



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 8 March 2002)

Case no. CH/01/6979

E.M. and Š.T.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 8 February 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

Mr. Ulrich GARMS, 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 VIII(2) and Article XI of the Agreement as well as Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The application was brought before the Chamber by Ms. E.M. in her own right and on behalf of her brother, Š.T., in accordance with Article VIII(1) of the Agreement, which provides in the relevant part, that “the Chamber shall receive ... from any person ... acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights ...”.

2. On the evening of 16 July 1998 B.B. shot Š.T. in the head in Dinarska Street No. 8 in Livno. The following day, on 17 July 1998, Š.T. died of his head injury. On 21 October 1998, at the conclusion of the criminal trial for the killing of Š.T., the Municipal Court of Livno issued a procedural decision ordering B.B. to undergo a security measure of mandatory psychiatric treatment. After only two months B.B. was released from the security measure. He has been free ever since. The applicant unsuccessfully initiated several legal proceedings before the courts in order to achieve a reconsideration of the procedural decision of the first-instance court of the 21 October 1998.

3. The panel of judges, the public prosecutor, the defence council and the accused at the trial before the Municipal Court were all citizens of Bosnia and Herzegovina of Croat origin whereas the victim and his family were citizens of Bosnia and Herzegovina of Bosniac origin.

4. The case raises issues under Article 2 of the European Convention on Human Rights (“the Convention”). It further raises issues in regard to discrimination against Š.T. in the enjoyment of his rights under Article 2 of the Convention and Article 5(a) and (b) of the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”) and of Article 5(a) of CERD in regard to the applicant herself.

II. PROCEEDINGS BEFORE THE CHAMBER

5. On 17 June 1999 the applicant E.M. addressed the Chamber in a letter which contained a summary of the her complaints. A provisional file was opened and the applicant’s representative was sent an application form to be filled out. On 13 March 2001 the representative submitted the application form to the Chamber. The representative in addition submitted several medical documents to support his claim that due to bad health he had been unable to submit the application form any earlier. On 13 March 2001 the Chamber closed the provisional file and re-registered the case.

6. In the application form submitted 13 March 2001, the applicant requested that the Chamber order the respondent Party, as a provisional measure, to immediately imprison B.B.. On 4 June 2001, the Chamber decided not to order the provisional measure requested.

7. On 4 June 2001 the Chamber also decided to transmit the application to the respondent Party for its observations on the admissibility and merits thereof.

8. The respondent Party submitted its observations on 27 August 2001 and on 24 September 2001 the Chamber received the applicant’s reply to these observations. Additional information was submitted by the respondent Party on 26 November 2001.

9. On 4 June 2001, 12 October 2001, 7 November 2001 and on 8 February 2002 the Chamber considered the admissibility and merits of the application. On 8 February 2002 the Chamber adopted the present decision.

III. FACTS

A. Established facts

10. The main facts of the case are uncontested. On 16 July 1998 at around 21.00 o'clock B.B., having drunk alcohol, started an argument with Š.T., whom he did not previously know and who did not provoke him. B.B. then went to his car that was parked in front of Š.T.'s house and took an automatic rifle from it. He shot twice at Š.T. from a close distance, hitting Š.T. with one shot in the head. Š.T. died of the injury on 17 July 1998. B.B. did not deny these facts at his trial. According to the judgement he stated that due to his extensive alcohol consumption he could not remember having murdered Š.T.. He remembered only that there had been some shooting in front of the house, that he had been hit in the area of the nose and chin by some unknown person and that due to post-traumatic stress he had run away from the site.

11. On 21 October 1998 the Municipal Court issued a procedural decision in the case. The court found that the accused B.B. had committed the criminal offence of murder. In accordance with Article 63 of the Criminal Code of the Socialist Republic of Yugoslavia, which is in the relevant parts identical to Article 63 of the Criminal Code of the Federation of Bosnia and Herzegovina in force after 28 November 1998 (hereinafter "the Criminal Code", see paragraph 20) the court ordered that B.B. must undergo the security measure of mandatory psychiatric treatment in the Clinic Hospital in Mostar. He was not sentenced to any imprisonment or other punishment. The decision was based on the court's opinion that B.B.'s criminal accountability at the moment of the crime was reduced to such an extent that punishment was inappropriate. The expert heard by the court established that two hours after the killing B.B.'s blood-alcohol concentration amounted to 1,23 o/oo. The expert concluded that the misuse of alcohol and the post-traumatic stress from the alleged blow in the nose impaired the faculties of the accused B.B. so as to make him unable to understand the significance of his conduct and of controlling it.

12. The panel of judges deciding the case in the Municipal Court and the public prosecutor are all citizens of Bosnia and Herzegovina of Croat origin, as are the defence council and the accused. The victim Š. T. was a citizen of Bosnia and Herzegovina of Bosniac origin. The applicant, his sister, is also of Bosniac origin.

13. The applicant filed an appeal against the procedural decision of the Municipal Court of 21 October 1998 to the same court. The Municipal Court rejected the appeal on 10 November 1998. It based its rejection on Article 360 paragraph 4 of the old Code of Criminal Proceedings according to which an injured party may not contest the reasons of a verdict on the merits.

14. The applicant filed a complaint against the decision of the Municipal Court of 10 November 1998. The case was transferred to the Cantonal Court in Livno which requested the Supreme Court of the Federation of Bosnia and Herzegovina ("Supreme Court") to refer the case to another Cantonal Court because of a lack of judges in the Cantonal Court in Livno. By decision of 8 January 1999 the Supreme Court referred the case to the Cantonal Court West Herzegovina in Široki Brijeg.

15. On 15 January 1999 the Cantonal Court West Herzegovina in Široki Brijeg refused the applicant's appeal as being ill-founded without re-examining the case. It upheld the procedural decision of the Municipal Court of 10 November 1998. The court based its decision on the procedural ground that the family of the victim as the damaged party does not have the right to challenge a decision ordering the security measure of mandatory psychiatric treatment.

16. On 20 January 1999 the President of the Municipal Court in Livno issued a decision ordering B.B. to undergo mandatory psychiatric treatment at liberty in place of the treatment in custody previously ordered. The public prosecutor appealed to the Cantonal Court in Livno against this decision on the ground that it had been taken by the President of the Court. The Cantonal Court upheld the appeal and returned the case to the Municipal Court for reconsideration. On 30 March 1999 the Municipal Court issued a decision suspending the security measure of mandatory psychiatric treatment in custody, ordering the release of B.B. and ordering the security measure of mandatory psychiatric treatment at liberty on the basis of Article 64 of the Criminal Code of the Federation of Bosnia and Herzegovina. B.B. was released in accordance with this decision and has been free ever since.

17. At the request of the applicant the Federal Attorney in Sarajevo lodged, as an extraordinary remedy, a petition for the protection of legality against the decisions of the Municipal Court of 21 October 1998 and of the Cantonal Court West Herzegovina in Široki Brijeg of 15 January 1999. The Federal Attorney argued *inter alia* that the Livno Municipal Court had not established the responsibility of the accused in a fair and legal way since it had not given reasons and proper explanations for its findings. There were also contradictions in its findings. In particular, the Municipal Court first established that the accused was dangerous and then changed the security measure on the basis of a contradictory finding that he was not dangerous. Furthermore, the Municipal Court could not have established the total incompetence of the accused only on the basis of his intoxicated state or post-traumatic stress, especially as this decision gave no reasons for its finding.

18. In its decision of 13 July 1999 the Supreme Court found that the Federal Attorney's petition was well-founded. It found that the decision of the Livno Municipal Court violated Article 13 paragraph 3 of the Criminal Code and Article 358 paragraph 1 item 11 of the Code of Criminal Procedure. It stated in particular that it could not be seen from the decision for what temporary or permanent mental disease, temporary mental disorder or mental retardation the accused was declared mentally incompetent. Reference to the degree of intoxication and post-traumatic stress was not sufficient for the finding of incompetence. In relation to the question of intoxication the Municipal Court had failed to take the provisions of Article 13 paragraph 3 of the Criminal Code into account and decide on the existence of *actiones liberae in causa*. It had not stated what kind and level of the alleged post-traumatic stress was, how the accused was influenced by it and how and to what extent it influenced the capability of the accused to understand his actions and conduct his behaviour. Just to state the existence of post-traumatic stress was not sufficient to declare somebody completely incompetent. The Supreme Court further held that the Municipal Court in Livno had violated Article 476 paragraph 2 of the Law on Criminal Procedure because it had not summoned experts and doctors of the proper psychiatric institution.

19. However, in its decision upon a petition for protection for legality the Supreme Court could not change the decisions of the Municipal Court and the Cantonal Court as Article 409 paragraph 2 of the Code of Criminal Procedure prevents *reformatio in peius* at the expense of the accused.

B. Relevant law

1. Criminal Code of the Federation of Bosnia and Herzegovina

20. The new criminal Code of the Federation of Bosnia and Herzegovina, hereinafter "the Criminal Code" (Official Gazette of the Federation of Bosnia and Herzegovina, hereinafter "OG FBiH" no. 43/98 of 20 November 1998), came into force on 28 November 1998. Before this date, the old Criminal Code, which was taken over from the former Socialist Republic of Bosnia and Herzegovina, was in force (OG SRBiH nos. 16/77, 19/77, 32/84, 19/86, 40/87, 41/87, 33/89, 2/90, 24/91 and OG RBiH nos. 16/92, 21/92, 13/94, 28/94 and 33/94)

21. Article 13 of the Criminal Code sets out the rules to determine criminal responsibility. It reads as follows:

"(1) The person who has committed a criminal offence is not considered mentally competent if at the time of committing the criminal offence he was incapable of understanding the significance of his act or controlling his conduct due to a lasting or temporary mental disease, temporary mental disorder, or mental retardation. (incompetence, insanity)

(2) If the capacity of the perpetrator to understand the significance of his act or controlling his conduct was diminished due to one or all of the conditions mentioned in paragraph 1 of this article, he may be punished less severely. (significantly reduced mental competence)

(3) The perpetrator shall be considered criminally responsible if, by abusing alcohol, he has brought himself into such a state as not to be capable of understanding the

import of his actions or controlling his conduct, and if prior to his placing himself in such a state, the act was premeditated or if he was negligent in relation to the criminal offence and the act in question is punished by law if committed in negligence.”

22. Article 40 paragraph 1 of the Criminal Code reads in the relevant parts as follows:
“(1) The court shall pronounce the punishment within the limits provided by the law for the particular offence taking into account all circumstances bearing on the magnitude of the punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal liability ... the degree and danger or injury to the protected object....”
23. Article 171 paragraph 1 of the Criminal Code and the identical Article 36 paragraph 1 of the old Criminal Code state:
“(1) Whoever deprives another person of his/her life shall be punished with imprisonment for no less than five years.”
24. Article 61 of the new Criminal Code reads as follows:
“The following security measures may be pronounced on perpetrators of criminal offences:
1) mandatory psychiatric treatment and custody in a medical institution.”
25. According to Article 63 paragraph 1 of the Criminal Code the court shall pronounce mandatory psychiatric treatment on a perpetrator who has committed a criminal offence in a state of lack of or substantially diminished mental capacity if there is the danger that the perpetrator might commit a grave criminal offence if he was set free. Article 63 paragraph 3 regulates the case that the perpetrator is sentenced to imprisonment but also has to undergo mandatory psychiatric treatment in an institution. In this case, the prison sentence is reduced for the period of time spent in the psychiatric institution.

2. Code of Criminal Procedure of the Federation of Bosnia and Herzegovina

26. The Code of Criminal Proceedings (OG FBiH No. 43/98 of 20 November 1998) (hereinafter “the Code of Criminal Proceedings”) came into force on 28 November 1998, replacing the old Code of Criminal Proceedings (OG SFRY 26/86, 74/87, 57/89, 3/90 and OG R BiH 2/92, 9/92).
27. Article 354 of the Code of Criminal Proceedings (identical to Article 360 of the old Code) reads in the relevant parts as follows:
“(1) An appeal may be filed by the principals, defence counsel, the legal representative of the accused and the injured party.
...
(4) An injured party may contest a judgement only with respect to the court's decision concerning the punitive sanctions for a crime committed against life or body, against the personal and moral dignity or against public security, concerning the costs of criminal proceedings and a claim under property law. However, if the competent prosecutor has taken prosecution over from the injured party as prosecutor, the injured party may file an appeal on all grounds on which the judgement may be contested. “
28. Article 358 paragraph 1 item 11 of the Code of Criminal Procedure (identical to Article 364 of the old Code) reads in the relevant parts as follows:
“(1) The following constitute an essential violation of the provisions of criminal procedure

11) if the pronouncement of the judgement is incomprehensible, internally inconsistent or inconsistent with the grounds of the judgement or if the judgement has no grounds at all or if it did not cite reasons concerning the decisive fact or if those reasons were all together unclear or contradictory to a considerable extent, or if there is a considerable discrepancy concerning the decisive fact between what is cited in the grounds of the judgement concerning the content of documents or records concerning testimony given in proceedings and those documents and records themselves.”

29. Article 381, paragraph 1 of the Code of Criminal Procedure reads as follows:

“(1) In the opinion part of the judgement or decision the appellate court shall evaluate the allegations in the appeal and those violations of the law it has automatically to take into account.”...

30. Article 409, paragraph 2 of the Code of Criminal Procedure, in so far as relevant, reads as follows:

“ (2) If a petition for protection of legality has been filed to the detriment of the accused, and the Supreme Court of the Federation finds that it is well founded, it shall establish merely that a violation has occurred, without affecting the valid decision. ...”

31. Article 476, paragraphs 1, 2 and 5 of the Code of Criminal Procedure (identical to Article 494, paragraphs 1, 2 and 5 of the old Code) read as follows:

“(1) Enforcement of the security measure of mandatory psychiatric treatment and deprivation of liberty in a medical institution shall be decided after the main trial is held by the court which has the original jurisdiction in the case.

(2) In addition to the persons who must be summoned to the main trial, experts and psychiatrists shall also be summoned from a medical institution commissioned to make an expert evaluation of the mental capacity of the accused. The accused shall be summoned if his condition is such that he can attend the main trial. ...

(5) All persons who have the right to appeal a judgement, except the injured party, have the right to file an appeal against a decision of the court within 8 days of the date of the decision’s receipt.”

IV. COMPLAINTS

32. The applicant complains that the accused B.B., in spite of being criminally responsible for the death of the applicant’s brother Š.T., did not receive any punishment for his crime. She claims that the decision of the Municipal Court of 21 October 1998 and the conduct of the public prosecutor in the case led to this result.

33. The applicant does not name any specific Articles of the Convention. From her application it can be concluded that she complains that her late brother Š.T. has been violated in his rights protected by Article 2 of the Convention and by Article 2 in conjunction with Article 13 of the Convention. The applicant further complains that there was no effective investigation into her brother’s death which might give rise to a violation of Article 2 of the Convention in regard to her own rights as a relative. From the applicant’s description of the circumstances of the trial before the Municipal Court and the allegations made in regard to the ethnic composition of that court, it can be understood that the applicant further alleges discrimination against her brother on ethnic grounds in regard to his rights under Article 2 of the Convention and in regard to his rights under Article 5 (a) (equal treatment before the courts) and 5 (b) (right to security of person and protection of the State against violence and bodily harm inflicted by individuals) of CERD. The applicant further alleges discrimination on grounds of ethnic origin in the enjoyment of her own right to equal treatment before the courts as protected by Article 5 (a) of CERD.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

34. The respondent Party is of the opinion that the application is inadmissible with regard to the six-months rule, as the application was filed on 13 March 2001, more than two years after the decision of the Municipal Court of 21 October 1998 had become final and binding.

35. The respondent Party asserts that, even if the application were to be found admissible, there are no violations of the applicant's human rights. In particular, there was no violation of Article 2 of the Convention. The security measure of mandatory psychiatric treatment of B.B. by the Municipal Court was a correct application of the law. Furthermore, Article 13 was not violated because the Supreme Court in its decision upon the petition for protection of legality acted in accordance with the law. According to the Code of Criminal Procedure, it could not change the sentence of the accused B.B.. Finally, the respondent Party submits that there is no case of discrimination. The reason why the public prosecutor and the panel of judges in the court proceedings in Livno were all of the same ethnic origin was simply due to the fact that at the time all judges, lay judges and public prosecutors elected to work in the Municipal Court were of the same (i.e. Croat) ethnic origin.

B. The applicant

36. In regard to the admissibility of the case, the applicant's representative refers to his bad state of health. He states that he was unable to submit the application form earlier, although he had been asked by the Chamber to do so in response to his letter of 17 June 1999.

37. The applicant alleges that during the trial before the Municipal Court there was an unfavourable, biased atmosphere towards her as a member of the family of the victim. The applicant claims that about 80 members of the military unit in which the accused B.B. served were present during the trial adding to this hostile atmosphere. According to the applicant and her representative, who also represented her during the trials before the domestic courts in regard to her brother's death, the public prosecutor remained extremely and unusually passive during the whole proceeding. He did not ask any specific questions to illuminate the circumstances of the crime, nor did he try to find out more detailed information on the perpetrator's state of mind at the time of the criminal act. Furthermore, the prosecutor did not file an appeal against the first-instance decision. Thereby he put the applicant into a difficult position. The applicant alleges that as the damaged party under the law of the time she was procedurally barred from appealing against the incorrectly and incompletely established factual background and the application of law in the decision. Finally, the applicant stresses that she does not seek pecuniary compensation but a fair trial against B.B. resulting in just punishment.

VI. OPINION OF THE CHAMBER

A. Admissibility

38. Before considering the case on its merits the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a) the Chamber shall consider whether effective remedies exist and the applicant has demonstrated that they have been exhausted, and whether the application was submitted within six months of the final decision in the applicant's case.

39. In its observations on the admissibility and merits of 27 August 2001, the respondent Party claims that the application is inadmissible in respect to the six-months rule as the application was filed on 13 March 2001, more than two years after the decision of the Municipal Court of 21 October 1998 had become final and binding. In his reply of 24 September 2001, the applicant's representative refers to his bad health. He submits medical documents substantiating that he was unable to work.

40. According to Rule 46 paragraph 5 of the Chamber's Rules of Procedure "the date of introduction of the application shall generally be considered to be the date of the first communication from the applicant, setting out, even summarily, the subject matter of the application." Hence, the date of introduction is the date of the applicant's first letter. This rule reflects also the long-standing case-law of the European Commission of Human Rights interpreting the six-months requirement broadly (see, e.g. European Commission of Human Rights, *Mercier de Bettens v Switzerland*, no. 12158/86, decision on admissibility of 7 December 1987, Decision and Reports 54, p.178).

41. The Chamber notes that the purpose of the six-months rule is not to create an empty formal requirement. On the contrary, the rule is designed to ensure a certain degree of legal certainty and to ensure that cases raising problems under the Convention are examined within a reasonable time.

42. The Chamber finds in the light of the spirit and purpose of the six-months rule, that in the present case the six-months period was interrupted on 17 June 1999, the date on which the Chamber received the letter of the applicant. In this letter she lays out in great detail the facts and the alleged violations of the case. The six-months period began to run on 15 January 1999, the date on which the Cantonal Court West Herzegovina in Široki Brijeg refused the applicant's appeal, less than six months before the date of the letter.

43. Hence, the Chamber finds that the application was submitted within six months of the final decision in the applicants' case and the applicant complied with Article VIII(2)(a) of the Agreement.

44. As no other ground for declaring the case inadmissible has been put forward, the Chamber declares the application admissible.

B. Merits

45. Under Article XI of the Agreement the Chamber must next address the question whether this case discloses a breach by the respondent Party of its obligations under the Agreement. 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 Convention and the other international agreements listed in the Appendix to the Agreement.

46. Under Article II(2) of the Agreement, the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix (including the Convention), where such a violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ.

1. Article 2 of the Convention (right to life)

a) in regard to Š.T.

47. The applicant complains that her brother was killed and that the perpetrator, although he was prosecuted, was effectively allowed to go free because the courts did not conduct a fair trial against him. The Chamber will examine whether this amounts to a violation of Š.T.'s rights as protected by Article 2 of the Convention. In addition this may amount to a breach of the applicant's own rights under Article 2 of the Convention as the relative of the deceased person. The relevant part of Article 2 of the Convention reads as follows:

“ (1) 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.”

48. In its observations on the admissibility and merits of the case, received on 27 August 2001, the respondent Party interprets the scope of Article 2 paragraph 1 in regard to the present case, stating: “The State has to efficiently apply laws, which contain punishment for intentional murders committed by individuals or by the representatives of authority who act outside their legal authorisation.”

49. The respondent Party then goes on to conclude that in the present case Article 2 of the Convention has not been violated. It argues that the decision of the Municipal Court of 21 October 1998 pronouncing the security measure of mandatory psychiatric treatment of the accused B.B. was a just decision and established an appropriate criminal sanction for the perpetrator.

50. The Chamber agrees with the respondent Party’s interpretation of the obligations that arise for the state parties under Article 2 paragraph 1 of the Convention. It recalls that the European Court of Human Rights has ruled “‘that the first sentence of Article 2 paragraph 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.’ (see Eur. Court HR, *the L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, paragraph 36). The State’s obligation in this respect requires it to put in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.” (see Eur. Court HR, *Osman v. UK*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3159, paragraph 115). It requires *inter alia* that there should be “some form of effective official investigation when individuals have been killed as a result of the use of force.” (see e.g. Eur. Court HR, *McKerr v. U.K.*, judgment of 4 May 2001, paragraph 111). The essential purpose of such investigation “is to secure the effective implementation of the domestic laws which protect the right to life” (*ibid*) and the investigation must be effective in the sense that it is capable of leading “... to the identification and punishment of those responsible,” this being not an obligation of “result but of means” (*ibid*, paragraph 113). In examining whether these obligations under Article 2 have been complied with the Court has taken into account not only the adequacy of police investigation but also the actions of the prosecuting authorities and the courts in relevant criminal proceedings (see e.g. *ibid*, paragraphs 130-136).

51. The obligation to carry out an effective investigation is not confined to cases where the implication of state agents has been established (see e.g., Eur. Court HR, *Yasa v. Turkey*, judgment of 2 September 1998, paragraph 100). Furthermore, in accordance with the jurisprudence of the European Commission of Human Rights of 2 September 1991 in *Dujardin v. France* (Eur. Commission HR, No. 16734/90, Decision and Reports 72, p. 236) there is a positive obligation for the State under Article 2 of the Convention to prosecute those who harm life.

52. In the present case the applicant complains essentially that the prosecutor was passive in court and that the domestic courts failed to deal fairly and properly with the case. The Chamber has therefore considered whether the above-mentioned procedural requirements under Article 2 of the Convention were complied with in the proceedings in question.

53. The Chamber finds that the first instance decision of the Municipal Court, that the accused was not criminally responsible for his actions is *prima facie* questionable. In particular, on the evidence available, he does not appear to have had a particularly high level of alcohol in his blood and there are no clear findings that he suffered from any serious mental disorder. It notes furthermore that the Supreme Court held that the Municipal Court’s decision had involved essential violations of the provisions of the Code of Criminal procedure under Article 358 of the Code of Criminal Procedure in that *inter alia* its conclusions on the crucial parts were unsupported by proper reasons. In particular, as outlined in the Supreme Court decision, the Municipal Court failed to determine the question of the accused person’s criminal responsibility in a fair and legal way, not giving proper reasons and making no findings on the nature and level of the so-called “post-traumatic stress syndrome”. It also failed to consider whether the accused deserved a punishment in addition

to mandatory psychiatric treatment, as possible under the law. Having regard to these and the other failures found by the Supreme Court, the Chamber can only conclude that there was a fundamental failure by the Municipal Court to give proper consideration to the crucial question of the accused's criminal responsibility for the death of Š.T..

54. The Chamber does not therefore agree with the conclusion of the respondent Party that in the present case the procedural obligations of the State under Article 2 of the Convention were met. The law-enforcement machinery for the sanctioning of the breach of criminal law provisions has failed in the present case. The statement in Article 2 of the Convention that "everyone's right to life shall be protected by law" gives rise to obligations of the State which continue under certain circumstances even after the death of a person. An efficient protection of life by the State as required by Article 2 of the Convention is unthinkable if a killer can take somebody else's life in the knowledge that he will not be sanctioned for his crime. One of the aims of a criminal sanction is to constitute a deterrence to potential perpetrators and to ensure public peace.

55. In fact, the decision is so seriously flawed that, in light of the situation in Canton 10 in 1998 which will be discussed later in the context of discrimination, it gives rise to suspicion as to whether B.B., a member of the Croat majority in Canton 10, when shooting Š.T. in the head, acted in the awareness of the probability that no adequate sanction would follow. Hence, it is fair to say that the respondent Party has failed to effectively deter B.B. from his crime as he might have had legitimate reasons to believe that he would not be punished.

56. The absurdity of sending the perpetrator to mandatory psychiatric treatment without any punishment is illustrated by the fact that after a very brief period B.B. was discharged from the psychiatric clinic, and declared to be a healthy and sane person.

57. The Supreme Court in its decision of 13 July 1999 further found the Cantonal Court West in Široki Brijeg to be in breach of the Code on Criminal Procedure when it refused the appeal against the Municipal Court's decision on procedural grounds without re-examining the case. According to the Supreme Court there was an obligation on the Cantonal Court to deal with the substance of the appeal.

58. The Chamber notes, that the court proceedings reached a stage in which, according to the Code of Criminal Procedure, the decision and the sentence could no longer be revised to the detriment of the accused. As a factual result, B.B., in spite of killing Š.T., was effectively allowed to go free after a very brief period of custody without being adequately sanctioned for his crime. It is likely that this factual outcome was intended by the Municipal Court when it issued its procedural decision. The court took its decision of 21 October 1998 knowing that it could only be challenged by the accused B.B. himself or the public prosecutor, neither of whom had any interest of challenging the decision: The accused did not have any interest because the decision suited his interests, while the public prosecutor collaborated with the Municipal Court with his intentional passivity.

59. The procedural decision of the Municipal Court and the fact that the public prosecutor failed to appeal against it in spite of the *prima facie* violations of the law amount to a negation of Š.T.'s right to life as protected by Article 2 of the Convention.

b) in regard to E.M.

60. The Chamber will further consider whether Article 2 of the Convention has also been violated in respect of the applicant Ms. E.M. herself.

61. The Chamber notes, that there is a long-standing jurisprudence of the European Court of Human Rights in which the Court finds a violation of Article 2 of the Convention in cases brought before it by relatives of killed persons when no effective investigation into the deaths of those relatives have been carried out (see e.g. *Akdeniz*, judgment of 31 May 2001 or *Mc Kerr*, judgment of 4 May 2001).

62. In the present case the applicant's brother has been killed and the trial against the perpetrator ended in a flawed decision of the Municipal Court in Livno of 21 October 1998 which was

based on completely inadequate grounds. As discussed above, the respondent Party thereby violated the brother's right as protected under Article 2 of the Convention. The failure of the respondent Party in addition also violates the applicant herself in her right to have a proper investigation and trial in regard to her brother's death, a positive obligation that arises from Article 2 of the Convention.

2. Discrimination in the enjoyment of the right to life, the right to equal treatment before the tribunals and all other organs administering justice and the right to security of person and protection of the State against violence and bodily harm

63. The applicant complains that during the court proceedings before the Municipal Court there has been discrimination in regard to the rights of her late brother Š.T. as protected by Article 2 of the Convention, in so far as the perpetrator of the crime did not receive a fair trial and was not adequately sanctioned because, as a person of Croat background, he had killed a Bosniac. In particular, the applicant claims that during the trial before the Municipal Court, composed of members of Croat ethnicity only, there was an unfavourable, biased atmosphere towards her as a member of the family of the Bosniac victim. About 80 members of the military unit in which the accused B.B. served were allegedly present during the trial adding to this hostile atmosphere. The applicant further alleges that the public prosecutor remained extremely and unusually passive during the whole proceedings. He omitted to ask any specific questions to illuminate the circumstances of the crime including the mental state of the accused, with whom the public prosecutor shared the same ethnic origin. He also failed to appeal against the decision. The applicant concludes on that basis that she has been discriminated herself, as an injured party in the criminal trial, in regard to her right to equal treatment before the courts.

64. The Chamber notes that it has already found a violation of Š.T.'s rights in regard to Article 2 of the Convention. It must now consider whether he has suffered discrimination in the enjoyment of the rights protected by Article 2 of the Convention.

65. The Chamber will consider this allegation under Article II(2)(b) of the Agreement, which states that the Chamber shall consider:

“alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this [Agreement]”

in connection with Article 5 paragraphs (a) and (b) of CERD that read:

“In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- a) The right to equal treatment before the tribunals and all other organs administering justice
- b) The right to security of person and protection of the State against violence and bodily harm, whether inflicted by government officials or by any individual, group or institution. “

66. In examining whether there has been discrimination in violation of the Agreement, the Chamber recalls the jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee. As the Chamber noted in its decision in *Đ.M.* (case no. CH/98/756, decision on admissibility and merits delivered on 14 May 1999, paragraph 72, Decisions January–July 1999), these bodies have consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular

onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in the relevant provisions, including religion or national origin.

67. The Chamber recalls that the obligation of the Parties to the Agreement to “secure” the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on the respondent Party a positive obligation to protect those rights (see the aforementioned decision in *D.M.*, paragraph 74). Analogous obligations are also contained in the Constitutions of Bosnia and Herzegovina, of the Federation of Bosnia and Herzegovina and of the Republika Srpska.

68. The Chamber notes that the applicant’s late brother was of Bosniac origin. The accused and his lawyer and also the panel of judges and the public prosecutor are all citizens of Bosnia and Herzegovina of Croat origin.

69. The Chamber notes further that Canton 10 is comprised of a majority population of Croat descent where, consequently, the applicant belongs to a minority population. Both the Constitution of Bosnia and Herzegovina and the Constitution of Canton 10 stipulate that the composition of the judiciary shall reflect the population structure of the Canton. This also includes an adequate representation of minorities.

70. In its observations on the admissibility and merit of this case of 27 August 2001, the respondent Party states in reference to a letter of the Municipal Court of 18 July 2001: the reason that the panel of judges and the prosecutor during the trial of B.B. were all of the same ethnic origin (i.e. Croat) is simply due to the fact that at the time of the trial no judges, lay judges or public prosecutors of the Municipal Court were elected to work there who were of a different ethnic origin.

71. The Chamber recalls that it has already previously found that in 1998 there was a pattern of discrimination against persons of Bosniac origin with respect to the enjoyment of their rights before the courts of Canton 10, and that at the time there was a practice in Canton 10 according to which only members or sympathisers of the ruling Croat party were appointed to judicial office. Furthermore, the respondent Party has in a submission regarding a previous case, concerning proceedings before the same court during the same period of time, conceded that there is “a problem” in the court system in Canton 10 “in respect of both efficiency and independence” (see the aforementioned decision in *D.M.*, paragraphs 70-88, paragraph 87).

72. In light of all the aforementioned considerations and its findings in respect to a violation of Article 2 arising from the fundamental flaws in the proceedings to sanction the crime committed against Š.T., the Chamber finds it established that in the proceedings before the Municipal Court the crime victim Š.T., on account of his Bosniac origin, has been subjected to differential treatment compared with the Croat majority in similar situations. It must be assumed that the nationality of the victim and the perpetrator had an influence on the court and the public prosecutor. The respondent Party has not suggested any justification for the differential treatment in issue and the Chamber cannot, of its own motion, find any such justification.

73. Accordingly, the Chamber concludes that the applicant’s brother Š.T. has been discriminated against in the enjoyment of his right to life under Article 2 of the Convention. In addition, the discrimination of Š.T. also constitutes discrimination in the enjoyment of the rights under Article 5 (a) and (b) of CERD, namely the right to equal treatment before the tribunals and all other organs administering justice and the right to security of person and protection by the State against violence and bodily harm.

74. The Chamber notes that the applicant is a citizen of Bosnia and Herzegovina of Bosniac origin. In addition to the findings regarding Š.T., the Chamber finds, in the light of what it has discussed above, that there has also been discrimination in regard to the applicant’s own rights “to equal treatment before the tribunals and all other organs administering justice” as protected by Article 5(a) of CERD.

3. Article 13 of the Convention in Conjunction with Article 2 of the Convention

75. The applicant also alleges that no effective remedy was available to her brother Š.T. in respect of the complaints of a violation of the rights under Article 2 of the Convention, contrary to Article 13 of the Convention, which provides as follows:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

76. The Chamber has already decided that the case primarily raises issues under Article 2 of the Convention. It considers that, in light of the findings it has made in respect of that Article, and also in respect to the findings made in regard to discrimination, it is not necessary for it to examine the case under Article 13 of the Convention.

VII. REMEDIES

77. Under Article XI(1)(b) of the Agreement the Chamber must next address the question what steps shall be taken by the respondent Party to remedy breaches of the Agreement which it has found, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures.

78. The applicant requests that the respondent Party be ordered to conduct a fair trial against B.B., the murderer of her brother Š.T., in which he is sentenced to the sentence he deserves. In the application form the applicant expressly states that she does not request any pecuniary compensation. In a letter of the applicant’s representative of 20 September 2001 the applicant repeats that she does not seek any form of pecuniary compensation. Her request to the Chamber is only directed to find help in her quest that B.B. be punished for the killing of Š.T. in a fair way. In the circumstances, the Chamber will therefore confine itself to consider the claim of the applicant E.M. for a retrial of B.B..

79. The Chamber has found the respondent Party to be in breach of its obligation to ensure to everyone within its jurisdiction the rights guaranteed in the Agreement. In particular, the respondent Party has been found to have violated Š.T.’s right to life, and to have discriminated against him in the enjoyment of his right to life, to equal treatment before the tribunals and to protection of the State against violence. In addition, the respondent Party is found to have discriminated against E.M. in regard to her right to equal treatment before the tribunals and E.M.’s rights under Article 2 of the Convention to a proper investigation and fair trial in regard to her brother’s death.

80. The Chamber notes that under ordinary domestic law a retrial of the accused as requested by the applicant would not be possible. In accordance with the Code of Criminal Proceedings, B.B.’s acquittal on grounds of criminal irresponsibility is *res judicata* and at the stage of a decision upon a petition for protection of legality a *reformatio in peius* is no longer allowed.

81. The Chamber is well aware of Article 4 of Protocol No. 7 to the Convention, which contains a prohibition of *ne bis in idem*. Article 4 of Protocol No. 7 reads in the relevant parts as follows:

“(1) No one shall be liable or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law or the penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”

82. In the context of the present case, the Chamber has to find a balance of interest between the applicant’s requests that the respondent Party be ordered to conduct a fair trial against B.B., the murderer of her brother Š.T., in which he would be sentenced to the sentence he deserves and the interest of B.B. that no new trial is conducted against him. Behind these two individual interests in

conflict there are two general interests equally at odds that require balancing: the need of the community for appropriate prosecution and punishment of crimes and the need of the community for a certain measure of legal certainty. In finding the balance between these opposing needs the Chamber finds on one hand that the respondent Party is in breach of its obligations under Article 2 of the Convention. The Chamber on the other hand also takes into consideration that Article 4 of Protocol No. 7 to the Convention generally forbids a retrial of B.B. in regard to the murder of Š.T. .

83. In finding a fair balance of interests between the rights of the applicant and the rights of B.B. the element of time plays an important role. The Chamber notes that more than three years have passed since the decision of the Municipal Court in Livno of 21 October 1998 in which the court ordered B.B. to undergo mandatory psychiatric treatment in custody. The Chamber notes further that, ever since the Cantonal Court in Široki Brijeg on 15 January 1999 had refused the appeal against the decision of the Municipal Court in Livno of 21 October 1998, B.B. could be confident that there would be no sentence of imprisonment or other punishment for his deed. The Chamber finds that it is for reasons that fall within the applicant's sphere that such a long time elapsed between the Chamber's decision and the time since which B.B. could think that he knew all consequences of his deed. As discussed in paragraph 38 above due to the bad health of the applicant's lawyer, almost two years have passed between the applicant's initial letter of 17 June 1999 and the submission of the application on 13 March 2001.

84. In the light of the considerable time elapsed the Chamber whilst not excluding that a retrial could have been ordered, finds that it would not be appropriate to order a retrial in this case.

VIII. CONCLUSIONS

85. For the reasons given above, the Chamber decides:

1. unanimously, to declare the application admissible.
2. unanimously, that there has been a violation of Š.T.'s right to life as guaranteed by Article 2 of the European Convention on Human Rights, the respondent Party thereby being in violation of Article I of the Agreement;
3. unanimously, that there has been a violation of E.M.'s right to a proper investigation into her brother's death as guaranteed by Article 2 of the European Convention on Human Rights, the respondent Party thereby being in violation of Article I of the Agreement;
4. unanimously, that there has been discrimination against Š.T. in the enjoyment of his rights protected by Article 2 of the European Convention on Human Rights thereby also discriminating against him in the enjoyment of Article 5(a) and (b) of the Convention for the Elimination of All Forms of Racial Discrimination, the respondent Party thereby being in violation of Article I of the Agreement;
5. unanimously that there has been discrimination against the applicant E.M. in the enjoyment of her right as protected by Article 5(a) of the Convention for the Elimination of All Forms of Racial Discrimination, the respondent Party thereby being in violation of Article I of the Agreement;
6. unanimously, that it is not necessary to examine the case under Article 13 of the European Convention on Human Rights;
7. unanimously, not to order a retrial of B.B., as requested by the applicant E.M..

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel