HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 12 June 1998

of

Borislav HERAK

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

CASE No. CH/97/69

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 11 June 1998 in a panel composed of the following Members:

Michèle PICARD, President of the Panel
Dietrich RAUSCHNING, Vice-President of the Panel
Rona AYBAY,
Želimir JUKA,
Miodrag PAJIĆ,
Andrew GROTRIAN,
Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the admissibility and merits of the application by Borislav HERAK against the Federation of Bosnia and Herzegovina, registered under Case No. CH/97/69;

Adopts the following Decision on the admissibility and merits of the case under Article VIII(2) and Article XI of the Human Rights Agreement (hereinafter "Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter "the General Framework Agreement") and Rules 52(1), 57 and 58 of its Rules of Procedure.

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I. INTRODUCTION

1. The applicant is currently held in prison in Sarajevo under sentence of death passed by a military court in Sarajevo on 12 March 1993. The case concerns the threatened execution of the death penalty against the applicant and raises issues under Article 2 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the "Convention") and Protocol No. 6 to that Convention (hereinafter "Protocol No. 6").

II. PROCEEDINGS BEFORE THE CHAMBER

2. On 22 September 1997, the applicant wrote a letter addressed to the International Criminal Tribunal for the former Yugoslavia in the Hague. At the suggestion of the Federal Ministry of Justice of the Federation of Bosnia and Herzegovina (the "Federation"), the letter was sent to the Chamber on 29 September 1997. An application was submitted to the Chamber by the applicant on 13 October 1997 through the Federal Ministry of Justice and was registered at the Chamber on 31 October 1997 under the above case number.

3. The Chamber considered the application on 4 November 1997. It decided, in accordance with Rule 49(3)(b) of its Rules of Procedure (the "Rules"), to give notice of the application to the Federation. The Federation was invited to submit observations on the admissibility of the application under Article VIII(2) of Annex 6 to the Agreement and on the merits of the application. In submitting any observations the Chamber requested the respondent Party in particular to take into account the Chamber's Decisions in the case of Damjanović (Decision on Admissibility, Damjanović v. Federation of Bosnia and Herzegovina, CH/96/30, delivered on 11 April 1997; Decision on Merits, Damjanović v. Federation of Bosnia and Herzegovina, CH/96/30, delivered on 5 September 1997, hereinafter "the Chamber's Damjanović Decision"). In accordance with Rule 51, a time limit of 8 December 1997 was fixed for the submission by the respondent Party of its observations.

4. In accordance with Article X(1) of the Agreement and Rule 36 of the Chamber's Rules of Procedure, the Chamber ordered the respondent Party to secure that the death penalty on Mr Herak was not carried out pending the Chamber's consideration of the case. This order was communicated to the agent of the respondent Party on 10 November 1997.

5. The case was considered again by the Chamber on 4 April 1998. The Chamber noted that no observations had yet been received by the Chamber from the respondent Party in response to its request. The Chamber decided not to hold a public hearing in the case, in view of the similarity of the case, in both the legal and factual contexts, with the Chamber's Damjanović Decision.

6. By letter dated 14 April 1998 the Chamber requested the applicant to submit any claims he may have for compensation or other relief. A time-limit expiring on 30 April 1998 was set for the receipt of any such claims. A document containing claims for compensation, filed on the applicant's behalf, was received at the Chamber's Registry on 8 June 1998.

7. In accordance with Rule 21(1)(b) of the Chamber's Rules of Procedure Mr Hasan Balić did not participate in the Chamber's examination of the case, having participated in proceedings relating to the case as a member of the Supreme Court of Bosnia and Herzegovina (hereinafter "BiH").

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III. ESTABLISHMENT OF THE FACTS

A. Proceedings Against the applicant

8. The facts of the case as set out in the application and in the documents contained in the Chamber's case-file have not been disputed by the respondent Party and can be summarised as follows.

9. The applicant was born on 18 January 1971 in Sarajevo. On 16 May 1992, he was conscripted into the Bosnian Serb armed forces. He was arrested by the Army of the Republic of BiH on 11 November 1992.

10. On 12 March 1993 the applicant was convicted, by judgment No. K-I-14/93 of the District Military Court (Okružni Vojni Sud) in Sarajevo, of criminal acts contrary to Articles 141, 142 and 144 of the Criminal Law. Article 141 relates to the crime of Genocide and Article 142 relates to war crimes against the civilian population. Article 144 relates to war crimes against prisoners of war (see paragraphs 19-21 below). The applicant and a co-accused, Sretko Damjanović, were both sentenced to death. The decision was taken by a Panel of the court consisting of two professional judges, one of whom was the President of the Panel, and three lay judges. The applicant appealed against this decision on 27 April 1993.

11. On 30 July 1993 the Supreme Court (*Vrhovni Sud*) of BiH, sitting in Sarajevo, in Judgment No. Kž 44/93, made certain alterations to the facts on which the applicant's conviction was based but otherwise upheld the verdict of the District Military Court. The verdict was also confirmed by a different panel of the Supreme Court, sitting at third instance, in judgment No. Kž 191/93 on 29 December 1993. The applicant's conviction, as upheld by the Supreme Court, related to 35 murders of civilians, the murder of 3 prisoners who were members of the Army of BiH and 14 rapes.

12. The applicant alleges that he was subject to severe ill-treatment whilst he was in police custody, including being cut in the hand with a knife, having a number of his ribs broken, having a tooth knocked out and being forced to perform sexual acts in front of others. He states that his detention lasted eight days, as opposed to the legal maximum of three days for which a person can be held without a judicial review of their detention.

13. The applicant was transferred to the Military Investigation prison called "*Viktor Bubanj*" on 20 November 1992. He was interrogated there on a daily basis from 25 November 1992 until 26 December 1992. The applicant alleges that he was forced to read to the foreign media statements that had been given to him by a Judge of the Military Court.

14. The applicant's trial took place on 7 February 1993 and according to the applicant lasted 30 minutes. The applicant states that he was unable to communicate with his advocate.

15. The applicant states that there was prejudicial media coverage of the case before the trial and that his lawyer was given inadequate opportunity to see the applicant before the trial. He also states that at the time of the trial Sarajevo was under siege and all possible witnesses were outside the territory under Government control. The applicant's lawyer was thus limited to trying to put the prosecution evidence in doubt.

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16. On 25 May 1994, the applicant's father submitted a request for a pardon to the Presidency of BiH. The applicant's father states that no decision has been made on this request to date.

B. Relevant Provisions of National Law

(i) Criminal Law

17. The applicant was sentenced to death on the basis of provisions in the Criminal Law of the former Socialist Federative Republic of Yugoslavia (SL SFRY Nos. 44/76, 34/84, 74/87, 57/89 and 3/90), which were adopted as the law of the Republic of BiH (SL RBiH, No. 2/92).

18. Article 37 of the Criminal Law makes provision for the death penalty. It provides that it can only be imposed for the most serious cases of severe crimes for which it is provided by law. It cannot be imposed on a person who was under eighteen years of age at the time of the offence in question and, if the accused was under twenty-one years of age at that time it can only be imposed for crimes against humanity and international law. The death penalty is carried out by firing squad in private.

19. Article 141 of the Criminal Law relates to the crime of genocide. There is no provision in Article 141 restricting its applicability to time of war. The full terms of Article 141 are as follows:

> "Anyone who with intent to destroy, in whole or in part, a national, ethnic, racial or religious group orders the killing of, or the causing of serious bodily injury to, or serious impairment of the physical or psychological health of members of the group, or the forced expatriation of the population or the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, or the imposition of measures intended to prevent births within the group, or the forcible transfer of children of the group to another group, or anyone who, with the same intention, commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

20. Article 142 of the Criminal Law concerns war crimes against the civilian population. It reads 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, or conversion to another religion, forced prostitution or rape, acts of intimidation or terror, the taking of hostages, orders of 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 services or administration, the performance of forced labour, subjection of the population to starvation, orders for the confiscation of property, the looting of property of the population, the excessive confiscation of property without military necessity, unlawful and deliberate devastation, the taking of unlawful, substantial and disproportionate contributions and requisitions, the inflation of the domestic currency, the unlawful issue of currency, or who commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

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21. Article 144 of the Criminal Law concerns war crimes against prisoners of war. It reads as follows:

> "Anyone who, in violation of the rules of international law, has ordered that prisoners of war be subjected to killing, torture, inhuman actions, biological experiments, major suffering, violations of their bodily integrity or health; forcibly joining the enemy armed forces, or deprives them of the right to a fair and just trial, or anyone who commits one of the above crimes, shall be punished by at least five years of imprisonment or by the death penalty."

(ii) Military Courts

22. District Military Courts were established by the Law on District Military Courts which came into force in August 1992 (SL RBiH No. 12/92), and which has been amended on a number of occasions since. This law provided for the establishment of District Military Courts during the state of war (Article 1). Such courts were to be impartial in exercising their functions and were to adjudicate on the basis of the Constitution and the law (Article 2). They were courts of first instance for their districts (Article 5). They had jurisdiction to adjudicate on criminal acts committed by prisoners of war and also on crimes against humanity and international law (Article 11), and also to decide on criminal cases concerning persons participating in the armed conflict for whom the jurisdiction of a court was provided pursuant to the Geneva Conventions on the Protection of the Victims of War and the Protocols thereto (Article 12).

23. Decisions of District Military Courts were taken in Panels composed of professional judges and lay judges. In cases concerning offences for which imprisonment for fifteen years or a more serious penalty could be awarded the Courts were composed of a panel comprising two professional judges, one of whom presided, and three lay judges (Article 16). Professional and lay judges were appointed, and subject to dismissal by, the Presidency of the Republic of BiH on the proposal of the Minister of Defence. If, because of the state of fighting, the Presidency was not in a position to take the decision on appointment or dismissal, the decision could be taken by the Presidency of a region on the proposal of the official in charge of the Regional Secretariat for Defence (Article 20).

24. The District Military Courts ceased to function on 15 July 1996, by virtue of Article 66(f) of the Law on the Supreme Court of the Federation (SN FBiH Nos. 2/95, 4/95 and 9/96).

(iii) The Law on Pardon

25. The Law on Pardon of the Former Socialist Republic of BiH (SL SRBiH, No. 17/77), which was amended by a Decree with Force of Law of the Republic of BiH (SL RBiH 6/92) regulates the conditions under which a pardon may be granted to a person convicted of a criminal offence.

26. Article 4 of the Law on Pardon (as amended) states:

> "A pardon involves the following:
>
> > 1. It releases the offender from prosecution, from the entire punishment or a portion of it, commutes the punishment to a less severe one or to a suspended sentence, or orders the conviction set aside;

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2. (…)

3. It absolves the offender from certain legal consequences of the crime or shortens their duration."

27. Article 6 states:

"The (possibility of) setting aside a conviction by a pardon is limited neither by the duration of the punishment nor by the type of the offence for which the punishment was pronounced…. "

28. Article 7 states:

"Proceedings on pardon will be instituted either upon a request of the convicted person or ex officio.

(…)

If a punishment involves the death penalty and no request for pardon has been submitted, the proceedings will be instituted ex officio."

29. Article 8 states:

"Proceedings on pardon ex officio will be instituted by the Minister of Justice and Administration…"

30. Article 14 of the Decree with Legal Force of the Republic of RBiH (SL RBiH 6/92) states as follows:

"The Presidency of RBiH will also grant a pardon if it concerns a criminal offence for which a sentence was pronounced by application of the former federal laws before the entry into force of this law."

31. The Federation has subsequently enacted a new Law on Pardon (SN FBiH 9/96) which has been applied within the territory of the Federation since its entry into force on 9 July 1996 . The applicant's request for a pardon was made under the previous legal provisions referred to above.

(iv) Draft Criminal Law of the Federation of BiH

32. By letter dated 6 April 1998 concerning the Damjanović case, Federal Minister of Justice Mato Tadić informed the Chamber that the Ministry of Justice is in the process of drafting the Criminal Law of the Federation of BiH and that the draft law includes a provision on the death penalty. Article 379(1) of the draft law provides that any death penalty validly pronounced before the entry into force of the law will be commuted to a prison term. This provision was adopted by the House of Representatives of the Federation on 3 June 1998 but has not yet been adopted by the House of Peoples of the Federation.

IV. FINAL SUBMISSIONS OF THE PARTIES

A. The applicant

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33. The applicant alleges that the execution of the death sentence against him would violate his right to life as guaranteed by Article 2 of the Convention.

B. The Respondent Party

34. The Federation, the respondent Party, has not made any submissions regarding the application.

V. OPINION OF THE CHAMBER

A. Admissibility

35. Before considering the application on its merits the Chamber must decide whether to accept the application taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

36. The Chamber first notes that the respondent Party has not suggested that any "effective remedy" is available to the applicant for the purposes of Article VIII(2)(a) of the Agreement. Based on the information available to it the Chamber finds that it has not been established that any such remedy exists and that therefore there is no ground for rejecting the application under Article VIII(2)(a) of the Agreement.

37. Secondly, the Chamber notes that the complaints made relate in part to the alleged maltreatment of the applicant in the proceedings which led to his conviction in 1993 and to the fact of that conviction. They thus relate to events which are alleged to have occurred before 14 December 1995, when the Agreement came into force. In accordance with generally accepted principles of law the Agreement cannot be applied retroactively (see the Decision on Admissibility of the Chamber in Matanović v. Republika Srpska, CH/96/1, delivered on 13 September 1996). In its Decision on the Admissibility in the Damjanović case, the Chamber held that it must, consequently, confine its examination of the case to considering whether the human rights of the applicant have been violated or threatened with violation since that date (Decision on Admissibility, Damjanović, sup. cit., paragraph 13). Insofar as the applicant complains that he is threatened with the execution of the death penalty against him after 14 December 1995 his complaints are within the competence of the Chamber *ratione temporis* and are not incompatible with Article VIII(2)(c) of the Agreement. The complaints which relate to the proceedings which resulted in his conviction and sentencing in 1993 may also be relevant to the question of whether the execution of the death sentence would now be compatible with the Agreement. The Chamber does not, therefore, consider that the allegations regarding those proceedings should be excluded from consideration at this stage.

38. The Chamber finds no grounds to consider declaring the application inadmissible under Article VIII(2) of the Agreement. It concludes therefore that the application should be accepted as admissible and examined on its merits insofar as it relates to violations of the applicant's human rights which are alleged to have occurred or are threatened to occur since the Agreement came into force on 14 December 1995.

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39. In terms of Article XI(1)(a) of the Agreement the Chamber must, in the present decision, address the question whether the facts found indicate a breach by the respondent Party of its obligations under the Agreement.

B. Merits

40. Article I of the Agreement provides that:

> "the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex".

41. Under Article II of the Agreement the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the other international agreements listed in the Appendix to the Agreement.

42. The Chamber has considered the present case under Article 2 of the Convention,and also under Protocol No. 6 to the Convention.

43. Article 2(1) of the Convention provides as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Protocol No. 6 to the Convention provides, *inter alia*, as follows:

> "Article 1
> The death penalty shall be abolished. No one shall be condemned to such penalty or executed.
>
> Article 2
> A State may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."

44. In the absence of any submissions on the merits by the respondent Party, the Chamber considers it appropriate to follow the same approach as in its Damjanović Decision, to which the present case is essentially similar (see paragraph 3 above).

(i) As to whether the Law on Pardon provides a safeguard against execution of the death penalty

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45. Proceedings for a pardon were instituted by the applicant's father under the Law on Pardon on 25 May 1994 (see paragraphs 25-31 above). However, the mere initiation of proceedings for a pardon gives no indication as to the likely outcome of those proceedings. The law on pardon does not contain any criteria for the granting of a pardon and does not give any indication as to the likely circumstances in which a pardon may be granted. That being so the Chamber finds that the refusal of a pardon remains possible at any time and the possibility of the death penalty being carried out, however unlikely it may now appear, against the applicant has not been removed permanently. The law on pardon cannot, therefore, be said to have removed the risk to the applicant of being put to death.

(ii) Protocol No. 6 to the Convention

46. The Chamber first notes that Article 1 of Protocol No. 6 to the Convention abolishes the death penalty and prohibits both the imposition of such penalty ("condemned to such penalty") and the execution of any such penalty which has already been imposed ("or executed"). These prohibitions are absolute subject only to the exception provided for in Article 2 of the Protocol. They came into immediate effect on 14 December 1995 when the General Framework Agreement entered into force. The execution of the death penalty imposed on the applicant would therefore violate Article 1 of the Protocol unless the exception in Article 2 was applicable.

47. Following the same approach as it did in its Damjanović Decision (sup. cit.), the Chamber will construe this provision strictly and scrutinise carefully the whole circumstances surrounding the threatened execution of the applicant, including the relevant laws, in order to determine whether or not the execution would be compatible with Protocol No. 6.

48. Article 2 of Protocol No. 6 contains a number of requirements which must be satisfied before any death penalty can be either imposed or carried out. In the first place the State concerned must have made "provision in its law for the death penalty". Secondly such legal provision must be "in respect of acts committed in time of war or of imminent threat of war". Thirdly the death penalty is to be "applied only in the instances laid down in the law and in accordance with its provisions". Since BiH is not a State Party to the Convention on the international level the additional procedural requirement in the last sentence of the Article, providing for notification of relevant law to the Secretary General of the Council of Europe is, of course, inapplicable.

49. Bearing in mind the principles which it derived from the case-law of the European Court of Human Rights in the Chamber's Damjanović Decision (sup. cit., paragraphs 30-31), the Chamber considers that before Article 2 of Protocol No. 6 can apply there must be specific provision in domestic law authorising the use of the death penalty in respect of defined acts committed in time of war or of imminent threat of war. The law must define with adequate precision the acts in respect of which the death penalty may be applied, the circumstances in which it may be applied, and the concepts of "time of war or of imminent threat of war". Article 2 requires that before it can apply, the legislature should have considered and defined the circumstances in which, exceptionally in the context of a legal system where the death penalty has been abolished, such penalty may nevertheless be applied in respect of acts committed in time of war or imminent threat thereof.

50. In the present case the applicant was convicted and sentenced to death on the basis of Articles 141, 142 and 144 of the Criminal Law (see paragraphs 19-21 above). Article 141, which relates to the crime of genocide, is not restricted in its applicability to acts committed in time of war or imminent threat of war. In the Chamber's view it is not therefore a valid basis for the application of Article 2 of the Protocol and in so far as the applicant's

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sentence is based on it there is therefore a violation of his rights under Article 1 of Protocol No. 6. The same applies to Article 144, which would appear capable of application after the cessation of hostilities. As to Article 142 the Chamber notes that it applies to acts committed in time of "war, armed conflict or occupation". Prima facie this phrase appears to be capable of covering situations which would not fall within the concept of "time of war or of imminent threat of war" referred to in Article 2 of the Protocol.

51. The Chamber notes furthermore that Article 142 covers a large variety of criminal acts which may be of widely varying gravity. Under Article 37 of the Criminal Law the death penalty may only be imposed for the most serious cases of severe crimes. Reading these two provisions together the Chamber finds that it is difficult to predict which of the acts referred to in Article 142 might be subject to the death penalty and which might not. In the Chamber's opinion therefore Article 142 lacks the necessary precision both in defining the circumstances in which the death penalty applies and the acts to which it applies and cannot therefore form a valid basis for the application of Article 2 of Protocol No.6 either. In so far as the applicant is threatened with execution on the basis of his conviction under Article 142 there is therefore also a violation of his rights under Article 1 of the Protocol.

52. In considering whether the threatened execution of the death penalty against the applicant would be provided for in national law and in accordance with its provisions for the purposes of Article 2 of Protocol No. 6 to the Convention, the Chamber must, as it did in its Damjanović Decision (sup. cit., paragraphs 34-37) take into account relevant provisions of the Constitution set out in Annex 4 to the General Framework Agreement. In this respect it notes that under Article 2 of Annex II to the Constitution, dealing with transitional arrangements, it is provided that laws in effect at the date of entry into force of the Constitution "shall remain in effect to the extent not inconsistent with the Constitution". The application of the death penalty could therefore only be considered to be provided by national law in the form of Articles 141, 142 or 144 of the Criminal Law in so far as the provisions of those Articles were themselves "not inconsistent with the Constitution".

53. Under Article II(1) of the Constitution, BiH and the two Entities are obliged "to ensure the highest level of internationally recognised human rights and fundamental freedoms." Article II(2) provides that the rights and freedoms set forth in the Convention are to apply directly in BiH and have priority over all other law and Article II(3) and (6) provide for these rights to be enjoyed by all persons within the territory of BiH and to be implemented by the authorities. Article II(4) also provides that the enjoyment of the rights and freedoms referred to in Article II "or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground ....".

54. One of the agreements listed in Annex I to the Constitution is the Second Optional Protocol to the International Covenant on Civil and Political Rights. Article 1 of this Protocol provides for the abolition of the death penalty and stipulates that no one within the jurisdiction of a state party to the Protocol shall be executed. Article 2 provides that no reservation to the Protocol is admissible except for a reservation "that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." The Chamber notes that under this provision the "application" of the death penalty is permissible only in time of war. The word "application" covers both the imposition and execution of the death penalty in the Chamber's view. The effect of the Second Optional Protocol is therefore to impose an absolute prohibition, without the possibility of any reservation or exception, on the imposition or execution of the death penalty in time of peace. Since no state of war now exists in Bosnia and Herzegovina, the execution of the death penalty on the applicant would therefore not now be compatible with the Second Optional Protocol.

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55. The question which next arises is therefore whether a law authorising the execution of the death penalty in peacetime can be considered consistent with the Constitution given that it would not be in conformity with the Second Optional Protocol.

56. The provisions of the Constitution referred to above (paragraphs 52-55) do not expressly provide for any of the human rights agreements referred to, apart from the Convention and its Protocols, to be directly applicable in BiH. It is provided in Article II(4), which is headed "Non-Discrimination", that the rights and freedoms provided for in the other human rights agreements "shall be secured to all persons ... without discrimination". In the Chamber's view this provision includes both an obligation to secure the rights in question to all persons and an obligation to do so without discrimination. It is one aspect of the general obligation under Article II(1) of the Constitution "to secure the highest level of internationally recognised human rights ...". This interpretation is confirmed by Article I of the Agreement (see paragraph 35 above), where the general obligation referred to is stated as including the obligation to secure the rights and freedoms guaranteed by all the agreements listed. Where one of the human rights agreements referred to imposes a clear, precise and absolute prohibition on a particular course of action, the only way in which the obligation to secure the right in question to all persons without discrimination can be carried out is by giving effect to the prohibition. Laws which run counter to such a prohibition cannot therefore be considered consistent with the Constitution and cannot therefore be regarded as a proper basis in domestic law for any action which is required under the Convention to be lawful in domestic law.

57. The Chamber therefore considers that Articles 141, 142 and 144 of the Criminal Law, in so far as they authorise the use of the death penalty in peacetime, are not consistent with the Constitution and that the threatened execution of the death penalty against the applicant would not therefore be provided for by national law for the purposes of Article 2 of Protocol No. 6 to the Convention. It would therefore breach Article 2 of Protocol No. 6 for this reason also.

(iii) Article 2(1) of the Convention

58. Independently of its finding that the execution of the death penalty would be incompatible with Article 2 of Protocol No. 6, the Chamber will also consider whether the execution of the applicant would be in conformity with Article 2 of the Convention itself. This prohibits use of the death penalty "save in the execution of the sentence of a court ...".

59. As the Chamber held in its Damjanović Decision (sup. cit.), a death sentence cannot be carried out under Article 2(1) of the Convention unless it was imposed by a "court" which was independent of the executive and the parties to the case and which offered procedural guarantees appropriate to the circumstances. In relation to the latter requirement the guarantees required in a case involving the imposition of the death penalty must be of the highest order. The Chamber further points out that no derogation from this particular requirement of Article 2 is permissible in time of war under Article 15 of the Convention. If circumstances prevailing in time of war make it impossible to provide an appropriate procedure the death penalty cannot therefore be imposed or carried out.

60. In its Damjanović Decision (sup. cit.), the Chamber, applying principles derived from the case-law of the European Court of Human Rights, noted that Article 20 of the Law on District Military Courts, as in force at the time of the proceedings against the applicant in 1993, provided that both professional and lay members of the District Military Courts were normally appointed and dismissed by the Presidency of the Republic of BiH on the proposal

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of the Minister of Defence. No minimum period of office was laid down and no grounds or procedure for dismissal were specified. There was thus no legal protection of the judges' tenure of office. Although such legal protection might not always be necessary, the Chamber considered that in the context of a case such as the present one, where a strict approach to the requirements of independence and impartiality must be taken, legal protection against removal of the judges must normally be considered an essential requirement of independence. At the very least, the clearest evidence that the irremovability and independence of the judges was recognised in practice would be required. The Chamber did not find such evidence before it in its Damjanović Decision and does not find any in the present case either.

61. As in its Damjanović Decision, Chamber notes furthermore that the District Military Court was operating in a situation of conflict where outside pressure on its members was likely. In such a situation the fact that members of the Court were, as a matter of law, subject to dismissal on the proposal of the Defence Ministry, could give rise to legitimate doubts as to whether they met the high standard of independence required in a case where life was at stake. In the circumstances the Chamber concludes that the District Military Court lacked a sufficient appearance of independence and cannot therefore be regarded as a "court" for the purposes of Article 2(1) of the Convention.

62. Again as in its Damjanović Decision, the Chamber notes that the applicant's case was heard on appeal at the second and third instance before different panels of the Supreme Court of Bosnia and Herzegovina. No material has been placed before the Chamber which could lead it to conclude that this body should not be regarded as a "court" for the purposes of Article 2(1) of the Convention. The Chamber notes that the Supreme Court did not find it necessary to investigate the facts or hear witnesses. However in criminal proceedings of the classical kind it is essential that the "court" before which the trial at first instance is held should meet the requirements of independence and impartiality arising under the Convention (the Chamber's Damjanović Decision, sup. cit., paragraphs 38-42). The fact that the applicant's case was heard on appeal by a court does not therefore suffice to remedy the defect arising in relation to the structure and composition of the Military Court which tried the case at first instance. The source of the defect being the very composition of the criminal court, the defect involved matters of internal organisation and could be cured only by the quashing of the first instance judgment.

63. Having reached the conclusion that the District Military Court was not a court for the purposes of Article 2 of the Convention for the above-mentioned reasons, the Chamber finds it unnecessary to investigate the question whether it afforded sufficient procedural guarantees. It observes, however, that the submissions of the applicant give rise to grave doubts on that matter.

64. The Chamber thus concludes that the execution of the death penalty on the applicant would not be covered by Article 2 of Protocol No. 6 to the Convention and that it would therefore breach his rights under Article 1 of that Protocol and Article 2 of the Convention itself.

VI. REMEDIES

65. Under Article XI(1)(b) of the Agreement the Chamber must address the question what steps shall be taken by the respondent Party to remedy the breach of the Agreement which it has found, "including orders to cease and desist, monetary relief … and provisional measures".

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A. ORDERS

66. In the present case the Chamber considers it appropriate to order the respondent Party not to carry out the death sentence on the applicant, to lift the death sentence and to report to it within one month of the delivery of this decision on the steps taken by it to give effect to these orders.

B. COMPENSATION

67. The Chamber notes that the applicant submitted a claim for compensation to the Chamber on 8 June 1998, after the time-limit set by the Chamber set for the recipt of such claims had expired (see paragraph 6 above). The time available to the applicant would seem to have been adequate, and an extension of the time-limit was never requested. In view of this, the Chamber rejects the claim for compensation as out of time.

VII. CONCLUSIONS

68. For the reasons given above the Chamber unanimously:

1. **Decides** that the execution of the death penalty on the applicant would involve a violation by the respondent Party of its obligations under Article 1 of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the respondent Party would thereby breach its obligations under Article 1 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

2. **Decides** that the execution of the death penalty on the applicant would involve a breach by the respondent Party of its obligations under Article 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the respondent Party would thereby breach its obligations under Article 1 of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

3. **Orders** the respondent Party (a) not to carry out the death sentence on the applicant and (b) to secure that the death sentence against him is lifted without delay and **further orders** the respondent Party to report to it before 12 July 1998 on the steps taken by it to give effect to these orders and

4. **Rejects** the claim for monetary relief as out of time.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate concurring opinion by Mr. Rona AYBAY.

CONCURRING OPINION OF MR. RONA AYBAY

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While I concur with the conclusion reached by the majority of the Panel my interpretation of Article 2 of Protocol No. 6 to the Convention differs.

I am of the opinion that Protocol No. 6 established a subjective and justiciable right not to be executed in time of peace. Therefore, in my opinion, States party to Protocol No. 6 are under the obligation not to execute any death sentence after the termination of "*time of war or imminent threat of war*" even in cases where the death sentences had already been pronounced before the termination of "*time of war or imminent threat of war*".

For the reasoning on which the above interpretation is based see the concurring opinion signed by Viktor Masenko-Mavi and myself appended to the Chamber's *Damjanović* decision (Case No. CH/96/30, Damjanović v. The Federation of Bosnia and Herzegovina, Decision on Merits of 5 September 1997).

(signed)
Rona AYBAY

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