DECISION ON ADMISSIBILITY AND MERITS

(delivered on 11 February 2000)

Case no. CH/98/638

Sretko DAMJANOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 14 January 2000 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Želimir JUKA
Mr. Jakob MÖLLER
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 as well as Rules 52, 57 and 58 of it's Rules of Procedure:

I. INTRODUCTION

1. The applicant, who is a citizen of Bosnia and Herzegovina of Serb origin, was convicted of genocide and war crimes against the civilian population by the District Military Court in Sarajevo in 1993. In December 1996 the applicant submitted a petition to the then Sarajevo High Court for the reopening of the criminal proceedings based on the discovery of new evidence. In May and October 1997 the (by then) Cantonal Court in Sarajevo rejected the petition. The applicant appealed against these decisions and certain procedural decisions. His appeals were finally rejected by the Supreme Court of the Federation of Bosnia and Herzegovina in February 1998. The applicant is the same as the applicant in case no. CH/96/30 *Damjanović v. the Federation of Bosnia and Herzegovina*.

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 11 May 1998 and registered on 25 May 1998. The applicant is represented by Mr. Branko Marić, a lawyer practising in Sarajevo.

4. On 19 June 1998 the Chamber transmitted the application to the respondent Party for its observations on admissibility and merits of the case. On 17 July 1998 the respondent Party submitted its observations.

5. On 29 September 1998 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 6 November 1998.

6. On 28 June 1999 the applicant submitted an additional explanation of the application, which was transmitted to the respondent Party for comments.

7. On 3 August 1999 the respondent Party submitted additional written observations on admissibility and merits of the case, which were transmitted to the applicant for his information.

8. By letter of 22 September 1999 the Chamber requested additional information from the applicant and the respondent Party. The respondent Party's answer was received on 22 October 1999. No reply was submitted by the applicant.

9. On 1 November 1999 the Chamber decided that the respondent Party should again be requested to submit further information within a short time limit. Accordingly, by letter of 12 November 1999, the respondent Party was again requested to submit a detailed account of the delivery of the 13 October 1997 Cantonal Court decision to the applicant and his defence counsel, the public record of the renewal proceedings before the Cantonal Court in which it adopted its decision on 13 October 1997 and a clear copy of the Cantonal Court decision of 15 December 1997.

10. On 23 November 1999 the respondent Party submitted to the Chamber the following documents: the procedural decision of the Cantonal Court of 13 October 1997, the procedural decision of the Cantonal Court of 15 December 1997, the bills of delivery of these decisions and the procedural decision of the Supreme Court of the Federation of Bosnia and Herzegovina of 16 February 1998. As far as the records of the deliberations and the voting of the Cantonal Court on 13 October 1997 were concerned, the respondent Party stated that no records of the deliberations existed, as decisions on petitions to reopen criminal proceedings were taken by a panel in informal in camera proceedings, while the record of the voting was a sealed document that could be delivered to the Chamber in that form, if requested.

11. The Chamber deliberated on the admissibility and the merits of the case on 15 May, 10 June, 6 July, 1 November and 9 December 1999 and 13 and 14 January 2000. On the latter date the Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. Particular facts of the case before the domestic courts

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

13. On 12 March 1993 the applicant was convicted by a judgment of the District Military Court in Sarajevo of genocide and war crimes against the civilian population under Articles 141 and 142 of the, then still applicable, Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter "SFR Yugoslavia") and sentenced to death. The District Military Court found that the applicant had taken part in the "combing of Muslim elements" of several villages, and in doing so had killed the brothers Kasim and Asim Blekić and a man called Ramiz Kršo in the village of Krše, and had also killed, in the following days, "a man in his sixties with blond hair", another unidentified man, and a girl named Amela which he had previously raped, and, furthermore, had raped another girl, inflicted severe injuries to a detainee named Adem Skrobanović and looted the possessions of the victims of the ethnic cleansing. On 30 July 1993 the Supreme Court of Bosnia and Herzegovina upheld the judgment of the District Military Court.

14. On 12 December 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 30 below) on the ground that new evidence had emerged which would prove his innocence. The request stated that reliable information was now available to the effect that the two Blekić brothers, who had allegedly been murdered by the applicant, were alive. Criminal proceedings had also been instituted against another person for the murder of Kršo Ramiz, which the applicant had been charged with and convicted for in 1993.

15. On 27 May 1997 the Cantonal Court in Sarajevo (previously referred to as the High Court, which had replaced the District Military Court) rejected the request according to Article 408 paragraph 1 of the Law on Criminal Procedure. It accepted that two of the alleged victims were actually alive and that this was to be considered a new fact relevant to the case. However, according to the Cantonal Court, this new fact did not cast doubt upon the conviction and consequently the applicant's request was rejected.

16. On 29 July 1997 the Supreme Court annulled the decision of the Cantonal Court and returned the case for reconsideration. The Supreme Court found that the Cantonal Court had failed in its obligation to state reasons for refusing the review. It ordered the Cantonal Court to:

> "limit its reconsideration of the facts and new evidence to ascertain the probability of their probative force, and consequently to ascertain whether they are pertinent so as to give rise to a modification of the final judgment with the effect of an acquittal of the convicted person or his conviction under a less severe law."

17. On 13 October 1997 the Cantonal Court adopted its renewed decision, refusing the petition to reopen the proceedings as ill-founded. The court conducted an inquiry into the original proceedings, considered the new evidence and called the two alleged murder victims of the applicant, Kasim and Asim Blekić, as witnesses. In rejecting the petition, the Court reasoned:

> "Having in mind that these actions [i.e. the killing of two men originally identified as the Blekić brothers] were included in the crime of genocide under Article 141 of the Criminal Law and that all actions of the accused were aimed at the total elimination of the Muslim population from the village Krše, the fact that the brothers Asim and Kasim are alive due to the fact that they were not in the village Krše, would not lead to an acquittal of the accused nor to a sentence under a less severe law, because of the murder of the other two men whom he killed believing that they were Muslims and with a view to cleansing the village Krše of the members of the Muslim population. Consequently, the personal identity of the victim is not relevant; what is relevant is the intention of the accused and his conduct in the realisation of this intention.

> The fact that there are criminal proceedings before this court for the crime of genocide against numerous persons headed by Jovan Jovanović, and that the procedural decision opening the investigation stated that Miro Vuković and Božo Jeftić slaughtered Ramiz Kršo in a brutal manner is not evidence which would lead in the present proceedings to an acquittal or to a sentence under a less severe law. It is obvious from those proceedings that there is a reasonable suspicion that a whole army unit participated in the cleansing of the village, seeking to cleanse it from its population of Muslim nationality and that they will all be prosecuted for the acts they committed within the frame of their premeditation. In the same way, [Sretko] Damjanović was found guilty in the final judgment only of those acts he committed within the framework of his premeditation.
>
> ... As the reasons proposed in the petition for the renewal of the proceedings are not pertinent to lead to an acquittal or a conviction under a less severe law, this petition shall be refused as groundless on the basis of Article 408 paragraph 1 of the Law on Criminal Procedure."

18. The president of the panel of the Cantonal Court deciding on the applicant's petition, Judge Idriz Kamenica, had also been the president of the District Military Court when the applicant was convicted of these crimes; however, he did not take part in the proceedings in 1993.

19. The decision of the Cantonal Court of 13 October 1997 was delivered to the applicant in detention on 20 October 1997. It is not clear on which date it was put into the mailbox of the applicant's counsel at the Cantonal Court. The decision indicated that the time-limit to lodge an appeal to the Supreme Court against the decision to refuse the reopening of the proceedings was three days from the delivery of the decision. The applicant trusted that his counsel, Mr. Marić, would lodge an appeal against the decision and did not appeal himself. Mr. Marić, however, only collected the contents of his mailbox on 24 October 1997. According to the delivery slip submitted to the Chamber, 24 October 1997 is the date of delivery to Mr. Marić.

20. On 27 October 1997 Mr. Marić sent by registered mail an appeal against the decision to refuse the reopening of the criminal proceedings in the applicant's case. It was received at the Cantonal Court on 29 October 1997.

21. On 4 November 1997 the applicant's counsel, having realised that he lodged the appeal out of time, filed an application for the reinstatement of the proceedings under Article 92 of the Law on Criminal Procedure (see paragraph 42 below), on the ground that for personal reasons he had not been able to collect the Cantonal Court's decision until after the three-day time limit had expired.

22. On 15 December 1997 the application for reinstatement was denied by the Cantonal Court and the appeal refused as being filed out of time. The Court reasoned that, firstly, the provisions allowing a request for reinstatement did not apply to the appeal against a decision refusing the reopening of proceedings. It secondly argued that the application for reinstatement was inadmissible as such a request has to be made by the defendant personally, and not by his counsel. It finally reasoned that in any case the applicant's counsel had received the decision on 24 October 1997 and submitted the appeal only on 29 October 1997, i.e. more than three days after he had received the decision.

23. On 31 December 1997 the applicant filed an appeal against the procedural decision of 15 December 1997, particularly stressing that it constituted a violation of his rights to have adequate time and facilities for the preparation of his defence and to avail himself of the assistance of legal counsel in his defence, guaranteed by Article 6 paragraphs 3(b) and 3(c) of the Convention.

24. This appeal was denied by a procedural decision of the Supreme Court of the Federation of 16 February 1998. The Supreme Court upheld the Cantonal Court's decision and stated that it had correctly applied the law. It confirmed that the provisions allowing a request for reinstatement did not apply to the appeal against a decision refusing the reopening of proceedings and that the application for reinstatement would have had to be made by the defendant personally. The Supreme Court added that it was irrelevant whether the applicant's lawyer had filed the appeal on 27 or 29 October 1997,

because the law clearly ruled that the three days deadline ran from the date of delivery to the petitioner.

B. The applicant's first case before the Chamber

25. The applicant is the same person as the applicant in case no. CH/96/30, *Damjanović v. the Federation of Bosnia and Herzegovina*, in which the Chamber adopted its decision on the admissibility on 11 April 1997 and delivered its decision on the merits on 8 October 1997 (both published in Decisions on Admissibility and Merits 1996-1997). This first case concerned the threatened carrying out of the death penalty on the applicant.

26. In the decision on the merits the Chamber concluded that the carrying out of the death penalty on the applicant would involve a violation of Article 2 of the Convention and of Article 1 of Protocol No. 6 to the Convention. It therefore ordered the respondent Party not to carry out the death sentence and to secure that it was lifted without delay. In reaching these conclusions, the Chamber also established that the District Military Court that had convicted the applicant could not be considered a "court" in terms of Article 2 paragraph 1 of the Convention (*Damjanović* decision of 5 September 1997, paragraph 40). The Chamber noted "that proceedings in respect of the applicant's request for a renewal of the criminal proceedings are still pending" and that "the grant of a retrial would constitute an appropriate remedy" (*Damjanović* decision of 5 September 1997, paragraph 47).

27. The respondent Party complied with the Chamber's order not to carry out the death sentence, which was commuted into a sentence of 40 years of imprisonment by a decision of the Cantonal Court in Sarajevo of 30 November 1998. Upon the applicant's appeal, the Supreme Court, by decision of 16 March 1999, changed the decision of the Cantonal Court and commuted the death sentence into 20 years of imprisonment.

C. Relevant domestic law

28. The domestic law relevant to the present case is contained in the Law on Criminal Procedure of the Socialist Federal Republic of Yugoslavia (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).

1. Extraordinary legal remedies - reopening of criminal proceedings

29. Article 400 of the Law on Criminal Procedure provided:

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

30. 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, ..."

31. 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 accused 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."

32. 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."

33. 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."

34. 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."

35. 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."

2. Relevant provisions relating to appeals

36. Article 359 and following of the Law on Criminal Procedure established the rules applicable to appeals against first instance judgments. Article 359 in particular provided that the deadline for filing an appeal against a first instance judgment is 15 days after the date of delivery of the copy of the decision.

37. Article 360 paragraphs 1, 2 and 6 listed the persons entitled to file an appeal on behalf of the accused:

"(1) An appeal may be filed by the parties, defence counsel, legal representative of the accused and the injured party.

(2) An appeal on behalf of the accused may also be filed by his spouse, direct blood relative, adopted parent, adopted child, brother, sister and foster parent. In this case the period allowed for appeal shall also run from the day when the accused or his defence counsel was delivered the copy of the judgment.

...

(6) Defence counsel and the persons referred to in paragraph 2 of this Article may file an appeal even without separate authorisation of the accused, but not against his will, unless the death penalty has been pronounced on the accused."

38. Article 362 established the necessary contents of an appeal. It provided insofar as relevant:

"(1) The appeal should contain the following:
1. indication of the judgment being appealed;
2. the basis for contesting the judgment;
3. the arguments supporting the appeal;
4. a proposal that the contested judgment be entirely or partially set aside or modified;
5. and at the end, the signature of the person filing the appeal.

(2) If an appeal has been filed by the accused ..., and the accused does not have defence counsel, ..., and the appeal has not been drawn up in conformity with the provisions of paragraph 1 of this Article, the court in the first instance shall call upon the appellant to supplement the appeal in writing or for the record of that court by a certain date. If the appellant does not respond, the court shall reject the appeal if it does not contain the data

> referred to in items 2, 3 and 5 of paragraph 1 of this Article; if the appeal does not contain the information referred to in point 1 of paragraph 1 of this Article, it shall be rejected if it cannot be established which judgment it pertains to. (...)

39. Article 394 and following of the Law on Criminal Procedure related to appeals against procedural decisions. Article 395 provided:

> "(1) The appeal shall be filed with the court which rendered the procedural decision.
>
> (2) Unless this law states otherwise, an appeal against a procedural decision shall be filed within 3 days of the date when the decision was delivered."

40. Article 3(b) of the Law on Changes and Amendments to the Law on Application of the Law on Criminal Procedure (OG RBiH 9/92, see paragraph 28 above) provided that where the applicant was assisted by counsel, the deadline for appealing ran from the date of delivery to whoever received the decision to be impugned first. It read:

> "If the defendant has a defence counsel, the indictment, the proposal for indictment, the private suit and all the decisions upon whose delivery the time-limit for filing the appeal runs, as well as the appeal of the opposed party which is delivered for a response, shall be delivered to both the defence counsel and the defendant under the provisions of Article 122 of the Law on Criminal Procedure. In that case, the time-limit for submission of a legal remedy, in other words the response to an appeal, runs from the date of delivery to the person to whom the document was first delivered."

41. Article 397 paragraph 3 provided that, in ruling on an appeal, the court could issue a decision rejecting the appeal because it was late or inadmissible.

3. Provisions concerning the reinstatement of proceedings (return to *status quo ante*)

42. Article 92 paragraph 1 provided:

> "If the accused shows good cause for failing to meet a deadline for appealing a judgment or a decision pronouncing a security measure or a decision to confiscate property gain, the court shall allow the return to the *status quo ante* for the purpose of submitting the appeal if, within eight days following the termination of the causes for failing to meet the deadline, he submits a petition for return to the *status quo ante* and files his appeal simultaneously with the petition."

43. Article 93 paragraphs 1 and 3 provided:

> "(1) The decision on the return to the *status quo ante* shall be made by the presiding judge of the panel which rendered the judgment or the decision contested by the appeal.
>
> (3) If an accused appeals a decision refusing the return to the *status quo ante*, the court must deliver that appeal, together with the appeal of the judgment or decision instituting a security measure or juvenile measure or decision to confiscate property gain, with the response to the appeal, and with all other parts of the record to the higher court for a decision."

IV. COMPLAINTS

44. The applicant complains that, in violation of Article 6 of the Convention, he was denied a fair hearing before an impartial tribunal during the examination of his request for renewal. He also alleges that he did not have adequate time and facilities to prepare his defence and that the time-limit for lodging an appeal during the review proceedings is unreasonably short.

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Admissibility

45. 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 29 December 1993 and therefore the application would not be within the competence of the Chamber.

46. The respondent Party further argues that the application should not be accepted pursuant to Article VIII(2)(a) of the Agreement. The Federation submits firstly that the applicant exceeded the six-month time-limit for the submission of the application to the Chamber in respect of all decisions, except for the procedural decision of the Supreme Court of the Federation of Bosnia and Herzegovina of 16 February 1998. Secondly, the case should also be declared inadmissible on the ground that the applicant failed to exhaust domestic remedies, as he could still file a "new" petition to reopen proceedings in his case.

47. Finally, the Federation submits that the applicant's request that the Chamber should issue a decision expressly ordering the reopening of proceedings should be dismissed as manifestly ill-founded under Article VIII(2)(c). In the view of the respondent Party it is beyond any dispute that the judicial institutions confirmed that the law was correctly applied during the appeal proceedings. Consequently, the respondent Party considers that the applicant has abused his right to petition.

2. Merits

48. Should the Chamber find that the admissibility requirements have been met, the respondent Party submits that the criminal proceedings were in full accordance with international standards. The Federation argues that Articles 359 and 360 of the Law on the Criminal Procedure meet the standards of Article 6 of the Convention. With regard to Article 6 paragraph 3, the respondent Party argues that the applicant's representative has a mail box at the Court where the decision of the Cantonal Court of 13 October 1997 was placed. The decision was also delivered to the applicant in prison and the three-day time-limit began when the applicant received the decision. The respondent Party argues that it is the responsibility of the applicant's counsel to check his mailbox regularly, especially with such an important decision to be rendered and with such a well-known deadline to appeal.

B. The applicant

1. Admissibility

49. The Chamber's consideration should, so the applicant argues, be limited only 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).

50. With regard to the six-month rule, the applicant replies that he could not have challenged the earlier decisions before the Chamber until having exhausted all domestic remedies. The applicant states that he has now exhausted these remedies because a new request for review could be based only on new evidence not previously presented before the courts, and the applicant does not have any such evidence.

2. Merits

(a) Article 6 paragraph 1 of the Convention

51. The applicant complains that the renewal proceedings, not being conducted by impartial courts, were in violation of Article 6 paragraph 1 of the Convention. It is argued that the partial attitude of the District Military Court in the ordinary criminal proceedings continued throughout the proceedings on the request for the renewal. The President of the District Military Court in 1993 was also the presiding judge of the panel of the Cantonal Court, which rendered the decisive decision on 13 October 1997 refusing the petition for renewal. The applicant argues that it was impossible for the Cantonal Court on 13 October 1997 to have fairly established that instead of the Blekić brothers he must have killed two other men. This finding was rendered without presentation of evidence in an adversarial setting.

(b) Article 6 paragraph 3(b) of the Convention

52. The applicant argues that the present law distinguishes between time-limits for the submission of an appeal against a judgment and an appeal against a procedural decision. The time-limit provided for submission of an appeal against a judgement is 15 days. The time limit provided for the submission of an appeal against any procedural decision under the provision of Article 395 of the Law on Criminal Procedure is limited to three days. Considering the seriousness of the crimes, of the excessive duration of the proceedings as well as the severity of the sentence, the applicant complains that the time required for the preparation of an appeal should be at least 15 days. The applicant contends that Article 395 is inconsistent with Article 6 paragraph 3(b) of the Convention.

(c) Article 6 paragraph 3(c) of the Convention

53. The three-day time-limit within which to appeal under Article 395 started on the day when the defendant received the decision in hand and not his authorised representative. The applicant's representative claims he received the Cantonal Court's decision of 13 October 1997 only after the deadline for appealing had expired because he was away on business. In effect, the applicant argues that he was deprived of the possibility to defend himself through his counsel because he was limited to written communication with his counsel and, therefore, the applicant had been unable to notify him of the appeal on time.

VI. OPINION OF THE CHAMBER

A. Admissibility

54. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. Competence *ratione temporis*

55. The Chamber first of all notes that the case falls within its competence *ratione temporis*, because this application concerns the proceedings leading to the rejection of the applicant's petition to reopen his case. These proceedings were initiated on 12 December 1996 by the applicant's petition to the Sarajevo High Court.

2. Exhaustion of domestic remedies and the six-months time-limit

56. According to Article VIII(2)(a) of the Agreement, in deciding whether to accept an application the Chamber shall take into account whether effective remedies exist, and whether the applicant has demonstrated that they have been exhausted and that the application was filed within six months from the date of the final decision in the applicant's case.

57. The Chamber takes note of the arguments raised by the respondent Party. However, the Chamber is satisfied that the applicant has no further domestic remedies available which he could be required to exhaust. The Chamber also finds that the applicant submitted his application within six months of the final decision by the Supreme Court on 16 February 1998.

58. Having found that, at present, there are no further domestic remedies the applicant could pursue, the Chamber recalls, however, that the principle of exhaustion of domestic remedies also implies that the applicant must have used, in the course of the domestic proceedings, all effective procedural remedies against an unfavourable outcome.

59. In the present case, according to domestic law, the applicant appears to have failed to appeal in a timely manner to the Supreme Court against the crucial decision of 13 October 1997.

60. The applicant complains that his rights to have adequate time and facilities for his defence and to avail himself of the assistance of defence counsel, protected by Article 6 paragraphs 3(b) and 3(c) of the Convention, were violated by the application of the three-days deadline provided in Article 395 of the Law on Criminal Procedure.

61. The Chamber shall construe this complaint as an allegation that the appeal to the Supreme Court under such a short deadline was not an effective remedy.

62. For the reasons set forth in greater detail below (paragraphs 85 and 86), pertaining to the extreme brevity of the deadline, the fact that the applicant was in detention and the deadline expired before the decision was delivered to his lawyer, the Chamber is not satisfied that, in the particular circumstances of the applicant's case, the appeal to the Supreme Court constituted a sufficiently accessible remedy.

63. The Chamber therefore concludes that it is not precluded under Article VIII(2)(a) from examining the decision to refuse the applicant's petition to reopen his case of 13 October 1997.

3. Competence *ratione materiae*

64. According to Article VIII(2)(c) of the Agreement, the Chamber shall dismiss any application which it considers incompatible with the Agreement. Amongst others, an application will be incompatible with the Agreement *ratione materiae* if the right invoked by the applicant is not protected by the Agreement.

65. Article 6 paragraph 1 of the Convention provides that, "(i)n 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…".

66. The Chamber must therefore examine whether the proceedings following the applicant's petition of 12 December 1996 for the reopening of his criminal case involved a "determination of a criminal charge" against him, within the meaning of Article 6 paragraph 1 of the Convention. In this respect the Chamber notes that also the applicability of paragraph 3 of Article 6 depends on whether the applicant was at that time "charged with a criminal offence".

67. The Chamber notes that in the Federation of Bosnia and Herzegovina, as in the countries to which the case-law of the European Commission of Human Rights quoted below refers, review proceedings in criminal cases are composed of two phases. The first one consists of the proceedings leading to a decision on whether to re-open a case in which a final judgment has been rendered. In the Federation these proceedings are initiated by a petition to re-open the case under Article 400 of the Law on Criminal Procedure, on which a panel of the court which decided the case in first instance is called to decide (Article 406 of the Law on Criminal Procedure). The second phase, taking place only in case of a positive outcome of the first one, is the actual re-trial of the convicted person (Article 409 of the Law on Criminal Procedure).

68. 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 and 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 (see, e.g., *X. v. Austria*, application no. 7761/77, decision of 8 May 1978, Decisions and Reports 14, p. 171, at 173).

69. 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. In *Callaghan and Others v. the United Kingdom*, (application no. 14739/89, decision of 9 May 1989, Decisions and Reports 60, p. 296, at 300) the Commission noted:

> "that the criminal proceedings had long been completed and that the reference procedure was not a normal step. Nonetheless the proceedings on the Secretary of State's reference had all the features of an appeal against conviction, and could have resulted in the applicants being found not guilty, or, as in fact happened, the convictions being upheld. They must therefore in the Commission's view be regarded as having the effect of determining, or re-determining, the charges against the applicants."

70. With regard to the case before it, the Chamber notes that it is indisputable that from a formal point of view the proceedings in the applicant's case had not reached the re-trial stage yet. In the light of the Commission's case-law referred to above, Article 6 would therefore appear to be inapplicable to the proceedings leading to the decisions of 13 October and 15 December 1997.

71. However, the Chamber recalls that the European Court of Human Rights has consistently held that the extent and the manner in which Article 6 applies 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 (see, e.g., *Brualla Gómez De La Torre v. Spain* judgment of 19 December 1997, paragraph 37, Reports of Judgments and Decisions 1997-VIII).

72. In considering the special features of the proceedings in the applicant's case, the Chamber recalls that prior to its decision of 13 October 1997, the Cantonal Court conducted an inquiry into the original proceedings, heard witness testimony from the two alleged murder victims and ascertained the probability of their probative force. The Cantonal Court found in its decision refusing the petition to reopen the case that if the applicant did not murder the two men found alive, he did murder two other men which he believed were Muslims. In fact, the Cantonal Court altered the factual finding during the review proceedings so as to find confirmed the applicant's intention to commit genocide, but without formally renewing the trial.

73. In this particular case it would therefore appear that the proceedings leading to the decision of 13 October 1997 did involve a re-determination of the criminal charges against the applicant falling within the scope of Article 6 paragraph 1 of the Convention. In these circumstances, the consequence of the decision of 13 October 1997 refusing to re-open the proceedings, was, in fact, to confirm the applicant's conviction and sentence and the proceedings were therefore "decisive" for the determination of the criminal charge against him (see *mutatis mutandis*, Eur. Court H.R., *JJ v. the Netherlands* judgment of 27 March 1998, paragraphs 34-40, Reports of Decisions and Judgments 1998-II).

74. The Chamber concludes that the admissibility requirement of VIII(2)(c) of the Agreement has also been met.

4. Conclusion as to admissibility

75. As no other ground for declaring the application inadmissible has been established, the Chamber declares the application admissible.

B. Merits

76. The applicant complains that the proceedings leading to the Cantonal Court decision of 13 October 1997 were conducted in violation of Article 6 paragraph 1 of the Convention, which reads insofar as relevant to the case at hand:

> "In the determination ... of any criminal charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

77. The applicant also complains of a violation of his rights under letters (b) and (c) of paragraph 3 of Article 6, which provide:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing ..."

78. The applicant complains that the panel of the Cantonal Court that rejected his petition on 13 October 1997 disregarded evidence proving his innocence that should have led to the reopening of the trial and thereby failed to grant him a fair hearing. He adds that the tribunal lacked impartiality, that he did not have adequate time to prepare his appeal against the decision of 13 October 1997 and that he did not have the assistance of a lawyer at that stage.

79. The Chamber recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of Article 6 (see Eur. Court HR, *Barberà, Messegué and Jabardo v. Spain* judgment of 23 September 1987, Series A no. 146, p. 31, paragraph 67); it will therefore have regard to them when examining the facts under paragraph 1 of Article 6.

80. The Chamber further recalls that the European Court of 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 defence evidence was taken, were fair as required by Article 6 § 1" (*Barberà, Messegué and Jabardo v. Spain* judgment, p. 31, paragraph 68). The European Court then considered in turn the various grounds of complaint before it.

81. The Chamber shall proceed analogously. It first of all recalls that in order to reach a decision on the applicant's petition to reopen the proceedings as ill-founded, the Cantonal Court conducted an inquiry into the original proceedings, considered the new evidence and called the two alleged murder victims of the applicant, Kasim and Asim Blekić, as witnesses. It then concluded that the fact that two of the applicant's alleged murder victims were alive and that two other persons were under investigation for killing the third victim was not relevant to the applicant's guilt (see paragraph 17 above).

82. While it is fully aware of the need not to substitute its own evaluation of the evidence for that of the domestic court, the Chamber cannot but note that the reasoning of the Cantonal Court is grossly inadequate and devoid of the appearance of fairness. The Chamber recalls that Kasim and Asim Blekić and Ramiz Kršo are the only murder victims of the applicant clearly identified by their name in the judgment of the District Military Court and that it was the applicant and his co-accused who had provided the court with the identity of their victims, whose killing they confessed. The fact that the applicant had consistently claimed that the confession on which his conviction in 1993 was based had been extorted, should have prompted the Cantonal Court to address the issue of the relevance of the "re-appearance" of the Blekić brothers with particular caution and attention. The same applies to the fact that at the time of the Cantonal Court's decision two other persons were

under investigation for the murder of Ramiz Kršo, another crime confessed by the applicant and his co-accused in 1993.

83. The applicant also complains that the panel of the Cantonal Court lacked impartiality. This complaint is based on the fact that Judge Idriz Kamenica, the presiding judge of the Panel of the Cantonal Court which examined the applicant's petition to reopen the proceedings, was the president of the Sarajevo District Military Court at the time when the applicant was convicted by that court, although Judge Kamenica did not sit on the applicant's case in 1993. However, the Chamber recalls that in the decision on the merits of the applicant's first case (the above-mentioned *Damjanović* decision of 5 September 1997, paragraph 40), it reached the conclusion that the District Military Court lacked a sufficient appearance of independence and could not be regarded as a "court" for the purposes of the Convention. It does not favourably affect the appearance of justice being done impartially that the President of the District Military Court, which did not meet the requirements of independence, would later preside the court called to decide whether to reopen the criminal proceedings conducted in 1993 before that very Court.

84. The applicant also complains that his right to have adequate time and facilities for his defence and to avail himself of the assistance of defence counsel were violated by the application of the three-days deadline provided in Article 395 of the Law on Criminal Procedure.

85. In general it is not within the Chamber's competence to assess whether the deadline set in Article 395 of the Law on Criminal Procedure, as integrated by Article 3b of the 1992 Law on Changes and Amendments to the Law on Application of the Law on Criminal Procedure, is in itself incompatible with the Convention. The Chamber notes, however, that when, on 20 October 1997, the applicant was notified in detention of the decision of the Cantonal Court, he did not have the possibility to quickly contact his lawyer. Furthermore, the decision indicated that "an appeal against this decision to the Supreme Court of the Federation is allowed within three days of its receipt". It did not contain a warning to the effect that under the amendment of the Law on Criminal Procedure introduced by a decree in 1992 (see paragraph 40 above), this deadline ran from the date of delivery of the decision to whoever, the convicted person or his lawyer, received the decision first. As a layman, the applicant had no reason to consider the possibility that the deadline might expire before his lawyer even received the decision.

86. Considering the brevity of the deadline, aggravated by the circumstances set forth above, and considering also the complexity and extreme importance of the matter, the Chamber finds that the applicant did in fact not enjoy a fair chance to appeal to the Supreme Court, notwithstanding the opportunity to supplement the appeal provided in Article 362 paragraph 2 of the Law on Criminal Procedure (see paragraph 38 above).

87. Considering the cumulation of serious weaknesses affecting the proceedings regarding the applicant's petition to reopen his case, the Chamber concludes that these proceedings did not satisfy the requirements of a fair trial within the meaning of Article 6 of the Convention.

88. In the light of the above conclusion, the Chamber does not find it necessary to examine separately whether the applicant was denied the procedural rights granted by Article 6 paragraphs 3(b) and 3(c) in isolation.

VI. REMEDIES

89. Under Article XI(1)(b) of the Agreement the Chamber must address the question what steps shall be taken by the respondent Party to remedy the established breach of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, and monetary relief (including pecuniary and non-pecuniary injuries).

90. In establishing the appropriate measures to remedy the violation found, the Chamber has taken into account that in its decision on the merits of the applicant's first case (see paragraphs 25-27 above) it found that the District Military Court that had convicted the applicant could not be considered a "court" for the purposes of Article 2 paragraph 1 of the Convention, because it lacked a sufficient appearance of independence (*Damjanović* decision of 5 September 1997, paragraph 40). The Chamber has also taken into account that in the mentioned decision it had noted that "the grant of a retrial would constitute an appropriate remedy" (paragraph 47). In the present decision, the Chamber has found that in the course of the court proceedings which resulted in the rejection of the applicant's petition to reopen his case, the applicant was denied the right of a fair hearing in the re-determination of the charges against him. On the basis of these considerations, the Chamber finds it appropriate to order the respondent Party to take all the necessary steps in order to grant a re-trial to the applicant, which should start not later than six months from the date of delivery of the present decision.

91. As to the applicant's claim for pecuniary compensation of 29 September 1998, the Chamber notes that it consists of four items. Firstly, the applicant claims compensation for the allegedly unlawful imprisonment from 12 December 1996, the date of the petition to reopen his case, onwards ("the lost years of the applicant's life"), which he quantifies in the amount of 10,000 German Marks (DEM) per month, for a sum of DEM 210,000 as of September 1998. Secondly, the applicant claims a lump sum amount of DEM 80,000 for the mental suffering during the same period. The applicant thirdly claims compensation for lost income in the same period, which he assesses in the amount of DEM 1,000 per month for overall DEM 21,000. Finally, the applicant claims compensation for the detention from December 1992 to December 1996 in the amount of DEM 480,000 (DEM 10,000 per month). The overall amount of the applicant's compensation claim accordingly is DEM 791,000 as of 29 September 1998.

92. The Chamber notes that the applicant's compensation claim entirely relies on the assumption that his detention since December 1992 has been unlawful. The issue before the Chamber in the present case was limited to the lack of fairness of the proceedings concerning the applicant's petition to reopen the case that led to his conviction. The Chamber recalls that it can order remedies only for violations it has found. The applicant, on the other hand, is asking for pecuniary compensation for allegedly unlawful detention, an issue the Chamber was not called upon to examine and has not examined. His compensation claim is therefore rejected in its entirety.

VIII. CONCLUSIONS

93. For the above reasons, the Chamber decides

1. by 8 votes to 3, to declare the case admissible;

2. by 9 votes to 2, that there has been a violation of Article 6 of the European Convention on Human Rights in that the proceedings regarding the applicant's petition to reopen his case did not satisfy the requirements of a fair trial within the meaning of that provision, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Human Rights Agreement;

3. by 6 votes to 5, to order the Federation of Bosnia and Herzegovina to take all the necessary steps in order to grant a re-trial to the applicant which should start not later than six months from the date of delivery of the present decision;

4. unanimously, to refuse the applicant's claim for compensation;

5. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 11 May 2000 on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Dissenting Opinion of Mr. Andrew Grotrian, joined by Mr. Mato Tadić
Annex II Partly Dissenting Opinion of Ms. Michèle Picard

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Andrew Grotrian, joined by Mr. Mato Tadić.

DISSENTING OPINION OF MR. ANDREW GROTRIAN, JOINED BY MR. MATO TADIĆ

I disagree with the opinion of the majority of the Chamber on the admissibility and merits of this case. In my opinion Article 6 of the European Convention on Human Rights was, in accordance with long-standing case-law of the European Commission of Human Rights, inapplicable to the proceedings at issue and there has therefore been no breach of that provision.

The applicant complains that he was denied a fair hearing before an impartial tribunal in the proceedings which he instituted in the Cantonal Court for the renewal of the criminal proceedings against him. He also complains that he was denied effective access to the Supreme Court for the purpose of appealing against the decision of the Cantonal Court refusing his request for renewal. He invokes Article 6 of the Convention, which provides that "in the determination ... of any criminal charge against him" everyone is entitled to a fair hearing before an independent and impartial tribunal.

The Commission has consistently held that Article 6 of the Convention does not apply to proceedings in which it is sought to re-open a criminal case after the conviction has become final, since at that stage the convicted person is no longer charged with an offence, the charge against him having already been finally determined. In *X v. Austria* (application no. 864/60, Collection of Decisions 9, p. 17), the applicant applied for the re-opening of his trial. Such a request could be granted if the applicant produced new facts or evidence which appeared likely to justify acquittal. The court refused the request as inadmissible on the ground that no such facts or evidence existed and the Commission held that Article 6 was inapplicable to the proceedings since the applicant was not charged with an offence. In a later case the Commission, applying analogous reasoning in a civil case, stated:

> "According to the constant case-law of the Commission, Article 6 of the Convention does not apply to proceedings for re-opening a trial given that someone who applies for his case to be re-opened and whose sentence has become final, is not someone "charged with a criminal offence" within the meaning of the said Article." (*X v. Austria*, application no. 7761/77, Decisions and Reports 14, p. 171 at p. 173)

In *Callaghan v. the United Kingdom* (application no. 14739/89, Decisions and Reports 60, p. 296) the Commission held that Article 6 did apply to proceedings before the Court of Appeal in England, after a criminal case had been referred back to that court by the Home Secretary. In that case, however, the case had already been reopened by the Home Secretary's decision and in the Court of Appeal the proceedings were conducted as an ordinary appeal against conviction. There was no suggestion that Article 6 applied to the Home Secretary's decision on whether the case should be re-opened and this case does not, in my view, involve any departure from the Commission's "constant case-law" referred to above.

In the present case, in my opinion Article 6 would, on the basis of the *Callaghan* decision, have been applicable to any new proceedings conducted under Article 409 of the Law on Criminal Proceedings (see paragraph 35 of the decision) if the applicant's request for renewal had been granted. It did not apply to the proceedings which took place, which concerned only the question whether the case should be reopened or not. The fact that the court heard the evidence of witnesses and conducted other inquiries does not bring the proceedings within the scope of Article 6. A court or other authority deciding whether proceedings should be reopened may well need to make a close examination of both the original and new evidence in order to come to its decision.

The majority of the Chamber finds that the Cantonal Court altered the factual basis of the applicant's conviction and thereby re-determined the charge against him, thus attracting the applicability of Article 6 (see paragraphs 72-73 of the decision). I do not agree with this analysis. The applicant was convicted of genocide under Article 141 of the Criminal Law. The Cantonal Court

considered that the new evidence before it was not such as would lead to an acquittal or conviction under a less severe law and refused to reopen the proceedings for that reason. In particular it pointed out that the applicant had explained in his defence in the earlier proceedings that he had shot two persons whose identity he did not know, but had been informed by his brother that they were the Blekić brothers. It accepted that the Blekić brothers were still alive but ruled that the personal identity of the alleged murder victims was not relevant in a charge of genocide. In these circumstances it appears that the court accepted that two of the persons whom the applicant was found to have shot had been misidentified but ruled that this fact would not affect the validity of the applicant's conviction. I consider that in the circumstances the court, whether its decision was right or wrong, did not materially alter the applicant's conviction.

Accordingly, in my opinion Article 6 of the Convention was not applicable to the proceedings in question, which were only concerned with the question whether the proceedings should be renewed and did not involve the determination of a criminal charge against the applicant. I therefore find no breach of Article 6 in this case.

I would add that even if I had found that there was a violation of the Convention in this case, I would not have voted in favour of ordering a retrial of the applicant. The complaints under consideration relate only to the proceedings on the applicant's request for a reopening of the proceedings. In my opinion if those proceedings involved breaches of Article 6, it would be appropriate at most to order that the application for renewal should be re-heard, without any prejudgement of the result of such a re-hearing. The Chamber's order for a retrial in my opinion goes beyond the proper scope of the case.

(signed)
Andrew Grotrian

(signed)
Mato Tadić

ANNEX II

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Ms. Michèle Picard.

PARTLY DISSENTING OPINION OF MS. MICHELE PICARD

I agree with the opinion of Mr. Andrew Grotrian on the admissibility of the case and on the remedies. However, after a majority of the members had decided that the case was admissible, I saw no objection to vote in favour of a violation on the merits.

I would add to Mr. Grotrian's opinion that, to my knowledge, the European Commission of Human Rights never declared admissible under Article 6 of the Convention an application which related to the proceedings on the reopening of a criminal trial after the decision convicting the applicant had become final and binding. In my opinion, however, the jurisprudence of the European Court of Human Rights could lead to the conclusion that Article 6 may apply to such proceedings if it appears that the national court or authority examining the reopening question *de facto* redetermined the charge against the convicted person. Still, the European Court has never found Article 6 to be applicable in the cases that have come under its examination, although all States that have ratified the Convention provide in their domestic legislation for the possibility of reopening a criminal trial where there are new facts that could justify that the person in question be given a different sentence. It thus appears to me that, by finding Article 6 applicable in the present case although the procedure in the Federation did not differ from the procedure in identical cases in other States (see Mr. Grotrian's opinion), the Chamber is imposing on Bosnia and Herzegovina and its Entities a stricter obligation than that which is imposed on the Contracting Parties to the Convention. This is a paradox given the fact that Bosnia and Herzegovina has not yet ratified the Convention.

However, on the merits I agree with the Chamber for the reasons stated in the decision.

(signed)
Michèle Picard