DECISION ON THE MERITS
(delivered on 6 July 2000)

Case no. CH/98/548

Savo IVANOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 June 2000 with the following members present:

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

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

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

Adopts the following decision pursuant to Article XI of the Agreement as well as Rules 57 and 58 of its Rules of Procedure;

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Montenegrin origin. In 1992 he was convicted by the Sarajevo High Court of war crimes against the civilian population and sentenced to 15 years of imprisonment. The judgment was confirmed by the Supreme Court of Bosnia and Herzegovina in December 1992. In September 1996 the applicant submitted a petition for the reopening of the criminal proceedings, which, after several decisions by the Cantonal Court (previously the High Court) and the Supreme Court of the Federation of Bosnia and Herzegovina, was finally rejected on 10 February 1998. The applicant complains of a violation of his right to an impartial tribunal, on the ground that one of the judges of the Supreme Court panel that rejected his petition to reopen the case in February 1998 had also been a member of the Supreme Court panel that confirmed his conviction in 1992. He also complains that he did not receive a fair trial in the proceedings upon his petition to reopen the case.

2. The case raises issues under Article 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 13 April 1998 and registered on the same day. The applicant is represented by Mr. Gavrilo Gunjak, a lawyer practising in Sarajevo.

4. On 1 December 1998 the Chamber transmitted the application to the respondent Party for its observations on the admissibility and the merits of the case. On 1 February 1999 the respondent Party submitted its observations.

5. On 17 March 1999 the applicant submitted his observations in reply and a claim for compensation. The respondent Party sent its observations on the applicant's claim for compensation on 19 April 1999.

6. On 9 March 2000 the Chamber adopted its decision on the admissibility of the case. The Chamber declared admissible the applicant's complaint that he did not receive a fair trial before an impartial tribunal in the proceedings following his petition to reopen his case, and declared the remainder of the application inadmissible.

7. On 15 March 2000 the Chamber requested further information from the respondent Party. A reply to this request was received on 29 March 2000.

8. The Chamber deliberated on the merits of the case on 9 March, 6 April, 12 May and 5 June 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. Particular facts of the case before the domestic courts

9. The facts of this case are essentially not in dispute and may be summarised as follows.

1. The 1992 first instance judgment

10. On 16 September 1992 the applicant was convicted by a judgment of the Sarajevo High Court of war crimes against the civilian population under Article 142 of the, then still applicable, Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter "SFRY") and sentenced to fifteen years of imprisonment. The applicant was found guilty of having assisted the armed forces besieging Sarajevo to correct their fire by giving signals with a mirror from his apartment.

11. In his statement to the investigating judge (made in the presence of a lawyer), the applicant recounted that in mid-May 1992, having crossed into the Serb-controlled part of Sarajevo in order to

buy food, he had been contacted by two men and asked to assist in correcting the fire of the besieger's artillery placed on Vrace, a hill dominating his part of town and Velešići, the area to which the fire was to be directed. It had been agreed that he would first send two long signals with a mirror from his apartment window in order to establish contact with the artillery position, and would then give between one and four short signals with the mirror, respectively signalling that the shelling was either hundred meters short or long, to the left or to the right of the target. The applicant further stated to the investigating judge that he had signalled around 5 p.m. on 8 June and between 10 and 11 a.m. on 11 June 1992, while he had been interrupted by the members of the security forces when he was preparing to do so on 12 June. At trial, the applicant repudiated his previous confession, claiming that he had made his statement under the impression that his life was threatened by the security forces, although he conceded that he had not been actually ill-treated.

12. The High Court further heard as witnesses an officer of the security forces who had arrested the applicant and the president of the tenants' council of the applicant's apartment building, who confirmed that from the applicant's apartment both the artillery positions at Vrace and the target area Velešići were clearly visible.

13. In reaching its decision, the High Court relied on the applicant's confession to the investigating judge and on the witnesses' testimony. It concluded that the applicant's disclaimer of his confession at the main hearing was "unnecessary and untruthful". From the Supreme Court judgment of 2 December 1992 (see paragraphs 14-16 below) it can further be seen that the defence and the public prosecutor had requested the taking of evidence through an on-site inspection of the applicant's apartment in order to establish whether it was accurate that from the applicant's apartment both Vraca and Velešići were visible. Moreover, the parties had suggested that an artillery expert, V.K., a retired JNA (Yugoslav National Army) artillery colonel, be heard in order to establish whether the actions confessed by the applicant would be of any assistance to the besieging forces. The High Court had decided that it was not necessary to gather this evidence.

2. The 1992 appeals judgment

14. Both the applicant and the public prosecutor appealed against the judgment of 16 September 1992 on the ground that the High Court had refused the request to carry out an inspection of the applicant's apartment without indicating the reasons for its refusal. The applicant also presented several other grounds of appeal, among them the first instance court's alleged failure to establish the facts in a reliable way and its refusal to hear an artillery expert as suggested by the parties.

15. On 2 December 1992 the Supreme Court of Bosnia and Herzegovina rejected all grounds of appeal presented and upheld the judgment of the High Court. It reasoned that the first instance court had been right in not accepting the applicant's disclaimer of his confession, as this statement described the applicant's actions in great detail, had been made in the presence of a lawyer and was corroborated by the testimony of the two witnesses. For the same reasons the Supreme Court concluded that the inspection of the applicant's apartment would have been redundant and that the High Court's failure to give reasons for its refusal to carry out the inspection did not constitute a serious flaw. Finally, as to the admission of the ballistic expert testimony, the Supreme Court stated:

> "Also, it would have been superfluous to follow the proposal of the parties to hear as a witness V.K. with regard to the issue of which technology the JNA, which supplies the paramilitary forces of the SDS [the Serb Democratic Party], has at its disposal, in order to establish that the SDS forces do not need such primitive and imprecise navigating/steering techniques [as the one allegedly provided by the applicant]. This proposal also seems superfluous considering that the first instance court confirmed in a reliable manner that the defendant committed all the actions as set forth in the operative part of the first instance judgment, as can be deduced from his full confession, which he gave in detail during the preliminary proceedings before the investigating judge in the presence of his lawyer and that his confession is substantiated by other evidence."

16. One of the five members of the Supreme Court panel in the applicant's case was Judge Malik Hadžiomeragić.

3. The proceedings upon the applicant's petition for retrial from 1996 to 1998

17. On 15 August 1996 the applicant submitted to the then High Court in Sarajevo a petition to reopen the criminal proceedings under Article 404 paragraph 1(4) of the Law on Criminal Procedure (see paragraph 25 below) on the ground that evidence not available at the time of his trial was now available. Such evidence consisted primarily of the testimony of the artillery expert, V.K., regarding the question whether the applicant could have committed the crime he was found guilty of without being an artillerist and without a "table of signals" on the basis of which to communicate with the besiegers.

18. On 21 February 1997 the High Court in Sarajevo denied the petition according to Article 408 paragraph 1 of the Law on Criminal Procedure. The High Court reasoned that the evidence, whose admission in the course of a retrial was sought, had not been gathered during the 1992 proceedings because it was superfluous in the light of the applicant's confession and of other witness testimony, and not because it had been unavailable at the time of the applicant's trial.

19. On 10 July 1997 the Supreme Court of the Federation of Bosnia and Herzegovina annulled the decision of the High Court and returned the case for reconsideration. The Supreme Court found that the High Court had erred in that it had denied the petition only on the basis of the case-file, without examining the evidence suggested by the petitioner. The Supreme Court reasoned that the High Court could have declared the petition inadmissible on the ground that it failed to meet the conditions set forth in paragraph 1 of Article 407 of the Law on Criminal Procedure (see paragraph 28 below). However, as it had decided to deny the applicant's petition on the merits, the High Court was under an obligation to examine the allegedly new facts and evidence.

20. On 5 November 1997 the (by then) Cantonal Court in Sarajevo, having heard V.K. as an expert witness, again denied the applicant's petition to reopen the proceedings in his case. V.K. had concluded his expert testimony with the following statement:

> "In conclusion, a lay person, a person without appropriate education and a signal table and radio connection, could not send signals for the correction of the artillery fire on the line Vraca-Velešići, and in addition to this, it was not necessary for the artillery fire which took place during day time, as each weapon had its commander who would carry out such corrections."

The Cantonal Court, however, concluded:

> "V.K., who was heard, did not confirm that the convicted person did not commit the incriminated acts and his testimony may not be considered in that sense as new evidence or a new fact. Consequently, his statement does not have such significance as to challenge the established criminal responsibility of the convicted Savo Ivanović and as to lead to an acquittal or to a conviction under a less severe law."

It thus rejected the applicant's petition under Article 408 paragraph 1 of the Law on Criminal Procedure (see paragraph 29 below).

21. On 10 February 1998 the Supreme Court of the Federation rendered its decision on the applicant's appeal against the decision of the Cantonal Court. It explained that the evidence on which the applicant's petition was based could not be considered new evidence, as it had been available at the time of the applicant's trial and had not been admitted at that time because it was not considered to be necessary in the light of the applicant's confession and of other witness testimony. The Supreme Court concluded that the applicant's petition should therefore have been rejected under Article 404 paragraph 1(4) of the Law on Criminal Procedure, on the ground that it was not supported by "new" evidence. It added, however, that, as the Cantonal Court had taken the evidence of V.K., it had been forced to decide on the petition in accordance with Article 408 paragraph 1. As the procedural mistake had not affected the final result, the Supreme Court concluded that a renewed decision on the applicant's petition was not necessary. The petition was thus finally rejected. One of the judges on the Supreme Court panel that adopted this decision was Judge Malik Hadžiomeragić,

who had been a member of the panel of the Supreme Court of Bosnia and Herzegovina in the applicant's case in 1992.

22. Against the decision of the Supreme Court of the Federation the applicant filed an application for the protection of legality. It was denied by the Federal Prosecutor on 12 March 1998.

4. The applicant's transfer and release from detention

23. On 20 January 1999 the applicant was transferred from the Correctional Institution in Zenica in the Federation of Bosnia and Herzegovina to the District Prison in Srpsko Sarajevo in the Republika Srpska. On 14 June 1999 the Federal Ministry of Justice issued a decision by which the applicant was released on probation from the District Prison on 18 June 1999.

B. Relevant domestic law

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

1. Provisions relating to review proceedings

25. Article 400 of the old Law on Criminal Procedure provided:

> "Criminal proceedings which were concluded by a decision which has become final or a judgment which has become final may be reopened upon petition of an authorised person only in the cases and under the conditions envisaged in this law."

26. Article 404 paragraph 1 reads in relevant parts:

> "Criminal proceedings which have been terminated with a final judgment may be reopened:
> ...
> 4. If new facts are presented or new evidence submitted which, by themselves or in relation to the previous evidence would tend to bring about the acquittal of the person who has been convicted or his conviction under a less severe or more severe criminal law, or to the sentencing of a person who was acquitted of a charge, ..."

27. Article 405 provided:

> "(1) A petition to reopen criminal proceedings may be filed by the parties and by their counsel, after the death of the convicted person the petition can be submitted on his behalf by the public prosecutor and by the persons mentioned in Article 360 paragraph 2.
>
> (2) In the case referred to in Article 404, paragraph 1, subparagraphs 4 and 6, of this Law it is not permitted to reopen criminal proceedings to the detriment of the convicted or acquitted person if more than 6 months have passed from the date when the prosecutor learned of the new facts or new evidence.
>
> (3) A petition to reopen criminal proceedings on behalf of a convicted person may be filed even after the convicted person has served his sentence and regardless of the statute of limitations, amnesty or pardon.

(4) If a court which has jurisdiction to decide the issue of reopening criminal proceedings (Article 406) learns that reason exists for reopening criminal proceedings on behalf of the convicted person, it shall so inform the convicted person or the person authorised to file the petition on his behalf."

28. Article 406 provided:

"(1) A petition to reopen criminal proceedings shall be decided on by a panel ... of the court which tried the case in the first instance in the previous proceedings.

(2) The petition must cite the legal basis on which reopening of proceedings is sought and the evidence to support the facts on which the petition is based. If the petition does not contain such information, the court shall request the petitioner to supplement the petition by a certain date.

(3) If possible, no judge who participated in rendering the judgment in the prior proceeding shall participate when deciding on the petition (for a reopening) in the panel."

29. Article 407 provided:

"(1) The court shall reject the petition if on the basis of the petition itself and the record of the prior proceedings it finds that the petition was filed by an unauthorised person or that there are no legal conditions for reopening the proceedings, or because the facts and evidence on which the petition is based have already been presented in a previous petition for reopening of proceedings which was refused by a valid decision of the court, or if the facts and evidence obviously are not adequate to provide a basis for reopening the proceedings, or if the petitioner did not conform with Article 406, paragraph 2, of this Law.

(2) Should the court not reject the petition, it shall serve a copy of the petition on the adverse party, who has the right to answer the petition within 8 days. When the court receives the answer to the petition or when the period for answer has expired, the presiding judge of the panel shall order that the facts be investigated and evidence obtained as referred to in the petition and the answer to the petition.

(3) Following these investigations the court shall immediately issue a decision in which it rules on the petition for reopening proceedings under Article 403 of this Law. In other cases, when crimes which are prosecuted ex officio are involved, the presiding judge of the panel shall order that the record be sent to the public prosecutor, who shall return the record without delay along with his opinion."

30. Article 408 paragraph 1 provided:

"When the public prosecutor returns the record, and if the court has not ordered that the inquiry be supplemented, it shall, on the basis of the results of the inquiry, (either) accept the petition and grant a reopening of the criminal proceedings or refuse the petition."

31. Article 409 paragraphs 1 to 3 provided:

"(1) The provisions which apply to the original proceedings shall also apply to the new proceedings being conducted on the basis of a decision calling for repetition of criminal proceedings. In the new proceedings the court is not bound by decisions rendered in the previous proceedings.

(2) If the new proceedings are dismissed before the trial commences, in its decision to dismiss the proceedings the court shall also quash the previous judgment.

(3) When the court renders a decision in the new proceedings, it shall pronounce that the previous judgment is partially or entirely quashed or that it remains in force. The court shall give the accused credit for time served in the sentence it pronounces in the new judgment; if

reopening of the proceedings was ordered only for some of the crimes of which the accused has been convicted, the court shall pronounce a single new sentence under the provisions of the Criminal Code."

2. General provisions relating to the disqualification of judges

32. While Article 406 paragraph 3 of the Law on Criminal Procedure set forth a specific rule concerning retrial proceedings, Chapter III of the First Part of the Criminal Procedure Law provided for the general rules regarding the disqualification of judges.

33. Article 39 (taken over without changes as Article 35 of the 1998 Law) read:

> "A judge or lay judge may not perform his judicial duties in the following cases:
> (1) if he has been injured by the crime;
> (2) if the accused, his defence counsel, the prosecutor, the injured party, their legal representative or authorised agent, is his spouse or extramarital partner or direct blood relative ...;
> (3) if he has stood in the relationship of guardian, ward, adopted parent, adopted child, foster parent or foster child to the accused, his defence counsel, the prosecutor or the injured party;
> (4) if in the same criminal case he has performed actions in the preliminary examination or has participated in proceedings as prosecutor, defence counsel, legal representative or authorised agent of the injured party or the prosecutor, or has been examined as a witness or an expert;
> (5) if in the same case he has participated in rendering a decision of a lower court or if in the same court he participated in rendering a decision completed by an appeal;
> (6) if circumstances exist which engender doubts as to his disinterestedness."

34. Article 40 (taken over without changes as Article 36 of the 1998 Law) provided insofar as relevant to this case:

> "As soon as a judge or lay judge learns that any of the grounds for disqualification exists referred to in Article 39, points 1 through 5, of this law, he must interrupt all work on that case and inform the president of the court, who shall appoint his replacement."

IV. COMPLAINTS

35. The applicant primarily complains of the fact that Judge Malik Hadžiomeragić, who had been one of the judges of the panel of the Supreme Court of Bosnia and Herzegovina that confirmed his conviction in 1992, also sat on the panel of the Federation Supreme Court that rejected his petition to reopen the case on 10 February 1998. He alleges that this constitutes a violation of his right to a hearing by an impartial tribunal protected by Article 6 paragraph 1 of the Convention.

36. The applicant also argues that by denying his petition for a retrial, the courts violated his right to obtain the examination of witness testimony on his behalf, i.e. the testimony of the artillery expert Mr. V.K., guaranteed by Article 6 paragraph 3(d).

37. The applicant further submits that he was not informed of the charges against him in violation of Article 9 paragraph 2 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and that he was compelled to confess guilt in violation of Article 14 paragraph 3(g) of the ICCPR. He does not explain or substantiate these complaints.

38. The applicant finally submits that the way in which the criminal proceedings against him were conducted was due to his Montenegrin origin. He does not specify whether this allegation refers to the 1992 criminal proceedings or to the proceedings upon his petition to reopen the case. He also does not make any arguments in support of this claim.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

39. As to the merits, the respondent Party submits that both the proceedings in 1992 and those upon the applicant's petition to reopen his case from 1996 to 1998 were in full accordance with national law and the Convention. The Federation states that the applicant was judged by legally constituted, independent and impartial courts, in full compliance with his rights under Article 6 paragraph 1 of the Convention and his right to obtain the examination of witnesses on his behalf as provided by Article 6 paragraph 3(d).

40. In reply to the Chamber's question whether there had been compelling reasons for the participation of Judge Hadžiomeragić in the Federation Supreme Court panel that adopted the decision of 10 February 1998, the respondent Party replied that Article 406 paragraph 3 of the (then applicable) Law on Criminal Procedure (see paragraph 27 above) should be construed as providing the following:

> "... a judge who participated in rendering a judgment in the earlier proceedings shall not be formally disqualified from participating in a panel deciding on a petition to reopen the proceedings. In other words, the mentioned legal provision does not involve a prohibition for the judge who took part in rendering a judgment to take part in deciding on the petition to reopen the proceedings, but only suggests not to do so if possible. In case that it occurs, as in the present case, it cannot be concluded, on the basis of what has been stated above, that a judge who should have been disqualified participated in dealing with the petition to reopen the criminal proceedings."

The Federation did not, however, indicate which circumstances had led to the participation of Judge Hadžiomeragić in the Supreme Court panel that adopted the decision of 10 February 1998.

B. The applicant

41. The applicant maintains his complaints.

VI. OPINION OF THE CHAMBER

A. Scope of the case before the Chamber

42. The Chamber recalls that in its decision on admissibility of 9 March 2000 it has declared the case admissible insofar as it concerned the applicant's complaint that he did not receive a fair hearing before an impartial tribunal in the proceedings following his petition to reopen his case. The Chamber has declared inadmissible as outside its competence *ratione temporis* under Article VIII(2)(c) of the Agreement the alleged violations of the applicant's rights to be informed of the charges against him and not to be compelled to testify against himself, as these complaints could only refer to the 1992 proceedings against the applicant (paragraph 37 of the decision on admissibility). It has also declared inadmissible as incompatible with the Agreement *ratione materiae* the applicant's complaint that, by denying his petition for a retrial, the judicial authorities violated his right to "obtain the examination of witnesses on his behalf". Finally, the Chamber declared inadmissible as unsubstantiated and therefore manifestly ill-founded the applicant's complaint that he was discriminated against on the grounds of his Montenegrin origin.

43. The case before the Chamber for examination on the merits is therefore limited to two issues. Firstly, the complaint that the applicant's right to an impartial tribunal was violated in the proceedings following his petition to reopen his case. Secondly, the fairness of those proceedings. The Chamber has examined these issues under Article 6 paragraph 1 of the Convention, which insofar as relevant reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... ."

B. The complaint of lack of impartiality of the tribunal

44. The Chamber recalls that for the purposes of Article 6 paragraph 1 the impartiality of the tribunal must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see case no. CH/97/51, *Stanivuk*, decision on admissibility and merits delivered on 11 June 1999, paragraph 47, Decisions January-July 1999).

45. As to the subjective test, the applicant has not alleged that Judge Hadžiomeragić acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary. In the present case there is no such proof.

46. As to the objective test, the Chamber recalls the following statement of the European Court of Human Rights (Eur. Court HR, *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, paragraph 48):

> "Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubt as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw ..."

47. The Chamber notes that Article 39 of the old Law on Criminal Procedure applicable at the time of the proceedings in the applicant's case (which has been taken over without changes as Article 35 of the 1998 Federation Law on Criminal Procedure, see paragraph 32 above) manifests the Federation legislature's concern to remove all reasonable doubts as to the impartiality of the courts. As reflected in point 5 of Article 39 (now 35), when a judge is called to decide upon an appeal against a decision which he has adopted (or taken part in adopting) at a previous stage of proceedings, his impartiality is open to serious doubts, quite apart from his or her personal conduct.

48. The Chamber also notes that Article 406 paragraph 3 of the old Law on Criminal Procedure (now Article 398 paragraph 3) provides for an exception to this general and fundamental rule. With regard to proceedings upon a petition for the reopening of a criminal case, it provides that "if possible, no judge who participated in rendering the judgment in the prior proceeding shall participate in the panel deciding on the petition". The reason for this difference could be that a petition for retrial, which presupposes the emergence of significant new facts, does not constitute as direct a challenge against the previous decision as an appeal.

49. As to the case presently before it, the Chamber notes that the decision of the Supreme Court of the Federation of 10 February 1998 concerned an appeal directed against the decision of the Cantonal Court of 5 November 1997. The judgment of the Supreme Court of Bosnia and Herzegovina of 2 December 1992 was not directly at issue and Judge Hadžiomeragić was therefore, at least formally, not deciding on a challenge against a decision in which he had taken part.

50. However, the Chamber considers that, to satisfy itself that the composition of the panel of the Supreme Court of the Federation was not capable of reasonably compromising the confidence which the courts in a democratic society must inspire in the public and above all in the accused, it cannot limit itself to such a formal approach. In order to decide whether judge Hadžiomeragić's participation in two Supreme Court panels at different stages of the applicant's case was such as to give rise to legitimate reasons to fear a lack of impartiality, the Chamber has examined the specific issues concerned by the appeals on which the Supreme Court was called to decide on the two occasions. In 1992 the main issue before the Supreme Court of Bosnia and Herzegovina was whether the applicant's confession made to the investigating judge, as corroborated by the testimony of two witnesses, was more credible than the applicant's disclaimer of this confession at trial. In connection with this assessment, the Supreme Court also had to decide whether the first instance court had

erred in finding that the taking of certain evidence suggested by the defence and the prosecution, such as the opinion of an artillery expert, was not necessary (see paragraph 15 above).

51. The second panel which included Judge Hadžiomeragić was called on to decide upon an appeal against the decision of the Cantonal Court of 5 November 1997 rejecting the applicant's petition for a retrial (see paragraph 21 above). In its decision the Cantonal Court, having heard the artillery expert V.K., found that his expert testimony did not challenge the credibility of the applicant's confession. The Supreme Court of the Federation, however, did not examine this question of evaluation of evidence in its judgment of 10 February 1998. It recalled that, in order to be admissible under Article 404 paragraph 1(4) of the Law on Criminal Procedure, a petition to reopen a case concluded by a final judgment has to present new facts or submit new evidence. The Supreme Court then found that evidence which had been available at the time of the trial and had not been not admitted, because the trial court considered it to be redundant or otherwise unnecessary could not be considered "new evidence" within the meaning of Article 404 paragraph 1(4). Accordingly, as V.K. had been suggested as an expert also during the trial in 1992, his expert opinion did not constitute "new facts or evidence". The petition for a retrial had therefore to be preliminarily rejected under Article 404 paragraph 1(4), without deciding whether or not V.K.'s expert testimony challenged the credibility of the applicant's confession, as the Cantonal Court had erroneously done.

52. The Chamber therefore considers that the panel of the Supreme Court of Bosnia and Herzegovina that decided on the appeal against the first instance conviction and the panel of the Supreme Court of the Federation that decided on the appeal against the Cantonal Court's decision of 5 November 1997 were called on to decide substantially different questions. On the first occasion, the Supreme Court was confronted with a sweeping appeal directed against the evaluation of the evidence by the first instance court. In 1998 the Supreme Court found that the issue before it was limited to the question whether the expert's opinion was to be considered "new evidence" within the meaning of Article 404 paragraph 1(4). Considering the difference in subject and nature of the issues under scrutiny by the two Supreme Court panels in which Judge Hadžiomeragić took part, the Chamber concludes that there was no legitimate reason for the applicant to fear a lack of impartiality on the side of Judge Hadžiomeragić. The Chamber does therefore not find that the application reveals a violation of Article 6 paragraph 1 of the Convention in this respect.

C. The complaint of unfairness of the trial

53. The applicant has raised several complaints of violations of specific fair trial guarantees, which the Chamber has declared inadmissible either *ratione temporis* or *ratione materiae* (see paragraph 41 above). However, the Chamber has declared admissible the complaint that the proceedings upon the applicant's request for a retrial considered as a whole, and in particular the way the Cantonal Court and the Supreme Court of the Federation evaluated the relevance of V.K.'s expert opinion, were unfair.

54. The Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them and to construe the applicable domestic law. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, Decisions August-December 1999). Only where it is alleged or apparent that the evaluation of the evidence by the domestic court is grossly inadequate and devoid of the appearance of fairness, the Chamber might examine the establishment of the facts by the domestic court (see case no. CH/98/638, *Damjanović*, decision on admissibility and merits delivered on 11 February 2000, paragraphs 80-82, and case no. CH/99/2146, *Babić*, decision on admissibility of 6 April 2000, paragraph 19).

55. In the present case, the applicant's petition for a retrial was dealt with in four decisions (see paragraphs 17-21 above). While all four decisions appear to concur on the fact that the applicant's petition should be rejected, they are discordant as to the grounds of rejection. Without venturing into a close analysis of the four decisions, the Chamber notes that a first ground was that the petition was inadmissible because the expert opinion on which it was based did not constitute new facts or new evidence, as required by Article 404 paragraph 1(4) of the Law on Criminal Procedure, as it had

already been available at the time of the trial in 1992. The second ground was that the contents of the expert opinion was not such as to challenge the findings of the courts that convicted the applicant. This ground appears to have been relied on, though in somewhat confusing terms, by the Cantonal Court in its decision of 5 November 1997. The Supreme Court decision of 10 February 1998 states that the petition should have been rejected on the first ground without examining the contents of the expert opinion. As, however, the outcome of the Cantonal Court's examination was the same, the Supreme Court found that a renewed decision on the petition was not necessary and refused to annul the appealed decision.

56. The Chamber takes the view that the above short summary of the issues before the Cantonal and the Supreme Court during the proceedings upon the petition for retrial reveals the complexity, both factual and legal, of the matter before the domestic courts. The domestic courts examined the assertedly new evidence proposed by the applicant and went at considerable length in order to determine whether the applicant's petition for a retrial met the strict requirements set forth in Articles 404 and 407 of the Law on Criminal Procedure. The Chamber has also taken into account that, in assessing the overall fairness of the proceedings in the applicant's case, particular weight must be attributed to the decisions of the Supreme Court, which has corrected the conclusions of the Cantonal Court on the occasion of both the applicant's appeals. Accordingly, while the Chamber might have misgivings about the conclusions of the Cantonal Court judgment of 5 November 1997, it cannot find that the reasoning in the Supreme Court's final decision of 10 February 1998 is grossly inadequate and devoid of the appearance of fairness. The Chamber accordingly concludes that also in this respect the application does not reveal a violation of the applicant's right to a fair trial.

VII. CONCLUSION

57. For the above reasons, the Chamber decides, by 6 votes to 6 with the President's casting vote, that the application does not reveal a violation of Article 6 of the European Convention on Human Rights.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex Dissenting opinion of Mr. Giovanni Grasso, joined by Messrs. Dietrich Rauschning, Manfred Nowak, Miodrag Pajić and Vitomir Popović.

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Giovanni Grasso, joined by Messrs. Dietrich Rauschning, Manfred Nowak, Miodrag Pajić and Vitomir Popović.

DISSENTING OPINION OF MR. GIOVANNI GRASSO, JOINED BY MESSRS. DIETRICH RAUSCHNING, MANFRED NOWAK, MIODRAG PAJIĆ AND VITOMIR POPOVIĆ

1. I cannot agree with the decision of the Chamber. In my opinion the case reveals a serious and clear violation of Article 6 paragraph 1 of the European Convention on Human Rights as regards the requirements of the impartiality of the tribunal which judged upon the applicant's petition for a retrial and of the fairness of the proceedings.

The violation of the applicant's right to on impartial tribunal

2. Judge Hadžiomeragić's participation in the panel of the Supreme Court of the Federation that finally rejected the applicant's petition for a re-trial raises the issue whether his previous participation in the case constituted a legitimate reason to fear a lack of impartiality on his side.

3. In the specific circumstances of the applicant's case, the panel of the Supreme Court of Bosnia and Herzegovina that decided on the appeal against the first instance conviction and the panel of the Supreme Court of the Federation that decided on the appeal against the Cantonal Court's decision of 5 November 1997 rejecting the petition for a re-trial were called to judge a substantially identical issue. In 1992 the main issue before the Supreme Court of Bosnia and Herzegovina was whether the applicant's confession made to the investigating judge was as convincing as to render superfluous the taking of evidence that would – according to the assertions of the defence – prove its implausibility. The evidence suggested was an on-site inspection of the applicant's apartment and the testimony of an artillery expert, V.K. In its judgment of 2 December 1992 the Supreme Court concluded that, in the light of the applicant's full (and subsequently disowned) confession and the testimony of two witnesses corroborating it, the taking of potentially contradictory evidence was superfluous. As to the re-opening proceedings, in its decision of 5 November 1997 the Cantonal Court, having heard the artillery expert V.K., found that his expert testimony did not challenge the credibility of the applicant's (still disowned) confession. The Supreme Court of the Federation was called to decide upon an appeal against this finding. Its decision of 10 February 1998 stated that in any case the Cantonal Court correctly assessed the relevance of the expert's opinion.

4. Considering the very close relationship between the matter before the Supreme Court panel that took the decision of 2 December 1992 and the one that took the decision of 10 February 1998, I cannot but conclude that Judge Hadžiomeragić's impartiality in deciding on the applicant's petition for a re-trail is open to very serious doubt. In addition, the Federation did not justify why he actually participated in the panel of the Supreme Court that took the decision on 10 February 1998. There has therefore been a clear violation of Article 6 paragraph 1 of the Convention in respect of the impartiality of the Supreme Court panel that on 10 February 1998 took the final decision in the applicant's case.

The violation of the applicant's right to fair proceedings

5. In my opinion the way the Cantonal Court and the Supreme Court evaluated the relevance of V.K.'s expert opinion is so unfair as to deprive the proceedings of the appearance of fairness. It is true that in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is the competence of the domestic courts to assess the evidence before them. But when it is clear that the evaluation of the evidence by the domestic court is grossly inadequate and devoid of the appearance of fairness, the Chamber might examine the establishment of the facts by the domestic court (see case no. CH/98/638, *Damjanović*, decision on admissibility and merits delivered on 11 February 2000, paragraphs 80-82).

6. In the present case after its first decision on the applicant's petition to reopen the proceedings had been quashed by the Supreme Court, the Cantonal Court called the artillery expert V.K. to give his expert testimony. V.K. stated:

> "In conclusion, a lay person, a person without appropriate education and a signal table and radio connection, could not send signals for the correction of the artillery fire on the line Vraca-Velešići, and in addition to this, it was not necessary for the artillery fire which took place during day time, as each weapon had its commander who would carry out such corrections."

In fact no signal table or radio equipment were found in the applicant's apartment on the occasion of the search on 12 June 1992. Furthermore, according to the applicant's confession the signals would have been sent during the daytime (when they would have been completely useless). In spite of these facts – patently contradicting the confession – the Cantonal Court concluded:

> "V.K., who was heard, did not confirm that the convicted person did not commit the incriminated acts and his testimony may not be considered in that sense as new evidence or a new fact. Consequently, his statement does not have such significance as to challenge the established criminal responsibility of the convicted Savo Ivanović and as to lead to an acquittal or to a conviction under a less severe law."

7. It is clear that the reasoning of the Cantonal Court is grossly inadequate and devoid of the appearance of fairness. The fact that the applicant has consistently repudiated his confession to the investigating judge (on which the 1992 conviction is based) should have prompted the Court to address, with particular attention, the issue of the relevance of this expert opinion patently contradicting the confession's version of the facts and thus putting in question the plausibility of this confession.

8. This gross inadequacy of the Cantonal Court's decision, confirmed by the decision of the Supreme Court, is of such gravity to cast serious doubts about the fairness of the proceedings. There has therefore been a violation of Article 6 paragraph 1 of the Convention also in this respect.

(signed)
Giovanni Grasso

(signed)
Dietrich Rauschning

(signed)
Manfred Nowak

(signed)
Miodrag Pajić

(signed)
Vitomir Popović