



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 September 2003)

Case no. CH/02/8667

Mediha NUKIĆ HARBAŠ and Edina, Emina and Jasmina NUKIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 1 September 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Andrew GROTRIAN

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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 first applicant is a daughter of Mehmed Nukić, who is designated as a victim in the application form. The other applicants are sisters of the first applicant. The applicants state that their father was killed in the yard in front of their house in Bihać by M.L. on 23 June 1993. The criminal proceedings against the alleged murderer of the applicants' father have not been concluded yet.
2. The applicants complain of violations of their rights in relation to the fairness of the trial and the length of the proceedings and that they are deprived of their rights to obtain compensation.
3. The case raises issues under Article 6 paragraph 1 of the European Convention on Human Rights (the "Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced before the Chamber on 10 January 2002. The applicants requested the Chamber, as a provisional measure, to disqualify the Cantonal Court in Bihać from dealing with this case and to order that the case be decided by the Supreme Court of the Federation of Bosnia and Herzegovina.
5. On 8 April 2002, the Chamber rejected the applicants' request for the issuance of a provisional measure and decided to ask the applicants some additional questions before deciding on further action in the case.
6. On 19 April 2002, the Chamber informed the applicants that it had rejected the request for the issuance of a provisional measure and asked the applicants to submit new information about the proceedings pending before the Cantonal Court in Bihać.
7. On 25 April 2002 and 21 May 2002, the applicants submitted new information about the proceedings before the domestic courts.
8. On 12 July 2002, the case was transmitted to the respondent Party for its observations on admissibility and merits under Article 6(1) of the Convention.
9. On 4 September 2002, the respondent Party requested an additional one month time limit for the submission of its written observations. The respondent Party's request was granted.
10. On 14 October 2002, the respondent Party submitted its written observations, which were forwarded to the applicants.
11. On 25 October 2002, the applicants submitted their observations in reply to the respondent Party's observations.
12. On 13 January 2003 and 27 May 2003, the applicants submitted additional information to the Chamber.
13. The Chamber deliberated on the admissibility and merits of the case on 8 April and 5 July 2002, 4 June, 2 July and 1 September 2003. On the latter date the Chamber adopted the present decision.

III. FACTS

14. On 11 October 1993, the District Military Prosecutor in Bihać brought an indictment against M.L. charging that he had fired five shots at his neighbour Mehmed Nukić and deprived him of his life, thereby having committed the criminal offence of murder under Article 36(1) of the Criminal Code of the Republic of Bosnia and Herzegovina.

15. By a judgment of the District Military Court of Bihać of 19 September 1994, M.L. was acquitted of the charge that he had committed the criminal offence of murder. The Court found that M.L. had acted in self-defence.
16. The District Military Prosecutor filed an appeal against the Bihać District Military Court's judgment for a substantial violation of the provisions of the Code of Criminal Procedure and for the incorrect and incomplete establishment of the facts.
17. On 21 November 1994, the Department of the Supreme Court of Bosnia and Herzegovina in Bihać issued a decision accepting the appeal and the case was returned for retrial.
18. In the renewed proceedings, the District Military Court in Bihać issued on 17 November 1995 a judgment by which M.L. was acquitted of the charge that he had committed the criminal offence.
19. The Higher Public Prosecutor in Bihać filed an appeal against the aforementioned judgment.
20. On 16 June 1997, the Supreme Court of the Federation of Bosnia and Herzegovina accepted the appeal, quashed the judgment, and returned the case for retrial.
21. On 14 February 2000, the Cantonal Court in Bihać issued a judgment acquitting the accused of the charge of having committed the criminal offence of murder under Article 171 (1) of the Criminal Code of the Federation of Bosnia and Herzegovina.
22. The heading of the decision states that the Cantonal Court issued the decision in the presence of the Deputy Public Prosecutor, the defendant, and his lawyer, and Edina Nukić and Mediha Harbaš, as the injured parties. The Deputy Public Prosecutor had asked the Court to find M.L. guilty and to sentence him in accordance with the law. The lawyer of the injured parties joined the request of the Deputy Public Prosecutor. In addition, the lawyer asked the Court to instruct the injured parties to apply for compensation before the civil court.
23. The operative section of the judgment states that the Court, in the course of the evidentiary proceedings, examined evidence by hearing witness and expert testimony. In particular, the Court heard the injured party, Edina Nukić (a daughter of the killed person), the witness F.L. (the wife of the accused person), the medical expert Miroslav Rakočević, and the ballistics expert Ismet Bećirspahić. In addition, records of previously heard testimonies were read out. The Court further considered the on-site investigation report, the record on confiscation of the gun, the hospital record on injuries of the accused person, a dismissal letter from the hospital for the accused person, the record of the on-site investigation of 6 September 1993 with an expert ballistics opinion, the record of the autopsy, the findings and opinion of a doctor presented in the course of the investigation, the findings and opinion of the ballistics expert of 27 May 1997, and the record on the reconstruction of events after 27 May 1997, all of which were read out. The Court also examined photo documents and a scheme of the site of 25 July 1993, a drawing of the site subsequent to an additional visit to the site of 6 September 1993, and photo documents and a plan of the site after the reconstruction of the event of 19 June 1998. Considering all the evidence, the Court found it established that Mehmed Nukić had started cursing and insulting the accused. Mehmed Nukić then threw concrete blocks, metal rods and shock-absorbers, thereby hitting the accused on the head and arm. Since Mehmed Nukić continued his attack, the accused took out his gun and started firing in a kneeling position towards Mehmed Nukić. He stopped firing once he could not see Mehmed Nukić anymore.
24. The Court found that the attack was carried out with concrete blocks and that, against such an intensive attack, self-defence was justified.
25. On 14 March 2000, the Cantonal Public Prosecutor filed an appeal against the judgment for the incorrectly and incompletely established factual background, and an essential violation of the provisions of the Code of Criminal Procedure and for a violation of the Criminal Code.
26. On 26 October 2000, the Supreme Court of the Federation of Bosnia and Herzegovina examined the allegations in the appeal and, in accordance with the provision of Article 370 of the Code of Criminal Proceedings of the Federation of Bosnia and Herzegovina, issued a procedural

decision granting the appeal of the Cantonal Public Prosecutor in Bihać and returned the case for retrial. Having considered the case, the Supreme Court found that the Public Prosecutor's statements contained in the appeal were justified, and that the statement of the facts in the case was not sufficiently clear. In particular, the Supreme Court invited the Cantonal Court, as it had previously done, to establish whether the action in self-defence, if any, was proportional to the attack.

27. On 22 May 2003, the Cantonal Court in Bihać issued a judgment acquitting the accused of the charge of having committed the criminal offence of murder under Article 171 (1) of the Criminal Code of the Federation of Bosnia and Herzegovina. The Cantonal Public Prosecutor appealed against the judgment on 31 July 2003. The proceedings upon the appeal are still pending before the Supreme Court of the Federation of Bosnia and Herzegovina.

IV. RELEVANT DOMESTIC LEGISLATION

A. Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 43/98, 23/99, 50/01, 27/02); new Code of Criminal Procedure came into force on 1 August 2003 (OG FBiH no. 35/03)

1. Provisions related to the role of the injured party

28. Article 55, concerning the injured party and the private prosecutor, provides:

"(1) The injured party and the private prosecutor have the right during the examination to call attention to all facts and suggest evidence which has a bearing on establishing the crime, on finding the perpetrator of the crime or on establishing their claims under property law.

(2) In the main trial they have the right to propose evidence, to put questions to the accused, witnesses and expert witnesses, and to make remarks and present clarifications concerning their testimony, and also to make other statements and make other proposals.

(3) The injured party, the injured party as prosecutor and the private prosecutor have the right to examine the records and articles presented as evidence. ...

(4) The investigative judge and the presiding judge of the panel shall inform the injured party and private prosecutor of their rights as referred to in paragraphs 1 and 2 of this Article."

29. Article 159, concerning the preliminary examination, provides:

"(1) During the inquiry the parties and the defence counsel and the injured party may file motions with the investigative judge that certain investigative actions be taken. ..."

30. Article 160, also concerning the preliminary examination, provides:

"(2) The prosecutor, the injured party, the accused and defence counsel may attend an inquest and hearing conducted by an expert and the examination of that expert witness.

(5) The investigative judge must suitably inform the prosecutor, defence counsel, the injured party and the accused concerning the time and place of investigative procedures which they may attend unless postponement is risky. ...

(7) Persons who attend investigative procedures may propose that the investigative judge for the purpose of clarifying the matter put certain questions to the accused, witness or expert witness, and with permission of the investigative judge they may also put questions directly. Such persons have the right to have their remarks concerning the performance of certain actions entered in the court record, and they may also propose that certain evidence be presented."

31. Article 276, concerning preparation for the main trial, provides:

"(1) The accused and his defence counsel, the prosecutor and injured party and their legal representatives and attorneys, as well as an interpreter shall be summoned to the main trial. ...

(4) In the summons the court shall inform an injured party who is not being called as a witness that the main trial will be held even without him and that his statements concerning a claim under property law will be read. The injured party shall also be warned that should he not appear, it

shall be assumed that he does not wish to continue prosecution if the competent prosecutor drops the charge.”

32. Article 279, also concerning preparation for the main trial, provides:

“(3) The parties, defence counsel and injured party shall be informed of the time and place of the examination. When the parties, defence counsel and injured party attend the examination, they shall have the rights referred to in Article 160, paragraph 7 of this Law.” (See paragraph 30 above).

33. Article 308, concerning commencement of the main trial and examination of the accused, provides:

“(2) If the injured party is present, but still has not filed his claim under property law, the presiding judge shall instruct him that he may file a petition to realise that claim in criminal proceedings and shall instruct him about his rights under Article 55 of this Law.” (See paragraph 28 above).

34. Article 310, also concerning commencement of the main trial and examination of the accused, provides:

“(3) If the injured party is present, he may argue in support of a claim under property law; if he is not present, his petition shall be read by the presiding judge.”

35. Article 313, further concerning commencement of the main trial and examination of the accused, provides:

“(1) When the presiding judge completes the examination of the accused, the members of the panel may put questions directly to the accused. The prosecutor, defence counsel, the injured party, a legal representative, attorney, co-accused and experts may put questions directly to the accused with the permission of the presiding judge.”

36. Article 322, concerning evidentiary procedure, provides:

“(1) When the presiding judge completes the questioning of a witness or expert, the members of the panel may put questions to the witness or expert directly. The prosecutor, accused, defence counsel, injured party, legal representative, attorney and experts may put questions directly to witnesses and experts with permission of the presiding judge.”

37. Article 325, also concerning evidentiary procedures, provides:

“(3) The parties, defence counsel and the injured party shall always be informed as to the time and place of the questioning of a witness or conduct of an on-the-spot inquest or reconstruction, with instruction that he may attend these proceedings. When the parties, defence counsel and the injured party are present at these proceedings, they have the right envisaged in Article 160, paragraph 7, of this Law.” (See paragraph 46 above).

38. Article 330, further concerning evidentiary procedures, provides:

“After questioning each witness or expert and after the reading of each record or other official document, the presiding judge shall ask the parties, defence counsel and injured party for their comments.”

39. Article 334, concerning the closing arguments of the parties, provides:

“Upon completion of the evidentiary proceeding, the presiding judge shall recognise the parties, the injured party and defence counsel. The prosecutor shall speak first, and then the injured party, defence counsel and the accused.”

40. Article 336, also concerning the closing arguments of the parties, provides:

“The injured party or his attorney may defend a claim under property law in his closing argument and point out evidence of the criminal responsibility of the accused.”

41. Article 349, concerning announcement of the verdict, provides:

“(1) After announcing the verdict the presiding judge shall instruct the parties and the injured party concerning the right of appeal and the right to answer the appeal.”

42. Article 354, concerning the right to file an appeal provides, in pertinent part:

“(1) An appeal may be filed by the principals, defence counsel, legal representative of the accused and the injured party. ...

(4) An injured party may contest a verdict only with respect to the court’s decision concerning the punitive sanctions for crimes committed against life or body, against dignity of personality or moral or against public traffic security, concerning the costs of criminal proceedings and the claim under the property law... .”

43. Article 355, concerning the right to waive the right of appeal provides, in pertinent part:

“(2) The prosecutor and injured party may waive the right of appeal from the moment when the verdict is announced to the end of the period allowed for filing an appeal, and they may abandon an appeal already filed until a decision is rendered by the court in the second instance.

(3) The waiving and abandonment of an appeal cannot be revoked.”

44. Article 360, concerning the reasons for appeal, provides:

“(1) A verdict may be contested because the state of the facts has been incorrectly or incompletely established when the court has erroneously established some decisive fact or has failed to establish it.

(2) It shall be taken that the state of facts has been incompletely established when new facts or new evidence so indicate.”

45. Article 367, concerning the hearing before second instance court, provides:

“(1) A hearing shall be held before the court in the second instance only if this is necessary for presentation of new evidence or repetition of evidence already presented because the state of the facts was erroneously or incompletely established and if there are legitimate reasons for not returning the case for retrial by the court in the first instance.

(2) The accused and defence counsel, the prosecutor, the injured party, legal representatives and attorneys of the injured party, the injured party as prosecutor and the private prosecutor, and witnesses and experts which the court decides on for questioning shall be summoned to the hearing before the court in the second instance.”

46. Article 378

“(1) In honouring an appeal or acting *proprio motu*, the court in the second instance shall render a decision vacating the verdict in the first instance and shall return the case for retrial if it finds that there has been as essential violation of the provisions of criminal procedure, except for cases referred to in Article 380, paragraph 1 of this Law. In honouring an appeal the court in the second instance shall vacate the verdict in the first instance and shall return the case for retrial if it feels that because of the state of facts was erroneously or incompletely established a new main trial should be ordered before the court in the first instance.

(2) The court in the second instance may order that the new main trial before the court in the first instance be held before an entirely replaced panel.

(3) The court in the second instance may also vacate the original verdict only partially if certain parts of the verdict can be taken separately without damage to proper rendering of judgment.

(4) If the accused is in custody, the court in the second instance shall examine whether the grounds still exist for custody and shall issue a decision to extend or terminate custody. No appeal is admitted against that decision.”

47. Article 380

“(1) In honouring an appeal or acting *proprio motu*, the court in the second instance shall issue a verdict to revise the verdict in the first instance if it finds that the decisive facts have been correctly ascertained in the verdict in the first instance and that in view of the state of the facts as established a different verdict must be rendered when the law is properly applied, according to the

state of facts and in the case of violation as per Article 358, paragraph 1, points 5, 9 and 10 of this Law.

(2) If the appellate court finds that the legal conditions exist for the pronouncement of an admonition of the court, it shall render a decision to modify the verdict in the first instance and pronounce an admonition of the court.

(3) If because of the modification of the original verdict conditions have accrued for ordering custody or for terminating custody on the basis of Article 348, paragraphs 1 and 3 of this Law, the court in the second instance shall issue a specific decision to that effect, against which an appeal is not admitted.”

2. Provisions related to property law claims

48. The Code of Criminal Procedure includes provisions allowing property law claims arising out of the commission of a crime to be considered in the criminal proceedings.

49. Article 96 states:

“(1) A claim under property law which has arisen because of the commission of a crime shall be deliberated on the motion of the authorised persons in criminal proceedings if this would not considerably prolong those proceedings.

(2) A claim under property law may pertain to reimbursement of damage, recovery of things, or annulment of a particular legal transaction.”

50. Article 97 states:

“(1) The petition to realise a claim under property law in criminal proceedings may be filed by the person authorised to pursue that claim in a civil action.”

51. Article 98 states:

“(1) A petition to pursue a claim under property law in criminal proceedings shall be filed with the body or agency to whom the criminal charge is submitted or to the court before which proceedings are being conducted.

(2) The petition may be submitted no later than the end of the main trial before the court in the first instance.

(3) The person authorised to submit the petition must state his claim specifically and submit evidence.

(4) If the authorised person has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is brought, he shall be informed that he may file that petition up to the end of the main trial. ...”

52. Article 100 states:

“(1) The court before which proceedings are being conducted shall examine the accused concerning the facts alleged in the petition and shall investigate the circumstances that have a bearing on the establishment of the claim under property law. But even before a petition to that effect is presented, the court has a duty to gather evidence and conduct the investigation necessary to making a decision on the claim.

(2) If the investigation of the claim under property law would considerably prolong criminal proceedings, the court shall restrict itself to the gathering of that data which would be impossible or considerably more difficult to subsequently establish.”

53. Article 101 states:

“(1) The court shall render judgment on claims under property law.

(2) In a verdict pronouncing the accused guilty the court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not afford a reliable basis for either complete or partial award, the court shall instruct the injured party that he may take civil action to pursue his entire claim under property law.

(3) If the court renders a judgment acquitting the accused of the charge or rejecting the charge or if it renders a decision to dismiss criminal proceedings, it shall instruct the injured party that he may pursue his claim under property law in civil action. When a court is declared not to have

competent jurisdiction for criminal proceedings, it shall instruct the injured party that he may present his claim under property law in criminal proceedings which the competent court will commence or continue.”

B. Law on Obligations (Official Gazette of the Republic of Bosnia and Herzegovina, nos. 2/92 and 13/94)

54. The Law on Obligations of the Federation of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina, nos. 2/92 and 13/94) regulates obligations which arise from contracts, the infliction of damage, acquisition without legal grounds, business conduct without order and unilateral statements of will.

55. Article 200 provides for cash compensation, as follows:

“(1) The court shall allocate just cash compensation for suffered bodily pain, mental suffering due to a decrease of life activity, impairment, violated reputation, honour, freedom or personal right, death of a close person, as well as for fear, if it establishes that this is justified taking into account the circumstances of the case and especially the intensity of the pain and fear, regardless of whether compensation for material damage exists or not.

“(2) While deciding about the request for compensation of consequential damage, as well as about the amount of compensation, the court shall take into account the significance of the damaged goods and the purpose of the compensation, as well as ensure that the compensation does not favour tendencies which would not be compatible with its nature and social purpose.”

56. Article 201 concerns persons entitled to cash compensation in the event of death or severe disability. It provides, in pertinent part:

“(1) In the event of death of a person, the court may award to the members of his/her close family (spouse, children and parents) just cash compensation for their mental suffering. ...”

C. Criminal Code of the Federation Bosnia and Herzegovina (OG FBiH nos. 43/98, 2/99, 15/99, 29/00, 59/02); new Criminal Code came into force on 1 August 2003 (OG FBiH no. 36/03)

57. Article 10

“(1) An act committed in necessary defence is not considered a criminal offence.

(2) A defence is considered to be necessary if it is absolutely necessary for the defender to avert a coinciding illicit attack upon himself or upon another, and which defence is proportionate to the attack.

(3) If the perpetrator exceeds the limits of necessary defence, the court may reduce the punishment, and if he/she had exceeded the limits for the reason of extensive excitement or fear caused by the attack, the court may decide to remit the punishment.

58. Article 171

“(1) Whoever deprives another person of his/her life shall be punished by imprisonment for not less than five years.”

V. COMPLAINTS

59. The applicants complain that their right to prompt and fair resolution of the case has been violated, as well as the right to have the murderer punished. They complain that they are unable to obtain compensation because of the slowness of the court proceedings. They also allege that their right to a fair hearing in the court proceedings has been violated. The applicants allege that they were not allowed by the court to give their witness testimonies and that the acquitting judgments were issued on the basis of the testimony of the defendant's wife. Further, they state that the Court has not accepted the other claims of the injured party either, particularly the compensation claim in the criminal proceedings pursuant to Articles 96, 97, and 98 of the Law on Criminal Procedure. In the

request for a provisional measure, the applicants requested the Chamber, as a provisional measure, to disqualify the Cantonal Court in Bihać from dealing with this case and to order that the case be decided by the Supreme Court of the Federation of Bosnia and Herzegovina.

VI. SUBMISSIONS OF THE PARTIES

A. Respondent Party

60. In its written observations, the respondent Party considers that there has been no violation of the applicants' rights. The respondent Party raises an objection *ratione materiae*. The applicants are not the persons against whom the criminal proceedings are being conducted, and in such circumstances, they cannot be the victims of the violation of the rights protected by Article 6(1). The respondent Party points out that the applicants have not attempted to realise their property claim through the civil proceedings. The respondent Party invokes the Chamber's case law so far, in the case no. CH/99/2150, *Unković v. the Federation*, suggesting that, in the present case, the Chamber should act in the same manner.

B The applicants

61. In response to the respondent Party's observations, the applicants state that "it is evident from the course of the proceedings in this case, as well as regarding the duration of the process, that it is impossible for us, as the injured parties, to achieve our rights to a fair hearing, to have the proceedings decided within a reasonable time, and to have the perpetrator of the murder, M.L, punished."

62. In the additional information submitted to the Chamber by the applicants, they also complain of the manner in which the evidence was presented and assessed by the Court. During the reconstruction of the events, which was carried out in 1998, neither the applicants nor the experts from Bihać were present. During the reconstruction that was carried out in 1999, in order to eliminate the shortcomings of the previous reconstruction, no photographs were taken and the surrounding scenery was not reinstated to a state similar to that in which the events had occurred. The senior expert's finding is based on the photographs taken during the reconstruction of 1998.

VII. OPINION OF THE CHAMBER

63. 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) of the Agreement. According to Article VIII(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.

A. As to the admissibility

1. Competence *ratione temporis*

64. The Chamber will first address the question of whether it is competent *ratione temporis*. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively. Accordingly, the Chamber is not competent to consider events that took place prior to 14 December 1995. The Chamber may, however, consider relevant evidence of prior events as background information to events occurring after 14 December 1995 (case no. CH/97/67, *Sakib Zahirović v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, decision on admissibility and merits of 10 June 1999, paragraphs 104-06, Decisions January–July 1999).

65. The criminal proceedings against M.L. were initiated in 1993. In 1994 the District Military Court issued its first judgment. In 1994 the Supreme Court issued the judgment annulling the District Military Court decision and ordering a retrial. In the renewed proceedings, the District Military Court issued a judgment on 17 November 1995. On 16 June 1996, the Supreme Court annulled the judgment of the District Military Court and referred the case back to the lower court for rehearing for the second time.

66. The criminal proceedings thus started prior to 14 December 1995, before the Agreement entered into force. However, the proceedings have continued for over seven years after this date. Thus, insofar as the applicants' claims relate to conduct by the respondent Party that continued after 14 December 1995, they fall within the Chamber's competence *ratione temporis*.

2. Competence *ratione materiae*

67. The respondent Party also argues that the applicants' complaints under Article 6 of the Convention are outside the Chamber's competence *ratione materiae*, since the proceedings in question do not concern any criminal charge against the applicants or their civil rights and obligations. The Chamber notes, however, that on several occasions the European Court of Human Rights has held Article 6 to be applicable to the determination of the claims of a civil party in criminal proceedings, in particular where such proceedings are decisive of a compensation claim made by the civil party (see, e.g., Eur. Court HR, *Acquaviva v. France*, judgment of 21 November 1995, Series A no. 333A; Eur. Court HR, *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A no. 189). The Chamber notes that in the present case the applicants in the criminal proceeding asked the Court to instruct them to initiate the proceedings before the civil court to pursue their compensation claim ("property law" claim). If the proceedings in the criminal proceedings result in a conviction, then the applicants' claim before the civil court will be determined in their favour. If the accused is acquitted, then it will be still open to them to claim compensation in civil proceedings. It is, however, the practice that the civil courts will not deal with a claim for compensation in a case such as this one, until the criminal proceedings have been completed. There is thus a close link between the civil and criminal proceedings. In these circumstances, Chamber finds that Article 6 of the Convention is applicable and that the respondent Party's objection to admissibility on this ground cannot be upheld.

68. The Chamber notes that some of the applicants' complaints in relation to Article 6 paragraph 1 relate to the domestic courts' assessment of the facts pertaining to this criminal case against M.L. and the alleged wrongful application of the law. The Chamber recalls that Article 6 of the Convention guarantees the right to a fair hearing. However, the Chamber has stated on several occasions that it has no general competence to substitute its own assessment of the facts and application of the law for that of the national courts (see, e.g., case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, Decisions August-December 1999, and case no. CH/00/4128, *DD "Trgosirovina" Sarajevo (DDT)*, decision on admissibility of 6 September 2000, paragraph 13, Decisions July-December 2000). Therefore, insofar as the applicants complain that the courts wrongly assessed the facts or misapplied the law, such complaints are outside of the Chamber's competence.

3. Fairness of the proceedings

69. The applicants complain that the respondent Party violated their rights to a fair hearing in the criminal proceedings against the man charged with murdering their father. Allegedly they are deprived of their rights guaranteed under the domestic law because the Court refused to examine the evidence proposed by them and refused to hear them as witnesses. It is obvious from the judgment that the applicants took part in the criminal proceedings. Further, it is obvious from the court's judgment that one of the applicants was heard as a witness before the Court. The Chamber notes that under the domestic law the applicants have some procedural rights, for instance to put certain questions to the accused, witnesses, or expert witnesses, to make remarks concerning the performance of certain actions entered into the court record, and to also propose that certain evidence be presented. The applicants have not explained before the Chamber which rights they have been deprived of. The applicants failed to substantiate their complaints before the Chamber because they did not specify

what they asked the Court and why the Court refused to accept the proposal of the applicants. Taking into account that the proceedings in question are criminal proceedings and that the applicants' compensation claim is of an ancillary nature, the Chamber cannot find that the applicants' rights to participate in the proceedings were unduly restricted.

70. It follows that the applicants' claim in this part is manifestly ill-founded, and the Chamber, therefore, declares it inadmissible.

4. Length of the proceedings

71. The applicants finally complain of the duration of the proceedings. The Chamber finds that this complaint cannot be regarded as manifestly ill-founded. No other ground of inadmissibility appears applicable; thus, this part of the application must be declared admissible.

5. Conclusion as to admissibility

72. To sum up, therefore, the Chamber finds that the application is admissible insofar as it concerns the length of the proceedings in question since 14 December 1995. The Chamber finds that the remainder of the application is inadmissible.

B. Merits

73. Under Article XI of the Agreement, the Chamber must next address the question of whether the facts established above 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 jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 6 paragraph 1 of the Convention

74. Article 6 paragraph 1 of the Convention in the relevant part provides the following:

"1. In the determination of his civil rights and obligations or 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 law...."

75. In determining whether there has been a violation of the reasonable time requirement, the Chamber must firstly address the relevant period to be assessed. The Chamber concludes that the proceedings commenced on 11 October 1993, when the indictment was issued. However, the Chamber recalls that it only has competence to find a violation for the period after the entering into force of the Agreement, that is to say from 14 December 1995. As mentioned previously, however, the Chamber will take into consideration the time period prior to the entering into force of the Agreement, but only insofar as relevant in assessing the reasonable time requirement after the entry into force.

76. The next consideration is when time stopped running. 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 proceedings are still pending before the domestic judiciary. On 22 May 2003, the Cantonal Court in Bihać issued a judgment acquitting M.L. The public prosecutor appealed, and as of the date of this decision, the decision of 22 May 2003 is not yet final.

77. The Chamber notes that once the time period has been established, the reasonableness for any delay must be established. Taking into account the European Court's criteria which should be applied to the specific facts of each case, the Chamber will apply the criteria in the present case.

78. Firstly, the question of complexity must be adjudged on a case by case basis. The European Court has attached importance to several factors, such as the nature of the facts to be determined,

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.

79. The Chamber notes that the applicants' father was killed on 23 July 1993. M.L. had fired several shots in the direction of the applicants' father. The applicants' father was hit two times. M.L. started shooting at the moment when he had started to throw heavy objects toward M.L. According to the prosecution, there had been a land dispute between M.L. and the applicants' father. During the main trial the Cantonal Court decided that M.L. was acting in self-defence. The Court issued the decision upon the presentation of evidence (by questioning the witnesses, by questioning the experts, by making a reconstruction, *etc.*). The Public Prosecutor filed an appeal against the judgment for the incorrectly established factual situation and for wrongfully applied material law. The Chamber concludes that the facts of the case as presented were not extensively complicated and are not sufficient to explain the delay in the proceedings.

80. Secondly, the Chamber notes that a large portion of the delay was due to the fact that the domestic court has not been able to deal effectively with the case. The Chamber notes that the Cantonal Court Bihać has issued three judgments. The Cantonal Court's judgments have been annulled three times by the decisions of the Supreme Court and the case has been returned to the Cantonal Court for retrial. In the decisions of the Supreme Court some instructions on possible action of the Cantonal Court have been given. Although the Cantonal Court is obliged to conduct all procedural actions and examine all issues as instructed by the Supreme Court's decision, it seems that the Cantonal Court has failed to do so.

81. Moreover, the Chamber notes that it is the practice in Bosnia and Herzegovina that the Supreme Court dealing with the appeal almost never makes a decision on the merits. The Chamber further notes that under the domestic law the Supreme Court can decide to organise a hearing if it is necessary for the presentation of new evidence or repetition of the evidence already presented before Cantonal Court. As stated in Article 367 of the Code on Criminal Proceedings, a hearing shall be held before the Supreme Court if the facts are wrongly and incompletely established by the Cantonal Court and there is "legitimate" reason for not returning the case for retrial before the Cantonal Court. Which reasons are "legitimate" the Supreme Court will decide. Although the Supreme Court is not obliged to decide on the merits, returning the case before the Cantonal Court three times has resulted in substantial delay, having in mind that the judicial authorities have to make efforts to expedite the proceedings as much as possible. The Chamber notes that the criminal proceedings started in 1993 and ten years later the proceedings are still pending and the final judgment has not yet been issued.

82. In view of the above, the Chamber finds a violation of Article 6 paragraph 1 of the Convention in that the proceedings in the applicant's case have not been determined within a reasonable time.

VIII. REMEDIES

83. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy the established breaches of the Agreement. In this regard, the Chamber shall consider issuing orders to cease and desist and for monetary relief.

84. The applicants requested a fair trial, a "fair judgment" and compensation.

85. The Chamber notes that it has found a violation of the applicants' right protected by Article 6 paragraph 1 of the Convention with regard to the length of proceedings. Since the applicants' rights have been violated by the fact that the criminal case has been pending for more than seven years since the Agreement came into force, the Chamber considers it appropriate to order the respondent Party to take all necessary steps to promptly conclude the pending proceedings.

86. Furthermore, the Chamber considers it appropriate to award a sum to the applicants in recognition of the sense of injustice they suffered as a result of their inability to have the case decided within a reasonable time.

87. Accordingly, the Chamber will order the respondent Party to pay to each of the applicants the sum of 1000 Convertible Marks (*Konvertibilnih Maraka*) on account of non-pecuniary damages in recognition of their suffering as a result of their inability to have their case decided within a reasonable time.

88. Additionally, the Chamber will further award simple interest at an annual rate of 10% on the sum awarded to be paid to the applicants in the preceding paragraph. The interest shall be paid as of one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the sum awarded or any unpaid portion thereof until the date of settlement in full.

89. Moreover, the Chamber will order the Federation of Bosnia and Herzegovina to report to it no later than two months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

IX. CONCLUSIONS

90. For these reasons, the Chamber decides,

1. unanimously, to declare admissible the part of the application relating to the length of proceedings since 14 December 1995;

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

3. unanimously, that there has been a violation of the applicants' rights under Article 6 paragraph 1 of the European Convention on Human Rights with regard to the length of proceedings, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, to order the Federation of Bosnia and Herzegovina, through its authorities, to take all necessary steps to promptly conclude the criminal proceedings;

5. unanimously, to order the Federation of Bosnia and Herzegovina to pay to each of the applicants, no later than one month after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, 1000 Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for non-pecuniary damages;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay simple interest at the rate of 10 (ten) per cent per annum on the sum awarded in conclusion 5 or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full; and

7. unanimously, to order the Federation of Bosnia and Herzegovina to report to it no later than two months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel