DECISION ON REQUEST FOR REVIEW

Case no. CH/98/1366

V.Č.

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 12 May 2000 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the respondent Party's request for a review of the decision of the Second Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the First Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS

1. The applicant is a citizen of Bosnia and Herzegovina of Serb nationality from Foča (now Srbinje), Republika Srpska. On 2 June 1996 he was arrested in Sarajevo on account of charges of war crimes and genocide committed in 1992 against the Muslim civilian population of Foča. In April 1997 the indictment against the applicant was transmitted to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the Hague in order to comply with the "Rules of the Road". On 7 May 1997 the Prosecutor expressed the view that the evidence presented to her was sufficient only to justify proceedings for unlawful confinement or imprisonment of civilians. In the following, the indictment was amended several times in order to bring it in line with the opinion of the ICTY Prosecutor. On 19 January 1998 the Cantonal Court in Sarajevo found the applicant guilty on two counts and sentenced him to 11 years of imprisonment. The appeals judgment of 16 June 1998 reduced the sentence imposed to nine years. In the meantime, the applicant has been released on probation.

2. The applicant complained of violations of his rights guaranteed by Articles 5, 6 and 7 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 16 December 1998 and was registered on the same day. The applicant is represented by Ms. Senka Nožica, a lawyer practising in Sarajevo.

4. On 7 March 2000 the Second Panel adopted its decision on admissibility and merits of the case, which was delivered in a public hearing on 9 March 2000. The Second Panel declared inadmissible all the applicant's complaints, insofar as they were directed against Bosnia and Herzegovina. Insofar as the application was directed against the Federation, the Panel declared admissible the complaints under Articles 5 and 6 of the Convention, while it declared inadmissible the complaints under Article 7 of the Convention and under Article 14 of the ICCPR. As to the merits, the Second Panel found that the arrest and detention of the applicant from 2 June 1996 to 7 May 1997 constituted a violation of the applicant's right to liberty and security of person guaranteed by Article 5 paragraph 1 of the Convention. The Second Panel also found that the way in which the Cantonal Court and the Supreme Court disregarded the binding opinion of the ICTY Prosecutor, as well as the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge, constituted a violation of the right of the applicant to a fair trial guaranteed by Article 6 paragraph 1 of the Convention. Furthermore, the Second Panel found that the restrictions placed on the applicant's contacts with his lawyer during the preliminary investigation phase constituted a violation of his right to the assistance of a lawyer in the preparation of his defence, as guaranteed by Article 6 paragraph 3(b) and (c) of the Convention. As to remedies for the violations found, the Second Panel ordered the Federation to take all necessary steps to grant the applicant a re-trial, should he lodge a petition to this effect. Moreover, it ordered the Federation to pay the applicant 4,000 Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for the unlawful deprivation of his freedom from 2 June 1996 to 7 May 1997.

5. On 6 April 2000 the Federation submitted a request for a review of the decision. In pursuance of Rule 64(1) the request was considered by the First Panel, which on 10 May 2000 decided to recommend to the plenary Chamber that the request be accepted in part and rejected for the rest. Mr. Juka did not take part in the deliberations of the First Panel. The plenary Chamber considered the request and the First Panel's recommendation on 12 May 2000.

III. REQUEST FOR REVIEW

6. In its request the Federation first of all asks the plenary Chamber to review the decision of the Second Panel on the admissibility of the application. In case the plenary Chamber should confirm the admissibility of the application, the Federation requests a review of the finding of violations of Articles 5 and 6 of the Convention and, thirdly, of the remedies ordered.

7. Regarding the admissibility, the Federation argues that the Second Panel erred in finding the application admissible. It is submitted that the case is firstly outside the Chamber's competence because, under Article 9 of its Statute and Rule 9 of its Rules of Procedure and Evidence, the ICTY enjoys exclusive jurisdiction to adjudicate the lawfulness and fairness of criminal proceedings before the courts of Bosnia and Herzegovina concerning serious violations of international humanitarian law committed since 1991. Secondly, it is argued that the Second Panel should have declared the case inadmissible also under Article VIII(2)(d) of the Agreement, as the application concerned a matter pending before another international human rights body, i.e. the ICTY. The Federation also submits that the application should have been declared inadmissible on the basis of the case-law of the European Court of Human Rights (*recte* the Commission), which established that Article 6 of the Convention does not apply to the proceedings initiated by a request for re-trial.

8. As to the Second Panel's finding of violations of Articles 5 and 6 of the Convention, the Federation has submitted a number of grounds for reviewing the decision. With regard to the finding of unlawful deprivation of liberty from 2 June 1996 to 7 May 1997, it is argued that the obligations of the Parties under the "Rules of the Road" contained in the Rome Agreement of 18 February 1996 became effective and binding for the Federation authorities not on the date of that Agreement, but only after a necessary "period of implementation". During this period of implementation the text of the Rome Agreement was communicated to the legislative bodies on 21 October 1996, while the Supreme Court of the Federation informed the courts in the Federation territory on 4 December 1996 of which cases to transmit to the ICTY Prosecutor. It is supposedly argued that before the latter date the Rules of the Road were not in force in the Federation and that, as the applicant's case was among the first ones transmitted to The Hague, no responsibility for further delays lies with the Federation authorities.

9. Secondly, the Federation submits that the applicant's detention was necessary in order to comply with a peremptory norm of international law (*jus cogens*) obliging the Federation to effectively prosecute and punish persons suspected of serious breaches of international humanitarian law. This *jus cogens* principle assertedly is an integral part of the law of Bosnia and Herzegovina, prevailing over the obligation to comply with the Rules of the Road.

10. With reference to the finding of a violation of the applicant's right to a fair trial, the Federation appears to argue that the failure to transmit the indictment against the applicant to the ICTY Prosecutor prior to his arrest and a possible conviction on charges excluded by the ICTY Prosecutor do not constitute a violation of the principle of legality (*nullum crimen sine lege*), which in the prosecution of persons guilty of war crimes cannot be applied in absolute and formalistic terms. According to the Federation, this argument is supported by the judgment of the International Military Tribunal in Nürnberg and by the writings of eminent legal scholars. Regarding the finding of a violation of the applicant's right to a fair trial, the Federation further argues, relying on the *Eichmann* case and the jurisprudence of the ICTY, that possible irregularities in the arrest of the applicant do not compromise the legality of the subsequent trial. In this respect, the Federation recalls the principle *male captus, bene detentus*.

11. Concerning the finding of a violation of the applicant's right to the assistance of a lawyer in the preparation of his defence, the Federation submits that "there could not have been an essential violation because the accused, as soon as the indictment had been issued, had unlimited right to contact his attorney".

12. As to the remedies ordered, the Federation moves objections both against the order to grant the applicant a re-trial if he submits a request to this effect and against the award of compensation. Regarding the order for a re-trial, it is argued on several grounds that the Chamber exceeded its powers as to remedies. Firstly, the Federation states that Article 50 of the European Convention on Human Rights, limiting the power of the European Court of Human Rights concerning remedies for violations found to "afford[ing] just satisfaction", applies also the Chamber. Secondly, it is argued that both under a general principle of international law and under the Agreement the Chamber cannot issue orders to domestic courts or substitute itself to domestic appeals courts in their functions. By ordering the respondent Party to grant the applicant a re-trial, the Chamber assertedly exceeded its competencies under the Agreement in substituting itself to the appeals courts in the Federation's

judicial system. In this regard the Federation finally claims that there is a lack of clarity as to under which circumstances the Chamber, having found a violation of Article 6, will order a re-trial and under which it will have recourse to other remedies.

13. The Federation also objects to the conditional character of the order granting the applicant a re-trial. It claims that the conditional character of the order "makes it even more confusing", and points to a number of alleged difficulties it entails, e.g. whether in case of a re-trial the judicial authorities would have to seek again the opinion of the ICTY Prosecutor and what would be the consequence of a renewed conviction on crimes excluded by the opinion of the ICTY Prosecutor.

14. Finally, as to the pecuniary compensation ordered, the Federation argues that the Chamber should have found that its decision finding a violation of the applicant's rights constitutes sufficient compensation of the moral damage suffered by the applicant. If not so, it is argued that the amount awarded is disproportionate in comparison to the order for compensation issued by the Chamber in favour of other applicants, who had suffered more serious violations of their rights.

IV. OPINION OF THE FIRST PANEL

15. The First Panel notes at the outset that the request for review has been lodged within the time-limit prescribed by Rule 63(2). The First Panel has therefore examined whether (a) the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and, if so, (b) the whole circumstances justify reviewing the decision, as required in Rule 64 of the Chamber's Rules of Procedure.

A. The request to review the finding of admissibility under Articles 5 and 6

16. The First Panel notes that the Federation argued already in the proceedings before the Second Panel that the application was inadmissible on the ground that the Chamber was incompetent to adjudicate complaints of violations of the Rules of the Road (paragraph 43 of the decision on admissibility and merits). This incompetence is derived from the argument that the ICTY was established by an international procedure and is allegedly solely competent to adjudicate violations of the Rules of the Road. The Second Panel dismissed this objection to its competence on the following grounds (paragraphs 52 and 53):

> "52. The Chamber notes that under the Rules of the Road the ICTY is competent to review arrest warrants and indictments where a person is suspected or accused of a serious violation of international humanitarian law. There is no provision in the Rules of the Road, nor in the Statute or the Rules of Procedure of the ICTY, to the effect that the ICTY is competent to investigate and judge alleged violations of the Rules of the Road by the Federation authorities.
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> 53. The Chamber also recalls that, in several previous cases, it has found that it is the responsibility of the Federation to ensure that its organs comply with the Rules of the Road, and that a failure to do so constitutes a violation of the Agreement (see, e.g., the aforementioned *Hermas* decision, paragraphs 46-47, and case no. CH/98/1374, *Pržulj*, decision on admissibility and merits delivered on 13 January 2000, paragraphs 133-137). To sum up, this challenge to the Chamber's jurisdiction over the present case is groundless."

17. The Federation now reiterates its argument, adding that the ICTY Statute prevails over the Dayton Peace Agreement and over Annex 6 thereto (the Agreement establishing the Human Rights Chamber) as *lex specialis* and *lex posterior*. It also submits a further argument, according to which the ICTY, under Article 9 of its Statute and Rule 9 of its Rules of Procedure and Evidence, enjoys exclusive jurisdiction to adjudicate the lawfulness and fairness of criminal proceedings before the courts of Bosnia and Herzegovina concerning serious violations of international humanitarian law committed since 1991. This argument is in fact an objection to the Second Panel's statement that there is no provision in the Statute or the Rules of Procedure of the ICTY to the effect that the ICTY is competent to investigate and judge alleged violations of the Rules of the Road by the Federation authorities (paragraph 52).

18. The First Panel observes that Article 9 of the ICTY Statute reads:

> "*Concurrent jurisdiction*
> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

Rule 9 of the ICTY Rules of Procedure and Evidence reads:

> "*Prosecutor's Request for Deferral*
> Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
> (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
> (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,
> the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal."

19. The First Panel notes that the two quoted provisions establish the primacy of the ICTY over national courts. This primacy is exercised where the jurisdiction of the ICTY in the prosecution of persons suspected of having committed serious violations of international humanitarian law concurs with that of national courts, among them in a prominent position those of the Federation of Bosnia and Herzegovina. It is within the framework of the legal mechanisms designed to regulate this concurrent jurisdiction and to secure the primacy of the ICTY that the ICTY may, under Rule 9 (ii) of its Rules of Procedure and Evidence, examine whether the proceedings before national courts lacked impartiality or independence. The jurisdiction of the Chamber is of a radically different nature. It does not prosecute persons suspected of having committed serious violations of international humanitarian law (nor anybody else). Its mandate is to receive and examine applications directed against the Parties to the Agreement concerning alleged or apparent violations of human rights protected by the Agreement. Accordingly, the power of the ICTY to examine the impartiality and independence of criminal proceedings before courts in the Federation is of a different nature and serves a completely different purpose than that of the Chamber and can in no way conflict with the Chamber's jurisdiction.

20. Moreover, the First Panel notes that the provisions under letters (b) and (d) of Article VIII(2) require the Chamber to take into account whether "[an] application is substantially the same as a matter which … has already been submitted to another procedure of international investigation or settlement" and whether "the application concerns a matter currently pending before any other international human rights body", i.e. the Chamber must take into account whether there actually is a relevant *lis alibi pendens*, not whether there could theoretically speaking be one. The First Panel notes that it has not been submitted that the ICTY has examined or is examining whether the Federation has violated its obligations under the Rules of the Road in the applicant's case. Nor has it been submitted that the ICTY has been examining the impartiality and independence of the Cantonal Court in Sarajevo in the applicant's trial. Accordingly, even if the Chamber's jurisdiction could in the abstract concur with the jurisdiction of the ICTY, it certainly does not so in the case at hand.

21. Regarding the Federation's submission that under Article 6 of the Convention, as interpreted by the European Commission on Human Rights, proceedings upon a request for re-trial are outside the Chamber's competence *ratione materiae*, the First Panel notes that no such proceedings were examined by the Second Panel in the case at hand. This submission is therefore irrelevant to the applicant's case. Whether the Chamber may order a re-trial of the applicant as a remedy where it has found a violation of Article 6 is a different issue.

22. The First Panel has consequently no doubts that the arguments submitted by the Federation in support of its request to review the finding that the application is admissible are clearly ill-founded, and therefore unable to raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as stipulated in Rule 64(2)(a). The request for review of the decision to declare the application admissible should hence be rejected.

B. The request to review the findings on the merits of the case under Articles 5 and 6 of the Convention

23. The Federation objects on a number of grounds to the findings of violations of Articles 5 and 6 of the Convention (see paragraphs 8-11 above).

24. The First Panel takes the view that these submissions do raise serious questions affecting the interpretation and application of the Agreement with regard to the application of the Rules of the Road in the legal system of the Federation, which in turn raises serious questions of interpretation and application of Articles 5 paragraph 1(c) and 6 of the Convention in so-called "Rules of the Road cases". The request to review the Second Panel's decision on the merits thus meets the requirement in Rule 64(2)(a).

25. In view of the fact that several other cases are currently pending before the Chamber to which this issue is of relevance, the First Panel also considers that "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b). It notes that it is true that the Federation failed to invoke certain of these arguments in support of the lawfulness of the applicant's detention and the fairness of the applicant's trial during the ordinary proceedings before the Second Panel. The Chamber has generally held that Parties are precluded from raising for the first time at the stage of the request for review arguments which they could have submitted during the ordinary proceedings (see cases nos. CH/97/81 et al., *Ostojić and others*, decision on request for review of 15 May 1999, paragraph 23, Decisions January-July 1999). However, the Federation has consistently argued that the applicant's detention was in accordance with the law as he was suspected of crimes for which pre-trial arrest and detention are mandatory. It has also consistently argued during the ordinary proceedings before the Second Panel that a possible violation of the Rules of the Road in the applicant's arrest would not result in an unfairness of the applicant's trial. In these circumstances the First Panel finds that, in this respect of the request for review, "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b). Accordingly, the request for review on this point meeting both conditions set forth in Rule 64(2), the First Panel recommends that it be accepted.

C. The request to review the remedies ordered

26. The First Panel notes that the Federation objects both against the order to grant the applicant a re-trial and to the order to pay the applicant compensation for the time spent in detention in violation of Article 5 of the Convention (see paragraphs 12-14 above).

27. The First Panel considers that the question whether the Chamber has the power to order the respondent Party to afford an applicant a re-trial constitutes a serious question affecting the interpretation and the application of Article XI(1) of the Agreement as required in Rule 64(2)(a). Furthermore, in the circumstances of the present case, the First Panel cannot detect any reason to doubt that, in this respect of the request for review, "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b). Accordingly, the request for review on this point meeting both conditions set forth in Rule 64(2), the First Panel recommends that it be accepted.

28. As to the request for review of the compensation award, the First Panel recalls that the Chamber has previously, on more than one occasion, held that a request for review directed against "the amount and type of compensation awarded [...] as well as the method used when deciding on [the] claim for compensation" does not raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as required in Rule 64(2)(a), even assuming that the concerns expressed were well-founded (see e.g. case no. CH/97/59, *Rizvanović*, decision on requests for review of 13 November 1998, paragraph 17, Decisions and Reports 1998, and case no. CH/98/1374 *Pržulj*, decision on request for review of 5 April 2000,

paragraph 19). However, considering that it has recommended to accept the request for review of the Second Panel's decision on the merits and that a different finding on the merits of the case might require a review of the compensation awarded, the First Panel deems it necessary that also this part of the request for review be accepted.

D. Conclusion

29. For the above reasons, the First Panel,

1. unanimously, recommends that the request for review in respect of the finding that the application is admissible under Articles 5 and 6 of the Convention be rejected;

2. unanimously, recommends that the request for review in respect of the finding that there has been a violation of the applicant's rights under Articles 5 and 6 of the Convention be accepted; and

3. unanimously, recommends that the request for review in respect of the remedies ordered be accepted.

V. OPINION OF THE PLENARY CHAMBER

30. The plenary Chamber recalls that it shall consider the request for review as well as the recommendation of the Panel, and decide whether to accept the request. Under Rule 64(2) it shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision.

31. Having considered the request for review and the recommendation of the First Panel, the plenary Chamber agrees with the First Panel, for the reasons stated above, that the request for review meets the conditions required for the Chamber to accept such a request pursuant to Rule 64(2)(a) and (b) in respect of the finding that there has been a violation of the applicant's rights under Articles 5 and 6 of the Convention and in respect of the remedies ordered by the Second Panel. The plenary Chamber also agrees with the First Panel, for the reasons stated above, that the request for review fails to meet the conditions required for the Chamber to accept such a request pursuant to Rule 64(2)(a) and (b) in all other respects.

VI. CONCLUSIONS

32. For these reasons, the Chamber decides,

1. unanimously, to reject the request for review in respect of the finding that the application is admissible under Articles 5 and 6 of the Convention;

2. by 10 votes to 1, to accept the request for review in respect of the finding that there has been a violation of the applicant's rights under Articles 5 and 6 of the Convention; and

3. unanimously, to accept the request for review in respect of the remedies ordered.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber