DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 July 2002)

Case no. CH/01/7488

Vlatko BUZUK

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 3 July 2002 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. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered 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 Article VIII(2) and XI of the Agreement and Rules 52 and 66 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Croat origin. During the armed conflict he was a member of the Central Bosnia Croat Council of Defence (HVO) for Kreševo. On 1 September 2000 he was arrested for offences of genocide and war crimes against the civilian population. The indictment against him alleged that during 1993 he had participated in the ethnic cleansing, frightening, persecution, maltreatment, robbery of property, forced labour of citizens, hostage taking and illegal imprisonment of Bosniaks. He was held on remand until 17 January 2002 whereupon he was acquitted of all charges and released. The applicant complains of various violations of his rights in relation to his detention, indictment and trial, as well as his right to freedom of religion.

2. The case raises issues under Article 5, paragraphs 1, 2 and 3, Article 6, paragraphs 1 and 3(a), Article 9 and Article 13 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the "Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was initially introduced on 3 May 2001 and amended on 8 May 2001. It was registered on the date of amendment. The applicant is represented by Nikica Gržić, a lawyer practising in Sarajevo. The applicant requested that the Chamber order the respondent Party, as a provisional measure, to release him from pre-trial detention. On 10 May 2001, the Chamber decided not to order the provisional measure requested.

4. On 14 May 2001 the case was transmitted to the respondent Party.

5. On 12 June 2001 the Chamber received the respondent Party's written observations and these were transmitted to the applicant on the same day.

6. On 10 September 2001 the Chamber received the applicant's response to the written observations of the respondent Party. At this time the applicant complained that his right to freedom of religion had been violated by the respondent Party.

7. On 11 December 2001 the Chamber wrote to the respondent Party inviting further written observations in relation to the applicant's reply to its first written observations, specifically in relation to the applicant's continued detention subsequent to the filing of an indictment.

8. On 26 December 2001 the Chamber received the respondent Party's further written observations.

9. On 14 February 2002 the Chamber wrote to the applicant inquiring whether he wished to continue with his application in light of his acquittal. On 19 February 2002 the Chamber received, through the applicant's legal representative, confirmation that he wished to proceed with his application, as he believed the proceedings had not been finalised by his acquittal. On 14 February 2002 the Cantonal Prosecutor filed an appeal before the Supreme Court against the applicant's acquittal in the Cantonal Court in Sarajevo. As far as the Chamber is aware, at the time of the present decision, this appeal is still pending before the Supreme Court.

10. On 22 April 2002 the Chamber wrote to the applicant requesting further information concerning his allegation of being denied access to a Catholic priest during the Easter Holiday of 2001. The Chamber received this information on 26 April 2002. On 13 May 2002 the Chamber transmitted the application under Article 9 of the Convention to the respondent Party together with the applicant's further observations. The Chamber received the respondent Party's further written observations on 27 May 2002. The respondent Party further stated that it would submit additional information forthwith. The Chamber received this information on 30 May 2002. On 11 June 2002 the Chamber transmitted the respondent Party's written observations of 27 and 30 May 2002 to the applicant. The applicant did not reply to the respondent Party's submissions.

11. The Chamber deliberated on the admissibility and merits of the case on 10 May and 4 December 2001, 8 February, 7 March, 9 and 11 April, 10 May, 3 June and 1 and 3 July 2002. On the latter date the Chamber adopted the present decision.

III. FACTS

12. On 13 February 1995 the then Higher Court in Sarajevo initiated an investigation against the applicant for suspicion of having committed acts of genocide and war crimes against the civilian population. The Cantonal Court in Sarajevo (hereinafter the "Cantonal Court") subsequently submitted the case in September 1997 to the International Criminal Tribunal for the Former Yugoslavia (hereinafter the "ICTY") in accordance with Article 5 of the Rome Agreement of 18 February 1996 (hereinafter "The Rules of the Road"). On 15 June 1999 authorisation was handed down to the Cantonal Court by the ICTY Prosecutor (no. 993321/GB/DFG/RR 56), stating that the evidence obtained was sufficient, according to international standards, to justify the prosecution of the applicant for serious violations of international humanitarian law.

13. On 9 September 1999 the Cantonal Court issued a procedural decision on the applicant's pre-trial detention in accordance with Article 183, paragraph 1 of the Code of Criminal Procedure for the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98, hereinafter the "Code of Criminal Procedure"). The applicant's whereabouts were unknown at that time.

14. On 1 September 2000 the applicant was arrested in the Posavski Canton on the border of the Republic of Croatia by members of the Police Administration Odžak (Ministry of Interior for Canton Posavski) and subsequently handed over to the Ministry of Interior of Canton Sarajevo, whereupon he was held in pre-trial detention on the basis of the 9 September 1999 procedural decision. The applicant was brought before the investigating judge on the same day and through his legal representative, Nikica Gržić, he requested sight of the case file against him. This request was denied. On 4 September 2000 the applicant, again through his legal representative, applied in writing for sight of the case file. This request was again denied on the ground that the case file was not complete.

15. On 29 September 2000 the Cantonal Court issued a procedural decision by which it extended the applicant's detention until 1 December 2000 and on 28 November 2000 the Supreme Court of the Federation of Bosnia and Herzegovina (hereinafter the "Supreme Court") issued a procedural decision by which it extended the applicant's detention a further two months; that was until 1 February 2001. The Supreme Court then extended the applicant's detention for one month until 2 March 2001 by its procedural decision of 30 January 2001.

16. On 27 February 2001 the Cantonal Prosecutor in Sarajevo issued an indictment containing 8 counts against the applicant for having committed war crimes against the civilian population in accordance with Article 142, paragraph 1 of the taken over Criminal Code of the Socialist Federal Republic of Yugoslavia.[1]

17. On 28 February 2001 the Cantonal Court, by its procedural decision extended the applicant's detention for a further two months until 28 April 2001.

18. On a date unspecified to the Chamber, but in any event after 27 February 2001 and prior to 4 April 2001, the applicant through his legal representative, Nikica Gržić, filed an objection against the indictment to the Cantonal Court in Sarajevo. He proposed that the proceedings be adjourned or that the indictment be returned so that certain faults in the indictment be eliminated. He further requested that the matter be transferred to the Cantonal Court in Travnik as the competent court to hear his case.

[1] At the time the applicant was investigated, the applicable criminal law was contained in the Criminal Code of the Socialist Federal Republic of Yugoslavia and later adopted by the Republic of Bosnia and Herzegovina. The same provision is now contained under Article 154 of the Criminal Code of the Federation of Bosnia and Herzegovina (see paragraphs 38-40 below).

19. On 4 April 2001 the Cantonal Court in Sarajevo issued a procedural decision concerning the applicant's objections. It decided to return the indictment of 27 February 2001 to the Cantonal Prosecutor with the instruction to request the investigative judge of the Cantonal Court to institute a new investigation against the applicant on some parts of the indictment. The Cantonal Court accepted the applicant's complaint that counts B, D, E, F and G had never been put to him and had not formed part of the investigation, therefore he had been deprived of a defence in that respect. The court further ordered that the Cantonal Prosecutor had a maximum of three months in which to rectify the faults in the indictment. The Cantonal Court further refused to examine the legitimacy of the other counts in the indictment or whether they were *prima facie* well founded. The Cantonal Court did not address the issue of transferring the case to the Cantonal Court in Travnik. On 20 April 2001 the applicant submitted a request to the Cantonal Court for explanation of his detention, and further for his detention to be annulled and for him to be released forthwith. The Cantonal Court did not expressly reply to these requests.

20. On 23 April 2001 the Cantonal Prosecutor filed a request with the investigative judge to re-open the investigation against the applicant concerning the returned counts of the indictment. On 24 April 2001 the Cantonal Court issued a procedural decision on conducting the new investigation. The applicant appealed against this procedural decision.

21. On 25 April 2001 the Cantonal Court issued a procedural decision extending the applicant's detention for a further two months, expiring on 25 June 2001. On 27 April 2001 the applicant appealed against this decision to the Supreme Court on the ground that his pre-trial detention was unlawful as the indictment of 27 February 2001 had been declared invalid and he had been held in pre-trial detention for a period longer than six months. This appeal was not addressed directly, but on 7 May 2001 the Supreme Court found that the indictment of 27 February 2001 was partly valid since the Cantonal Prosecutor had been instructed to request the Cantonal Court to open the investigation against the applicant concerning some other parts of the indictment.

22. On 16 May 2001 the Cantonal Prosecutor filed a new indictment containing the previously returned counts. The second indictment was identical to the first indictment in every respect, save for minor grammatical and word changes. The applicant renewed his objection. On 13 June 2001 the Supreme Court issued a procedural decision rejecting the applicant's objection as ill-founded and further issued a procedural decision on conducting a single trial on the indictment of 27 February 2001 and the indictment of 16 May 2001.

23. On 30 August 2001 the applicant's trial for the charges brought against him in the Cantonal Court began. At some point, the exact date has not been specified to the Chamber, the main trial drew to a halt and restarted on 17 September 2001. The reason given for this interruption was the change of composition of the Panel of the Cantonal Court.

24. On 9 September 2001 the Chamber received from the applicant, through his lawyer, a further allegation that the prison authorities had denied the applicant access to a Catholic priest of his own choosing sometime during the Easter holiday of 2001. On 22 April 2002, the Chamber requested from the applicant further information concerning this allegation. The applicant stated in his written reply that:

(a) the request was to have access to a priest of his own choosing, namely Father Ante Ledić, appointed by the Archiepiscopal Ordinariate in Sarajevo;

(b) this request was made on several occasions;

(c) the investigative judge had previously agreed to his request;

(d) the President of the Panel of Judges, Muhamed Podrug, had denied him of this right on 10 April 2001 on the basis that he had not seen the applicant personally, as a "guilty party" he was not entitled to such access, and Judge Muhamed Podrug denied Father Ledić access to the applicant to give him Confession and Holy Communion stating that the Archbishop's Ordinariate of the Vrhbosanska Archdiocese should send its request to President of the Cantonal Court.

25. Pursuant to the applicant's complaint, the Federal Commission for Election and Appointment of Judges informed the applicant by letter, on 30 July 2001, that Judge Muhamed Podrug had not intended to violate the applicant's human rights, but that they would, in any event, continue to examine the allegations. However, the Chamber has yet to receive additional information concerning this inquiry.

26. On 24 October 2001 the Cantonal Court issued a procedural decision, extending the applicant's detention until 24 December 2001. The applicant appealed against this procedural decision to the Supreme Court. On 1 November 2001 the Supreme Court accepted the applicant's appeal, declared the extension invalid on procedural grounds and ordered the matter to be returned for reconsideration by the Cantonal Court. On reconsideration of this matter, the Cantonal Court issued its procedural decision on 5 November 2001, extending the applicant's detention for two months as permitted under Article 190 of the Code of Criminal Procedure. The applicant renewed his appeal against his continued detention. The Supreme Court, in its procedural decision of 15 November 2001 again accepted the applicant's appeal and directed the Cantonal Court for a second reconsideration. On 19 November 2001 the Cantonal Court reconsidered the matter and extended the detention until 24 December 2001. The applicant renewed his appeal and the Supreme Court in its procedural decision of 27 November 2001 again accepted his appeal on procedural grounds and referred the matter back to the Cantonal Court for reconsideration. On 4 December 2001 the Cantonal Court reconsidered the matter and by its procedural decision extended the detention until 24 December 2001 on the same grounds as mentioned previously. Upon hearing the applicant's subsequent appeal, the Supreme Court issued its procedural decision on 11 December 2001, and denied the appeal, upholding the procedural decision of the Cantonal Court.

27. On 17 January 2002 the applicant was acquitted of all charges and released from custody. However, the Chamber notes that the Cantonal Prosecutor's appeal against the applicant's acquittal remains pending before the Supreme Court.

28. The investigation against the applicant started in 1995 and he was held in pre-trial detention from 1 September 2000 to 30 August 2001 and held on remand pending trial from 30 August 2001 to 17 January 2002.

IV. RELEVANT DOMESTIC LEGISLATION

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

29. 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 "Co-operation 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."

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

31. 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 of Bosnia and Herzegovina 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."

32. This view of the direct applicability of the Rules of the Road as domestic law 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 Code 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 Code of 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."

B. The Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no. 43/98, hereinafter the "Code of Criminal Procedure")

1. Pre-trial detention

33. The Code of Criminal Procedure provides insofar as is relevant:

Article 183

"(1) Custody shall always be ordered against a person if there is a warranted suspicion that he has committed a crime for which the law prescribes a sentence of long-term imprisonment;[2]

"(2) If there are grounds for suspicion that a person has committed a crime, but the conditions do not exist for mandatory custody, custody may be ordered against that person in the following cases:

1) if he conceals himself or if other circumstances exist which suggest the strong possibility of flight;

2) if there is a warranted fear that he will destroy, hide, alter or falsify evidence or clues important to criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accomplices or accessories in terms of concealment;

[2] The Decision of the Law of Amendments to the Code of the Criminal Procedure which entered into force on 8 November 2001 abolished the measure of compulsory detention by deleting Article 183 paragraph 1 of the Code of Criminal Procedure. Article 183 paragraph 2 is now to be referred to as paragraph 1 (Official Gazette of the Federation of Bosnia and Herzegovina no. 50/01).

3) if particular circumstances justify the fear that the crime will be repeated or an attempted crime will be completed or a threatened crime will be committed and for those offenses a sentence of imprisonment of three years or a more severe penalty is prescribed."

Article 188

"(1) On the basis of the investigative judge's decision the accused may not be held in pretrial 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 pretrial custody;

"(2) Pretrial custody may be extended a maximum of 2 months. An appeal is permitted against the panel's decision, but the appeal does not stay 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 Federation may for important reasons extend pre-trial custody by not more than another 3 months. The decision to extend pretrial custody shall be made on the reasoned recommendation of the investigative judge;

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

Article 190

"(1) Once the proposed indictment has been presented to the court and until the end of the main trial custody may be ordered or terminated only by decision of the panel of judges after hearing the competent prosecutor provided proceedings are being conducted on his petition;

"(2) At the end of 2 months from the date when the last decision on custody became valid, even in the absence of motions by the accused personally, the panel shall examine whether the grounds still exist for custody and shall make a decision to extend or terminate custody."

2. Compensation for unlawful detention

34. Articles 524, 525 and 527 of the Code of Criminal Procedure insofar as they are relevant provide as follows:

Article 524

"(1) The right to compensation for damage shall expire 5 years from the date when the verdict in the first instance acquitting the accused of the charge or dismissing the charge became valid or the date when the decision in the first instance dismissing the proceeding became final; and if it occurred when a higher court was ruling on an appeal, from the date when the decision of the higher court was received;

"(2) Before filing with the court a plea for compensation for damage the injured party must present his petition to the Federal Ministry of Justice so that agreement might be reached as to the existence of damage and the type and amount of compensation."

Article 525

"(1) If a petition for compensation for damage is not accepted or if the Federal Ministry of Justice does not render a decision concerning such petition within 3 months from the date when the petition was filed, the injured party may file a plea with the competent court for

compensation for damages. If an agreement has been reached only concerning a part of the petition, the injured party may file suit with respect to the remainder of the claim;

"(2) So long as the proceeding referred to in Paragraph 1 of this Article persists, the statute of limitations envisaged in Article 524, Paragraph 1, of this law shall not run;

"(3) The plea for compensation for damage shall be filed against the Federation."

Article 527

"(1) An individual shall also be entitled to compensation for damage in the following cases:

1. if he has been in custody, and a criminal proceeding was not instituted, or the proceeding has been dismissed by a decision that has become final, or he has been acquitted of the charge by a verdict that has become final, or the charge was dismissed;

2. if he has served a prison sentence, but in a retrial or in response to a petition for protection of legality a shorter sentence than he has served is pronounced against him or a criminal sanction is pronounced against him which does not consist of imprisonment, or he is found guilty but released from punishment;

3. if because of an error or illegal act by an authority he has been falsely arrested or kept for a prolonged period in custody or other institution for serving punishment or measure;

4. if he has spent a longer time in custody than the prison sentence pronounced against him."

3. Time limit for filing an indictment

35. Articles 165, 166, paragraph 2, 256, 264, 273, and 274 of the Code of Criminal Procedure insofar as they are relevant provide as follows:

Article 165

"(1) Before the end of the preliminary examination the investigative judge shall inform the principals and the defence counsel that within a specified period they may examine the objects and papers pertaining to such evidence and may file their motions for presentation of new evidence;

"(2) Upon the expiration of the period specified or if the motion for presentation of evidence is not upheld, the investigative judge shall proceed in accordance with Article 166 of this law."

Article 166 paragraph 2

"Once the preliminary examination is completed, the investigative judge shall deliver the papers to the competent prosecutor, who within 15 days must file a motion for additional inquiry or file a proposed indictment or issue a declaration that he is giving up prosecution. The panel of judges may extend this period (Article 21, Paragraph 6) on the petition of the competent prosecutor."

Article 256

"(1) Once the examination is completed and also when under this law charges may be brought without conducting an examination (Article 152), proceedings may be conducted before the court solely on the basis of an indictment brought by the competent prosecutor or the injured party as prosecutor."

Article 264

"(1) If the panel does not reject the objection as late or disallowed, it shall undertake to study the proposed indictment;

"(2) If in connection with an objection the panel finds that there are errors or shortcomings in the indictments (Article 257) or in the proceeding itself, or if the state of affairs needs more clarification for the soundness of the indictment to be studied, it shall return the indictment for the shortcomings to be corrected or shall supplement the examination already held or conduct an examination. Within 15 days and no later than 3 months from being communicated the panel's decision, the competent prosecutor, the injured party as prosecutor or the private prosecutor must submit a corrected proposed indictment or charge or file a motion of an additional hearing or for a preliminary examination. If the competent prosecutor, the injured party as prosecutor or private prosecutor fail to meet the deadline, it shall be deemed that they have abandoned prosecution and the proceedings shall be dismissed. The decision on dismissal of the proceedings shall be rendered by the presiding judge of the panel."

Article 273

"The indictment becomes final when the traverse (objection) has been rejected; or, if no objection has been filed or it has been rejected, on the date when the panel of judges examining the motion of the presiding judge of the panel (Article 272) concurs in the indictment; and if there has been no such motion – on the day when the presiding judge of the panel sets the main trial or at the end of the period referred to in Article 272 paragraph 2 of this law."

Article 274

"(1) The presiding judge of the panel shall set the day, hour and place of the main trial in an order

"(2) The presiding judge of the panel shall set the main trial no later than 2 months from the date the proposed indictment or plea was received in the court; or, if a motion was filed as referred to in Article 272 of this law, as soon as the main trial may be set in view of the panel's decision. If the main trial is not set within that period, the presiding judge of the panel shall inform the president of the court of the reasons why the main trial was not scheduled. The president of the court shall take the necessary steps so the main trial is set."

4. Motion for investigative action

36. Article 159, paragraph 1 of the Code of Criminal Procedure insofar as is relevant provides as follows:

"During the inquiry the principals and the defence counsel may file motions with the investigative judge that certain investigative action be taken. If the investigative judge does not concur in the motion of the competent prosecutor or the accused or the defence counsel to perform a particular investigative action, he shall refer the issue to the panel of judges for a decision."

5. Petition for Protection of Legality

37. Articles 403 of the Code of Criminal Procedure insofar as is relevant provides as follows:

"(1) A petition for protection of legality may be filed against a valid court decision or against court proceedings preceding to the bringing of the court decision, in the following cases:

1. for violation of the criminal code;

2. for violation of the provisions of the criminal procedure envisaged in Article 358, paragraph 1, of this law;

3. for other violations of the criminal procedure provisions if such violations have affected the legality of the court decision.

"(2) The petition for protection of legality may not be filed against an incorrectly or incompletely established state of facts, nor against the decision of the Supreme Court of the Federation ruling upon the petition for protection of legality.

"(3) Regardless of the provision of paragraph 1 of this article, the federal prosecutor may file a petition for protection of legality for any violation of the law."

C. The relevant criminal law

38. At the time of the decision on conducting the investigation against the applicant on 13 February 1995, the applicable criminal law provisions were contained in the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY"). This law was adopted as the Law of the Republic of Bosnia and Herzegovina by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992. It 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 BiH") 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).

39. Article 142 of the previous SFRY Criminal Code 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, would be punished by imprisonment for at least five years or by the death penalty. Its full terms were as follows:

"Whoever in violation of the rules of international law applicable in time of war, armed conflict or occupation orders attack at civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of peoples health; an attack without selecting a target, by which civilian population gets hurt; that civilian population be subject to killings, torture, inhuman treatment, biological, medical or other scientific experiments taking tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health; this location or displacement or forced conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, pronouncing collective punishment, unlawful bringing in concentration camps and other illegal arrest and detention, deprivation of rights to a fair and impartial trial; forcible service in the armed forces of enemies armies or in its intelligence service or administration; forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing scale of of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency, or commits one of the foregoing acts, shall be punished with a sentence of imprisonment for not less than least five years or by the death penalty."

40. The applicant was initially charged under Articles 141 and 142 of the SFRY Criminal Code, namely genocide and war crimes against the civilian population. These provisions are now contained in Articles 153 and 154 of the new Criminal Code, which entered into force on 28 November 1998.

V. COMPLAINTS

41. The applicant complains that he was deprived of his right to liberty and security of person for a total of five hundred and four days, thus constituting a violation of his rights as guaranteed under Article 5 of the Convention. He complains that his right to a fair and public hearing within a reasonable time as guaranteed under Article 6 of the Convention has been violated. He complains that his right of no punishment without law as guaranteed under Article 7 of the Convention has been violated. He complains that his right to an effective remedy as guaranteed under Article 13 of the Convention has been violated. He complains that he has been discriminated against because of his Croat origin. He further complains that while in custody, he was deprived of the access to a Catholic priest of his own choosing during the Easter Holiday of 2001, thus violating his right to freely exercise his religion as guaranteed under Article 9 of the Convention. He complains that the prohibition of abuse of rights as guaranteed by Article 17 of the Convention has been violated. He also complains that his right of appeal in criminal matters as guaranteed under Article 2 of Protocol No. 7 to the Convention has been violated. As a result of the numerous alleged violations, the applicant seeks compensation in the amount of 20,000 KM (Convertible Marks) in non-pecuniary damage and 10,000 KM for legal costs and expenses.

42. The applicant further alleges violations of his rights under Articles 2, 3, 5, 7, 9 and 10 of the Universal Declaration of Human Rights, Articles 9 and 14 of the International Covenant on Civil and Political Rights and Article 5(a) of the International Convention on the Elimination of all Forms of Racial Discrimination.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent party

1. In respect to the facts and to the applicable domestic law

43. The respondent party states in its written observations of 11 June 2001 that the applicant was deprived of his liberty in accordance with "The Rules of the Road". Consent to the prosecution of the applicant was given on 15 June 1999 by the ICTY Prosecutor and the applicant was considered as falling within category A, in that "... for the purpose of determining whether criminal proceedings should be pursued at this stage, on the papers transmitted, the Prosecutor does consider that the evidence is sufficient by international standards to provide reasonable grounds for believing that Vlatko Buzuk may have committed serious violations of international humanitarian law."

44. The respondent Party further states that the Cantonal Court's procedural decision of 29 September 2000 to extend the applicant's pre-trial detention by two months was justified and in accordance with domestic law, as the investigation had not been concluded, and the reasons for issuing his detention on 1 September 2000 had not changed. The same reasons may be attributed to the procedural decisions of 28 November 2000 and 30 January 2001 by the Supreme Court. The respondent Party states that the pre-trial detention was in accordance with domestic law, and in any case, this detention did not exceed six months as a valid indictment was filed on 27 February 2001.

45. In relation to the applicant's allegation that the indictment was filed one day before the expiration of the six-month deadline, the respondent Party states that this is ill-founded. According to Article 166, paragraph 2 of the Code of Criminal Procedure (see paragraph 35 above), a time limit of fifteen days must be complied with, and in the present case the indictment was filed within eleven days, namely on 27 February 2001, and therefore it was in accordance with domestic provisions.

46. In relation to the applicant's claim that his request of 20 April 2001 for termination of his detention was never dealt with, the respondent Party states that the Cantonal Court's procedural decision of 25 April 2001, extending his detention for a further two months, effectively dealt with this request.

47. In relation to the applicant's claim that, as one part of the indictment had been returned by the procedural decision of the Cantonal Court of 4 April 2001, it follows that his detention was unlawful, the respondent Party states that Article 190 of the Code of Criminal Procedure (see

paragraph 33 above) does not in this case connect the validity of the indictment with the extension of detention. These are two separate issues. According to the respondent Party the procedure to be followed once the indictment has been filed is, firstly to deal with the detention and then secondly to deal with legal matters pertaining to the indictment. The Cantonal Court in its procedural decisions of 28 February 2001 and 25 April 2001 extended the applicant's detention for a further two months on each occasion. On 4 April 2001 the Cantonal Court dealt solely with the applicant's objection to the indictment of 27 February 2001 and partially accepted the objection (see paragraph 19 above).

48. The respondent Party further objects to the applicant's claim that the indictment of 27 February 2001 is invalid as a consequence of the procedural decision of 4 April 2001. In that procedural decision, the Cantonal Court refused to determine whether the remaining counts on the indictment, that is to say those counts that were not rejected, were *prima facie* well founded. It subsequently decided upon the indictment of 16 May 2001 "to join this criminal procedure, after the (second) indictment becomes final and binding, with the proceedings conducted against the same accused person and for the same criminal offence under the indictment of this prosecution no. KT-256/94-KZ of 27 February 2001."

49. The respondent Party concludes that the relevant legal provisions have not been violated in relation to the arrest, detention and prosecution of the applicant.

2. In respect to admissibility

50. The respondent Party makes two assertions on the admissibility of the application.

a. Non-exhaustion of domestic remedies under Article VIII(2)(a) of the Agreement

51. The respondent Party points out that under Article 404 of the Code of Criminal Procedure the applicant has the right to request protection of legality under Article 403 of the Code of Criminal Procedure (see paragraph 37 above). The request may be filed against a final court decision. Under Article 406 of the Code of Criminal Procedure the request shall be made to the Supreme Court. According to the respondent Party, the decision pertaining to the applicant's request for protection of legality was scheduled to be issued on 13 June 2001. The Chamber has not been notified that any such decision was issued.

52. The respondent Party states that if this domestic remedy has been exhausted or is not considered an effective domestic remedy, the applicant has further failed to exhaust domestic remedies under Article 527 of the Code of Criminal Procedure (see paragraph 34 above). Article 527 gives the applicant the right to apply through the domestic organs for compensation for unlawful detention, which he has not demonstrated to have done.

b. Six-month rule under Article VIII(2)(a) of the Agreement

53. The respondent Party further claims that the application should be declared inadmissible, as the applicant has not complied with the six-month rule. According to the respondent Party the application is premature, as the six-month period since the final decision in the applicant's case has not passed.

3. In respect to the merits

a. Article 5 of the Convention

54. The respondent Party reiterates that the applicant was held in pre-trial detention in accordance with the Rules of the Road and was informed promptly of the charges against him. The applicant was able to challenge his detention in accordance with domestic law and the Convention. The respondent Party states that the correct legal procedures were respected at all times.

55. The applicant filed a complaint in relation to his detention and the indictment filed against him and on 4 April 2001 the Cantonal Court issued its procedural decision, accepting in part his complaint. For the purposes of establishing the legality of his detention, the Cantonal Court accepted counts A and C of the indictment, and these have the characteristics of criminal offences under Article 142, paragraph 1 of the Criminal Code. Consequently, the Cantonal Court acted correctly, within the meaning of Article 190, paragraph 2 of the Code of Criminal Procedure when the applicant's detention was extended on 24 April 2001. The applicant subsequently appealed this procedural decision to the Supreme Court. The Supreme Court denied the appeal as ill-founded, confirming the procedural decision of the Cantonal Court.

56. The respondent Party reiterates that considering the chronology of events, the time period taken from the date the applicant was first deprived of his liberty, the respondent Party has not exceeded the time limits foreseen by the law and as such there is no violation of the Convention.

b. Article 6 of the Convention

57. The respondent Party states that the guarantees under Article 6, paragraph 3 are in fact inclusive of Article 5 and consequently it is not necessary to consider Article 6, paragraph 3 separately. Therefore, the respondent Party has not addressed the alleged violation of Article 6, paragraph 3(a) of the Convention, in this respect. The respondent Party has also failed to address the allegation that the applicant did not receive a fair hearing by an independent and impartial tribunal under Article 6, paragraph 1 of the Convention.

c. Article 7 of the Convention

58. The respondent Party states that the applicant was held in detention as established by its summary of the facts above and as an indicted person pursuant to Article 190 of the Code of Criminal Procedure, and not as a person serving a sentence. The respondent Party further states that the provisions of the Code of Criminal Procedure under which the applicant was held in detention could not be interpreted as "punishment" within the meaning of Article 7 of the Convention. No valid judgment has been passed against the applicant; therefore he was not serving a sentence under a criminal conviction.

d. Article 9 of the Convention

59. The respondent Party denies that Article 9 has been violated. In its written observations of 27 May 2002, the respondent Party states that the applicant made several requests to have access to a Catholic priest of his own choosing, namely Father Ante Ledić. Initially, this request was approved by the investigative judge. The respondent Party then goes on to state that the applicant made a request to the Cantonal Court to be given access to his priest for the Easter holidays in 2001. This request was denied by Judge Muhamed Podrug, President of the Panel of Judges of the Cantonal Court, on procedural grounds. He stated that such a request should be made by the Archbishop's Ordinariate of the Vrhbosanska Archdiocese to the President of the Cantonal Court. The respondent Party states that since this procedure was never followed, access could not be given. The respondent Party further declares that the Independent Judicial Commission checked the procedure adopted by Judge Muhamed Podrug on several occasions and concluded that this could not be declared as a violation of the applicant's rights and that it was based on procedural grounds.

60. The respondent Party further submits in its written observations of 30 May 2002 that the applicant was granted permission on four separate occasions to see a Catholic priest, albeit not a Catholic priest of his own choosing. The respondent Party submits that the applicant was visited by a Catholic priest, appointed by the prison authorities, on 8 February 2001 between the hours of 10.00 am and 10.15 am, on 21 August 2001 between the hours of 11.50 am and 12.15 pm, and was present at a Christmas Mass on 25 December 2001, presided by a Catholic priest. The respondent Party states that Christmas Mass was arranged for all prisoners of Catholic faith. On 13 April 2001, the date that the applicant complains he was refused access to a Catholic priest of his own choosing, the respondent Party reaffirms that this was refused by Judge Muhamed Podrug on the procedural grounds previously stated. Furthermore, the applicant was in fact granted permission on that

occasion to see a Catholic priest, but he refused to see him. For these reasons, the respondent Party states that there cannot have been a violation of Article 9 of the Convention.

e. Article 13 of the Convention

61. The respondent Party states that in order for Article 13 to be invoked, a right guaranteed under the Convention must have been violated. The respondent Party further states that there exists a domestic remedy that the applicant has not exhausted. The respondent Party does not comment any further on this point.

f. Article 17 of the Convention

62. The respondent Party reaffirms that there has been no violation of either Article 5 or Article 6 and as such the detention of the applicant cannot be considered a misuse of power, exercise of ill-will or arbitrary in nature. The actions of the respondent Party do not limit the applicant's rights under the Convention, nor do they constitute a derogation from the Convention and as such there can be no violation of Article 17.

g. Article 2 of Protocol No. 7 to the Convention

63. The respondent Party repeats that no judgment has been passed against the applicant and that the applicant has not been convicted of the offences with which he was charged. Consequently, there can be no violation of Article 2 of Protocol No. 7.

3. In respect to compensation

64. The respondent Party submits the claim for compensation for non-pecuniary damage is ill-founded. The respondent Party's position is that the claim for compensation was only made to obtain material benefit and given the manner in which it has been stated, the respondent Party is unable to comment further.

65. In relation to the applicant's request for compensation for legal costs and expenses, the respondent Party states that there has been no hearing before the Chamber nor any other reason for substantial expenses to be incurred. Therefore, this part of the application must also be considered ill-founded. The respondent Party states that Rule 43 of the Chamber's Rules of Procedure stipulates that legal costs and expenses cannot be indemnified upon the Chamber's decision and they refer exclusively to the obtaining and demonstrating of evidence, respectively.

B. The applicant

66. The applicant states that the indictment was not filed within a reasonable time period as the respondent Party filed the indictment just before the six months time limit had expired. The applicant objected to the indictment and the Cantonal Court issued its procedural decision on 4 April 2001 which, according to the applicant, returned the entirety of the indictment. The reasoning of the procedural decision is that the indictment was not filed in accordance with Article 165 of the Code of Criminal Procedure (see paragraph 35 above). The applicant claims that in view of this, the indictment lacked sufficient legal basis and that Article 188 of the Code of Criminal Procedure (see paragraph 33 above) clearly states that, if the time limit set out in this Article, namely six months, has expired, the applicant shall be released. Therefore, the applicant maintains that his subsequent detention was unlawful.

67. The applicant further disputes the legality of his detention under the Rules of the Road. He accepts that he was initially detained with the approval of the ICTY Prosecutor, on the basis of a suspicion that he had committed the offence of war crimes. However, after the indictment was returned and re-filed, he was being held for charges that had not been approved by the ICTY Prosecutor.

68. Concerning the Article 9 violation, the applicant maintains that permission for him to have access to a priest of his own choosing was initially authorised by the investigative judge. The applicant further claims that the denial to have access to his priest, Father Ante Ledić, was not in accordance with the ICTY Rules on Detention and as a person detained under the Rules of the Road he is entitled to such protection. However, according to the applicant, on 10 April 2001 his priest, Father Ante Ledić, addressed the President of the Panel of Judges of the Cantonal Court, Muhamed Podrug, who denied Father Ante Ledić access to the applicant, seemingly on three grounds. Firstly, that Judge Muhamed Produg had not seen the applicant personally. Secondly, that the request should be made to the President of the Cantonal Court. Thirdly, according to the applicant, Judge Muhamed Produg asked Father Ante Ledić whether he was aware of what the applicant was guilty. The applicant submits that in relation to the first reason given, this is in itself a violation of the Code of Criminal Procedure. Furthermore, due to the constraints of time, it was impossible for the applicant or his priest to apply to the President of the Cantonal Court. The final reason given concerns Judge Muhamed Podrug's assertion of the applicant's guilt in the pre-trial stage. The applicant submits, therefore, that the reasons given were without legal basis and thus a violation of his rights.

69. The applicant maintains the remainder of the allegations set out in his application to the Chamber.

VII. OPINION OF THE CHAMBER

A. Admissibility

70. Before considering the merits of the case the Chamber must first decide whether to accept it, taking into account the admisibility criteria set out in Article VIII(2) of the Agreement. According to Article VII(2)(a), the Chamber shall consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted and whether the application has been filed within six months from such date on which the final decision was taken. Article VIII(2)(c) states that the Chamber shall dismiss any application it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right to petition.

1. The six-months rule

71. The respondent Party objects to the admissibility of the application in that the applicant failed to wait for six months after the final decision in his case, as required by Article VIII(2)(a) of the Agreement. This provision reads:

> "In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: (a) ... that the application has been filed with the Commission within six months from such date on which the final decision was taken."

72. The Chamber notes that the six-months rule is designed to mark out the temporal limits of supervision carried out by the Chamber in order to ensure a certain degree of legal certainty. Therefore the Chamber finds the applicant was not obliged to wait for six months before submitting an application; on the contrary, he was obliged to file an application within six months. The applicant hence complied with Article VIII(2)(a) of the Agreement and his application is therefore admissible under the six-months rule.

2. Article 7 of the Convention

73. The applicant complains that his rights as guaranteed by Article 7 of the Convention have been violated. Article 7 of the Convention 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."

74. 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 tried constituted criminal offences under Article 142 of the, then applicable, Criminal Law of the Socialist Federal Republic of Yugoslavia. They also presently constitute the offence of war crimes against the civilian population under Article 154 of the Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no. 43/98, hereinafter the "Criminal Code"). Furthermore, the applicant was acquitted of all charges. Accordingly, the complaint under this provision is inadmissible as manifestly ill-founded within the meaning of Article VIII(2)(c) of the Agreement.

3. Article 17 of the Convention

75. The applicant claims to be a victim of a violation of Article 17 of the Convention. Article 17 is of dependent character and in order for it to be invoked, the applicant needs to show an act of the respondent Party aimed at the destruction of any of the rights and freedoms protected by the Convention or its Protocols, or aimed at their limitation to a greater extent than is provided in the Convention. However, the applicant has failed to substantiate, in relation to which rights the respondent Party misused its powers, and how it misused them. Therefore, the Chamber decides to declare this part of the application inadmissible as manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

4. Article 2 of Protocol No. 7 to the Convention

76. The applicant has alleged a violation of his right to appeal in criminal matters under Article 2 of Protocol No. 7 to the Convention. However, the Chamber notes that the applicant was acquitted of all charges. It follows that the application in respect of these complaints is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application in this respect inadmissible.

5. Discrimination in the enjoyment of various rights

77. The applicant has alleged that he has been discriminated against because of his Croat origin in the enjoyment of his right to liberty and security of person under Article 9 of the International Covenant on Civil and Political Rights, his right to equality before the courts and tribunals under Article 14 of the International Covenant on Civil and Political Rights, his right to equal treatment before the courts and all other court organs administering justice under Article 5(a) of the International Convention on the Elimination of all Forms of Racial Discrimination.

78. The Chamber finds that the facts of this case do not indicate that the applicant has been the victim of discrimination on any of the grounds set forth in Article II(2)(b) of the Agreement. It follows that the application in respect of discrimination is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

6. Universal Declaration of Human Rights

79. The Chamber notes that the applicant complains that there has been an interference with the prohibition of discrimination under Article 2 of the Universal Declaration of Human Rights, his right to liberty and security under Article 3 of the Universal Declaration of Human Rights, the prohibition of degrading and inhuman treatment and punishment under Article 5 of the Universal Declaration of Human Rights, his right to equality before the law and the prohibition of any kind of discrimination under Article 7 of the Universal Declaration of Human Rights, the prohibition on arbitrary detention under Article 9 of the Universal Declaration of Human Rights and his right to a fair trial under Article

10 of the Universal Declaration of Human Rights. However, the Universal Declaration of Human Rights is not a binding treaty and is not among the international instruments listed in the Appendix to the Agreement which may be applied by the Chamber in connection with alleged or apparent discrimination under Article II(2)(b) of the Agreement. Therefore, the Chamber is not competent to consider allegations of violations of provisions of the Universal Declaration of Human Rights. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

7. Exhaustion of domestic remedies

80. The respondent Party argues that the applicant has failed to exhaust the available domestic remedies, as he was given the possibility to do in accordance with the provisions of the Code of Criminal Procedure. In relation to the possibility of a motion for protection of legality, under Article 403 of the Code of Criminal Procedure (see paragraphs 37 and 51 above), the Chamber finds that that is an extraordinary remedy, which the applicant is not required to exhaust. Furthermore, the Chamber notes that no procedural decision was ever issued in relation to the applicant's motion for protection of legality. Consequently, the applicant had challenged all the decisions concerning his detention and in this respect he has exhausted all domestic remedies.

81. The respondent Party also argues that the applicant has failed to exhaust domestic remedies under Article 525 of the Code of Criminal Procedure in that he could have addressed a claim for compensation to the Federation Ministry of Justice. The respondent Party's argument is that the applicant has an enforceable claim under domestic law and that he has not exhausted this remedy, as he is required to do. The Chamber notes however, that this enforceable right to compensation for unlawful detention is relevant to the admissibility and merits under an alleged violation of Article 5, paragraph 5 of the Convention, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

However, the Chamber notes that the applicant has not complained of a lack of an enforceable right to claim compensation. Therefore, the Chamber will not consider the respondent Party's objections insofar as they concern the admissibility of the applicant's alleged violations of Article 5, paragraph 1 and Article 5, paragraph 3 of the Convention, as the objections are irrelevant to these provisions of the Convention.

8. Conclusion as to admissibility

82. The Chamber finds that no other ground for declaring the case inadmissible has been established. Accordingly, the Chamber declares the application admissible insofar as it relates to the alleged violations of Articles 5, 6, 9 and 13 of the Convention. The Chamber declares the remainder of the application inadmissible.

B. Merits

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

1. Article 5, paragraph 1 of the Convention

84. The Chamber finds that the application raises issues with regard to 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."

85. The applicant was held in detention from his arrest on 1 September 2000 until his acquittal on 17 January 2002. This period covers pre-trial detention and detention during trial. The application in this respect raises two issues with regard to the lawfulness of the applicant's detention on remand:

a. Exceeding six months of detention under domestic law

86. The applicant complains that he was held in pre-trial detention, to which Article 5, paragraph 1(c) of the Convention applies, for a period exceeding six months. Under Article 188 of the Code of Criminal Procedure an accused may be held in pre-trial detention for a maximum period of six months and if no proposed indictment is brought at the expiration of this period, Article 188, paragraph 3 provides that he shall be released. The applicant's detention started on 1 September 2000. The applicant states that an indictment was filed on 27 February 2001 to which he filed an objection. This objection was partially accepted by the issuance of the Cantonal Court's procedural decision on 4 April 2001. The Cantonal Court stated that of the eight counts on the indictment (counts A to H) only counts A and C were valid. The remaining counts had not formed part of the investigation and had not been put to the applicant, therefore depriving him of the opportunity to comment and subsequently prepare a defence. The respondent Party was ordered to renew the investigation and serve an amended indictment within three months. A second indictment was served within the time limit, on 16 May 2001, and was accepted by the Cantonal Court. The applicant claims that his continued detention after 27 February 2001 was in violation of Article 188, paragraph 3 of the Code of Criminal Procedure.

87. The respondent Party argues that the first indictment was a valid indictment for the purposes of the six-month time limit. Its reasoning in support of this assertion is that, due to the Cantonal Court's findings of 4 April 2001, two counts constituting offences under Article 142, paragraph 1 of the taken over Criminal Code on the indictment were accepted. The charges underlying these counts were authorised by the ICTY Prosecutor. Furthermore, it states that the applicant's detention was subsequently ordered under Article 190, paragraph 1 of the Code of Criminal Procedure as an indictment had been filed. The respondent Party also states that, considering the Cantonal Court's procedural decision of 16 May 2001 to join the two indictments, the first indictment must have been valid for the purposes of Article 188 of the Code of Criminal Procedure.

88. The Chamber accepts the respondent Party's argument in relation to Article 190 of the Code of Criminal Procedure (see paragraphs 33 and 47 above) that the validity of the indictment and extension of detention are two separate issues. The Chamber further accepts that once a proposed indictment has been filed within the six-month time limit, detention is subsequently governed by Article 190 of the Code of Criminal Procedure. Under Article 190, paragraph 1, once a proposed indictment has been presented to the court, custody may be ordered until the end of the main trial by the panel of judges after hearing the competent prosecutor. In the present case, the panel of judges heard from the competent prosecutor on 27 February 2000 and authorised the applicant's continued detention within the requisite time limit.

89. The Chamber therefore concludes that in this respect, the applicant's detention from 28 February 2001 to 16 May 2001, was lawful under Article 5, paragraph 1 of the Convention.

b. The Rules of the Road

90. 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 war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer (see paragraph 29-32 above).

91. The Rules of the Road stipulate that the prosecution for offences of war crimes in the domestic courts may only be instigated under the express authorisation of the ICTY Prosecutor. It is undisputed that the applicant was arrested on 1 September 2000 on charges of war crimes and that the opinion of the ICTY Prosecutor had been previously sought. The opinion of the ICTY Prosecutor declaring that there was sufficient evidence by international standards to justify proceedings against the applicant for serious violations of international humanitarian law was obtained on 15 June 1999. However, the applicant complains that the authorisation to prosecute was obtained from the ICTY Prosecutor on the basis of information gathered through the investigative stage that went to form the contents of the first indictment filed on 27 February 2001. The respondent Party then renewed its investigation against the applicant and submitted a second indictment on the basis of which the applicant was tried, but there was no specific authorisation from the ICTY Prosecutor for the second indictment.

92. The authorisation obtained from the ICTY prosecutor concerned sufficiency of evidence for the purpose of initiating an investigation and ordering custody during the investigation. The authorisation is not based upon the charges set forth in the indictment(s), as this would be completed at a later stage. In the present case, an investigation was commenced on the basis of the Cantonal Court's procedural decision of 13 February 1995. Authorisation to further investigate and detain the applicant was obtained from the ICTY Prosecutor on 15 June 1999 and the applicant was arrested on 1 September 2000. The applicant was held in pre-trial detention until the indictments of 27 February 2001 and 16 May 2001 were filed. The fact that the first and second indictments differed does not constitute a violation of the Rules of the Road. The Chamber is of the opinion that if in fact the two indictments had differed substantially and the second indictment had contained charges not covered by the opinion of the ICTY Prosecutor, then this might have been a violation of the Rules of the Road. In such a case, the detention of the applicant from 16 May 2001 may have been unlawful and consequently a violation of Article 5, paragraph 1(c) of the Convention. However, the Chamber finds, on consideration of the two indictments (see paragraph 22 above), that there was no difference in fact or law between the two indictments. Therefore, the argument that the applicant was detained without the authorisation of the ICTY Prosecutor is ill-founded.

93. The Chamber finds that the detention of the applicant was in accordance with the Rules of the Road, as the indictments of 27 February 2001 and 16 May 2000 did not raise charges that were extraneous to the information and evidence submitted to the ICTY Prosecutor. Therefore, the Chamber concludes that the applicant's detention in this respect was lawful.

c. Conclusion as to Article 5, paragraph 1 of the Convention

94. In conclusion, the Chamber finds that the applicant's detention was lawful as complying with the six month rule under domestic law. The Chamber further finds it lawful as complying with the Rules of the Road as the respondent Party was acting under the authority of the ICTY Prosecutor. Therefore, the Chamber finds that there has been no violation of Article 5, paragraph 1 of the Convention.

2. Article 5, paragraph 3 of the Convention

95. The applicant further claims that his rights as guaranteed under Article 5(3) of the Convention have been violated.

96. Article 5, paragraph 3 of the Convention, insofar as relevant, provides as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time, or to release pending trial…".

97. The purpose of this provision is to prevent individuals from being arbitrarily deprived of their liberty and to ensure that the period of arrest and detention is kept as short as possible (Eur. Court HR, *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, paragraph 30).

a. First limb: requirement of being brought promptly before a judge or other officer authorised by law to exercise judicial power

98. In the present case the applicant was brought before the investigative judge on the day of his arrest, namely 1 September 2000, when his pre-trial detention was considered. The fact that he was brought before the investigative judge on the day of his arrest satisfies the requirement of promptness. The next consideration is whether the investigative judge that the applicant was brought before may be considered "a judge or other officer authorised by law to exercise judicial power" for the purposes of Article 5, paragraph 3. In *Schiesser* at paragraphs 30-31, the European Court of Human Rights laid down criteria for determining whether a person can be regarded as such an officer. It noted that, whilst the meaning of "officer authorised by law" is not the same as "judge", the former must have some of the latter's attributes.

i. independence from the executive and from the parties;

ii. the officer is obliged to hear personally the applicant brought before him; and

iii. there is a substantive requirement which places the officer under an obligation to review "the circumstances militating for or against detention" and to decide "by reference to legal criteria whether there are justifications for maintaining detention" and, if there are not, to order the release.

The Chamber must satisfy itself, in accordance with this test, that the investigative judge was a "judge" or "officer authorised by law" for the purposes of Article 5, paragraph 3. The Chamber notes that there is no indication of a lack of impartiality or independence on the part of the investigative judge. Moreover, it is not disputed that the judge heard the applicant personally.

99. The third criterion places a positive obligation on the "judge" or "officer authorised by law" to consider the reasons for maintaining detention. Moreover, it requires that the "judge" or "officer authorised by law" must have the power to discontinue detention if there are no justifications for continuing detention. In *De Jong, Baljet and Van Den Brink v. The Neth*erlands (Eur. Court HR, judgment of 4 May 1984, Series A no. 77), the European Court of Human Rights held, referring to the requirements in *Schiesser*, that if an officer of the court lacked the power to release the applicant, then the continued detention would be unlawful in this respect. In the present case, the applicant's pre-trial detention was ordered on the basis of the then Article 183, paragraph 1 of the Code of Criminal Procedure. This provided for mandatory pre-trial detention if there existed a "warranted suspicion" that the offence had been committed. The judge was prevented from considering the elements contained in Article 183, paragraph 2 (now to be read as Article 183, paragraph 1), requiring deliberation of the risk of flight, tampering with evidence, influencing witnesses or repetition of offences.

100. The European Court of Human Rights has consistently stated that in any case where judicial discretion is removed by law this will be incompatible with the Convention and any detention based on such provisions unlawful (Eur. Court HR, *Fox, Campbell and Hartley v. United Kingdom*, judgments of 30 August 1990 and 27 March 1991, Series A. no. 182). In the instant case, the power of the judge to release the applicant was not entirely removed, as the judge could still have ordered the applicant's release if he had found that there was no "warranted suspicion" that the applicant committed the offences he was charged with. However, the Chamber finds that in the circumstances, taking the domestic provisions into consideration, the investigative judge did not have any discretion to review the circumstances militating for or against detention, such as, (1) danger of failure to appear for trial, (2) interference with the course of justice, (3) prevention of further offences, (4) the preservation of public order and (5) consideration of the presumption of innocence. The investigative judge also could not exercise discretion by reference to legal criteria whether there were justifications for maintaining detention and if there were not, to order the release, as stated in paragraph 31 of

Schiesser.

101. The Chamber therefore concludes that the investigative judge, whom the applicant was brought before on 1 September 2000, was not a judge for the purposes of Article 5, paragraph 3, as he had no discretion to release the applicant, once he had established that there was a warranted suspicion that the applicant had committed the offence with which he was charged.

b. Second limb: entitlement to trial within a reasonable time, or to release pending trial

102. The applicant further complains, in relation to the second limb of Article 5, paragraph 3, that he did not benefit from the right to be brought to "trial within a reasonable time or release[d] pending trial". However, it should be noted that the use of the word "or" does not suggest that prompt trial is an alternative to release on bail, as there must still be justification for his continued detention (Eur. Court HR, *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7 and *De Jong, Baljet and Van Den Brink v. The Neth*erlands) as mentioned above. The reasons, on the basis of which continued detention could be justified, are those that the judge is required to examine as explained above with regard to the first limb, i.e., the risk of flight, tampering with evidence, influencing witnesses or repetition of offences.

103. Furthermore, the European Court of Human Rights has held in *Neumeister v. Austria* (Eur. Court HR, judgment of 7 May 1974, Series A no. 8), that "reasonable time" in this context does not refer to the processing of the prosecution and the trial, but to the length of detention. This must be distinguished from the concept of reasonableness under Article 6, paragraph 1 (see paragraphs 109-114 below). The length of the trial may be reasonable under Article 6, paragraph 1 due to complexity and the number of witnesses to be heard, but this does not mean that the continued detention will be reasonable under Article 5, paragraph 3. In addition to being subject to different standards, in the present case the relevant time periods differed as well. Under Article 5, paragraph 3 the relevant period was 1 September 2000 to 17 January 2002 as this covered the period of detention. Under Article 6, paragraph 1 the relevant period was from 1 September 2000 until the Public Prosecutor's appeal has been finally dealt with, as the matter will remain pending until such time.

104. The European Court of Human Rights has therefore developed two questions in order to determine whether the length of detention is reasonable. Firstly, whether the grounds given by the national authorities are "relevant and sufficient" to justify continued detention. Secondly, whether the national authorities displayed "special diligence" in the conduct of the proceedings. If the answer to either question is negative, it may be that the length of continued detention will be considered unreasonable. In relation to the first question, the only consideration given to the applicant's detention was under Article 183, paragraph 1 of the Code of Criminal Procedure, that is to say that there was a warranted suspicion that the applicant had committed the offence and that the offence was one for "which the law prescribes a sentence of long-term imprisonment". However, in *Letellier v. France* (Eur. Court HR, judgment of 26 June 1991, Series A no. 207), the European Court of Human Rights held that the reasons given by the national authorities as acceptable reasons for detention, "cannot be gauged solely on the basis of the severity of the sentence risked", as other factors must be considered, too. Consequently, in the applicant's case the authorities failed to consider all the elements that would have been "relevant and sufficient" to justify continued detention.

105. In relation to the second question above, the applicant requested at an early stage to confront the prosecution's witnesses in accordance with Article 159, paragraph 1 of the Code of Criminal Procedure. The investigative judge denied this request and the matter was not referred to the panel of judges, as required by the same provision. The relevance of this is that the prosecution's case depended almost entirely on identification evidence. The applicant disputed this identification evidence and a number of witnesses were called at trial; not a single witness was able to identify him and he was subsequently acquitted. Therefore, instead of displaying special diligence in this respect, the national authorities wilfully prolonged the applicant's detention. Such conduct failed to fulfil the requirements of reasonable time of detention in accordance with Article 5, paragraph 3.

c. Conclusion as to Article 5, paragraph 3 of the Convention

106. The Chamber therefore finds, that the investigative judge was not a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5, paragraph 3 and that the length of the applicant's detention from 1 September 2000 until his release on 17 January 2002 exceeded the limits of reasonableness. Consequently, the respondent Party violated the applicant's rights as guaranteed by Article 5, paragraph 3 of the Convention.

3. Article 6, paragraph 1 of the Convention

107. The applicant claims that his right as guaranteed under Article 6, paragraph 1 of the Convention has also been violated.

108. Article 6, paragraph 1 of the Convention, insofar as relevant, provides as follows:

> "In the determination of…any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law."

a. Reasonable time requirement

109. This issue overlaps slightly with Article 5, paragraph 3 of the Convention (as discussed above), but Article 6, paragraph 1 of the Convention provides a more general right to a trial within a reasonable time whereas Article 5, paragraph 3 deals more specifically with the right of a person in detention to be brought promptly before a judge and subsequently entitled to a trial within a reasonable time. The right under Article 6, paragraph 1 begins to run from the moment a person is charged within the meaning of the Convention. In *Eckle v. Germany* (Eur. Court HR, judgment of 21 June 1983, Series A no. 65, paragraph 73), the European Court of Human Rights defined a charge for the purposes of Article 6, paragraph 1 of the Convention as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". This means that the moment when time begins to run is not necessarily when an indictment is served or charges formally filed, as an arrest may precede charge. Once an individual is aware that he is officially suspected of a criminal offence, from that moment he has an interest in an expeditious decision about his guilt or innocence being made by the court, whether or not an indictment has been filed, and whether or not he has been arrested.

110. In relation to the applicant, an investigation was commenced against the applicant as early as 13 February 1995, but the Chamber has no information as to whether he was aware of this investigation prior to his arrest on 1 September 2000. Furthermore, the European Court of Human Rights stated in *Girolami v. Italy* (Eur. Court HR, judgment of 19 February 1991, Series A no. 196-E) that if an accused is aware of a charge against him and is on the run, time does not start to run during this period for the purposes of Article 6, paragraph 1 of the Convention. Therefore, the earliest that time could start to run is 1 September 2000, not necessarily upon his arrest, but on being brought before the investigative judge the applicant would have been aware at that stage of the charges against him.

111. The next consideration for Article 6, paragraph 1 is when time ceases to run. For the purposes of Article 6, paragraph 1, time ceases to run when the proceedings have been concluded or when the determination becomes final (Eur. Court HR, *Scopelliti v. Italy*, judgment of 23 November 1993, Series A no. 278). In the present case, the Cantonal Prosecutor filed an appeal on 14 February 2002 with the Cantonal Court and this has not yet been finalised. Accordingly, time has not stopped running until this appeal has been finalised. The fact that the criminal proceedings have not been completed yet will not prevent the Chamber from examining whether, as of the date of its decision, duration has been or has not been unreasonably long (see case no. CH/00/4295, *Osmanagić*, decision on admissibility and merits of 5 March 2002, Decisions January-June 2002).

112. Once the time period has been established, the reasonabless for any delay must be established. The European Court of Human Rights has held that, despite not wishing to set a rigid criterion for a claim under Article 6, paragraph 1 of the Convention, a delay of less than two years is

in most cases unlikely to invoke Article 6, paragraph 1. However, in each case the European Court of Human Rights applies three criteria:

(a) the complexity of the case;

(b) the conduct of the applicant; and

(c) the conduct of the relevant authorities.

113. The question of complexity is one that is difficult to asses in general and must be adjudged on a case by case basis. However, the European Court of Human Rights has attached importance to several factors, such as the nature of the facts to be assessed, the number of accused persons, and the number of witnesses to be heard. This consideration may well concern issues of law as well as of fact. The second criterion, i.e., the conduct of the applicant, does not apply in the present case as the respondent Party has offered no suggestion that the applicant prolonged the investigation in any way, and there is no duty on the applicant to assist the prosecuting authority. However, the conduct of the relevant authorities plays an important part in determining the reasonableness of any delay. The respondent Party has stated in its written observations that the delay was partially attributed to the contacting and hearing of numerous witnesses. The European Court of Human Rights has said that this is not necessarily a ground that the respondent Party will be able to rely on (Eur. Court HR, *Idrocalce SRL v. Italy,* judgment of 27 February 1992, Series A no. 229-F and *Tumminelli v. Italy*, judgment of 27 February 1992, Series A no. 231-H). A balance must be struck between the length of delay caused by the gathering of witnesses and evidence and the result expected, and obtained by hearing those witnesses. The Chamber recognises that matters concerning war crimes are of a particularly complex nature and the gathering of witnesses and evidence is an arduous task and consequently a different standard must be applied. In the present case the delay has lasted from 1 September 2000 until the date of adoption of the Chamber's decision, that is to say almost twenty-two months. However, as stated above, the European Court of Human Rights has consistently held that trials lasting less than 2 years will rarely invoke Article 6, paragraph 1 of the Convention.

114. The Chamber finds that the period of almost 22 months is not excessively long considering the complexity of the charges and the difficulty in detecting witnesses. Therefore, the Chamber finds that there has been no violation of Article 6, paragraph 1 of the Convention in this regard.

b. Fair hearing requirement at the pre-trial stage

115. The applicant complains that he failed to receive a fair hearing by an independent and impartial tribunal during the pre-trial stage. The guarantees provided by Article 6 apply not only to court proceedings, but also during the stages that precede them.

116. During the investigative stage the applicant requested confrontation of prosecution witnesses. This request was made in accordance with Article 159 of the Code of Criminal Procedure (see paragraph 36 above). The investigative judge denied the applicant's request and the matter was not referred to the panel of judges as is required under paragraph 1 of that provision when a motion for investigative action is filed. By failing to act in accordance with Article 159, paragraph 1, the investigative judge refused to accept evidence from the applicant, thus violating domestic law.

117. The applicant consistently maintained throughout the duration of the proceedings that he was falsely accused. The prosecution's case relied almost entirely on identification evidence and the applicant wished to examine what the prosecution witnesses might say at trial. The Chamber notes that during the investigative stage the prosecution continually called new witnesses to be heard as it became apparent that existing witnesses would be unable or unwilling to identify the applicant. At the main trial the prosecution called in excess of fifty witnesses and not a single one was able to identify the applicant. The Chamber notes that the equality of arms principle under Article 6 of the Convention imposes on the investigating judge an obligation not to impede the defendant's access to relevant evidence, to which the prosecuting and investigating authorities have access and which the defendant specifically requests. This principle extends, in the Chamber's opinion, to material, which might undermine the credibility of a prosecution witness. Certainly, the request for confrontation was a

matter that was of direct relevance to the applicant's defence, as it would have permitted him the opportunity of potentially exonerating himself.

118. It is implicit under Article 6 of the Convention that the investigating judge has the responsibility of ensuring that this principle of equality of arms is upheld and that there is a fair balance between the parties. The investigating judge's conduct violated this established principle and the applicant has alleged that this resulted in a lack of impartiality. The Chamber finds in the present case that the investigating judge's disregard for the provisions of the Code of Criminal Procedure and his refusal of the applicant's request to be given the opportunity to prove his innocence at the pre-trial stage might have prejudiced the applicant receiving a fair trial thus violating the principle of equality of arms under Article 6, paragraph 1 of the Convention. The Chamber notes that the applicant was acquitted of all charges on 17 January 2002 and that it may be considered that this remedied any failings of the investigating judge at the pre-trial stage. The Strasbourg authorities have consistently stated that where an unfair trial is followed by an acquittal, the latter "may" be an effective remedy as it redresses any previous deficiencies in the pre-trial hearings. However, the Chamber notes that the applicant's acquittal is subject to an appeal presently pending before the Supreme Court. In *Bönisch v. Austria* (Eur. Court HR, decision of just satisfaction of 2 June 1986, Series A no. 103, paragraph 7) the European Court applied Article 50 of the Convention, which reads as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Whilst the issue in *Bönisch* concerned a pardon on the basis of a violation of Article 6, paragraph 1 of the Convention during the substantive proceedings, the Chamber finds that the present case raises an issue of similar importance, in that the applicant's acquittal is not a sufficient remedy as long as the appeal remains pending. The Chamber may therefore find a violation during the pre-trial stage and issue further remedies in order to satisfy the applicant's claim.

c. Conclusion as to Article 6, paragraph 1 of the Convention

119. The Chamber therefore finds, in conclusion to the alleged violations of Article 6, paragraph 1 of the Convention that there has been no violation of the reasonable time requirement, but that there has been a violation as to the fairness at the pre-trial stage that has not been sufficiently remedied by the applicant's acquittal.

4. Article 5, paragraph 2 and Article 6, paragraph 3(a) of the Convention

120. The applicant further complains that his right to be informed promptly of the charges against him has been violated under Articles 5, paragraph 2 and 6, paragraph 3(a) of the Convention. Despite the similarities of the two provisions, a distinction must be drawn as Article 5, paragraph 2 refers to events from arrest to charge and Article 6, paragraph 3(a) refers to events subsequent to charge.

121. Article 5, paragraph 2 of the Convention, insofar as relevant, provides as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

122. Article 6, paragraph 3(a) of the Convention, insofar as relevant, provides as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> "(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

123. The Convention does not lay down any specific procedure for charging an individual. However, Article 5, paragraph 2 and Article 6, paragraph 3(a) require that certain information be given to the applicant at an early stage.

a. Article 5, paragraph 2 of the Convention

124. In *Fox, Campbell and Hartley v. UK* the European Court of Human Rights interpreted the requirement of Article 5, paragraph 2 as meaning that any individual upon arrest must be told:

> "...in simple, non-technical language, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness."

125. In the present case, the applicant was arrested on 1 September 2000 and on the same day brought before the investigative judge. It was at this stage that the applicant was informed of the investigation against him. The reason for the requirement of Article 5, paragraph 2 is to enable an individual to challenge the lawfulness of his arrest and detention. The applicant had the opportunity at this time to challenge the lawfulness of his detention when he was brought before the judge. The applicant has not stated in relation to his arrest and first appearance before the judge that he was: (a) not informed of the charges against him; or (b) that the information he was provided with was insufficient or unclear. He has stated that he requested sight of the case file and that this was denied on 1 and 4 September 2000. The Chamber notes that in relation to the requirement of Article 5, paragraph 2, sight of the case file is not necessary, as long as the information provided is sufficient to challenge the lawfulness of detention.

126. In conclusion to the alleged violation of Article 5, paragraph 2 of the Convention, the Chamber finds that the applicant was furnished with the relevant information to challenge the lawfulness of his detention. Therefore, the Chamber finds that for the period from the applicant's arrest until charge, there has been no violation of Article 5, paragraph 2 of the Convention.

b. Article 6(3)(a) of the Convention

127. When an indictement is filed, the requirements of Article 5, paragraph 2 are superseded by those of Article 6, paragraph 3(a). The requirement of Article 6, paragraph 3(a) is that everyone charged shall be informed promptly and in detail of the charges against him. The purpose of this provision, unlike Article 5, paragraph 2, is to enable the individual to begin to prepare a defence to the charges (Eur. Commission HR, *G, S and M v. Austria*, no. 9614/81, decision of 12 October 1983, Decisions and Report 34, p.119 at p.121). On 27 February 2001, the applicant was served with an indictment containing eight counts. This indictment was based upon the investigation conducted against the applicant since 1995. The applicant challenged this indictment and a second indictment was filed on 16 May 2001.

128. For the purposes of Article 6, paragraph 3(a) time started to run at the moment the first indictment was filed on 27 February 2001 and not upon arrest as under Article 5, paragraph 2. The information required at this stage must allow the accused to begin preparing his defence to the charges. The information required must therefore be in greater detail than the information required under Article 5, paragraph 2 and must explain the nature and cause of the accusation against the applicant.

129. The applicant states that he was refused access to the case file despite requesting it on 1 and 4 September 2001, but it must be noted that this period was covered by Article 5, paragraph 2, when there was no requirement for the authorities to provide such detailed information. Furthermore, in *Pélissier v. France* (Eur. Court HR, judgment of 25 March 1999, Reports of Judgments and Decisions 1999-II, paragraphs 51-52) the European Court stressed that the requirement of Article 6, paragraph 3(a) referred to the notification of the charges and that the applicant be informed, in sufficient detail, not only of the cause of the accusation, but also the legal characterisation given to those acts. The applicant was informed promptly of the nature and cause of the accusations against him and the legal characterisation on which they were based at the relevant time, but maintains that the case file was withheld. The Chamber notes that the substance of the applicant's complaint may fall within the meaning of "facilities for the preparation of his defence" as guaranteed under Article 6

paragraph 3(b). However, the applicant (deleted text) only requested insight into the case file during the early stages of his pre-trial detention, almost half a year before an indictment against him was filed. During this time, the protection of Article 6, paragraph 3 (a) and (b) was not applicable. There is no indication that at any time after 4 September 2000 the applicant requested sight of the case file. Furthermore, the applicant has failed to substantiate what material was withheld and on what basis its non-disclosure prejudiced his defence at trial or would have assisted him in the preparation of his defence.

130. It is important to note that the purpose of Article 6, paragraph 3(a) in this respect is that it prevents the prosecuting authorities from surprising the defence at trial. That is to say, to propose facts or charges that were not previously put to the applicant. However, the applicant was presented with the indictment of 16 May 2001 that detailed the allegations that were to be presented at trial. Upon examination of this indictment, the Chamber finds that it was not vague in character and it specifically detailed the charges against the applicant. The Chamber further notes that there is no conclusive evidence to show that the prosecution presented at trial material contained in the case file that had previously not been put to the applicant. The applicant was provided with sufficient material to begin preparing his defence at the relevant time.

131. On this basis, the Chamber finds that the applicant has failed to show any grounds for a violation of Article 6, paragraph 3(a). The Chamber finds that the indictment of 16 May 2001 was sufficiently clear and detailed in nature to permit the applicant to prepare a defence to the charges that he was subsequently acquitted of. Therefore, the Chamber also finds that there has been no violation of Article 6, paragraph 3(a) of the Convention.

5. Article 9 of the Convention

132. The applicant claims that his rights as guaranteed under Article 9 of the Convention have also been violated.

133. Article 9 of the Convention, insofar as relevant, provides as follows:

> "(1) Everyone has the right to freedom…of religion; this right includes freedom, either alone or in a community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> "(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

134. The applicant complains that his right to freedom of religion has been violated by a refusal to allow him access to a Catholic priest of his own choosing during the Easter Holidays in the year 2001. The applicant's complaint is that the investigative judge initially authorised this, but on 10 April 2001, the President of the Panel of Judges of the Cantonal Court, Muhamed Podrug, who was in charge of the applicant's case, refused his request on the grounds that firstly, he had not had a chance to see the applicant himself, secondly, that the request should be made to the President of the Cantonal Court, and finally implying that as a "guilty party" he was not entitled to receive such access. The respondent Party maintains that it did not refuse the applicant access to Father Ante Ledić for the reasons stated by the applicant, as Judge Muhamed Podrug merely outlined the procedure to be followed. Due to the fact that this procedure was not followed, the applicant was subsequently refused access to Father Ante Ledić. Nonetheless, the respondent Party fails to outline the specific procedural reasons given by Judge Muhamed Podrug and does not contest the statement raised by the applicant.

135. The Chamber notes that Article 9 of the Convention places an obligation on states to ensure the peaceful enjoyment of religious rights to those detainees who hold such religious beliefs, and that any limitation placed on such rights must be in accordance with paragraph 2 of Article 9. The Chamber further notes that the taking of Confession and Holy Communion during the Easter Holidays

must be considered acts of worship essential to the practice of Catholicism and that Catholicism is a religion widely practised in the Federation of Bosnia and Herzegovina.

136. Pursuant to paragraph 2 of Article 9, the freedom to manifest one's religion or beliefs can only be restricted by such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The questions therefore are firstly whether there is a legal basis for the interference under domestic law; secondly whether a legitimate aim is pursued; and thirdly whether the interference is strictly proportionate to the aim pursued.

137. As to the question of whether the denial of access to Father Ante Ledić was in accordance with the law, the applicant claims that this denial was not in accordance with the rules applying to persons detained in the detention facility of the ICTY and as a person detained under the Rules of the Road he is entitled to such protection. The Chamber notes however, that these rules do not apply to the applicant's detention in a prison of the Federation of Bosnia and Herzegovina. Therefore, this argument is irrelevant. The applicant further complains that the refusal was not in accordance with the Code of Criminal Procedure (see paragraph 68 above). However, the applicant does not indicate which applicable provisions have been violated. The Chamber further notes, that the findings of the Independent Judicial Commission and the Federal Commission for Election and Appointment of Judges suggest that the refusal by Judge Muhamed Podrug was in accordance with the law. In such a situation the Chamber sees no reason to doubt that the procedural grounds on which Judge Muhamed Podrug rejected the applicant's requests were covered by domestic law. Accordingly, the Chamber concludes that the interference was in accordance with the law.

138. The Chamber notes that a legitimate aim may be pursued, as the limited Strasbourg jurisprudence implies, that restrictions placed on prisoners' rights may be necessary in a democratic society in the interests of public safety, for the protection of public order or for the protection of the rights and freedoms of other prisoners. The Chamber notes in the present case, however, that no such grounds were given by Judge Muhamed Podrug that could be taken to fall within such limitations as are detailed in paragraph 2 of Article 9. Nonetheless, the Chamber notes that the Strasbourg authorities have given a wide meaning to the term "protection of public order" and in this context it must cover "order" that prevails within the confines of a special group; i.e., a prison. The question is, therefore, was the interference necessary to maintain "order" within the confines of the prison. The test of necessity will determine whether the interference was proportionate to the aim pursued. The Chamber notes that the emphasis must be placed on whether such a restriction or limitation is necessary; what interest sought to be protected is of less importance. Consequently, the Chamber must ask itself whether the refusal by Judge Muhamed Podrug to allow the applicant access to Father Ante Ledić was "necessary" to any aim pursued.

139. The Chamber takes note of the respondent Party's observations, in particular those of 30 May 2002, and also notes that the applicant has left these latter submissions unchallenged. The Chamber points out that while the restriction of denying access to a Catholic priest in Bosnia and Herzegovina can never be considered inherent to detention and thus justified under Article 9, paragraph 2 of the Convention, a Catholic priest was made available by the prison authorities to the applicant during the Easter Holidays in 2001. However, the applicant chose not to avail himself of the services of this priest, because he was not the priest the applicant wished to see. The applicant, by not responding to the submissions of 30 May 2002, has not given any reasons as to why he did not wish to see the Catholic priest provided by the prison authorities.

140. The Chamber therefore finds that, considering the wide margin of appreciation afforded to states to assess the existence and extent of the necessity of an interference with the freedom of religion, the interference in the present case is proportionate to the aim pursued, that is to maintaining the protection of public order, and therefore in accordance with Article 9 paragraph 2 of the Convention. The obligation on the respondent Party was to provide the applicant with a Catholic priest and not to impose restrictions contrary to Article 9, paragraph 2. There is no right under the Convention, to be given access to a priest of one's own choosing. The Chamber therefore finds that the interference with the applicant's rights was proportionate to the aims pursued and therefore not a violation of the applicant's right of freedom to manifest his religion under Article 9 of the Convention.

6. Article 13 of the Convention

141. The applicant complains that there has been a violation of Article 13 of the Convention as there is no effective remedy available to him, but he does not specify in relation to which alleged violations this remedy is sought. However, due to the finding of violations under Articles 5, 6 and 9 of the Convention, the Chamber considers it unnecessary to separately examine the complaint under Article 13 of the Convention.

7. Conclusions as to the merits

142. The Chamber therefore finds, in conclusion, that the respondent Party has violated the applicant's rights as guaranteed under Article 5, paragraph 3 of the Convention in that the investigative judge was not a "judge or other officer authorised by law to exercise judicial power" and that the length of the applicant's detention from 1 September 2000 until his subsequent acquittal of all charges on 17 January 2002 exceeded the limits of reasonableness. The respondent Party further violated the applicant's right to a fair trial and violated the principle of equality of arms as guaranteed under Article 6, paragraph 1 of the Convention.

VIII. REMEDIES

143. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the breaches of the Agreement, which it has found, "including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures".

144. The applicant requests compensation in the amount of 20,000 KM for compensation for non-pecuniary damage and 10,000 KM for compensation for legal costs and expenses as a result of his detention from 1 September 2000 until 17 January 2002.

145. The Federation submits that the claims for compensation are ill-founded and unsubstantiated.

146. The Chamber notes that although the applicant's detention was not unlawful under Article 5, paragraph 1 of the Convention, the period of detention exceeded the limits of reasonableness under Article 5, paragraph 3 of the Convention and the investigative judge was not a "judge or other officer authorised by law to exercise judicial power" within the meaning of the same provision (see paragraphs 95-106 above). The Chamber has further found violations of the applicant's right to fair hearing and the right to equality of arms as guaranteed under Article 6, paragraph 1 of the Convention. The Chamber finds that these violations are considerable and warrant the awarding of compensation. In determining the amount of appropriate compensation, the Chamber considers the violations, not in isolation, but taken as a whole.

147. The Chamber notes that serious violations have been established in the present case and that the Chamber finds it appropriate, considering the case in general terms, to award compensation for non-pecuniary damage for the harm suffered by the applicant in the amount of 5,000 KM. This amount is to be paid within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

148. The applicant has also requested compensation for legal costs and expenses in the amount of 10,000 KM. Taking into account that the applicant has been legally represented throughout the proceedings before the Chamber, and that his legal representative has made, in addition to the original application to the Chamber, five separate submissions either at the request of the Chamber or in response to the respondent Party's written observations, taking into consideration the particular facts of the case and the complexity of the issues, the Chamber finds it appropriate to award the applicant 1,800 KM in respect of legal costs incurred.

149. In respect to the applicant's request for additional compensation for expenses incurred, the Chamber notes that the applicant has failed to submit any evidence of the expenses incurred. In the

Marjanović case (case nos. CH/00/373 et al, *Vejlko Marjanović et al*, decision on admissibility and merits of 9 October 2001, paragraph 103, Decisions July-December 2001) the Chamber noted that it could not consider the applicants' claim for compensation for expenses incurred in the absence of specific evidence. Therefore, the Chamber will not award any compensation to the applicant in the present case for expenses in addition to his legal costs, in this respect.

150. The Chamber further awards simple interest at an annual rate of 10% as of the date of expiry of the one-month period set in paragraph 147 and 148 for the implementation of the compensation awards in full or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

151. For the above reasons, the Chamber decides,

1. unanimously, to declare the application in relation to the complaints under Articles 5, 6, 9 and 13 of the European Convention on Human Rights admissible;

2. unanimously, to declare the remainder of the application inadmissible;

3. unanimously, that there has been no violation of the applicant's right to liberty and security of person as guaranteed by Article 5 paragraph 1 of the European Convention on Human Rights;

4. unanimously, that there has been no violation of the applicant's right to be informed promptly of the reasons for his arrest and of any charge against him as guaranteed by Article 5 paragraph 2 of the European Convention on Human Rights;

5. unanimously, that the investigative judge whom the applicant was brought before was not a judge or other officer authorised by law for the purposes of Article 5 paragraph 3 of the European Convention on Human Rights, as he had no discretion to release the applicant, once he had established that there was a warranted suspicion, thus constituting a violation of that Article, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that the period of the applicant's detention from 1 September 2000 until 17 January 2002 constitutes a violation of his right to be tried within a reasonable time or released pending trial as guaranteed by Article 5 paragraph 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, that the principle of equality of arms was violated by the investigating judge thus depriving the applicant of a fair hearing at the pre-trial stage as guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights, thus constituting a violation of that Article, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

8. unanimously, that there has been no violation of the applicant's right to be tried within a reasonable time as guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights;

9. unanimously, that there has been no violation of the applicant's right to be informed promptly of the nature and cause of the accusation against him as guaranteed by Article 6 paragraph 3(a) of the European Convention on Human Rights;

10. by 5 votes to 2, that there has been no violation of the applicant's right to freedom of religion as guaranteed by Article 9 of the European Convention on Human Rights;

11. unanimously, that it is not necessary to separately examine whether the applicant has been deprived of an effective remedy under Article 13 of the European Convention on Human Rights;

12. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66

of the Chamber's Rules of Procedure, the sum of 5,000 KM (five thousand Convertible Marks) by way of compensation for non-pecuniary damage;

13. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 1,800 KM (one thousand and eight hundred Convertible Marks) by way of compensation for legal costs;

14. unanimously, to dismiss the remainder of the applicant's claim for compensation;

15. unanimously, that simple interest at an annual rate of 10% (ten percent) will be payable on the sum awarded in conclusions 12 and 13 above from the expiry of the one-month period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

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

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel