



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

Case no. CH/02/9892

Dušan LAZIĆ

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 3 July 2003 with the following members present:

Mr. Mato TADIĆ, President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Manfred NOWAK
Mr. Viktor MASENKO-MAVI

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 Articles VIII(2) and XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. On 12 December 2001 the Court of First Instance of the Brčko District of Bosnia and Herzegovina found the applicant guilty of the crime of mediation in prostitution and sentenced him to one year and six months imprisonment and a fine of KM 4,000. The Court held that the applicant forced women into prostitution. On 6 February 2002 this judgement was confirmed by the Appellate Court of the Brčko District. The applicant alleges violations of his right to a fair trial in several respects, among them the alleged lack of independence of the judges involved in his case who were on a one year probation period.

2. The case raises issues under different aspects of Article 6 of the European Convention on Human Rights (“the Convention”).

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 8 April 2002. The applicant is represented by Mr. Borisav Stojaković, a lawyer practising in Brčko. The applicant requested the Chamber to order the respondent Party, as a provisional measure, to postpone the execution of the sentence of imprisonment under the judgement of 12 December 2001. On 6 May 2002 the Chamber decided to reject the request for provisional measures.

4. On 13 May 2002 the case was transmitted to the respondent Party for its observations on admissibility and merits of the application under Article 6 of the Convention. On 28 June 2002 the respondent Party submitted its observations.

5. On 9 July 2002 the observations of the respondent Party were transmitted to the applicant. On 1 August 2002 the applicant submitted his reply to the observations of the respondent Party.

6. On 11 September 2002 the case was re-transmitted to the respondent Party under Article 1 of Protocol No. 1 to the Convention. No observations were received in reply.

7. On 11 November 2002 the Chamber sent a letter to the respondent Party requesting further information on the appointment process for judges in the Brčko District and the probation period of newly appointed judges and further information on the pre-trial hearing of 3 September 2001.

8. On 9 December 2002, the Chamber received a letter from the Brčko Judicial Commission in reply to the Chamber’s letter to the respondent Party of 11 November 2002.

9. On 20 December 2002 the Chamber sent a letter to the respondent Party asking it to confirm whether the Brčko Judicial Commission’s letter of 9 December 2002 should be considered the respondent Party’s submission in reply to the Chamber’s questions.

10. On 31 December 2002 the respondent Party confirmed that the Brčko Judicial Commission’s letter of 9 December 2002 should be considered by the Chamber a submission made by the respondent Party.

11. On 12 February 2003, the Chamber invited the Office of the High Representative (“OHR North”), to participate as *amicus curiae* and requested information on the appointment process for judges of the Brčko District judiciary and the probation period of newly appointed judges and on the pre-trial hearing of 3 September 2001.

12. On 20 February 2003 the Chamber received a letter from the OHR North in reply to the Chamber’s letter of 12 February 2003. The OHR North accepted to act as *amicus curiae* and responded to the questions submitted by the Chamber. On 20 June 2003 the OHR North answered further questions of the Chamber regarding the appointment of judges in Brčko.

13. The Chamber deliberated on the admissibility and merits of the case on 6 May 2002, 6 September 2002, on 31 March 2003, on 3 June 2003, on 2 and 3 July 2003. On the latter date it adopted the present decision.

III. FACTS

14. In the course of the year 2001 the United Nations Mission to Bosnia and Herzegovina launched a campaign to end the flow of women trafficked into Bosnia and Herzegovina from Eastern Europe. The campaign resulted in police investigations and the closure of circa 15 night bars in the Brčko area.

15. On 27 July 2001, the Office of the Prosecutor of the Brčko District of Bosnia and Herzegovina filed an indictment against the applicant charging him with being a mediator in prostitution punishable under Article 212 paragraph 2 in conjunction with paragraph 1 of the Criminal Code of the Brčko District, Bosnia and Herzegovina (hereinafter “the Criminal Code”). The indictment was extended on 30 August 2001, adding charges of committing the criminal offence of enslavement and transport of enslaved persons punishable under Article 161 paragraph 3 in conjunction with paragraph 1 of the Criminal Code of the Brčko District of Bosnia and Herzegovina.

16. On 8 August 2001 the market inspector of the Brčko Government issued a decision prohibiting catering activities in the applicant's facilities, consisting of a dancing bar and the adjacent Motel “Lovac”, a restaurant and bedrooms. According to the procedural decision, on 1 August 2001 the market inspector received information from the police that during their raid of the applicant's facilities on 31 July 2001 they found indications that prostitution took place at the applicant's dancing bar and the adjacent motel “Lovac”. The procedural decision further states that the next day, on 2 August 2001, the market inspector himself carried out an inspection of the applicant's facilities. The decision also mentions that the applicant is under the warranted suspicion of having used those facilities in order to commit a criminal offence. The market inspector bases his decision on temporary closure on Article 13 of the Law on Market Inspection and Article 126, paragraph 4 of the Law on Administrative Procedure of the Brčko District. On 24 September 2001 the market inspector issued an additional procedural decision ordering the temporary sealing of the facilities. The applicant appealed against the decision to close his facility and on 12 November 2001 the appellate commission of the Brčko District as the relevant authority rejected the appeal as manifestly ill founded.

17. On 3 September 2001, upon request from the public prosecution, the witnesses I.B., O.L. and M.A.G. were heard at a pre-trial hearing conducted pursuant to Article 176 of the Brčko Code of Criminal Procedure (see para. 44 below, hereinafter “the Article 176 hearing”). These three witnesses are young women allegedly forced into prostitution by the applicant. Judge A.M. excluded the public from the hearing in order to protect the interests of the under-aged witness M.A.G. and the privacy of the witness O.L. in accordance with Articles 187 and 188 of the Code on Criminal Procedure of the Brčko District (hereinafter “the Code of Criminal Procedure”). Judge A.M. requested the representatives of the International Community who were monitoring the trial, including Celhia de Lavarene, Lars Wait, Niccolo Angelo, Biljana Đević of the United Nations Civil Affairs, Adrian Christiador of the International Police Task Force (“IPTF”), and Joan Richardson of the Independent Judicial Commission for Bosnia and Herzegovina, Field Office Brčko, to leave the courtroom in accordance with his decision to close the hearing to the public. However, the representatives of the International Community refused to leave. Judge A.M. interrupted the hearing to consult with the President of the Court as to how to proceed. The hearing was then continued in the presence of the international representatives in spite of an objection of the applicant's defence lawyer to their presence.

18. On 6 September 2001 witness O.L. returned from Bosnia and Herzegovina to her native country Ukraine and on 11 September 2001 witness M.A.G. returned to her native country Romania, both assisted by the International Organisation for Migration (hereinafter “IOM”).

19. On 8 November 2001 the main trial started. The Court, following a proposal of the public prosecutor, listened to the audio recordings of the witness statements of O.L. and M.A.G. recorded at the Article 176 hearing of 3 September 2001. The Court also heard I.B. as witness of the defence.

20. On 12 December 2001 the Court of First Instance of Brčko District of Bosnia and Herzegovina, sitting as a panel of three judges (not including judge A.M.), issued its judgement. It declared the applicant guilty of the crime of mediation in prostitution punishable under Article 212 paragraph 2 in conjunction with paragraph 1 of the Criminal Code sentencing him to one year and six months of imprisonment and a fine of KM 4,000. It also prohibited the applicant, as a security measure, to operate dancing bars for a period of three years. The Court held that in the time period between April 2001 and July 2001 the applicant forced women into prostitution in his dancing club in Brčko. The Court found it to be established that the applicant had forced O.L., a woman of Ukrainian citizenship, to give sexual services to his guests in his dancing club in Brčko. He supervised O.L. and took away her passport. The Court found it further established that the applicant had bought M.A.G., an underage woman of Romanian citizenship, from an unknown person in Belgrade with the nickname "Pulja" for KM 3,000. He had brought her illegally to his dancing club in Brčko to force her into prostitution. The applicant was acquitted from the charges that he had committed the criminal offence of enslavement and transport of enslaved persons under Article 161, paragraph 3 in conjunction with Article 161, paragraph 1 of the Criminal Code.

21. By the same judgement, besides the applicant, N.B., a waiter of Motel "Lovac", was declared guilty of the criminal offence of being mediator in prostitution under Article 212 paragraph 1 of the Criminal Code and was sentenced to six months of imprisonment. In addition, the applicant's son T.L. was declared guilty of the criminal offence of being mediator in prostitution under Article 212 paragraph 2 of the Criminal Code and was sentenced to one year of imprisonment.

22. The applicant, the public prosecutor, N.B. and T.L. all filed appeals to the Appellate Court of the Brčko District of Bosnia and Herzegovina (hereinafter: "the Appellate Court").

23. The applicant in his appeal alleged substantial violations of the Code on Criminal Procedure, wrongful establishment of the facts and challenged the sentencing decision. He complained, *inter alia*, about the overall lack of independence of the courts because of the way the judges were appointed and the fact that newly appointed judges were under a one year probation period. In his written appeal he stated with regard to the fact that Judge A.M. continued the hearing of 3 September 2001 in the presence of representatives of the International Community that: "the defence understands such position of the judge, since he was eager to avoid a scandal in the courtroom and also a very possible conflict between the persons working for the court security and the representatives of the international police, but this, at the same time, confirms the position of the defence that the court was not independent, especially if we add the irrefutable facts which support that dependence, which is obvious if we look at the manner in which judges are appointed and the duration of their mandate (they are appointed for a period of one year)".

24. On 6 February 2002 the Appellate Court issued its judgement rejecting the appeal of the applicant as ill founded. The appeal of public prosecution was also rejected, while the appeals of B.N. and T.L. were partly accepted. Namely, as to N.B. and T.L. the Appellate Court altered the first instance judgement in the sentencing part, so that N.B. was sentenced to three months of imprisonment and T.L. to six months of imprisonment.

25. The Appellate Court discussed in its judgement, *inter alia*, the following issues.

- a) With regard to the independence and impartiality of Judge A.M., the Appellate Court stated that the applicant's allegation that the judge was put under pressure and his independence thereby interfered with, was unsubstantiated and ill-founded. The presence of a certain number of representatives of the international community in the courtroom during the hearing did not diminish the impartiality of the judge or put pressure on him.
- b) As to the applicant's claim that he was not given enough time to prepare his defence, the Appellate Court stated that at all stages of the procedure he had enough time to prepare the defence.
- c) As to the applicant's claim that he could not contest the statements of the witnesses since they were not present at the main trial, which started in November 2001, the court held that the defence lawyers had had the possibility to cross-examine the witnesses at the pre-trial hearing. At the main trial the mentioned female witnesses could not be heard because they were not available.

- d) Regarding the assessment of evidence the Appellate Court stated that the First Instance Court accepted evidence of both prosecution and defence and that prosecution and defence at all stages of the procedure had the possibility to exchange evidence and to get acquainted with all evidence and information. It stated further that the First Instance Court presented enough evidence and correctly assessed such evidence and that it based the guilt of the sentenced persons upon presented and correctly assessed evidence. In addition, the Appellate Court stated that the applicant's defence lawyer in the appeal insisted that certain evidence was subjective, unconvincing and irrelevant, particularly the testimonies of witnesses O.L. and M.A.G.. However, the Appellate Court found that the defence lawyer did not substantiate this complaint.
- e) With regard to the application of the law, the Appellate Court stated that the procedure before the First Instance Court was carried out in accordance with the Code on Criminal Procedure.
- f) Finally, the Appellate Court determined that the applicant's sentence was adequate, in particular as the First Instance Court took into account all mitigating and aggravating circumstances.

IV. RELEVANT LEGISLATION

A. The issue of appointment of judges in the Brčko District

26. On 8 March 1999 the Arbitration Tribunal for Brčko, established under Annex 5 of the Dayton Peace Agreement, issued its final award ("the Final Brčko Arbitration Award"), establishing that Brčko¹ shall be a self-governing neutral district under the sovereignty of Bosnia and Herzegovina upon the effective date to be established by the Brčko Supervisor. The Final Brčko Arbitration Award was implemented by the Brčko Arbitration Statute of the Brčko District of Bosnia and Herzegovina (hereinafter "the Statute of Brčko"), which, on 8 March 2000, Robert W. Farrand, the Supervisor of Brčko, declared to be in force. The Brčko Supervisor has at all times been a citizen of the United States of America, appointed by the High Representative.

1. Relevant Provisions in the Final Brčko Arbitration Award and its Annex

27. The Final Brčko Arbitration Award vested the Supervisor with the responsibility of implementing the Dayton Agreement in the Brcko area, strengthening the democratic institutions in Brcko, and was given the authority to promulgate binding Regulations and Orders to further these goals. The Arbitral Tribunal, with the issuance of the Final Award, expressly envisioned significant judicial and legal reform for the District. The Brcko Law Revision Commission was established by the Supervisor in accordance with the Annex to the Final Award with the responsibility to produce a uniform system of laws for the District area.

28. The relevant provisions regarding the restructuring of the judiciary and legal reform are contained in the Annex to the Final Brčko Arbitration Award. The Annex states in paragraph 4, titled "the Judicial and Penal System":

"The Statute shall specify the structure of the District Judiciary. Initially the number of judicial posts shall be determined by the Supervisor, but the number may subsequently be changed by the District Assembly with the consent of the Supervisor. The District courts shall be independent and shall have general jurisdiction. The Supervisor shall make the initial appointments of (a) the members of the District Judiciary, and (b) the prosecutor and deputy prosecutors. As to subsequent appointments, the District Statute shall provide for the

¹ The town of Brčko occupies a unique strategic point in Bosnia: it lies in a narrow passage which provides the only direct communication between the eastern and western parts of the Republika Srpska (RS); and that same narrow passage stands between the Federation and eastern Croatia. It is such a key location that the Dayton Peace Accords gave it neither to Republika Srpska nor the Federation. Rather, the Arbitration Tribunal for Brčko had to decide its final status. The Arbitration Tribunal for Brčko enumerated obligations for the parties to fulfil, including the return and integration of internally displaced persons and the establishment of a multi-ethnic administration. It provided for the Office of the Brčko Supervisor to oversee the implementation of those obligations. The pre-war Brčko Municipality is to become "the Brčko District of Bosnia and Herzegovina, under exclusive sovereignty of national institutions of Bosnia and Herzegovina". Brčko municipality was thus made an autonomous district under the constitutional jurisdiction of the central government of Bosnia and Herzegovina. Brčko will remain under international administration for some time to come. For now Brčko is governed by the Brčko Supervisor, with extensive powers.

establishment of a Judicial Commission, which shall have responsibility for the appointment, tenure, and dismissal of judges and prosecutors in accordance with District law. All such appointments and dismissals shall be subject to the approval of the Supervisor. All persons appointed to such positions must be professionally qualified.”

29. The Annex establishes in paragraph 5 the Law Revision Commission and sets out its mandate:

“The Supervisor shall establish and appoint a Law Revision Commission with responsibility for proposing new laws or modifications of existing laws so as to produce an appropriately uniform system of laws throughout the District. The Commission shall be chaired by an international jurist and include representatives of both entities. The Commission’s recommendations will be submitted to the Assembly for approval and thereafter be subject to approval of the Supervisor. If the Assembly fails to act, the Supervisor may determine the disposition of the Commission’s recommendations after consulting with appropriate BiH and entity officials.”

2. The Statute of Brčko

30. The Statute of Brčko (Official Gazette of Brčko District of Bosnia and Herzegovina (hereinafter “OG of Brčko District of BiH”) no. 1/00) came into force on 8 March 2000 (see para. 26). In Section C it contains provisions on “Appointment and Independence”.

31. Article 64 titled “Judicial Commission” reads as follows:

“An independent Judicial Commission shall be established by law with responsibility for appointment and dismissal of District Judges and Prosecutors.

The Commission shall, in particular, be responsible for:

- ensuring the independence of the District Judiciary and Prosecutor’s Office;
- providing the Judges and Prosecutors with the training required to carry out their tasks;
- preparing and implementing the Code of Ethics of the District Judiciary and Prosecutor’s Office;
- taking disciplinary measures against Judges and Prosecutors in accordance with the law.”

32. Article 66 titled “Tenure” reads as follows:

“Judges and Prosecutors receive lifetime appointment and can be dismissed only under the conditions provided by law. Judges and Prosecutors shall retire from service upon attaining the age of seventy (70).

Judges and Prosecutors shall not hold any other public office or conduct any business.”

3. The Law on Judicial Commission

33. In accordance with Articles 23 and 64 of the Statute of Brčko, the Assembly of the Brčko District of Bosnia and Herzegovina, on 3 August 2000, adopted the Law on Judicial Commission of the Brčko District of Bosnia and Herzegovina (“the Law on Judicial Commission”), in the Official Gazette of the Brčko District of BiH 4/00, 1/01 and 5/01. The law entered into force on 28 September 2000 and is applicable as of 5 April 2001. It establishes the Judicial Commission for the Brčko District of Bosnia and Herzegovina (“the Brčko Judicial Commission”) and sets out its obligations and powers.

34. Article 1 reads as follows:

“In order to establish an independent and impartial judiciary and prosecution; provide independence and professionalism in the performance of judges and prosecutors; and provide for a professional and efficient Basic Court of the Brčko District of Bosnia and Herzegovina (hereinafter referred to as “the Basic Court”), Appellate Court of the Brčko District of Bosnia and Herzegovina (hereinafter referred to as “the Appellate Court”), the Judicial Commission of the Brčko District of Bosnia and Herzegovina (hereinafter referred to as “the Commission”) shall be

established by this Law. This Law shall regulate the election of members of the Commission, terms of service, the scope of authority, and the authorized procedures of the Commission. It shall set forth the judicial principles; appointment and dismissal of the Court President, judges, the Prosecutor and Deputy Prosecutors; standards for determining incompatibility of employment with other services; procedures for determining disciplinary responsibility; dismissal and removal from duty, and other Commission-related duties.”

35. Article 5 reads as follows:

“The Commission shall have 7 members.

The Commission members are:

1. The President of the Constitutional Court of Bosnia and Herzegovina, or the judge of that Court whom he appoints;
2. The President of the Appellate Court of the District;
3. The President of the Basic Court of the District;
4. The President of the Bar Association of the District;
5. The Prosecutor of the District; and
6. Two residents of high professional and moral standing to be selected by the Ombudsman of Bosnia and Herzegovina from a list of a minimum of 6 candidates proposed by the Mayor and the Assembly of the Brčko District of Bosnia and Herzegovina (hereinafter referred as “the Assembly”).

The member of the Commission mentioned in Paragraph 2, Item 1 of this Article shall take office pursuant to an agreement made in accordance with Article 10 of the Statute.

The members of the Commission mentioned in Paragraph 2, Items 2-5 of this Article shall become members of the Commission according to the function they perform.

The members of the Commission mentioned in Paragraph 2, Item 6 of this Article shall be elected for a period of four years.”

36. Article 12 reads, in relevant parts, as follows:

“ The Commission shall:

1. appoint and dismiss judges and prosecutors;
- ...
16. ensure the independence of the judiciary, the Prosecutor’s Office, and the Agency for Legal Aid;
17. prepare and implement the Judges’ Code of Ethics, the Prosecutors’ Code of Ethics...
- ...
21. ensure that in the appointment of judges and prosecutors, the composition of the courts and the Prosecutor’s Office reflect the composition of the District’s population;
- ...
23. review reports on the work of the courts, judges, the Prosecutor’s Office, and prosecutors;
24. maintain records on judges and prosecutors;”

37. Article 25 reads as follows:

“When appointing a candidate for the position of judge or prosecutor, the Commission is required to consider whether the candidate meets objective and subjective criteria for performing the judicial or prosecutor duty as stipulated in the Law on Courts or the Law on Prosecutor’s Office, taking into account the candidate’s:

- (1) Professional knowledge and work;
- (2) Proven intellectual capacity through academic written works and participation in professional associations;
- (3) Proven professional ability based on previous career results;

- (4) Work capability and capacity for solving legal problems;
- (5) Reputation and ability to impartially, conscientiously, diligently, decisively, and responsibly perform the duties of the office for which he is being considered;
- (6) Communication abilities; and
- (7) Prior relations with colleagues and his conduct out of office.”

38. Article 26 reads as follows:

“The Commission shall also interview the applicants and may obtain the opinion in writing from the previous employer.”

39. Article 27 reads as follows:

“Upon making its final decision, the Commission shall inform the candidate, the court the candidate was appointed to, or the Prosecutor’s Office if it was the appointment for a prosecutor.

The decision on selection is published in the “Official Gazette of the Brčko District of Bosnia and Herzegovina” and in the “Official Gazette of Bosnia and Herzegovina”.

The judge or the prosecutor is required to assume his duties in a term determined by the Commission, not later than thirty (30) days from the day he was notified by the Commission.

If a judge or prosecutor fails to assume his duty due to unjustified reasons within the deadline prescribed in Paragraph 3 of this Article, his appointment shall be cancelled.

The judge or prosecutor appointed in the District shall have a probation period of one year. During the probation period the judge or prosecutor shall perform regular judicial, respectively prosecutorial, duties. Upon a successful completion of the probation period, the Judicial Commission shall appoint the judge, respectively the prosecutor, to permanent office up to the age of 70.”

4. The Law on Courts

40. The Law on Courts (OG Brčko District of BiH 4/00, 1/01, 10/01, 5/02, 6/02 and 14/02), entered into force on 28 September 2000 and is applicable as of 1 April 2001. Article 6 reads as follows:

- (1) “Judges shall be appointed, dismissed, and removed from office by the Judicial Commission.
- (2) Upon satisfactory completion of the mandatory one (1) year probationary period stipulated in Article 28 of the Law on Judicial Commission of the Brčko District of Bosnia and Herzegovina, the judge shall receive appointment up to the age of 70. After receiving the appointment up to the age of 70, the judge can be removed from duty only under conditions provided by law. Retirement is mandatory at age seventy.”

B. Relevant legal provisions regarding the presence of international observers during a trial

41. Article III of Annex 11 to the Dayton Agreement on the International Police Task Force, titled “IPTF Assistance Program” reads, in relevant parts, as follows:

- “1. IPTF assistance includes the following elements, to be provided in a program designed and implemented by the IPTF Commissioner in accordance with the Security Council decision described in Article I(2):
 - a. monitoring, observing, and inspecting law enforcement activities and facilities, including associated judicial organizations, structures, and proceedings;
 - b...”

42. On 21 May 1998, the UN Security Council unanimously adopted the resolution no. 1168(1998) which authorized the deployment of an additional 30 IPTF monitors in Bosnia and Herzegovina, bringing their number to a total of 2,057. The Council also agreed to consider expeditiously a court monitoring program led by the United Nations Mission to Bosnia and Herzegovina as part of an overall program of legal reform. At the time relevant for the present case such a court monitoring system with UN court monitors was in place.

C. Relevant legal provisions regarding the criminal trial against the applicant

1. The Code of Criminal Procedure of the Brčko District

43. The Code on Criminal Procedure of the Brčko District of Bosnia and Herzegovina (OG Brčko District of BiH, no. 7/00, 1/01) which entered into force on 8 December 2000 and is applicable as of 1 April 2001 contains the following provisions relevant to the case:

44. Article 176 reads as follows:

“(1) Whenever, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a witness be taken and preserved for use at trial because the witness may be unavailable during the trial, the court may, upon request of the Prosecutor or accused, order that testimony of such witness be taken at a pretrial hearing and may request that the witness bring to the hearing any evidence he possesses that is relevant to the case. During the pretrial hearing both parties and the court may question the witness.

(2) Prior to the use of the statement taken under Paragraph 1 of this Article at the main trial, the party offering the statement must demonstrate that even after reasonable effort to secure the witness’s presence, the witness remains unavailable. Such statements may not be used if the witness is available, unless for the purpose of impeaching the witness or to support the witness’s in-court testimony when challenged.”

45. Article 187 reads as follows:

“(1) The judge conducting the main trial may order that the press and the public be excluded from all or part of the proceedings for reason of:

- protecting a minor;
- protecting the intimate life of an injured party or witness; or
- preserving an official, military, or important business secret.

(2) The judge shall make public the reasons for his/her order.

(3) An interlocutory appeal is allowed against this decision.”

46. Article 193 provides that the judge may exclude a person from the courtroom in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of proceedings.

2. The Criminal Code of the Brčko District

47. The Criminal Code of the Brčko District of Bosnia and Herzegovina (OG Brčko District of BiH, no. 6/00, 1/01) which entered into force on 3 December 2000 and is applicable as of 1 April 2001 contains the following provisions relevant to the case:

48. Article 212, titled “Intermediation in Performing Prostitution”, reads as follows:

“(1) A person who recruits, induces, encourages or lures female persons to prostitution, or whoever in any sense participates in handing a female person over to another for the purpose of prostitution, shall be sentenced to prison from three months to three years.

2) If the offense referred to in Paragraph 1 of this Article was committed against a juvenile person, or by use of force, threat or deception, the perpetrator shall be sentenced to prison from one to ten years.

3) If the offense referred to in Paragraphs 1 and 2 of this Article was committed against a child, the perpetrator shall be sentenced to prison from two to twelve years.”

49. Article 161, titled “Establishing Slavery and Transporting Enslaved People”, reads as follows:

“1) A person, who in violation of the Rules of International law, enslaves another person or puts him in similar position, or keeps him in such position, buys, sells or hands him over to another person, or mediates in buying, selling or handing over of such a person, or incites another person to sell his freedom or freedom of persons he supports or takes care of, shall be sentenced to prison from one to ten years.

2) A person who transports enslaved persons or persons in similar positions from one country to another shall be sentenced to prison from six months to five years.

3) A person who commits the act described in Paragraphs 1 and 2 of this Article against a juvenile shall be sentenced to prison from five to fifteen years.”

V. COMPLAINTS

50. The applicant alleges violation of various aspects of the right to a fair trial enshrined in Article 6 of the Convention.

1. Right to an independent tribunal, Article 6, paragraph 1

51. The applicant complains in general that the election process of judges in the Brčko District, the fact that the judges were not appointed by the Assembly, and the fact that they first were elected for a probation period of one year, results in a lack of independence of the judiciary during the probation period. With regard to the lack of independence of Judge A.M., who conducted the Article 176 hearing of 3 September 2001, the applicant claims that the judge was in addition pressured by the representatives of the International Community who remained present at a hearing closed to the public. He also states that the International Community at the time had launched a campaign to close all night clubs in the Brčko District in an attempt to reduce prostitution in the area. He concluded that it was his personal impression that it was therefore better for the judge to find him guilty in order not to risk losing his job.

52. The applicant cites as an other example of the lack of independence the fact that his lawyer was warned during the main trial by the Court that he might be excluded from the hearings for contempt of Court when the lawyer pointed out his reservations regarding the independence of the court in light of the appointment procedure for judges and the existence of a one year probation period. In addition, the applicant claims that his defence lawyer was asked several times during his defence statements to be brief. In particular, the President of the Panel interrupted the final statement of the applicant’s defence lawyer who wanted to explain and present evidence confirming the allegations about the pressure on the court by the representatives of International Community and the violation of the court’s independence because of the manner judges were elected.

53. The applicant notes that the defence lawyer requested the exclusion of the judge A.M from any proceedings in applicant’s case at the Article 176 hearing of 3 September 2001. The President of the Brčko First Instance Court rejected that request as ill-founded. The appeal against this decision was rejected by the Appellate Court as ill-founded.

2. Principle of the presumption of innocence, Article 6, paragraph 2

54. The applicant alleges further a violation of the principle of presumption of innocence as protected by Article 6, paragraph 2 of the Convention. He claims that on 8 August 2001, before the

court proceedings were completed, the market inspector as the competent organ of the Government of Brčko District of Bosnia and Herzegovina prohibited catering activities both in the applicant's dancing bar and in the adjacent motel "Lovac". He complains that the presumption of innocence has also been violated by the fact that the prosecution informed the TV and other organs of public information about his arrest for prostitution and enslavement, even though the court in its final judgement acquitted him of the enslavement charges.

3. Right to adequate time to prepare defence, Article 6, paragraph 3 (b)

55. The applicant complains that he and his lawyer did not have adequate time to prepare the defence in accordance with Article 6, paragraph 3 (b) of the Convention. He claims that in such a complex case the defence should not have been asked to give its final statement immediately after the presentation of the evidence.

4. Right to examine witnesses and have witnesses examined, Article 6, paragraph 3 (d)

56. Finally the applicant claims that the right to examine witnesses and evidence as protected by Article 6, paragraph 3 (d) of the Convention has been violated. He claims that when the prosecution found out that he intended to propose his employee I.B., who worked as dancer in the dancing bar, as a defence witness, the district police rejected her request for extension of her residence permit and initiated criminal proceedings against her for falsification of documents in order to intimidate her. The applicant further claims that, although in the end I.B. was heard, the court failed to adequately consider her statement. In addition the applicant suggests that three potential defence witnesses, M.A., I.S. and B.S, dancers in the applicant's dancing bar, were expelled from the territory of the Brčko District so that they could not be heard as witnesses. He claims that they were expelled pursuant to a procedural decision of the First Instance Court in Brčko, even before the procedural decision became final because they were found guilty of having committed a petty offence against the Law on Movement and Residence of Foreigners.

57. The applicant claims that the court relied only on the statements of two "key witnesses", O.L. and M.A.G.. He alleges that these two "key witnesses" lied about the facts because they were afraid of being prosecuted and sentenced for prostitution. The applicant further states that in criminal proceedings involving such a serious criminal offence as mediation in prostitution it is unusual that the key witnesses are heard only at the pre-trial stage and not during the main trial. He claims that his objection to the fact that the witnesses were not heard during the main trial was rejected by the First Instance Court.

58. He further complains that the First Instance Court, without any valid reason, gave no significance to the statements of the accused persons or to the statements of seven defence witnesses heard during the trial, not even to the statements of police officers who confirmed that during their control checks and raids they had found no evidence of prostitution.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

59. In its written observations of 27 June 2002, the respondent Party argues that the applicant has not exhausted domestic remedies. The respondent Party argues that the applicant failed to initiate the extraordinary remedy of protection of legality against the judgement of the Appellate Court of the Brčko District of Bosnia and Herzegovina of 6 February 2002. Secondly, it claims that the applicant did not wait six months after the decision of the Appellate Court of the Brčko District on 6 February 2002 before submitting his application on 8 April 2002, the applicant thereby, in the respondent Party's view being in breach of the six-months rule under Article VIII(2)(a) of the Agreement.

2. As to the merits

60. The respondent Party discusses the applicant's allegations of a violation of Article 6 in detail. With regard to the proceedings in general, the respondent Party claims that it is the right of each court to assess which evidence it shall consider as legally relevant, which facts it shall consider to be proved and which witness statements it accepts as the truth. The respondent Party claims that the court enabled all parties to the proceedings to present any evidence they considered legally relevant and provided them with the possibility to make statements to all relevant facts giving the parties enough time to present their considerations. As to the witnesses, the respondent Party submits that the proceedings were carried out in accordance with the Code on Criminal Procedure of the Brčko District of Bosnia and Herzegovina. During the pre-trial hearing the applicant and his lawyer as well as the representative of the prosecution, were allowed to directly cross-examine the witnesses O.L. and M.A.G. in relation to all circumstances they considered to be of significance. Accordingly, the respondent Party submits that the right to examine witnesses before and during the main trial was completely complied with, as well as the requirement to give adequate time for the preparation of the defense.

61. As to the applicant's allegations that the court was under pressure by the IPTF, the respondent Party submits that such allegations are completely ill founded. It states that there was no pressure by the IPTF, except the fact that the members of the IPTF were present during the trial, in the capacity of observers.

62. The respondent Party also explains the legal situation concerning the appointment of judges in the Brčko District. It refers to Article 66 of Statute of Brčko which states that: "Judges and Prosecutors receive lifetime appointment and can be dismissed only under the conditions provided by law". In accordance with Article 64 those judges should be appointed by the Brčko Judicial Commission. The respondent Party points out that Article 27 paragraph 5 of the Law on Judicial Commission provides differently. It states that judges or prosecutors will be first appointed for a probation period of one year. Asked by the Chamber about these discrepancies between the Law on Judicial Commission and the Statute of Brčko, the respondent Party answers by forwarding a letter from the Brčko Judicial Commission of 30 December 2002. According to this letter the respondent Party "cannot decisively answer your question why there was this discrepancy from the Statute of Brčko in the Law on Judicial Commission of the Brčko District of Bosnia and Herzegovina". It further states that the Law on Judicial Commission entered into force on 1 January 2001 and that the Brčko Judicial Commission was established on 1 April 2001. The respondent Party concludes that at the time when the Law on Judicial Commission was approved, the Statute of Brčko was already in force.

63. The letter of the Brčko Judicial Commission of 30 December 2002 further states that according to the Law on Judicial Commission "...upon a successful completion of the probation period, the Judicial Commission shall appoint the judge or the prosecutor to permanent office up to the age of 70". The criteria for a "successful completion" are contained in the Law on Judicial Commission. The Brčko Judicial Commission decides on whether the criteria are met for a successful completion of the probation period and appointment of judges to permanent positions. There is no control mechanism or review of the determination of a "successful completion" explicitly provided for in the law. The respondent Party argues that the work of the Brčko Judicial Commission is transparent and the documentation of the Commission is available to all interested organs and individuals.

64. The letter from the Brčko Judicial Commission dated 30 December 2002 further states that judge A.M. was appointed by the Law Revision Commission composed of national and international experts. It also states that the Brčko Judicial Commission has exclusive competence to decide who will finally be appointed as a judge after the expiry of the probation period. However, these appointments or dismissals are subject to the consent of the Supervisor for the territory of the Brčko District of Bosnia and Herzegovina in the meaning of Paragraph 4 of the Annex to the Final Brčko Arbitration Award.

65. Regarding the hearing of the witnesses in the pre-trial hearing on 3 September 2001 in the presence of representatives of the International Community the respondent Party states that it has no explanation as to why these representatives did not leave the hearing which was closed for the public. The respondent Party acknowledges that applicant's defense lawyer, Mr. Stojaković, objected to the presence of the international representatives.

66. The respondent Party concludes that the proceeding were conducted in accordance with the procedural law and that there has not been any violation of Article 6 of the Convention.

B. The applicant

1. As to the admissibility

67. In his observations of 29 July 2002, the applicant alleges that all effective legal remedies were exhausted. He reminds the Chamber that he exhausted all “ordinary legal remedies” in both the administrative and court proceedings. He further submits that during the court proceedings, in his written observations, he has always objected to the incorrectly or incompletely established facts upon which the court decisions were based. He did not seek the extraordinary remedy of “Petition for Protection of Legality” under Article 299 of the Law on Criminal Procedure of District Brčko of BH, because there was no possibility of success under this provision which provides:

“2. The Petition for Protection of Legality may not be filed against an incorrectly or incompletely established state of facts ...”

68. The applicant further states that he submitted his application to the Chamber in accordance with Article VIII(2)(a) of the Agreement on Human Rights, which provides that the application may be filed with the Chamber within six months from the date on which the final decision was taken.

2. As to the merits

69. The applicant maintains his complaints under Article 6 of the Convention.

C. The *amicus curiae*

70. The OHR North, as *amicus curiae*, submitted their letter on 28 February 2003. It states that judge A.M. was appointed judge of the First Instance Court of the Brčko District for a one-year probationary term by Supervisory Order of 8 March 2001, pursuant to the powers vested in the Supervisor under paragraphs 10 and 36 of the Final Brčko Arbitration Award and Paragraph 4 of the Final Brčko Arbitration Award Revised Annex of 18 August 1999, in accordance with Article 27 (5) of the Law on Judicial Commission. Judge A.M. was pre-selected by the Brčko Law Revision Commission pursuant to the Supervisor’s mandate and appointed pursuant to the criteria set out in Articles 23 and 24 of the Law on Courts. The *amicus curiae* points out that the Brčko Law Revision Commission conducted the selection process and not the Brčko “Judicial Commission” as provided for by law because the latter was still not established at that time. Judge A.M. was thus appointed for the one-year probationary period by the Supervisor pursuant to a recommendation of the Brčko Law Revision Commission.

71. Regarding the subsequent appointment following the one-year probation period, the *amicus curiae* states that the Brčko Judicial Commission established a procedure for review which was approved by the Supervisor. An original selection panel including the Brčko Law Revision Commission Chairman evaluated the “top four officials of the judiciary and judicial commission” (i.e. the Presidents of First Instance and Appellate Court, the public prosecutor and director of Agency for Legal Aid) who were permanently appointed by the Supervisor. Judge A.M. was evaluated by the Brčko Judicial Commission which had been established by then in accordance with the Brčko Judicial Commission’s procedure contained in the “Judicial Commission of Brčko District’s procedure for conducting evaluation of members of the judiciary for permanent appointment following the one-year probationary term”. The permanent appointments are subject to the Supervisor’s approval pursuant to Paragraph 4 of the Annex to the Final Brčko Arbitration Award.

72. Concerning the provisions governing the exclusion of the public from a hearing (Articles 187 and 193 of the Brčko Code of Criminal Procedure), and the fact that representatives of the International Community did not leave the court room when asked by judge A.M., the *amicus curiae* points out that these provisions do not explicitly govern the exclusion of representatives of the International Community. The United Nations Mission to Bosnia and Herzegovina and Independent Judicial Commission for Bosnia and Herzegovina both have mandates to be present and monitor trials. If

representatives of the International Community who do not have a clear mandate to monitor trials remain in a hearing not open for the public, the decision whether to continue the hearing is left to the judge's discretion.

73. In its submission of 20 June 2003 the *amicus curiae* informed the Chamber that under Paragraph 4 of the Annex, the Supervisor is mandated to make the initial appointments of the members of the Brčko Judiciary in the District and that he exercised this power on 8 March 2001. In doing so the Supervisor made use of all staff and means available to his office including the Brčko Law Revision Commission. In particular, the Brčko Law Revision Commission advised the Supervisor on the exercise of his mandate and conducted interviews and background researches on behalf of the Supervisor with applicants for positions in the Brčko judiciary. The Brčko Law Revision Commission itself, however, did not have a mandate to appoint interim authorities, which is a prerogative of the Supervisor, and never exercised such authority.

74. On 1 April 2001, a package of legislation came into force, regulating in detail the functioning of the Brčko judiciary. Among these laws, the most important are the Law on Judicial Commission, the Law on Prosecutor's Office and Law on Courts.

75. Following the initial appointments made by the Supervisor and the entry into force of the aforementioned laws, the process of evaluation and confirmation of the appointments has been taken over by the Brčko Judicial Commission and the procedure established by the Law on Judicial Commission. So far, the Supervisor has agreed with all expert recommendations in executing his authority to approve final appointments of judges and prosecutors. Finally, the *amicus curiae* informed the Chamber that all judges involved in the applicant's case were appointed for life-time with the exception of judge A.B. who sat on the first instance proceedings.

VII. OPINION OF THE CHAMBER

A. Admissibility

76. Before considering the merits of this application, the Chamber must decide whether to accept it, taking into account the admissibility criteria set forth in Article VIII(2) of the Agreement.

1. Exhaustion of domestic remedies

77. The respondent Party states in its observations that the applicant did not exhaust all domestic remedies as he did not make a request for protection of legality set out under Article 299 of the Code of Criminal Procedure of the Brčko District of Bosnia and Herzegovina and has not presented any reasons for not doing so.

78. The Chamber notes that a request for protection of legality is an extraordinary remedy that need not be exhausted for the purposes of Article VIII(2)(a) of the Agreement. Consequently, it finds that the applicant has complied with the requirements of that provision.

2. The six-months rule

79. Bosnia and Herzegovina 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 it argues is required by Article VIII(2)(a) of the Agreement. As the Chamber has repeatedly pointed out, for instance in *Boudellaa and Others* (CH/02/8679 *et al.*, *Boudellaa et al.*, decision on admissibility and merits of 3 September 2002, paragraphs 154 and 155) 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 final decision in the present case was taken by the Appellate Court on 6 February 2002 and the Chamber received the application from the applicant on 8 April 2002. The applicant therefore complied with Article VIII(2)(a) of the Agreement.

3. Conclusion

80. As no other grounds for declaring the case inadmissible have been established, the Chamber declares the application admissible.

B. Merits

81. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement.

1. Right to an independent tribunal, Article 6, paragraph 1

82. The applicant complains that the judges in the Brčko District in general are not in a position to work in full autonomy from the International Community. The applicant notes that at the relevant time the International Community had just launched a campaign to combat prostitution and the trafficking of women. The applicant concludes that, as a consequence, the judiciary in the Brčko District was not independent in the case of the applicant who was charged with mediation in prostitution. On the contrary, the judges needed to show that they shared the goals of the International Community by acting tough on prostitution.

83. To substantiate this allegation the applicant uses two arguments: Firstly, he claims that the election process of judges in itself endangers the independence of the Brčko judges. He raises his concerns in particular about the fact that judges were elected for a one-year probation period, to be permanently appointed only upon successful completion of the probation period. Secondly, the applicant argues that the fact that the representatives of the International Community monitoring the applicant's trial at the Article 176 hearing of 3 September 2001 remained at the hearing although they were at first ordered by Judge A.M. to leave the courtroom, illustrates the pressure from the International Community on Judge A.M. and his lack of independence.

84. Article 6 of the Convention provides, as far as relevant, as follows:

“1. In the determination ofany 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... public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

a. As to the argument concerning the one year probation period

85. On 1 April 2001, all judges involved in the applicant's criminal proceedings were appointed for the one-year probationary period, upon the successful completion of which they could be appointed for life-time.

86. On 3 September 2001, when conducting the Article 176 hearing, Judge A.M. was therefore still in the one year probation period. Also, on 12 December 2001, the date of the first instance judgement, the judges of the main trial, Š.N., Ž.Č and A.B., were still in the one year probation period, as were the judges of the appellate court D.K., M.N. and M.J. on 6 February 2002, the date the appeals judgement was handed down.

87. Article 6 of the Convention protects the right to an “independent tribunal.” The Chamber notes that “independent” means independent of the executive and also of the parties (Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, paragraph 95). Furthermore, the Chamber points out that in considering whether a body is “independent,” the European Court of Human Rights has had regard to “the manner of appointment of its members and the duration of their term of office...the existence of guarantees against outside pressures...and the question whether a body presents an appearance of independence” (see Eur. Court HR, *Campbell and Fell v. United Kingdom*, decision of 28 June 1984, Series A No. 80, paragraph 78).

88. The Chamber notes also that to challenge the independence of a judge by reference to the manner of appointment, the European Court of Human Rights has held that it would have to be shown that the practice of appointment “as a whole is unsatisfactory” or that “at least the establishment of the particular court deciding the case was influenced by improper motives” (see European Commission of Human Rights, no. 7360/76, Decision of 12 October 1978, Decisions and Reports 15, p. 70, at p. 82).

89. The European Commission of Human Rights has further held that it is not necessary that judges are appointed for life time, provided that they cannot be discharged at will or on improper grounds by the authorities (see e.g. Eur. Comm. HR, *Zand v. Austria*, report of 12 October 1978, Decisions and Reports, 15, p. 81-82). As an indication of how long a minimum term of office must be the Court held in the *Sramek* case (see Eur. Court HR, *Sramek v. Austria*, judgment of 22 October 1984, Series A No. 84, para. 37) that a term of three years of office in the case of lay judge satisfies the requirements of Article 6 as regards the length of term of office. In the *Sramek* case the court also found that the fact that members of a tribunal are appointed by the executive does not in itself violate the Convention (*ibid*, para. 38). What is important, however, is that the tribunal must have the power to give binding decisions which cannot be altered by a non-judicial authority (see Eur. Court HR, *Findlay v. United Kingdom*, decision of 25 February 1997, Reports 1997-I, para. 77). The executive may also issue guidelines to the members about the general performance of their functions, as long as any such guidelines are not in reality instructions as to how cases are to be decided (see Eur. Court HR, *Campbell and Fell v. United Kingdom*, *ibid*, para. 79)

90. The Chamber notes that Paragraph 4 of the Annex to the Final Brčko Arbitration Award states that “the Supervisor shall make the initial appointments of the members of the District Judiciary (...). As to subsequent appointments, the District Statute shall provide for the establishment of a Judicial Commission, which shall have responsibility for the appointment, tenure, and dismissal of judges and prosecutors in accordance with District law. All such appointments and dismissals shall be subject to the approval of the Supervisor. All persons appointed to such positions must be professionally qualified.” The Chamber recalls that Article 66 of the Statute of Brčko states: “Judges and Prosecutors receive lifetime appointment and can be dismissed only under the conditions provided by law” and that according to Article 64 of the Statute of Brčko judges should be appointed by the Brčko Judicial Commission. The Chamber also notes that Article 27 paragraph 5 of the Law on Judicial Commission provides differently. It states that judges or prosecutors will be first appointed for a probation period of one year. The Law on Judicial Commission further states that: “Upon a successful completion of the probation period, the Brčko Judicial Commission shall appoint the judge, respectively the prosecutor, to permanent office up to the age of 70”.

91. According to the Balkans Report of the International Crisis Group No. 127 of 25 March 2002, “Courting Disaster: The Misrule of Law in Bosnia and Herzegovina” in post-conflict Bosnia and Herzegovina, including the Brčko District, a strong need for judicial reforms was felt. The report further states that once the Final Brčko Arbitration Award had clarified the special status of the Brčko District, a general reappointment model for the judiciary based on the experiences of East Germany after the unification and Georgia after its independence had been introduced. Accordingly, all mandates of judges and prosecutors were suspended and all positions were re-advertised throughout Bosnia and Herzegovina and its neighboring countries. The previous members of the judiciary who held the positions in the past could apply to be re-appointed. The good salaries and the open competition, however, also attracted returnees to Brčko to apply and well qualified candidates from outside Brčko, so that only approximately twenty percent of previous post-holders were re-appointed. All candidates were initially appointed only for a one-year probation period.

92. These first initial judicial appointments were made by the Supervisor in accordance with Paragraph 4 of the Annex to the Final Brčko Arbitration Award. It provides that the Supervisor makes the initial appointments of the members of the judiciary in Brčko, whereas subsequent appointments are made by the Brčko Judicial Commission, “which shall have responsibility for the appointment, tenure, and dismissal of judges and prosecutors in accordance with District law ... subject to the approval of the Supervisor” (see paragraph 28 above). It was necessary to provide for a different procedure for the initial appointment because the Brčko Judicial Commission, which is according to the law *inter alia*

composed of the highest judges of the Brčko District, could not yet be formed at the time of the initial appointment.

93. In the initial absence of the Brčko Judicial Commission to give expert advises to the Supervisor as to whom to appoint, he turned to the Brčko Law Revision Commission for assistance. The Brčko Law Revision Commission was established by Paragraph Five of the Annex to the Final Brčko Award and consists of national and international legal experts. Together with distinguished national jurists it conducted interviews with all candidates who applied to be appointed as judges in the Brčko District and then recommended to the Supervisor suitable candidates for the initial appointment all of which were appointed by the Supervisor.

94. The Chamber notes that, following the initial appointments made by the Supervisor and the entry into force of a legal framework, including the Law on Judicial Commission and the Law on Courts, the process of evaluation and confirmation of the appointments has been taken over by the Brčko Judicial Commission. The procedure of appointment is now established in the Law on Judicial Commission.

95. The Chamber further recalls the submission of the *amicus curiae* that up to date the Supervisor has agreed with all expert recommendations on the appointment of judges, such as the recommendations of the Brčko Judicial Commission, in exercising his authority to approve final appointments and that all judges involved in the applicant's case were appointed for life-time with the exception of judge A.B., who sat on the first instance proceedings (see para. 75 above).

96. The obvious and ideal way to ensure the independence of the judiciary is for every judicial appointment to be permanent and full-time with tenure *ad vitam aut culpam*. The Chamber notes, however, that in many European countries, e.g. Germany, new, inexperienced judges are initially appointed for a probation period before they are subsequently appointed for life-time, the purpose of this probation being to screen out individuals unfit for such a delicate office.

97. It appears to the Chamber that all candidates to be appointed as judges in the Brčko district are required to demonstrate that they meet prescribed criteria of professional competence, moral integrity and commitment to the highest standards of human rights, precluding involvement in the administration of 'ethnic justice' during and since the war. The establishment of the Brčko Judicial Commission, composed of highly qualified legal experts (see para. 35 above) including the President of the Constitutional Court of Bosnia and Herzegovina or another judge of the Constitutional Court to substitute him, and the "Judicial Commission's procedure to evaluate members of the judiciary for permanent appointment following the one-year probationary term" are aimed at ensuring a transparent and neutral selection process for judges.

98. In Bosnia and Herzegovina, where a process of reform of the judiciary is necessary and ongoing in order to ensure impartiality and independence of the courts, the Chamber, balancing the need for a screening process against the problems related to the independence, does not find that the practice of an initial appointment on a one year probation with the expectation of appointment for life time after this period is "unsatisfactory", or that the short duration of the probationary period of only one year endangers the judges' independence. The Chamber also notes that during the one year probation it was not possible to remove the judges. After the end of the one year probationary period the Brčko Judicial Commission proposed all judges involved in the applicant's criminal proceedings with the exception of one to be appointed for life-time and, in accordance with this recommendation, their appointment was approved by the Supervisor. The Chamber notes that in all cases he followed the recommendation of the Brčko Judicial Commission.

99. The Chamber concludes that the appointment process of judges in Brčko and the fact that they are at first appointed for a one-year probation period is in itself not a sufficient indication to find a violation of the right to an independent tribunal.

b. The argument relating to the presence of representatives of the International Community during the criminal proceedings

100. The Chamber next examines whether the presence of the international monitors indicates that the Court lacked independence. According to the statement of the *amicus curiae*, the United Nations Mission to Bosnia and Herzegovina and Independent Judicial Commission have mandates to be present and monitor trials. The provisions governing the exclusion of the public from a hearing (Articles 187 and 193 of the Code of Criminal Procedure) do not explicitly govern the exclusion of representatives of the International Community. The *amicus curiae* concludes that in the absence of a clear mandate to monitor trials, this decision is therefore left at the judge's discretion.

101. The Chamber recalls that the judge conferred with the President of the Court whether to continue the hearing. The Chamber considers that, in order to effectively carry out their mandate, trial monitors have to be present also at closed hearings, which in fact represents a particularly delicate part of a trial. The Chamber, having in mind the particular reasons for the exclusion of the public from the hearing of 3 September 2001, namely to protect the privacy of the witnesses, finds that the judge acted correctly when he continued the hearing in the presence of the international representatives and that the continuation was not to the detriment of the applicant. It cannot find any indications that the presence of representatives of the International Community at the hearing affected the independence of Judge A.M. or the fairness of the proceedings or that any pressure was exerted on the judge to influence him in any direction.

c. Conclusion as to the right of an independent tribunal

102. The Chamber finds that the applicant's right to an independent tribunal has not been violated.

2. Principle of the presumption of innocence, Article 6, paragraph 2

103. The applicant alleges a violation of the principle of presumption of innocence as protected by Article 6, paragraph 2 of the Convention. He claims that on 8 August 2001, before the completion of the court proceedings, the market inspector as the competent organ of the Government of Brčko District of Bosnia and Herzegovina prohibited catering activities in both the applicant's dancing bar and the adjacent motel "Lovac". He complains that the presumption of innocence has also been violated by the fact that the prosecution informed the TV and other organs of public information about his arrest on prostitution and enslavement charges.

104. Article 6, paragraph 2 of the Convention reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

105. The Chamber recalls that the presumption of innocence is one of the elements of a fair criminal trial required by Article 6. It is mainly directed at guaranteeing the fairness of a criminal trial: The court should not start with a pre-conceived idea that the accused has committed the offence with which he is charged; the burden of proof is on the prosecution and doubt should benefit the accused. The Chamber notes that Article 6, paragraph 2 may also be violated if public officials treat someone as being guilty of an offence before this is established by a court. In addition, under certain circumstances, the presumption of innocence may be infringed upon not only by a judge or court hearing the case, but also by other public authorities.

a. Information given to the press by the public prosecution about the applicant's criminal case

106. The Chamber recalls that, in accordance with the long standing jurisprudence of both the European Commission of Human Rights and the European Court of Human Rights, there is no violation of the presumption of innocence if public officials merely "state that a suspicion exists, that people have been arrested, that they have confessed, etc... What is excluded, however, is the formal declaration that someone is guilty" (see e.g. Eur. Comm., judgement *Kraus v. Switzerland*, in 13 DR 73 (1978)).

107. The Chamber recalls that the press was informed only about the charges against the applicant. However, no statement was made formally declaring the applicant guilty. The Chamber concludes that the mere information given to the press about the charges against the applicant does not give rise to a violation of the presumption of innocence. In addition, the fact that the applicant was acquitted of the enslavement charges shows that, contrary to the applicant's opinion, the Court was not influenced in its findings by how the case was portrayed in the media.

b. Sealing of the applicant's facilities by the market inspector

108. The second aspect of the applicant's claim regards the fact that on 8 August 2001 the market inspector as the competent organ of the Government of the Brčko District of Bosnia and Herzegovina prohibited catering activities in the applicant's dancing bar and the adjacent motel "Lovac" and later on sealed those facilities. The Chamber finds that there is no evidence that the fact that the applicant's facilities, the motel "Lovac and the dancing club, were sealed on 8 August 2001 influenced the outcome of the criminal trial against the applicant. The Chamber also notes that the procedural decision itself does not draw any conclusions as to the applicant's guilt.

109. The Chamber recalls that the presumption of innocence also embodies a second aspect. A violation of the presumption of innocence will also be found where the organs of the respondent Party caused negative consequences for the applicant outside the criminal proceedings themselves, such as the closure of his facilities, based on the mere presumption that the applicant will be found guilty of having committed a crime. The Chamber therefore will examine the procedural decision of 8 August 2001 in this respect. It notes that, according to the procedural decision, on 1 August 2001 the market inspector received information from the police that during their raid of the applicant's facilities on 31 July 2001 they found indications that prostitution took place at the applicant's dancing bar and the adjacent motel "Lovac". The procedural decision further states that the next day, on 2 August 2001, the market inspector himself carried out an inspection of the applicant's facilities. The decision also mentions that the applicant was under the warranted suspicion of having used those facilities in order to commit a criminal offence. The market inspector based his decision on temporary closure on Article 13 of the Law on Market Inspection and Article 126, paragraph 4 of the Law on Administrative Procedure of the Brčko District. Article 126, paragraph 4 allows the administrative authorities to take temporary measures if a public interest exists and there has been a sufficient establishment of facts that indicate that there has been some illegal activity. Considering these circumstances, the Chamber finds that the market inspector, as the competent administrative authority, reached his own conclusions of fact on the basis of the standard of proof appropriate for the issuance of temporary measures in administrative proceedings. He did not rely primarily on the existence of criminal proceedings against the applicant to come to the decision to close the applicant's facilities. Therefore, the Chamber cannot find that the decision to seal the applicant's facilities violates the presumption of innocence.

c. Conclusion as to the presumption of innocence

110. In view of the above, the Chamber cannot find a violation of the principle of presumption of innocence as protected by Article 6, paragraph 2 of the Convention.

3. Right to adequate time to prepare defence, Article 6, paragraph 3 (b)

111. The applicant claims that he and his lawyer did not have adequate time to prepare the defence in accordance with Article 6, paragraph 3 (b) of the Convention. He claims that in such a complex case the defence should not have been asked to give its final statement immediately after the presentation of the evidence. The respondent Party contests that there was no adequate time to prepare the defence. Both Parties refer to the audio recording of the trial.

112. Article 6 paragraph 3 (b) reads as follows:

- "3. Everyone charged with a criminal offence has the following minimal rights: ...
b. to have adequate time and facilities for the preparation of his defence. ..."

113. The Chamber notes that the right to a fair hearing includes the principle of equality of arms which requires that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent” (see Eur. Court HR, *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, paragraph 53).

114. The Chamber further notes that the European Court of Human Rights decides according to the circumstances and the nature of the case whether the right to adequate time for the preparation of the defence has been infringed. Relevant factors are, *inter alia*, the complexity of the case and the defence lawyer’s workload (Eur. Court HR, *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, paragraph 41; Eur. Comm. HR no. 7909/77, Decision of 12 October 1978, Decisions and Reports 15, p. 160)

115. The Chamber agrees with the findings of the Appellate Court that in the present case the applicant’s defence lawyer had adequate time to prepare the defence. In particular, the most important evidence in the case, the witness statements of 3 September 2001, were known to the applicant and his defence lawyer, who were both present at that hearing, more than three months before the final hearing on 12 December 2001. Considering the course of proceedings in the applicant’s case and the fact that the decisive evidence was presented in early stages of the trial, there was enough time for the defence lawyer to prepare his final statement. The Chamber cannot find it substantiated that the defence lawyer was hindered to adequately express his views and to properly defend the applicant. The Chamber does not find a violation of Article 6, paragraph 3 (b) of the Convention, the right to adequate time to prepare defence.

4. Right to examine witnesses and have witnesses examined, Article 6, paragraph 3 (d)

116. Finally, the applicant complains of a violation of his right to examine witnesses and have witnesses examined as protected under Article 6, paragraph 3 (d).

117. He claims that the court completely relied on the statements of two “key witnesses”, O.L. and M.A.G., which were not given during the main trial but during a pre-trial hearing. He complains of the fact that his lawyer did not have a chance to cross-examine the witnesses at the main trial. He claims that his objection to the fact that the witnesses were not heard during the main trial was rejected by the court. The applicant notes that in criminal proceedings involving such a serious criminal offence as mediation of prostitution involving a juvenile woman, it is very rare that the main witnesses are heard at a pre-trial stage and not at the main trial. In addition he notes that he could not confront O.L. and M.A.G. with the statements of the seven defence witnesses made later in the trial, which were directly contradicting the statements of O.L. and M.A.G.

118. The applicant also claims that when the prosecution found out that he intended to propose as defence witness I.B., who was registered as employee of the applicant, the district police rejected her request for extension of her residence permit. The police then initiated criminal proceedings against I.B. for falsification of documents in order to intimidate her. The applicant further claims that, although I.B. in the end was heard by the court, the court failed to adequately consider her statement. In addition, the applicant suggests that three potential defence witnesses, M.A., I.S. and B.S, all dancers in the applicant’s club, were expelled from the territory of the Brčko District because they were found guilty of having committed a petty offence against the Law on Movement and Residence of Foreigners, only in order to prevent that they could be heard as witnesses. He claims that their expulsion pursuant to the procedural decision of the First Instance Court in Brčko was carried out even before it became final and valid.

119. The applicant further complains that the court, without any valid reason, gave no significance to the statements of the accused persons or to the statements of seven defence witnesses, including even the police officers who confirmed that during their control checks and raids they had found no evidence of prostitution. He also alleges that the two “key witnesses”, O.L. and M.A.G., lied about the facts because they were afraid of being prosecuted and sentenced for prostitution. The applicant further generally criticises the evaluation of evidence by the courts and the length of the sentence.

120. The respondent Party submits that all witnesses were heard in accordance with the provisions in the Code of Criminal Procedure and that the applicant and his lawyer were able to directly cross-examine the witnesses in relation to all the circumstances they considered to be of significance.

121. Article 6 paragraph 3 (d) reads as follows:

“3. Everyone charged with a criminal offence has the following minimal rights: ...

b. to examine or have examined witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...”

122. Article 6, paragraph 3 (d) of the Convention recognizes that in accordance with and within the limits of the principle of equality of arms the accused has the right to call defence witnesses and to cross-examine witnesses. At a court trial hearing “it is in principle essential that an accused is present when witnesses are being heard in a case against him”. (see e.g. Eur. Comm. HR, *Krupp v. Denmark* 42 DR, p. 287, (1985)) .

a. Claim that the “key witnesses” M.A.G. and O.L. were only heard at the pre-trial stage but not heard during the main trial

123. On 3 September 2001 the hearing of the witnesses M.A.G., O.L. and I.B. was held in the presence of the applicant and his lawyer. The Chamber notes that this was possible in accordance with paragraph 1 of Article 176 of the Code of Criminal Procedure, first sentence (see para. 44 above). It provides that in exceptional circumstances the testimony of a witness may be taken and preserved for use at trial at a hearing prior to the beginning of the main trial when the witness may be unavailable during the trial. Article 176, paragraph 1, second sentence, provides that all parties to the trial may cross-examine the witnesses heard. The Chamber notes that during the Article 176 hearing the applicant, his defence lawyer, the public prosecution and the court had the opportunity to cross-examine M.A.G. and O.L..

124. The Chamber notes further that according to Article 176, paragraph 2 of the Code of Criminal Procedure the use of statements obtained under the circumstances described in Article 176, paragraph 1 in the main trial is permissible, provided that the witnesses remain unavailable even after reasonable attempts to secure their presence.

125. The Chamber finds that Article 176 of the Code of Criminal Procedure in itself is compatible with Article 6, paragraph 3 (d) of the Convention. It allows for an exception to the rule to hear the witnesses during the main trial only under certain circumstances and contains the right of the accused to cross-examine the witnesses at the pre-trial stage of proceedings.

126. With regard to the specific circumstances of the applicant’s case, the Chamber notes that at the time when the criminal proceedings were conducted against the applicant it was the standard procedure, in cases in which women were found who appeared to be victims of trafficking, that the International Organization of Migration (hereinafter: the “IOM”) provided these women with protection and assistance. The IOM provided women found to be victims of trafficking with shelter while it sought to obtain the necessary travel documents for them and organized a so-called “assisted return” from Bosnia and Herzegovina to the countries of origin as soon as these documents were available. The well-being and safe and sustainable return of the victims of trafficking was and is the principal aim of the IOM’s counter-trafficking activities in Bosnia and Herzegovina.

127. Therefore the IOM did not wait with the assisted return of M.A.G. and O.L. until the outcome of criminal proceedings against the applicant and his co-defendants or the beginning of the main trial on 8 November 2001. Instead, as soon as the pre-trial hearing was held on 3 September 2001, IOM went ahead with the assisted return. On 6 September 2001 witness M.A.G. returned to her home-country Ukraine and on 11 September 2001 witness O.L. returned to her home-country Romania. As a consequence, they were not available at the main trial.

128. The Chamber finds that the hearing of the witnesses prior to the beginning of the main trial was in accordance with Article 176 of the Code of Criminal Procedure. The Chamber further notes that also I.B., a defence witness, was heard during the same hearing. In light of the fact that the witnesses were heard in front of a judge and all parties to the criminal proceedings, and of the fact that the applicant and his defence lawyer made use of their opportunity to cross-examine the witnesses at the hearing of 3 September 2001, the Chamber finds no violation of the principle of equality of arms as embodied in Article 6, paragraph 3 (d) of the Convention.

b. Claim that the right to have witnesses on his behalf heard was violated

129. The applicant claims a violation of the right to have witnesses on his behalf heard on two grounds: firstly, he claims that the prosecution tried to deport the defence witness I.B. before her hearing on 3 September 2001 or at least tried to intimidate her. Secondly, the applicant claims that three potential defence witnesses, M.A., I.S. and B.S, all dancers in the applicant's club, were expelled from the territory of the Brčko District before they could be heard.

130. The Chamber notes that the first instance court considered the statements of eight defence witnesses (V.G., R.J., Z.L., M.Ž.; P.S., M.R., S.P. and V.K.).

131. With regard to the first claim the Chamber notes that the witness I.B. was heard on 3 September 2001 and that the applicant does not claim that the statement given by her during that hearing contained any untruth or omissions as a result of duress from the prosecution. On the contrary, it appears that the applicant fully agrees with the content of the witness statement given by I.B.. Therefore, the Chamber does not find that this aspect of the claim reveals a violation of the applicant's right to have witnesses on his behalf heard as protected by Article 6, paragraph 3 (d).

132. With regard to the fact that three potential witnesses (M.A., I.S. and B.S) were removed from the Brčko District in accordance with the procedural decision of the First Instance Court, it appears that the applicant had never formally named these persons to be witnesses. In his application he refers to them as "potential witnesses" and does not substantiate when or whether he informed the respondent Party's authority that these persons may be defence witnesses. As a consequence, it cannot be established whether M.A., I.S. and B.S could have been heard, had the court found their appearance relevant. Bearing in mind that seven defence witnesses were heard the Chamber does not find a violation of the applicant's right to have witnesses on his behalf heard as protected by Article 6, paragraph 3 (d).

c. Claim that the Brčko courts wrongly evaluated the witness statements

133. With regard to the applicant's claim that the court gave no significance to the statements of the accused persons or to the statements of the seven defence witnesses and his allegation that O.L. and M.A.G. did not tell the truth, the Chamber recalls 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 11, Decisions August-December 1999). The Chamber does not find a violation of Article 6 of the Convention with regard to the allegedly wrongful evaluation of witness statements and evidence by the Brčko courts.

5. Conclusion

134. In conclusion, the Chamber finds that there has been no violation of the applicant's right as protected by Article 6 of the Convention.

VIII. CONCLUSIONS

135. For the above reasons, the Chamber decides,

1. unanimously, that the application is admissible;

2. unanimously, that Bosnia and Herzegovina has not violated the applicant's right to fair trial under Article 6 of the European Convention on Human Rights.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel