DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 12 JUNE 1998

in

CASE No. CH/97/59

Nail RIZVANOVIĆ

against

the Federation of Bosnia and Herzegovina

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

Michèle PICARD, President
Dietrich RAUSCHNING, Vice-President
Hasan BALIĆ
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 Nail RIZVANOVIĆ against the Federation of Bosnia and Herzegovina, registered under Case No. CH/97/59;

Adopted 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 and Rules 52 (1), 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. The applicant was sentenced to death by the District Military Court of Zenica on 4 August 1993 for crimes he committed as a member of the Army of Bosnia and Herzegovina on 17 June 1993. The applicant is currently in prison in Zenica. The case concerns the threatened execution of the death penalty against the applicant and raises issues under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention") and Protocol No. 6 to the Convention (hereinafter "Protocol No. 6").

II. PROCEEDINGS BEFORE THE CHAMBER

2. Mustafa Rizvanović wrote to the Chamber on 9 August 1997 seeking assistance in having the death sentence against his son Nail Rizvanović commuted to imprisonment. The case was registered by the Chamber on 1 September 1997. On the same day the Chamber considered the case and decided, as a provisional measure, to order the respondent Party to secure that the death sentence against Nail Rizvanović was not carried out pending the Chamber's consideration of the case. This order was communicated to the agent of the respondent Party on 2 September 1997.

3. Mustafa Rizvanović subsequently submitted a letter of authority signed by Nail Rizvanović dated 4 September 1997 authorising him to act on his son's behalf in the proceedings before the Chamber. In view of the letter of authority the Chamber decided to treat the application as one by Nail Rivanović as applicant rather than one by his father.

4. On 10 October 1997 the Chamber again considered the case and decided to invite the respondent Party to submit written observations on both the admissibility and merits of the application, with the request that the respondent Party take into particular account the Chamber's *Damjanović* decisions (Case No. CH/96/30, Damjanović v. Federation of Bosnia and Herzegovina, Decision on Admissibility of 11 April 1997; Case No. CH/96/30, Damjanović v. Federation of Bosnia and Herzegovina, Decision on Merits of 5 September 1997). This request was sent to the respondent Party on 10 November 1997 with a time limit of 3 December 1997. No observations however were received from the agent of the respondent Party.

5. By letter dated 27 January 1998 the Federation Minister of Justice Mato Tadić (hereinafter "Minister") submitted a copy of a letter dated 22 January 1998 from the applicant to the President of the Cantonal Court in Zenica requesting that his death sentence be lifted. The Minister also requested that the Chamber issue a decision on the present case taking into account both the applicant's letter of 22 January 1998 and the Chamber's *Damjanović* decisions, and to deliver it to the Minister who in turn would refer the decision to the Cantonal Court in Zenica.

6. Upon the instructions of the President of the Chamber, the Registrar sent a letter to the Minister dated 10 February 1998 with the following points:

(1) that the provisional order remained in force;

(2) that the absence of a decision in the present case until that date did not prevent the authorities from lifting the death sentence imposed on the applicant at any time;

(3) that an amicable resolution of the matter remained possible at any time; and

(4) that the agent of the Federation had failed to respond to the Chamber's request dated 10 November 1997 for written observations on the admissibility and merits of the case.

7. 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* decisions.

8. By letter dated 14 April 1998 the Chamber requested the applicant to submit any claims he may have for compensation or other relief. By letter dated 30 April 1998 the applicant submitted a compensation claim. This was transmitted to the respondent Party on 5 May 1998 for observations. Attached to the claim for compensation was a letter of authority dated 27 April 1998 authorising Enver Skopljak, a lawyer practising in Zenica, to represent the applicant.

9. By letter dated 25 May 1998 the respondent Party submitted observations on the applicant's compensation claim which also included observations on the admissibility and merits of the application.

III. ESTABLISHMENT OF THE FACTS

A. Proceedings against the Applicant

10. 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:

11. The applicant was born in Vrselje (municipality Zenica) on 14 December 1966. During the war he was a member of the 7th Muslim Brigade of the Army of Bosnia and Herzegovina. On 17 June 1993 he was arrested and has been held in prison in Zenica since that date.

12. On 4 August 1993 the District Military Court (*Okružni Vojni Sud*) in Zenica, in Decision No. IK 212/93, convicted the applicant of aggravated robbery under Article 151 (1) of the Criminal Law of the Republic of Bosnia and Herzegovina (hereinafter "Criminal Law of the RBiH"), two counts of murder under Article 36 (2) (6) of the Criminal Law of RBiH, rape under Article 88 (2) of the Criminal Law of RBiH and attempted rape under Article 88 of the Criminal Law of RBiH in conjunction with Article 19 adopted from the Criminal Law of the former Socialist Federative Republic of Yugoslavia (hereinafter "Criminal Law of the SFRY"). The Court sentenced the applicant to five years of imprisonment for aggravated robbery, the death penalty for the murders, seven years of imprisonment for rape, and three years of imprisonment for attempted rape. The Court then sentenced the applicant to death for all four acts under Article 48 adopted from the Criminal Law of the SFRY. The decision was taken by a Panel of the Court consisting of two professional judges, one of whom was also the President of the Panel, and three lay judges. The acts to which the applicant's conviction related included the murders of a mother and father in the village of Rebrovac (Zenica municipality) and the rape and attempted rape of their two teenage daughters respectively on 17 June 1993. The applicant did not deny the charges against him.

13. The applicant subsequently appealed to the Supreme Court (*Vrhovni Sud*) of Bosnia and Herzegovina against the death penalty imposed by the District Military Court. On 20 January 1994 a panel of the Supreme Court sitting in Zenica, in Decision No. Kž 121/93, denied the applicant's appeal as ill-founded and upheld the decision of the District Military Court. In the same decision the Court changed the legal basis for the applicant's charge from Article 151 (aggravated robbery) to Article 150 (robbery) of the Criminal Law of the RBiH and changed the sentence for that charge from five years of imprisonment to three years.

14. The applicant subsequently appealed against the Supreme Court's decision. On 1 September 1994 the Supreme Court, in Decision No. Kž 230/94, denied the appeal.

15. On 21 October 1994 the applicant submitted a request to the District Military Court that the death penalty be commuted to life imprisonment.

16. On 3 June 1996 a panel of the Supreme Court of Bosnia and Herzegovina, sitting in Sarajevo, reviewed the applicant's appeal against the 20 January 1994 decision of the Supreme Court in accordance with Law on Amendments to the Law on Application of the Law on Criminal Procedure (Službeni list of RBiH, No. 33/95). The Court, in Decision No. Kž 232/95, invalidated the 1 September 1994 decision of the Supreme Court and confirmed the 20 January 1994 decision of the

Supreme Court sitting in Zenica. The Court stated that the seriousness of the crimes committed by the applicant justified the imposition of the death penalty and denied the applicant's appeal as ill-founded.

17. On 24 July 1996 the applicant submitted a letter to the District Military Court requesting that his death sentence be commuted to life imprisonment (request for pardon). By letter dated 16 January 1997 the Federal Ministry of Justice informed the applicant that his request had been rejected by decision of the Presidency of the Federation of Bosnia and Herzegovina.

18. On 7 February 1997 the applicant submitted a request for a pardon to the Presidency of the Federation that the death penalty against him be lifted in accordance with the Law on Pardon. No response has been made to this request.

19. On 22 January 1998 the applicant submitted a letter to the Cantonal Court of Zenica requesting that the death penalty against him be lifted. In response the Federation Minister of Justice requested the Chamber, by letter dated 27 January 1998, that it take a decision in the present case (see para. 4 above).

20. On 4 March 1998 the applicant submitted a "Request for the Extraordinary Mitigation of a Sentence" dated 27 February 1998 to the Supreme Court of the Federation of BiH through the Cantonal Court of Zenica. The request was based on changes in circumstances since the applicant was sentenced, namely, 1) the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina by which the respondent Party became bound to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2) the Chamber's decision in *Damjanović* and 3) the adoption of the Constitution of Bosnia and Herzegovina by which the respondent Party became bound to international agreements prohibiting the death penalty.

21. On 22 May 1998 the Supreme Court of the Federation of BiH issued a decision refusing the applicant's Request for the Extraordinary Mitigation of a Sentence. The Supreme Court found that the applicant's request was ill-founded because the issues raised were legal questions rather than new facts or changes in circumstances. It thus found that no new circumstances or facts arose since the District Military Court sentenced the applicant to death which would have led the lower court to impose a lesser sentence.

B. Relevant Provisions of National Law

(I) Criminal Law

22. The applicant was sentenced to death on the basis of provisions in the Criminal Law of the Republic of Bosnia and Herzegovina (Službeni list of RBiH, No. 2/92) as well as the Criminal Law of the former Socialist Federative Republic of Yugoslavia (Službeni list of SFRY, Nos. 44/76, 34/84, 74/87, 57/89 and 3/90).

23. Article 150 of the Criminal Law of the RBiH concerns robbery. It provides as follows:

> "Anyone who, by using force or threats against the life or body of a person, deprives that person of personal movable property, with a view to obtaining benefit for himself or another person, shall be punished by a term of imprisonment of at least three years."

24. Article 36 (2) (6) of the Criminal Law of the RBiH concerns murder. It provides as follows:

> "A term of imprisonment of at least ten years or the death penalty shall be imposed on any person who, with premeditation, commits two or more murders, except for those provided in Articles 37 and 39 of this law."

Article 37 concerns murder committed in an extreme state of anger and Article 39 concerns the murder of a child at or shortly after birth.

25. Article 88 of the Criminal Law of the RBiH concerns rape. It provides as follows:

> "(1) Anyone who compels a female, to whom he is not married, to have sexual intercourse with him by using force or threats against the life or body of that person or of another person who is close to her, shall be punished by a term of imprisonment of one to ten years.
>
> (2) If as a consequence of an act referred to in paragraph 1 of this Article serious bodily injury, serious damage to health or death results, or if such an act was committed by two or more persons, or in a particularly ruthless or humiliating manner, or against a juvenile female who is less than fourteen years of age, the offender shall be punished by a term of imprisonment of at least three years."

26. Article 19 of the Criminal Law of the SFRY concerns attempted criminal acts. It provides as follows:

> "(1) Anyone who, with premeditation, proceeds with the commission of a crime, but does not complete it, shall be punished for an attempted crime for which the law provides a term of imprisonment of five years or a more severe penalty, and for other attempted crimes only when the law explicitly prescribes a punishment for attempt.
>
> (2) The offender shall be punished within the limits of the penalty provided for the relevant crime, and he may also be punished less severely."

27. Article 48 of the Criminal Law of the SFRY concerns multiple criminal acts. It provides as follows:

> "(1) If the offender committed several crimes by one or several acts, for which he is judged at the same time, the court shall first decide on the punishment for each of those crimes, and then pronounce one unified sentence for all such crimes together.
>
> (2) The unified sentence shall be pronounced under the following rules:
>
> 1) If the court decides on the death penalty for one of the crimes committed, it shall pronounce only that penalty."

(ii) Military Courts

28. District Military Courts were established by the Law on District Military Courts which entered into force in August 1992 (Službeni list of RBiH, No. 12/92), and which has subsequently been amended on a number of occasions. 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 criminal acts committed by prisoners of war and 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).

29. Decisions of District Military Courts were taken in panels composed of professional judges and lay judges. In cases concerning acts for which imprisonment of 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 elected, and subject to dismissal, by the Presidency of the Republic of Bosnia and Herzegovina on the proposal of the Minister of Defence. If, due to hostilities, the Presidency was not in a position to take the decision on election 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).

30. 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 of Bosnia and Herzegovina (Službeni list of FBiH, Nos. 2/95, 4/95 and 9/96).

(iii) The Law on Pardon

31. The Law on Pardon of the Federation of Bosnia and Herzegovina (Službeni novine of FBiH, No. 9/96) regulates the conditions under which a pardon may be granted to a person convicted of a crime.

32. Article 5 of the Law on Pardon (as amended) states:

> "A pardon involves as follows:
>
> (1) It releases the offender from prosecution, from the entire punishment or a portion of the punishment, commutes the punishment to a less severe one or to a suspended sentence, or orders the conviction set aside;
>
> (2) (...)
>
> (3) It absolves the offender from certain legal consequences of the crime or shortens their duration."

33. Article 7 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. .... "

34. Article 8 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."

35. Article 9 states:

> "Proceedings on pardon ex officio will be instituted by the Minister of Justice."

36. Article 17 states:

> "The President may, with the agreement of the Vice-President of the Federation, exceptionally grant a pardon without conducting the proceedings provided for under this Law."

(iv) Extraordinary Mitigation of a Sentence

37. The Law on Criminal Procedure (Službeni list of SFRY, Nos. 26/86, 74/87, 57/89, 3/90 and Službeni list of RBiH, Nos. 2/02, 9/92, 13/94) provides for Requests for the Extraordinary Mitigation of a Sentence.

38. Article 412 states:

> "The mitigation of any validly pronounced sentence is allowed when, after a judgement takes effect, circumstances appear which were not present at the time the judgement was issued, or the court was not aware of them although they did exist, and they clearly would have led to a less severe conviction."

39. Article 413 states:

"(1) Any request for the extraordinary mitigation of a sentence may be submitted by the public prosecutor, the convicted person and his counsel, as well as by persons authorised to file an appeal on behalf of the accused against a judgement.

(2) The request for the extraordinary mitigation of a sentence does not stay the enforcement of the sentence. If the request was submitted for the extraordinary mitigation of the death penalty the enforcement of such sentence shall be delayed pending the conclusion of the proceedings on this request. In the case of a renewed request for the extraordinary mitigation of the death penalty, enforcement of the sentence shall be delayed if so decided by the President of the court in charge of enforcement."

40. Article 414 states:

"(1) Any request for the extraordinary mitigation of a sentence shall be decided by the Supreme Court of BiH.

(2) A request for the extraordinary mitigation of a sentence shall be submitted to the court which issued the judgement at first instance.

(3) The President of the Panel of the court of first instance shall reject any request submitted by any person who is not authorised to do so.

(4) The court of first instance shall investigate whether there are reasons for mitigation, and it shall, after it hears the public prosecutor, and if the proceedings were conducted at his request, transmit the files with a substantiated proposal to the court competent to decide upon the request for the extraordinary mitigation of a sentence.

(5) If a case concerns a crime in which the proceedings were conducted at the request of the public prosecutor, the court which is to decide on the request for the extraordinary mitigation of a sentence shall transmit the files to the public prosecutor who is in charge of the case before that court, before it issues a decision.

(6) (...)

(7) The court shall refuse the request for the extraordinary mitigation of a sentence if it finds that legal conditions are not met. If the court grants the request, it shall change by decision, that part of the valid judgement regarding the sentence.

(v) Draft Criminal Law of the Federation of BiH

41. By letter dated 6 April 1998 concerning the Chamber's Damjanović decision, 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 (hereinafter "draft Criminal Law") 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.

IV. FINAL SUBMISSIONS OF THE PARTIES

A. The Applicant

42. The applicant alleges that the execution of the death penalty against him would be contrary to the practice of many democratic states throughout the world and a violation of his human rights.

B. The Respondent Party

43. The Federation of Bosnia and Herzegovina, the respondent Party, did not make any submissions regarding the application until it submitted observations on the applicant's compensation claim.

V. OPINION OF THE CHAMBER

A. Admissibility

44. 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.

(I) The Respondent Party's Preliminary Objections

45. The respondent Party submitted, in its observations dated 25 May 1998 on the applicant's claim for compensation, that the application should be declared inadmissible because domestic remedies had not been exhausted. The applicant's Request for Pardon dated 7 February 1997 (see para. 18 above) and his Request for the Extraordinary Mitigation of a Sentence dated 27 February 1998 (see paras. 20 - 21 above) were still pending. Furthermore, Article 413 of the Law on Criminal Procedure prohibited the execution of the death penalty before proceedings on a Request for the Extraordinary Mitigation of a Sentence are concluded. In addition, the draft Criminal Law (see para. 41 above), which does not provide for the death penalty, was certain to be adopted soon. Finally, the respondent Party was bound to the Agreement and the Annexes thereto under which the death penalty against the applicant could not be executed. For these reasons, the respondent Party submitted that the threat of the death penalty being executed against the applicant no longer existed, and that there was thus no basis for the applicant's fear of such penalty.

46. The Chamber first notes that it invited the respondent Party to submit observations on the admissibility of the application on 10 November 1997 with a time-limit of 3 December 1997. However, the respondent Party did not avail itself of that opportunity. The objections to admissibility were raised for the first time as part of the respondent Party's observations dated 25 May 1998 on the applicant's claims for compensation. As the Chamber noted in its Decision on Merits in the *Damjanović* case, it should normally determine any questions of admissibility which arise under Article VIII (2) of the Agreement at the initial stage of proceedings, and it would be contrary to the proper administration of justice to permit a respondent Party, without good reason, to raise an objection to admissibility at a later stage.

47. While the Chamber finds no reason why the objection that the applicant's Request for Pardon was still pending and the objection that the respondent Party was bound to the Agreement and the Annexes thereto could not have been raised when the respondent Party was first requested to submit observations on admissibility, the Chamber must address the objections concerning the Request for the Extraordinary Mitigation of a Sentence and the draft Criminal Law. Both the Request and the draft Criminal Law upon which these objections are based appear to have arisen only after the deadline for the respondent Party to submit observations on admissibility had passed on 3 December 1997.

48. Acceptance of the respondent Party's objection concerning the Request for the Extraordinary Mitigation of a Sentence would necessarily imply a finding that the threat of execution of the death penalty does not exist, and that there was thus no danger that the rights invoked would be violated. The Chamber therefore joins it to its consideration of the merits of the application (see, *mutatis mutandis*, Case No. CH/96/45, Hermas v. Federation of Bosnia and Herzegovina, Decision on Admissibility and Merits of 18 February 1998, para. 23).

49. For the same reason, the Chamber also joins the objection concerning the draft Criminal Law to its consideration of the merits of the application.

(ii) The Chamber's Competence *Ratione Temporis*

50. Secondly the Chamber notes that the applicant's complaints relate in part to his conviction in 1993 and thus to events which are alleged to have occurred before 14 December 1995, when the Agreement entered into force. In accordance with generally accepted principles of law the Agreement cannot be applied retroactively (see Case No. CH/96/1, Matanović v. Republika Srpska, Decision on Admissibility of 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 (sup. cit., para. 13). In so far as the applicant complains that he is threatened with execution of the death penalty 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.

51. The Chamber finds no other reasons 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 in so far as it relates to violations of the applicant's human rights which are alleged to have occurred or have been threatened to occur since the Agreement came into force on 14 December 1995.

B. Merits

52. 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".

Under Article II of the Agreement the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the European 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.

53. The applicant has submitted that the execution of the death penalty would violate his human rights as guaranteed by the Agreement. The Chamber has considered the present case under Article 2 of the Convention and also under Protocol No. 6 to the Convention.

54. 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 of 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."

55. The Chamber considers it appropriate to follow the same approach as in the Chamber's *Damjanović* decision, to which the present case is essentially similar (see para. 3 above).

(i) The Law on Pardon, the Request for the Extraordinary Mitigation of a Sentence and the Draft Criminal Law

56. The applicant instituted proceedings under the Law on Pardon on 7 February 1997 (see para. 18 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 executed against the applicant, however unlikely it may now appear, 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.

57. The applicant submitted a Request for the Extraordinary Mitigation of a Sentence on 4 March 1998 (see paras. 20 - 21 above). As is the case with a pardon, the relevant provisions of national law give no indication as to the possible result of such requests. This situation is not altered by Article 413 of the Law on Criminal Procedure which provides that the death penalty cannot be executed until proceedings for the request for the mitigation of such a sentence has been concluded. In the applicant's case, the Supreme Court of BiH refused his request. While Article 413 of the Law on Criminal Procedure provides for a renewed request, the Chamber finds that the refusal of such a request remains possible at any time and therefore that the threat of execution of the death penalty against the applicant remains. It follows that the respondent Party's preliminary objection based on this provision must be rejected.

58. As for the draft Criminal Law, any provisions it may contain concerning the death penalty is not final until adopted and entered into force. At present no Federation legislation has been enacted abolishing the death penalty altogether. The Chamber thus finds that the draft Criminal Law also does not eliminate the potential execution of the death penalty against the applicant. For this reason, the respondent Party's preliminary objection based on the draft Criminal Law must also be rejected.

(ii) Article 2 of Protocol No. 6 to the Convention

59. The Chamber notes that Article 1 of Protocol No. 6 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 ("executed"). These prohibitions are absolute subject only to the exception provided for in Article 2 of the Protocol and came into immediate effect on 14 December 1995 when the 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 were applicable.

60. Following the same approach as it did in its *Damjanović* decision, the Chamber will construe this provision strictly and scrutinise carefully the whole circumstances surrounding the threatened execution of the death penalty against the applicant, including the relevant laws, in order to determine whether or not the execution of the death penalty would be compatible with Protocol No. 6.

61. 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. First, the State concerned must have made "provision in its law for the death penalty". Second, such legal provision must be "in respect of acts committed in time of war or of imminent threat of war". Third, the death penalty is to be "applied only in the instances laid down in the law and in accordance with its provisions". Since Bosnia and Herzegovina is not a State Party to the Convention the procedural requirement in the last sentence of

Article 2 that the relevant law is communicated to the Secretary General of the Council of Europe is, of course, inapplicable.

62. Bearing in mind the principles which it derived from the case-law of the European Court of Human Rights in its *Damjanović* decision (sup. cit., paras. 30-31), the Chamber considers that before Article 2 of Protocol No. 6 can apply there must also 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 "in time of war or of imminent threat of war". Article 2 thus requires that the legislature should consider and define the circumstances in which, 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.

63. In the present case the applicant was convicted and sentenced to death on the basis of Article 36 (2) (6) of the Criminal Law of the RBiH (see para. 19 above). This provision, which relates to the crime of murder, is not restricted in its applicability to acts committed in time of war or imminent threat of war. In the Chamber's view this provision is not therefore a valid basis for the application of Article 2 of the Protocol and in so far as the applicant's sentence is based on this provision there is a violation of his rights under Article 1 of Protocol No. 6.

64. 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, the Chamber must, as it did in its *Damjanović* decision (sup. cit., paras. 32-37), take into account relevant provisions of the Constitution of Bosnia and Herzegovina (hereinafter "Constitution") set out in Annex 4 to the Agreement. In this respect it notes that Article 2 of Annex II to the Constitution dealing with transitional arrangements provides 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 Article 36 (2) (6) of the Criminal Law of RBiH in so far as the provisions of this Article are themselves "not inconsistent with the Constitution".

65. Under Article II (1) of the Constitution Bosnia and Herzegovina and the two Entities are obliged "to ensure the highest level of internationally recognised human rights and fundamental freedoms." Under Article II (2) the rights and freedoms set forth in the Convention are to apply directly in Bosnia and Herzegovina and have priority over all other law. Paragraphs 3 and 6 of Article II provide for these rights to be enjoyed by all persons within the territory of Bosnia and Herzegovina and to be implemented by the authorities. Paragraph 4 of the same Article 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...".

66. 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 (hereinafter "Second Optional Protocol"). Article 1 of the Second Optional Protocol provides for the abolition of the death penalty and provides 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 against the applicant would therefore not now be compatible with the Second Optional Protocol.

67. 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. The provisions of the Constitution referred to

above (paras. 64 - 66 above) do not expressly provide that any of the human rights agreements referred to, apart from the Convention and its Protocols, are directly applicable in Bosnia and Herzegovina. Article II (4) of the Constitution, which is headed "Non-Discrimination", states 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 (para. 40 above), which includes among the obligations of the Parties to the Agreement the obligation to secure the rights and freedoms guaranteed by all of the agreements listed in the Annex to the Agreement. Where one of the human rights agreements referred to imposes a clear, precise and absolute prohibition on a particular course of action, the obligation to secure the right in question to all persons without discrimination can be carried out only by giving effect to the prohibition. Laws which run counter to such a prohibition cannot 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. The Chamber therefore considers that Article 36 (2) (6) of the Criminal Law of the BiH, in so far as it authorises the use of the death penalty in peacetime, is not consistent with the Constitution and 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 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

68. 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 death penalty against the applicant would be in conformity with Article 2 (1) of the Convention itself, which prohibits the use of the death penalty "save in the execution of the sentence of a court...".

69. As the Chamber held in the *Damjanović* decision, 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 (1) 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.

70. In its *Damjanović* decision, 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, which was 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 Bosnia and Herzegovina on the proposal 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 in the *Damjanović* case and does not find any before it in the present case either.

71. As in the *Damjanović* decision, the 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 Ministry of Defence, 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.

72. Again as in the *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 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 District 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 judgement.

73. Having reached the conclusion that the District Military Court was not a court for the purposes of Article 2 (1) of the Convention for the above-mentioned reasons, the Chamber finds it unnecessary to investigate the question whether it afforded sufficient procedural guarantees.

74. The Chamber thus concludes that the execution of the death penalty against 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 (1) of the Convention itself.

VI. REMEDIES

75. 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".

A. ORDERS

76. In the present case the Chamber considers it appropriate to order the respondent Party not to execute the death sentence against 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

77. In his claim for compensation dated 30 April 1998, the applicant referred to the Chamber's Decision on the Claim for Compensation in the *Damjanović* case and asked the Chamber to award non-pecuniary damages of 15,000 German Marks (DEM) based on the fear he has suffered since he was sentenced to death on 4 August 1993. The applicant noted that he suffers from depression and that his health has deteriorated.

78. Again referring to the *Damjanović* case, the applicant also asked the Chamber to award him DEM 1,750 for his legal costs and expenses.

79. The agent of the respondent Party, in her written response dated 25 May 1998 to the applicant's claims for compensation, expressed the view that those claims were premature. She drew attention to Articles 541 to 545 of the Law on Criminal Procedure, pursuant to which any person who had suffered damage as a result of a conviction or sentence which had subsequently been overturned by another judgement or shown to be ill-founded had a right to financial compensation. It did not appear that the applicant had applied to the competent authority for such compensation; accordingly, the requirement contained in Article VIII (2) (a) of the Agreement that domestic remedies should be exhausted before an application was made to the Chamber had not been met.

80. Article XI (1) (b) of the Agreement states:

> "(1) Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address...:
>
> (b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures."

81. As noted in the *Damjanović* case, the Chamber considers that the rule contained in Article VIII (2) (a) of the Agreement that available remedies should be exhausted does not apply to claims for monetary relief under Article XI (1) (b). That rule defines one of the conditions relating to the Chamber's jurisdiction to consider allegations of violations of human rights as referred to in the first two Articles of the Agreement; in other words, it relates to the institution of proceedings before the Chamber. A claim for monetary compensation or other relief, which the Chamber may consider if a violation is found, does not constitute a new application under Article VIII paragraph 1; it is an element of the case which the Chamber must consider in reaching its decision, as follows from the clear wording of Article XI. The objection of the respondent Party that the claim for compensation is premature must therefore be rejected.

82. The Chamber accepts that the fear arising from the death penalty imposed upon the applicant constituted mental suffering for which monetary relief is in order. However, the Chamber's jurisdiction *ratione temporis* is limited to the period after 14 December 1995, when the Agreement entered into force. The Chamber cannot therefore award any compensation for damage suffered before that date.

83. The damage suffered by the applicant, by its nature, does not lend itself to precise qualification. In view of the respondent Party's submissions and the circumstances of the case, the Chamber awards the applicant DEM 3,000 in respect of non-pecuniary damage suffered up to and including the date of this decision.

84. As for the applicant's claim for remuneration of his legal costs and expenses, the Chamber notes that compensation may include costs and expenses incurred by the applicant in order to prevent the breach found or to obtain redress therefor. Although the Chamber specifically requested that supporting evidence be attached to any claims for compensation, the applicant did not provide any specification or supporting documentation. Accordingly, the Chamber rejects the applicant's claim for legal costs and expenses.

85. In respect of all damage suffered the Chamber therefore awards the applicant DEM 3,000. The Chamber will order the respondent Party to pay that sum before 12 September 1998. After the expiry of that time limit, simple interest at an annual rate of 4% will be due over any unpaid portion of that sum until the date of settlement.

VII. CONCLUSIONS

86. For the reasons given above the Chamber:

-1. **Rejects** by six votes against one the respondent Party's preliminary objection that the applicant's Request for Pardon was still pending and the objection that the respondent Party was bound to the Agreement and the Annexes thereto under which the death penalty could not be executed;

-2. **Joins** by six votes against one the remainder of the respondent Party's preliminary objections to the merits of the application and rejects them after considering the merits;

-3. **Decides** unanimously that the execution of the death penalty against 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 I of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

-4. **Decides** unanimously that the execution of the death penalty against 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 I of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

-5. **Orders** unanimously the respondent Party (a) not to execute the death penalty against the applicant and (b) to secure that the death penalty 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;

-6. (a) **Orders** by six votes against one the respondent Party to pay to the applicant, before 12 September 1998, the sum of DEM 3,000 (three thousand German Marks) by way of compensation for non-pecuniary injury and reject the remainder of the claims;

(b) **Orders** by six votes against one that simple interest at an annual rate of 4% (four percent) will be payable over this sum or any unpaid portion thereof from the day of expiry of the above-mentioned time-limit until the date of settlement.

(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 and a separate partly dissenting opinion by Mr. Hasan BALIĆ.

CONCURRING OPINION OF MR. RONA AYBAY

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

DISSENTING OPINION OF MR. HASAN BALIĆ

I consider that there is no legal ground to award any compensation. My opinion is based on the implementation of Article 5 of the Law on Pardon and Articles 541 and 545 of the Law on Criminal Procedure and Article 2 of Protocol No. 6 to the Convention.

(signed) Hasan BALIĆ