however, there is no showing that such an arguable claim exists and therefore Article 13 cannot be considered. Accordingly, the Commission finds that the respondent Party has not violated the applicant’s rights under Article 13 of the Convention.

### **3. Conclusion as to the merits**

137. The Commission therefore concludes that the respondent Party was not in breach of the applicant’s right to a fair hearing or his right to an effective remedy as guaranteed by the Convention and the Agreement.

## **VIII. CONCLUSION**

138. For the reasons given above, the Commission decides:

1. unanimously, that Bosnia and Herzegovina has not violated the applicant’s right to a fair hearing under Article 6 or his right to an effective remedy under Article 13 of the European Convention on Human Rights.

(signed)  
J. David YEAGER  
Registrar of the Commission



(signed)  
Jakob MÖLLER  
President of the Commission

Annex I Concurring opinion of Mr. Jakob Möller, joined by Mr. Miodrag Pajić

**ANNEX 1**

In accordance with Rule 60 of the Commission's Rules of Procedure, this Annex contains the concurring opinion of Mr. Jakob Möller, joined by Mr. Miodrag Pajić.

**CONCURRING OPINION OF MR. JAKOB MÖLLER,  
JOINED BY MR. MIODRAG PAJIĆ**

1. I agree with the conclusion reached by the Commission in this case that Bosnia and Herzegovina has not violated the applicant's right to a fair hearing under Article 6 of the European Convention on Human Rights. I do so on the ground elaborated mainly in paragraphs 119 to 122 of the Commission's decision, namely that the respondent Party had no choice but to fully cooperate with the IPTF and to comply with legitimate IPTF requests, that the IPTF's decisions issued in the process of vetting police officers are final and binding and cannot be reviewed by national authorities, that the respondent Party's compliance with IPTF decisions in the certification process cannot be regarded as a violation of human rights engaging its responsibility, and that a failure by the domestic authorities to implement IPTF decisions in this regard would constitute a breach by Bosnia and Herzegovina of its international obligations under Annex 11 to the Agreement. In these circumstances, and taking into account that the situation in post-war Bosnia and Herzegovina was considered to be a threat to stability in the region which continued to constitute a threat to international peace and security, the consequent restrictions on access to court in the process of purging the law enforcement agencies of Bosnia and Herzegovina, grounded in agreements with the international community, was justified and proportionate to the aims sought to be achieved.

2. I cannot associate myself with the Commission's other ground for finding no violation, namely that Article 6 of the Convention is not applicable at any rate and that it would therefore be wrong for the Commission to uphold recent case law of the Human Rights Chamber for Bosnia and Herzegovina which is inconsistent with established jurisprudence of the European Court of Human Rights, in particular its judgment in *Pellegrin v. France* (EUR.Ct.HR, judgment of 8 December 1999), in which the Grand Chamber of 17 judges confirmed, by a majority of 13 against 4, that labour disputes of members of the police fall manifestly outside the scope of protection of Article 6.

3. I recognize the weight of the argument that it would be highly desirable, for a number of reasons, including legal certainty, that different jurisdictions applying the European Convention should interpret its provisions in a uniform manner. I also agree that the meaning and scope of protection of Article 14 of the International Covenant on Civil and Political Rights does not alter the scope of protection of the Article 6 of the European Convention. However, the Commission is not bound by the European Court's jurisprudence (cf. para. 92 of the Commission's decision) and is therefore not bound by its decision in *Pellegrin*, no matter how desirable a uniform interpretation of the law may be.

4. In *Pellegrin*, the European Court of Human Rights sought "to put an end to the uncertainty which surrounds application of the guarantees of Article 6(1) to disputes between states and their servants". To that end, it established a new criterion to be applied in order to determine the applicability of Article 6(1) to public servants, i.e. "a functional criterion based on the nature of the employee's duties and responsibilities". The Court noted in this regard that certain posts in public service involve responsibilities in the general interest [of the State] or participation in the exercise of powers conferred by public law and that the holders of such posts thus wield a portion of the State's sovereign power. In the opinion of the Court, the State therefore has a legitimate interest "in requiring of these servants a special bond of trust and loyalty". By way of comparison and guidance the Court also refers to European Economic Community law and the 17 December 1980 judgment of the Court of Justice of the European Communities in the case of *Commission v. Belgium* (C-149/79, ECR 3881). In this judgment, the Court of Justice decided that the derogation clause of Article 48(4) of the EEC Treaty (restricting freedom of movement of workers and access to public service employment) concerned only posts "which involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general

interest of the State or other public authorities, and which thus presumed on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which formed the foundation of the bond of nationality". Accordingly, the European Court of Human Rights ruled that "no dispute between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6(1) of the Convention".

