DECISION ON ADMISSIBILITY

Case no. CH/01/8325

Ivo LOZANČIĆ, Niko JOZINOVIĆ, Božidar TOMIĆ, Luka BABIĆ, Ivo MRKONJIĆ, Anto JOZIĆ, Viktor MARKANOViĆ, Slavko SPAJIĆ, Alojz VRBIĆ, Marinko MARTIĆ, Perica JUKIĆ, Drago DRAGIČEVIĆ, Esad ČORLAK, Marinko JAKOVLJEVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 March 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Andrew GROTRIAN

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)(a) and (c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. On 14 March 2001, the Deputy Cantonal Prosecutor in Zenica filed a request with the Cantonal Court in Zenica for the execution of an investigation against the applicants for well-founded suspicion that they had committed war crimes against civilians under Article 154, paragraph 1, war crimes against the injured or diseased under Article 155 and war crimes against prisoners of war under Article 156 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"). The Deputy Cantonal Prosecutor further requested that the applicants be detained for the purpose of ensuring their attendance in accordance with Article 183, paragraph 1 of 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").

2. On 24 September 2001 almost all of the applicants (except Drago Gragičević and Esad Čorlak), who are citizens of Bosnia and Herzegovina and the majority of which are of Croat origin, filed a request through their defendant lawyer, Danilo Stijović, to the Cantonal Court in Zenica for the disqualification of the President of the Cantonal Court, Zijada Alihodžić, the investigative judge, Hilmo Ahmetović, and all other judges of that court in accordance with Article 37 paragraphs 1 and 2 of the Law on Criminal Procedure. The request explained that due to the conflict between Bosniaks and Croats it is justified for the applicants to doubt the objectivity of the Cantonal Court in Zenica. The applicants proposed, in their applications to the Chamber, to appoint the Cantonal Court Mostar as the competent court to hear their case.

3. On 25 September 2001, the Supreme Court of the Federation of Bosnia and Herzegovina issued a procedural decision partly rejecting the applicants' request for disqualification of the investigative judge, Hilmo Ahmetović, and the President of the Cantonal Court in Zenica, Zijada Alihodžić, as ill-founded, and partly rejecting the request in relation to the disqualification of all other judges of the Cantonal Court Zenica. The Supreme Court in its reasoning of the procedural decision, stated that there was insufficient evidence to suggest that the investigative judge and President of the Court would fail to act and apply the law impartially and further that the disqualification of the judges could not be approved procedurally. The reasoning of this was, firstly, that the composition of the Court included judges and lay judges of Serb and Croat ethnic origin and this composition would satisfy the requirements of independence and impartiality as provided by Article 6 of the European Convention on Human Rights (hereinafter the "Convention"). Secondly, since the request for disqualification of judges referred to all judges, the Supreme Court rejected this part of the claim as Article 37 paragraph 4 of the Code of Criminal Procedure only permits the disqualification of individual judges that are specified by name and who are participating in the case.

II. RELEVANT LEGAL PROVISIONS

A. Article 183 of the Code of Criminal Procedure

4. Article 183 of the Code of Criminal Procedure under which the Deputy Cantonal Prosecutor in Zenica filed the request with the Cantonal Court in Zenica read:

> "(1) Custody shall always be ordered against a person if there is a warranted suspicion that he has comitted a crime for which the law prescribes a sentence of long-term imprisonment.
>
> "(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 possibibily 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, fellow accuseds or accessories in terms of concealment;

(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 offences a sentence of imprisonment of three years or more sever penalty is prescribed;

(4) if the crime is one for which because of the manner of the execution or the consequences of the crime, detention is necessary for the safety of the citizenry. These include crimes envisaged in the Criminal Code of the Federation:...war crimes against the civilian population (Article 154), war crimes against the injured or diseased (Article 155), war crimes against war detainees (Article 156)..."

5. The Decision of the Law of Amendments to the Code of the Criminal Procedure entered into force on 8 November 2001, repealing 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).

B. Disqualification of judges

6. Under Article 35 of the Code of Criminal Procedure a judge or lay judge may be prevented from performing his judicial duties if one or more of six circumstances arise. These relate primarily to the judge or lay judge's personal involvement in the matter before him, relationship to any of the parties, or previous involvement in the matter. A final circumstance under paragraph 6 provides, "if circumstances which engender doubt as to his disinterestedness".

7. Under Article 37 it is stated that the parties may seek disqualification but this must be of a particular judge by name who is involved in the case.

8. Under Article 38 the president of the court shall rule on the petition for disqualification and paragraph 3 states that a statement shall be taken from the judge, lay judge or president of the court before any decision on disqualification is taken.

C. Change of venue

9. Article 31 of the Code of Criminal Procedure permits circumstances where a matter may be designated to another court:

"(2) The Supreme Court of the Federation may designate another court to conduct proceedings which is competent with respect to the subject matter on the territory of another canton if important grounds exist.

(3) The court may render the decision referred to in paragraphs 1 and 2 of this article on the motion of the investigative judge, an individual judge or the president of the panel of judges or on the motion of the principals or the defence counsel."

III. COMPLAINTS

10. The applicants allege violations of their rights guaranteed under Articles 5(1), 5(3) and 6 of the Convention, as well as discrimination in the enjoyment of those rights and of the right to equality before the law under Article 26 of the International Covenant on Civil and Political Rights.

IV. WRITTEN SUBMISSIONS OF THE PARTIES

A. The respondent Party

11. The respondent Party states in its written observations that the International Criminal Tribunal for the former Yugoslavia gave its consent on 12 December 2000 to the applicants' prosecution for certain criminal offences. It further states that the Cantonal Court in Zenica has not ordered detention for any of the applicants. Therefore, the applicants were not deprived of their liberty. Furthermore, the respondent Party mentions that the High Representative issued the Decision of the Law of Amendments to the Code of the Criminal Procedure on 8 November 2001 abolishing the law providing for compulsory detention in Article 183 paragraph 1 of the Code of Criminal Procedure.

12. In the procedural decision of 25 September 2001, the Supreme Court rejected the applicants' claim for disqualification of some individual judges and of all the judges of the Cantonal Court in Zenica partly on the merits and partly on procedural grounds for failure to satisfy formal requirements for filing the claim. The respondent Party contends that this procedural decision is in accordance with domestic law and that it is not contrary to the Convention. Further, it emphasises that the applicants have failed to lodge an appeal against this procedural decision within the meaning of Article 39, paragraph 4 of the Code of Criminal Procedure.

13. As to the merits of the application, the respondent Party states that Article 5 of the Convention has not been violated, as criminal proceedings have not been initiated and preliminary legal procedures were respected, and according to case-law, the European Court of Human Rights in Strasbourg will purportedly not consider whether the law has been correctly applied. As to the violation of Article 6, the respondent Party repeats that the criminal proceedings have not been initiated as the procedural decision on conducting the investigation was not issued. As to the complaint of discrimination, the respondent Party states that these allegations are arbitrary, unsubstantiated by evidence, and therefore untenable in their entirety.

B. The applicants

14. The applicants repeat in their observations that there has been a threat of compulsory detention and that many citizens spent several years in detention before being finally released with no charges filed against them. The applicants have stated to the Chamber that it would be more appropriate if some other court in the Federation conducted the criminal proceedings in their cases (for example, the applicants suggested the court in Travnik, having previously mentioned Mostar as an equivalent alternative). The applicants allege that the respondent Party has not appointed judges of Croat and Serb origin to the Cantonal Court in Zenica and that the applicants are exposed to public pressure because the criminal offences they are charged with are closely connected to that area. The applicants request that the Chamber issues a decision on admissibility and merits as Articles 5, 6 and 14 of the Convention have been violated. The applicants repeat that they are of the opinion that the Cantonal Court in Zenica cannot act independently and impartially because it does not have a judge of Croat ethnic origin.

V. PROCEEDINGS BEFORE THE CHAMBER

15. The application was introduced on 29 October 2001. On the same day the President of the Chamber issued an order for provisional measures requiring the respondent Party to refrain from applying the measure of compulsory detention provided by Article 183, paragraph 1 in conjunction with Article 174, paragraph 1 of the Code of Criminal Procedure during the investigative proceedings against the applicants conducted before the Cantonal Court in Zenica. This order remained in force until 7 November 2001. It was not extended further when it lapsed.

