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Head of Department for Legal Affairs

1 March, 2004
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Mr. David Yaeger
Registrar of the Human Rights Commission
within the Constitutional Court of
Bosnia and Herzegovina

Dear Mr. Yaeger,

Further to earlier correspondence I enclose herewith the comments and preliminary observations made on behalf of the Office of the High Representative with reference to the following cases:

CH/00/6586, *Isanovic* v. *Federation of BiH*
CH/02/10476, *Lugonjic* v. *BiH*
CH/03/12464, *Deljkic* v. *Federation of BiH*
CH/03/12932, *Dzaferovic* v. *Federation of BiH*
CH/03/14491, *Danicic* v. *BiH and the Federation of BiH*
CH/03/14492, *Kobilica* v. *Federation of BiH*
CH/03/14494, *Derakovic* v. *Federation of BiH*
CH/03/14507, *Vehabovic* v. *Federation of BiH,*
CH/03/14508, *E.B.* v. *Federation of BiH,*
CH/03/14957, Rekic v. *BiH*

The Office of the High Representative will look forward to receiving further information about developments in respect to this case.

Yours sincerely,

Edouard d'Aoust

OHR
Office of the High Representative

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AMICUS CURIAE
BRIEF

CH/00/6586, *Isanovic* v. *Federation of BiH*
CH/02/10476, *Lugonjic* v. *BiH*
CH/03/12464, *Deljkic* v. *Federation of BiH*
CH/03/12932, *Dzaferovic* v. *Federation of BiH*
CH/03/14491, *Danicic* v. *BiH and the Federation of BiH*
CH/03/14492, *Kobilica* v. *Federation of BiH*
CH/03/14494, *Derakovic* v. *Federation of BiH*
CH/03/14507, *Vehabovic* v. *Federation of BiH*,
CH/03/14508, *E.B.* v. *Federation of BiH*,
CH/03/14957, *Rekic* v. *BiH*

Preliminary Remarks

1. On 3 December 2003, the Plenary Chamber of the Human Rights Chamber for Bosnia and Herzegovina (hereinafter *Chamber*) rendered a decision in the case of *Dzaferovic* v *Federation of Bosnia and Herzegovina* (3 December 2003, Decision of Admissibility, case no. CH/03/12932) (hereinafter *Dzaferovic case*) whereby it declared admissible the application of a police officer alleging violations of his rights under the European Convention on Human Rights (hereinafter *European Convention*) relating to his dismissal by his employer pursuant to a decision from the United Nations International Police Task Force (hereinafter UN/IPTF) and retained the application for further consideration by the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (hereinafter *Commission*). Following its decision in the *Dzaferovic* case, the Plenary Chamber of the Human Rights Chamber decided on 5 December 2003 to "vacate" the decision on admissibility rendered on 1 April 2003 by the Second Panel of the Human Rights Chamber regarding the case of officer Lugonjic (see *Lugonjic* v *Bosnia and Herzegovina* (5 December 2003, Decision on Request for Review, case no. CH/02/10476) (hereinafter *Lugonjic* case).

2. On 21 January 2004, the Office of the High Representative (hereinafter *OHR*) received from the registrar of the Commission an invitation to act as amicus curiae with respect to ten (10) applications filed by police officers who have been dismissed by their employer on the ground that they had not been certified by the UN/IPTF. The invitation sent by the registrar lists seven (7) questions. The OHR has decided to provide answers to questions no. 1, 4 and 5 and to defer the remaining questions to those organisations invited to act as *amici curiae* who can better answer them due to their mandate or expertise.

3. Considering that the OHR was not invited to act as amicus curiae in the *Dzaferovic* and *Lugonjic* cases and that the Commission has yet to decide on the admissibility of eight (8) of the

applications referred to in its invitation, the OHR has also decided to share its reasoning with the Commission regarding the admissibility of the cases at hand.

Remarks on Admissibility

I. Competence Ratione Materiae

1. Case law of the European Court of Human Rights

4. It is a well established principle stemming from the case law of the European Court of Human Rights (hereinafter *European Court*) that disputes relating to the recruitment, careers and termination of service of civil servants are, as a general rule, outside the scope of Article 6 (1) of the European Convention (see, for example, *Massa* v. *Italy* (1993), 265B Eur. Ct. H.R. (Ser.A) par. 26; see also *Neigel* v. *France* (1997) Eur. Comm. H.R. D.R. par. 43).

5. In a recent decision, (*Pellegrin v. France*, no. 28541/95, ECHR 1999- VIII, 8 December 1999) (hereinafter *Pellegrin*) the European Court recognised that its case law related to the scope of application of Article 6 (1) contained a margin of uncertainty for contracting States:

> The Court considers that, as it stands, the above case-law contains a margin of uncertainty for Contracting States as to the scope of their obligations under Article 6 § 1 in disputes raised by employees in the public sector over their conditions of service (*Pellegrin* case, par 60).

6. The European Court decided in the *Pellegrin* case to clarify the elements of its case law that caused uncertainty with respect to the application of Article 6 (1) to civil servants:

> The Court therefore wishes to put an end to the uncertainty which surrounds application of the guarantees of Article 6 (1) to disputes between States and their servants (*Pellegrin* case, par. 61).

7. The Court went on to indicate clearly that disputes raised by police officers do not fall within the scope of application of Article 6 (1):

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

8. The European Court has on several occasions, since its decision in the *Pellegrin* case, held that it had no competence *ratione materiae* with respect to diputes concerning the dismissal of certain civil servants. The Court considered for example that a dispute relating to the dismissal of an individual from the judiciary did not concern the individual's "civil rights" within the meaning of Article 6 (see *Pitkevich* v *Russia*, 8 February 2001, application no. 47936/99). More recently, it held that disputes concerning officers of the Greek army did not fall under the application of Article 6 (see *Amaxopoulos* v *Greece*, 6 February 2003, application no. 68141/01).

2. Case Law of the Human Rights Chamber

9. The Human Rights Chamber for Bosnia and Herzegovina (hereinafter *Chamber*) has also recently applied the ruling of the European Court in the *Pellegrin* case to exclude certain disputes related to the dismissal of civil servants.

10. In *Halilagic* v *Federation of Bosnia and Herzegovina,* (7 March 2001, Decision on Admissibility, case no. CH /01/6796) the First Panel of the Chamber held that, based on the *Pellegrin* case, it had no jurisdiction *ratione materiae* to examine the part of an individual's application alleging that her rights under Article 6 of the European Convention had been violated due to the fact that she had allegedly not been allowed to participate in a competition for the appointment of Deputies of the Federal Prosecutor in the Federal Prosecutor's Office:

> The Chamber notes that the applicant applied for a position in the public service. The European Court of Human Rights has repeatedly stated that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 paragraph 1 of the Convention" (see, European Court of Human Rights, *Pellegrin v. France*, judgment of 9 December 1999, to be published in Decisions and Reports 1999). The present case concerns the non-appointment of the applicant for the position of the Federal Prosecutor. In cases where the nature of the civil servant's employment is one of exercising discretionary powers, conferred by public law, protecting the public, or safeguarding the interests of the State, the European Court of Human Rights has held that no "civil" right is at issue (see the above mentioned judgment, paragraph 66). The employment sought by the applicant is of such a nature. Consequently, Article 6 does not apply. Therefore, the Chamber has no jurisdiction *ratione materie (sic)* to examine this part of the application. (*Halilagic* case, par. 19).
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> (our emphasis)

11. In *Sukalic* v *Federation of Bosnia and Herzegovina* (5 March 2003, Decision on Admissibility, case no. CH/02/10009) the First Panel of the Chamber held that an individual's application claiming violations of his rights under Article 6 in relation to a dispute stemming from the termination of his employment as Deputy Cantonal Prosecutor fell outside the scope of Article 6 based on the test established in the *Pellegrin* case.

> (...) The Chamber also recalls that in *Pellegrin* (Eur. Court HR, *Pellegrin v. France*, judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VII, paragraphs 64-67) the European Court established a functional criterion, i.e. based on an examination of the duties of a particular applicant. The European Court noted that disputes concerning the employment of civil servants whose duties involve "direct or indirect participation in the exercise of powers conferred by public law and duties assigned to safeguard the general interests of the State or of other public authorities" are excluded from the scope of Article 6(1).
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> The Chamber finds that the applicant's function as deputy public prosecutor involves the "direct" participation in the exercise of powers

> conferred by public law and duties assigned to safeguard the general interests of the State or of other public authorities. It follows that the application in this respect is outside the scope of Article 6 of the Convention and thus incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII (2) (c). The Chamber therefore decides to declare this part of the application inadmissible. (Sukalic case, par. 10-11)
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> (our emphasis)

12. Finally, in a very recent decision, the Second Panel of the Chamber held that it had no competence *ratione materiae* with respect to an application brought by an individual who had complained of violations of his rights under Article 6 in relation to the termination of his employment as a police officer pursuant to a decision of the UN/IPTF (see *Lugonjic* v *Bosnia and Herzegovina*, 1 April 2003, Decision on Admissibility, case no. CH/02/10476) (hereinafter *Lugonjic I*).

> The Chamber notes that the European Court of Human Rights has held that Article 6 is not applicable where an applicant has exercised powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. (European Court of Human Rights, *Pellegrin v. France*, judgment of 8 December 1999). The *Pellegrin* decision makes it clear that police officers fall within this category:
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> (...)
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> Having regard to the above, the Chamber concludes that, because the dispute concerns the applicant's position as a police officer, the application does not concern the determination of the applicant's "civil rights" within the meaning of Article 6 of the Convention. (*Lugonjic* case, par. 19-20).
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> (our emphasis)

13. Based on the aforesaid, we submit that the case law of the European Court and the Chamber establish unequivocally that disputes related to the termination of employment of police officers do not fall within the scope of application of Article 6 of the European Convention.

3. The Dzaferovic case

14. We note that, on 3 December 2003, the Plenary Chamber of the Human Rights Chamber decided by a vote of 7 to 6 that it had competence *ratione materiae* with respect to an application raising issues under Article 6 of the European Convention in relation to the dismissal of a police officer by the Ministry of Interior of the Sarajevo Canton pursuant to a decision issued by the International Police Task Force (see *Dzaferovic* case). We note also that, by reference to its decision in the *Dzaferovic* case, the Plenary Chamber of the Human Rights Chamber decided on 5 December 2003 to "vacate" the decision on admissibility rendered on 1 April 2003 by the Second Panel of the Human Rights Chamber (see *Lugonjic* case).

15. In the *Dzaferovic* case, the Chamber departed from the clear ruling of the European Court in the *Pellegrin* case and from its own case law (see *Dzaferovic* case, par. 59 and 72) based on the following reasons:

i) The rights enshrined in Article 6 ECHR are fundamental rights (*Dzaferovic* case, par. 60);

ii) The fundamental nature of the rights protected by Article 6 entails that any restriction on these rights must be supported by compelling reasons (*Dzaferovic* case, par. 61-64);

iii) The fact that domestic laws governing the applicant's employment as a police officer have at all times provided the right of access to court with regard to decisions affecting his labour relations justifies a broader reading of Article 6 (*Dzaferovic* case, par. 65-66);

iv) The broader wording of article 14 of the International Covenant on Civil and Political Rights (ICCPR) as well as the case law of the UN Human Rights Committee justify a broader interpretation of Article 6 ECHR. (*Dzaferovic* case, par. 69-70).

16. We argue that none of these grounds can reasonably justify a departure from the clear ruling of the European Court in the *Pellegrin* case and its subsequent application by the European Court or from the case law of the Human Rights Chamber following the *Pellegrin* case.

i) The fundamental nature of the rights enshrined in Article 6 ECHR;

17. As a starting point, the Chamber recalled, in the *Dzaferovic* case, the fundamental nature of the rights protected by Article 6. In doing so, it referred to the *Delcourt* v *Belgium* case (*Delcourt v. Belgium* (1970), 11 Eur. Ct. H.R. (Ser. A) par. 25) in which the European Court of Human Rights stated that "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision" (*Dzaferovic* case, at par. 60).

18. We note that the *Delcourt* case was rendered in 1970 and that it did not prevent the European Court to subsequently consider in the *Pellegrin* case that the termination of employment of a police officer did not fall within the scope of application of Article 6 (1). It is consequently difficult to consider that the subsequent ruling of the Court in the *Pellegrin* case would constitute, as the Chamber seems to suggest, a "restrictive interpretation of Article 6 (1)" which does not "correspond to the aim and purpose of that provisions".

19. Moreover, the European Court in the *Pellegrin* case specifically took into account the specific object and purpose of the European Convention and decided to adopt a restrictive interpretation of the exceptions to the safeguards afforded by Article 6 (1):

> To that end, in order to determine the applicability of Article 6 § 1 to public servants, whether established or employed under contract, the Court considers that it should adopt a functional criterion based on the nature of the employee's duties and responsibilities. In so doing, it must adopt a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6 § 1. (*Pellegrin* case, par. 64)
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> (our emphasis)

20. While applying a restrictive interpretation of the exceptions to the application of Article 6 (1) the Court, as indicated above, still considered that the termination of employment of a police officer was not covered by Article 6 (1) of the European Convention (see *Pellegrin* case, par. 66).

21. Based on the aforesaid, it is apparent that the Chamber has based its decision on an erroneous interpretation of the case law of the European Court which seems to isolate a specific element of the said case law without taking into consideration most recent decisions. The case law of the European Court must be read as constituting a coherent whole and one should not favour an interpretation that would suggest that the European Court renders contradictory decisions.

22. We submit therefore that such an argument should not be considered by the Commission as a justified ground to depart from the clear ruling of the Court in the *Pellegrin* case.

ii) The fundamental nature of the rights protected by Article 6 entails that any restriction on these rights must be supported by compelling reasons;

23. As mentioned above, the European Court has already recognised the need to give a restrictive interpretation to exceptions to the application of Article 6 in accordance with the object and purpose of the Convention (Pellegrin case, par. 64) and that such a recognition did not prevent it from considering that police officers were excluded from the application of Article 6.

24. The Chamber further indicates in paragraphs 63 and 64 of its decision in *Dzaferovic* that the principles enshrined in Articles 3 and 4 of the new *Law on the Civil Service of the Federation of BiH* (O.G. FBiH no. 29/03, 30 June 2003) (hereinafter *CSL*) illustrate that the special bond of trust and loyalty required from civil servants does not entail that they can be arbitrarily dismissed (*Dzaferovic* case, par 63) and tries to import this principle within the realm of the *Law on Internal Affairs of the Federation of BiH* (O.G. FBiH, no. 42/02, 46/02, 19/03, 3 September 2002) (hereinafter *LIA*) through Article 69 of the LIA (*Dzaferovic* case, par. 64).

25. The Chamber's argument is based on a wrong interpretation of the law. We note that the CSL explicitly excludes police officers from its application. Article 5 (6) of the CSL provides that:

> This Law shall not apply to the auditors employed at the Supreme Audit Institution of the Federation of Bosnia and Herzegovina, the members of police and armed forces.
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> (our emphasis)

26. Therefore, Article 69 of the LIA cannot be interpreted as changing the effects of Article 5 (6) of the CSL. On the contrary, Article 69 simply ensures that the provisions of the *Law on Employment Relationships and Salaries of the Employees of the Administrative Bodies in the Federation of Bosnia and Herzegovina* (O.G. FBIH no. 13/98, 11 April 1998) will continue to apply until such time as they will be in force.

27. We note also that the FBIH LIA was not applicable to officer Dzaferovic as his case fell under the application of the *Law on Internal Affairs of the Sarajevo Canton* (O.G. Sarajevo Canton no. 15/02, 18/02, 15 June 2002). Moreover, the Chamber's argument is based on the assumption that the existence of provisions in the domestic legislation that would provide some civil servants with certain guarantees which are also included in Article 6 of the European Convention would automatically change the scope of obligations under this Article. As we argue in the point below, we cannot concur with such an argument.

iii) The fact that domestic laws governing the applicant's employment as a police officer have at all times provided the right of access to court with regard to decisions affecting his labour relations justifies a broader reading of Article 6.

28. We argue that one must make a distinction between (1) the obligations of a State under Article 6 of the ECHR and (2) the adoption by a given State of legislation which may provide to certain individuals a protection that goes beyond that which is required by Article 6.

29. The reasoning of the Chamber seems to suggest that these two distinct concepts are inter-dependent. The Chamber's approach is based on the premise that Article 6 should receive a broader application considering that the domestic legislation guarantees the rights protected by Article 6 to certain civil servants. Although one should recognize and welcome the ability of a State to guarantee to certain individuals a protection which goes beyond the level of protection required by the European Convention, one should not interpret such a decision as an irreversible act that would prevent the State to adopt a different regime with respect to other individuals if such a regime is in accordance with the State's obligations under the European Convention.

30. We believe that the adoption of a law that guarantees the rights protected under Article 6 *vis a vis* the termination of employment of certain civil servants does not create an irreversible obligation under Article 6 of the Convention to guarantee these rights to all civil servants. Such reasoning would otherwise imply that a State would automatically be violating its obligations under Article 6 of the European Convention should it decide to amend or repeal such a law. A State cannot unilaterally and irreversibly change the content of its obligations under the Convention through its own legislation. Such a position would recognise the asymmetrical application of the European Convention at the international level. Based on that argument, the obligations of a State under the Convention would be less or more stringent than those of another State depending on their respective legislation.

31. In the case at hand, the Commission must determine if, based on the case law of the European Court and the case law of the Chamber, the guarantees of Article 6 apply to the termination of employment of police officers. As we argued above, it is clear based on such case law, that Article 6 (1) does not apply to police officers. The fact that the State of BiH has adopted legislation which may grant some of the rights protected by Article 6 to certain civil servants means that the relevant authorities must guarantee these rights pursuant to domestic law but does not mean that the State of BiH has an obligation to guarantee those rights pursuant to Article 6 of the European Convention. According to Article II (2) of Annex 6 of the *General Framework Agreement for Peace* (hereinafter *GFAP*) the jurisdiction of the Chamber is limited to the examination of alleged or apparent violations of human rights as provided in the ECHR and its protocols. The Commission should consequently limit itself to the determination of the obligations of BiH under the ECHR.

32. Based on the aforesaid, we submit that the Chamber's contention does not have any support in the case law of the European Court. The Commission should consequently not consider this argument as a ground justifying a departure from the clear ruling in the *Pellegrin* case.

iv) **The broader wording of article 14 of the International Covenant on Civil and Political Rights as well as the case law of the UN Human Rights Committee justify a broader interpretation of Article 6 ECHR. (*Dzaferovic* case, par. 69-70).**

33. We argue that the Chamber exceeded its jurisdiction under Annex 6 of the GFAP in holding that Article 14 of the *International Covenant on Civil and Political Rights* (hereinafter ICCPR) required it to give a broader interpretation of Article 6 of the European Convention. Article II (2) b) of Annex 6 of the GFAP provides that the Chamber shall consider:

> "alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ."
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> (our emphasis)

34. The Chamber has interpreted on several occasions its competence under Article II (2) b) of Annex 6 of the GFAP as being strictly limited to the consideration of the rights referred to in the international instruments listed in the appendix of Annex 6 in conjunction with alleged or apparent discrimination and has consistently held that it had no competence *ratione materiae* with respect to cases where no alleged or apparent discrimination in the enjoyment of these rights could be found.

35. In *Huremovic* v *Federation of Bosnia and Herzegovina (*6 April 2001, Decision on Admissibility, case no. CH/01/6662) the Second Panel of the Chamber interpreted its competence under Article II (2) b) of Annex 6 of the GFAP in relation to allegations of a violation of the right to alternative accommodation. While the Chamber recognised that such a complaint could fall within the scope of Article 11 of the *International Covenant on Economic, Social and Cultural Rights (*hereinafter *ICESCR*), it held that it did not enjoy competence *ratione materiae* with respect to such a complaint as there was no alleged or apparent discrimination in the case at hand:

> A complaint concerning the right to housing could come within the scope of Article 11 of the International Covenant on Economic, Social and Cultural Rights ("the Covenant"). However, under Article II (2)(b) of the Agreement, the Chamber only has jurisdiction to consider alleged violations of rights guaranteed under the Covenant or the other international instruments referred to in the Appendix to the Agreement in case of alleged or apparent discrimination, on a wide range of specified grounds, in relation to the enjoyment of these rights. The applicant has not alleged that there has been any such discrimination. Neither is it apparent from the facts of the case that the applicant has in fact been the victim of discrimination on any of the grounds set out in Article II (2)(b) of the Agreement. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the

> Agreement, within the meaning of Article VIII(2)(c), and must be rejected. (*Huremovic* case, par. 4)
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> (our emphasis)

36. In the *Halilagic* case, the First Panel of the Chamber had to determine whether it had competence with respect to the part of an application alleging a violation of the right to equal access to public service. The Chamber recognised that such an allegation could come within the ambit of Article 25 of the ICCPR but recalled that under Article II (2) b) of Annex 6 of the GFAP, it only had jurisdiction "to consider whether there had been "alleged or apparent discrimination" in relation to the rights guaranteed by the Covenant and other international instruments referred to" (*Halilagic* case, at par. 16). Based on the fact that the case at hand did not allow the Chamber to conclude that the applicant had been the victim of any discrimination, the Chamber held that this part of the application was "manifestly ill founded" (*Halilagic* case, at par. 17).

37. In the *Sukalic* case the First panel of the Chamber followed the precedent established in the *Huremovic* case and held that parts of the application that were alleging a violation of the right to work as well as other rights protected by the ICCPR were incompatible *ratione materiae* with the provisions of Annex 6 as the facts in this case did not indicate that the applicant had been the victim of discrimination on any ground (*Sukalic* case, at par 9 and 13).

38. Moreover, the Chamber's contention with regard to Article 14 ICCPR in the *Dzaferovic* case seems to collide with its interpretation of its jurisdiction under Article II (2) b) of Annex 6 of the GFAP applied in previous parts of the same case. In the *Dzaferovic* case, the Chamber had to determine also whether it had competence with respect to alleged violations of Article 6 (1) ICESCR and Article 25 c) of the ICCPR. It decided to continue to strictly interpret its competence under Article II (2) b) of Annex 6 of the GFAP and *unanimously* declared itself incompetent *ratione materiae* with respect to the allegations of violations of the rights protected by the ICESCR and the ICCPR. The Chamber held that it was *only competent* to examine these rights in conjunction with alleged or apparent discrimination.

> Concerning the applicant's allegation of a violation of his right to work and his right to have access, on general terms of equality, to public service, the Chamber is, according to Article II(2)(b) of the Agreement, only competent to consider these rights in conjunction with alleged or apparent discrimination. The applicant has not alleged that he was discriminated against on any of the grounds set forth in Article II(2)(b) of the Agreement in the enjoyment of these rights. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare this part of the application inadmissible (*Dzaferovic* case, par. 53).
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> (our emphasis)

39. The rights protected by the European Convention have an autonomous meaning. The Chamber's reference to Article 14 of the ICCPR to justify a broader reading of Article 6 does not find any support in the case law of the European Court. We acknowledge that Article 14 of the ICCPR has a broader wording than that of Article 6 of the European Convention and that the UN Human Rights Committee has decided to give a broad interpretation to Article 14 of the ICCPR in the *Casanovas* case (*Casanovas* v *France*, Comm. No. 441/1990, 10 August 1994, at par. 70).

We note however that such an interpretation of France's obligations under the ICCPR did not prevent the European Court to consider subsequently in the *Pellegrin* case that Article 6 had a narrower scope than that of Article 14. We note that France was a party to the above-mentioned two cases. The Chamber's jurisdiction in the case at hand is strictly limited to the determination of the Parties' obligations under Article 6 of the European Convention and shall not be interpreted as allowing the Chamber to do indirectly what it cannot do directly.

40. Based on the aforesaid we submit that the Chamber's exceeded its jurisdiction under Article II (2) b) of Annex 6 of the GFAP by holding that Article 14 of the ICCPR justifies a broader interpretation of Article 6 and that the Commission should not consider this ground as a valid ground to depart from the clear ruling in the *Pellegrin* case.

4. Conclusion as to Competence Ratione Materiae

41. Considering that the *Pellegrin* case clearly established that the termination of employment of police officers was manifestly not falling under the application of Article 6 (1) of the European Convention and that none of the grounds relied upon by the Chamber in the *Dzaferovic* case can reasonably justify a departure from such a clear ruling by the European Court as well as a departure from the consistent case law of the Chamber, the Commission shall declare that it has no competence *ratione materiae* to hear the cases at hand. As highlighted in the dissenting opinion submitted by Ms. Michèle Picard, Mr. Dietrich Rauschning and Mr. Rona Aybay in the *Dzaferovic* case, the Commission shall take into consideration the fact that "among all European states, only in Bosnia and Herzegovina would disciplinary procedures concerning policemen appear to fall under the scope of Article 6 of the Convention" (see *Dzaferovic* case, Dissenting Opinion, at par. 2).

II. Competence Ratione Personae

42. We submit that even if the Commission considers that it has competence *ratione materiae* with respect to the cases at hand, the Commission does not have competence *ratione personae.*

1. Case Law of the Human Rights Chamber

43. The Chamber had the opportunity to determine its competence *ratione personae* in several cases which enjoy similarities with the case at hand. Two main principles have emerged from the case law of the Chamber in relation to cases where the actions complained of were in fact carried out by bodies established pursuant to the GFAP in *BiH.* In *V.J.* v. *Federation of Bosnia and Herzegovina* (4 April 2003, Decision on Admissibility and Merits, case no. CH/01/7728) the Chamber recalled:

> "In applying Articles II (2) and VIII (1) to applications in which the conduct complained of was in fact carried out by bodies established under other Annexes to the General Framework Agreement, the Chamber has consistently held that:
>
> (i) it is competent *ratione personae* only to examine complaints directed against one of the three respondent Parties (see cases nos. CH/00/4027 and CH/00/4074, *Municipal Council of the Municipality of South-West Mostar v. the High Representative*, decision of 9 March 2000, Decisions January-June 2000; and

case no. CH/00/4194, *Radic v. the International Stabilisation Force in Bosnia and Herzegovina (SFOR)*, decision of 7 June 2000, Decisions January-June 2000);

(ii) the respondent Parties cannot be held responsible under the Annex 6 Agreement for having agreed, by putting their signature under other Annexes of the DPA, to the mandate of certain international bodies (SFOR, OSCE, OHR) and for granting those bodies the powers necessary to carry out their mandate." (*V.J.* case, par. 114).

(our emphasis)

44. In the *V.J.* case, the Chamber had to determine *inter alia* whether it had competence *ratione personae* with respect to allegations of a violation of the applicant's rights under Article 6 of the European Convention stemming from a decision rendered by the *Commission for Real Property Claims of Displaced Persons and Refugees* (hereinafter *CRPC*) pursuant to its mandate under Annex 7 of the GFAP and implemented by domestic administrative authorities. The Chamber held that the issues raised under Article 6 of the European Convention were inadmissible partly because they were not compatible *ratione personae* with the Agreement (*V.J.* case, par. 123).

45. In response to arguments indicating that, despite the fact that the *Law on Implementation of CRPC Decisions* had been imposed by the OHR, the Federation of Bosnia and Herzegovina was still responsible for its implementation and that, in the case at hand, it was the Canton Sarajevo Administration for Housing Affairs which issued and enforced eviction orders pursuant to CRPC decisions, the Chamber held:

As to the arguments (nos. (ii) and (iii) above) that the Federation is responsible for having legislation that provides for the implementation of CRPC decisions, and for having applied this legislation in the applicant's case, the Chamber notes that Article XII(7) of Annex 7 prescribes that " Commission decisions shall be final, and any title ....awarded by the Commission shall be recognised as lawful throughout Bosnia and Herzegovina". Accordingly, it is in execution of its obligations under Annex 7 that the Federation enacted legislation that provides for the implementation of CRPC decisions and that does not allow any review of those decisions by the authorities of the Federation. It is as well in execution of the Federation's obligations under Annex 7 that the Canton Sarajevo Administration for Housing Affairs took steps to implement the CRPC decision in favour of S.M.

To sum up, the Chamber finds that the Parties to Annex 7, among them the Federation, agreed that CRPC would, independently, promulgate its own procedures and that there would be no review of the CRPC decisions by the Federation authorities. Therefore, the Chamber finds that the respondent Party cannot be held responsible under the Agreement for the procedures by which CRPC decisions are issued. Also, the respondent Party cannot be held responsible under the Agreement for failing to provide review of CRPC decisions by an independent and impartial tribunal, as such review is excluded by Annex 7. In this respect, the complaint is inadmissible *ratione personae* with the Agreement. (*V.J.* Case, par. 121-122).

(our emphasis)

46. We note that in the *V.J* case, the complaint of the applicant was related to (1) decisions issued by a body created under Annex 7 of the GFAP and (2) implemented by domestic administrative authorities. Furthermore, pursuant to Article IX (1) of Annex 7 of the GFAP, the Federation of BiH had the obligation to appoint 4 members (out of nine members) to the CRPC and that according to Article X (2) of Annex 7 of the GFAP, the salaries and expenses of the Commission and its staff had to be borne equally by the Parties to Annex 7 (i.e. between the State of Bosnia and Herzegovina, the Federation of BiH and the Republika Srpska).

2. The Dzaferovic case

47. The Chamber distinguished the facts in the *Dzaferovic* case from those of its previous cases and held that, unlike previous cases, the domestic authorities in the case at hand were left with their own margin of discretion in the UN/IPTF vetting process and could decide on the case in one way or another (see *Dzaferovic* case, par. 79-85). The Chamber relied upon the following arguments to justify its position:

i) The fact that the UN/IPTF Policy no. P10-2002 obliged the domestic authorities to "*apply appropriate legal provisions*" when dismissing police officials necessarily presupposes that the said domestic authorities could conduct their own assessment of the underlying cases (*Dzaferovic* case, par. 79);

ii) Unlike previous cases examined by the Chamber, the case at hand is characterized by the need for domestic administrative authorities to implement UN/IPTF decisions in order for these to gain legal effect and by the fact that there is no legislation guiding the domestic authorities in issuing decisions to dismiss police officers (*Dzaferovic* case, par. 80);

iii) There is no explicit provision in Annex 11 of the GFAP, the Bonn Petersberg Agreement or other subsequent acts, indicating that IPTF decisions shall be final and binding and that no such decision can be reviewed by domestic authorities (*Dzaferovic* case, par. 82-83);

48. We argue that the domestic authorities had an immediate and irreversible obligation to dismiss a police official following the issuance of a UN/IPTF decision on non-certification and that the domestic authorities had no margin of discretion in deciding whether or not the concerned police officer should be dismissed. None of the arguments put forward by the Chamber in the *Dzaferovic* case can reasonably uphold the fact that domestic authorities enjoyed a margin or discretion *vis a vis* the implementation of the said UN/IPTF decisions.

i) The fact that the UN/IPTF Policy no. P10-2002 obliged the domestic authorities to "*apply appropriate legal provisions*" when dismissing police officials necessarily presupposes that the said domestic authorities could conduct their own assessment of the underlying cases;

49. One should make a distinction between (1) the removals of provisional authorization of police officers undertaken by the UN/IPTF prior to the final certification of police officers and (2) the certification decisions issued by the UN/IPTF as part of the final certification process of police officers.

50. We note that UN/IPTF Policy no. P10-2002 is a policy document related to the *Removal of Provisional Authorization and Disqualification of Law Enforcement Agency Personnel in BiH.* We note also that the applicant in the *Dzaferovic* case was dismissed pursuant to a UN/IPTF non-certification decision and not pursuant to a decision on removal of provisional authorisation. We note further that the policy guidelines followed by the UN/IPTF through its certification process were outlined in the UN/IPTF Policy no. P11-2002 *Certification of Law Enforcement Agencies Personnel.* We argue therefore that the Chamber based itself on the wrong UN/IPTF policy in its assessment of the obligations of the domestic authorities *vis a vis* UN/IPTF decisions on certification.

51. Moreover, we note that Paragraph 2 of UN/IPTF Policy no. P11-2002 provides that

> "(...) Certification is a requirement for new or continued employment in the Republika Srpksa, Federation and Brcko District police forces. (...) Any applicant who fails to successfully complete or meet such requirements is ineligible for selection or certification as a police officer. These persons will not be allowed to exercise police powers, can not carry an IPTF identification card and may not represent him or her as a police officer."
>
> (our emphasis)

52. By unequivocally establishing that a non-certified police officer will (1) not be allowed to exercise police powers and (2) may not represent him/her as a police officer, we believe that the wording of UN/IPTF Policy that was applicable to the case of the applicant in the *Dzaferovic* case is directly incompatible with the Chamber's contention that the UN/IPTF policy necessarily implied that the domestic authorities could conduct their own assessment of such cases.

53. Moreover, we believe that any determination of the domestic authorities' obligations with respect to UN/IPTF decisions should be based on a comprehensive analysis of the policies and procedures applied by the UN/IPTF, including the decisions issued thereunder. Such a determination should not exclusively be premised on the analysis of a particular segment of an internal policy document. Such policy guidelines must be interpreted in conjunction with several other factors including the decisions on non-certification that were issued by the UN/IPTF.

54. In the letters outlining the identity of the officers who were denied certification as well as the basis justifying such denials that were sent to the responsible domestic authorities within the Ministries of Interior, the UN/IPTF Commissioner indicated that, as a consequence of non-certification, officers who were denied certification were "*losing the authorization/right to exercise police powers with immediate effect*". The letter also indicated that within eight days of receipt of the letter, the relevant authority within the concerned Ministry of Interior had to ensure that non-certified police officers would *"turn in uniforms (if any), police issued side arms (if any), and UNMIBH/IPTF identification cards (if any)*". Furthermore, the letter stressed that following the receipt of the notifications, the relevant authority was *" obliged to initiate measures to terminate employment of officers"* and that it could *" use these notifications as a legal basis*" (our emphasis).

55. The letter further indicated that the police officers had a right to submit a request for reconsideration and stressed that "(..) *if these officers submit a request for reconsideration, the obligation to terminate their employment is suspended pending the termination of their request*" and that "*once the decision of not granting certification is final, these officers will be precluded*

from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina" (our emphasis).

56. The letters sent by the UN/IPTF clearly indicates that the domestic authorities had no margin of discretion whatsoever with respect to cases of non-certified police officers and that they had a clear and immediate obligation to terminate their employment. The Chamber's contention in the *Dzaferovic* case that the UN/IPTF policy guideline allowed the domestic authorities to exercise a margin of discretion *vis a vis* such cases does not find any support in the applicable policy as well as the wording of the UN/IPTF letters/decisions sent to the authorities. We submit consequently that the Commission shall not follow the reasoning of the Chamber.

ii) Unlike previous cases examined by the Chamber, the case at hand is characterized by the need for domestic administrative authorities to implement UN/IPTF decisions in order for these to gain legal effect and by the fact that there is no legislation guiding the domestic authorities in issuing decisions to dismiss police officers.

57. We recall that in the *V.J.* case the Chamber has held that the Federation of BiH could not be held responsible for alleged violations of Article 6 of the European Convention related to a decision issued by the CRPC pursuant to its mandate under Annex 7 of the GFAP and implemented by domestic administrative authority. We note also that in the case at hand, the decisions on certification were issued by the UN/IPTF pursuant to its mandate under Annex 11 of the GFAP and under UN Security Council resolutions (see par. 66-67 below) and that such decisions were calling upon the Ministries of Interior to fully implement these decisions and that such a process is almost identical to that of the CRPC that was examined by the Chamber in the *V.J.* case.

58. We note further that, in the *Dzaferovic* case, the Chamber stressed that, in contrast to the factual background of the *V.J* case, there is no legislation guiding the Ministries of Interior in issuing its decisions to dismiss police officers. We note that the Chamber based itself on the absence of such legislation to justify its departure from its clear ruling in the *V.J.* case. (*Dzaferovic* case, par. 80). We do not subscribe to the Chamber's position regarding this matter.

59. The Chamber's reasoning seems to be based on the premise that the absence of legislation guiding domestic authorities in the implementation of their obligations under the GFAP leads to the inevitable conclusion that such authorities enjoy a margin of discretion with respect to such obligations. While it is undisputable that the adoption of domestic legislation ensures that the obligations of domestic authorities under the GFAP will be implemented more efficiently, the absence of such legislation cannot be interpreted as denying the very existence of the said obligations.

60. As indicated in par 64-70 below, the State of BiH has the obligation to fully cooperate with the UN/IPTF both under Article IV (1) of Annex 11 of the GFAP and under several UN Security Council resolutions and to give full effect to such decisions. The nature and the scope of Bosnia and Herzegovina's obligations under UN Security Council resolutions and under the GFAP cannot be unilaterally modified by the adoption of (or by the omission to adopt) legislation determining the manner in which the said obligations shall be implemented. Such reasoning would implicitly endorse the ability of a State to rely on its domestic legal order to avoid its international obligations.

61. Should one apply this argument to the *V.J.* case, one would be forced to conclude that, had the High Representative not imposed a law, in accordance with its powers under Annex 10 of the GFAP, providing for a procedure to implement decisions issued by the CRPC, the domestic authorities would have had necessarily enjoyed a margin of discretion with respect to the said decisions. Such an argument would have the effect of transforming CRPC decisions into mere recommendations. We consider, based on the aforesaid, that the Chamber's reasoning leads to results which are manifestly unreasonable and that the Commission should not rely of such a ground to depart from the clear ruling of the Chamber in the *V.J.* case.

iii) There is no explicit provision in Annex 11 of the GFAP, the Bonn Petersberg Agreement or other subsequent acts indicating that IPTF decisions shall be final and binding and that no such decision can be reviewed by domestic authorities.

62. The argument of the Chamber is based on a restrictive reading of Annex 11 of the GFAP whereby the absence of an explicit provision indicating that decisions issued by the UN/IPTF are not final and binding necessarily entails that domestic authorities enjoy a margin of discretion *vis a vis* such decisions.

63. The obligations of BiH under Annex 11 must be read in conjunction with several other factors. We note that Article 31 of the *Vienna Convention on the Law of Treaties* (hereinafter *Vienna Convention*) prescribes the general rules of interpretation of international treaties and provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> (our emphasis)

64. We note that pursuant to Article IV (1) of Annex 11 of the GFAP, the State of BiH, the Federation of BiH and the Republika Srpska have an obligation to fully cooperate with UN/IPTF:

> The Parties shall cooperate fully with the IPTF and shall so instruct all their law enforcement agencies.
>
> (our emphasis)

65. We note that the UN/IPTF was established by *UN Security Council Resolution 1035* (21 December 1995, S/RES/1035 (1995):

> The Security Council,
> (...)
>
> 2. Decides to establish, for a period of one year from the transfer of authority from the United Nations Protection Force to the multinational implementation force (IFOR), a United Nations civilian police force to be known as the International Police Task Force (IPTF) to be entrusted with the tasks set out in Annex 11 of the Peace Agreement and a United Nations civilian office with the responsibilities set out in the report of the Secretary-General, and to that end endorses the arrangements set out in the report of the Secretary-General;

66. We note that several UN Security Council resolutions adopted under Chapter VII of the Charter of United Nations (hereinafter *UN Charter*) have called upon all parties to the Dayton Peace Agreement to implement all aspects of that Agreement, to comply strictly with their obligations under those Agreements and to fully cooperate with the IPTF on all relevant matters and instruct their respective responsible officials and authorities to do so (See *Security Council Resolution no. 1088* (12 December 1996, S/RES/1088 (1996)) at par. 1 and 30; *Security Council Resolution no. 1103* (31 March 1997, S/RES/1103 (1997)) at par.4; *Security Council Resolution no. 1174* (15 June 1998, S/RES/1174 (1998)) at par 1 and 22; *Security Council Resolution no. 1247* (18 June 1999, S/RES/1247 (1999)) at par. 1 and 22; *Security Council Resolution no. 1305* (21 June 2000, S/RES/1305 (2000)) at par.1-3-22; *Security Council Resolution no. 1357* (21 June 2001, S/RES/1357 (2001)) at par. 1-3-22; *Security Council Resolution no. 1423* (12 July 2002, S/RES/1423 (2002)) at par. 1-3-23 and *Security Council Resolution no. 1491* (11 July 2003, S/RES/1491 (2003)) at par. 1 and 3).

67. We note also that the UN Security Council has *decided* in several of its resolutions adopted under Chapter VII of the UN Charter that the IPTF was entrusted with the tasks set out in Annex 11 of the GFAP including the tasks referred to by various Conclusions of the Peace Implementation Council (hereinafter *PIC*) (see *Security Council Resolution no. 1088* (supra, at par. 27); *Security Council Resolution no. 1103* (supra, in Preamble); *Security Council Resolution no. 1144* (19 December 1997, S/RES/1144 (1997) at par 1; *Security Council Resolution no. 1174* (supra, at par 19); *Security Council Resolution no. 1247* (supra, at par. 19); *Security Council Resolution no. 1305* (supra, at par.19); *Security Council Resolution no. 1357* (supra, at par. 19); *Security Council Resolution no. 1423* (supra, at par 19)).

68. For example, Paragraph 19 of *Security Council Resolution no. 1423* provides that:

> "The Security Council,
>
> (...)
>
> *19. Decides* to extend the mandate of UNMIBH, which includes the IPTF, for an additional period terminating on 31 December 2002, 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; (*UN Security Council Resolution no. 1423*, supra, at par 19).

69. We note also that Section 1 of the *Declaration of the Peace Implementation Council, Madrid, 16 December 1998* provides that:

> "We, the members of the Peace Implementation Council met in Madrid on 15/16 December, where we reviewed progress in implementing the Peace Agreement in Bosnia and Herzegovina. We identified what still needed to be done to make the peace self-sustaining, and agreed on a work programme to achieve this. We approved the following Declaration, and an accompanying detailed operational Annex."
>
> (our emphasis)

70. We note also that Sub Paragraph (7), Paragraph 16, Section II of *Annex: The Peace Implementation Agenda, Madrid 16 December 1998* states that:

> "...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 GFAP and related documents. The Council understands that local police, IPTF and SFOR will regard any person exercising police powers in the restructured Federation and Republika Srpska police forces, but not registered or certified by the IPTF, as a person not authorised to act as a police officer. Such persons may be disarmed and detained by SFOR under the terms of Annex 1A and in accordance with the Bonn Petersberg Agreement. The Council makes clear that decertified officers may be deprived of the right to serve in any public function in BiH"
>
> (our emphasis)

71. We note further that Article 25 of the *Charter of the United Nations* provides that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

72. As indicated above (see par. 51-52), Paragraph 2 of UN/IPTF Policy no. P11-2002 clearly established that an individual who was not certified:

1. Will not be allowed to exercise police powers;
2. Will not be allowed to carry an IPTF identification card;
3. Will not be able to represent himself/herself as a police officer.

73. Moreover, as indicated above (see par. 54-56), the letters sent by the UN/IPTF Commissioner to the Ministries of Interior unequivocally established that:

1. Police officers who were denied certification were losing the authorization/right to exercise police powers with immediate effect;
2. Such police officers had the obligation to turn in their uniforms, their police issued side arms as well as their IPTF identification cards;
3. The relevant authority within the concerned Ministry of Interior was obliged to initiate measures to terminate employment of officers;
4. Once the decision on non-certification was final, non-certified police officers were precluded from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina.

74. The Chamber's contention that the domestic authorities enjoyed a margin of discretion with respect to these decisions constitute a misinterpretation of the powers of the UN/IPTF under Annex 11 of the GFAP and the obligations of the State of BiH. Furthermore, the interpretation given by the Chamber of the obligations stemming from Annex 11 of the GFAP is not in accordance with the general rules of interpretation of treaties prescribed by the Vienna Convention.

75. Moreover, such an interpretation transforms UN/IPTF decisions into mere recommendations and goes directly against BiH's obligations under the UN Charter and the Vienna Convention as it endorses the possibility for BiH authorities to rely upon domestic laws in order to avoid their obligations under the UN Charter and would allow them to completely deprive the certification process of all of its effects.

76. Article 26 and 27 of the *Vienna Convention on the Law of Treaties* provide that:

> "Article 26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
>
> "Article 27. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

3. Conclusion on Competence Ratione Personae

77. Based on the aforesaid, we argue that, according to their obligations under Annex 11 of the GFAP and their obligations under the UN Charter and relevant UN Security Council resolutions as well as the Vienna Convention, all components of the state of BiH have a clear, immediate and irreversible obligation to dismiss police officers who were not certified by the UN/IPTF and that

such decisions could not be reviewed by the local courts. Based on the decision of the Chamber in the *V.J.* case, the Commission should consider that the domestic authorities have no margin of discretion whatsoever with respect to these cases and that it does not have competence *ratione personae* with respect to these applications.

4. Review on Admissibility by the Commission

78. We note that neither the UN, nor the EUPM nor the OHR were invited to act as amicus curiae by the Chamber in its decision on admissibility in the *Dzaferovic* and *Lugonjic* cases. We note also, that under the rules of procedure of the Chamber, a decision on admissibility may be reviewed only after the adoption of the decision on the merits.

Rule 63
Request for review

1. Upon motion of a party to the case the plenary Chamber may decide to review:
- a decision of a Panel declaring an application inadmissible under para. 2 of Article VIII of the Agreement;
- a decision of a Panel to reject or strike out an application or to suspend its consideration under Article VIII para. 3 of the Agreement;
- a decision of a Panel on the merits of an application;
- a decision to declare an application admissible. However, a party may request review of these decisions only after the adoption of the decision on the merits;
- a decision on remedies.
2. Any such request for review shall specify the grounds of the request.
3. Any such request for review shall be submitted:
a) if directed against a decision read out at a public hearing in pursuance of Rule 60, paragraph 2: within one month starting on the day following that on which the Panel's reasoned decision was so read out;
b) in all other cases: within one month starting on the day following that on which the Panel's reasoned decision was delivered to the Parties in writing.

(our emphasis)

79. We note that, under the special circumstances at hand, it is the Commission that is now competent to assess the merits in the *Dzaferovic* and *Lugonjic* cases. We submit that the right to request a review of the decisions on admissibility rendered by the Chamber in the *Dzaferovic* and *Lugonjic* cases is thus still available to the parties under the rules of procedure of the Chamber, as no decision on the merits has yet been rendered.

80. We note that the Commission has recently adopted new rules of procedures. Article 63 of the said rules provide that:

Rule 63
Review of Decisions of the former Chamber

In the event that any pending review proceedings relating to decisions of the former Chamber should fall to be decided by the Commission, the following will apply:

(a) the plenary Commission shall decide whether to accept the request for review and shall decide any case in which a request for review is accepted;

(b) in so deciding the plenary Commission will apply *mutatis mutandis* the provisions of Rules 63-66 of the Rules of Procedure of the former Chamber;

(c) notwithstanding the foregoing, the procedure provided for in Rule 64 of the Rules of Procedure of the former Chamber, for obtaining the recommendation of a Panel on a request for review, shall not apply.

81. We argue that the Commission should interpret its rules of procedure in a manner that would not deprive parties of the possibility to have access to remedies to which they were entitled at the time of the Chamber's decision in the *Dzaferovic* case. We argue moreover that the right to review the admissibility of the Chamber's decisions in the *Dzaferovic* and *Lugonjic* cases is still available under the Chamber's rule of procedure and that the Commission shall consider such a right to review as being a "pending review proceeding" within the meaning of Article 63 of the Commission's rules of procedures. We submit therefore that the Commission should review the Chamber's decisions on admissibility in the *Dzaferovic* and *Lugonjic* cases. The Commission should declare itself not competent to hear both these cases as well as all other cases referred to in its invitation to act as amicus curiae.

Questions of the Commission

(1) What was the obligation of the employer of any of the applicants (e.g., the Sarajevo Canton Ministry of Internal Affairs), upon receipt of information from IPTF that an applicant was de-certified or not put on the list of certified officers?: To dismiss the policeman, exclusively relying on the IPTF decision, or to conduct autonomous disciplinary proceedings against that person? What is the basis in the domestic laws for this obligation?

a) Obligation to dismiss

82. As indicated above, we submit that, according to their obligations under Annex 11 of the GFAP and their obligations under the UN Charter and relevant UN Security Council resolutions as well as the Vienna Convention, all components of the state of BiH have a clear, immediate and irreversible obligation to dismiss police officers who were not certified by the UN/IPTF.

83. We recall that according to Article IV (1) of Annex 11 of the GFAP, the State of BiH, the Federation of BiH and the Republika Srpska have an obligation to fully cooperate with UN/IPTF. We recall that several UN Security Council resolutions have called upon all parties to the Dayton

Peace Agreement to implement all aspects of that Agreement, to comply strictly with their obligations under those Agreements and to fully cooperate with the IPTF on all relevant matters and instruct their respective responsible officials and authorities to do so (See *Security Council Resolution no. 1088* (12 December 1996, S/RES/1088 (1996)) at par. 1 and 30; *Security Council Resolution no. 1103* (31 March 1997, S/RES/1103 (1997)) at par.4; *Security Council Resolution no. 1174* (15 June 1998, S/RES/1174 (1998)) at par 1 and 22; *Security Council Resolution no. 1247* (18 June 1999, S/RES/1247 (1999)) at par. 1 and 22; *Security Council Resolution no. 1305* (21 June 2000, S/RES/1305 (2000)) at par.1-3-22; *Security Council Resolution no. 1357* (21 June 2001, S/RES/1357 (2001)) at par. 1-3-22; *Security Council Resolution no. 1423* (12 July 2002, S/RES/1423 (2002)) at par. 1-3-23 and *Security Council Resolution no. 1491* (11 July 2003, S/RES/1491 (2003)) at par. 1 and 3).

84. We recall also that the UN Security Council has decided in several of its resolutions that the IPTF was entrusted with the tasks set out in Annex 11 of the GFAP including the tasks referred to by various Conclusions of the Peace Implementation Council (hereinafter *PIC*) (see *Security Council Resolution no. 1088* (supra, at par. 27); *Security Council Resolution no. 1103* (supra, in Preamble); *Security Council Resolution no. 1144* (19 December 1997, S/RES/1144 (1997) at par 1; *Security Council Resolution no. 1174* (supra, at par 19); *Security Council Resolution no. 1247* (supra, at par. 19); *Security Council Resolution no. 1305* (supra, at par.19); *Security Council Resolution no. 1357* (supra, at par. 19); *Security Council Resolution no. 1423* (supra, at par 19)).

85. We recall also that Sub Paragraph 7, Paragraph 16, Section II of *Annex: The Peace Implementation Agenda, Madrid 16 December 1998* clearly indicates that the PIC welcomed the determination of the UN/IPTF Commissioner to make robust use of his powers to decertify police officers and that both local police and IPTF would regard any person exercising police powers who was not registered or certified by the IPTF as a person not authorized to act as a police officer.

86. As indicated above, Article 25 of the UN Charter also provides that Bosnia and Herzegovina has an obligation both to *accept* and *carry out* the decisions of the Security Council in accordance with the provisions of the Charter.

87. We recall, that Paragraph 2 of UN/IPTF Policy no. P11-2002 clearly established that an individual who was not certified:

1. Will not be allowed to exercise police powers;
2. Will not be allowed to carry an IPTF identification card;
3. Will not be able to represent himself/herself as a police officer.

88. Furthermore, we recall, that the letters sent by the UN/IPTF Commissioner to the Ministries of Interior unequivocally established that:

1. Police officers who were denied certification were losing the authorization/right to exercise police powers with immediate effect;
2. Such police officers had the obligation to turn in their uniforms, their police issued side arms as well as their IPTF identification cards;
3. The relevant authority within the concerned Ministry of Interior was obliged to initiate measures to terminate employment of officers;
4. Once the decision on non-certification was final, non-certified police officers were precluded from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina.

89. Based on the aforesaid, it is beyond any dispute that the relevant authorities in BiH have a clear obligation to terminate the employment of police officers who were not certified and that such police officers should be precluded from employment in any position within any law enforcement agency in BiH.

b) Obligation to conduct autonomous disciplinary proceedings

90. Based on the above, it follows that any contention suggesting that relevant domestic authorities merely had an obligation to conduct autonomous disciplinary proceedings with respect to non-certified police officers is inherently incompatible with their obligations to terminate their employment. Such a contention would deprive the certification process of all of its effect and would lead to results which are manifestly unreasonable.

91. We note that domestic laws provide for several types of disciplinary sanctions in addition to termination of employment. For example, in the Federation of Bosnia and Herzegovina, Article 88 of *the Law on Internal Affairs of FBiH* refers to *the Law on Employment Relationships and Salaries of Employees of Administrative Bodies in the Federation of Bosnia and Herzegovina* (O.G. FBIH 13/98, 11 April 1998) (hereinafter *Law on Employment*) as the applicable law for the determination of disciplinary responsibility. Articles 76 and 77 of the Law on Employment provide for several types of disciplinary sanctions such as warnings, fines, suspensions and reassignments:

> ***Article 76***
>
> Disciplinary measures – a warning or a public warning – may be imposed for minor violations of official duties and if minor violations occur frequently a fine may be imposed in the amount of up to 10% of a monthly salary paid to an employee in the month when the punishment was imposed.
>
> ***Article 77***
>
> The serious violations of an official duty shall be liable to the following disciplinary measures:
>
> 1) fine in the amount of up to 20% or not more than 30% of the total monthly salary of an employee;
> 2) suspension of promotion to a higher official title or a wage scale or denial of periodical salary increase;
> 3) reassignment of an employee to a different working post;
> 4) removal from position or duty;
> 5) removal from service;
> 6) dismissal and prohibition of re-employment during one year in an administrative body or service as from the day of dismissal.
>
> (...)

92. It is consequently difficult to determine exactly how the Ministry of Interior of the Federation of Bosnia and Herzegovina would in such a case fully comply with its obligation to terminate the employment of a non-certified police officer under Annex 11 of the GFAP and UN Security

Council resolutions by suspending a police officer for promotion or reassigning him/her to a different position.

93. Moreover, we argue that one should make a distinction between a disciplinary process and a selection/vetting process. The UN/IPTF certification program was a selection process that was based upon several criteria, some of which are not recognised or reflected in domestic law. The fact that the non-certification of a police officer necessarily leads to the termination of employment of a police officer who had been provisionally authorized by the UN/IPTF to exercise police powers until final certification cannot be interpreted as transforming such a vetting process into a disciplinary one. The Commission should keep in mind that such police officers were *provisionally* authorized by the UN/IPTF to exercise police powers until their final certification.

94. Paragraphs 8 and 9 of UN/IPTF Policy no. P11-2002 provided for a list of positive and negative criteria to be applied to every police officer registered by the UN/IPTF:

> **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) illegal occupant, or
> 2) 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.

95. It is thus difficult to foresee exactly on what basis would the domestic authorities conduct disciplinary proceedings against a police officer for his/her failure to have demonstrated an ability to perform police powers or for not having completed a UN/IPTF Human Dignity and Transitional Course.

96. Considering that disciplinary proceedings may lead to sanctions which fall short of terminating the employment of a police officer, such an interpretation would transform UN/IPTF decisions into mere recommendations and would, as indicated above, go directly against BiH's obligations under Annex 11 of the GFAP, the UN Charter and Article 27 of the Vienna Convention as it endorses the possibility for BiH authorities to rely upon domestic law in order to avoid their obligations under the UN Charter and would entitle them to completely deprive the certification process of all of its effects.

c) Obligation to dismiss vs other international obligations

97. One may argue that the obligations of Bosnia and Herzegovina to terminate the employment of non-certified police officers under UN Security Council Resolutions collide with other international obligations stemming from other international conventions.

98. We argue that such an argument does not apply to the case at hand. We submit that Bosnia and Herzegovina's obligations under Article 25 of the UN Charter have a special status in the international sphere and have precedence over any other international obligations under any other international agreement. Article 103 of the United Nations Charter provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
>
> (our emphasis)

99. The principle of precedence of the obligations under the UN Charter have been recognised in several ways. Firstly, Article 30 (1) of the Vienna Convention takes into account this principle in regulating the application of successive treaties that are relating to the same subject matter. Secondly, the principle was confirmed by the International Court of Justice in its order on provisional measures in the *Lockerbie* case (see *Lybian Arab Jamahiriya* v. *United Kingdom, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie,* Request for the Indication of Provisional Measures, Order, International Court of Justice, 14 April 1992).

100. In the *Lockerbie* case, the Lybian government requested the International Court of Justice to order provisional measures in order to protect its rights under the *1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.* In this case, two Lybian nationals were accused by the Lord Advocate of Scotland for having placed a bomb aboard a Pan Am airplane which subsequently exploded and crashed. The Lybian government claimed that it was fulfilling its obligations under the 1971 Montreal Convention as it had established jurisdiction over offences charged and that it had taken measures to ensure the presence of the accused in Lybia in order to institute criminal proceedings against them. The United Kingdom argued that the UN Security Council had adopted several resolutions which urged the Lybian government to provide a full and effective response to requests addressed by the United Kingdom

the United States and France to surrender for trial all those charged with the terrorist act and that such resolutions had precedence over any other rights and obligations stemming from the 1971 Montreal Convention pursuant to Articles 25 and 103 of the UN Charter. The International Court of Justice rejected Lybia's request and stressed *inter alia*:

> Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention. (*Lockerbie* case, par.39)
>
> (our emphasis)

101. Based on the aforesaid, we submit that the Commission as well as any other court in BiH cannot interpret the provisions of the European Convention or the provisions of any other international agreement as requiring the reintegration of any police officer who were not certified by the UN/IPTF pursuant to several resolutions adopted by the UN Security Council under Chapter VII of the UN Charter.

(4) What is the scope of jurisdiction of the courts of Bosnia and Herzegovina (or of any of its Cantons or Entities) in an action submitted by a non-certified policeman against the decision (e.g., by the Ministry of Internal Affairs) dismissing him or her from service? Assuming the employer's decision to dismiss the applicant is based exclusively on the IPTF decision, do the courts have jurisdiction to review the IPTF decision-making process and the IPTF decision?

a) Jurisdiction of courts to review decisions issued by the Minister

i) Jurisdiction of the Chamber

102. We submit, as indicated above, that the Commission should consider that it does not enjoy competence *ratione matriea* regarding applications alleging a violation of an applicant's rights under Article 6 of the European Convention related to the termination of his/her employment by a Ministry of Interior pursuant to a UN/IPTF decision on certification. We submit also, as highlighted above, that the Commission does not enjoy competence *ratione personae* with respect to such cases.

103. Even if the Commission considers that it has jurisdiction with regards to these cases, we submit, as indicated above, that the Commission's decision should not have the effect of overturning the substance of the decisions rendered by the UN/IPTF, namely that such a decision should not have the effect, either directly or indirectly, of authorizing a non-certified police officer to exercise police powers and/or allowing him/her to be employed, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina. We submit that such a decision would force the State of BiH to breach its international obligations.

Moreover, the provisions of the European Convention cannot be interpreted as having precedence over obligations stemming from UN Security Council resolutions based on Article 103 of the UN Charter (see par. 97-101 above).

ii) Jurisdiction of local courts

104. If a local court declares itself competent to review a decision issued by the Ministry, we argue that any decision rendered by a local court cannot have the effect of overturning the substance of a decision rendered by the UN/IPTF, namely that such a decision should not have the effect, either directly or indirectly, of authorizing a non-certified police officer to exercise police powers and/or allowing him/her to be employed, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina. We submit that such a decision would place the State of BiH in a situation of breach of its international obligations.

b) Jurisdiction of courts to review IPTF decisions

i) Jurisdiction of the Chamber

105. The Chamber interpreted its jurisdiction on several occasions with respect to bodies exercising their powers pursuant to the GFAP. The Chamber has consistently held that it had no competence *ratione personae* regarding these cases as such bodies were not Parties to Annex 6 of the GFAP.

106. In *Municipal Council of the Municipality South West Mostar* v *The High Representative* (9 March 2000, Decision on Admissibility, cases no, CH/00/4027 and CH 00/4074) the First Panel of the Chamber held that it had no competence *ratione personae* regarding applications alleging violations of the applicants' rights under the European Convention stemming from decisions on removal of office issued by the High Representative pursuant to its powers under Annex 10 of the GFAP (*Municipal Council case*, at par. 9-10).

107. In *Radic* v *SFOR* (7 June 2000, Decision on Admissibility, case no. CH/00/4194) the Second Panel of the Chamber declared inadmissible an application brought against the SFOR and held that such an application was incompatible *ratione personae* with the meaning of Article VIII (2) c) of Annex 6 of the GFAP as the SFOR was not a Party to Annex 6 of the GFAP (*Radic* case, at par. 7-8). This consistent case law was confirmed by the Chamber in the *Dzaferovic* case (Dzaferovic case, at par. 75).

108. We note that the UN/IPTF certification process was carried out pursuant to the UN/IPTF mandate under Annex 11 of the GFAP and several UN Security Council resolutions. We submit that the Commission should, in the present cases, continue to apply the consistent case law of the Chamber on this matter and consider itself not competent to review either the IPTF decision-making process or the IPTF decisions.

ii) Jurisdiction of the local courts

109. We note that the Constitutional Court of Bosnia and Herzegovina held that it had no competence to review provisions of rules issued by the *Provisional Election Commission* established by the *Organisation for Security and Cooperation in Europe* pursuant to Annex 3 of the GFAP (Case *U/40/00*, 2 February 2001, O.G. no. 13/01, 6/12/2001, at par. 17).

110. Based on the aforesaid, we submit that the local courts do not have jurisdiction regarding UN/IPTF decisions or the UN/IPTF decision-making process.

(5) If the answer to question (4) above is that the courts have no competence at all to review the IPTF decision-making process and the IPTF decision, do the applicants have access to a "judicial body that has full jurisdiction" to determine the factual and legal well-foundedness of the decision to dismiss them?

In asking this question the Commission is referring to the case law of the European Court of Human Rights concerning the "right of access to court", as reflected in the following citations:

> **"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. Article 6 para. 1 (art. 6-1) must be read in the light of these principles." (*Golder* case, judgment of 21 February 1975, Series A-18, paragraph 35)**
>
> **"... 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". (*Umlauft* judgment of 23 October 1995, A-328, para. 37, referring to a series of previous decisions of the Court)**
>
> **"(...) the 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).**

111. We submit that the question at hand is not whether police officers have access to a judicial body that has full jurisdiction to determine the factual and legal well-foundedness of the decision to dismiss them *but whether they are entitled* to enjoy such a right under the European Convention. We acknowledge that the rights protected by Article 6 are fundamental in nature and that their importance have been recognised on several occasions by the European Court.

112. The fundamental nature of these rights has also been taken into consideration by the European Court when determining the criteria to be applied with respect to the applicability of Article 6 to a given case. It is based on the importance of the protection afforded by Article 6 that the European Court has decided to adopt a restrictive interpretation of the criteria that would disqualify an individual from the protection afforded under Article 6 (see *Pellegrin* case, par. 64)

113. Despite the recognition given by the Court to the fundamental nature of the rights protected under Article 6 and its corollary principle of restrictive interpretation, the Court clearly indicated its provisions were not applicable to police officers (see *Pellegrin* case at par. 66). The case law of the Court indicates rather clearly that the non-applicability of the protection of Article 6 to

certain groups of individuals does not entail that the rights protected under Article 6 are less important.

114. We submit that the Commission should not at once rigorously base itself on the case law of the European Court while assessing the importance of the protection afforded by Article 6 and, on the other hand, disregard a clear ruling by the Court related to the applicability of such protection. We submit that particular attention shall be given to the fact that the Court openly decided to clarify its position regarding the application of Article 6 in the *Pellegrin* case (see *Pellegrin* case at par. 60-61).

115. Our view is that the case law of the European Court affects both the nature of the protection under Article 6 as well as the scope of applicability of such a protection. The Commission should give equal importance to the findings of the Court that are related either to the applicability of Article 6 or to the nature of the rights protected by Article 6.