



Strasbourg, 3 March 2005

**Opinion no. 326 / 2004**

Restricted  
**CDL(2005)016**  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**  
**ON A POSSIBLE SOLUTION**  
**TO THE ISSUE OF DECERTIFICATION OF POLICE OFFICERS**  
**IN BOSNIA AND HERZEGOVINA**

**on the basis of comments by**

**Mr Pieter van DIJK (Member, the Netherlands)**  
**Mr Jan HELGESEN (Member, Norway)**  
**Mr Giorgio MALINVERNI (Member, Switzerland)**

## *I. Introduction*

*1. By a letter of 8 December 2004, Mr Adnan Terzic, Prime Minister of Bosnia and Herzegovina, requested the assistance of the Commission in finding an adequate solution to the issue of a possible review of some of the decisions taken by UNMBiH until 2002 on decertification of police officers in Bosnia and Herzegovina.*

*2. A working group, composed of Messrs Pieter van Dijk, Jan Helgesen and Giorgio Malinverni, members, and of Mr Ralph Wilde, UK expert, was subsequently set up.*

*3. The present opinion, which was prepared on the basis of the contributions of the members of the working group, was discussed within the sub-commission on international law on ... and subsequently adopted by the Commission at its .. Plenary Session (Venice ...)*

## **II. Background**

4. In the period 1996-2002, the United Nations International Police Task Force (IPTF) of Bosnia and Herzegovina, established under Annex 11 to the Dayton Peace Accords (General Framework Agreement for Peace in Bosnia and Herzegovina – GFAP), proceeded with the reorganisation of the police forces in both the Federation of Bosnia and Herzegovina (pursuant to the Bonn-Petersberg agreement of 1996<sup>1</sup>) and in the Republic Srpska<sup>2</sup> (see in particular the UN Security Council Resolution No. 1088/1996 and the decisions of the Peace Implementation Conference held in London on 4-5 December 1996).

5. The vetting process of police officers in Bosnia and Herzegovina was notably conducted pursuant to IPTF Policies Nos. P10-2002 and P11-2002.

6. The certification criteria set out in Policy P11 were the following:

Positive criteria (all to be complied with):

- Demonstrated ability to perform police powers;
- Proof of citizenship of Bosnia and Herzegovina (original or certified copy of the certificate would 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 would be accepted); and
- Compliance with the property legislation.

---

<sup>1</sup> “We agree to the creation of the permanent Police Standards and Training Commission under the advice and guidance of the Commissioner UN IPTF. Based on recommendations by the Commissioner UN IPTF, which will be predicated on his review of the conduct of those persons provisionally certified, the Police Standards and Training Commission shall issue permanent credentials to police officers and be responsible for future accessions to the police forces and for the continued training function.” Bonn-Petersberg Agreement, “Concrete Steps, Section 8.”

<sup>2</sup> A reform and restructuring agreement in Republika Srpska was signed only in December 1998.

Negative criteria (any of which would prevent certification):

- 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); and
- 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.

7. The provisionally authorised officers<sup>3</sup> who did not meet the requirements as listed under Certification Criteria were not certified by UNMIBH/IPTF to exercise police powers.

8. The certified officers, who by their acts or omissions, would fall within the scope of application of Policy IPTF-P10/2002 para. 2(a) to 2(h), i.e. in the following cases:

- 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;
- 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;
- 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;
- An officer has committed a pattern of minor offences that demonstrate disregard for upholding the law;
- 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;
- An officer has been issued two substantive non-compliance reports as outlined in UNMIBH/IPTF "Performance Assessment Policy" (IPTF-P05/2001);
- An officer has made a material misrepresentation to UNMIBH that fundamentally affects consideration of suitability to exercise police powers; or
- 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.

were decertified. Non-certification and de-certification precluded the local police officer from holding any position within a law enforcement agency in BiH.

---

<sup>3</sup> See UNMIBH/IPTF Policy on Registration, Provisional Authorisation and Certification (IPTF-P02/2000).

9. In May 2002 a review mechanism was introduced: the possibility of applying, within eight days of the Commissioner's decision on decertification, to a panel composed of UNMBiH staff members. The application was to be made on the basis of the reasons for the refusal, but without access to the file and the evidence. Neither the applicant nor a representative were allowed to appear before the panel. The panel would make its recommendation to the Commissioner who would then make the final and binding decision.

10. According to the information provided by the UNMBiH, 16,762 officers were certified, and 598 decertified, of which 150 have challenged the decisions decertifying them before national courts.

11. UNMBiH terminated its mission on 31 December 2002.<sup>4</sup> The continuation was ensured by the European Union with the European Union Police Mission<sup>5</sup> as of 1 January 2003.

### III. Analysis

12. A decision whereby a police officer is decertified, that is to say is prevented from exercising the same profession *for life*, is certainly one which substantially affects that individual's rights under Articles 8 of the European Convention on Human Rights (ECHR) and 1 of Protocol No. 1 to the ECHR. It must therefore be possible for the police officer to challenge this decision before an independent and impartial court in conformity with Article 6 ECHR, or at least before a body competent to effectively review the merits of the decision in accordance with Article 13 ECHR.

13. The decertification decisions should fall under domestic law. However, in the circumstances under consideration, they were taken *by an international organisation* rather than by the competent national bodies of Bosnia and Herzegovina. This is due to the particular constitutional arrangement of Bosnia and Herzegovina. As a result of this, and given that the national authorities (the FBiH) did not have any margin of appreciation in respect of decertification recommendations and were bound to implement them in order to comply with their international obligations<sup>6</sup>, the Bosnian courts, even if competent to review the decertification decisions, have no competence to annul such decisions and order to be taken new ones, as they have no power to ignore or reverse the IPTF recommendations on decertification.<sup>7</sup>

14. The Venice Commission considers that this situation, which amounts to a lack of effective domestic remedies, should be analysed in a similar manner as if the policemen had been *employed by the United Nations* and consequently not subjected to the jurisdiction of domestic courts.

---

<sup>4</sup> See Security Council Resolution 1423(2002).

<sup>5</sup> See Council Joint Action of 11 March 2002 on the European Union Police Mission.

<sup>6</sup> See Article V of Annex 11 to the GFAP.

<sup>7</sup> Human Rights Commission, decision on the merits of 7 May 2004 in the case *Dzaferovic v. the Federation of Bosnia and Herzegovina*.

15. In the opinion of the Human Rights Commission of Bosnia and Herzegovina, the limitation on the relevant police officers' right of access to a domestic court which resulted from the impossibility for them to bring their case before a court competent to examine the merits of their case is compatible with Article 6 ECHR.<sup>8</sup>

16. The Venice Commission recalls that the immunity of international organisations from legal proceedings in courts of member states and other international institutions is generally compatible with public international law. The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems. Therefore, it is with good reason that international organisations and their organs, such as the UN and UNMBiH (and their personnel) are not subjected to legal proceedings in member states and before other international institutions.

17. It is particularly important in the present circumstances that the authority of the United Nations Mission in Bosnia should not be undermined or diminished by allowing IPTF's decisions to be reopened by the national authorities of BiH after the end of the mandate of the same mission.

18. The Commission nevertheless refers to the case-law of the European Court of Human Rights in the field of the immunity of jurisdiction of international organisations.<sup>9</sup> The compatibility of the limitation on the right of access to a court depends on certain factors such as the existence of adequate alternative means for determining the claims. Compatibility in that case rests on the assumption that the latter comply with the ECHR. "Adequate" means providing sufficient guarantees in terms of independence and impartiality and offering adequate procedural guarantees that could be said to fulfil the general requirements of Article 6 ECHR or Article 13 ECHR, as the case may be.<sup>10</sup>

19. If that is not the case, that is to say if the alternative procedure carried out within the international organisation in question is not capable of ensuring compliance with internationally recognised human rights standards, the State in question may not be exempted from its responsibilities under the ECHR.

20. It is so, because compliance with human rights standards is so important that no international mechanism or procedure may be allowed to circumvent it. Consequently, a State may neither engage in international obligations, nor rely on these as a justification for any action or omission, if these obligations result in such circumvention.

---

<sup>8</sup> See §§ 92-101 of the Džaferović decision.

<sup>9</sup> See in particular, in respect of labour disputes, European Court of Human Rights, *Waite and Kennedy v. Germany* judgment (Grand Chamber) of 18 February 1999.

<sup>10</sup> See Application No. 41387/98, *A.L. v. Italy*, Second Section, inadmissibility decision of 11 May 2000, in respect of the NATO Appeals Board.

21. The Venice Commission underlines that the Human Rights Commission has found<sup>11</sup> that the decertification proceedings before IPTF and the Ministry of Internal Affairs (in that particular case, but the pattern was repeated in several other cases) did not satisfy the requirements of Article 6 ECHR, on account of the lack of public, adversarial, impartial and independent examination of the applicants' rights.

22. It recalls however that Bosnia and Herzegovina did not decide to transfer its powers in the field of police reorganisation to the United Nations: the UN powers derived directly from the GFAP. Bosnia is not free to choose to take back these powers: it follows that it cannot be held accountable for shortcomings in the proceedings carried out by the United Nations.

23. It is therefore of the utmost importance that compliance with international human rights standards be ensured *by the United Nations itself*.<sup>12</sup>

24. In the vetting process, IPTF has failed to provide the relevant police officers with a public, adversarial, impartial and independent examination of their rights,<sup>13</sup> while the review mechanism (see § 8) appeared to be abortive for the larger part.

25. The Venice Commission notes that no justification has been adduced for this failure. The crucial nature of this process in ensuring peace in Bosnia does not explain why, for example, the police officers were not heard in person or allowed to make submissions or challenge allegations against them, or why they were not provided with access to their files and the evidence adduced against them. The need to complete the process speedily, while at the same time preparing to wind down the mission, may explain some of the shortcomings in question. It may not, however, justify them.

26. The Venice Commission considers therefore that it is necessary that the United Nations carry out a review process of the decertification decisions that have been challenged before the Bosnian authorities after the end of 2002.

27. It deems this to be even more so on account of the far-reaching consequences of the decertifications: the policemen who were decertified are prevented from exercising this profession for life.

28. Moreover, the Venice Commission deems an adequate solution within the framework of the United Nations to be highly desirable for the sake of the United Nations' credibility and authority. It must be underlined that in Bosnia, the UN-IPTF has carried out tasks which are certainly more similar to those of a State administration than those of an international organisation proper. It is inconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that it could act or have acted as a State authority and be exempted from any independent legal review.

---

<sup>11</sup> Dzaferovic Decision, §§ 70-72.

<sup>12</sup> See also Articles 1 and 25 of the UN Charter, and Article 14 of the International Covenant on Civil and Political Rights.

<sup>13</sup> Dzaferovic Decision, § 72.

29. The Venice Commission recognises the excellent work the United Nations has done in Bosnia; the tasks performed by the IPTF, also in the area of restructuring of the police forces, are part thereof and the difficulties faced in this respect must certainly not be forgotten or underestimated. But the United Nations should be ready to fulfil IPTF's mission "in accordance with internationally recognised standards and with respect for internationally recognised human rights and fundamental freedoms".<sup>14</sup>

30. The Venice Commission recommends, therefore, that the Security Council set up a review body of (three) independent experts, entrusted with reviewing the approximately 150 decertification cases which have been challenged before the domestic courts. The United Nations might find it appropriate to entrust this body also with completing the certification proceedings in respect of the 237 cases in which a final decision was never taken.

31. In this respect, the Commission notes with appreciation that in a letter addressed on 14 October 2004 to the High Representative of Bosnia and Herzegovina, the UN Under-Secretary-General for Peacekeeping Operations, Mr Jean-Marie Guéhenno, indicated the readiness of the United Nations Secretariat to assist "whatever competent agency may be authorised [by the Security Council] to carry out a review of certification cases, by providing such agency with the relevant files on a case-by-case basis". The Commission welcomes this readiness which would indeed be essential in order for the review body to carry out its tasks.

32. In the proposed SC Resolution, the task and relevant powers should be given to the appropriate national authority (notably the Ministry of the Interior of the FBiH) - in case the review body, in the light of any potential new information provided to it by the applicants in the course of adversarial proceedings, should come to the conclusion that the original recommendation should be reversed - to implement a new recommendation by annulling its own previous decision on decertification.

33. It is recommended that the (three) members of the review body be appointed by the Secretary General, in consultation with the High Representative, also in the latter's capacity as European Union Special Representative.

34. The Venice Commission considers that it would be reasonable to expect the review process of the approximately 150 cases which are currently pending before the Bosnian courts (several of which raise similar issues) to be completed within a relatively short period of time (six months). The review body should be assisted by a small secretariat, which should immediately proceed with preparing appropriate rules of procedure. The decisions should be rendered in both English and the applicant's local language.

#### **IV. Conclusions**

35. The Venice Commission considers it highly appropriate that the decertification cases that have been challenged before the Bosnian courts be reviewed by the United Nations.

36. It therefore recommends that a special body be set up by the UN Security Council and mandated to review the decertification cases that have been challenged before the Bosnian authorities.

---

<sup>14</sup> See Article 2, para. 5, of Annex 11 to the GFAP.

37. This review body might be composed of (three) independent experts, appointed by the UN Secretary General, in consultation with the High Representative, also in the latter's capacity as European Union Special Representative.

38. This body would be competent to review the recommendations on decertification previously made by IPTF, on the basis of the information previously gathered by IPTF (with the assistance of the UN Secretariat) and in the course of an adversarial procedure in which the former policeman concerned would be allowed to have access to such a file (with the exception of duly classified information) and provide new information.

39. Should the review body come to the conclusion that the original recommendation needs to be reversed, the competent national authorities would have to implement the new recommendation and annul their previous decision on decertification.

40. The Venice Commission considers that this review body, with the assistance of a small secretariat, could be expected to complete the review process within a short period of time (six months).

41. The Venice Commission remains at the disposal of the Bosnian authorities and of the United Nations, should any further assistance be necessary in this matter.