DECISION ON ADMISSIBILITY

Case no. CH/99/2117

Borislav HERAK

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 6 September 2001 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to Article VIII(2)(b) and (c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant's previous application was submitted on 13 October 1997 and registered on 31 October 1997 under case number CH/97/69. The case concerned the threatened execution of the death penalty against the applicant. The Chamber issued its decision on admissibility and merits on 12 June 1998 ordering the respondent Party not to carry out the death sentence on the applicant. The death sentence was modified into a twenty-year imprisonment, which sentence the applicant is currently serving in the Correctional Institution in Zenica ("the Correctional Institution").

2. In the present application the applicant alleges that he did not receive a fair trial regarding his request for the renewal of the proceedings and that he is constantly exposed to threats and insults, by both prisoners and guards, in the Correctional Institution. Furthermore, the applicant repeated his allegation from the previous application regarding the fear of the threatened execution of the death penalty he was exposed to until 30 November 1998 (see paragraph 1).

3. The case raises issues under Articles 2, 3 and 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced on 11 February 1999.

5. On 25 May 2000 the Chamber sent a letter to the applicant asking him for information regarding his request for the renewal of the proceedings of 29 December 1998. On 30 May 2000 the applicant informed the Chamber in writing that he had not received any answer on his request.

6. On 7 June 2000 the Chamber considered the case and decided to invite the respondent Party to submit certain information (Rule 49(3)(a) of the Chamber's Rules of Procedure).

7. On 21 June 2000 the Chamber sent a letter to the respondent Party asking it for information regarding both the applicant's request for the renewal of the proceedings and the provocation the applicant alleged to be exposed to in the Correctional Institution.

8. On 20 July 2000 the Chamber received the respondent Party's response.

9. On 7 February 2001 the Chamber decided to transmit the case to the respondent Party for its observations under Articles 3 and 6 of the European Convention. Regarding the applicant's compensation claim for the fear of the threatened execution of the death penalty he was exposed to until 30 November 1998, the Chamber decided not to consider it since the applicant's claim of the same content had already been rejected by the decision on admissibility and merits of 12 June 1998. Further, the time-limit for filing a request for review of that decision had expired.

10. On 8 March 2001 the Chamber received the respondent Party's observations.

11. On 2 April and 2 July 2001 the Chamber received letters from the applicant, in which he repeated his allegations from previous correspondence with the Chamber.

III. FACTS

A. Particular facts of the case

1. Previous proceedings

12. The applicant was born on 18 January 1971 in Sarajevo. On 16 May 1992 he joined the Bosnian Serb armed forces. On 11 November 1992 he was arrested by the Army of the RBiH.

13. The applicant was held in police custody for 7 days. While in police custody, the applicant claims that he was beaten very hard until he confessed charges against himself and Mr. Sretko Damjanović. Further, the applicant claims that he was forced to give interviews to a number of journalists, who published his confession.

14. On 18 November 1992 the applicant was brought before the investigative judge. On 19 November 1992 the applicant was examined for the first time in the presence of his *ex officio* defense counsel appointed by the court. The applicant alleges that he was beaten after that as well.

15. On 12 March 1993 the applicant was convicted and sentenced to death, by the District Military Court in Sarajevo ("the Military Court"), of the crime of genocide, war crimes against the civilian population and war crimes against prisoners of war. Specifically, he was convicted for the murder of 28 persons, for the rape and the murder of 10 women, for the rape of 5 women, for the maltreatment of Mr. M.LJ. and the attempted murder of Mr. R.B. Several witnesses were summoned. Mr. M.LJ. confirmed that the applicant maltreated him. Mr. R.B. confirmed that the applicant attempted to kill him. The remainder of the conviction was based, in essence, on the applicant's and Mr. Sretko Damjanović's confession.

16. On 30 July 1993 the Supreme Court of BiH in Sarajevo upheld the judgment of the Military Court. On 29 December 1993 the Supreme Court of BiH upheld its judgment of 30 July 1993.

17. On 12 June 1998 the Chamber adopted and delivered its decision on admissibility and merits, ordering the respondent Party not to carry out the death sentence on the applicant and to secure that the death sentence against him be lifted without delay.

18. On 30 November 1998 the Cantonal Court issued a decision modifying the death sentence to one of forty years' imprisonment. The applicant appealed against this decision to the Supreme Court.

19. On 16 March 1999 the Supreme Court granted the applicant's appeal and reduced the forty-year prison sentence to a twenty-year prison sentence.

20. On 25 May 1999 the Federal Prosecutor Office submitted a "request for the protection of legality", an extraordinary remedy, against the decision of 16 March 1999. On 2 March 2000 the Supreme Court refused the request.

2. Request for the renewal of the proceedings

21. On 10 September 1997 the applicant submitted a request for the renewal of the proceedings to the Cantonal Court. On 29 December 1998 the applicant submitted a new request for the renewal of the proceedings since the Cantonal Court had found the first request incomplete.

22. On 24 July 2000 the applicant submitted a third request for the renewal of the proceedings since the Cantonal Court had found the second request incomplete as well. Firstly, the applicant claimed that Mr. M.Š, who had been considered as a possible victim in the previous proceedings against the applicant, had actually died in the eighties. Secondly, the applicant claimed that seven women, who had been considered as possible victims and designated only by their first names in the previous proceedings against the applicant, were Ms. S.Dž, Ms. N.P, Ms. Z.P, Ms. S.P, Ms. S.P, Ms. M.D. and Ms. F.D. The applicant further claimed that they were still alive and lived in Ulica Drinska in Novo Sarajevo. Thirdly, the applicant reminded the Cantonal Court that a proper investigation was never done because it would have required gathering evidence in territory that was held by the Bosnian Serb armed forces at that time. Fourthly, the applicant claimed that the Cantonal Court had not taken into consideration that the applicant had been treated in mental institutions since he was very young. Finally, the applicant claimed that he had been forced to confess charges against himself and Mr. Sretko Damjanović during the previous proceedings (for example, the applicant testified that Mr. Sretko Damjanović had killed the Blekić brothers and they had turned out to be still alive).

23. The Cantonal Court summoned Ms. S.Dž, Ms. N.P, Ms. Z.P, Ms. S.P. and Ms. F.D. The Cantonal Court could not find Ms. S.P. and Ms. M.D, the other two women from the applicant's request. Further, the Cantonal Court obtained Mr. M.Š's death certificate and established that he had died on 27 September 1992 and not in the eighties as the applicant claimed. Afterwards, the case file was transmitted to the Cantonal Prosecutor Office in Sarajevo for its opinion.

24. On 24 August 2000 the Cantonal Prosecutor Office suggested the Cantonal Court to refuse the applicant's request.

25. On 28 August 2000 the Cantonal Court issued a decision refusing the applicant's request of 24 July 2000. The Cantonal Court was of the opinion that the evidence offered in the applicant's request could not lead to the renewal of the proceedings, because Ms. S.Dž, Ms. N.P, Ms. Z.P, Ms. S.P and Ms. F.D shared only the same first names with the applicant's victims. Further, Mr. M.Š. had died on 27 September 1992 and not in the eighties as the applicant claimed. Finally, the allegation that the applicant had been forced to confess charges against himself and Mr. Sretko Damjanović during the previous proceedings had already been considered. The same applied to the applicant's mental health.

26. On 5 September 2000 the applicant appealed to the Supreme Court. On 26 December 2000 the Supreme Court rejected the appeal.

3. The Correctional Institution

27. The applicant alleges that he is constantly exposed to threats and insults, by both prisoners and guards, in the Correctional Institution. Specifically, he alleges that prisoners of Bosniak origin have called him "četnik", sworn at him, forced him to kiss pictures of mosques, threatened to kill him, put a knife to his throat etc. The applicant has complained to the warden and to the Federal Ministry of Justice several times. It appears that the warden has done an investigation, but no disciplinary sanction has been imposed. The applicant alleges that the warden told him that they could not prevent such provocation.

28. On 16 January 2001 the applicant allegedly started a hunger strike requesting to be moved to a prison in the RS because of the provocation he is exposed to. It appears from the applicant's letter of 2 July 2001 that the applicant is still on the hunger strike.

B. Relevant domestic law

1. The Code of Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98)

29. Article 391 reads as follows:

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

30. Article 395(1), as far as relevant, reads as follows:

> "Criminal proceedings which were concluded by a judgment which has become final shall be reopened in favor of the convicted:
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> …
>
> 3) 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 criminal code;
>
> … ."

31. Article 399(1) reads as follows:

> " The court shall reject the request if, on the basis of the request itself and the record of the prior proceedings, it finds that ... the facts and evidence obviously are not adequate to provide a basis for reopening the proceedings ... ."

IV. COMPLAINTS

32. The applicant alleges a violation of Articles 2, 3 and 6 of the European Convention.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

33. The respondent Party confirmed that the applicant had complained of the provocation to the warden and to the Federal Ministry of Justice several times. The respondent Party stated that all the provocations had been verbal except for one, which was more significant, when one prisoner put a knife to the applicant's throat and threatened to kill him. However, that could not be proved and the warden could therefore not take any steps to impose disciplinary sanctions against the perpetrator. Regarding the verbal provocation, the respondent Party explained that such provocation was a part of the prisoners' subculture and thus out of its control. Furthermore, the respondent Party provided the Chamber with the statements of a few prisoners in the Correctional Institution. They claimed that the applicant was treated well in general, but that he had problems with some prisoners. The Chamber was also provided with the minutes of the conversation between the supervisor of the Correctional Institution and the applicant.

34. Regarding Article 3, the respondent Party claimed that the reason for the applicant's allegations and also for the hunger strike by the applicant was to obtain his transfer to a prison in the Republika Srpska. As regards Article 6, the respondent Party stressed that although admittedly in the Damjanović case the reasoning of the Cantonal Court was grossly inadequate and devoid of the appearance of fairness, but in the present case it was not (see case no. CH/98/638, *Damjanović,* decision on admissibility and merits of 14 January 2000, Decisions January-June 2000). In conclusion, the respondent Party was of the opinion that the Chamber should not apply the reasoning of the Damjanović decision by analogy in the present case.

B. The applicant

35. The applicant maintained his complaints.

V. OPINION OF THE CHAMBER

36. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement which, so far as relevant, provides as follows:

> "The Chamber will decide which applications to accept ... . In so doing, the Chamber shall take into account the following criteria:
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> ...
>
> (b) The Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure or international investigation or settlement.

(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.

... ."

A. The applicant's complaint under Article 2 of the European Convention

37. In this application the applicant repeats his complaint from the previous application regarding the fear of the threatened execution of the death sentence he was exposed to until 30 November 1998.

38. Article VIII(2)(b) of the Agreement provides that the Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber. The Chamber observes that on 12 June 1998 it gave a decision on admissibility and merits in the case number CH/97/69. After examining the present application, the Chamber finds that this part of the application is essentially the same as the previous one. It follows that this part of the application must be rejected.

B. The applicant's complaint under Article 3 of the European Convention

39. The applicant complains that he is constantly exposed to threats and insults, by both prisoners and guards, in the Correctional Institution.

40. The Chamber notes that the warden investigated the applicant's complaints and found them ill-founded. The Chamber further notes the statements of a few prisoners in the Correctional Institution, which confirm that the applicant had problems with some prisoners but also that he was treated well in general.

41. The Chamber notes that the applicant has not submitted sufficient evidence to support his allegation that he is constantly exposed to threats and insults in the Correctional Institution. The Chamber is therefore of the opinion that this part of the application is unsubstantiated and thus manifestly ill-founded in accordance with Article VIII(2)(c) of the Agreement.

C. The applicant's complaint under Article 6(1) of the European Convention

42. The applicant complains that he did not receive a fair trial regarding his request for the renewal of the proceedings.

43. Firstly, it is necessary to examine whether this complaint falls within the Chamber's competence *ratione materiae.* The Chamber notes that the European Commission of Human Rights has consistently held that Article 6(1) of the European 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(1) of the European Convention. The Chamber, however, has already established that Article 6(1) of the European Convention is applicable in the proceedings following the applicant's request for the renewal of his criminal case. In the Ivanović case (see case no. CH/98/548, *Ivanović,* decision on admissibility of 9 March 2000, Decisions January-June 2000) the Chamber took the view that "in order to attain the highest level of internationally recognised human rights to which the Parties to the Agreement had committed themselves in Article I of the Agreement, it (was) necessary to go beyond the restrictive approach of the European Commission of Human Rights".

44. Having established that this complaint falls within the Chamber's competence *ratione materiae,* it is necessary to examine whether it is well-founded. The Chamber observes that the European Court on Human Rights has repeatedly held that "it is for the national courts to assess the evidence before them" (Eur. Court HR, *Lüdi v. Switzerland,* judgment of 15 June 1992, Series A no. 238, paragraph 43) and that "it is not within the province of the Court to substitute its own assessment of the facts for that of the national courts" (Eur. Court HR, *Dombo Beheer B.V. v. the Netherlands,* judgment of 27 October 1993, Series A no. 274, paragraph 31). However, the

European Court of Human Rights has also stressed that, notwithstanding the quoted general rule, it must determine "whether the proceedings considered as a whole, including the way in which prosecution and defense evidence was taken, were fair as required by Article 6(1)" (Eur. Court HR, *Barberà, Messegué and Jabardo v. Spain,* judgment of 6 December 1988, Series no. 146, p. 31, paragraph 68).

45. The Chamber notes that the Cantonal Court summoned a number of witnesses and ruled on the evidence it heard. This is precisely the type of evidence the court is competent to assess and there is no indication of unfairness or arbitrariness. The Chamber is therefore of the opinion that this part of the application is manifestly ill-founded in accordance with Article VIII(2)(c) of the Agreement.

VI. CONCLUSION

46. For there reasons, the Chamber, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel