DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 6 APRIL 1998

in

CASE No. CH/97/41

Milorad MARČETA

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 3 April 1998, with the following members present:

Michèle PICARD, President
Manfred NOWAK, Vice-President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Jakob MÖLLER
Mehmed DEKOVIĆ
Giovanni GRASSO
Miodrag PAJIĆ
Vitomir POPOVIĆ
Viktor MASENKO-MAVI
Andrew GROTRIAN

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the admissibility and merits of the Application by Milorad MARČETA against the Federation of Bosnia and Herzegovina, registered under Case No. CH/97/41;

Adopted the following decision on the admissibility and merits of the case under Article VIII paragraph 2 and Article XI of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Rules 52, 57 and 58 of its Rules of Procedure.

i. INTRODUCTION

1. The applicant was arrested on 22 October 1996 by authorities of the Federation of Bosnia and Herzegovina and kept in detention until 12 August 1997. He complained that his arrest and detention were illegal. He also made several other complaints arising from related matters. The case was referred to the Chamber by the Human Rights Ombudsperson for Bosnia and Herzegovina (hereinafter "the Ombudsperson") under Article V paragraph 5 and Article VIII paragraph 1 of the Human Rights Agreement (hereinafter "the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina. The case raises issues under Article 5 of the European Convention on Human Rights (hereinafter "the Convention") and deals with allegations of discrimination on the ground of the applicant's Serb origin.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The case was referred to the Chamber by the Ombudsperson on 6 June 1996. It originated in an application lodged with the Ombudsperson on 28 March 1997 by Ms Vesna Rujević, an advocate, on behalf of Mr Milorad MARČETA ("the applicant") against the Federation of Bosnia and Herzegovina ("the Federation"). To the Ombudsperson's letter referring the case to the Chamber were appended documents relating to the application.

3. On 10 July 1997 the Chamber decided, on the basis of the information then available to it, to refuse the applicant's request for a provisional order for his release.

4. By a letter of 9 September 1997 the Registrar conveyed to the Government of the Federation ("the respondent Party") the invitation of the Chamber to submit observations in writing as to the admissibility and merits of the application no later than 2 October 1997. No response was received from the respondent Party.

5. On 5 November 1997 the Chamber decided that a single hearing should be held in the present case and in the cases of Čegar v. the Federation (no. CH/96/21) and Hermas v. the Federation (no. CH/97/45).

6. A hearing on the admissibility and merits of the application was held in Sarajevo on 3 December 1997. There appeared before the Chamber:

Mr Milorad MARČETA, applicant;
Ms Vesna RUJEVIĆ, lawyer practising in Banja Luka,
Counsel for the applicant;

Mr Džemaludin MUTAPČIĆ, Agent of the Federation,
representing the respondent Party.

The Chamber heard addresses by Ms Rujević and Mr Mutapčić.

The Agent of the respondent Party left the hearing immediately after delivering his address, explaining that due to other professional commitments he was unable to remain. In response to an enquiry from the President, the Agent indicated that he would like the opportunity to comment in writing on a claim for compensation from the applicant. After the departure of the Agent the Chamber heard answers to questions put individually by its members to the applicant and his representative. The Chamber notes with serious concern that it was deprived of the opportunity to put questions to the Agent and to hear the respondent Party's response to its questions.

7. By a letter of 19 December 1997 the Agent of the respondent Party submitted comments on the applicant's compensation claim.

8. The applicant submitted additional compensation claims after the Chamber's hearing, which were received at the Chamber's Registry on 26 January 1998.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the Case

9. The Chamber's establishment of the facts is based on documents in its possession and on the statements made by the applicant and his counsel at the Chamber's hearing. The Agent of the respondent Party has not disputed any of the applicant's allegations.

10. The applicant is of Serb descent and resident in Prokuplje in the Federal Republic of Yugoslavia. He was born on 1 January 1945.

It appears that the applicant and his family used to live in Sanski Most, which is now in the Federation, but left because of the hostilities in the recent war.

The applicant is in poor health as a result of an accident which happened in 1974.

11. On 22 October 1996 the applicant returned to Sanski Most to visit his former home and the local cemetery. He was recognised as a Bosnian Serb by persons who had known him before he had left that town, including at least one person who had lost a son allegedly killed by the Bosnian Serb side. The applicant's presence was reported to the authorities and he was arrested.

By a procedural decision dated the same day the Chief of the Sanski Most police station ordered the applicant to be detained for a maximum of three days, effective from 22 October 1996 at 16.20, on suspicion of an unspecified criminal act.

12. At the time of his arrest the applicant was paraded for approximately forty minutes before inhabitants of Sanski Most, who beat him, threatened him and called him a "četnik". The police did nothing to protect him.

13. Representatives of the United Nations High Commissioner for Refugees (UNHCR) learned that the applicant had been arrested and was being detained. They informed the Ombudsperson and the applicant's family. The applicant's family engaged a lawyer. From then on the applicant was legally assisted.

14. On 25 October 1996 the applicant was brought before the investigative judge of the Higher Court in Bihać. He was charged with war crimes (Article 142 § 1 of the Criminal Law of the Former Socialist Federative Republic of Yugoslavia, see paragraph 35 below) and ordered to be kept in pre-trial detention for one month, effective as from the moment of the applicant's arrest.

15. On 26 October 1996 the applicant, through his lawyer, appealed to the Criminal Board of the Higher Court in Bihać against the decision of the investigating judge on the ground that it stated the wrong time of arrest. Although it appeared from the decision of the Chief of the Sanski Most police station that the applicant had been arrested at 16.20 on 22 October, the decision of the investigative judge gave the time as 16.00 on 25 October 1996. The applicant asked the Criminal Board to correct the decision of the investigative judge accordingly.

16. On 27 October 1996, the applicant, through his lawyer, made a request to the Higher Court in Bihać for release on the ground that the Senior Public Prosecutor had failed to submit a request for a criminal investigation within 48 hours of being informed of the order for the applicant's detention (Article 193 § 4 of the Law on Criminal Proceedings). The application is dated "Banja Luka, 27.10.1996 at 18.00 hours".

17. The following day, 28 October 1996, the Higher Court ordered an investigation on the ground that the applicant was suspected of having been in command of a unit of the army of the Republika Srpska which had committed crimes of murder, torture, inhuman treatment and looting against the

civilian population and had imprisoned persons in concentration camps. The decision states that it was made at the request of the Senior Public Prosecutor's office.

18. The Criminal Board accepted the applicant's appeal referred to in paragraph 15 above on 29 October 1996. It found it established, on the basis of documents contained in the case file, that the applicant had been arrested on 22 October at 16.20.

19. On 30 October 1996 the applicant, through his lawyer, asked the Higher Court to hear four witnesses, whose names were provided.

20. On 6 November 1996 the applicant's lawyer submitted to the Bihać Higher Court a document containing the findings and opinion of the Institute for the Assessment of Working Ability in Sarajevo, Ilidža office, dated 28 January 1986, declaring the applicant to be 50% disabled. She also submitted a certificate of the Ministry of Defence, Sanski Most office, dated 4 November 1996 confirming that the applicant had not been a member of the armed forces except for his period of compulsory military service from 29 March 1964 until 10 September 1965.

21. On 14 November 1996 an article appeared in a newspaper under the heading "Četnik Mića, end of story", which contained a photograph of the applicant and gave his name. In this article it was alleged that the applicant had committed serious violations of international humanitarian law.

22. On 14 November 1996 the applicant, through his lawyer, submitted a request to the investigative judge of the Higher Court asking the latter to seek the opinion of the prosecuting authorities as to his release from detention. He argued that it was clear from the documents referred to in paragraph 20 above that he had not been involved in the crimes with which he had been charged.

23. On 21 November 1996 the Senior Public Prosecutor submitted an indictment against the applicant to the Higher Court. It charged the applicant with war crimes under Article 142 paragraph 1 of the Criminal Law of the Former Socialist Federative Republic of Yugoslavia (see paragraph 35 below).

24. On 22 November 1996 the Higher Court gave a decision ordering the continuation of the applicant's pre-trial detention. The decision referred to the indictment.

25. The applicant's lawyer received a copy of the indictment by fax on 26 November 1996. The following day she lodged an objection to it on the grounds that there was no *prima facie* evidence of the applicant's guilt and that no prior approval of the prosecution had been given by the International Criminal Tribunal for the Former Yugoslavia, as required by the Rome Agreement of 18 February 1996 (see paragraph 40 below).

26. On 11 December 1996 the Higher Court dismissed the objection. It found that there was sufficient evidence to support the indictment and noted that proceedings had been taken to obtain the required approval of the International Criminal Tribunal for the Former Yugoslavia.

27. By decisions of the Higher Court dated 20 January and 19 March 1997 the applicant's detention was prolonged for a period of two months each time.

28. On 16 April 1997 the applicant, through his lawyer, repeated his request of 30 October 1996 for witnesses to be heard and gave their addresses. In addition to the four named in the request of 30 October 1996 he named four others whose addresses were unknown.

29. On 21 July 1997 the Higher Court gave a decision prolonging the applicant's detention by a further two months.

30. On 8 August 1997, Mr Graham T. Blewitt, Deputy Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, wrote to Judge Vasvija Vidović, Liaison Officer at the Embassy of Bosnia and Herzegovina in The Hague about the case. The letter stated *inter alia* that the evidence was insufficient by international standards to provide reasonable grounds for believing that the

applicant had committed a serious violation of international humanitarian law. A copy of this letter was sent to the Office of the High Representative.

31. On 11 August 1997, Ambassador Gerd Wagner, Senior Deputy High Representative, wrote to the Prime Minister of the Federation, Mr Edhem Bičakčić. He stated in strong terms that a serious violation of human rights and breach of the Rome Agreement had occurred and called for the release of the applicant. He further stated in his letter that he was referring the case to the Ombudsperson since such a gross human rights abuse could not be remedied simply by Mr Marčeta's release.

32. The Cantonal Court in Bihać was informed on 12 August 1997 of the decision of the Prosecutor of the International Tribunal for the Former Yugoslavia. The case file was thereupon transferred to the Cantonal Prosecutor's Office, which stated the same day that there were no more reasons to detain the applicant and that his detention should be terminated.

33. By a separate decision of the same day the Cantonal Court ordered the proceedings against the applicant terminated because the prosecutor's office had withdrawn the indictment.

34. The Cantonal Court ordered the applicant's release on 12 August 1997. The applicant was released the same day.

B. Relevant Legislation

(a) The Criminal Law of the FSFRY

35. Article 142 paragraph 1 of the Criminal Law of the Former Socialist Federative Republic of Yugoslavia, adopted by the then Republic of Bosnia and Herzegovina ("Official Gazette SFRJ" no. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90; "Official Gazette RBiH" no. 2/92, 8/92, 10/92, 16/92 and 13/94), reads as follows:

> "A person who, in violation of the rules of International Law during a period of war, armed conflict or occupation, has ordered that civilians be subjected to killing, torture, inhuman actions, biological experiments, major suffering, violations of their bodily integrity or health; displacement or moving to other places, change of their nationality and forced conversion to another religion; forcible prostitution or rape; measures of fear and terror, being taken hostage, collective punishment, being taken into concentration camps, illegal detention, being deprived of the right to a fair and impartial trial; forcibly joining the enemy armed forces or intelligence service or administration; forced labour, starvation, confiscation of property, looting; a person who ordered that the following be done: illegal and unlawful extirpation or usurpation, not justified by military necessity, of a great amount of property, taking an illegal and disproportionate amount of contribution and requisition, reduction of the value of the domestic currency or illegal printing of money; or who carried out any of the above-mentioned actions, shall be punished by at least five years of imprisonment or by death penalty."

36. The provisions on arrest, detention and related issues are provided in the Law on Criminal Procedure, the Law on Application of the Law on Criminal Procedure and the Federation of Bosnia and Herzegovina Law on Internal Affairs.

(b) The Law on Criminal Procedure of the FSFRY

37. Relevant Articles of the Law on Criminal Procedure (Consolidated text) ("Official Gazette SFRJ", no. 26/86, 74/87, 57/89, 3/90, "Official Gazette RBiH", no. 2/92, 9/92, 16/92 and 13/94), read as follows:
Article 157

> "(1) An investigation shall be instituted against a particular individual if there is a ground for suspicion that he has committed a crime."

Article 158

"(1) The investigation shall be conducted at the request of the public prosecutor.

(2) The petition to conduct the investigation shall be submitted to the investigative judge of the competent court.

(3) The petition must indicate the following: the person against whom the investigation is to be conducted, a description of the act which has the legal attributes of a crime, the legal name of the crime, the circumstances justifying suspicion and the evidence that exists.

(4) The petition to conduct the investigation may include a proposal that certain circumstances be investigated, that certain actions be taken, and that certain persons be examined with respect to certain points, and it might also be recommended that the person against whom the investigation is being petitioned be taken into custody.

(5) The public prosecutor shall deliver to the investigative judge the criminal charge and all papers and records concerning actions which have been taken. The public prosecutor shall at same time deliver to the investigative judge physical objects which may serve as evidence or shall indicate where they are located."

Article 159

"(1) When the investigative judge receives the petition for conduct of the investigation, he shall examine the records, and if he concurs in the petition, he shall order that the investigation be conducted; the decision to that effect should contain the data referred to in Article 158, paragraph 3 of this law. The decision shall be delivered to the public prosecutor and to the accused.

(2) Before making the decision the investigative judge shall examine the person against whom the conduct of the investigation is requested, unless there is a risk of delay.

(3) Before deciding on the public prosecutor's petition the investigative judge may summon the public prosecutor and the person against whom conduct of the investigation has been requested to come before the court on a specified date, if this is necessary in order to clarify circumstances which may be important in deciding on the petition, or if the investigative judge feels that an oral hearing would be advisable for other reasons. On that occasion the principals may present their motions orally, and the public prosecutor may amend or supplement his petition for conduct of an investigation and he may also propose that proceedings be conducted on the basis of an indictment (Article 160).

(4) Provisions on the summoning and examining of an accused shall be applied to the summoning and examining of the person against whom the conduct of an investigation has been requested. A person summoned under paragraph 3 of this article shall be instructed by the investigative judge in conformity with Article 218 paragraph 2 of this law.

(5) An appeal is allowed against the decision of an investigative judge to conduct an investigation. If the decision was communicated orally, the appeal may be filed for the record at that time."

Article 190

"(1) Custody may be ordered only under the conditions envisaged in this law.
(2) The duration of custody must be limited to the shortest necessary time. It is the duty of all bodies and agencies participating in criminal proceedings and of agencies providing legal aid to proceed with particular urgency if the accused is in custody.

(3) Throughout the entire course of the proceedings custody shall be terminated as soon as the grounds on which it was ordered cease to obtain."

Article 191

"(1) Custody shall always be ordered against a person if there is a reasonable suspicion that he has committed a crime for which the law prescribes the death penalty. Custody is mandatory if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced.

(4) A person committing a criminal offence that is automatically prosecuted can be deprived of his liberty by any person. The person deprived of his liberty must immediately be delivered to the investigative judge or to the Ministry of Internal Affairs authority, and if this is not possible, one of the latter must immediately be informed. The Ministry of Internal Affairs authority shall proceed according to Article 195 of this law."

Article 192

"(1) Custody shall be ordered by the investigative judge of the competent court.

(2) Custody shall be ordered in a written decision containing the following: the first and the last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instruction as to the right of appeal, a brief substantiation in which the basis for ordering custody is specifically argued, the official seal, and the signature of the judge ordering custody.

(3) The decision on custody shall be presented to the person to whom it pertains at the moment when he is arrested, and no later than 24 hours from the moment he is deprived of liberty. The time of his detainment and the time of presentation of the warrant must be indicated in the record.

(4) An individual who has been taken into custody may appeal the decision on custody to the panel of judges (Article 23, paragraph 6) within 24 hours from the time when the warrant was presented. If the person taken into custody is examined for the first time after that period has expired, he may file an appeal at the time of his examination. The appeal, a copy of the transcript of the examination, if the person taken into custody has been examined, and the decision on custody shall be immediately delivered to the panel of judges. The appeal shall not stay execution of the warrant.

(5) If the investigative judge does not concur in the public prosecutor's recommendation that custody be ordered, he shall seek a decision on the issue from the panel of judges (Article 23, paragraph 6). A person taken into custody may file an appeal against the decision of the panel of judges which ordered custody, but that appeal shall not stay execution of the order. The provisions of paragraphs 3 and 4 of this Article shall apply in connection with presentation of the warrant and the filing of the appeal.

(6) In the cases referred to in paragraphs 4 and 5 of this Article the panel of judges ruling on an appeal must render a decision within 48 hours."

Article 193

"(1) The investigative judge must immediately inform a person who has been detained and brought before him that he may engage defence counsel, who may attend his examination, and, if necessary, he shall help him to find defence counsel. If within 24 hours of the time of this communication a person taken into custody does not provide the presence of defence counsel, the investigative judge must immediately examine that person.

(2) If a person who has been detained declares that he will not engage defence counsel, the examining magistrate has a duty to examine him within 48 hours.

(3) If in the case of obligatory defence (Article 70, paragraph 1) a person taken into custody does not engage defence counsel within 24 hours from the date when he is instructed concerning that right or if he declares that he will not engage defence counsel, counsel shall be automatically appointed for his defence.

(4) Immediately after the examination the investigative judge shall decide whether to release the individual who has been taken into custody. If he feels that the person arrested should be detained, the investigative judge shall immediately inform the public prosecutor to that effect unless the latter has already submitted a petition for the conduct of an investigation. If within 48 hours from the time of being informed about custody the public prosecutor does not file a petition for the conduct of an investigation, the investigative judge shall release the person who has been taken into custody."

Article 195

"(1) Authorised officials of the Ministry of Internal Affairs authority may detain a person if any of the reasons envisaged in Article 191 of this law obtain, but they must bring that person without delay before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, if the seat of that court can be reached more quickly. When the authorised official of the law enforcement agency brings the person before the investigative judge, the official shall inform him of the reasons at the time of the person's apprehension.

(2) If impediments which could not be overcome made it impossible to bring a person who has been apprehended before the investigative judge within 24 hours, the officer must give a specific justification for this delay. The delay must also be justified when an individual is being brought in at the request of the investigative judge.

(3) If, because of the delay in bringing the accused before the investigative judge, the latter is unable to make the decision on custody within the period referred to in Article 192, paragraph 3, of this law, he is obliged to render a decision on custody as soon as the person who has been apprehended is brought before him."

Article 196

"(1) In exceptional circumstances custody can be ordered by the Ministry of Internal Affairs authority before an investigation is carried out, if it is necessary for establishing an identity, checking an alibi or for other reasons it is necessary to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 paragraph 1 and paragraph 2 points 1 and 3 of this law exist, although in cases prescribed by Article 191 paragraph 2 point 2 this can be done only if there is a warranted fear that the person at issue will destroy clues to the crime.

(3) Custody ordered by the Ministry of Internal Affairs authority may last up to three days, from the moment of apprehension. The provisions of Article 192 paragraphs 2 and 3 of this law shall apply to custody. A detained person may appeal against a decision on custody before the panel of judges of the competent court within 24 hours from the moment of receipt. The panel is obliged to render a decision on appeal within 48 hours from the moment of receipt of appeal. The appeal has no suspensive effect. The Ministry of Internal Affairs authority shall provide a detainee with legal aid for the lodging of his appeal.

(5) If, after the expiry of the three days time-limit, the detainee is not released, the Ministry of Internal Affairs authority shall act in accordance with Article 195 of this law, and the investigative judge before whom the detainee is brought shall act in accordance with Article 193 of this law."

Article 197

"(1) On the basis of the investigative judge's decision the accused may not be held in custody more than 1 month from the date of his apprehension. At the end of that period the accused may be kept in custody only on the basis of a decision to extend custody.

(2) Custody may be extended for a maximum period of 2 months under a decision of the panel of judges (Article 23, paragraph 6). An appeal is permitted against the panel's decision, but the appeal does not stay the execution of the decision. If proceedings are conducted for a crime carrying a prison sentence of more than 5 years or a more severe penalty, a panel of the Supreme Court of the Republic may for important reasons extend custody by not more than another 3 months. The decision to extend custody shall be made on the agreed recommendation of the investigative judge or public prosecutor.

(3) If a bill of indictment is not brought before the expiration of the periods referred to in paragraph 2 of this Article, the accused shall be released."

Article 198

"In the course of the preliminary examination the investigative judge may terminate custody on agreement with the public prosecutor when proceedings are being conducted on his petition, unless custody is terminated because the period of its duration has expired. If the investigative judge and public prosecutor do not reach agreement on this point the investigative judge shall ask the panel of judges to decide the issue, which it must do within 48 hours."

Article 205

"(2) The President of the Court or a judge appointed by him is under obligation to visit detainees at least once a week and to obtain information, if he finds it necessary without presence of supervisors and guards, as to how well they are supplied and what is the situation like in respect to their needs, and how they are treated. The President, or a judge appointed by him is obliged to take all necessary steps to remedy irregularities observed by him while visiting the prison. The appointed judge may not be an investigative judge."

38. According to the statement of the Agent of the respondent Party at the Chamber's hearing, Article 542, paragraph 2 of the Law on Criminal Procedure now provides for compensation of damage which is the result of unjustified deprivation of liberty. A person wishing to claim such compensation may address a request to the competent Ministry of Justice of the Canton concerned in order to reach an agreement on the existence of such damage and on the form and amount of compensation. However, provision is made only for compensation of pecuniary damage.

39. Article 13 of the Law on the Application of the Law on Criminal Procedure ("Official Gazette RBiH", no. 6/92, 9/92, 13/94 and 33/95) provided, *inter alia*:

"1) Provisions of the Law on Criminal Procedure in regard to … procedures for the compensation of damage, rehabilitation and procedures for the achievement of other rights of persons unjustly convicted and unjustly deprived of liberty, shall not apply."

The Law on the Application of the Law on Criminal Procedure was in force from 2 June 1992 until 23 December 1996, i. e. from the day of its publication in the "Official Gazette RB&H" until the cessation of the imminent threat of war. Since the day it was repealed, the provisions of Articles 541 to 549 of the Law on Criminal Procedure, relating to the procedure for compensation for damage, rehabilitation and realisation of other rights of persons who had been unjustly sentenced and whose detention was ill-founded, have been fully applicable once more.

(c) The Rome Agreement of 18 February 1996, Agreed Measures

40. On 18 February 1996, the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, meeting in Rome, agreed on certain measures to strengthen and advance the peace process. The second paragraph of item 5, entitled "Cooperation on War Crimes and Respect for Human Rights", reads as follows:

> "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

The expressions "International Tribunal" and "Tribunal" refer to the International Criminal Tribunal for the Former Yugoslavia, which has its seat in The Hague. The above-quoted provision is normally referred to as the "Rules of the Road".

41. At the hearing before the Chamber the Agent of the respondent Party stated, in relation to the legal status of the Rome Agreement, as follows (in translation):

> "Legally the Rome Agreement, the Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law".

IV. FINAL SUBMISSIONS OF THE PARTIES

42. The applicant's counsel, speaking at the Chamber's hearing, submitted that the applicant had been the victim of various human rights violations, including violations of the right to personal liberty and to a fair trial, freedom of movement and protection against discrimination. She asked the Chamber to award the applicant compensation as claimed.

43. The respondent Party accepted that the applicant had been unlawfully detained but submitted firstly that the application was premature in that the possibility of claiming compensation under the ordinary law was open to the applicant and, secondly, that the compensation claimed by the applicant was in any event excessive.

V. OPINION OF THE CHAMBER

A. Admissibility

44. The applicant made various complaints relating to his detention and restrictions of his freedom of movement. He further claimed that the criminal proceedings against him had been unfair. Finally, he claimed to have been discriminated against.

45. The Chamber finds that the case raises issues under Article 5 (1) of the European Convention on Human Rights ("the Convention"). It will declare the application admissible in this regard.

The applicant's allegations of discrimination in relation to his arrest, detention and restrictions of freedom of movement raise issues which the Chamber should address under Article II paragraph 2 (b) of the Agreement taken together with Article 5 of the Convention and Articles 9, 12 and 26 of the 1966 International Covenant on Civil and Political Rights ("the Covenant"). The Chamber will declare the application admissible in this respect also.

46. On the other hand, Article 6 of the Convention would not seem to be relevant to the case. Since the applicant was never actually put on trial, the question whether the applicant had a "fair

hearing" before an "impartial tribunal" in the "determination ... of any criminal charge against him" does not arise.

B. The Respondent Party's Preliminary Objection

47. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that it would have been open to the applicant under Article 524 § 2 of the Law on Criminal Procedure to apply to the competent Minister of Justice for compensation for damage arising from his illegal detention and thereafter to apply to the competent court. The applicant's claim for damages was accordingly premature.

48. Article XI paragraph 1 of the Agreement provides as follows:

> "Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address:
>
> (a) whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so
>
> (b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures."

49. The Chamber considers that the rule, contained in Article VIII paragraph 2 (a) of Annex 6, that available remedies should be exhausted does not apply to claims for monetary relief under Article XI paragraph 1 (b). That rule defines one of the conditions relating to the Chamber's jurisdiction to consider allegations of violations of human rights as referred to in the first two Articles of the Agreement; in other words, it relates to the institution of proceedings before the Chamber. A claim for monetary compensation or other relief, which the Chamber may consider if a violation is found, does not constitute a new application under Article VIII paragraph 1; it is an element of the case which the Chamber must consider in reaching its decision, as follows from the clear wording of Article XI.

The preliminary objection must therefore be rejected.

C. Merits

50. Article I of the Agreement provides:

> "That the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex."

Under Article II of the Agreement the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the other international agreements listed in the Appendix to the Agreement.

51. The Chamber has considered the present case under Article II (2) a of the Agreement in relation to Article 5 (1) of the Convention as well as under Article II (2) b of the Agreement in relation to Article 5 (1) of the Convention and to Articles 9, 12 and 26 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant").

I. Article 5 of the Convention

52. Article 5 of the Convention, in so far as it is relevant, provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
..."

53. The applicant considered that he had been a victim of violations of this provision.

54. The Agent of the respondent Party, speaking at the Chamber's hearing, admitted that the applicant had been detained without just cause.

55. The applicant argued that he had been arrested illegally and kept in detention as a person suspected of having committed serious violations of international humanitarian law. Under the "Rules of the Road", contained in the second paragraph of item 5 of the Rome Agreement of 18 February 1996, such arrest or detention required a previously issued order, warrant or indictment previously reviewed by the International Criminal Tribunal for the Former Yugoslavia. In the present case such prior review had not taken place.

56. The Agent of the respondent Party, speaking at the Chamber's hearing, admitted that this was so.

57. As the European Court of Human Rights has held on many occasions, most recently in the Giulia Manzoni v. Italy judgment of 1 July 1997 (*Reports of Judgments and Decisions* 1997, § 21), detention must be lawful. The words "in accordance with a procedure prescribed by law" essentially refer to domestic law; they state the need for compliance with the relevant procedure laid down in that law. The "lawfulness" of the detention presupposes conformity with domestic law and also conformity with the purpose of the restrictions permitted by Article 5 § 1, namely the protection of individuals from arbitrariness; it is required in respect of both the ordering and the execution of the measures entailing deprivation of liberty.

58. It has not been alleged that the provisions of the Law on Criminal Procedure were not complied with.

However, the Chamber notes that the "Rules of the Road" contained in the Rome Agreement of 18 February 1996 required that the relevant order, warrant or indictment be reviewed beforehand by the International Criminal Tribunal for the Former Yugoslavia. As stated by the Agent of the respondent Party at the Chamber's hearing, the "Rules of the Road" apply as domestic law in the Federation.

59. It appears from the decision of the Higher Court of Bihać dated 11 December 1996 (see paragraph 26 above) that the Tribunal was then still reviewing the case against the applicant and accordingly that the Tribunal's prior approval was lacking. No approval was subsequently given and the request for approval was ultimately rejected. It follows that the applicant could not at any relevant time legally be arrested or kept in detention on war crimes charges.

60. The Chamber concludes that there has been a violation of Article 5 § 1 of the Convention.

II. Discrimination

61. The applicant alleged that he had been a victim of discrimination. In his submission, the applicant stated that because of believing in the freedom of movement as guaranteed by the Dayton Peace Agreement, he had travelled to the Federation by the normal UNHCR bus line. He had been stopped by inhabitants of Sanski Most and arrested by the police on the ground of his Serb origin. With the connivance of the police, he had been beaten and threatened by civilians. In addition to linking him to atrocities assumed to have been committed by Bosnian Serbs, they had used an expression (now considered abusive) referring to his Serb origin, namely the word "četnik".

62. The Agent of the respondent Party offered no argument to the contrary.

63. The Chamber observes that under Article I paragraph 14 of the Agreement the Parties are bound to secure to all persons within their jurisdiction, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided, *inter alia*, in the international agreements listed in the Appendix to the Agreement. Article II paragraph 2 (b) of the Agreement confers on the Chamber jurisdiction to consider allegations of discrimination arising in the enjoyment of the rights and freedoms concerned.

64. Among these rights are those set out in Article 5 (1) of the Convention, quoted above in paragraph 52, and in Articles 9 (1), 12 (1) and 26 of the Covenant. These provisions read as follows:

Article 9 (1) of the Covenant

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Article 12 (1) of the Covenant

> "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

Article 26 of the Covenant

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

65. The Chamber finds that the facts of the case, in particular the circumstances surrounding the applicant's arrest and detention, including the passive attitude of the police in the face of the abuse directed against the applicant by private citizens, show that he was denied his rights to personal liberty, freedom of movement and equal protection of the law on the ground of his national origin.

There has accordingly been discrimination contrary to all the above-mentioned provisions.

66. The Chamber concludes that the applicant has been discriminated against on the ground of his national origin in the enjoyment of his rights to personal liberty as provided for in Article 5 (1) of the Convention and in Article 9 (1) of the Covenant, freedom of movement as provided for in Article 12 (1) of the Covenant and equal protection of the law as provided for in Article 26 of the Covenant.

D. Remedies

67. The applicant submitted claims for compensation at the hearing on 3 December 1997. On 26 January 1998 he submitted additional claims in writing (see paragraph 8 above).

68. The Chamber finds that the additional claims for compensation are out of time. The claims submitted at the hearing were set out in a detailed statement, on which the Agent of the respondent Party was able to comment if he wished. There is no reason why the additional claims the applicant now wishes to make should not have been contained in the same document, or at least submitted at the same time, so that they too might have been the object of adversarial argument.

69. The applicant asked the Chamber to award him damages. He did not separate his claims for pecuniary and non-pecuniary damages. The sums he claimed were intended to cover the damage caused by the detention itself and the damage done to his reputation as well as the pecuniary and non-pecuniary damage suffered by his family.

He claimed 10,000 German Marks (DEM) for each month of detention the damage which he had suffered. This was intended to cover, in addition to non-pecuniary damage, the travel expenses incurred by his family in coming to visit him and gifts which they had brought him to alleviate his suffering.

He further claimed DEM 50,000 for other pecuniary and non-pecuniary damage suffered by his family but provided no further specification.

Given that the applicant had to spend ten months in detention, his claims thus total DEM 100,000 plus DEM 50,000, that is DEM 150,000.

70. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that the applicant's claims were too high.

71. The applicant did not substantiate his claims for pecuniary damage in any way. No award can therefore be made under this head.

72. As to the non-pecuniary damage claimed, the Chamber cannot overlook the extreme length of the detention, which was illegal from the very beginning. It may be assumed that the difficulties which it caused the applicant and his family increased with the passage of time. Given that he suffered discrimination in addition, it is appropriate to award a considerable sum.

Nevertheless, the Chamber considers the aggregate sum claimed to be too high. The Chamber decides to award the applicant DEM 30,000 in respect of all damage suffered.

Vi. CONCLUSIONS

73. For the above reasons the Chamber decides:

1. By thirteen votes to one, to declare the application admissible under Article II (2) (a) of the Annex 6 Agreement in relation to Article 5 (1) of the European Convention;

2. By twelve votes to two, to declare the application admissible under Article II (2) (b) of the Agreement in relation to Article 5 (1) of the European Convention and Articles 9 (1), 12 (1) and 26 of the International Covenant on Civil and Political Rights.

3. By thirteen votes to one, that there has been a violation of Article 5 (1) of the European Convention and that the respondent Party is thereby in breach of its obligations under Article 1 (4) of the Agreement;

4. By eleven votes to three, that the applicant suffered discrimination on the ground of his national origin in the enjoyment of his rights to personal liberty, freedom of movement and equal protection of the Law as provided for, respectively, in Article 5 (1) of the European Convention and Articles 9 (1), 12 (1) and 26 of the International Covenant on Civil and Political Rights, and that the respondent Party is thereby in breach of its obligations under Article 1 (14) of the Agreement;

5. By thirteen votes to one:

a) To order the respondent Party to pay to the applicant, before 6 July 1998, the sum of DEM 30,000 (thirty thousand German Marks);

b) That simple interest of an annual rate of 4% will be paid over this sum, or any unpaid portion thereof from the day of expiry of the above-mentioned time limit until the date of settlement;

6. By thirteen votes to one, to order the respondent Party to inform the Chamber, before 6 July 1998, on the steps taken by it to comply with the above orders.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate dissenting opinion of Mr Victor Masenko-Mavi.

PARTLY DISSENTING OPINION OF MR MASENKO-MAVI

I have voted against § 4 of the Conclusions not for reasons of principle, but for reasons connected with argumentation and interpretation followed by the majority in the part of the judgment dealing with the discrimination issue. In other words, I accept that in the treatment of the applicant one can probably find discriminatory motives. However, I cannot accept the structure and logic of the reasoning in this part of judgment. My reasons are as follows.

Firstly, the allegation of discrimination is not a central issue of the case. The main point of the case is arbitrary detention on the basis of false charges. The majority opinion presents the discrimination issue as a main and central point.

Secondly, I am of the opinion that it would have been sufficient to consider the problem of discrimination in light of Article 14 of the European Convention, because the rights and freedoms violated in respect of the applicant (e.g. the rights to liberty and security, the right to freedom of movement) are set out in the European Convention system and its Protocols,* and thus there was no particular obstacle for the application of Article 14 of the European Convention. The violations at issue fall clearly within the ambit of conventional rights, and the consideration of the case from the point of Article 26 of the ICCPR is therefore simply superfluous. I would have agreed to consider discrimination issue on the basis of Article 26 of the Covenant - which provides for an autonomous, substantive right - had the majority substantiated its choice of that provision with elaborated reasons, pointing out the added value of this application of that provision.

* Article 5 § 1 of the Convention and Article 2 of Protocol No. 4 respectively