DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 July 2000)

Case no. CH/98/934

Edin GARAPLIJA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 July 2000 with the following members present:

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

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

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

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin. Since June 1992 he has been working as a police officer for a Bosnian State Security Service, the "Agency for Investigation and Documentation" (*Agencija za Istraživanje i Dokumentaciju*, hereinafter "AID"). On 13 June 1997 the Cantonal Court Sarajevo convicted him of abduction and attempted murder and sentenced him to 13 years of imprisonment. The judgment was confirmed by the Supreme Court of the Federation of Bosnia and Herzegovina on 26 May 1998. The applicant is currently serving his prison sentence at the Zenica Correctional Facility.

2. The applicant essentially alleges that his trial was unfair, in particular that he was prevented from defending himself appropriately during his trial and that he is a "political prisoner". The application thus raises issues under Article 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 10 September 1998 and registered on the same day. The applicant is represented by Mr. Faruk Balijagić, a lawyer practising in Brčko and Tuzla.

4. In his application, the applicant requested the Chamber to order the respondent Party as a provisional measure to take all necessary action to protect him from being killed while serving his prison sentence. The Chamber rejected the applicant's request on 11 September 1998. At the same time, he was asked to substantiate the allegation that his life was endangered.

5. On 21 September 1998 the applicant's representative submitted further information and repeated the request for provisional measures. He stated that he had visited his client in prison, where he had learned from him that his name was on a secret list concerning "liquidation". On 13 October 1998 the Chamber rejected the request once again. On the same day, it decided to communicate the application to the respondent Party pursuant to Rule 49(3)(b) of the Rules of Procedure and to grant it precedence under Rule 35(2). The Chamber further decided to inform the Organisation for Security and Co-operation in Europe, the Office of the High Representative, and the United Nations Mission in Bosnia and Herzegovina of the application pursuant to Rule 33(1).

6. On 6 November 1998 the applicant's representative informed the Chamber that his client had been transferred to the Cantonal Clinic in Zenica to undergo an appendix surgery and that neither he nor the applicant's mother had been notified about the incidence. He also expressed doubts whether the diagnosis was correct and reiterated the request for provisional measures. On 9 November 1998 the Chamber requested the respondent Party to provide the applicant's medical records no later than 12 November 1998.

7. As no such evidence was submitted within the prescribed time-limit, on 13 November 1998 the Chamber ordered the respondent Party as a provisional measure to ensure that the applicant could be examined by a team of international doctors and that they have access to all medical documents kept in hospital or in prison. On 23 November 1998 the Chamber received written observations of the respondent Party. On 2 December 1998 the Federation permitted that the applicant be examined by international doctors.

8. On 10 December 1998 three members of the Stabilisation Force's Theatre Surgeon Group carried out the examination of the applicant and of the medical records. The medical team ascertained that the applicant's state of health was good and that the operation of the applicant was in fact medically indicated and even necessary to save his life. It also found that there were no medical circumstances indicating that further detainment would be detrimental to the applicant's health.

9. On 18 December 1998 the Chamber decided to withdraw the provisional order it had issued on 13 November 1998.

10. On 4 August 1999 the applicant's representative reported to the Chamber that his involvement in the case had turned into a "nightmare" and brought him into "great trouble". He said that he and his family were subject to harassment and that he had to give up membership in the Advocate's Bar Association in Sarajevo and become a member of the Mostar Bar Association. Furthermore, he alleged that the AID kept a secret file on him and that his assassination was planned.

11. The respondent Party commented on these allegations on 14 December 1999, stating that Mr. Balijagić's membership in the Sarajevo Bar Association had in fact been suspended. It also stated that he could not be a member of two Bar Associations at the same time. The Federation also contested the existence of a secret file on Mr. Balijagić with any of its authorities. It held that the applicant's representative had lost any credibility since none of his allegations had turned out to be true and proposed that his authorisation to represent the applicant be revoked.

12. Further submissions of the applicant and of his representative were received on 3 December 1998, on 22 February, 23 April, 24 May and 22 December 1999, and on 5 and 26 January, 2 and 22 February, 3 and 7 March and 3 April 2000. The respondent Party sent further observations on 10 June and 30 December 1999, and on 2 February and 30 March 2000. On 17 May 2000 the applicant provided the Chamber with a confidential document issued by the AID ordering him to detain Mr. Nedžad Herenda. This document was transmitted to the Federation on 8 June 2000.

13. The Chamber deliberated on the case on 11 September, 13 October, 13 November and 18 December 1998 and on 13 January, 11 February, 10 March, 11 May, 6 and 8 June and 3 July 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

1. Facts underlying the applicant's conviction (as presented in the first instance judgment)

14. On 25 June 1996 the applicant, together with a Mr. H.P., stopped Mr. Nedžad Herenda in a street in Sarajevo, dragged him into a car and abducted him to a house located somewhere in town. Mr. Herenda was apparently a member of the paramilitary group "Ševa". Inside the house the applicant and H.P. made their victim surrender all his personal belongings. It seemed that the purpose of the abduction was to get hold of certain information in the possession of Mr. Herenda.

15. Mr. Herenda remained in the hands of the accused until 29 June 1996 and was subject to serious ill-treatment. At one point, the applicant fired two pistol bullets into the head of Mr. Herenda, wrapped him into a blanket and threw him out of his car at a place outside Sarajevo. Being still alive, Mr. Herenda was found there and admitted to hospital, where he received intensive medical treatment. Mr. Herenda survived the assault and testified against the accused.

2. Criminal proceedings

16. The applicant was arrested on 2 July 1996 on the grounds of reasonable suspicion that he had committed the crime. During the investigation phase the applicant used his right to remain silent. On 25 December 1996 the competent prosecutor indicted the applicant for the criminal charges of abduction and attempted murder. On 20 January 1997 the main hearing commenced before the Cantonal Court Sarajevo. The applicant was defended by Mr. Fahrija Karkin, a lawyer practising in Sarajevo.

17. At the hearing, the applicant denied that he had committed the crime he was indicted for, stating that on the date in question he was on an official trip in Tuzla from which he only had returned on 30 June 1996.

18. The Cantonal Court rendered a judgment on 13 June 1997. After having heard numerous witnesses, the court found it established that the applicant had abducted and attempted to kill Mr. Nedžad Herenda and sentenced him to 13 years of imprisonment. The public was excluded from a part of the hearings in the case.

19. On 17 July 1997 the applicant appealed against the judgment to the Supreme Court of the Federation of Bosnia and Herzegovina. The appeal alleged erroneous factual and judicial assessment by the Cantonal Court, therefore proposing that the first instance judgment be revoked or the applicant's sentence be reduced. The Supreme Court was also requested to allow the presence of the applicant during the deliberations in order to further explain the appeal reasons.

20. During the proceedings before the Supreme Court, the applicant was represented by his defence counsel, but he was not present in person although he requested to be so. Pursuant to Article 371 paragraph 1 of the Law on Criminal Proceedings (see paragraph 26 below) he was only informed that a session would be held on 26 May 1998. On the same day the Supreme Court rejected the appeal as manifestly ill-founded and confirmed the first instance judgment which became thereby legally binding.

21. On 7 September 1998 the applicant withdrew the authorisation of Mr. Fahrija Karkin as his defence counsel and appointed Mr. Faruk Balijagić as his new representative.

22. The applicant's new lawyer demanded protection of legality against his client's conviction, but on 8 October 1998, the Federal Prosecutor rejected the request. Thereafter, a request for renewal of criminal proceedings was rejected by the Cantonal Court on 13 November 1998 as ill-founded. Finally, the appeal against that decision was rejected by the Supreme Court on 9 December 1999.

23. On 23 December 1997 the President of the Federation of Bosnia and Herzegovina issued a decision to pardon 108 convicts (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 32/97) in exercise of his powers according to Article 17 of the Law on Pardon (OG FBiH no. 9/96). The applicant was not included in the list.

3. The confidential order

24. On 10 June 1996 the Director of the AID, Mr. Kemal Ademović, issued a confidential order by which an operation called "Orao" (Eagle) was to be carried out (reference no. 17-18/96). The operation consisted of two stages: firstly, Mr. Nedžad Herenda was to be surveilled and secondly, his arrest and detention for "further operative processing" was ordered. The confidential order also stated that Mr. Herenda was under suspicion of having committed serious criminal acts in the field of terrorism punishable under international law.

B. Relevant domestic law and practice

25. At the relevant time, the following material and procedural criminal laws were in force:

1) The Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY – hereinafter "OG SFRY" – nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90); taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94);

2) The Criminal Code of the Socialist Republic of Bosnia and Herzegovina as applicable in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement) (Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 16/77, 19/77, 32/84, 19/86, 40/87, 41/87, 33/89, 2/90 and 24/91; OG RBiH nos. 16/92, 21/92, 13/94, 28/94 and 33/94);

3) The Law on Criminal Procedure of the SFRY (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90); taken over as the law of the Republic of Bosnia and Herzegovina (OG RBiH nos. 2/92, 9/92 and 13/94).

26. The relevant Articles of the Law on Criminal Procedure provide as follows:

Article 363:

"A verdict may be challenged on the following grounds:

1. because of an essential violation of the provisions of criminal procedure;
2. because of a violation of the Criminal Code;
3. because of erroneously or incompletely established facts;
4. because of the decision as to the criminal sanctions

..."

Article 366:

"1. A verdict may be challenged on the basis of erroneously or incompletely established facts or if the court has erroneously established decisive facts or failed to establish them at all.
..."

Article 371:

"1. Notice of the session of the panel shall be given to the accused and his defense counsel ..., who within the period allowed for an appeal ... are requested to be notified of the session or can propose that a hearing be held before the court of second instance. The presiding judge of the panel or the panel itself may decide to give notice of the session of the panel to the parties even if they have not requested so, or to give notice of the session to a party who did not request so if their presence would be helpful to clarify the matter."

"2. If the accused is in custody and has a defence counsel, the presence of the accused shall be provided for only if the presiding judge of the panel finds this to be expedient."
...
"4. The failure of a party to appear, although duly notified, shall not prevent the session of the panel from being held."

Article 372:

"1. The second instance court shall render a decision in a session of a panel or on the basis of a hearing."

"2. The second instance court shall decide in a session of a panel whether to hold a hearing."

Article 373:

"1. A hearing shall be held before the second instance court only if it is necessary for presentation of new evidence or repetition of evidence already presented because the state of the facts was erroneously or incompletely established and if there are legitimate reasons for not returning the case for retrial to the court of first instance.
..."

Article 378:

"If an appeal has been filed in favour of the accused, the judgment may not be modified to his detriment. In this case the court may not convict the accused of a more severe criminal charge nor impose a more severe sentence than the first instance court."

Article 381:

"... The second instance court may, on the basis of a panel session or of a hearing, reject an appeal as being submitted out of time or as being inadmissible, or it may refuse the appeal as ill-founded and confirm the judgment of the first instance court, or it may revoke the judgment of the first instance court and return the case to the court for reconsideration, or it may modify the verdict of the first instance court."

Article 385:

"1. The second instance court shall ... render a decision revoking the first instance judgment and return the case for retrial if it finds that there has been an essential violation of the provisions of criminal procedure or if it considers that erroneously or incompletely established facts justify a new trial before the original court.
..."

27. The relevant Articles of the Law on the Agency for Investigation and Documentation (OG RBiH 17/96) provide as follows:

Article 3:

"1. The tasks of investigation and documentation within the meaning of this law are as follows:

1) Investigation, documention and prevention of criminal acts with elements of international and inter-entity crimes, especially terrorism, illegal drug trafficking, organised crime and other criminal offences punishable under international law.
..."

Article 14:

"1. Certain employees of the Agency, when conducting their tasks and carrying out assignments, have special duties and rights determined by this law (hereinafter: "the empowered official").

2. The empowered official may be an employee engaged directly in the performance of operative tasks and assignments provided in Article 3 of this law as well as any other employee whose tasks, assignments and responsibilities are directly related to performing these tasks and assignments.
..."

Article 16:

"Empowered officials are under an obligation to carry out orders issued by the director or their immediate superior in order to carry out official tasks and assignments within the competence of the Agency with the exception of those whose execution would be contrary to the Constitution and the law."

Article 22:

"1. Besides in those cases regulated by the Law on Criminal Procedure, an empowered official is entitled to take in or to bring in also:

1) a person extradited by foreign organs when it is necessary in order to hand them over to a competent organ in Bosnia and Herzegovina;

2) a person whose conduct shows that it might put in danger a person whose security is being provided for or if some other circumstances and information point at it;

3) a person whose identity cannot be established on the spot.

2. Persons referred to in sub-paragraphs 1 and 2 of paragraph 1 of this Article may be detained up to 48 hours, and persons mentioned in sub-paragraph 3 may be detained for 24 hours at the longest, respectively until the person has been handed over to the competent police organ.

3. Detention is ordered by a procedural decision of the director or by any person authorised by him.
..."

Article 31:

"1. If criminal or civil proceedings are initiated against an empowered official because of the use of fire arms, coercion or other measures while performing or in relation to the performance of tasks and assignments, the Agency shall provide a defence counsel and other legal assistance required for the conduct of the proceedings.
..."

Article 44:

"1. An employee of the Agency is under an obligation to keep state, military and official secrets. The obligation to keep state, military and official secrets continues even after the termination of the employment.
..."

IV. COMPLAINTS

28. The applicant asserts that he was "unlawfully" not pardoned by virtue of a decision of the President of the Federation of Bosnia and Herzegovina of 23 December 1997.

29. The applicant essentially alleges that he did not enjoy a fair trial, including the right to an adequate defence. The applicant states that he was ordered to arrest and detain Mr. Nedžad Herenda. He claims to have been under an obligation not to reveal "professional secrets" relating to his work and the commanding structure within the AID. Moreover, he alleges that he was convicted for "political reasons" and in order to "hide criminal activities" on the highest political level of the country. Furthermore, the applicant claims that he was provided with a defence counsel by the AID who had failed to act in his favour and had carried out his duty only formally.

30. Finally, the applicant complains that he did not have an opportunity to be present in person during the appellate proceedings before the Supreme Court. The applicant asks the Chamber to order the respondent Party that the proceedings in his case be reopened.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

31. The Federation claims that the applicant's allegations concerning the facts of the case are contradictory and untrue. It proposes that the application be declared inadmissible as manifestly ill-founded.

32. As to the presence of the applicant in the proceedings before the Supreme Court, the Federation states that the President of the deciding Panel had a discretionary power to decide if the presence of the accused was necessary or not pursuant to Article 371 paragraph 2 of the Law on Criminal Procedure (see paragraph 26 above). It asserts that the applicant could have attended if he had made a request in that respect. However, the applicant would have had to pay the expenses for his transport to the court. It is concluded that he preferred to be absent of his own choice.

B. The applicant

33. The applicant maintains all his allegations concerning the unfairness of his trial both before the Cantonal and the Supreme Court. He furthermore alleges that before his arrest and during the investigation phase he was instructed by agents of the AID to keep confidential the background of the act he was to be brought to trial for and that failure to do so would cost his life. He asserts that an agent of the AID told him that "he would lose his head" if he did not stay silent and that he was told to defend himself with a fake alibi during the hearing before the Cantonal Court.

VI. OPINION OF THE CHAMBER

A. Admissibility

34. Before considering the case on the merits the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(c), the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded, or an abuse of the right of petition.

35. The applicant has alleged that he was "unlawfully" denied the "right to be pardoned". In support of this complaint he quotes a decision issued by the President of the Federation of Bosnia and Herzegovina on 23 December 1997 (see paragraph 23 above), which contains a list with the names of 108 convicts that the pardon applies to. The applicant claims that he should have been included in that list because he was "innocent".

36. According to the Agreement, the Chamber can find violations of the human rights protected therein and to order the appropriate remedies for the respondent Party's breach of its obligations under the Agreement. The Chamber notes that there is no general right to pardon guaranteed in the Agreement or in any of the treaties listed in the Appendix to the Agreement. The Chamber therefore has no competence to examine whether the fact that the applicant's name was not included in the pardon list constitutes a breach of the Agreement.

37. It follows that the Chamber cannot accept this part of the application, it being incompatible with the Agreement *ratione materiae*.

38. The Federation has proposed to declare the application inadmissible as manifestly ill-founded in its entirety. The Chamber notes that the substance of the applicant's remaining complaints contains serious allegations relating to the principle of fair trial. The Chamber cannot dismiss these allegations as manifestly ill-founded without having considered them on the merits.

39. As no other ground for inadmissibility of the application has been established, the remainder of the application is declared admissible.

B. Merits

40. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest

level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for by the Convention and the other international agreements listed in the Appendix to the Agreement.

41. The Chamber will now consider the applicant's allegations that there have been violations of Article 6 of the Convention in that he was limited in his right to defend himself or through the assistance of a defence counsel and in that he was absent during the appellate proceedings.

42. The relevant parts of Article 6 provide as follows:

> "1. In the determination ... 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..."
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (c) to defend himself in person or through legal assistance of his own choosing
> ..."

1. The right to defend oneself in person or through legal assistance

43. The Chamber recalls the applicant's allegations that he was ordered to arrest and to detain Mr. Nedžad Herenda and that he was prevented from defending himself appropriately during his trial due to his obligation not to reveal "professional secrets". He has furthermore asserted that he was told by an agent of the AID that "he would lose his head" if he did not stay silent during the investigative stage and that he was apparently provided with a fake alibi for the trial hearing.

44. The Chamber notes that, according to the documents before it, an order to detain Mr. Herenda existed and that the applicant was under a legal obligation to keep secret professional information of the AID (see paragraph 27 above). Even though it may be open to speculation what the applicant was instructed to do in detaining Mr. Herenda "for further operative processing" as stated in the order, the Chamber also notes that the applicant thereby cannot be released from his individual criminal responsibility for the acts committed by him.

45. Furthermore, the Chamber recalls that the applicant stated in person at the hearing before the Cantonal Court on 20 January 1997 that, at the relevant period of time, he was in Tuzla, and could therefore not have committed the crime. However, the witnesses heard by the court testified to the contrary and the court in its judgment followed their evidence. The Chamber finds that it was at the applicant's disposal either to remain silent and to leave his defence to his attorney, or to present to the court a different version of the events that occurred. It may be that the applicant's above-mentioned statement before the court was given in order not to violate his legal duty to keep the professional secrets of the AID. Neither was the issue that an order to detain Mr. Herenda existed raised in the applicant's appeal letter. It was only in an advanced stage of the proceedings before the Chamber that the applicant has presented evidence that such an order existed.

46. It derives from its mandate under the Agreement that, in the instant case, the Chamber can only examine the complaints moved by the applicant with a view to determining whether they amount to a violation of the procedural safeguards set forth in Article 6 of the Convention by the respondent Party. Since the applicant has not raised the issue of the existence of a confidential order during his proceedings before the Cantonal Court and the Supreme Court, the Chamber, in the light of the information before it, does not consider it to amount to an interference by the courts with the applicant's right to defend himself as guaranteed by Article 6 paragraph 3(c) of the Convention. The Chamber therefore cannot find that this right was violated in the course of the domestic court proceedings.

47. The applicant has further claimed that his defence counsel had carried out his duty only formally on account of his assignment by the AID. The applicant can thus be understood to complain that he did not enjoy "legal assistance of his own choosing" for the purposes of Article 6 paragraph 3(c) of the Convention. The European Court of Human Rights has previously held that the right

referred to in this provision is to "effective" legal assistance (*Artico v. Italy* judgment of 13 May 1980, Series A no. 37, paragraph 34).

48. The Chamber notes that the applicant's defence counsel was authorised to represent him during the trial. It has not been demonstrated by the applicant that, in the case of disagreement or loss of confidence, it would not have been possible to revoke the authorisation conferred on the defence counsel.

49. The Chamber also notes that, to be "effective" within the meaning of Article 6 paragraph 3(c) of the Convention, a lawyer appointed to defend an accused must be qualified to represent him at the particular stage of proceedings for which his assistance is sought. In applying this requirement to the case before it, the Chamber cannot find that the applicant's defence counsel did not meet this standard. Accordingly, the applicant's allegations in this respect are rejected.

50. To sum up, the Chamber considers the applicant's complaints in that he was prevented from defending himself in person or through legal assistance of his own choosing are ill-founded and must therefore be dismissed.

2. The right to be present at the appellate proceedings

51. Lastly, the applicant complained that the Supreme Court had decided his case without allowing him to appear before the court.

52. When examining the question whether the applicant was deprived of a "fair hearing" and of the right to defend himself in person, as provided for in paragraphs 1 and 3(c) of Article 6 of the Convention, the Chamber recalls that the European Court of Human Rights has previously held that this provision requires that a person charged with a criminal offence be entitled to take part at the trial hearing (*Colozza v. Italy* judgment of 12 February 1985, Series A no. 89, paragraph 27).

53. With regard to the first instance proceedings, the Chamber notes that this requirement was satisfied since the Cantonal Court determined the charges brought against the applicant on the basis of a hearing at which the applicant was present, gave evidence and argued in his case. However, the same did not apply to the proceedings before the Supreme Court.

54. Addressing the question whether the guarantees under Article 6 of the Convention can also be applied to the proceedings before an appellate court, the European Court of Human Rights has already found that "persons shall enjoy before these courts the fundamental guarantees contained in Article 6 of the Convention". However, account must be taken of the entirety of the proceedings and the role of the appellate court therein (see the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, paragraphs 54 and 56). Provided that there has been a public hearing before the court of first instance, the absence of such a hearing before the appellate court may be justified if these proceedings involve only questions of law, as opposed to questions of fact (*Monnell and Morris*, paragraph 58).

55. The Chamber will now, in deciding this question, have regard to the domestic appeal system, the ambit of the Supreme Court's powers and the manner in which the applicant's interests were actually protected.

56. According to the applicable laws at the relevant time, a judgment of a court of first instance could be appealed, *inter alia*, for the reason of erroneously or incompletely established facts (Article 366 of the Law on Criminal Procedure, see paragraph 26 above). The second instance court in a criminal case was called upon to decide on questions of law and on those of fact (Article 385). It was within the scope of the appellate court's jurisdiction either to confirm or to annul a first instance judgment and to return the case to that court, or to change the qualification of the criminal charge and to modify a sentence, but without increasing it, provided that no appeal was submitted by the prosecutor (Articles 378 and 381).

57. In his appeal letter, the applicant's representative challenged the Cantonal Court's factual and legal findings. In particular, the appeal was directed against the qualification of the criminal charges underlying the applicant's conviction and the length of the sentence pronounced. Also reference to the applicant's personality was made. Accordingly, the Supreme Court was called upon to examine the instant case as to the facts and the law. It should also be noted that, in the same document, there was a request that the applicant be enabled to be present in person before the Supreme Court to give further explanation of the appeal reasons.

58. The Chamber notes that Articles 372 and 373 of the Law on Criminal Procedure provided for a session of a panel of the Supreme Court or a hearing. In deciding whether the accused should be present or not during the proceedings, it can be seen from the provision of Article 371 paragraph 2 that the court enjoyed a certain margin of appreciation. Against this decision there was no legal remedy allowed.

59. The respondent Party has submitted a statement of the Supreme Court indicating that the applicant's defence counsel in his appeal had only repeated the arguments already brought forward against the indictment of the accused during the first instance hearing and that therefore the court did not deem it expedient to hear the applicant once more.

60. However, taking into account the formal request to be present in the appeal letter and bearing in mind that the applicant could have presented new facts to the court which could have had an impact on his conviction and sentence, the Chamber takes the view that the procedural guarantees provided in Article 6 paragraphs 1 and 3(c) of the Convention required that the applicant be allowed to attend the proceedings before the Supreme Court in person.

61. It is not in dispute that the applicant was notified in prison that the Supreme Court would hold a session in his case. The Federation has argued that the applicant could have attended the proceedings if he had expressed his wish and made a request in that respect. However, he would have had to bear the expenses of his journey. The applicant has made a statement to the contrary, saying that he was not allowed to attend.

62. As the applicant already in his appeal letter had asked to be present, the Chamber cannot find that another request was necessary. The Federation's assertion that the applicant had waived his right to be present must accordingly be dismissed. As to the travel expenses, the Chamber is of the opinion that it is inconsistent with the respondent Party's positive obligation to secure the enjoyment of the fundamental rights and freedoms set forth in the Convention to attribute such costs to the applicant.

63. With a view to the proceedings before the domestic courts regarded as a whole, the role of the Supreme Court and the issue subject to the appeal procedure, the Chamber concludes that the applicant was denied the right to be present in person at the appellate proceedings without reasonable justification. Accordingly, there has been a violation of paragraphs 1 and 3(c) of Article 6 of the Convention.

VII. REMEDIES

64. Under Article XI(b) of the Agreement the Chamber must next address the question what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found.

65. In the circumstances, the Chamber finds that the repetition of the appellate proceedings would be an appropriate measure to remedy the violation that occurred. It will make an order to the respondent Party to that effect.

VIII. CONCLUSIONS

66. For these reasons, the Chamber decides,

1. by 8 votes to 4, to declare the application admissible insofar as it relates to the alleged violation of the applicant's right to a fair hearing as guaranteed by Article 6 of the European Convention on Human Rights;

2. unanimously, to declare the application inadmissible insofar as it concerns the applicant's complaint relating to the granting of a pardon;

3. by 7 votes to 5, that the applicant's right to a fair hearing as guaranteed by Article 6 paragraph 1 in conjunction with paragraph 3(c) of the Convention has been violated in that he was not present during the proceedings before the appellate court, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. by 11 votes to 1, that there has been no other violation of the applicant's rights as guaranteed by Article 6 of the Convention;

5. by 6 votes to 6, with the Acting President's casting vote, to order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant renewed appellate proceedings, should the applicant lodge a petition to this effect; and

6. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 7 October 2000 on the steps taken by it to give effect to this decision.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
Acting President of the Chamber