DECISION ON ADMISSIBILITY AND MERITS
(delivered on 9 March 2000)

Case no. CH/98/1366

V.Č.

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 March 2000 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the admissibility and merits of the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb nationality from Foča (now Srbinje), Republika Srpska. In June 1996 he was arrested in Sarajevo on account of charges of war crimes and genocide committed in 1992 against the Muslim civilian population of Foča. In April 1997 the indictment against the applicant was transmitted to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the Hague in order to comply with the "Rules of the Road". The Prosecutor expressed the view that the evidence presented to her was sufficient only to justify proceedings for unlawful confinement or imprisonment of civilians. In the following, the indictment was amended several times in order to bring it in line with the opinion of the ICTY Prosecutor. On 19 January 1998 the Cantonal Court in Sarajevo found the applicant guilty on two counts and sentenced him to 11 years of imprisonment. The appeals judgment of 16 June 1998 reduced the sentence imposed to nine years. In the meantime, the applicant has been released on probation.

2. This case raises issues under Articles 5 and 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 16 December 1998 and was registered on the same day. The applicant is represented by Ms. Senka Nožica, a lawyer practising in Sarajevo.

4. On 13 July 1999 the Chamber invited the Federation of Bosnia and Herzegovina to submit observations in writing on the admissibility and merits of the case. The Federation's observations were received on 15 September 1999.

5. The applicant's reply to the Federation's observations and a claim for compensation were received on 28 October 1999.

6. On 5 November 1999 the Chamber was informed that the applicant, who had on 27 January 1998 submitted an application concerning the same matter to the Human Rights Ombudsperson for Bosnia and Herzegovina, wished to pursue his application before the Chamber.

7. On 2 December 1999 the Federation submitted observations in reply to the applicant's compensation claim.

8. The Chamber deliberated on the admissibility and merits of the case on 4 November 1999 and on 11 January and 6 and 7 March 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

1. The applicant's arrest and pre-trial detention and the opinion of the ICTY Prosecutor

9. The applicant was arrested in Sarajevo on 2 June 1996 and detained on account of an investigation concerning genocide and war crimes allegedly committed in 1992 against the Muslim civilian population of Foča (Srbinje).

10. On 4 June 1996 the applicant was interrogated by the investigating judge for the first time. He claims that before his first appearance before the judicial authorities he was beaten up by a prison guard and that he gave his statement to the investigating judge under the influence of this ill-treatment. The applicant also claims that he provided information sufficient to identify this prison guard to both the first instance and appeal courts, which did not follow up his complaint. The respondent Party disputes that the applicant was beaten and submits that in any case the ill-treatment would have been of no consequence, as the applicant's statement to the investigative

judge was rendered in the presence of his defence lawyer. The applicant, however, submits that he did not at the time have undisturbed contact to his defence counsel, so that he could not inform him of the ill-treatment.

11. On 29 November 1996 the Cantonal Prosecutor's Office issued an indictment charging the applicant with genocide and war crimes.

12. In April 1997, i.e. ten months after the arrest, the documents relating to the charges against the applicant were transmitted to the Prosecutor of the ICTY for review under the Rome Agreement of 18 February 1998 ("the Rules of the Road", see paragraphs 36-39 below). On 7 May 1997 the ICTY Prosecutor expressed the following view:

> "... for the purpose of determining whether criminal proceedings should be pursued at this stage, on the papers transmitted by you the evidence is insufficient by international standards to provide reasonable grounds for believing that V.Č. may have committed the serious violations of international humanitarian law with which he has been charged, other than charges relating to the unlawful confinement of members of the civilian population. The Prosecutor does consider that the evidence is sufficient by international standards to justify proceedings for unlawful confinement or imprisonment of civilians."

2. The trial before the Cantonal Court in Sarajevo

13. In spite of the view expressed by the ICTY Prosecutor, the Sarajevo Cantonal Prosecutor's Office did not amend the indictment and the first hearing was held on 11 June 1997. Subsequent to an intervention by the Office of the High Representative ("OHR"), the Cantonal Prosecutor's Office issued an amended indictment on 15 August 1997, dropping the genocide charges.

14. On 9 September 1997 the Federal Minister of Justice requested from the Cantonal Prosecutor's Office and the Cantonal Court information concerning the respect of the Rules of the Road in the applicant's case. On 17 September 1997 the Federal Minister of Justice instructed the Federal Prosecutor's Office to instruct the Cantonal Prosecutor's Office to bring the indictment against the applicant in line with the obligations arising under the Rules of the Road. The Federal Minister of Justice expressly stated that the institutions of the State and of the Federation are bound to comply with the Rules of the Road and that the indictment against V.Č. contains charges that were not acceptable to the ICTY Prosecutor because of lack of evidence.

15. Amended indictments were issued by the Cantonal Prosecutor's Office on 21 November and 12 December 1997. The latter one charges the applicant, as a member of the Serb paramilitary forces in the Foča area holding the rank of a reserve captain of the Yugoslav National Army, with the commission of war crimes against the civilian population. The first count comprises alleged war crimes "ordered and personally commanded" by the applicant in connection with a prisoner camp for Muslim civilians, in particular the establishment of a prison camp for Muslim civilians, where these were kept in degrading conditions, the capturing and transport to the prison camp of Muslim civilians, as well as having enabled members of paramilitary formations and the camp guards to kill and ill-treat the prisoners. A second count in the indictment charges the applicant with having personally activated a hand grenade that killed a civilian in the course of the attack on the town centre of Foča.

16. On 3 December 1997 the applicant wrote to the Prime Minister of the Federal Government, Mr. Edhem Bičačkić, asking him to intervene for an amendment of the indictment that would bring it in compliance with the opinion of the ICTY Prosecutor.

17. In the meantime the trial had been going on and prosecution witnesses had been heard also in relation to the charges that went beyond unlawful confinement or imprisonment of civilians. According to the applicant, at the hearing of 12 November 1997, in the presence of representatives of the OHR and of the International Police Task Force (IPTF), the Deputy Cantonal Prosecutor assigned to the case, Mr. Zlatan Tersić, declared that the indictment would be amended only after all witnesses had been heard.

18. The applicant states that during December 1997 and at the beginning of January 1998, the Deputy Cantonal Prosecutor made statements to the newspapers *Dnevni avaz* and *Dani*, accusing the OHR and the Federal Prosecutor of exercising pressure in order to interfere with the case. He allegedly also declared that he would insist for the trial to continue in the present form, regardless of the violations of the Rules of the Road and of the position taken by the Federal Prosecutor. The respondent Party has not disputed these allegations.

19. On 19 January 1998 the Cantonal Court rendered its judgment. It found the applicant guilty, under Article 142 of the Criminal Law then in force (cfr. paragraph 27 below), on two counts of war crimes against the civilian population, as in the amended indictment. The applicant was firstly found guilty of having taken part in the establishment of a prison camp for Muslim civilians, where these were kept in degrading conditions, in the capturing and transport to the prison camp of Muslim civilians, and of having enabled members of paramilitary formations and the camp guards to kill and ill-treat the prisoners. Secondly he was found guilty of having personally activated a hand grenade that killed a civilian in the course of the attack on the town centre of Foča. He was sentenced to 11 years of imprisonment.

3. The appeals judgment of the Supreme Court of the Federation

20. On 16 February 1998 the applicant appealed against the judgment on grounds of violation of the Rules of the Road, of the criminal procedure and of incorrect appraisal of the evidence by the court. In his appeal he also mentioned that the statement to the investigative judge on 4 April 1996 had been made after he had been beaten by a prison guard.

21. On 16 June 1998 the Supreme Court rendered the appeals judgment. As to the applicant's complaint that there was no ICTY approval for the prosecution of the crimes he was convicted for, the Supreme Court dismissed it as ill-founded, on the ground that the ICTY Prosecutor does not "approve" the indictment but just "gives an opinion". The Supreme Court also held that the changes to the indictment during the proceedings did not alter its essence, so that a new opinion of the ICTY Prosecutor was not necessary.

22. With regard to the evaluation of evidence by the Cantonal Court, the Supreme Court held that the first instance court was correct in relying on the applicant's partial confession, and that the first instance court took into consideration and correctly evaluated the defence evidence.

23. Without expressly stating so, the Supreme Court then proceeded to reducing significantly the factual basis of the applicant's conviction. It stated:

> "[T]here is reliable evidence only for those actions which are cited in the factual state of this [the Supreme Court's] judgment. Important are only those actions which refer to the illegal arrests and internment of Bosniak population in the camp under the name "Livade" (Meadows) and their subsequent transfer to the Foča prison. This was the foundation of the factual description of the felony as stated in the judgment, which is fully compatible with the content of the mentioned letter of the Prosecutor of the International Tribunal, who stated that there is enough evidence according to international standards to justify the criminal prosecution of the defendant for arrest and detention of civilians".

24. As to the sentencing, the Supreme Court found that the penalty imposed on the applicant was too harsh, on the grounds that he had not been previously convicted of any offence, that the fact that the civilian population was not armed was an element of the crime and could therefore not be counted as an aggravating circumstance, and, finally, that the defendant was found guilty of a small number of criminal actions. The Supreme Court therefore reduced the sentence from 11 to 9 years of detention.

4. The applicant's request for review and release on probation

25. On 18 November 1998 the applicant filed a petition for review proceedings. It was rejected by the Cantonal Court in Sarajevo on 9 April 1999. By a decision of 14 September 1999 the Supreme Court of the Federation confirmed the decision to refuse the applicant's petition.

26. On 1 December 1999 the applicant was transferred to the detention centre in Foča, where, having served one third of his sentence, he was immediately released on probation.

B. Relevant legislation

1. The relevant criminal law

27. At the time of the applicant's arrest and trial the applicable criminal provisions were contained in the Criminal Law of the former Socialist Federal Republic of Yugoslavia ("SFRY"), adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (Official Gazette of the SFRY – hereinafter "OG SFRY" – nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90; Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94). Genocide and war crimes against civilians are now punishable under Articles 153 and 154 of the new Criminal Law of the Federation of Bosnia and Herzegovina, which entered into force on 28 November 1998 (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 43/98).

28. Article 141 of the Criminal Law related to the crime of genocide. It provided that anyone who, with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, ordered or committed murders or other defined acts would be punished by imprisonment of at least five years or by the death penalty. The full terms of Article 141 were as follows:

> "Anyone who – with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group – orders the killing of, the causing of serious bodily injury to or serious impairment of the physical or mental health of members of that group, orders the forced expatriation of the population or the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, orders the imposition of measures intended to prevent births within the group or orders the forcible transfer of children of the group to another group, or anyone who – with the same intent – commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

29. Article 142 of the Criminal Law concerned war crimes against the civilian population. It provided that anyone who, in violation of the rules of international law in time of war, armed conflict or occupation, ordered or committed any of a number of defined acts, including the subjection of the civilian population to unlawful confinement in concentration camps, would be punished by imprisonment for at least five years or by the death penalty. Its full terms were as follows:

> "Anyone who – in violation of the rules of international law in time of war, armed conflict or occupation – orders the subjection of the civilian population to murders, torture, inhuman treatment, biological experiments, great suffering, injuries to physical integrity or health, expatriation or displacement, deprivation of national identity by force, conversion to another religion, forced prostitution or rape, acts of intimidation or terror, the taking of hostages, collective punishment, unlawful confinement in concentration camps or other unlawful taking into custody, deprivation of the right to a fair and impartial hearing, forced service in the enemy armed forces or intelligence service or administration, the performance of forced labour, starvation, confiscation of property, looting of property, excessive confiscation of property without military necessity, unlawful and deliberate devastation, the taking of unlawful, substantial and disproportionate contributions and requisitions, inflation of the

domestic currency, or unlawful issue of currency, or anyone who commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

2. The relevant provisions on criminal procedure

30. The criminal procedure provisions relevant to the present case were contained in the Law on Criminal Procedure of the SFRY (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90), adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (OG RBiH nos. 2/92, 9/92, 16/92 and 13/94). After the conclusion of the proceedings in the present case, on 28 November 1998, the new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 43/98).

31. Articles 190 and 191 concerned pre-trial arrest and custody. Article 190 read:

"(1) Custody may be ordered only under the conditions envisaged in this law.

(2) The length 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 exist."

32. Article 191 paragraph 1 provided:

"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 need not to be ordered if the circumstances indicate that, in the particular case involved, the law prescribes that a less severe penalty may be pronounced."

33. Article 74 concerned the contacts between an accused in pre-trial detention and his defence counsel. This provision, which has not been taken over into the new Law on Criminal Procedure of 1998, read:

"(1) If the accused is detained and has been interrogated, the defence counsel can contact him personally or in writing.

(2) The investigating judge can order that the letters sent by the accused to his defence counsel or vice versa shall be transmitted only after he himself has checked them, and that the accused can speak with his counsel only in his presence or in the presence of another official.

(3) When the investigation procedure is over, or when the indictment or the bill of indictment is issued with no previous examination or investigation, the accused cannot be forbidden to contact his lawyer orally or in writing freely and without supervision."

34. Article 348 established that, at the conclusion of a criminal trial, the court shall render a judgment either "rejecting the charge", or acquitting the accused or declaring him guilty.

35. Article 349 spelled out the cases in which the court should render a judgment "rejecting the charge". They are (1) that the court lacked jurisdiction over the case, (2 and 3) that the proceedings had not been initiated by the competent prosecutor or that the prosecutor dropped the charges, (4) that the necessary approval (to prosecute) is lacking or the competent government body withheld its approval, (5) that the accused has already been either convicted or acquitted on the same charges,

and (6) that prosecution is precluded by an applicable amnesty, pardon, or statute of limitations or on any other ground.

3. The Rome Agreement of 18 February 1996 ("The Rules of the Road")

36. 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 sub-paragraph of paragraph 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."

37. The expressions "International Tribunal" and "Tribunal" refer to the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has its seat in The Hague. The above-quoted provision is normally referred to as the Rules of the Road. On 10 September 1996 the ICTY Prosecutor sent a document entitled "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996" to the Prime Minister of Bosnia and Herzegovina, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and the Ministries of Foreign Affairs of the Federal Republic of Yugoslavia and of Croatia. These "Procedures and Guidelines" provide for the procedure for the submission of cases to the ICTY Prosecutor, for the contents of a request for review by the ICTY Prosecutor and of the response of the ICTY Prosecutor. Appendix B to the "Procedures and Guidelines" contains standard markings to be employed by the ICTY Prosecutor in responding to requests for review, which typically read:

> "I return this case, the Prosecutor having taken the view that for the purposes of determining whether criminal proceedings should be continued/initiated at this stage ..."

It was followed by a statement as to whether the evidence is sufficient by international standards to provide reasonable grounds for believing that the person who is the subject of the report has committed the serious violation of international humanitarian law he is charged with (see paragraph 12 above for the text of standard marking "G" applied to the applicant's case).

38. At the public hearing before the Chamber in cases no. CH/96/21 *Čegar*, no. CH/97/41 *Marčeta* and no. CH/97/45 *Hermas*, the Agent of the Federation stated, in relation to the legal status of the Rome Agreement, as follows (see case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 18, Decisions and Reports 1998):

> "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."

39. This view of the direct applicability as domestic law of the Rules of the Road is confirmed and elaborated in the decision (no. Kž-465/97) of the Supreme Court of the Federation of 28 May 1998 in the case of D.B. The accused in this case had been found guilty of war crimes against the civilian population under Article 142 of the Criminal Law by the (then) High Court in Mostar in the absence of an opinion by the ICTY Prosecutor on the charges against him. The Supreme Court quashed the conviction and sent the case back to the High Court for renewed proceedings with the following reasoning:

> "... the courts in the Federation of Bosnia and Herzegovina are obliged to apply the Rome Agreement ('The Rules of the Road'). According to the Rome Agreement ('The Rules of the Road'), the court of first instance cannot begin a criminal procedure before the Prosecutor of the ICTY reviews the indictment and gives his or her opinion on whether the indictment is consistent with international legal standards. This Court is also of the opinion that doing so violated Article 349, paragraph 1(4) of the Law on Criminal Procedure, because an approval or opinion of the competent authority necessary for the criminal proceedings was not previously obtained. This Court finds a violation of the provisions of an international agreement (the Rome Agreement), that has been signed and approved by Bosnia and Herzegovina, and the courts in the Federation of Bosnia and Herzegovina are obliged to apply it."

IV. COMPLAINTS

40. The applicant complains that his right to liberty and security of person, protected by Article 5 paragraph 1 of the Convention, was violated by his arrest and detention in violation of the Rules of the Road.

41. The applicant also claims that his trial and conviction disregarding "the binding opinion expressed by the ICTY Prosecutor" amounted to a violation of his rights protected by Article 7 of the Convention.

42. The applicant further complains of several violations of his rights as an accused person in relation to the criminal proceedings against him. He complains of a lack of impartiality of the Prosecutor and the courts and alleges that the way in which trial against him was conducted disregarding the binding opinion expressed by the ICTY Prosecutor, indicates the intention of the judicial organs to impute to him acts for which no evidence existed. He further complains that his right to have the witnesses against him examined and to obtain the attendance and examination of witnesses on his behalf, enshrined in Article 6 paragraph 3(d), were violated in connection with the evaluation by both the first and the second instance court of the witness, in particular defence witness, testimony. He also submits that he did not have unhindered contact to his lawyer in violation of Article 14 paragraph 3(b) of the International Covenant on Civil and Political Rights ("ICCPR"). He finally complains that his right not to be compelled to confess guilt, protected by Article 14 paragraph 3(g) of the ICCPR, was violated by the beating inflicted on him before the first interrogation by the investigating judge took place.

V. SUBMISSIONS OF THE PARTIES

1. The respondent Party

43. As to admissibility, the respondent Party submits that the application is inadmissible on the ground that the Chamber is incompetent *ratione materiae* to consider alleged violations of the Rules of the Road. The respondent Party stresses that the ICTY was established by an international procedure and appears to argue that only the ICTY would be competent to adjudicate the applicant's complaint of a violation of the Rules of the Road. The respondent Party also argues that the applicant has not exhausted the available domestic remedies as, at the time of the Federation's observations, the request for review of the criminal proceedings in his case was still pending.

44. In case the Chamber should find the application admissible, the respondent Party argues that the applicant's arrest and pre-trial detention were in accordance with the law, as he was accused of crimes for which pre-trial detention is mandatory.

45. The respondent Party further disputes that the applicant was maltreated before his statement to the investigative judge on 4 June 1996. It adds that in any case, even if his allegation was true, it would be irrelevant on the ground that his statement to the investigative judge was then rendered in the presence of his defence lawyer.

46. The respondent Party maintains that the indictment was amended so as to render it compatible with the opinion of the ICTY Prosecutor.

47. With regard to the applicant's trial, the respondent Party submits that the applicant had sufficient time to prepare his defence with the assistance of an attorney, and that numerous witnesses for the defence were heard at the trial and the facts accurately and impartially assessed.

2. The applicant

48. The applicant maintains his complaints. As to the exhaustion of domestic remedies, he submits that the request for review is an extraordinary remedy which does not fall among the remedies to be exhausted for the purposes of Article VII(2)(a) of the Agreement.

VI. OPINION OF THE CHAMBER

A. Admissibility

49. Before considering the merits of the case, the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber shall consider whether effective domestic remedies exist and whether the applicant has demonstrated that they have been exhausted. Under Article VIII(2)(b), the Chamber shall not address any application which is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement. Article VIII(2)(c) states the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right of petition.

1. As to the admissibility of the application against Bosnia and Herzegovina

50. The applicant directs his application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. The Chamber notes that Article III paragraph 1 of the Constitution of Bosnia and Herzegovina establishes which matters are the responsibility of the institutions of the State of Bosnia and Herzegovina. The administration of justice is not among them, with the exception of "international and inter-Entity law enforcement". The applicant has not provided any indication that Bosnia and Herzegovina could in any way be responsible for the actions he complains of, nor can the Chamber on its own motion find any such evidence. The application is therefore incompatible *ratione personae* with the Agreement insofar as it is directed against Bosnia and Herzegovina.

2. As to the Chamber's competence to adjudicate violations of the Rules of the Road

51. The Federation argues that the application is inadmissible on the ground that the Chamber is incompetent *ratione materiae* to consider alleged violations of the Rules of the Road. It stresses that the ICTY was established by an international procedure and appears to argue that only the ICTY would be competent to adjudicate the applicant's complaint of a violation of the Rules of the Road.

52. The Chamber notes that under the Rules of the Road the ICTY is competent to review arrest warrants and indictments where a person is suspected or accused of a serious violation of international humanitarian law. There is no provision in the Rules of the Road, nor in the Statute or the Rules of Procedure of the ICTY, to the effect that the ICTY is competent to investigate and judge alleged violations of the Rules of the Road by the Federation authorities.

53. The Chamber also recalls that, in several previous cases, it has found that it is the responsibility of the Federation to ensure that its organs comply with the Rules of the Road, and that a failure to do so constitutes a violation of the Agreement (see, e.g., the aforementioned *Hermas* decision, paragraphs 46-47, and case no. CH/98/1374, *Pržulj*, decision on admissibility and merits delivered on 13 January 2000, paragraphs 133-137). To sum up, this challenge to the Chamber's jurisdiction over the present case is groundless.

3. As to the complaint under Article 7 of the Convention

54. The applicant complains that his trial and conviction for offences going beyond those covered by the opinion of the ICTY Prosecutor violated his rights guaranteed by Article 7 of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

55. The Chamber notes that this provision, at least its first paragraph, enshrines the principle of *nullum crimen sine lege, nulla poena sine lege*. In the present case, the acts on account of which the applicant was found guilty constituted criminal offences under Article 142 of the, then applicable, Criminal Law of the SFRY (see paragraph 29 above). The allegation that the applicant was found guilty by the Cantonal Court and the Supreme Court of certain acts for which, according to the opinion of the ICTY Prosecutor, there was not sufficient evidence to raise criminal charges, does not raise any issue under Article 7 of the Convention. The complaint under this provision is therefore inadmissible as manifestly ill-founded.

4. As to the complaints under Article 14 of the ICCPR

56. The applicant further complains of violations of his rights to have unhindered contact to his counsel and not to be compelled to confess guilt, enshrined in Article 14 of the ICCPR, paragraphs 3(b) and 3(g) respectively.

57. The Chamber recalls that its jurisdiction extends to the examination of alleged or apparent violations of the European Convention on Human Rights and of discrimination on any ground mentioned in Article II(2)(b) of the Agreement in the enjoyment of the rights guaranteed by the international agreements listed in the Appendix to the Agreement, among them the ICCPR. The applicant does not explicitly allege that he was discriminated against in the enjoyment of the rights guaranteed by Article 14 paragraphs 3(b) and 3(g) of the ICCPR, nor can the Chamber find such discrimination on its own motion. Accordingly, the Chamber has no jurisdiction *ratione materiae* to consider these complaints under the provisions mentioned by the applicant. This shall not, however, preclude the Chamber from examining the substance of the complaints under Article 6 of the Convention, insofar as it raises issues under that provision.

58. The Chamber notes that the applicant's complaint that he was beaten up by a prison guard before his first interrogation by the investigating judge, could raise issues in relation to the right not to be subjected to inhuman or degrading treatment protected by Article 3 of the Convention. The applicant, however, has not made a complaint under that provision, and the Chamber considers that the allegations of ill-treatment are not sufficiently substantiated for it to raise the issue *ex officio*.

5. As to the exhaustion of domestic remedies

59. It is also argued that the applicant has not exhausted the available domestic remedies, as he submitted a request for review, which was pending at the time of the application. The Chamber notes that a request for review is an extraordinary remedy that need not be exhausted for the purposes of Article VIII(2)(a) of the Agreement. Consequently, the Chamber finds that the applicant has complied with the requirements of that provision.

6. Conclusion as to admissibility

60. To sum up, the Chamber declares the application admissible in relation to Article 5 paragraph 1 and Article 6 of the Convention, insofar as it is directed against the Federation of Bosnia and Herzegovina. The remainder of the application is inadmissible.

B. Merits

61. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the Federation of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 5 paragraph 1 of the Convention

62. The applicant complains that he was unlawfully arrested and detained in violation of Article 5 paragraph 1 of the Convention, which in the relevant part reads as follows:

> "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:
> ...
> (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;
> ..."

63. Under the Rules of the Road, "persons ... 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". Charges of genocide and war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer.

64. As stated by the respondent Party at the public hearing held before the Plenary Chamber in the cases of *Čegar, Marčeta* and *Hermas*, and held also by the Supreme Court of the Federation (see paragraphs 38-39 above), the Rules of the Road apply as domestic law in the Federation. The Rules of the Road had been circulated to all the courts in the Federation, and the Sarajevo Cantonal Public Prosecutor's office could not have been unaware of them.

65. It is undisputed that the applicant was arrested on 2 June 1996 on charges of genocide and war crimes and that the opinion of the ICTY Prosecutor, stating that there was sufficient evidence by international standards to justify proceedings for unlawful confinement or imprisonment of civilians, was obtained only on 7 May 1997. No order, warrant or indictment against the applicant had been preliminarily submitted to the ICTY after the Rules of the Road entered into force on 18 February 1996, as required by these Rules. The applicant's arrest and detention from 2 June 1996 to 7 May 1997, i.e. for more than 11 months, were therefore not "lawful" as required by paragraph 1(c) of Article 5.

66. As to the applicant's detention after 7 May 1997, the Chamber notes that the "unlawful confinement or imprisonment of civilians" was a war crime against the civilian population under Article 142 of the Criminal Law of the SFRY, punishable with the death penalty or imprisonment for at least five years. The applicant's pre-trial detention after 7 May 1997 appears therefore to have been in accordance with Article 191 of the Law on Criminal Procedure (see paragraph 32 above).

67. The Chamber concludes that the applicant's arrest and detention from 2 June 1996 to 7 May 1997 constituted a violation of Article 5 paragraph 1 of the Convention.

2. Article 6 of the Convention

68. The applicant has raised a number of complaints in relation to the pre-trial proceedings and the first instance and appeal trials in his case (see paragraphs 41 and 42 above), which the Chamber shall examine under Article 6 paragraph 1 and paragraph 3(b), (c) and (d) of the Convention, which insofar as relevant to the case at hand read:

> "1. In the determination ... of any criminal charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing ...;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> ..."

69. The Chamber recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 (see Eur. Court HR, *Barberà, Messegué and Jabardo v. Spain* judgment of 23 September 1987, Series A no. 146, p. 31, paragraph 67; and the Chamber's case no. CH/98/638, *Damjanović*, decision on admissibility and merits delivered on 11 February 2000, paragraph 79); it will therefore have regard to them when examining the facts under paragraph 1.

70. The Chamber shall consider the applicant's complaints under three headings: (a) alleged violation of the Rules of the Road, (b) alleged violation of the applicant's right to a fair trial and to assistance of a lawyer in the preparation of his defence by way of the restrictions on his contacts with his lawyer, and (c) alleged violation of the applicant's right to obtain the attendance and examination of defence witnesses under the same conditions as prosecution witnesses.

(a) The alleged violation of the Rules of the Road

71. The applicant complains of a lack of impartiality of the Cantonal Prosecutor and the courts and alleges that the conduct of the trial against him, disregarding the binding opinion expressed by the ICTY Prosecutor, indicates the intention of the judicial organs to impute to him acts for which no evidence existed. The Chamber will address this issue from a slightly different angle and examine whether the trial and conviction of the applicant, allegedly in violation of the opinion of the ICTY Prosecutor, constituted a violation of the right to a fair trial enshrined in Article 6 of the Convention. To this end, the Chamber will first examine whether the Rules of the Road apply to criminal trials. If so, the Chamber will then proceed to examine whether there was a violation of the Rules of the Road in relation to the applicant's trial and, if so, whether this violation resulted in a violation of the applicant's right to a fair trial.

(i) *Whether a violation of the Rules of the Road would raise issues under Article 6 of the Convention*

72. The Chamber notes that it has already found, in the present case as in several previous cases before it, a violation of the right to liberty and security of person under Article 5 paragraph 1 of the Convention, on the ground that the Rules of the Road were not respected in the arrest and pre-trial detention of the applicant. However, the complaint that the applicant's trial and conviction, which he alleges to have been in violation of the Rules of the Road, amounted to a violation of Article 7 of the Convention has been found manifestly ill-founded by the Chamber (see paragraph 55 above).

73. The Chamber must now determine whether the allegation that the applicant was found guilty of crimes which were not acceptable according to the opinion given by the ICTY Prosecutor in accordance with the Rules of the Road gives rise to an issue under Article 6 of the Convention. The

Chamber notes that, on their face, the Rules of the Road appear to apply only to the arrest and detention of a person suspected of serious violations of international humanitarian law, and not to the determination of criminal charges against that person at trial. Indeed, the second sub-paragraph of paragraph 5 of the Rome Agreement of 18 February 1996 reads:

> "Persons ... 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. ..."

74. The Chamber recalls that, in its judgment of 16 June 1998 in the applicant's case, the Supreme Court stated that the opinion of the ICTY Prosecutor was, for the purposes of trial and conviction of the applicant, not binding (see paragraph 21 above).

75. The Chamber, however, cannot disregard the fact that a narrow interpretation of the scope of the Rules of the Road would frustrate the purpose of paragraph 5 of the Rome Agreement of 18 February 1996, which significantly is entitled "Cooperation on War Crimes and Respect for Human Rights". The object and purpose of the Rules of the Road should not be interpreted as being limited to preventing arbitrary arrests or that the exercise of the right to freedom of movement within Bosnia and Herzegovina and of the right to return of refugees and internally displaced persons are obstructed by arbitrary arrests on groundless war crimes charges. These provisions also aim at ensuring that the necessary prosecution of persons suspected of serious violations of international humanitarian law is carried out in accordance with international standards, not only at the ICTY in The Hague, but also and especially before the courts in Bosnia and Herzegovina, where these crimes took place. A prerequisite for the prosecution of war crimes in accordance with international fair trial standards is to avoid charges being raised and persons being put to trial where no reasonable grounds exist to believe that they committed the crimes they are accused of. It is therefore necessary that the application of the Rules of the Road extends beyond the moment of the arrest of a war crimes suspect to the determination of the charges against him at trial.

76. The Chamber notes that this interpretation of the scope of the Rules of the Road is supported also by the text of the standard markings (see paragraph 37 above), according to which the ICTY Prosecutor takes a view "for the purposes of determining whether criminal proceedings should be continued or initiated", and not only for the purpose of determining whether the applicant should be arrested on certain charges. In the applicant's case the ICTY Prosecutor expressed a view as to "whether criminal proceedings should be pursued" (see paragraph 12 above).

77. The Chamber must next address the question whether the "Rules of the Road" are adhered to by obtaining the opinion of the ICTY Prosecutor, or whether this opinion is a "binding opinion" which has to be complied with by the domestic authorities, as submitted by the applicant. The Chamber notes that under paragraph 5 of the Rome Agreement persons may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order or indictment, which not only was reviewed by the ICTY Prosecutor, but also "deemed consistent" with international legal standards. The only possible conclusion to be drawn from this wording is that, where the order or indictment is not deemed consistent with international legal standards, the charges have to be dropped. On the basis of the correspondence in the case-file, the Chamber furthermore notes that the Federal Prosecutor, the Federation Minister of Justice and the Office of the High Representative all shared the view that the obligation to comply with the opinion expressed by the ICTY Prosecutor was not met by simply obtaining the opinion. This obligation also required the Cantonal Prosecutor and the courts to bring the charges against the applicant in line with that opinion (see paragraph 14 above). The Chamber finally notes that in a decision rendered on 28 May 1998 – three weeks before its judgment in the applicant's case – the Supreme Court of the Federation held that, where an accused is brought to trial on war crimes charges that have not been previously approved by the ICTY Prosecutor, the court can only issue a judgment "rejecting the charges" under Article 349 paragraph 1(4) of the Criminal Procedure Law (see paragraph 39 above). This means that the court can only make a finding that it is precluded from deciding on the accused's guilt or innocence because a necessary procedural pre-condition for deciding the case on the merits is lacking.

78. The Chamber accordingly concludes that the obligation to comply with the opinion expressed by the ICTY Prosecutor extends to the charges brought against a person accused of serious violations of international humanitarian law at trial, and, as a consequence, to the determination of those criminal charges at trial. A violation of this obligation by the courts is therefore capable of raising issues under Article 6 of the Convention.

(ii) *Whether the applicant's trial and conviction involved a violation of the Rules of the Road and, if so, a violation of Article 6 paragraph 1 of the Convention*

79. Turning back to the specific case before it, the Chamber notes that the indictment against the applicant was amended several times between 7 May 1997, when the opinion of the ICTY Prosecutor was obtained, and the final indictment of 12 December 1997. These amendments consisted of a progressive reduction of the charges raised against the applicant. However, the judgment of the Cantonal Court of 19 January 1998, which substantially reflects the charges brought by the prosecution in its last indictment, still finds the applicant guilty of charges for which, according to the opinion of the ICTY Prosecutor, "the evidence is insufficient by international standards to provide reasonable grounds for believing that [V.Č.] may have committed" the offence. These findings of guilt concern the applicant's complicity in the ill-treatments and killings carried out in the "Livade" prison camp and the killing of a Muslim civilian with a hand grenade. There is no doubt that these findings constituted a violation of the Rules of the Road.

80. In this regard the Chamber also notes that, in reviewing the indictment or arrest warrant issued by the domestic authorities, the ICTY Prosecutor establishes whether, on the papers transmitted by the domestic authorities, there is sufficient evidence to provide reasonable grounds for believing that the suspect or accused has committed the serious violations of international humanitarian law with which he is charged (see the text of the opinion of the ICTY Prosecutor in the applicant's case, paragraph 12 above). It is apparent that the probatory threshold for a finding of guilt at trial by a court on certain charges must be higher than the threshold for a positive opinion of the ICTY Prosecutor regarding the arrest of a suspect on the same charges. It has not been claimed that during the trial significant evidence confirming the charges against the applicant was available, which had not been available when the opinion of the ICTY Prosecutor was requested.

81. It is not the Chamber's task to substitute its own assessment of the charges for that of the Cantonal Court. The Chamber considers, however, that the fact that the Cantonal Court, in violation of its obligations under the Rules of the Road, found the applicant guilty on charges for which according to the ICTY Prosecutor no reasonable grounds existed, raises doubts as to whether the Cantonal Court's examination of these charges was impartial and fair. In this respect, the Chamber also notes that the Cantonal Court took no steps to counteract the Cantonal Deputy Prosecutor's open defiance of the limits imposed on his action by the opinion of the ICTY Prosecutor (see paragraphs 17 and 18 above).

82. In his appeal to the Supreme Court of the Federation, the applicant complained, *inter alia*, of the fact that he had been found guilty of charges excluded by the opinion of the ICTY Prosecutor. In its judgment of 16 June 1998 the Supreme Court found that there was reliable evidence only for the applicant's involvement in the illegal arrests and internment of the Bosniak population in the "Livade" camp (see paragraph 23 above), which is the charge for which the ICTY Prosecutor had concluded that the evidence was sufficient to justify proceedings. Nonetheless, the Supreme Court conspicuously avoided to state that the first instance court had erred in finding the applicant responsible for the ill-treatments and killings that took place in the detention camp and of killing one Muslim civilian with a hand grenade, notwithstanding the fact that the applicant's appeal was directed specifically against these findings. In this connection, it should be noted that the Supreme Court dismissed as ill-founded the applicant's complaint that there was no ICTY approval for the prosecution of these charges, finding that the ICTY Prosecutor just "gives an opinion". Not even three weeks earlier, the Supreme Court (sitting in a panel composed in three of its five elements of the same members) had decided in another case that the ICTY Prosecutor's approval was a necessary pre-condition for a finding on war crimes charges, in the absence of which the court could only terminate the trial by rejecting the charges. Furthermore, in reducing the applicant's sentence, the Supreme Court mentioned aggravating and mitigating circumstances, but "forgot" that the factual basis on which it found the applicant guilty had radically changed in comparison to the first instance

judgment and that its judgment did not contain a finding of guilt as to the most serious crimes of which the applicant had been found guilty by the Cantonal Court.

83. These shortcomings in the Supreme Court's reasoning can hardly be explained as an oversight. The Chamber concludes, on the contrary, that the ambiguous and contradictory stance taken by the Supreme Court in relation to the core argument of the applicant's appeal and its failure to make a clear ruling on the applicant's guilt under the charges excluded by the opinion of the ICTY Prosecutor is incompatible with the requirements of a fair trial. There has therefore been a violation of Article 6 paragraph 1.

(b) Restrictions on the applicant's right to legal assistance in the preparation of his defence

84. The applicant complains that during the initial phase of his detention he had no contact with his lawyer and that during his first appearance before the investigating judge he was intimidated by the beating inflicted on him just before it. The Chamber has already declared these complaints inadmissible in relation to Article 14 paragraph 3(b) and paragraph 3(g) of the ICCPR (paragraphs 56 and 57 above). The Chamber has also found that the complaint of ill-treatment is not sufficiently substantiated to be considered on its own (paragraph 58 above). It shall now examine the complaint concerning the restrictions on the applicant's contacts with his lawyer under Article 6 paragraph 1 and paragraph 3(b) and (c) of the Convention. In this respect, the Chamber will also take into account the applicant's argument that the intimidation that resulted from the beating had adverse consequences on the rest of the proceedings in his case, because he did not have the possibility to communicate with his lawyer before the interrogation by the investigating judge.

85. The Chamber notes that the Convention does not expressly guarantee the right of an accused to communicate freely with his defence counsel, for the preparation of his defence or otherwise. As the European Commission on Human Rights has stated, the fact that this right is not specifically mentioned in the Convention does not mean that it may not be inferred from its provisions, and in particular those of Article 6 paragraph 3(b) and (c). The Commission has recognised that the possibility for an accused to communicate freely with his lawyer is a fundamental part of the preparation of his defence (*Can v. Austria* case, Opinion of the European Commission of Human Rights as expressed in the Commission's report of 12 July 1984, Series A no. 96, p. 17, paragraph 52). However, the Commission has added that, in the absence of an express provision, it cannot be maintained that the right to have conversations with one's lawyer and exchange confidential information with him, as implicitly guaranteed by Article 6 paragraph 3, is without restrictions.

86. In the same Opinion in the *Can* case, the Commission extensively analysed the relevance of Article 6 paragraph 3(c) to the communication between a detained accused and his defence counsel. The Commission stated as follows (p. 17-18, paragraphs 54-57):

> "54. The Commission now turns to the consideration of the case under Article 6 paragraph 3(c) of the Convention, which guarantees the right of the accused to defend himself *inter alia* through legal assistance of his own choosing. Unlike Article 6 paragraph 3(b) this guarantee is not especially tied to considerations relating to the preparation of the trial, but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings. The Commission refers in this context to the dictum of the European Court of Human Rights in the *Artico* case (Eur. Court HR, Series A no. 37, pp. 15-16, paragraph 33) where it was stated with particular reference to this provision "that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".
> 55. In order to find out whether Article 6 paragraph 3(c) requires that the remand prisoner be given a right to communicate in private with his defence counsel at the initial stage of the preliminary investigations, it is important to consider the functions which the defence counsel has to perform during this stage of the proceedings. They include not only the preparation of the trial itself, but also the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he

> might wish to make in relation to his detention concerning its justification, length and conditions and generally to assist the accused who by his detention is removed from his normal environment.
>
> 56. Several of these functions are interfered with or made impossible if the defence counsel can communicate with his client only in the presence of a court official. The accused will find it difficult to express himself freely *vis-à-vis* his lawyer on the basic facts underlying the criminal charges because he must fear that his statement might be used, or might be forwarded for use against him by the court official who is listening. Under these circumstances it is e.g. difficult to discuss with the accused the question whether or not it is advisable in his case to make use of the right of silence, or to advise him to make a confession. The defence counsel will find it difficult to discuss the defence in general. Apart from these matters directly related to the defence, the accused might also find it difficult to raise complaints regarding his detention as he may fear reprisals if he expresses them in the presence of a court official. In this respect, it is not relevant whether such fears are justified.
>
> 57. For these reasons it is apparent that generally speaking the defence counsel cannot fulfil his tasks properly if he is not allowed to communicate with his client in private. Therefore it is in principle incompatible with the right to effective assistance by a lawyer as guaranteed by Article 6 paragraph 3(c) of the Convention to subject the defence counsel's contacts with the accused to supervision by the court. This does not mean, however, that the right of free contact with the defence counsel must be granted under all circumstances and without any exceptions. Any restrictions in this respect must however remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case."

87. In the present case heavy restrictions were imposed on the applicant's contacts with his defence counsel during the entire phase of preliminary investigations, as prescribed by the then applicable Article 74 of the Law on Criminal Procedure. The applicant did not have any access to legal assistance during the two days preceding his first interrogation. In the subsequent period, until the conclusion of the preliminary investigations and the issuing of the indictment against him, the applicant was granted contact with his lawyer only in the presence of the investigating judge or a court or prison official. In the legal system of Bosnia and Herzegovina the investigation proceedings are generally of crucial importance to the outcome of a criminal trial. The statement given by the applicant to the investigating judge on 4 June 1996 was relied on by the Cantonal Court in its judgment. The Supreme Court confirmed the Cantonal Court's reliance on the applicant's statement to the investigating judge. In these circumstances, the restrictions placed on the applicant's contacts with his lawyer in the preliminary investigation phase constituted an inadmissible interference with his right to adequately prepare his defence with the assistance of a lawyer.

88. The Chamber concludes that the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge, constitute a violation of the fair trial guarantee contained in paragraph 1 of Article 6 of the Convention, as well as a violation of the specific guarantees set out in paragraph 3(b) and (c) of that provision.

(c) Right of attendance and examination of defence witnesses

89. The applicant complains of a violation of Article 6 paragraph 3(d) of the Convention, in that no equal hearing was given to the testimony of defence witnesses, as opposed to the witnesses of the prosecution. However, in further explaining this complaint, the applicant states that:

> "The Court fully rejected testimonies of the defence witnesses, stating that they were vague, while from the testimonies of the prosecution witnesses, it is clear that these were vague, particularly when referring to anything related to the applicant, [V.Č.]. All knowledge of the prosecution witnesses on [V.Č.] was circumstantial. The partiality of the Court in respect of the criminal responsibility of the defendant, [V.Č.], related also to the omission of the court to establish whether the persons detained had been civilians or military men".

90. From this submission it is apparent that the applicant's complaint actually refers to the evaluation of the prosecution and defence evidence by the Cantonal Court, and not to the right to "have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", as guaranteed by Article 6 paragraph 3(d). The Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, and case no. CH/99/2629, *Nurković*, decision on admissibility of 8 December 1999, paragraphs 9 and 10, Decisions August-December 1999).

91. As to the complaint that no equal hearing was given to the testimony of defence witnesses as opposed to the witnesses of the prosecution, the Federation submits that, notwithstanding the difficulties in obtaining the attendance of witnesses residing in the Republika Srpska, the witnesses summoned on behalf of the applicant attended the trial and were close to equal in number to those called on behalf of the prosecution. The respondent Party further submits that the courts took into consideration the testimony of the defence witnesses and the documents submitted by the applicant.

92. The Chamber finds that these submissions by the Federation are not seriously challenged by the applicant and not contradicted by the judgments and the court records in the case-file. Therefore the applicant's complaint does not reveal a violation of Article 6 paragraph 3(d) of the Convention.

(d) Conclusion as to the complaints under Article 6 of the Convention

93. The Chamber finds that there has been a violation of the applicant's right to a fair trial, in the way in which the Cantonal Court and the Supreme Court disregarded the binding opinion of the ICTY Prosecutor, as well as in the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge. The latter also constitute a violation of the specific guarantees set out in paragraphs 3(b) and 3(c) of Article 6. Finally, the Chamber concludes that the application does not reveal a violation of Article 6 paragraph 3(d) of the Convention.

VII. REMEDIES

94. Under Article XI paragraph 1(b) of the Agreement the Chamber must address the question what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) as well as provisional measures.

95. The Chamber has found that the applicant's right to a fair trial was seriously violated in several respects, during the preliminary investigation phase, before the Cantonal Court and before the Supreme Court. It therefore finds it appropriate to order the Federation of Bosnia and Herzegovina to grant the applicant a re-trial, should the applicant again lodge a petition to this effect.

96. The applicant claims pecuniary compensation in the amount of 5,000 Convertible Marks (*Konvertibilnih Maraka*, KM) for each month of detention from 2 June 1996 to the date of his compensation claim, 28 October 1999. He thus claims overall compensation in the amount of KM 210,000.

97. The Chamber notes that the applicant's compensation claim relies on the assumption that his detention since 2 June 1996 has been unlawful in its entirety. The Chamber recalls that it can order remedies only for violations it has found. In the present case, the Chamber has found that the applicant was unlawfully detained between 2 June 1996 and 7 May 1997, i.e. for approximately 11 months. It will therefore order pecuniary compensation only for that period of detention.

98. In assessing the appropriate amount of compensation the Chamber has further taken into consideration that the applicant has not made any submissions as to pecuniary damage caused to

him by his detention. The Chamber will therefore consider the applicant's compensation uniquely as a claim for compensation for moral damages. The Chamber has finally taken into account that the applicant's detention on remand is counted as time served for the purposes of the sentence imposed on him by the Cantonal Court. This has allowed the applicant to be released on probation already on 1 December 1999, notwithstanding the sentence of eleven years of imprisonment imposed by the Cantonal Court on 19 January 1998, reduced by the Supreme Court to nine years.

99. In the light of these considerations, the Chamber decides to order the respondent Party to pay to the applicant KM 4,000 as compensation for the unlawful detention suffered between 2 June 1996 and 7 May 1997.

VIII. CONCLUSIONS

100. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible in relation to the complaints under Articles 5 and 6 of the European Convention on Human Rights, insofar as these complaints are directed against the Federation of Bosnia and Herzegovina;

2. unanimously, to declare inadmissible the applicant's complaints under Article 7 of the Convention and under Article 14 of the International Covenant on Civil and Political Rights, insofar as these complaints are directed against the Federation of Bosnia and Herzegovina;

3. unanimously, to declare inadmissible all the applicant's complaints, insofar as they are directed against Bosnia and Herzegovina;

4. unanimously, that the arrest and detention of the applicant from 2 June 1996 to 7 May 1997 constituted a violation of the right of the applicant to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, that the way in which the Cantonal Court and the Supreme Court disregarded the binding opinion of the ICTY Prosecutor, as well as the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge, constituted a violation of the right of the applicant to a fair trial in the determination of criminal charges against him as guaranteed by Article 6 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that the restrictions placed on the applicant's contacts with his lawyer during the preliminary investigation phase constituted a violation of the right of the applicant to the assistance of a lawyer in the preparation of his defence, as guaranteed by Article 6 paragraph 3(b) and (c) of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, that there has been no violation of the right of the applicant to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as guaranteed by Article 6 paragraph 3(d) of the Convention;

8. by 4 votes to 2, to order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant a re-trial, should the applicant lodge a petition to this effect;

9. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, 4,000 Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for the unlawful deprivation of his freedom from 2 June 1996 to 7 May 1997;

10. unanimously, that simple interest at an annual rate of 4 per cent will be payable on the amount awarded in conclusion number 9 above from the expiry of the three-month period set for such payment until the date of final settlement of the amount due to the applicant; and

11. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex Partly dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Mr. Mehmed Deković

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Mr. Mehmed Deković.

PARTLY DISSENTING OPINION OF MR. VIKTOR MASENKO-MAVI, JOINED BY MR. MEHMED DEKOVIĆ

For several reasons, I cannot support conclusion no. 8, which provides for a re-trial in the applicant's case. It is now becoming a general tendency in the Chamber's practice to issue orders of a consequential nature (see cases nos. CH/98/638, *Damjanović*, CH/98/1374, *Pržulj*, and CH/98/1786, *Odobašić*). Considering the particular features of the existing judicial system in the country – taking into account the fact that it is still burdened by the devastating consequences of the recent war – one cannot say that in all of the cases it would be inappropriate for the Chamber to give such orders. Thus, for example, in the *Pržulj* and *Odobašić* cases the consequential orders to carry out investigations were appropriate. However, the nature of the consequential order in the present case – like in the *Damjanović* case, in which I also voted against the order providing for a re-trial – is different. In my opinion, this kind of order is totally unacceptable for the following reasons.

The Chamber has no mandate to issue such orders. With the order, the Chamber in fact assumes the role of an appellate court that can order the lower instance courts to reconsider a case. As is evident from the provisions of Annex 6, the Chamber has no such powers. Its decisions have no direct effect in the judicial system of Bosnia and Herzegovina; it can only impose on the respondent Party an obligation to bring about a certain result.

The conditional character of the order (it provides for a re-trial, "should the applicant lodge a petition to this effect"), formulated in the light of the fact that the applicant has been released on probation, makes it even more confusing. Firstly, if the order is conditioned on the actions of the applicant, can it be considered a remedy? Secondly, there is a clear pre-judgment in respect of the end-result of the applicant's petition: if there is a petition, there should be a re-trial. Thirdly, one can only wonder what would happen if the re-trial would end with the applicant being convicted on the charges excluded by the opinion of the ICTY Prosecutor.

Moreover, with this kind of orders, the Chamber is putting itself in a rather difficult position. It has to establish some general principles – which would be extremely difficult – as to which circumstances would warrant an order for a re-trial. What would be the guiding rule in determining the need for such an order? The weight and seriousness of the violation found? How can it be objectively decided that some of the violations found give reason to order a re-trial and others not? The more one thinks about the consequences of this order, the more one becomes embarrassed.

(signed)
Viktor Masenko-Mavi

(signed)
Mehmed Deković