16. On 30 October 2001 the respondent Party informed the Chamber that the Cantonal Court in Zenica would respect the order for provisional measures completely and that it would refrain from applying the measure of compulsory detention to the applicants in this case.

17. On 8 November 2001 the High Representative issued the decision according to which the contested Article 183, paragraph 1 of the Code of Criminal Procedure was repealed.

18. On 15 November 2001 the respondent Party was invited to submit its written observations on admissibility and merits in this case. On 14 December 2001 the respondent Party submitted its written observations.

19. On 21 December 2001 the written observations of the respondent Party were transmitted to the applicants for their observations. On 11 January 2002 the applicants submitted their reply to the written observations of the respondent Party.

20. On 14 December 2001 the Chamber invited the Independent Judicial Commission of the Office of the High Representative to give its opinion as *amicus curiae* with regard to the applicants' allegations that the composition of the Cantonal Court in Zenica with respect to the origin of its judges was such that it was difficult to believe that they were not biased. The Chamber received these written observations, as well as other documentation, on 24 December 2001. These written observations were transmitted for information and possible observations to the respondent Party and to the applicants on 29 January 2002 with a two-week deadline attached for any observations. The Chamber did not receive any written observations in reply.

21. The Chamber deliberated on the admissibility and the merits of the application 6 November 2001, 5 February and 8 March 2002 and adopted the present decision.

VI. OPINION OF THE CHAMBER

22. Before considering the merits of the case the Chamber must first decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2)(a) and (c) of the Agreement which, so far as relevant provides as follows:

> "The Chamber shall decide which applications to accept... In so doing, the Chamber shall take into account the following criteria:
>
> > "(a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted...
> > "(c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded..."

23. With regard to the alleged violation of Articles 5(1) and (3) of the Convention, the applicants have never been subject to an order for detention under the old Article 183, paragraph 1. Under the new Article 183, paragraph 1 pre-trial detention is no longer mandatory, and the applicants again have not been subject to an order for detention. Therefore, the Chamber finds that in this respect the applicants are not and never have been victims of a violation of the rights and freedoms guaranteed under the Agreement. The Chamber therefore decides to declare this part of the application inadmissible

24. With regard to the alleged violation of Article 6(1) of the Convention, the Chamber notes that the Supreme Court issued its procedural decision on 25 September 2001 in which it rejected the applicants' claim for disqualification of judges partly on the merits and partly on procedural grounds for failure to satisfy formal requirements for filing the claim. However, it is quite clear that the essence of the applicants' request is that another court in the Federation of Bosnia and Herzegovina should decide their cases. The Code of Criminal Procedure provides under Article 31, paragraphs 2 and 3 that the Supreme Court of the Federation may, upon the proposal of the investigating court, the President of the court, one of the parties, or defence counsel, determine a court of equal competence in the territory of another Canton to decide the case if there are important supporting reasons. The applicants have never formally submitted such a claim under Article 31 for change of venue, but instead they submitted their claim for disqualification of some individual judges and of all the judges of the Cantonal Court in Zenica. Therefore, they still have the possibility to submit a claim for change of venue pursuant to Article 31, paragraphs 2 and 3 of the Code of Criminal Procedure.

25. The Chamber notes that the applicants failed to submit a request for the change of venue and as such the applicants have not shown that this remedy was ineffective and it does not appear so to the Chamber. Accordingly the Chamber finds that the applicants have not, as required by Article VIII(2)(a) of the Agreement, exhausted the available effective domestic remedies. The Chamber therefore decides to declare this part of the application inadmissible.

26. With regard to the allegation of the violation of Article 26 of the International Covenant on Civil and Political Rights, the Chamber has jurisdiction only in the case of discrimination. The Chamber finds that the applicants have failed to substantiate the allegations of discrimination. Therefore, the Chamber finds that the application does not disclose any appearance of a violation in this regard. It follows that these allegations are manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible, also.

VII. CONCLUSION

27. For these reasons, the Chamber, unanimously

DECLARES THE APPLICATION INADMISSIBLE

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber