



**DECISION ON REQUEST FOR REVIEW
OF DECISION ON ADMISSIBILITY AND MERITS**

CASE No. CH/97/69

Borislav HERAK

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 13 November 1998 with the following members present:

Ms. Michèle PICARD, President
Mr. Manfred NOWAK, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Rona AYBAY
Mr. Vlatko MARKOTIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

Mr. Leif BERG, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the respondent Party's request for a review of the decision of the First Panel of the Chamber on the admissibility and merits in the aforementioned case;

Having considered the Second Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS

1. The applicant was born on 18 January 1971 in Sarajevo. On 16 May 1992, he was conscripted into the Bosnian Serb armed forces. He was arrested by the Army of the Republic of Bosnia and Herzegovina on 11 November 1992.
2. On 12 March 1993 the applicant was convicted by the District Military Court in Sarajevo of criminal acts contrary to Articles 141, 142 and 144 of the Criminal Law. Article 141 relates to the crime of Genocide and Article 142 relates to war crimes against the civilian population. Article 144 relates to war crimes against prisoners of war. The applicant's conviction related to 35 murders of civilians, the murder of 3 prisoners who were members of the Army of the Republic of Bosnia and Herzegovina and 14 rapes. The applicant and a co-accused, Sretko Damjanović, were both sentenced to death. The applicant appealed against this decision but his appeal was dismissed.
3. On 25 May 1994, the applicant's father submitted a request for a pardon to the Presidency of Bosnia and Herzegovina. He states that no decision has been made on this application to date.

II. PROCEEDINGS BEFORE THE CHAMBER

4. On 22 September 1997, the applicant wrote a letter addressed to the International Criminal Tribunal for the former Yugoslavia in the Hague. At the suggestion of the Federal Ministry of Justice of the respondent Party, the letter was forwarded to the Chamber on 29 September 1997. The applicant submitted a formal application on 13 October 1997 through the Federal Ministry of Justice. The case was registered on 31 October 1997.
5. On 4 November 1997 the Chamber considered the case and decided, as a provisional measure to order the respondent Party to secure that the death penalty against the applicant was not carried out pending the Chamber's consideration of the case. After the establishment of panels in accordance with Article X(2) of the agreement the case was assigned to the First Panel.
6. On 12 June 1998 the First Panel delivered the Chamber's decision on the admissibility and merits of the case. It found that the execution of the death penalty against the applicant would involve a violation by the respondent Party of its obligations under Article 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 6 to the Convention, and that the respondent Party was thereby in breach of its obligations under the Agreement. Accordingly, the respondent Party was ordered (1) not to carry out the death sentence on the applicant and (2) to secure that the death sentence against him was lifted without delay.
7. On 25 June 1998, the respondent Party submitted a request for a review of the decision on the admissibility and merits.
8. On 16 July 1998, the Second Panel of the Chamber considered the request for review in accordance with Rule 64(1). On 7 September 1998 it adopted a recommendation to the Plenary Chamber regarding the request. On 10 September 1998 and 14 October 1998, the Plenary Chamber considered the request and the Second Panel's recommendation.
9. In accordance with Rule 21(1)(b) Mr 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 the Republic of Bosnia and Herzegovina.

III. REQUEST FOR REVIEW

10. The request was based on the ground that the applicant was not at risk of having the death sentence carried out against him, as there were a number of legal remedies available to the applicant which he had not sought to avail of. It also stated that the pardon procedure initiated by the applicant's father was not yet concluded.

11. The respondent Party also claimed that the Chamber should not have examined the independence of the District Military Court who passed the original decision convicting the applicant as that decision was passed prior to the entry into force of the Agreement.

IV. OPINION OF THE CHAMBER

12. Article X(2) of the Agreement provides:

“The Chamber shall normally sit in panels of seven, composed of two members from the Federation, one from the Republika Srpska, and four who are not citizens of Bosnia and Herzegovina or any neighbouring state. When an application is decided by a panel, the full Chamber may decide, upon motion of a party to the case or the Ombudsman, to review the decision; such review may include the taking of additional evidence where the Chamber so decides. References in this Annex to the Chamber shall include, as appropriate, the Panel, except that the power to develop general rules, regulations and procedures is vested only in the Chamber as a whole.”

13. Article XI(3) of the Agreement stipulates that “subject to review as provided in paragraph 2 of Article X, the decisions of the Chamber shall be final and binding.”

14. It follows from these aforementioned provisions that the proceedings provided for in Article X (2) are the only possibility envisioned in the Agreement for reviewing a decision on the merits delivered by the Chamber. This is, however, an exceptional procedure which firstly applies only to applications decided by a Panel. Secondly, the Plenary Chamber has discretionary power as to whether it wishes to accept a request for review. Article X para. 2 of the Agreement does not further specify how the Chamber shall exercise this discretionary power. When adopting its Rules of Procedure, the Chamber decided to be guided in its proceedings by the provisions adopted by the Council of Europe in the 11th Protocol to the European Convention of Human Rights and Fundamental Freedoms. The relevant Rules read as follows:

Rule 63:

1. Upon motion of a party to the case or the Ombudsperson the full Chamber may decide to review:
 - a decision of a Panel declaring an application inadmissible under para. 2 of Article VIII of the Agreement;
 - a decision of a Panel to reject an application under Article VIII para. 3 of the Agreement;
 - a decision of a panel on the merits of an application, including a decision on pecuniary or other remedies, under Article XI of the Agreement.
2. Any such request for review shall be made within one month of the date on which the Panel's reasoned decision is communicated to the parties under Rule 52 or delivered under Rule 60 and shall specify the grounds of the request.

Rule 64:

1. Any request for review under Rule 63 shall be referred to the Panel which did not take the decision in question and that Panel shall make a recommendation to the Plenary Chamber as to whether the decision should be reviewed or not.
2. The Plenary Chamber shall consider the request for review and the recommendation of the Panel and decide whether to accept the request or not. It shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision.

Rule 65:

1. If the Plenary Chamber accepts the request for review it shall decide on the procedure to be followed. It may invite the parties to submit written or oral observations or additional evidence on any aspect of the case.
2. During review proceedings the Plenary Chamber may make such orders for provisional measures as it thinks fit.

3. The Plenary Chamber shall decide any case in which it accepts a request for review. The provisions of Rules 55-61 shall apply *mutatis mutandis*.

Rule 66:

1. Decisions of the Chamber shall be final and binding in accordance with para. 3 of Article XI of the Agreement.

2. Decisions of Panels which are reviewable under Rule 63 shall become final and binding:

(a) when the parties declare that they will not request review;

(b) when the time limit referred to in Rule 63 para. 2 has expired without any request for review

(c) when a request for review has been refused under Rule 64.

3. When a Panel takes a decision which is reviewable under Rule 63 it may order such provisional measures as it thinks fit to protect the interests of the parties until the decision becomes final and binding under the preceding paragraph.

4. After a request for a review has been made the Plenary Chamber may make any such order for provisional measures and may revoke or vary any such order made by the Panel which took the decision under review.

15. In the present case the Chamber finds that the grounds upon which the respondent Party's request for review is based could have been raised during the proceedings before the panel which considered the admissibility and merits of the case. However, at no stage of the proceedings did the respondent Party submit any observations on the admissibility or merits of the case. The Chamber therefore does not consider that "the whole circumstances justify reviewing the decision" as stipulated in Rule 64(2)(b). In addition, the case does not raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as stipulated in Rule 64(2)(a).

16. In conclusion, the respondent Party's request for review does not meet the two conditions required for the Chamber to accept such a request.

V. CONCLUSION

17. For these reasons, the Chamber unanimously

REJECTS THE REQUEST FOR REVIEW.

(signed)
Leif BERG
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber