DECISION ON ADMISSIBILITY AND MERITS
(delivered on 8 March 2002)

Case no. CH/98/1324

Milan HRVAČEVIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 February 2002 with the following members present:

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

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

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. On 14 March 1996 he was arrested in Sarajevo on suspicion of having committed the criminal act of war crimes against the civilian population. When the applicant was arrested there was no approval of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") for the arrest and for the institution of criminal proceedings as required by the "Rules of the Road". The consent of the ICTY Prosecutor was received by the Higher Court in Sarajevo on 17 May 1996, when the investigation proceedings had been pending for over two months. In June 1997 the Cantonal Court in Sarajevo found the applicant guilty of having committed the criminal act of war crimes against the civilian population and sentenced him to 15 years imprisonment. The applicant filed an appeal to the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court"). In June 1998 the Supreme Court issued a decision without holding a public hearing, by which it reduced the applicant's sentence to 12 years imprisonment.

2. The applicant complains that his rights as guaranteed under Articles 6 and 7 of the European Convention on Human Rights ("the Convention") have been violated. The applicant's complaint under Article 6 of the Convention raises three different issues. The first issue refers to the Cantonal Court's assessment of the evidence. The second issue refers to the applicant's allegation that he was not allowed to call witnesses on his behalf and to present his own evidence. The third issue is that no public hearing was held before the Supreme Court.

3. This case also raises issues under Article 5 of the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced with the Chamber on 1 December 1998.

5. The applicant also lodged an application before the Office of the Human Rights Ombudsperson for BiH. By a letter dated 16 September 1999 the Deputy Ombudsperson informed the Chamber that, pursuant to Rule 16(1) of the Ombudsperson's Rules of Procedure, no investigation would be opened in the case. Explaining his decision, the Deputy Ombudsperson stated that the applicant had not provided any evidence in support of his allegations.

6. On 1 December 1999 the Chamber transmitted the case (only) to the Federation as the respondent Party for its observations on the admissibility and merits. Although the applicant did not invoke Article 5 of the Convention, the Chamber decided to transmit the case under this Article as well. On 31 January 2000 the Chamber received the Federation's observations.

7. The Federation's observations were forwarded to the applicant and on 14 March 2000 the Chamber received the applicant's reply and a compensation claim.

8. On 11 May 2000 the Chamber received further observations from the Federation.

9. On 11 June 2001 the Chamber requested the parties to submit additional information.

10. On 26 June 2001 the Chamber received additional information from both parties.

11. On 12 December 2001 the Chamber requested the respondent Party to provide further information. On 25 December 2001, the Chamber received the requested information from the respondent Party.

12. The Chamber deliberated on the admissibility and the merits of the case on 4 November 1999, 6 June 2001, 6 December 2001, 6 and 8 February 2002. On the latter date the Chamber adopted the present decision.

III. FACTS

13. The applicant was arrested on 14 March 1996 in Sarajevo on suspicion of having committed the criminal act of war crimes against civilian population. Immediately after the arrest an investigation procedure was instituted before the Higher Court in Sarajevo (now the Cantonal Court Sarajevo) upon the request of the Higher Public Prosecutor's Office (now the Cantonal Prosecutor's Office Sarajevo). When the applicant was arrested there was no consent of the ICTY Prosecutor for the arrest and for the institution of criminal proceedings in accordance the Rome Agreement of 18 February 1996 ("the Rules of the Road", see paragraphs 19-22 below). The consent of the Hague Tribunal Prosecutor was received by the Higher Court in Sarajevo on 17 May 1996, when the investigation proceedings had been pending for over two months.

14. On 13 September 1996 the Higher Public Prosecutor's Office in Sarajevo issued an indictment against the applicant charging him with the criminal act of war crimes against civilian population pursuant to Article 142 of the Criminal Law of SFRY (see paragraph 23-24 below).

15. On 26 June 1997 the Cantonal Court Sarajevo (the Higher Court in Sarajevo had at this point become the Cantonal Court) issued a judgement by which the applicant was found guilty of having committed the criminal act of war crimes against civilian population under Article 142 of the above mentioned Criminal Law. The applicant was found guilty because he:

> "As a reserve officer-engineer in the former JNA who was mobilised in the Army of Republika Srpska, upon the order of the commander Aleksandar Petrović, had planned and, with the help of other soldiers he had previously trained, had committed in January 1993 the destruction of a part of the residential-business building in Milutina Đuraškovića Street in Sarajevo, known as "Loris", by taking 100 kg of TNT explosive and planting it next to the embankment pillars of the building, and after personally activating the explosive, destroying so a part of the mentioned building and causing pecuniary damage amounting to DEM 1.197.254,30;
>
> In January 1994, upon the order of the commander Aleksandar Petrović, he had organised, with a group of soldiers, the planting of 60 kg TNT explosive on the vital elements of the supporting construction of the residential-business facility in Zagrebačka Street in Sarajevo, known as 'Invest-banka", committing so the demolition of the mentioned facility and causing pecuniary damage amounting to DEM 1.641.475,00;"

By the same ruling the applicant was found not guilty of the charges that he had, both personally and on behalf of a higher commander, ordered artillery and sniper fire which had resulted in death and injury of many people and great material damage on civilian buildings.

16. The applicant was sentenced to fifteen (15) years of imprisonment.

17. The applicant lodged an appeal against the judgement of the Cantonal Court to the Supreme Court of the Federation of Bosnia and Herzegovina as the second instance court. The applicant stated that the Cantonal Court had wrongly assessed the evidence and that it had breached procedural provisions prescribed by the Law on Criminal Procedure. The applicant did not suggest any new evidence in his appeal, neither did he propose that the Supreme Court hold a public hearing in his case. The applicant's brother submitted a supplement to the appeal, within the prescribed time-limit, which included a document issued by the armed forces of the Serbs in Bosnia and Herzegovina, "the Army of Republica Srpska"("VRS"), stating that the destroyed buildings were military targets.

18. On 2 June 1998 the Supreme Court issued a decision sentencing the applicant to 12 years imprisonment for having committed the criminal act of war crimes against civilian population. The applicant's appeal was "partly taken into account" by the Supreme Court. The Supreme Court did not hold a public hearing in the case and its decision was based on the facts established by the Cantonal Court.

IV. RELEVANT LEGAL PROVISIONS

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

19. On 18 February 1996, the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, meeting in Rome, agreed on certain measures to strengthen and advance the peace process. The second sub-paragraph of paragraph 5, entitled "Cooperation on War Crimes and Respect for Human Rights", reads as follows:

> "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

20. The expressions "International Tribunal" and "Tribunal" refer to the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has its seat in The Hague. The above-quoted provision is normally referred to as the Rules of the Road.

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

> "Legally, the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law."

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

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

B. The relevant criminal law

23. At the time of the applicant's arrest and trial the applicable criminal law provisions were contained in the Criminal Law of the former Socialist Federal Republic of Yugoslavia ("SFRY"), adopted

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

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

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

C. The relevant provisions on criminal procedure

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

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

> "(1) Custody may be ordered only under the conditions envisaged in this law.
>
> (2) The length of custody must be limited to the shortest necessary time. It is the duty of all bodies and agencies participating in criminal proceedings and of agencies providing legal aid to proceed with particular urgency if the accused is in custody.
>
> (3) Throughout the entire course of the proceedings custody shall be terminated as soon as the grounds on which it was ordered cease to exist."

27. Article 191 paragraph 1 provided:

"Custody shall always be ordered against a person if there is a reasonable suspicion that he has committed a crime for which the law prescribes the death penalty. Custody need not to be ordered if the circumstances indicate that, in the particular case involved, the law prescribes that a less severe penalty may be pronounced."

28. Article 359 to 399 of the Law on Criminal Procedure concerned procedure for regular legal remedies. Article 363 provided:

"A judgement may be challenged on the following grounds:

1. because of an essential violation of the provisions of criminal procedure;
2. because of a violation of the Criminal Code;
3. because of erroneously or incompletely established facts;
4. because of the decision as to the sentence..."

29. Article 366 provided:

"1. A judgement may be challenged on the basis of erroneously or incompletely established facts or if the court has erroneously established decisive facts or failed to establish them at all.
..."

30. Article 371, concerning criminal appeals proceedings provided:

"1. Notice of the session of the panel shall be given to the accused and his defense counsel ..., who within the period allowed for an appeal ... requested to be notified of the session or can propose that a hearing be held before the court of second instance. The presiding judge of the panel or the panel itself may decide to give notice of the session of the panel to the parties even if they have not requested so, or to give notice of the session to a party who did not request so if their presence would be helpful to clarify the matter."

"2. If the accused is in custody and has a defence counsel, the presence of the accused shall be provided for only if the presiding judge of the panel finds this to be expedient."

"3. The session of the panel shall begin with the report of the reporting judge concerning the state of affairs. The Panel may request the necessary explanations in connection with the allegations of the appeal from the principals attending the session. The principals may propose that particular documents be read to supplement the report, if the presiding judge so allows, or they may request the opportunity to furnish the necessary explanations for their positions, without repeating what was contained in the report."

"4. The failure of a party to appear, although duly notified, shall not prevent the session of the panel from being held."

31. Article 372 provided:

"1. The second instance court shall render a decision in a session of a panel or on the basis of a hearing."

"2. The second instance court shall decide in a session of a panel whether to hold a hearing."

32. Article 373 provided:

"1. A hearing shall be held before the second instance court only if it is necessary for the 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 to the court of first instance.
..."

33. Article 381 provided:

> "... The second instance court may, on the basis of a panel session or of a hearing, reject an appeal as being submitted out of time or as being inadmissible, or it may refuse the appeal as ill-founded and confirm the judgment of the first instance court, or it may revoke the judgment of the first instance court and return the case to the court for reconsideration, or it may modify the verdict of the first instance court."

34. Article 385 provided:

> "1. The second instance court shall ... render a decision revoking the first instance judgment and return the case for retrial if it finds that there has been an essential violation of the provisions of criminal procedure or if it considers that erroneously or incompletely established facts justify a new trial before the original court".

V. COMPLAINTS

35. The applicant complains that his rights under Article 6 and Article 7 of the Convention have been violated.

36. With regard to the alleged violation of Article 6, the applicant states that according to the Convention everyone is entitled to an independent and impartial tribunal established by law. The applicant states that his criminal liability established by the Cantonal Court was based exclusively on the Higher Public Prosecutor's witnesses as well as on experts residing in the territory of the Federation of Bosnia and Herzegovina. He further states that he was not allowed to present evidence confirming his statements throughout the criminal proceedings before the Cantonal Court. He claims that the second instance court did not examine the evidence *ex officio*. The applicant also states that the witnesses and the representatives of official institutions had a partial attitude in the proceedings against him as an "enemy soldier", since the criminal procedure against him was conducted immediately after the cessation of the armed conflict between the Army of the Republic of Bosnia and Herzegovina ("Army of the RBiH") and the VRS.

37. The case also raises issues under Article 5 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

38. The Federation is of the opinion that the application is inadmissible because the applicant has not exhausted all domestic remedies. The Federation is referring to extraordinary remedies as provided for by new the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina.

39. The respondent Party is further of the opinion that the proceedings have been fair and that the application therefore is manifestly ill-founded.

40. As to the merits, the Federation is of the opinion that there has been no violation of the applicants rights because there was a reasonable suspicion that the applicant had committed the criminal offence, the applicant was informed promptly of the reasons of his arrest and he was brought promptly before a judge. Therefore, according to the respondent Party, there has been no violation of Article 5 of the Convention.

41. The respondent Party argues that the Courts and the Prosecutor's Offices in the Federation learnt about the Rules of the Road only on 17 October 1996, when the Federal Ministry of Justice distributed the text of the Rules of the Road to them. According to the respondent Party the Rules of

the Road did not become positive law until this date since they had not been translated and transmitted to any relevant authority of the Federation.

42. The respondent Party further states that the Court system guarantees both independence and impartiality. The respondent Party points out that the case was dealt with within reasonable time and that the applicant was informed promptly of the reasons of the charges. Therefore, according to the respondent Party, there has been no violation of Article 6 of the Convention.

43. The respondent Party also submits that the applicant was declared guilty of having committed a criminal offence which, at the time when it was committed, constituted a criminal offence according to national and international law. Therefore there has been no violation of Article 7 of the Convention according to the respondent Party.

44. As to the applicant's claims for compensation, the Federation states that the applicant's compensation claims are completely ill-founded, unsubstantiated and excessive.

45. In its reply to the Chamber's questions, received by the Chamber on 26 June 2001, the respondent Party states that the applicant's allegation that he was not given an opportunity to present his own evidence and to propose his own witnesses, is incorrect. The respondent Party maintains that the applicant did not propose any evidence that was not accepted by the Cantonal Court and that the Cantonal Court *ex officio* gathered more evidence in order to check the allegations from the bill of indictment.

46. The respondent Party further states that the applicant did not propose a public hearing before the Supreme Court and that the only new evidence presented in the appeal proceedings was a document from the VRS stating that the destroyed buildings were military targets. According to the respondent Party, this evidence was not considered relevant since the applicant had confessed that there were no members of the RBiH Army in the buildings when they were destroyed. Furthermore, material evidence collected by the Court confirmed this.

B. The applicant

47. The applicant states that his detention was illegal since the Higher Court in Sarajevo did not have the consent of the Prosecutor of the ICTY, as required by the Rules of the Road. He further maintains the allegations in his application.

48. The applicant also submitted his claim for compensation. He claims KM 40.000,00 for his illegal detention and imprisonment from 14 March 1996 until the issuance of the Chambers decision. He also claims KM 100.000,00 as compensation for his weakened health, which according to the applicant, got worse during the proceedings. The applicant submitted a letter from the Clinical Center of General Clinics Kasindol providing information about his health. The applicant did not submit any other evidence.

VII. OPINION OF THE CHAMBER

A. Admissibility

49. Before considering the merits of the case, the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber shall consider whether effective domestic remedies exist and whether the applicant has demonstrated that they have been exhausted. Article VIII(2)(c) states that the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right of petition.

1. Bosnia and Herzegovina

50. The applicant directs his application against Bosnia and Herzegovina and the Federation of

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

2. Federation of Bosnia and Herzegovina

51. The Chamber notes that the actions complained of by the applicant are within the competence of the Federation of Bosnia and Herzegovina.

(a) The alleged violation of Article 7 of the Convention

52. The applicant complains that his rights as guaranteed by Article 7 of the Convention have been violated. Article 7 of the Convention reads:

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

53. The Chamber notes that this provision, at least its first paragraph, enshrines the principle of *nullum crimen sine lege, nulla poena sine lege*. In the present case, the acts on account of which the applicant was found guilty constituted criminal offences under Article 142 of the, then applicable, Criminal Law of the SFRY (see paragraphs 23-24 above). The complaint under this provision is therefore inadmissible as manifestly ill-founded.

(b) Exhaustion of domestic remedies

54. The Federation also argues that the applicant has not exhausted the available domestic remedies as he was given the possibility to use extraordinary remedies in accordance with new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina. The Chamber notes that it has previously held that extraordinary remedies do not need to be exhausted for the purposes of Article VIII(2)(a) of the Agreement (see case no. CH/98/1366, *V.Č.*, decision on admissibility and merits of 7 March 2000, paragraph 59, Decisions on Admissibility and Merits January-June 2000). Consequently, the Chamber finds that the applicant has complied with the requirements of that provision.

3. Conclusion as to admissibility

55. The Chamber further finds that no other ground for declaring the cases inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to Article 5 and Article 6 of the Convention, insofar as it is directed against the Federation of Bosnia and Herzegovina. The remainder of the application is inadmissible.

B. Merits

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

including the rights and freedoms provided for in the Convention.

1. Article 5 paragraph 1 of the Convention

57. The Chamber finds that the application raises issues with regard to Article 5 paragraph 1 of the Convention, which in the relevant part reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> ..."

58. Under the Rules of the Road, "persons ... may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal". Charges of war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer.

59. As stated by the respondent Party at the public hearing held before the Plenary Chamber in the cases of *Čegar, Marčeta* and *Hermas*, and held also by the Supreme Court of the Federation (see paragraphs 21-22 above), the Rules of the Road apply as domestic law in the Federation.

60. The respondent Party has argued that the courts and the prosecutor's offices in the Federation learnt about the Rules of the Road first on 17 October 1996 when the Federal Ministry of Justice distributed them. According to the respondent Party, the Rules of the Road did not become positive law until this date since they had not been translated and transmitted to any relevant authority of the Federation.

61. The Chamber notes that the Rules of the Road were agreed upon on 18 February 1996. The Chamber finds that the respondent Party, after having signed and agreed upon the Rules of the Road, had a positive obligation to transmit them and make them known to all relevant authorities in the Federation. Moreover, the Chamber notes that the prompt distribution of the text of the Rules of the Road to the judicial authorities is a responsibility of the respondent Party. If, as the respondent Party has stated, the Federal Ministry did indeed wait until 17 October 1996 to inform the relevant authorities of the existence of the Rules of the Road, it is the respondent Party that is to be held responsible for the consequences of this omission. The Chamber further recalls that it has previously held that the Rules of the Road entered into force on 18 February 1996 (see case no. CH/98/1374, *Pržulj*, decision on the admissibility and merits of 10 January 2000, paragraph 135, Decisions January-July 2000; and case no. CH/99/1366, *V.Č.,* decision on the admissibility and merits of 7 March 2000, Decisions January-July 2000, paragraph 65). Accordingly, the Chamber concludes in this case also that the Rules of the Road entered into force on 18 February 1996.

62. The Chamber also notes that the respondent Party's argument that the relevant authorities did not know about the Rules of the Road until 17 October 1996 is contradicted by the fact that the Higher Court in Sarajevo received the approval of the Hague Tribunal Prosecutor for the arrest and for the institution of criminal proceedings on 17 May 1996. In other words, the consent of the ICTY Prosecutor was received exactly 5 months before the respondent Party states that the Rules of the Road became known.

63. It is undisputed that the applicant was arrested on 14 March 1996 on charges of war crimes and that the opinion of the ICTY Prosecutor, stating that there was sufficient evidence by international standards to justify proceedings for serious violation of international humanitarian law, was obtained only on 17 May 1996. The respondent Party has not been able to provide the Chamber with information regarding when, and by whom, the ICTY Prosecutor was requested to give his

approval for the arrest and institution of criminal proceedings against the applicant. Further, the Chamber has not by its own motion been able to obtain the relevant information. However, it is clear that no approval for an order, warrant or indictment against the applicant from the ICTY Prosecutor was received by the Higher Court in Sarajevo before 17 May 1996. The Rules of the Road, which require such order, warrant or indictment to be approved by the ICTY Prosecutor, entered into force on 18 February 1996. The applicant's arrest and detention from 14 March 1996 to 17 May 1996, i.e. for more than 2 months, were therefore not "lawful" as required by paragraph 1(c) of Article 5.

64. As to the applicant's detention after 17 May 1996, the Chamber notes that he was detained because he was suspected of having committed war crimes against the civilian population under Article 142 of the Criminal Law of the SFRY, punishable with the death penalty or imprisonment for at least five years. The applicant's pre-trial detention after 17 May 1996 appears therefore to have been in accordance with Article 191 of the then applicable Law on Criminal Procedure (see paragraph 27 above).

65. The Chamber concludes that the applicant's arrest and detention from 14 March 1996 to 17 May 1996 constituted a violation of Article 5 paragraph 1 of the Convention.

2. Article 6 of the Convention

66. The applicant claims that his rights as guaranteed under Article 6 of the Convention have been violated. The complaint raises three different issues. The first issue refers to the Cantonal Court's decision that the destroyed buildings were to be considered as civilian buildings, i.e. the assessment of the evidence. The second issue refers to the applicant's allegation that he was not allowed to call witnesses on his behalf and to present his own evidence. The third issue is that no public hearing was held before the Supreme Court.

67. Article 6 paragraphs 1 and 3 of the Convention, in so far as relevant, provides as follows:

> "In the determination of .... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law."
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> ..."

68. With regard to the first issue, the Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, and case no. CH/99/2629, *Nurković*, decision on admissibility of 8 December 1999, paragraphs 9 and 10, Decisions August-December 1999).

69. As to the complaint that the applicant could not call his own witnesses and bring forward his own evidence the Chamber recalls the well established case law of the European Court that, as a general rule, it is for the domestic courts to assess the relevance of the evidence which defendants seek to adduce (see*, inter alia*, Eur. Court HR, *Barbèra, Messegué and Jabardo v. Spain* judgment of 6 December 1988, Series A no. 146, paragraph 68). More specifically, Article 6(3)(d) leaves it to the domestic courts, again as a general rule, to assess whether it is appropriate to call witnesses; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" (see Eur Court HR, *Engel and others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, paargraph 91). The Chamber's task therefore, is to ascertain whether the proceedings

considered as a whole, including the way in which evidence was taken, were fair (see, *inter alia*, Eur. Court HR *Asch v. Austria* judgment of 26 April 1991, Series A, No. 203, paragraphs 25-26 and *Vidal v. Belgium* judgment of 22 April 1992, Series A, No. 235-B, paragraph 33).

70. In the present case, the minutes of the trial before the Cantonal Court show that the applicant had the possibility to call his own witnesses and present his own evidence. The minutes also show that the Cantonal Court did not refuse any of the applicant's suggested witnesses or evidence. Finally, the minutes show that the prosecutor and the defence counsel were given the same opportunity to examine the called witnesses. Under these circumstances and in accordance with the relevant case-law of the European Court, the Chamber does not find any evidence before it which would lead it to conclude that the applicant was unable to exercise his right to examine witnesses as guaranteed under Article 6(3)(d) of the Convention.

71. The third issue concerns the fact that the Supreme Court did not hold a public hearing in the case and based its decision on the facts as established by the Cantonal Court.

72. The Chamber notes that the Cantonal Court determined the charges brought against the applicant on the basis of a hearing at which the applicant was present, gave evidence and argued in his case. However, the same did not apply to the proceedings before the Supreme Court, in which the applicant submitted a written appeal but was not given the opportunity to make oral submissions.

73. Addressing the question whether the guarantees under Article 6 of the Convention also apply to the proceedings before an appellate court, the European Court of Human Rights has already found that "persons shall enjoy before these courts the fundamental guarantees contained in Article 6 of the Convention". However, account must be taken of the entirety of the proceedings and the role of the appellate court therein (see the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, paragraphs 54 and 56). Provided that there has been a public hearing before the court of first instance, the absence of such a hearing before the appellate court may be justified if these proceedings involve only questions of law, as opposed to questions of fact (*Monnell and Morris*, paragraph 58).

74. The Chamber will now, in deciding this question, have regard to the domestic appeal system, the ambit of the Supreme Court's powers and the manner in which the applicant's interests were actually protected.

75. According to the laws applicable at the relevant time, a judgment of a court of first instance could be appealed, *inter alia*, for the reason of erroneously or incompletely established facts (Article 366 of the Law on Criminal Procedure, see paragraph 29 above). The second instance court in a criminal case was called upon to decide on questions of law and on those of fact (Article 385, paragraph 34 above). It was within the scope of the appellate court's jurisdiction either to confirm or to annul a first instance judgment and to return the case to that court, or to change the qualification of the criminal charge and to modify a sentence (Article 381, paragraph 33 above).

76. In his appeal letter, the applicant's representative challenged the Cantonal Court's legal findings, factual findings and the length of the sentence pronounced. However, the representative did not request the Supreme Court to hold a public hearing.

77. The Chamber notes that Articles 372 and 373 of the Law on Criminal Procedure (paragraph 31-32 above**)** provided for a session of a panel of the Supreme Court or a hearing. A hearing should be held before the second instance court only if it was necessary for the presentation of new evidence or repetition of evidence already presented, because the state of the facts was erroneously or incompletely established and if there were legitimate reasons for not returning the case for retrial to the court of first instance. According to Article 372, it is for the Supreme Court to decide whether to hold a hearing or not.

78. The Chamber further notes that Article 371 of the Law on Criminal Procedure (paragraph 30 above) states that notice of the session should be given to the parties who in a timely manner requested to be notified. The court could decide to give notice of the session of the panel to the parties even if they had not requested to be notified.

79. The Chamber has previously found that the lack of a public hearing before the Supreme Court could amount to a violation of Article 6 of the Convention (see case no. CH/98/934, *Garaplija*, decision on admissibility and merits of 3 July 2000, paragraph 63, Decisions July-December 2000). However, the Chamber notes that the applicant in that case formally requested to be present in the appeal proceedings. As noted above, the applicant in the present case did not request to be present before the Supreme Court in the appeal proceedings.

80. Having in mind the fact that the applicant did not request to be present in the appeal proceedings and also considering that a great amount of evidence was gathered and examined before the Cantonal Court, the Chamber concludes that the absence of a public hearing before the Supreme Court did not deny the applicant the right to a fair trial. Accordingly, there has been no violation of Article 6 of the Convention.

VIII. REMEDIES

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

82. The applicant requests the Chamber to issue a decision by which it orders the respondent Party to annul the decision of the Supreme Court and to reopen the proceedings in his case. The applicant further requests compensation in the amount of KM 40,000.00 for his illegal stay in detention from 14 March 1996 until the date of the delivery of the present decision. Finally, the applicant requests compensation in the amount of KM 100,000.00 for the deterioration of his health during the proceedings.

83. The Federation argues that the claims for compensation are ill-founded or unsubstantiated and in any case excessive.

84. With regard to the applicant's request for compensation for his illegal detention from 14 March 1996 until the date of the delivery of the present decision, the Chamber notes its finding above (see paragraph 65 above) that the applicant was illegally detained only until 17 May 1996. After that date the applicant's detention was in accordance with the law. The Chamber notes that the Supreme Court, when deciding upon the applicant's sentence, took into account the time he had spent in detention from 15 March 1996. The Chamber is therefore of the opinion that a decision finding a violation of the applicant's human rights is sufficient satisfaction as a remedy for the harm suffered by him.

IX. CONCLUSION

85. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible against Bosnia and Herzegovina;

2. by 5 votes to 2, to declare inadmissible the part of the application relating to the applicant's complaint under Article 7 of the European Convention on Human Rights;

3. unanimously, to declare admissible the remainder of the application;

4. by 6 votes to 1, that the arrest and detention of the applicant from 14 March 1996 to 17 May 1996 constituted a violation of the applicant's right to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

5. by 5 votes to 2, that there has been no violation of the applicant's rights as guaranteed by Article 6 of the Convention;

6. by 4 votes to 3, that a decision finding a violation of the applicant's human rights is an appropriate remedy for the harm suffered by him and to dismiss the applicant's claims for compensation and other remedies.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel