



DECISION ON THE MERITS

Case no. CH/03/12932

Rusmir DŽAFEROVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 7 May 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 57 of the Commission’s Rules of Procedure:

I. INTRODUCTION

1. The applicant is a former police officer. He was dismissed from his employment as a police officer with the Ministry of Interior of the Sarajevo Canton ("MUP") on the basis of a decision by the International Police Task Force ("IPTF") Commissioner of the United Nations Mission to Bosnia and Herzegovina ("UNMIBH"). The applicant received a letter from IPTF stating that he was not considered fit to serve as a law enforcement officer, removing his authorisation as a police officer, and banning him from "participating in any aspect of police function, currently and in the future, anywhere in Bosnia and Herzegovina". The applicant subsequently received a MUP decision terminating his employment relationship.

2. The application primarily raises issues under Article 6 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced on 29 January 2003.

4. At the time he filed his application, the applicant requested the Chamber to order the respondent Party, as a provisional measure, not to terminate his employment and that the payment of his salary be continued. On 4 April 2003 the Chamber decided not to order the provisional measure requested.

5. On 11 April 2003 the application was transmitted to the respondent Party for its observations on the admissibility and merits. The respondent Party's observations were received on 16 June 2003 and 26 August 2003. The applicant submitted a letter in reply to the respondent Party's observations on 20 August 2003.

6. The Chamber considered the case on 4 September 2003, 9 October 2003, 11 October 2003, 5 November 2003, 1 December 2003, and 3 December 2003. On the latter date, it adopted a decision declaring the application admissible under Article 6 of the Convention and declaring the remainder of the application inadmissible.

7. 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 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*.

8. The Commission again considered the merits of the case on 5 March 2004 and 7 May 2004. On the latter date it adopted the present decision.

III. THE FACTS

9. On 29 October 2002 IPTF sent a letter to the applicant banning him from further practicing his profession, stating that he did not meet the criteria to maintain full certification as a police officer because he did not "demonstrate the ability to uphold human rights and/or abide by the law". The IPTF Commissioner further stated that the applicant would not be able to "participate in any aspect of police function, currently and in the future, anywhere in Bosnia and Herzegovina". The decision was based on two grounds: First, on 16 May 1996 the Basic Court II in Sarajevo

found the applicant guilty of having caused general danger by firing two shots from his pistol in the air on the occasion of a wedding, and sentenced him to three months' probation. Second, the applicant gave a deceptive statement when he filled out an IPTF questionnaire on 7 December 1999, denying that he had ever been arrested, indicted, or convicted in criminal proceedings.

10. On 12 November 2002 the applicant filed a request to IPTF to review its decision of 29 October 2002. He conceded the events underlying the 16 May 1996 judgment, but he pointed out that, according to Article 119 of the Criminal Code of the Federation of Bosnia and Herzegovina, a suspended criminal sentence shall be deleted from the criminal record, provided that the offender does not commit a new criminal offence within one year. This being the state of the law, there were no entries in the applicant's criminal record. Consequently, the applicant asserts that he did not give a false statement to the IPTF.

11. On 21 December 2002 the IPTF rejected the applicant's request for review as ill-founded, thereby maintaining its decision of 29 October 2002.

12. On 20 January 2003 the MUP terminated its working relationship with the applicant effective 30 December 2002, fully relying on the IPTF's assessment. The applicant's objection against this decision was rejected by the MUP on 7 February 2003.

13. It appears that the applicant has never initiated any court proceedings requesting the annulment of the decisions terminating his employment.

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

14. 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."

15. 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."

16. 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;"

17. 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."

18. 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,"

19. 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

20. 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.

21. 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."

22. 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. 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. United Nations Security Council Resolutions

23. 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;...."

24. 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;...."

4. The Madrid Peace Implementation Council Declaration

25. 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...."

5. IPTF Policies regarding the vetting process of police officers

a. Policy no. P11-2002

26. 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."

27. 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 by 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."

28. Regarding the consequences of failure to meet the abovementioned 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."

29. 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 Office 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."

b. Policy no. P10-2002

30. IPTF Policy no. P10-2002 is entitled "Removal of Provisional Authorisation and Disqualification of Law Enforcement Agency Personnel in BiH" and was applied beginning 24 May 2002. The Policy provides, in relevant part:

"2. The 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."

31. As regards the procedure of 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."

32. 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."

6. Relevant correspondence

33. 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.”

34. 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.”

35. 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."

B. Domestic Law and Practice

1. Regulations on labour relations

36. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY ("OG SFRY") nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina ("OG RBiH" no. 2/92). It provides, in relevant part, as follows:

Article 80

"(1) A worker... has the right to appeal against the decisions which [the competent organ of the employer] issues on his rights, obligations and responsibilities.

"(2) An appeal...can be filed to the [competent body of the employer] within 15 days from the day when the decision ... was delivered to him...."

Article 83

"(1) A worker who is not satisfied with the final decision of the competent body in the organization, or if that organ fails to issue a decision within 30 days from the day the request or appeal is lodged, has the right to seek protection of his right before competent court within the next 15 days."

37. The Law on Labour (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 43/99, 32/00 and 29/03) entered into force on 5 November 1999. It contained the following relevant provision:

Article 103

"An employee who considers that the employer violated any of his rights deriving from his labour relations, can within 15 days...request the employer to enable him to exercise those rights.

...

"If the employer within 15 days from the day of delivery of the employee's request does not comply with the request from paragraph 1 of this Article, an employee can, within the next 15 days, request the protection of that right before the competent court."

This provision was amended by the Law on Amendments to the Law on Labour (OG FBiH, no. 32/00), extending the time limit for seeking protection of violated rights before the court to one year from the date the employee learns of a violation of his rights.

2. Regulations on civil service

38. The Law on State Administration (consolidated text) of the Republic of Bosnia and Herzegovina was published in the Official Gazette of the Republic of Bosnia and Herzegovina (OG RBiH no. 26/93). In relevant part, it regulated the labour relations of civil servants and their right to access to court as follows:

Article 332

“The head of the administrative organ decides by the issuance of a procedural decision ... on the rights and obligations of the employees deriving from labour relations....”

Article 333

“An employee who considers that his right has been violated by the decision of the head of the administrative organ has the right to object against that decision to the official....”

Article 335

“Against the decision ... issued upon the objection, an employee has the right to protection of his rights before the regular court....”

39. This part of the Law on State Administration regulating labour relations of employees stayed in force until 1998, when the Federation enacted the Law on Labour Relations and Emoluments of Civil Servants of Administrative Bodies in the Federation of Bosnia and Herzegovina (OG FBiH no. 13/98). This new law essentially regulated the right of employees to access to court in the same way.

40. On 1 July 2003 the new Law on Civil Service in the Federation of Bosnia and Herzegovina (OG FBiH no.23/03) entered into force. Article 3 of the Law on Civil Service dictates that “The recruitment and the professional career advancement of a civil servant shall be based upon open competition and professional merit.” Article 4 of the Law on Civil Service lists the following “Principles of the Law”: legality, transparency and publicity, accountability, efficiency and effectiveness, professional impartiality, and political independence. Disciplinary measures against civil servants, including termination, are governed by a set of rules (Articles 55 to 60) aimed at ensuring the objectivity and transparency of disciplinary proceedings.

41. Article 5 of the Law on Civil Service lists categories of public servants who are not covered by the Law, among them “members of the police and the armed forces”.

42. The Law on Civil Service does not explicitly establish what judicial remedies a civil servant can pursue against decisions affecting his employment.

3. The Federation Law on Internal Affairs

43. The Law on Internal Affairs of the Federation of Bosnia and Herzegovina (“1996 Law on Internal Affairs”) regulated the rights of police officers (OG FBiH nos. 1/96 and 19/98). Article 49 of the 1996 Law on Internal Affairs, provided that:

“The Laws ... [and] other regulations ... governing the labour relations, salaries, health and pension insurance of civil servants and employees ... in Federal administration organs, apply also to civil servants and employees of the Ministry [of Interior], unless this law otherwise provides....”

44. On 20 May 2003 a new Law on Internal Affairs of the Federation of Bosnia and Herzegovina (“2003 Law on Internal Affairs”) entered into force (OG FBiH no. 19/03). Article 69 of this Law is identical to Article 49 of the 1996 Law on Internal Affairs.

45. The Law on Internal Affairs 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 Civil Service.

46. Article 70 of the 2003 Law on Internal Affairs provides that a labour relationship with the Ministry of Internal Affairs can only be established on the basis of a public competition (*javni konkurs*). This represents a significant change from the 1996 Law on Internal Affairs, which allowed the establishment of a labour relationship with the Ministry of Internal Affairs without public competition.

47. Article 98 of the Law on Internal Affairs reads:

"When ... performing police duties in civilian clothing, officers shall display IPTF certification...."

4. The Canton Sarajevo Law on Internal Affairs

48. The Canton Sarajevo Law on Internal Affairs (Official Gazette of Sarajevo Canton, 9/96, 13/99, 14/00, 22/00, 15/02, 18/02 and 28/02) provides, in relevant part, as follows:

Article 27

"All regulations issued by the Ministry, as well as all actions done by the Ministry and its officials, must be in accordance with the internationally accepted principles of police duty in a democratic state, which were adopted by the Federation on 26 April 1996 in Bonn-Petersburg.

Article 28

"All the Ministry's regulations, including but not limited to the Rule Book, as well as all actions taken by the Ministry and its officials, must be in accordance with the Commissioner's guidelines for a democratic police force in the Federation of Bosnia and Herzegovina and the remarks related to the Commissioner's guidelines issued by the international police Commissioner in May 1996."

5. The Law on Civil Procedure

49. Article 426 of the Law on Civil Procedure (OG FBiH no. 42/98) as well as Article 420 of the new Law on Civil Procedure (OG FBiH no. 53/03) provide that, in disputes concerning employment, the court shall pay special attention to the need to resolve such disputes as a matter of urgency.

6. Domestic court decisions

50. 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 differently.

51. 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).

52. 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 Deljić, 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. 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. Persons not authorised by IPTF cannot exercise police functions.

V. COMPLAINTS

53. The applicant complains that he did not enjoy a fair hearing on the termination of his working relationship, as guaranteed by Article 6 paragraph 1 of the Convention. He also alleges that his dismissal violates his right to work, as guaranteed under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, and his right to have access, on general terms of equality, to public service in his country, as set out in Article 25(c) of the International Covenant on Civil and Political Rights.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

54. In its observations on the admissibility and merits of the application, the respondent Party proposes that the Chamber declare the application inadmissible *ratione personae*, claiming that the Federation of Bosnia and Herzegovina cannot be held responsible for any action taken by the IPTF in the vetting process of local police officers. Moreover, the respondent Party states that it was under an obligation to implement the IPTF's decision not to grant to the applicant final certification as a police officer, and that its authorities did not have the option to substitute their own assessment of the facts or the law for that of IPTF.

B. The applicant

55. The applicant maintains all his complaints as stated in his application.

C. *Amici curiae*

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

57. 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, 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 could constitute "a failure to cooperate with the IPTF"; 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.

58. *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 MUP was only of a declarative nature because MUP was compelled to follow the IPTF decision on removal of the applicant's authorisation and termination of his employment. The MUP was bound to execute IPTF decisions without further examination into the merits.

59. 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 MUP's 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 Bosnia and Herzegovina in breach of its international obligations.

60. 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.

61. *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.

62. 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, Reports of Judgments and Decisions 1999-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

63. 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. Regarding the Chamber's 3 December 2003 decision on admissibility

64. The Commission recalls that on 3 December 2003 the Human Rights Chamber issued a decision on admissibility in this case, declaring the application admissible in the part related to Article 6 of the Convention and declaring the remainder of the application inadmissible.

B. Article 6 of the Convention

65. Under Article XI of the Agreement, the Commission must examine whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement, particularly, whether there was a violation of Article 6 of the Convention.

66. 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.

67. The applicant complains that he has not enjoyed a fair hearing in relation to 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."

1. Whether the applicant received a fair hearing

68. The Commission must 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 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.

69. 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 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 MUP satisfied the requirements of Article 6, paragraph 1 of the Convention

70. 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 MUP on termination of his employment, the Commission observes that the MUP decision explicitly and exclusively refers to the preceding IPTF decision and to Articles 27 and 28 of the Law on Internal Affairs of Sarajevo Canton, and it is not based on any findings ascertained in domestic disciplinary or criminal proceedings.

71. The Commission also notes that, on 29 October 2002, the IPTF Commissioner merely sent a letter to the applicant informing him that he was not eligible for certification according to Policy no. P-11-2002 (see paragraphs 26-29 above). In this letter, the applicant was informed that, according to the necessary investigation conducted by IPTF, it was established that the applicant was sentenced to three month's probation and that he had given a deceptive statement while filling out an IPTF questionnaire (see paragraph 9 above).

72. The Commission notes that the applicant did not have an opportunity to participate in the proceedings before IPTF or MUP in the manner envisioned by Article 6 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 first instance MUP decision on termination of his employment. These actions were of no benefit to him, however, because on 21 December 2002, the IPTF Commissioner sent him another letter informing him that the IPTF had established that the previous decision on non-certification was well founded and that there was no reason for its withdrawal. The IPTF decision contained no other reasoning as to why the applicant's request for review was ill-founded. The MUP also rejected the applicant's complaint on review, establishing that his objection was ill-founded, relying entirely on the IPTF decision. 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 MUP have not provided the applicant with a public, adversarial, impartial, and independent examination of his rights, as required by Article 6 of the Convention. Thus, neither IPTF nor MUP satisfied the requirements of Article 6, paragraph 1 of the Convention.

b. Whether the applicant had an opportunity to effectively challenge the IPTF and MUP's decisions before the domestic courts

73. The European Court, in the *Umlauft* 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.”

(*Umlauft* judgment, para. 39).

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

75. The Commission notes that the applicant has not initiated any court proceedings with a view to annulling the MUP's decision on terminating his employment as a police officer, and that, therefore, he has not used the remedy provided by domestic law to all employees (i.e. to file an action before the domestic court in order to challenge the decision terminating his employment). The Commission need only examine, however, whether this domestic remedy was sufficient and effective, not only in theory but in practice.

76. The respondent Party states that its courts lack the competence to overturn IPTF decisions, as well as MUP's decision terminating the applicant's employment. Both *amici curiae*, in their briefs, strongly concur that the courts of the respondent Party have no jurisdiction to review IPTF decisions relating to decertification, either directly or indirectly (i.e. by challenging MUP's 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.

77. 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 50-52 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.

78. Turning to the present case, the Commission finds, having regard to the above, that the applicant, even if he had initiated proceedings before the domestic courts, would have had no real opportunity to effectively challenge the decision on non-certification 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

79. The respondent Party argues that it was under an international obligation to implement IPTF's decision not to grant to the applicant final certification as a police officer, and that its authorities did not have the option to substitute their own assessment of the facts or of the law for that of IPTF.

80. Both *amici curiae* also stress the international obligations of Bosnia and Herzegovina pursuant to various international agreements and instruments (see paragraphs 56-62 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, MUP's decision terminating the applicant's employment was only of a declaratory nature.

81. 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.

82. 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 16 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.

83. The Commission further notes that, by signing the Bonn-Petersberg Agreement, the respondent Party agreed that the IPTF would "formulate directives concerning the restructuring of Federation policing structures necessary to ensure compliance with [its] obligations" stemming from the GFAP, in the "process by which individuals will be vetted into the new forces." These 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 25 above). Finally, 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.

84. 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 Nos. P10-2002 and P11-2002 (see paragraphs 26-32 above). These Policies established the procedures and conditions under which the certification process was conducted. 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.

85. 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 17 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 (see paragraph 18 above).

86. 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.

87. 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 33-35 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.

88. 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*. The Human Rights Chamber concluded, in its examination of these issues, that the application met the standards for admissibility. 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.

b. Limitations on the right to a fair hearing

89. 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.

90. 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."

91. 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).

3. Whether limitations on the right to a fair hearing were justified in this case

92. 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.

93. 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.

94. 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".

95. 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.

96. 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.”

97. 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.

98. 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 33 above).

99. In these circumstances, the Commission considers the facts that the parties to the GFAP signed Annex 11, giving broad powers and competencies to IPTF; that IPTF carried out its vetting process pursuant to the procedures provided for in its “Policies”; and that the UN Security Council, by its resolutions, strongly supported the IPTF certification process would all strongly support a declaration that the restructuring of the police forces necessarily required some derogation from the guarantees set forth in Article 6 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.

4. Conclusion as to the merits

100. Having regard to the above, the Commission finds that no responsibility can attach to the Federation 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 non-certification) 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.

101. The Commission therefore concludes that the respondent Party was not in breach of the applicant's right to a fair hearing as guaranteed by the Agreement.

VIII. CONCLUSION

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

1. By 3 votes to 2, that the Federation of Bosnia and Herzegovina has not violated the applicant's right to a fair hearing under Article 6 of the European Convention on Human Rights.

(signed)
J. David YEAGER
Registrar of the Commission



(signed)
Jakob MÖLLER
President of the Commission

ANNEX 1

In accordance with Rule 60 of the Commission's Rules of Procedure, this Annex contains the concurring opinion of Mr. Andrew Grotrian.

CONCURRING OPINION OF MR. ANDREW GROTRIAN

1. I agree with, and voted in favour of, the conclusion reached by the majority of the Commission in this case, to the effect that the Federation of Bosnia and Herzegovina has not violated the applicant's right to a fair hearing under Article 6 of the European Convention on Human Rights.

2. The effect of Annex 11 to the GFAP and the other international agreements and instruments discussed in the decision (see, particularly, paragraphs 79-88 above) was that only persons who were certified as suitable by IPTF could be employed as police officers. The certification process was an essential part of the international system established under the GFAP for the implementation of its provisions. It was a system of international vetting by a United Nations body designed to secure the establishment of a police force compatible with democratic principles. It was not a matter within the jurisdiction of the domestic authorities of the Federation, and those authorities cannot be held responsible under Annex 6 to the GFAP for the manner in which the system was conducted by IPTF. The absence of any hearing by IPTF does not therefore entail any responsibility of the respondent Party under Annex 6. Nor were the parties to Annex 6 entitled, still less under any legal obligation, to confer jurisdiction on their courts to hear and determine appeals against decisions on certification (or de-certification) taken by IPTF. To have done so would have been a breach of their international obligations.

3. On the assumption that Article 6 of the Convention applies to disputes concerning employment in the police service (which, according to the European Court of Human Rights, it does not; see below), it would have provided the applicant the right of access to a court for the determination of any dispute relating to the lawfulness of his dismissal under applicable domestic law. Where the respondent Party was, as here, compelled by a legally binding decision of IPTF to carry out the dismissal, Article 6 would not require or entitle the domestic court to review the IPTF decision. Once the existence of the IPTF decision was established, the court would have been bound to find the dismissal lawful since the domestic authorities were obliged to carry out the dismissal and the applicant had no right to be employed in the police service after the de-certification decision. There is no dispute in this case as to the existence of an IPTF decision, and the fact that the domestic courts would not have had any jurisdiction to review it would not involve any violation of the Agreement.

4. During the proceedings on the merits in this case, the Commission received substantial submissions from *amici curiae* on the question of whether Article 6 of the Convention applies to court proceedings concerning the employment of public servants, and members of the police in particular. In the case of *Pellegrin v. France* (Eur. Ct. HR, judgment of 8 December 1999), the European Court of Human Rights ruled that disputes concerning the employment of public servants whose posts involve "responsibilities in the general interest or participation in the exercise of powers conferred by public law" were outside the scope of Article 6 of the Convention insofar as it relates to the determination of "civil rights". According to the Court, "a manifest example of such activities is provided by the armed forces and the police" (see paragraphs 65-66 of the judgement, quoted more fully in paragraph 58 of the Chamber's decision on admissibility of 3 December 2003).

5. In its decision in the *E.Z.* case (case no. CH/99/3375, *E.Z. v. the Federation of Bosnia and Herzegovina*, decision on admissibility and merits of 5 December 2003), however, the Chamber took the view that it should not follow the *Pellegrin* decision, and it held that Article 6 was

applicable. A similar view was expressed by the majority of the Chamber in the admissibility decision in the present case. Both *amici curiae* have argued cogently that the Chamber's approach in the *E.Z.* case was wrong and that the Commission should follow the *Pellegrin* decision and find Article 6 to be inapplicable.

6. The Commission has not found it necessary to enter this question of applicability in the present decision in view of the conclusion it has reached on the question of the respondent Party's responsibility. I can accept this approach insofar as the present case is concerned. In doing so, however, I do not in any way depart from the view expressed in my dissenting opinion in the *E.Z.* case that the Chamber should have followed the clear case law of the European Court and held that Article 6 of the Convention was inapplicable to such cases. As I indicated in that opinion, it was wrong in principle to give the Convention a different interpretation in Bosnia and Herzegovina from that which it bears elsewhere.

7. My view of the present case is therefore that it can be decided on the basis that there would have been no violation of Article 6 even if it had been applicable. However, I would also express the hope that the Commission will reconsider the question of the applicability of Article 6 of the Convention in cases such as the present one.

(signed)
Andrew Grotrian