5. The emphasis on "special bond of trust and loyalty" between the State and the employee and "allegiance to the State" forming the foundation of the "bond of nationality" may sound strange, even cynical, in Bosnia and Herzegovina. Ironically, misconceived or even misplaced loyalty in public authority and perceived importance of allegiance based on "nationality" are among the main reasons that made the vetting process of the police forces in Bosnia and Herzegovina necessary. The rule of law and respect for human rights would be strengthened immeasurably in Bosnia and Herzegovina, if, instead, a bond of loyalty, trust and confidence would develop between the police and the people at large.

6. It may be mentioned that Pellegrin was not a policeman. He was an accountant employed by a French Ministry as a technical adviser in an overseas development programme. He initiated a labour dispute before an administrative court in 1990 and, in 1995, filed an application before the European Commission of Human Rights complaining about the length of time of the court proceedings, relying on Article 6(1) of the Convention. The European Commission of Human Rights declared the application partly admissible in 1997 and, in 1998, adopted a report in which it expressed the opinion that there had been a violation of Article 6(1). The Commission referred the case to the Court which held, by 13 votes to 4, that Article 6(1) of the Convention was not applicable, because, in the majority opinion, Pellegrin's activities typified those conferred by public law, falling "par excellence" into a sphere in which States exercise sovereign power.

7. I find the joint dissenting opinion of four of the Court's judges more persuasive and convincing. They first note that the Court has abandoned the earlier criterion of the economic object of the dispute—which, in their opinion, would have made Mr Pellegrin's application admissible—in favour of a new criterion, namely "participation in the exercise of powers conferred by public law", based on the nature of the official's duties and responsibilities. The new criterion, they noted, deprives a whole category of persons of a fundamental safeguard, namely the right of access to court and to fair hearing. This, the dissenting judges state, will create a new type of discrimination between public sector workers, depending on whether or not they exercise powers conferred by public law, and the introduction of the new criterion will not avoid the risk of arbitrariness and will create a new zone of uncertainty. They point out that the criterion is largely based on the reference to a "special bond of trust and loyalty", which they consider insufficient for determining the scope of Article 6 and which has to a large extent lost its significance, because most member states have "judicialised" civil service disputes, if not entirely then at least for the most part. "We do not understand", they state, "why someone who participates in the exercise of powers conferred by public law, and who, under domestic law, has access to an independent tribunal in connection with disputes concerning employment, is not entitled to a judicial decision within a reasonable time". This, in my view, is the crux of the matter. Why should human rights protection under the European Convention on Human Rights lag behind the protection afforded by domestic law in most of the member states of the Council of Europe?

8. It is true that more than half a century ago the framers of the European Convention, in the last preambular paragraph, resolved to take "the first step for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]". Since then, a number of further important steps have been taken by adoption of protocols to the Convention. While the concept of "standard minimum rules" is known in the area of international human rights standard setting, the European Convention and its protocols should not be seen as "standard minimum rules" for the protection of human rights, but as a beacon, showing the way and setting an example. If Article 6(1) of the Convention cannot be interpreted by the European Court of Human Rights as applying to labour disputes of public officials who "directly or indirectly participate in the

exercise of powers conferred by public law”, the time may be ripe to remedy that shortcoming through the adoption of a new protocol. In the meantime, it is to be expected that the full strength of human rights protection under domestic law, including access to court for public officials, be rigorously applied and upheld in Bosnia and Herzegovina in all circumstances where the courts have jurisdiction, and that the guarantee of fair hearing be scrupulously observed.

A handwritten signature in black ink, appearing to read 'Jakob Möller', with a stylized flourish at the end.

(signed)  
Jakob Möller

(signed)  
Miodrag Pajić