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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, was subsequently set up.*
- 3. A preliminary discussion was held within the Sub-commission on international law on 10 March 2005.*
- 4. By a letter of 30 March 2005, Mr Jean-Marie Guéhenno, Under-Secretary-General of the Department of Peacekeeping Operations of the United Nations, was invited to inform the Commission of possible comments on the Commission's draft opinion.*
- 5. In a letter of 25 April 2005, Mr Guéhenno submitted his arguments, which are reflected in the pertinent parts of the present opinion.*
- 6. The present opinion, which was prepared on the basis of the contributions of the members of the working group, was adopted by the Commission at its .. Plenary Session (Venice ...)*

II. Background

7. 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 1996¹) and in the Republic Srpska² (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).
8. The vetting process of police officers in Bosnia and Herzegovina was notably conducted pursuant to IPTF Policies Nos. P10-2002 and P11-2002.
9. Policy P11 set out certain certification criteria, some of which (“the positive criteria”), were all to be complied with while others (“the negative criteria”) could each prevent certification.
10. The positive criteria were the following :

¹ “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.”

² A reform and restructuring agreement in Republika Srpska was signed only in December 1998.

- 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.

11. The negative criteria were the following:

- 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.

12. Police Officers were registered by the UN/IPTF and given an ID card and a registration number. They were then provisionally authorized to work as police officials until final certification. After a review of their files, police officers were either certified or denied certification³.

13. Before being certified, police officials who had been registered by the UN were thus able to provisionally work as police officials. The provisional authorization could be removed. The criteria and the procedure applicable to removals of provisional authorization were outlined in Article 2 a) to h) of Policy no. IPTF-10A/2002.

14. Policy No. IPTF-P10/2002 set out a number of cases which would lead to decertification:

- 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

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

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.

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

16. A review of the decisions on both removal of provisional authorization (carried out pursuant to Policy IPTF- P10A/2002) and denial of certification (carried out pursuant to Policy IPTF-P11/2002) could be sought before the Commissioner.

17. The procedure was as follows: within eight days of the Commissioner’s decision on non-certification or decertification, an appeal could be lodged before 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.

18. 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.

19. UNMBiH terminated its mission on 31 December 2002.⁴ The continuation was ensured by the European Union with the European Union Police Mission⁵ as of 1 January 2003.

III. Analysis

20. The decisions to refuse or remove certification of police officers in Bosnia and Herzegovina had the effect of preventing them from exercising that profession *for life* and undoubtedly affected significantly the professional and personal lives of those individuals.

21. In addition, the Venice Commission recalls that the decertification procedure which was conducted in Bosnia and Herzegovina by the UN/IPTF was motivated by a very specific

⁴ See Security Council Resolution 1423(2002).

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

situation. As the United Nations underlines, after the war the Bosnian police forces counted 44,000 officers, many of whom were demobilized soldiers and paramilitary personnel. A great number of these personnel has inadequate qualifications and little or not training in the core values of the rule of law and human rights. Some of them, in addition, were known or suspected to have been involved in the continuing commission of acts of ethnic violence or in organised crime.

22. It follows that a decertification decision carried with it, in the Venice Commission's opinion, certain negative inferences as to the relevant police officer's qualifications or, even, criminal involvement.

23. A decision on decertification, therefore, was likely to have a negative impact on the one hand on the officer's reputation⁶, and on the other hand on the possibility for him or her to find another job in the public administration and possibly in the private sphere⁷. Accordingly, in the Venice Commission's opinion, the relevant public officer's right to respect for their private life, guaranteed by Article 8 of the Convention, was at stake.

24. In the opinion of the Venice Commission, it should therefore have been or be possible, for those who so wished, to have these decisions *reviewed*.

25. The question of whether such review needs to be carried out by an independent and impartial tribunal in pursuance of Article 6 of the European Convention on Human Rights (ECHR)⁸ or, instead, by a body competent to effectively review the merits of the decision in accordance with Article 13 ECHR is a complex one.

26. Given that police officers are public servants, the applicability of Article 6 ECHR to the decertification proceedings is questionable.

27. As the United Nations has recalled, the European Court of Human Rights, in its judgment *Pellegrin v. France*, stated that "the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific

⁶ The right to enjoy a good reputation is a civil right (see, amongst others, Eur. Comm. H.R., No. 11430/85, dec. 16 October 1985, D.R. 50 p. 190; *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65; See the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 50-51, § 66-68, and the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 35-36, § 37); the right to have the justification on attacks on one's reputation determined before a tribunal is a civil right (Eur. Comm. H.R., No. 32218/96, dec. 30 June 1997, D.R. 90, p. 147).

⁷ "[The applicants' ban] from engaging in professional activities in various private-sector spheres on account of their status as "former KGB officers" [although it a]dmittedly has not affected the possibility for the applicants to pursue certain types of professional activities [...] has, however, affected the applicants' ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on the enjoyment of their private life."]
"In view of the wide-ranging scope of the employment restrictions which the applicants have to endure, the Court considers that the possible damage to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Article 8 of the Convention. [...] the Court considers that the impugned ban affected, to a significant degree, the possibility for the applicants to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Article 8." See Eur. Court HR, *Sidabras and Džiautas v. Lithuania* judgment of 27 July 2004, §§ 48-50.

⁸ See, for example, Eur. Comm HR, No. 32916/96, dec. 2 July 1997, D.R. 90, p. 161

activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police.”⁹

28. The European Court thus clearly excludes the applicability of Article 6 ECHR to disputes relating, as the decertification procedures did, to the employment, career and dismissal of police officers.

29. This case-law cannot, as such, prevent Bosnia and Herzegovina from stretching the guarantees of Article 6 ECHR to the decertification proceedings. In fact, Article 53 ECHR on safeguard for existing human rights provides that: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party (...).” This provision means that the European Convention, as interpreted by the European Court, represents a *minimum common standard* of human rights protection in Council of Europe member states. National legislation, as interpreted by the national courts, may well extend this protection beyond the scope determined by the European Court. The latter’s position on a specific matter must not be used to *reduce* the national scope of protection of that same right.

30. The Human Rights Commission of the Constitutional Court of Bosnia and Herzegovina, the highest human rights authority in Bosnia and Herzegovina, has already addressed this matter.

31. In the case of *Džaferović v. FBiH*¹⁰, the Human Rights Commission extended Article 6 ECHR to cover labour disputes initiated by police officers.

32. In the case of *Lugonjić v. Bosnia and Herzegovina*¹¹, the Human Rights Commission considered instead that it was appropriate to follow the *Pellegrin* case-law. It nonetheless assumed *arguendo* that Article 6 ECHR could apply, and expressed the view that the question of the possible responsibility of Bosnia and Herzegovina was “a serious issue that affects the protection of human rights in Bosnia and Herzegovina” and thus that it had to examine whether there had been a violation of the applicant’s right to a fair hearing.

33. The Venice Commission underlines that the Human Rights Commission has found¹² 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. In this respect, the Venice Commission stresses that the Human Rights Commission has found that no breach of Article 6 ECHR had been committed by *the national authorities*. In the Venice Commission’s opinion, instead, the Human Rights Commission suggested that such breach, which had taken place, had indeed been

⁹ *Pellegrin v. France* judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VIII, § 66

¹⁰ Human Rights Commission, decision on the merits of 7 May 2004 in the case *Džaferović v. the Federation of Bosnia and Herzegovina*.

¹¹ Human Rights Commission, decision on admissibility and merits of 10 September 2004 in the case *Lugonjić v. Bosnia and Herzegovina*.

¹² *Džaferović* Decision, §§ 70-72.

committed by the UN/IPTF. The Human Rights Commission, however, does not have any jurisdiction over the UNMBiH, hence could not declare such breach.

34. The Bosnian authorities were not responsible for the impugned decisions. Indeed, while a decision whereby a police officers is prevented from continuing to exercise his or her profession would normally fall under domestic law, and domestic courts would be competent to review it, in the circumstances under consideration, the decertification decisions 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. The national authorities of Bosnia and Herzegovina did not have any margin of appreciation in respect of decertification recommendations issued by UN/IPTF, and were therefore bound to implement them in order to comply with their international obligations¹³.

35. It follows from this finding by the Human Rights Commission that the Bosnian authorities are not responsible for the alleged breaches of Article 6, as they did not have any margin of appreciation in respect of whether or not to endorse the IPTF recommendations as to decertification, that the decertified police officers cannot seek judicial review of these decisions before the Bosnian courts. Bosnian courts, even if formally competent to review the decisions of domestic authorities implementing UN/IPTF decisions on denial of certification, have no competence to annul such decisions and order that new ones should be taken, as they have no power to ignore or reverse the IPTF recommendations on decertification.¹⁴

36. In this respect, the Venice Commission recalls the Statement by the President of the Security Council of 25 June 2004, recalling that “the parties to the Peace Agreement had the responsibility to cooperate fully with, and to instruct their respective responsible officials and authorities to provide their full support to the IPTF during its mandate on all relevant matters” and that “such responsibility included giving full and immediate effect to the decisions issued by the IPTF, including decisions to deny certification”.

37. In the Venice Commission’s opinion, this situation of lack of effective domestic remedies is due to the immunity of jurisdiction of the UN/IPTF : as a consequence, it should be analysed in a similar manner as if the policemen had been *employees of the United Nations* and consequently not subjected to the jurisdiction of domestic courts.

38. 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.¹⁵

39. 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 organizations can perform their tasks without undue and uncoordinated interference by courts

¹³ See Article V of Annex 11 to the GFAP.

¹⁴ Human Rights Commission, decision on the merits of 7 May 2004 in the case Dzaferovic v. the Federation of Bosnia and Herzegovina.

¹⁵ See §§ 92-101 of the Dzaferovic decision.

from individual states and other international institutions with their respective different legal systems. Therefore, it is with good reason that international organizations 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.

40. 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.

41. The Venice 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.¹⁶ 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.¹⁷

42. 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.

43. 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.

44. The Venice Commission recalls that the Human Rights Commission has found¹⁸ that the decertified police officers' rights under Article 6 were breached on account of the lack of a public, adversarial, impartial and independent examination of their rights.

45. The Venice Commission recalls 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.

46. It is therefore of the utmost importance that compliance with international human rights standards be ensured *by the United Nations itself*.¹⁹

¹⁶ 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.

¹⁷ See Application No. 41387/98, *A.L. v. Italy*, Second Section, inadmissibility decision of 11 May 2000, in respect of the NATO Appeals Board.

¹⁸ *Dzaferovic Decision*, §§ 70-72.

¹⁹ See also Articles 1 and 25 of the UN Charter, and Article 14 of the International Covenant on Civil and Political Rights.

47. In the vetting process, IPTF has failed to provide the relevant police officers with a public, adversarial, impartial and independent examination of their rights,²⁰ while the review mechanism (see §§ 8 and following) appeared to be abortive for the larger part.

48. The Venice Commission considers that no convincing justification has been adduced for this failure. The United Nations underlines that the certification of the Bosnian police officers, as organized and administered by the IPTF, formed a core component of the international community's response to the situation then prevailing in Bosnia and Herzegovina, which constituted "a threat to international peace and security". The police apparatus was inadequate to ensure the maintenance of law and order and the security of the Bosnian citizens, and even represented a potential threat to the stability, and integrity, of the State.

49. The Venice Commission is aware of the situation as described by the United Nations, and understands that it was deemed imperative to proceed with the vetting process. Indeed, the Venice Commission recognises the excellent work the United Nations has done in Bosnia; the tasks performed by the IPTF, particularly 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.

50. The Venice Commission, however, is of the opinion that 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.

51. It must be underlined that in this respect, 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 at the same time be exempted from any independent legal review²¹. In the Venice Commission's opinion, transparency and accountability of transitional territorial administration by international organisations are an extremely important element of their credibility and authority. Peace and security cannot but be fostered by transparent and fair proceedings.

52. 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".²²

53. The Venice Commission considers therefore that it is appropriate 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.

²⁰ Dzaferovic Decision, § 72.

²¹ See the Commission's Opinion on Human Rights in Kosovo : possible establishment of review mechanisms, CDL-AD(2004)033.

²² See Article 2, para. 5, of Annex 11 to the GFAP.

54. 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 continuing to exercise this profession *for life*.

55. It is obviously up to the Security Council to decide on the body that most appropriately should review the decertification proceedings that have been subject to legal challenge before the domestic courts of Bosnia and Herzegovina.

56. The Venice Commission, for its part, would recommend 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.

57. 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.

58. In the proposed SC Resolution, the task and relevant powers could be given to the appropriate national authority - in case the review body, in the light of any 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.

59. The (three) members of the review body could be appointed by the Secretary General.

60. In the Venice Commission’ opinion, the review process of the approximately 150 cases which are currently pending before the Bosnian courts (several of which raise similar issues) could be expected to be completed within a relatively short period of time. 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

61. The Venice Commission considers that it is beyond doubt that neither the Bosnian courts nor any other Bosnian authority are competent to review or reverse the decertification decisions.

62. 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.

63. While it is up to the UN Security Council to decide on the body that most appropriately should review the decertification proceedings, the Venice Commission suggests that a special body be set up by the Security Council and mandated to review the decertification cases that have been challenged before the Bosnian authorities.

64. This review body might be composed of (three) independent experts, appointed by the UN Secretary General.

65. 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 additional information.

66. 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.

67. 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.