# DECISION ON ADMISSIBILITY

**Case no. CH/98/548**

**Savo IVANOVIĆ**

**against**

**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 9 March 2000 with the following members present:

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

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

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

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement as well as Rule 52 of its Rules of Procedure:

## I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Montenegrin origin. In 1992 he was convicted by the Sarajevo High Court of war crimes against the civilian population and sentenced to 15 years of imprisonment. The judgment was confirmed by the Supreme Court of Bosnia and Herzegovina in December 1992. In September 1996 the applicant submitted a petition for the re-opening of the criminal proceedings, which after several decisions by the Cantonal Court (previously the High Court) and the Supreme Court was finally rejected on 10 February 1998. The applicant primarily complains of a violation of his right to an impartial tribunal, on the ground that one of the judges of the Supreme Court panel that rejected his petition to re-open the case in February 1998 had also been a member of the Supreme Court panel that confirmed his conviction in 1992.

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

## II. PROCEEDINGS BEFORE THE CHAMBER

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

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

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

6. The Chamber deliberated on the admissibility of the case on 15 May 1999, 10 February and 9 March 2000. On the latter date it adopted the present decision.

## III. ESTABLISHMENT OF THE FACTS

### A. Particular facts of the case before the domestic courts

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

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

9. On 2 December 1992 the Supreme Court of Bosnia and Herzegovina upheld the judgment of the Sarajevo High Court. One of the five members of the Supreme Court panel in the applicant's case was Judge Malik Hadžiomeragić.

10. On 15 August 1996 the applicant submitted to the then High Court in Sarajevo a petition to reopen the criminal proceedings under Article 404 paragraph 1(4) of the Law on Criminal Procedure (see paragraph 23 below) on the ground that evidence not available at the time of his trial was now available. Such evidence consisted primarily of the testimony of an artillery expert, V.K., a retired artillery colonel, regarding the question whether the applicant could have committed the crime he was found guilty of without being an artillerist and without a "table of signals" on the basis of which to communicate with the besiegers.

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

12. On 10 July 1997 the Supreme Court of the Federation of Bosnia and Herzegovina annulled the decision of the High Court and returned the case for reconsideration. The Supreme Court found that the High Court had erred in that it had denied the petition only on the basis of the case-file, without examining the evidence suggested by the petitioner. The Supreme Court reasoned that the High Court could have declared the petition inadmissible on the ground that it failed to meet the conditions set forth in paragraph 1 of Article 407 of the Law on Criminal Procedure (see paragraph 21 below). However, as it had decided to deny the applicant's petition on the merits, the High Court was under an obligation to examine the allegedly new facts and evidence.

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

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

The Cantonal Court, however, concluded that:

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

14. On 10 February 1998 the Supreme Court rejected the applicant's appeal against the decision of the Cantonal Court. It explained that the evidence on which the applicant's petition was based could not be considered new evidence, as it had been available at the time of the applicant's trial and had not been admitted at that time because it was not necessary in the light of the applicant's confession and of other witness testimony. The Supreme Court added that the Cantonal Court had nonetheless examined this evidence and correctly concluded that it was not such as to warrant a re-opening of the applicant's case. One of the judges on the Supreme Court panel that adopted this decision was Judge Malik Hadžiomeragić, who had been a member of the Supreme Court panel in the applicant's case in 1992.

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

### B. Relevant domestic law

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

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

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

18. Article 404 paragraph 1 read in relevant parts:

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

19. Article 405 provided:

"(1) A petition to reopen criminal proceedings may be filed by the parties and by their counsel, after the death of the convicted person the petition can be submitted on his behalf by the public prosecutor and by the persons mentioned in Article 360 paragraph 2.

(2) In the case referred to in Article 404, paragraph 1, subparagraphs 4 and 6, of this Law it is not permitted to reopen criminal proceedings to the detriment of the convicted or acquitted person if more than 6 months have passed from the date when the prosecutor learned of the new facts or new evidence.

(3) A petition to reopen criminal proceedings on behalf of a convicted person may be filed even after the convicted person has served his sentence and regardless of the statute of limitations, amnesty or pardon.

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

20. Article 406 provided:

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

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

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

21. Article 407 provided:

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

(2) Should the court not reject the petition, it shall serve a copy of the petition on the adverse party, who has the right to answer the petition within 8 days. When the court receives the

answer to the petition or when the period for answer has expired, the presiding judge of the panel shall order that the facts be investigated and evidence obtained as referred to in the petition and the answer to the petition.

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

22. Article 408 paragraph 1 provided:

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

23. Article 409 paragraphs 1 to 3 provided:

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

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

(3) When the court renders a decision in the new proceedings, it shall pronounce that the previous judgment is partially or entirely quashed or that it remains in force. The court shall give the accused credit for time served in the sentence it pronounces in the new judgment; if reopening of the proceedings was ordered only for some of the crimes of which the accused has been convicted, the court shall pronounce a single new sentence under the provisions of the Criminal Code."

## IV. COMPLAINTS

24. The applicant primarily complains that the fact that Judge Malik Hadžiomeragić, who had been one of the judges of the Supreme Court panel that confirmed his conviction in 1992, also sat on the Supreme Court panel that rejected his petition to re-open the case on 10 February 1998 constitutes a violation of his right to a hearing by an impartial tribunal protected by Article 6 paragraph 1 of the Convention.

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

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

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

## V. SUBMISSIONS OF THE PARTIES

### A. The respondent Party

### 1. Admissibility

28. The respondent Party submits that the application should be rejected as being incompatible *ratione temporis* with the Agreement within the meaning of Article VIII(2)(c). The original criminal proceedings against the applicant were concluded on 2 December 1992 and therefore the application would not be within the competence of the Chamber.

29. The respondent Party also claims that, under the same provision of the Agreement, the application should not be accepted on the ground that it is manifestly ill-founded and represents an abuse of the right to petition. It did not provide any further explanation of this submission.

### 2. Merits

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

## B. The applicant

### 1. Admissibility

31. The applicant argues that his complaint refers to the violation of human rights committed during the procedure for the examination of his petition to reopen proceedings, which he lodged after 14 December 1995. Therefore, the application would be compatible *ratione temporis* with the Agreement within the meaning of Article VIII(2)(c).

### 2. Merits

32. As to the merits, the applicant maintains his complaints.

# VI. OPINION OF THE CHAMBER

33. Before considering the merits of a case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Article VIII(2)(c), in particular, reads:

> "The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

## A. Competence *ratione temporis*

34. The respondent Party argues that the application should be rejected as being incompatible *ratione temporis* with the Agreement, on the ground that the original criminal proceedings against the applicant were concluded on 2 December 1992. The applicant replies that his complaint refers to the violation of human rights committed during the procedure for the examination of his petition to reopen proceedings, which he lodged on 15 August 1996.

35. The Chamber recalls that according to generally accepted principles of international law and to its own case-law, it is outside its competence to decide whether events occurring before the coming into force of the Agreement on 14 December 1995 involve violations of human rights (see e.g. case no. CH/96/1, *Matanović*, decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997). This does not apply to the proceedings lodged on 15 August 1996.

36. The Chamber therefore concludes that the case falls within its competence *ratione temporis* insofar as it concerns the proceedings leading to the rejection of the applicant's petition to reopen his case.

37. The Chamber considers, however, that the alleged violations of the applicant's rights to be informed of the charges against him and not to be compelled to testify against himself can only refer to the 1992 proceedings against the applicant. Accordingly, these complaints must be declared inadmissible pursuant to Article VIII(2)(c) as being outside the Chamber's competence *ratione temporis*.

**B. Competence *ratione materiae***

38. The applicant complains that, in the proceedings following his petition of 15 August 1996 for the reopening of his criminal case, his right to receive a fair trial by an impartial tribunal was violated. He also complains that, by denying his petition for a re-trial, the judicial authorities violated his right to "obtain the examination of witnesses on his behalf", protected by Article 6 paragraph 3(d) of the Convention.

39. The Chamber recalls that an application is incompatible with the Agreement *ratione materiae* under Article VIII(2)(c) if the right invoked by the applicant is not protected by the Agreement.

40. Article 6 paragraph 1 of the Convention reads:

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

Article 6 paragraph 3 provides for specific aspects of the right to a fair trial set forth in paragraph 1 of Article 6. It reads, insofar as relevant:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

41. The European Commission of Human Rights has consistently held that no right as such to a re-trial is included among the rights and freedoms guaranteed by the Convention (see, e.g., application no. 7761/77, *X. v. Austria*, decision of 8 May 1978, Decisions and Reports 14, p. 171, at p. 173).

42. The Chamber notes that the applicant's complaint that, by denying his petition for a re-trial, the judicial authorities violated his right to "obtain the examination of witnesses on his behalf" is tantamount to a complaint that he was not granted the possibility to prove his innocence in a new trial. As stated above (paragraph 41), neither Article 6 paragraph 3(d), nor any other provision of the Convention or of any of its Protocols grant a right to a re-trial as such. This complaint is therefore incompatible with the Agreement *ratione materiae*.

43. The European Commission of Human Rights has also consistently held that Article 6 of the Convention does not apply to the proceedings leading to a decision on whether to grant a re-trial or not, as such proceedings do not involve the "determination of a criminal charge" against the applicant within the meaning of Article 6 paragraph 1 of the Convention (see, e.g., the *X. v. Austria* case referred to above). On the other hand, the European Commission has accepted that Article 6 applies to the re-trial proceedings once a case has been re-opened (see, e.g., application no. 14739/89, *Callaghan and Others v. the United Kingdom*, decision of 9 May 1989, Decisions and Reports 60, p. 296).

44. The Chamber notes that it is indisputable that from a formal point of view the proceedings in the applicant's case did not reach the re-trial stage, and that therefore, in the light of the Commission's case-law, Article 6 appears to be inapplicable.

45. The Chamber, however, takes the view that in order to attain that "highest level of internationally recognised human rights" to which the Parties to the Agreement have committed themselves in Article I of the Agreement, it is necessary to go beyond the restrictive approach of the Commission. The Chamber notes that, just as Article 6 of the Convention does not compel the Parties to provide for the possibility to re-open a criminal case after a final decision has been rendered, it also does not contain a provision granting persons convicted on a criminal charge the right to appeal. Nonetheless, in one of its first decisions, already 15 years before Protocol No. 7 to the Convention containing the right to appeal in criminal matters was signed in 1984, the European Court of Human Rights established that:

> "Article 6 (1) of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 [...]. There would be a danger that serious consequences might ensue if the opposite view were adopted [...]. In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision [...].
> 26. Therefore, Article 6(1) is indeed applicable to proceedings in cassation. The way in which it is applicable must, however, clearly depend on the features of such proceedings." (Eur. Court H.R., *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, paragraphs 25-26).

46. The Chamber furthermore notes that, although Protocol No. 7 to the Convention does not provide for the right to seek the review of final decisions in criminal matters, it appears to presuppose the existence of mechanisms to this effect when in Article 3 it prescribes:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

An analogous provision is contained in Article 14 paragraph 6 of the International Covenant on Civil and Political Rights, adopted 18 years earlier (1966) together with a provision providing for a right to appeal.

47. Finally, the Chamber notes that it is not aware of a democratic State whose legal system does not provide, in one form or another, for a mechanism to reverse a conviction which clearly constitutes a miscarriage of justice. Some legal systems place this mechanism within the sphere of administrative authorities, others, among them the legal system of the Federation of Bosnia and Herzegovina, provide that proceedings in these matters take place before a court.

48. The Chamber is of the opinion that, where a decision affecting a convicted person as radically as the decision whether to re-open his criminal case because it is alleged that new evidence shows that there has been a miscarriage of justice, is placed before a court, it is incompatible with the concept of rule-of-law in a democratic society that the most basic rules of fair trial should not apply to the relevant proceedings (see the above citation from the *Delcourt v. Belgium* judgment, paragraph 25). The Chamber cannot overlook the consequences of the opposite view, i.e. that a tribunal need neither be independent, nor impartial, when it decides upon a request to re-open a criminal case in which it is alleged that a miscarriage of justice has occurred, or that a tribunal may divest itself of the restraints placed upon it by the concept of fair trial and even embrace arbitrariness and caprice.

49. This does not necessarily mean that all guarantees set forth in Article 6 equally apply to court proceedings upon a request to re-open a criminal case. Suffice it to note in this regard that in numerous legal systems such proceedings take place *in camera*, and that also the presumption of innocence cannot apply to a person convicted by a final decision in the same way as it applies to an accused before conviction. The statement by the European Court of Human Rights that "the manner in which Article 6(1) applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order" (*Brualla Gómez De La Torre v. Spain* judgment of 19 December 1997, Reports of Judgments and Decisions 1997-VIII, see also the *Delcourt* judgment quoted above, paragraph 26) applies all the more to courts deciding on a request to re-open a case in which a complete set of criminal proceedings has already taken place.

50. To sum up, the Chamber concludes that it is competent to examine the applicant's complaints relating to the proceedings initiated by his petition for the re-opening of his case. The applicant's complaint under Article 6 paragraph 3(d), however, is dismissed as incompatible *ratione materiae* with the Agreement.

### C. Admissibility of the complaint of discrimination

51. The applicant finally complains that he was discriminated against in the enjoyment of the allegedly violated rights on the grounds of his Montenegrin origin. The Chamber notes that the applicant has not made any submissions in support of this allegation, nor does the case-file reveal any discrimination on grounds of nationality against the applicant. This complaint is therefore manifestly ill-founded and the Chamber shall not accept it pursuant to Article VIII(2)(c) of the Agreement.

## VII. CONCLUSION

52. For the above reasons, the Chamber decides,

1. by 7 votes to 6, without prejudging the merits, to declare admissible the applicant's complaint that he did not receive a fair trial before an impartial tribunal in the proceedings following his petition to re-open his case; and

2. unanimously, to declare inadmissible the remainder of the application.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex Dissenting Opinion of Mr. Andrew Grotrian, joined by Ms. Michèle Picard and Messrs. Hasan Balić, Mehmed Deković, Viktor Masenko-Mavi and Mato Tadić

## ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Andrew Grotrian, joined by Ms. Michèle Picard and Messrs. Hasan Balić, Mehmed Deković, Viktor Masenko-Mavi and Mato Tadić.

## DISSENTING OPINION OF MR. ANDREW GROTRIAN, JOINED BY MS. MICHELE PICARD AND MESSRS. HASAN BALIĆ, MEHMED DEKOVIĆ, VIKTOR MASENKO-MAVI AND MATO TADIĆ

I disagree with the decision of the Chamber to declare admissible the applicant's complaint concerning the proceedings relating to his petition to reopen the criminal proceedings against him.

In my view, in accordance with the long-standing case-law of the European Commission of Human Rights, Artcle 6 was not applicable to the proceedings since the applicant was no longer a person charged with a criminal offence. The Commission has held consistently over a long period of time that Article 6 is not appliable to proceedings in which it is sought to reopen criminal proceedings after a conviction has become final (see, e.g., application no. 864/60, *X. v. Austria*, decision of 10 March 1962, Collection of Decisions Vol. 9, p. 17; and application No. 7761/77, *X. v. Austria*, decision of 8 May 1978, Decisions and Reports 14, p. 171).

The majority of the Chamber accept that "in the light of the Commission's case-law, Article 6 appears to be inapplicable" (paragraph 44 of the decision). They consider, however, that "in order to attain that 'highest level of internationally recognised human rights' to which the Parties to the Agreement have committed themselves in Article I of the Agreement, it is necessary to go beyond the restrictive approach of the Commission" (paragraph 45). They do not therefore follow the case-law in question. I do not agree with this approach to the interpretation of the Convention. In particular I do not consider that the terms of Article I of the Agreement require the Chamber to adopt a different approach to the interpretation of the European Convention to that adopted by the Strasbourg institutions.

Article I of the Annex 6 Agreement defines the rights and freedoms which are to be secured to all persons within the jurisdiction of the Parties, namely "the highest level of internationally recognised human rights and fundamental freedoms, *including* the rights and freedoms provided in the European Convention ... and its Protocols and the other international agreements listed in the Appendix to this Annex..." [emphasis added]. It is apparent from this provision that the obligation on the Parties to secure the rights guaranteed by the Convention and its Protocols is a part of the general obligation to secure the highest level of internationally recognised human rights. The fact that the obligation to secure the Convention rights is included in a wider general obligation does not affect the meaning or scope of the Convention or its Protocols or the approach which the Chamber should adopt to their interpretation. I cannot therefore agree that the terms of the general obligation in Article I necessitate, or justify, the adoption of a different approach to the interpretation of the Convention, whether more or less "restrictive", than that adopted by the Strasbourg institutions.

The case-law of the European Commission of Human Rights is not formally binding on the Chamber but in my opinion the Chamber should follow it, particularly were there is a long-standing and consistent body of case-law, unless there are compelling reasons not to do so. I do not find any such reasons in the present case.

The Commission's case-law does not appear to conflict with any principle laid down by the Court in relation to the scope of Article 6. In particular the judgment of the Court in the *Delcourt v. Belgium* case (sup. cit., paragraph 45 of the decision) deals exclusively with the applicability of Article 6 to appeal or cassation proceedings forming part of the ordinary appeal process. In that case the Court, as it has subsequently stated, "established the principle that the protection afforded by Article 6 does not cease with the decision at first instance" (see the *Monnell and Morris v. United Kingdom* judgment of 2 March 1987, Series A no. 115, paragraph 54). It seems clear, however, that it reached its decision in the *Delcourt* case on the basis that a criminal case could not be regarded as having been finally determined until after any appeal or cassation proceedings had been concluded. Article 6

was therefore applicable to any proceedings, at whatever instance, up to that point. In particular it stated:

> "... a criminal charge is not really 'determined' as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way, terminate in an enforceable decision. Proceedings in cassation are one special stage of the criminal proceedings and their consequences may prove decisive for the accused. It would therefore be hard to imagine that proceedings in cassation fall outside the scope of Article 6 para. 1." (*Delcourt v. Belgium* judgment, paragraph 25).

The *Delcourt* judgment does not deal with the fundamentally different situation which arises in the present case, where the conviction *has* "become final" and the proceedings *have* "terminated in an enforceable decision" and the criminal charge has thus been "determined".

It is of course true that in most, if not all, democratic states machinery exists for the review of criminal cases after their final determination, particularly where new evidence is produced. It is also obviously highly desirable that the procedure for dealing with requests for the re-opening of criminal cases should be fair and effective. It does not necessarily follow that Article 6 must apply to such procedures. Since there is a body of case-law of the Commission to the effect that Article 6 does not apply, and no case-law that I am aware of to the opposite effect, I consider that the Chamber should have followed the Commission.

(signed)
Andrew Grotrian

(signed)
Michèle Picard

(signed)
Hasan Balić

(signed)
Mehmed Deković

(signed)
Viktor Masenko-Mavi

(signed)
Mato Tadić