



**DECISION ON REVIEW
(Delivered on 9 November 2000)**

Case no. CH/98/1366

V.Č.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 November 2000 with the following members present:

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

Mr. Peter KEMPEES, 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;

Having regard to its decision of 12 May 2000 accepting the respondent Party's request for a review;

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 Rule 65 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS

1. The Chamber refers to the Second Panel's decision of 7 March 2000, which is appended to the present decision (Annex 1).

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

2. On 9 March 2000 the Second Panel's decision was delivered in pursuance of Rule 60. On 6 April 2000 the Federation of Bosnia and Herzegovina submitted a request for review of the decision.

3. In accordance with Rule 64(1) the request was considered by the First Panel which, on 10 May 2000, recommended that the request for review be accepted in respect of the finding that there had been a violation of the applicant's rights under Articles 5 and 6 of the European Convention on Human Rights and in respect of the remedies ordered. On 12 May 2000 the Plenary Chamber gave a decision on the request which was in accordance with the First Panel's recommendation.

4. On 17 May 2000 the respondent Party's request for review and the Plenary Chamber's decision on that request were transmitted to the applicant, together with an invitation to the applicant to submit his observations within one month. No response was received from the applicant.

5. Mr. Juka and Mr. Tadić did not take part in the review.

III. THE REQUEST FOR REVIEW

6. The Chamber refers to the request for review, which is appended to the present decision (Annex 2).

IV. THE OPINION OF THE FIRST PANEL AND THE PLENARY CHAMBER'S DECISION ON THE REQUEST FOR REVIEW

7. The Chamber refers to its decision of 12 May 2000 partly accepting the request for review, which is appended to the present decision (Annex 3).

V. THE CHAMBER'S DECISION ON REVIEW

1. Scope of the case on review

8. In light of its decision of 12 May 2000 the Plenary Chamber will confine its review of the case to items 4, 5, 6, 8, 9, 10 and 11 of the conclusions reached by the Second Panel in its decision on the admissibility and merits of the case as delivered on 9 March 2000.

2. Article 5 paragraph 1 of the Convention

9. The party seeking review argues that the "Rules of the Road" did not become effective and binding when the Rome Agreement ("Agreed Measures") was signed on 18 February 1996, but only after a necessary "period of implementation". This period was needed to communicate the text of the Rome Agreement to the Federation legislature (which was done on 21 October 1996) and, through the Supreme Court of the Federation, to the Federation judiciary (which happened on 4 December 1996).

10. The Plenary Chamber observes that paragraph 5 of the Rome Agreement of 18 February 1996, unlike paragraphs 1, 3, 4 and 7, provides no time schedule for its implementation. It is further noted that the "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February

1996”, which were transmitted to, amongst others, the Ministry of Justice of the Federation of Bosnia and Herzegovina on 10 September 1996, did not define any date for the entry into force of the said paragraph 5 but were intended solely to facilitate its implementation.

11. The Chamber had occasion to find a violation of Article 5 § 1 of the Convention in case no. CH/97/45 (*Hermas*, decision on admissibility and merits of 18 February 1998, Decisions and Reports 1998) on the ground that, *inter alia*, the applicant in that case had been arrested on 27 June 1996 and detained on war crimes charges in violation of the “Rules of the Road”. It is recalled that the Agent of the Federation of Bosnia and Herzegovina, at the Chamber’s public hearing in that case, stated that the “Rules of the Road” were law in the Federation and conceded that they had wrongly been disregarded.

12. In light of the above considerations the Plenary Chamber finds that the “Rules of the Road” were effective and binding for the Federation of Bosnia and Herzegovina at the time the applicant was arrested. Consequently, it rejects the respondent Party’s submission that they could not apply at the time of the events complained of in the present case.

13. The “Rules of the Road” provide not only for the trial and punishment of persons who have committed serious violations of international humanitarian law on the territory of the former SFRY since 1991, but also for a division of competences between ICTY and national authorities in the matter. More specifically, the “Rules of the Road” are provisions of international law which serve no other purpose than the prevention of arbitrary arrest or detention by national authorities and which need therefore to be respected. Consequently, no peremptory norm of international law (*jus cogens*) could have obliged the Federation of Bosnia and Herzegovina to act in clear violation of its obligations under the “Rules of the Road”.

14. It follows that the Plenary Chamber endorses the finding of the Second Panel that the arrest and detention of the applicant from 2 June 1996 to 7 May 1997 constituted a violation of the right of the applicant to liberty and security of person as guaranteed by Article 5 paragraph 1, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement.

3. Article 6 of the Convention

15. In so far as the party seeking review relies on the principle *nullum crimen sine lege*, the Plenary Chamber notes that this principle, which is enshrined in the Convention also (Article 7 paragraph 1), implies that no one can 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. The case now before the Chamber, however, does not by any means concern the problem of legality of any criminal sanction. It should be pointed out that the applicant’s complaint of a violation of this provision was declared inadmissible by the Second Panel as manifestly ill-founded (see paragraph 55 of the original decision) and is outside the scope of the present review (see paragraph 7 above).

16. The party seeking review also relies on the principle *male captus bene detentus*. It prays in aid the case of Adolf Eichmann, who was abducted from Buenos Aires (Argentina) and brought to Israel.

17. The principle *male captus bene detentus* is a principle of extradition law which implies that even if a person has been illegally arrested by the authorities of a state which is seeking to prosecute him, that state is not under an obligation to hand him back to another state where that person formerly enjoyed the protection of the authorities. It cannot apply to the present case, which does not concern extradition.

18. The Second Panel rightly held, in paragraph 77 of the original decision, that the opinion given by the ICTY Prosecutor in application of the “Rules of the Road” was binding on the domestic authorities. It follows logically that in so far as an order or indictment is found by the ICTY Prosecutor to be inconsistent with international legal standards, the charges concerned have to be dropped. The Sarajevo Cantonal Court’s judgment of 19 January 1998 finding the applicant guilty on charges for which according to the ICTY Prosecutor no reasonable grounds existed, which was wrongly upheld by

the Supreme Court of the Federation in its judgment of 16 June 1998, therefore constituted a violation of Article 6.

19. Moreover, the respondent Party's submissions of 6 April 2000 do not contain any information or argument capable of casting doubt on the Second Panel's finding that there were severe restrictions on the applicant's contacts with his lawyer during the entire preliminary investigation phase. These restrictions, in combination with the use made of the applicant's statement to the investigating judge, were sufficient to enable the Second Panel to find that the proceedings against the applicant were not impartial and fair.

20. The Plenary Chamber therefore endorses the finding of the Second Panel that there has been a violation of Article 6 paragraphs 1, 3(b) and 3(c) of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement.

4. Remedies

21. In so far as the respondent Party questions the power of the Chamber to issue consequential orders, and in particular to order that the applicant be given a re-trial should he apply for it, the following is noted.

22. Article XI(1)(b) of the Annex 6 Agreement empowers the Chamber, if it finds a breach by a respondent Party of its violations under that Agreement, to address in its decision the question "what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary compensation (including pecuniary and non-pecuniary injuries), and provisional measures". It therefore confers far wider powers than does former Article 50 (now Article 41) of the European Convention on Human Rights, which, as construed by the European Court of Human Rights (see, among other authorities, the *Saïdi v. France* judgment of 20 September 1993, Series A no. 261-C, paragraph 47), limits the "just satisfaction" that may be ordered by that Court to monetary compensation at most.

23. Ever since its first decision on the merits (6 August 1997, *Matanović*), the Chamber has consistently construed Article XI(1)(b) of the Agreement in such a way as to empower it to order a respondent Party to take specific positive action. Indeed, this is in harmony with the clear wording of that provision, which empowers the Chamber to decide "what steps shall be taken" to remedy a violation and gives a non-restrictive enunciation of possible courses of action. The Chamber has made use of this power on many occasions. In so doing the Chamber has not set itself up as a court of appeal against judgments of the courts of any of the three Parties to the Agreement. Instead, it has, with particular regard to its unique role within the context of the Dayton peace process, acted on its responsibility to ensure that the fullest possible redress is provided for violations of the Agreement in individual cases. The Plenary Chamber sees no reason to reconsider its general approach to this matter in the present case.

24. More specifically, the Plenary Chamber recalls that in case no. CH/98/934 (*Garaplija*, decision on admissibility and merits of 6 July 2000, to be published in Decisions July-December 2000) it ordered the respondent Party "to take all necessary steps to grant the applicant renewed appellate proceedings, should the applicant lodge a petition to this effect". The respondent Party, which is the same as the party seeking review in the present case, rightly considered itself bound by this order and complied with it, extending its benefits to other persons whom it considered – not without justification – to be victims of the same violation as the applicant in that case. The order complained of by the Federation of Bosnia and Herzegovina in the present case is in comparable terms.

25. Even so, the party seeking review rightly draws the Chamber's attention to certain uncertainties of the order in question. The Plenary Chamber considers it appropriate to remove these. It will therefore order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant a re-trial only if the applicant lodges a petition to that effect within a definite time-limit, which shall be three months from the date of delivery of the present decision. It will also order the Federation of Bosnia and Herzegovina in that event to reopen the proceedings in their entirety but to limit the charges on which the applicant may be convicted to those for which the ICTY Prosecutor

found the available *prima facie* evidence to be sufficient under international legal standards to justify criminal proceedings, namely unlawful confinement or imprisonment of civilians.

26. As regards the question of the monetary compensation which the Second Panel ordered the respondent Party to pay to the applicant, the Plenary Chamber observes that it has endorsed the findings of the Second Panel on the merits. That being so the Plenary Chamber sees no need to change the Second Panel's order for financial compensation, which moreover does not appear excessive or unreasonable.

27. It follows that the Plenary Chamber endorses the Second Panel's orders for appropriate remedies.

VI. CONCLUSIONS

28. For these reasons, the Chamber decides,

1. by 11 votes to 1, that the arrest and detention of the applicant from 2 June 1996 to 7 May 1997 constituted a violation of the right of the applicant 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;

2. by 11 votes to 1, 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 in the determination of criminal charges against him as guaranteed by Article 6 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

3. by 11 votes to 1, that the restrictions placed on the applicant's contacts with his lawyer during the preliminary investigation phase constituted a violation of the right of the applicant 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, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. by 9 votes to 3, to order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant a re-trial, should the applicant lodge a petition to this effect no later than 9 February 2001, and in that event to reopen the proceedings in their entirety but to limit the charges on which the applicant may be convicted to unlawful confinement or imprisonment of civilians;

5. by 10 votes to 2, to order the Federation of Bosnia and Herzegovina to pay the applicant, before 9 February 2001, 4,000 (four thousand) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for the unlawful deprivation of his freedom from 2 June 1996 to 7 May 1997;

6. by 10 votes to 2, that simple interest at an annual rate of 4 per cent will be payable on the amount awarded in conclusion number 5 above from 9 February 2001 until the date of final settlement of the amount due to the applicant; and

7. unanimously, to order the Federation of Bosnia and Herzegovina to report to it before 9 March 2001 on the steps taken by it to comply with the above order.

(signed)

(signed)

CH/98/1366 – Decision on review

Peter KEMPEES
Registrar of the Chamber

Michèle PICARD
President of the Chamber

In accordance with Rule 61 of the Chamber's Rules of Procedure, the dissenting opinion of Mr Balić is annexed to this decision.