DECISION ON THE MERITS

of

CASE No. CH/96/30

Sretko DAMJANOVIĆ

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 5 September 1997, with the following members present:

Jakob MÖLLER, Vice-President (Acting President)
Dietrich RAUSCHNING
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Mehmed DEKOVIĆ
Giovanni GRASSO
Miodrag PAJIĆ
Manfred NOWAK
Michèle PICARD
Vitomir POPOVIĆ
Viktor MASENKO-MAVI

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the merits of the Application by Sretko DAMJANOVIĆ against the Federation of Bosnia and Herzegovina, registered under Case No. CH/96/30 and declared admissible by the Chamber on 11 April 1997 under Article VIII paragraph 2 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 on the merits of the case under Article XI of the Agreement and Rules 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. The applicant is Sretko Damjanović who is currently held in prison in Sarajevo under sentence of death passed by a military court in Sarajevo in 1993. The application was originally presented by his sister, Ranka Đukić, who resides in Pale in the Republika Srpska. It concerns the threatened carrying out of the death penalty on the applicant and raises issues under Article 2 of the European Convention on Human Rights and Protocol No. 6 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was submitted to the Chamber by Ranka Đukić and was received by the Chamber on 13 December 1996. It was registered on the same day as an application by Ms Đukić. On 16 December 1996 the President of the Chamber decided, in accordance with Article X paragraph 1 of the Agreement and Rule 36 of the Chamber's Rules of Procedure, to order the respondent Party to secure that the death penalty on Mr Damjanović was not carried out pending the Chamber's consideration of the case. This decision was communicated to the Agent of the respondent Party on the same day. By letter of 19 December 1996 the Minister of Justice of the respondent Party made certain observations on the case.

3. The case was considered by the Chamber[*] at its session from 3 to 7 February 1997. The Chamber decided in accordance with Rule 49 (3) (b) of its Rules of Procedure to give notice of the application to the respondent Party and to invite it to submit, before 18 March 1997, observations on the admissibility and merits of the application, including observations on a number of specific questions. The Chamber also decided to maintain in force the order for provisional measures made by the President. No response was received from the respondent Party to the Chamber's invitation to submit written observations. On 3 April 1997 Ranka Đukić submitted a letter of authority signed by Mr Damjanović authorising her to act on his behalf in proceedings before the Chamber. On 11 April 1997 the Chamber declared the application admissible. In view of the letter of authority the Chamber also decided to treat the application as one by Mr Damjanović as applicant rather than one by Ranka Đukić. The relevant entry in the Chamber's register was amended accordingly.

4. The Chamber also decided, following the decision to declare the application admissible, again to invite the respondent Party to submit written observations on the merits of the case and also to hold a hearing on the merits of the case. By letter dated 18 June 1997 the respondent Party submitted information relating to the case. It also stated that its Agent would be unable to attend the hearing and requested that the hearing should be held in his absence. It further suggested that the hearing might be postponed pending the completion of proceedings for review of the applicant's conviction. The Acting President of the Chamber considered these requests and decided to invite the respondent Party to appoint another person to represent it at the hearing. The hearing took place on 9 July 1997. The applicant was represented by Advocate Branko Marić and was also present at the hearing in person. The respondent Party was represented by Mrs Ediba Tafro. Following the hearing both parties submitted further information, including in particular copies of relevant judgements.

III. ESTABLISHMENT OF THE FACTS

A. The Proceedings against the Applicant

5. The facts of the case relating to the criminal proceedings against the applicant, as they appear from the submissions of the parties and the documents in the file, are summarised hereafter.

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

Certain of the facts, in particular in relation to the fairness of the proceedings, are disputed. The respective positions of the parties in relation to such disputed facts are set out in this section of the Decision.

6. On 12 March 1993 the applicant and a co-accused, Borislav Herak, were convicted, by judgement No. K-I-14/93 of the District Military Court (Okružni Vojni Sud) in Sarajevo, of criminal acts contrary to Articles 141 and 142 of the Criminal Law. Article 141 relates to the crime of Genocide and Article 142 relates to war crimes against the civilian population (see paras. 12 and 13 below). The applicant and his co-accused were both sentenced to death. The decision was taken by a Panel of the court consisting of two professional judges, one of whom was the President of the Panel, and three lay judges. On 30 July 1993 the Supreme Court (Vrhovni Sud) of Bosnia and Herzegovina, sitting in Sarajevo, in Judgement No. KZ 44/93, made certain alterations to the facts on which the applicant's conviction was based but otherwise upheld the verdict of the District Military Court. The verdict was also confirmed by a different panel of the Supreme Court, sitting at third instance, in judgement No. KZ 191/93 on 29 December 1993. The acts to which the applicant's conviction, as upheld by the Supreme Court, related included the murder of two brothers named Blekić, the murder of a person named Ramiz Kršo, four other murders, two rapes and an abduction.

7. The applicant alleges that his trial was not fair. He alleges in particular that the evidence against him consisted almost entirely of statements by himself and his co-accused which were obtained by severe ill-treatment whilst he was in police custody, which lasted eight days as opposed to the legal maximum of three days. The applicant allegedly had four knife wounds on his body at the time of his trial, which had been inflicted after his arrest. In his statement to the police the applicant admitted having killed the Blekić brothers, whom he knew. They were subsequently found to be alive. There was prejudicial media coverage of the case before the trial. The applicant's lawyer was, it is alleged, given inadequate opportunity to see the applicant before the trial. At the time of the trial Sarajevo was under siege and all possible witnesses were outside the territory under Government control. The applicant's lawyer was thus limited to trying to put the prosecution evidence in doubt.

8. The respondent Party maintains that the applicant received a fair trial.

9. On 9 December 1996 the applicant's lawyer submitted to the High Court in Sarajevo a request for a renewal of the criminal proceedings against the applicant on the basis of new evidence. In this request it was stated that reliable information was now available to the effect that the two Blekić brothers, who had allegedly been murdered by the applicant, were alive and well and that criminal proceedings had also been instituted against other persons for the murder of Kršo Ramiz. The request for renewal was refused by the Cantonal Court in Sarajevo on 13 June 1997. The applicant appealed to the Supreme Court of Bosnia and Herzegovina against this decision. According to press reports the Supreme Court has remitted the case back to the Cantonal Court for further consideration. It appears therefore that these proceedings are still pending.

B. Relevant Provisions of National Law

(i) The Criminal Law

10. The applicant was sentenced to death on the basis of provisions in the Criminal Law of the Socialist Federal Republic of Yugoslavia (Službeni List of the SFRY Nos. 44/76, 34/84, 74/87, 57/89 and 3/90), which were adopted as the law of the Republic of Bosnia and Herzegovina (Službeni List of RB & H, No. 2/92).

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

12. Article 141 of the Criminal Law relates to the crime of genocide. It provides that anyone who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, orders the

commission of murders or other defined acts, or who commits such acts, shall be punished by imprisonment of at least five years or by the death penalty. There is no provision in Article 141 restricting its applicability to time of war. The full terms of Article 141 are as follows:

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

13. Article 142 of the Criminal Law concerns war crimes against the civilian population. It provides that anyone who, in violation of the rules of international law in time of war, armed conflict or occupation, orders or commits any of a number of defined acts, including the subjection of the civilian population to murders, shall be punished by imprisonment for at least five years or by the death penalty. Its full terms are as follows:

> "Anyone who in violation of the rules of international law in time of war, armed conflict or occupation, orders the subjection of the civilian population to murders, torture, inhuman treatment, biological experiments, great suffering, injuries to physical integrity or health, expatriation or displacement, deprivation of national identity by force, or conversion to another religion, forced prostitution or rape, acts of intimidation or terror, the taking of hostages, orders of collective punishment, unlawful confinement in concentration camps or other unlawful taking into custody, deprivation of the right to a fair and impartial hearing, forced service in the enemy armed forces or intelligence service or administration, the performance of forced labour, subjection of the population to starvation, orders for the confiscation of property, the looting of property of the population, the excessive confiscation of property without military necessity, unlawful and deliberate devastation, the taking of unlawful, substantial and disproportionate contributions and requisitions, the inflation of the domestic currency, the unlawful issue of currency, or who commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

(ii) Military Courts

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

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

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

IV. FINAL SUBMISSIONS OF THE PARTIES

A. The Applicant

17. On behalf of the applicant it is suggested that the carrying out of the death penalty imposed on him would involve a violation of the Agreement and in particular a violation of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

B. The Respondent Party

18. The respondent Party submits that the case should be declared inadmissible under Article VIII paragraph 2 (a) of the Agreement on the ground that effective alternative remedies exist and have not been exhausted or alternatively on the ground that the application has been introduced out of time. In the alternative it submits that the case should be rejected on the ground that it is ill-founded.

V. OPINION OF THE CHAMBER

19. In terms of Article XI paragraph 1 (a) of the Agreement the Chamber must, in the present decision, address the question whether the facts found indicate a breach by the respondent Party of its obligations under the Agreement. Before doing so the Chamber has, however, first considered the arguments as to admissibility which have been raised by the respondent Party.

A. Issues of Admissibility

20. The Chamber has first considered the respondent Party's argument to the effect that the case should be declared inadmissible under Article VIII paragraph 2 (a) of the Agreement on the ground that the applicant has not exhausted other effective remedies and that the application has been submitted to the Chamber out of time having regard to the six months time limit referred to in that provision. Article VIII paragraph 2 of the Agreement provides as follows:

> "2. The Chamber shall decide which applications to accept.... In so doing the Chamber shall take into account the following criteria:
>
> > (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted and that the application has been filed with the Commission within six months from such date on which the final decision was taken."

The respondent Party has argued that the application should be declared inadmissible under this provision on the ground that the request for renewal of the proceedings against the applicant is still pending. It has further argued that the six months time limit referred to in Article VIII (2) (a) has not been complied with in respect that the Chamber was established in March 1996 whilst the application was submitted only in December 1996.

21. The Chamber notes that it decided on 11 April 1997 to declare the application admissible under Article VIII (2) of the Agreement. Before taking that decision it invited the respondent Party to submit written observations on the admissibility of the application under Article VIII (2) and on the merits of the application but the respondent Party did not avail itself of that opportunity. The objections to admissibility outlined above were raised for the first time at the hearing on the merits of the case.

22. The Chamber notes that the European Court of Human Rights has consistently refused to entertain objections to the admissibility of cases brought before it unless such objections have first been raised at the admissibility stage of proceedings before the European Commission of Human Rights, to the extent that their character and the circumstances permitted, (See De Wilde and Others v. Belgium, Series A No. 12, paras. 53 - 59; Artico v. Italy, Series A No. 37, paras. 24 -28). In particular it stated in the De Wilde Case that it was "a requirement of the proper administration of justice and of legal stability" that objections to admissibility should as a general rule be raised *in limine litis*, (ibid para. 54) and in the Artico Case that "the spirit of the Convention requires that respondent States should normally raise their preliminary objections at the stage of the initial examination of admissibility, failing which they will be estopped" (ibid para. 27). Similar considerations apply, in the Chamber's opinion, in relation to proceedings under the Annex 6 Agreement. The structure of the Agreement implies that the Chamber should normally determine any questions of admissibility which arise under Article VIII (2) at the initial stage of proceedings, and it would be contrary to the proper administration of justice to permit a respondent Party, without good reason, to raise an objection to admissibility for the first time after the admissibility decision has been taken.

23. The Chamber sees no reason why the respondent Party could not have raised its objections to admissibility when it was initially invited to submit observations on the matter and finds that it is precluded from doing so now. The Chamber will not therefore make any further examination of the admissibility of the case.

B. The Merits

24. The applicant has submitted that the carrying out of the death penalty would violate his human rights as guaranteed by the Annex 6 Agreement.

25. Article I of the Agreement provides that:

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

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

26. The Chamber has considered the present case under Article 2 of the European Convention and also under Protocol No. 6 to the Convention. Article 2 (1) of the Convention provides 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."

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

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

27. The respondent Party has argued that the carrying out of the death sentence on the applicant would be covered by Article 2 of Protocol No. 6 and would not therefore involve any violation of his rights.

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

29. As to Article 2 of the Protocol, the Chamber first recalls that the European Court of Human Rights has held that provisions which provide for exceptions to the rights and freedoms guaranteed by the Convention must be narrowly interpreted, (Klass and Others v. Federal Republic of Germany, Series A No. 28, para. 42). More particularly, with reference to Article 2 of the Convention, the Court has stated as follows:

> "It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the taking of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention.... Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe.... As such its provisions must be strictly construed." (McCann and Others v. United Kingdom, Series A No. 324, para. 147)

In the same case the Court also said, with reference to Article 2 of the Convention:

> "In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny...taking into consideration all the surrounding circumstances..." (ibid. para. 150)

In the Chamber's opinion these remarks are equally applicable to Article 2 of Protocol No. 6. The Chamber must therefore construe this provision strictly and scrutinise carefully the whole circumstances surrounding the threatened execution of the applicant, including the relevant laws, in order to determine whether the execution would be compatible with Protocol No. 6 or not.

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

31. In considering references to domestic law in the context of other Articles of the Convention the European Court of Human Rights has laid down a number of general principles. In particular where the Convention imposes a requirement in terms to the effect that a particular measure should be "lawful" or "in accordance with law" this presupposes that there should be compliance with domestic law. The Convention organs therefore have jurisdiction, albeit limited, to determine the question whether relevant domestic law has been complied with, since disregard of such law will entail a breach of the Convention, (See e.g. Winterwerp v. Netherlands, Series A. No. 33, paras. 39 & 45-46). However such expressions do not merely refer back to domestic law but also relate to the quality of the law. The law must be adequately accessible and must be formulated with sufficient precision so that the citizen can "foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail" (Sunday Times v. United Kingdom, Series A. No. 30, para. 49). The law must also be compatible with the Convention, including the general principles such as respect for the rule of law which are expressed or implied therein, and must protect the individual against

arbitrary interference with his rights, (Winterwerp Case sup. cit., para. 45; Malone v. United Kingdom, Series A. No. 82, para. 67).

32. Bearing these principles in mind, the Chamber considers that before Article 2 of Protocol No. 6 can apply there must be specific provision in domestic law authorising the use of the death penalty in respect of defined acts committed in time of war or of imminent threat of war. The law must define with adequate precision the acts in respect of which the death penalty may be applied, the circumstances in which it may be applied, and the concepts of "time of war or of imminent threat of war." Article 2 requires that before it can apply the legislature should have considered and defined the circumstances in which, exceptionally in the context of a legal system where the death penalty has been abolished, such penalty may nevertheless be applied in respect of acts committed in time of war or imminent threat thereof.

33. In the present case the applicant was convicted and sentenced to death on the basis of Articles 141 and 142 of the Criminal Law (see paras. 12 and 13 above). Article 141, which relates to the crime of genocide, is not restricted in its applicability to acts committed in time of war or imminent threat of war. In the Chamber's view it is not therefore a valid basis for the application of Article 2 of the Protocol and in so far as the applicant's sentence is based on it there is therefore a violation of his rights under Article 1 of Protocol No. 6. As to Article 142 the Chamber notes that it applies to acts committed in time of "war, armed conflict or occupation." Prima facie this phrase appears to be capable of covering situations which would not fall within the concept of "time of war or of imminent threat of war" referred to in Article 2 of the Protocol. The Chamber notes furthermore that Article 142 covers a large variety of criminal acts which may be of widely varying gravity. Under Article 37 of the Criminal Law the death penalty may only be imposed for the most serious cases of severe crimes. Reading these two provisions together the Chamber finds that it is difficult to predict which of the acts referred to in Article 142 might be subject to the death penalty and which might not. In the Chamber's opinion therefore Article 142 lacks the necessary precision both in defining the circumstances in which the death penalty applies and the acts to which it applies and cannot therefore form a valid basis for the application of Article 2 of Protocol No. 6 either. In so far as the applicant is threatened with execution on the basis of his conviction under Article 142 there is therefore also a violation of his rights under Article 1 of the Protocol.

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

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

36. One of the agreements listed in Annex I to the Constitution is the Second Optional Protocol to the International Covenant on Civil and Political Rights. Article 1 of this Protocol provides for the abolition of the death penalty and stipulates that no one within the jurisdiction of a state party to the Protocol shall be executed. Article 2 provides that no reservation to the Protocol is admissible except for a reservation "that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." The Chamber notes that under this provision the "application" of the death penalty is permissible only in time of war. The word "application" covers both the imposition and carrying out of the death penalty in the

Chamber's view. The effect of the Second Optional Protocol is therefore to impose an absolute prohibition, without the possibility of any reservation or exception, on the imposition or carrying out of the death penalty in time of peace. Since no state of war now exists in Bosnia and Herzegovina, the carrying out of the death penalty on the applicant would therefore not now be compatible with the Second Optional Protocol.

37. The question which next arises is therefore whether a law authorising the carrying out of the death penalty in peacetime can be considered consistent with the Constitution given that it would not be in conformity with the Second Optional Protocol. The provisions of the Constitution referred to above (para. 35) do not expressly provide for any of the human rights agreements referred to, apart from the European Convention and its Protocols, to be directly applicable in Bosnia and Herzegovina. It is provided in Article II paragraph 4, which is headed "Non-Discrimination," that the rights and freedoms provided for in the other human rights agreements "shall be secured to all persons...without discrimination." In the Chamber's view this provision includes both an obligation to secure the rights in question to all persons and an obligation to do so without discrimination. It is one aspect of the general obligation under Article II paragraph 1 of the Constitution "to secure the highest level of internationally recognized human rights...." This interpretation is confirmed by Article I of the Annex 6 Agreement (see para. 25 above), where the general obligation referred to is stated as including the obligation to secure the rights and freedoms guaranteed by all the agreements listed. Where one of the human rights agreements referred to imposes a clear, precise and absolute prohibition on a particular course of action, the only way in which the obligation to secure the right in question to all persons without discrimination can be carried out is by giving effect to the prohibition. Laws which run counter to such a prohibition cannot therefore be considered consistent with the Constitution and cannot therefore be regarded as a proper basis in domestic law for any action which is required under the European Convention to be lawful in domestic law. The Chamber therefore considers that Articles 141 and 142 of the Criminal Law, in so far as they authorise the use of the death penalty in peacetime, are not consistent with the Constitution and that the threatened execution of the applicant would not therefore be provided for by national law for the purposes of Article 2 of Protocol No. 6 to the European Convention. It would therefore breach Article 2 of Protocol No. 6 for this reason also.

38. Independently of its finding that the carrying out of the death penalty would be incompatible with Article 2 of Protocol No. 6, the Chamber will also consider whether the execution of the applicant would be in conformity with Article 2 of the European Convention itself. This prohibits use of the death penalty "save in the execution of the sentence of a court...." In the context of Article 5 of the European Convention the European Court of Human Rights has held that in order to constitute a "court" an authority "must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty" (De Wilde and Others v. Belgium, Series A No. 12, para. 76). It further pointed out that the Convention uses the word "court" in a number of different provisions, including Article 2 (1), and stated that:

> "It does so to mark out one of the constitutive elements of the guarantee afforded by the provision in question....In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place." (ibid para. 78)

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

39. In considering whether a body is "independent," the European Court of Human Rights has had regard to "the manner of appointment of its members and the duration of their term of office…the existence of guarantees against outside pressures…and the question whether a body presents an appearance of independence" (Campbell and Fell v. United Kingdom, Series A No. 80, para. 78). It has also said that "the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence…" although "…the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and the other necessary guarantees are present…" (ibid. para. 80). The Court has also held that the requirements of independence and impartiality apply to jurors and lay judges as they do to professional judges, (Holm v. Sweden, Series A No. 279, para. 30).

40. As to the present case, the Chamber notes that Article 20 of the Law on District Military Courts, as in force at the time of the proceedings against the applicant in 1993, provided that both professional and lay members of the District Military Courts were normally appointed and dismissed by the Presidency of the Republic of Bosnia and Herzegovina on the proposal of the Minister of Defence. No minimum period of office was laid down and no grounds or procedure for dismissal were specified. There was thus no legal protection of the judges' tenure of office. Although, as indicated by the European Court, such legal protection may not always be necessary, the Chamber considers that in the context of a case such as the present one, where a strict approach to the requirements of independence and impartiality must be taken, legal protection against removal of the judges must normally be considered an essential requirement of independence. At the very least, the clearest evidence that the irremovability and independence of the judges was recognised in practice would be required. The Chamber does not find such evidence before it in the present case. The Chamber notes furthermore that the District Military Court was operating in a situation of conflict where outside pressure on its members was likely. In such a situation the fact that members of the Court were, as a matter of law, subject to dismissal on the proposal of the Defence Ministry, could give rise to legitimate doubts as to whether they met the high standard of independence required in a case where life was at stake. In the circumstances the Chamber concludes that the District Military Court lacked a sufficient appearance of independence and cannot therefore be regarded as a "court" for the purposes of Article 2 (1) of the Convention.

41. The Chamber notes that the applicant's case was heard on appeal at the second and third instance before different panels of the Supreme Court of Bosnia and Herzegovina. No material has been placed before the Chamber which could lead it to conclude that this body should not be regarded as a "court" for the purposes of Article 2 (1) of the Convention. The Chamber notes that the Supreme Court did not find it necessary to investigate the facts or hear witnesses. However in criminal proceedings of the classical kind it is essential that the "court" before which the trial at first instance is held should meet the requirements of independence and impartiality arising under the Convention, (De Cubber v. Belgium, Series A No. 86, paras. 31 - 33). The fact that the applicant's case was heard on appeal by a court does not therefore suffice to remedy the defect arising in relation to the structure and composition of the Military Court which tried the case at first instance. In accordance with the case-law of the European Court of Human Rights the source of the defect "being the very composition of the …criminal court, the defect involved matters of internal organisation" and could be cured only by the quashing of the first instance judgement, (ibid. para. 33).

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

43. To sum up, therefore, the Chamber concludes that the carrying out of the death penalty on the applicant would not be covered by Article 2 of Protocol No. 6 to the Convention and that it would breach his rights under Article 1 of that Protocol and Article 2 of the Convention itself.

44. In the decision on the admissibility of the case the Chamber also raised the question whether the applicant's treatment since the entry into force of the Agreement had been compatible with Article 3 of the Convention having regard, *inter alia,* to the length of time for which he had been held under sentence of death. At the hearing the applicant indicated that he had no complaint as to his present

conditions of detention and the question of a possible breach of Article 3 was not pursued by his representative. In these circumstances the Chamber sees no reason to pursue the matter further.

VI. REMEDIES

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

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

47. The Chamber notes that proceedings in respect of the applicant's request for a renewal of the criminal proceedings are still pending. The grant of a retrial would constitute an appropriate remedy.

48. The Chamber also reserves to the applicant the right to submit within two months of the date of delivery of this decision any claim he wishes to make for other redress.

VII. CONCLUSIONS

49. For the reasons given above the Chamber:

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

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

3. Unanimously **orders** the respondent Party (a) not to carry out the death sentence on the applicant and (b) to secure that the death sentence against him is lifted without delay and **further orders** the respondent Party to report to it before 8 November 1997 on the steps taken by it to give effect to these orders;

4. Unanimously **reserves** to the applicant the right to apply to the Chamber before 8 December 1997 for any other redress he wishes to claim and **further reserves** for future decision the question of procedure to be followed in relation to any such claim.

(signed) Andrew GROTRIAN
Registrar of the Chamber

(signed) Jakob MÖLLER
Vice-President of the Chamber
(Acting President)

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate concurring opinion by MM. Manfred NOWAK and Jakob MÖLLER, and a separate concurring opinion by MM Viktor MASENKO-MAVI and Rona AYBAY.

Concurring opinion of Manfred Nowak and Jakob Möller

1. While we agree with the conclusions of the Chamber that the carrying out of the death penalty on the applicant would involve a violation of Article 2 of the European Convention as well as of Article 1 of Additional Protocol No. 6 thereto, we wish to state the following. According to Article II (4) of the Constitution of BH (Annex 4 of the Dayton Peace Agreement), the enjoyment of the rights and freedoms provided for in the international agreements listed in Annex I to this Constitution shall be secured to all persons in BH without any discrimination. Article 1 (1) of the Second Optional Protocol (OP) to the International Covenant on Civil and Political Rights (CCPR), which is listed in Annex I, provides that no one shall be executed. Since Article 2 of the Second OP is not applicable, the right of every person within the jurisdiction of BH not to be executed is an absolute right and all organs of the State of BH and its entities have the constitutional obligation to secure this right. By virtue of the Second Transitional Arrangement contained in Annex II to the Constitution, all laws which provided for the execution of a person are clearly inconsistent with the Constitution and, therefore, do not remain in effect after 14 December 1995. Consequently, it is irrelevant whether the imposition of the death penalty before that date was in accordance with the law in force at that time and whether the sentence was imposed by an independent and impartial court after a fair trial or not. Even if all requirements of Article 2 of the European Convention and Article 2 of the Sixth Additional Protocol thereto were met, the carrying out of a death penalty after the entry into force of the Dayton Peace Agreement would nevertheless constitute a violation of the constitutional obligation to secure the absolute right not to be executed.

2. The constitutional obligation to secure the right not to be executed has to be distinguished from the international obligations of Bosnia & Herzegovina according to Annex 6 and the respective jurisdiction of the Chamber. According to Article I of Annex 6, "The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex." With respect to the jurisdiction of both the Ombudsperson and the Chamber, Article II makes, however, an important distinction. The Chamber shall consider all alleged or apparent violations of human rights as provided in the European Convention and Additional Protocols but only alleged or apparent discrimination arising in the enjoyment of the rights provided for in the other international agreements. In other words: While the absolute right not to be executed, provided for in Article 1(1) of the Second OP to the CCPR, shall be secured by the Federation of Bosnia & Herzegovina, irrespective of any alleged or apparent discrimination, the Chamber may only consider the possible violation of this right in case of alleged or apparent discrimination. Although the facts include certain indications of a discriminatory treatment on the ground of the national origin of the applicant, this has not been explicitly alleged by the applicant and we agree with the Chamber that the facts are not sufficient to show an apparent discrimination. That is why the Chamber cannot address the question whether the carrying out of the death penalty would constitute a violation of Article 1(1) of the Second OP on the ground of discrimination but must restrict itself to findings in relation of Article 2 of the European Convention and the Sixth Additional Protocol thereto.

(signed) Manfred Nowak

(signed) Jakob Möller

Concurring opinion of Viktor Masenko-Mavi and Rona Aybay

Though we have voted with all the other members of the Chamber in holding that the execution of the applicant would involve a violation by the respondent Party of its obligations under Protocol No. 6 and under Article 2 of the Convention itself, thus associating ourselves with the conclusions reached, for the sake of clarification we feel bound to add some supplementary observations. These observations we intend to put forward in light of the main defending argument of the respondent Party, namely, that the carrying out of the death sentence on the applicant would not involve any violation of the Convention. This argument cannot be accepted for different reasons, some of which we shall try to formulate below.

1. The European Convention on Human Rights and its protocols, including Protocol No. 6, - according to the provisions of Annex 6 of the Dayton Agreement and those of the Constitution of Bosnia and Herzegovina - are directly applicable instruments and have priority over all other laws in Bosnia and Herzegovina. In other words, in this case the scope of legal obligations of Bosnia and Herzegovina (including their consequences) is similar to that of those member states of the Council of Europe, which have ratified both the Convention and its Protocol No. 6. The main argument of the respondent Party, that is the claim that it has the right to execute the applicant on the basis of Article 2 Protocol No. 6, has to be examined first of all in light of the above-mentioned nature and scope of its obligations.

2. Protocol No. 6 of the European Convention leaves a very narrow margin of discretion for contracting states in the domain of death penalty issues. A state which is bound by its provisions has to reckon with the following consequences:

a) The provisions of Protocol No. 6 modify the content of para. 1 Article 2 of the Convention in the sense that they leave no possibility for the application of the death penalty by a contracting state in time of peace. It has been acknowledged that the intention of the contracting parties when adopting this Protocol was "to adopt a normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace" (Soering Case, Series A No. 161, para. 103). In time of war or of imminent threat of war para. 1 of Article 2 of the Convention may regain its validity, provided that a contracting state to the Protocol has made provision in its law for the death penalty in accordance with the provision of Article 2 of Protocol No. 6. This kind of "automatic reactivation" of para. 1 Article 2 of the Convention is aimed at preventing arbitrary and summary executions in time of war on the basis of a guarantee provided by the use of term "court" as developed in the case-law of the Convention.

b) This Protocol establishes a subjective and justiciable right of individuals not to be condemned to death in peace time, which implies that a contracting state must delete the death penalty from the system of its criminal law sanctions.

c) A contracting state may adopt special laws which allow death penalty in respect of acts committed in time of war, and may apply this penalty only in instances laid down by law and in accordance with the provisions of this law.

3. As it is evident from the facts of the case, the applicant has committed the impugned acts in time of war, however, the sentence has not been executed so far, that is, during the wartime period. The main point at issue is the interpretation of Article 2 of the Protocol, namely: would it be possible for the respondent Party to execute the applicant in time of peace, provided that the requirements of Article 2 were met? In other words, how should the provisions of Article 2 be interpreted: do they imply that a state is entitled to apply the death penalty even in peace time for acts committed in time of war or imminent threat of war? Taking into account the primary aim of Protocol No. 6, which has been adopted by the contracting states with a clear intention to abolish capital punishment in peace time, and considering also the last developments in the penal policy of European democratic states (at this particular moment of development death penalty is regarded as an alien institution within the system of European democratic values), the answer should be a negative one.

Furthermore, Article 2 of Protocol No. 6, which is an exception from the main rule, should be interpreted restrictively, like any other exception. The term "applied" used by it could only mean that both the imposition and execution of the death penalty might have relevance only in war time period. If the situation in the concerned state has been normalised, that is, if normal conditions of peaceful life have been re-established, there would be no practical reasons for executions, and one can hardly provide any reasonable argument for reserving the right for the concerned state to apply the death penalty.

(signed) Viktor Masenko-Mavi

(signed) Rona Aybay