DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 18 FEBRUARY 1998

in

CASE No. CH/97/45

Samy HERMAS

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 16 January 1998 with the following members present:

Michèle PICARD, President
Manfred NOWAK, Vice-President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Jakob MÖLLER
Mehmed DEKOVIĆ
Miodrag PAJIĆ
Vitomir POPOVIĆ
Viktor MASENKO-MAVI
Andrew GROTRIAN

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the admissibility and merits of the Application by Samy HERMAS against the Federation of Bosnia and Herzegovina registered under Case No. CH/97/45;

Adopted the following Decision on the admissibility and merits of the case under Article VIII paragraph 2 and Article XI of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Rules 52, 57and 58 of its Rules of Procedure.

I. INTRODUCTION

1. This case arises from the arrest and detention of the applicant, by Bosnian Croat authorities, between February and August 1996. It was referred to the Chamber by the Human Rights Ombudsperson for Bosnia and Herzegovina (hereinafter "the Ombudsperson") under Article V paragraph 7 of the Human Rights Agreement (hereinafter "the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, on the basis of a Report on the merits of the case. In her Report she concluded that the applicant's arrest and detention, and his treatment in custody, had entailed violations of his rights under Articles 3, 4, 5, 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

2. The case was referred to the Chamber by the Ombudsperson on 31 July 1997. It originated in an application lodged with the Ombudsperson on 29 August 1996 by Mr Samy HERMAS (hereinafter "the applicant") against the Federation of Bosnia and Herzegovina (hereinafter "the respondent Party"). To the Ombudsperson's letter referring the case to the Chamber was appended her Report, adopted on 4 March 1997, containing the Ombudsperson's findings with regard to the facts of the case and her opinion as regards the legal issues thereby raised.

3. By letter of 23 September 1997 the Registrar conveyed to the respondent Party the invitation of the Chamber to submit, before 24 October 1997, observations in writing on the admissibility and merits of the application. No response was received from the respondent Party.

4. On 5 November 1997 the Chamber decided that a single hearing should be held in the present case and in the cases of Čegar v. Federation of Bosnia and Herzegovina (Case No. CH/96/21) and Marčeta v. Federation of Bosnia and Herzegovina (Case No. CH/97/41).

5. The hearing, which concerned both the admissibility and merits of the present application, was held in Sarajevo on 3 December 1997.

The applicant appeared in person.

The Ombudsperson was represented by Ms. Simona GRANATA, Deputy Ombudsperson, and Mr Nedim OSMANAGIĆ, Legal Counsellor.

The respondent Party was represented by its Agent, Mr Džemaludin MUTAPČIĆ.

The Chamber heard addresses by the applicant, Ms Granata, Mr Osmanagić and Mr Mutapčić.

The Agent of the respondent Party left the hearing immediately after delivering his address explaining that due to other professional commitments he was unable to remain. The Agent, in response to an enquiry from the President, indicated that he would like the opportunity to comment in writing on a claim for compensation from the applicant.
After the departure of the Agent the Chamber heard answers to questions put individually by its members to the applicant and the representatives of the Ombudsperson. The Chamber notes with serious concern that it was thus deprived of the opportunity to put questions to him and to hear the respondent Party's response to its questions.

6. By letter dated 19 December 1997 the Agent of the respondent Party submitted comments on the applicant's compensation claim.

III. ESTABLISHMENT OF THE FACTS

A. The Facts of the Case

7. The Ombudsperson carried out an investigation in the course of which, through the staff of her office, she heard the applicant and other persons as witnesses and also examined documents. In her Report she summarised the facts of the case as follows:

> "15. The applicant is a citizen of Bosnia and Herzegovina of Bosniak descent. He also has Jordanian citizenship. The applicant was born in 1973 and resides in Sarajevo.
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> 16. In the course of the war in Bosnia and Herzegovina (hereinafter "BiH"), the applicant was employed as an interpreter by the humanitarian organisation "Human Relief International".
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> 17. On 10 February 1996 the applicant and a student from Sarajevo University: Hussein El Rayyes (Palestinian), were returning from Kiseljak, with two UN employees: Mohamed Momaeni (Jordanian) and Ahmed Nuseirat, when their UN vehicle was stopped by the civilian traffic police of the Bosnian Croats' administrative body named "Hrvatska Republika Herceg Bosna" (hereinafter "the HRHB"). The applicant and his friends did not have passports on them but were able to present other documents as identification, e.g. UN identification cards, university booklets and driving licences.
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> 18. In the course of the identity check carried out by the traffic police, a vehicle of the Military police of the Croatian Defence Council (Hrvatsko Vijeće Obrane, hereinafter "the HVO", Army of "the HRHB", a regular part of the then "Armed forces" of the Federation of Bosnia and Herzegovina) arrived on the scene. The Military police officers carried out another identity check, following which they ordered the applicant and his friends to follow them to "the HVO" Barracks in Kiseljak.
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> 19. On arrival at the Barracks, the applicant was questioned over a period of about five hours about various, non-specific issues, e.g. his identity, the purpose of his travelling through the area, his role in the war in BiH, murders of Croats, etc.
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> 20. The applicant was told that he had to spend a night in detention, and that the following day, after his identity had been checked, he would be released.
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> 21. The applicant and his friends were detained in the Kiseljak military prison for 22 days. On the first night they were threatened by the guards that they would be killed or badly hurt. The threats continued throughout the time of their detention in Kiseljak. The applicant was detained in an unheated room infested with mice. Only one meal was served each day, usually consisting of one piece of bread and some tinned fish.
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> 22. On several occasions the applicant asked to be given the reason for his detention, but no information was provided. He also asked to see the Chief of the Military Police but his request was not granted.
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> 23. On 12 February 1996 "the HVO" Military police, accompanied by three journalists, came to the applicant's cell. The journalists took a picture of him and his colleagues. On 16 February and 24 February 1996 articles were published about the applicant and his fellow detainees in the Hrvatska Riječ and the Slobodna Dalmacija respectively.
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> 24. On 15 February 1996 Ahmed Nuseirat was released after a UN official visited him and requested his release.
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> 25. On 16 February 1996 the applicant and his friends were registered as detained persons by the International Committee of the Red Cross (hereinafter "ICRC"). Several days later IFOR officials also visited the applicant.

26. On 2 March 1996 the applicant was transferred by helicopter to "the HVO" military prison "Heliodrom", former helicopter base located in Rodoč Barracks near Mostar ("Vojarna Stanislav Baja Kraljević", hereinafter "the Rodoč Barracks"). During the transfer the applicant was seriously beaten by members of the anti-terrorist squad, who were in control of his transfer.

27. The applicant was required to work for nine to ten hours each day. This involved cleaning the inside of the barracks and the surrounding area and removing equipment. During this time he was punched by soldiers.

28. On one of their visits, the ICRC officials informed the applicant that he was considered to be a prisoner of war, and that the authorities of "the HRHB" intended to exchange him and his colleagues for prisoners of war of Croat descent, who had been arrested by the authorities of the Republic of BiH (hereinafter "the RBiH") in 1993.

29. In May 1996 the Commander of the prison informed the applicant orally that the officials of the Government of BiH had not agreed to the proposed exchange of prisoners of war, and that it was for this reason he was still in prison. The applicant's mother, in letters transferred by ICRC, informed him that she had sought redress with a number of authorities and organisations, such as the Presidency of the RBiH, the Government of BiH, the President of the Federation of BiH, IFOR, IPTF, ICRC, Amnesty International, the Embassy of the USA, the Office of the High Representative and others.

30. By its decision of 7 June 1996 "the HRHB" Higher Court of Travnik having its seat in Vitez (Viši Sud u Travniku sa sjedištem u Vitezu), allocated an attorney N.M. to the applicant and two of his colleagues. This decision (no. Ki. 113/96 of 7 June 1996) further states that the Higher Public Prosecutor's Office in Travnik having its seat in Vitez, on 7 May 1996, had made a request (no. Kt. 149/96) for an investigation to be carried out into the applicant, Mohamed Momaeni and Hussein El Rayyes.

31. On 18 June 1996 "the HRHB" Office for the Exchange of Prisoners and Other Persons ("the HRHB" Služba za razmjenu zarobljenika i drugih osoba) made a written proposal for exchange of the applicant and two of his colleagues. According to this proposal "the HRHB" agreed to release "three Jordanian citizens in exchange for Mr. M.B., who was being detained in Zenica." This proposal was also sent to the applicant's mother, at her request.

32. On 24 June 1996 "the HRHB" Office for the Exchange of Prisoners and Other Persons, in a letter to the Ambassador of Bosnia and Herzegovina in Croatia, repeated the same proposal, referring to the applicant and his friends as "Sami (Jamie) Hermas, Husein (Ramadan) El Raiss, Muhamed (Ali) Momani...three Islamic citizens from Arab countries" (tri islamska državljana iz arapskih zemalja). This letter further stated that proceedings against the applicant were pending.

33. On 27 June 1996 the applicant was brought before the investigative judge of "the HRHB" Higher Court of Travnik having its seat in Vitez. He was introduced to his lawyer who had been officially appointed to him. The investigative judge questioned the applicant before issuing him with the decision on investigation and detention ("the decision on detention").

34. From that decision it appeared that it was on 27 May 1996 that the Higher Public Prosecutor's office in Travnik having its seat in Vitez, had made a request (no. Kt. 149/96) for an investigation to be carried out into the applicant, Mohamed Momaeni and Hussein El Rayyes, on the basis that they were suspected of having committed criminal acts and war crimes against civilians within the meaning of Article 142 para. 1 of the Penal Code and for their detention to be ordered. It further appeared that it was 27 May 1996 that the fourth Military Police of the HVO from Vitez had itself made an application to the Higher Public Prosecutor (no. 1730-4/96-KU-41) that a criminal investigation be carried out. This is in contrast to the decision of 7 June 1996, referred to above, that suggests that the date of the Higher Public Prosecutor's Office request (Kt. 149/96) was 7 May 1996.

35. The decision on detention states that an investigation would be opened in respect of the allegations against the applicant, Mohamed Momaeni and Hussein El Rayyes on the basis that there was substantiated suspicion that they had committed war crimes as members of the Army of the RBiH unit "El mudžahid" on 8 June 1993 during the general attack on Croat villages: Maline, Bikoše, Podovi, Orašac and Čukle, located in the territory of the municipality of Travnik. The decision listed thirty-six names of individuals the applicant, Mohamed Momaeni and Hussein El Rayyes were suspected of having singled out from the Croat prisoners and killed in the village of Bihoše using an automatic weapon. Further, it stated that on 18 September 1993 they had taken part in the attack on the village of Bobaši in the municipality of Vitez and that on that occasion they had killed a large number of civilians, burnt and destroyed the whole village and had taken civilians to the concentration camp in Krušćica in the municipality of Vitez. It further stated that they had taken part in the torture of F. by stamping with their heavy boots on her bare toes, putting a knife under her throat, punching and kicking her, hitting her with their weapons and threatening to kill her.

36. According to the decision on detention, the applicant, Mohamed Momaeni and Hussein El Rayyes were to be detained for a maximum of one month from noon on 27 June 1996 in accordance with Article 191 para. 1 of the Law on Criminal Procedure.

37. The applicant, Mohamed Momaeni and Hussein El Rayyes had a right of appeal against this decision that had to be lodged with the Council of the Court within 24 hours from the moment of receipt of the decision on detention, the appeal having no suspensive effect. None of the detained appealed the decision on detention.

38. On 27 June 1996 the applicant was transferred to the civil prison in Mostar, West Side where he was detained alone in a cell. During that period he was visited by his mother and sister.

39. On 25 July 1996 the applicant was brought before a woman, alleged to have been tortured by the applicant. The witness did not recognise the applicant. The Higher Public Prosecutor's Office of Travnik agreed with the investigative judge that the decision of 27 June 1996 to detain the accused should be quashed on the basis that there were no reasons within the meaning of Article 191 para. 1 of the Law on Criminal Procedure for their continued detention. On the basis of Article 198 of the aforesaid law, the Higher Court of Travnik issued a decision dated 25 July 1996 stating that the applicant, Mohamed Momaeni and Hussein El Rayyes should be released on 27 July 1996 at noon ("the decision on release").

40. However, the public prosecutor lodged an appeal against this decision on the basis that there was a new witness who allegedly recognised the accused person such that the investigation could not be considered as having been completed and requiring the continued detention of the applicant and his friends. On 26 July the Higher Court of Travnik granted to the public prosecutor's appeal and issued another decision ("the second decision on detention"), stating that the applicant and his friends could be held in custody for another month. The Ombudsperson has not been able to see a copy of that decision.

41. The applicant's representative appealed against the second decision on detention, claiming that it was not in accordance with Article 190 para. 2 of the Law on Criminal Procedure and asking that the matter, including all relevant documentation, be referred to the Supreme Court in Mostar. The appeal failed.

42. On 29 July 1996 "the HRHB" Office for the Exchange of Prisoners and Other Persons communicated its proposal of 24 June 1996 for exchange of prisoners to the Presidency of Bosnia and Herzegovina.

43. On 7 August 1996 the applicant was exchanged, near Mostar, as part of the exchange of prisoners of war between the Government of BiH and the Government of "the HRHB".

44. During the applicant's detention, "the HRHB's" and Croatia's media repeatedly presented the applicant and his friends as members of the "El-mudžahid" unit."

8. The facts of the case, as thus established by the Ombudsperson, were not disputed by the respondent Party, either in writing or at the oral hearing. The Chamber will therefore base its decision in principle on the facts as so established but will also take into account the submissions made by the applicant and the Ombudsperson at the hearing as well as documents made available by those appearing before it.

B. Relevant Legislation

9. (a) The Penal Code of the FSFRY

Article 142 § 1 of the Penal Code of the Former Socialist Federative Republic of Yugoslavia, adopted by the then Republic of Bosnia and Herzegovina ("Official Gazette SFRJ" no. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90; "Official Gazette RBiH" no. 2/92, 8/92, 10/92, 16/92 and 13/94), reads as follows:

> "A person who, in violation of rules of the International Law during a period of war, armed conflict or occupation, has ordered that civilians be subjected to: killing, torture, inhuman actions, biological experiments, major suffering, violations of their bodily integrity or health; displacing or moving to other places, changing of their nationality and taking of another religion; forcible prostitution or rape; measures of fear and terror, being hostages, collective punishment, being taken into concentration camps, illegal detention, being deprived of the right to a fair and impartial trial; forcibly joining the enemy armed forces or intelligence service or administration; forced labour, starvation, confiscation of property, looting; a person who has ordered that the following be done: illegal and unlawful extirpation or usurpation of a great amount of property which is not justified by military needs, taking an illegal and disproportionate amount of contribution and requisition, reduction of the value of the domestic currency or illegal printing of money; or who has executed any of the above mentioned actions, will be punished by at least five years of imprisonment or by death penalty."

(b) The Law on Criminal Procedure, The Law on Application of the Law on Criminal procedure and the Law on Internal Affairs

10. The provisions on arrest, detention and related issues are provided in the Law on Criminal Procedure, the Law on Application of the Law on Criminal Procedure and the Federation of Bosnia and Herzegovina Law on Internal Affairs.

Relevant Articles of the Law on Criminal Procedure (Consolidated text) ("Official Gazette SFRJ", no. 26/86, 74/87, 57/89, 3/90, "Official Gazette RBiH", no. 2/92, 9/92, 16/92 and 13/94), read as follows:

Article 157

> "(1) An investigation shall be instituted against a particular individual if there is a ground for suspicion that he has committed a crime."

Article 158

> "(1) The investigation shall be conducted on the application of the public prosecutor.
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> (2) The application to the investigation shall be submitted to the investigative judge of the competent court.
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> (3) The application must indicate the following: the person against whom the investigation is to be conducted, a description of the act which has the legal attributes of a crime, the legal name of the crime, the circumstances justifying suspicion and the evidence that exists.

(4) The application to conduct the investigation may include a proposal that certain circumstances be investigated, that certain actions be taken, and that certain persons be examined with respect to certain points, and it may also be recommended that the person against whom the investigation is being applied for be taken into custody.

(5) The public prosecutor shall deliver to the investigative judge the criminal charge and all papers and records concerning actions which have been taken. The public prosecutor shall at the same time deliver to the investigative judge physical objects which may serve as evidence or shall indicate where they are located."

Article 159

"(1) When the investigative judge receives the application for the conduct of the investigation, he shall examine the records, and if he concurs in the application, he shall order that the investigation be conducted; the decision to that effect should contain the data referred to in Article 158, paragraph 3 of this law. The decision shall be delivered to the public prosecutor and to the accused.

(2) Before making the decision the investigative judge shall question the person against whom the conduct of the investigation is applied for unless there is a risk of delay.

(3) Before deciding on the public prosecutor's application the investigative judge may summon the public prosecutor and the person against whom conduct of the investigation has been applied for to come before the court on a specified date, if this is necessary in order to clarify circumstances which may be important in deciding on the petition, or if the investigative judge feels that an oral hearing would be advisable for other reasons. On that occasion the parties to the proceedings may present their motions orally, and the public prosecutor may amend or supplement his application for conduct of an investigation and he may also propose that proceedings be conducted on the basis of an indictment (Article 160).

(4) Provisions on the summoning and examining of an accused shall be applied to the summoning and examining of the person against whom the conduct of an investigation has been applied for. A person summoned under paragraph 3 of this article shall be instructed by the investigative judge in conformity with Article 218 paragraph 2 of this law.

(5) An appeal is allowed against the decision of an investigative judge to conduct an investigation. If the decision was communicated orally, the appeal may be filed for the record at that time."

Article 190

"(1) Custody may be ordered only under the conditions envisaged in this law.

(2) The length of custody must be limited to the shortest necessary time. It is the duty of all bodies and agencies participating in criminal proceedings and of agencies providing legal aid to proceed with particular urgency if the accused is in custody.
(3) Throughout the entire course of the proceedings custody shall be terminated as soon as the grounds on which it was ordered cease to obtain."

Article 191

"(1) Custody shall always be ordered against a person if there is a reasonable suspicion that he has committed a crime for which the law prescribes the death penalty. Custody need not to be ordered if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced.

(4) A person committing a criminal offence that is automatically prosecuted can be deprived of his liberty by any person. The person deprived of his liberty must immediately be delivered to the investigative judge or to the Ministry of Internal Affairs authority, and if this is

not possible, one of the latter must immediately be informed. The Ministry of Internal Affairs authority shall proceed according to Article 195 of this law."

Article 192

"(1) Custody shall be ordered by the investigative judge of the competent court.

(2) Custody shall be ordered in a written decision containing the following: the first and the last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instruction as to the right of appeal, a brief substantiation in which the basis for ordering custody is specifically argued, the official seal, and the signature of the judge ordering custody.

(3) The decision on custody shall be presented to the person to whom it pertains at the moment when he is arrested, and no later than 24 hours from the moment he is deprived of liberty. The time of his detainment and the time of presentation of the warrant must be indicated in the record.

(4) An individual who has been taken into custody may appeal the decision on custody to the panel of judges (Article 23, paragraph 6) within 24 hours from the time when the warrant was presented. If the person taken into custody is examined for the first time after that period has expired, he may file an appeal at the time of his examination. The appeal, a copy of the transcript of the examination, if the person taken into custody has been examined, and the decision on custody shall be immediately delivered to the panel of judges. The appeal shall not stay execution of the warrant.

(5) If the investigative judge does not concur in the public prosecutor's recommendation that custody be ordered, he shall seek a decision on the issue from the panel of judges (Article 23, paragraph 6). A person taken into custody may file an appeal against the decision of the panel of judges which ordered custody, but that appeal shall not stay execution of the order. The provisions of paragraphs 3 and 4 of this Article shall apply in connection with presentation of the warrant and the filing of the appeal.

(6) In the cases referred to in paragraphs 4 and 5 of this Article the panel of judges ruling on an appeal must render a decision within 48 hours."

Article 193

"(1) The investigative judge must immediately inform a person who has been detained and brought before him that he may engage defence counsel, who may attend his examination, and, if necessary, he shall help him to find defence counsel. If within 24 hours of the time of this communication a person taken into custody does not provide the presence of defence counsel, the investigative judge must immediately examine that person.

(2) If a person who has been detained declares that he will not engage defence counsel, the examining magistrate has a duty to examine him within 48 hours.

(3) If, in a case in which legal representation is obligatory (Article 70, § 1), a person taken into custody does not engage defence counsel within 24 hours from the date when he is informed of his right to do so, or if he declares that he will not engage defence counsel, counsel shall be appointed for his defence ex officio.

(4) Immediately after the examination the investigative judge shall decide whether to release the individual who has been taken into custody. If he considers that the person arrested should be detained, the investigative judge shall immediately inform the public prosecutor to that effect unless the latter has already submitted an application for the conduct of an investigation. If within 48 hours from the time of being informed about custody the public prosecutor does not file an application for the conduct of an investigation, the investigative judge shall release the person who has been taken into custody."

Article 195

> "(1) Authorised officials of the Ministry of Internal Affairs authority may detain a person if any of the reasons envisaged in Article 191 of this law obtain, but they must bring that person without delay before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, if the seat of that court can be reached more quickly. When the authorised official of the law enforcement agency brings the person before the investigative judge, he shall inform him of the reasons at the time of his arrest.
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> (2) If impediments which could not be overcome made it impossible to bring a person who has been arrested before the investigative judge within 24 hours, the officer must give a specific justification for this delay. The delay must also be justified when an individual is being brought in at the request of the investigative judge.
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> (3) If, because of the delay in bringing the accused before the investigative judge, the latter is unable to make the decision on custody within the period referred to in Article 192, paragraph 3, of this law, he is obliged to render a decision on custody as soon as the person who has been arrested is brought before him."

11. Article 4(a) of the Law on the Application of the Law on Criminal Procedure ("Official Gazette RBiH" no. 6/92, 9/92, 13/94 and 33/95) supersedes and is identical to Article 196 of the Law on Criminal Procedure[1]. Insofar as relevant it provides as follows:

> "(1) In exceptional circumstances custody can be ordered by the Ministry of Internal Affairs authority before an investigation is carried out, if it is necessary for establishing an identity, checking an alibi or for other reasons it is necessary to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 § 1 and § 2 points 1 and 3 of this law exist, although in cases prescribed by Article 191 § 2 point 2 this can be done only if there is a well-founded fear that the person at issue will destroy evidence of the criminal act.
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> (3) Custody ordered by the Ministry of Internal Affairs authority may last up to three days, from the moment of arrest. The provisions of Article 192 §§ 2 and 3 of this law shall apply to custody. A detained person may appeal against a decision on custody before the panel of judges of the competent court within 24 hours from the moment he receives the decision. The panel is obliged to render a decision on appeal within 48 hours from the moment of receipt of appeal. The appeal has no suspensive effect. The Ministry of Internal Affairs authority shall provide a detainee with legal aid for the lodging of his appeal.
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> (5) If, after the expiry of the three days time-limit, the detainee is not released, the Ministry of Internal Affairs authority shall act in accordance with Article 195 of this law, and the investigative judge before whom the detainee is brought shall act in accordance with Article 193 of this law."

12. Law on Criminal Procedure (Consolidated text) (continued)

Article 197

> "(1) On the basis of the investigative judge's decision the accused may not be held in custody more than 1 month from the date of his arrest. At the end of that period the accused may be kept in custody only on the basis of a decision to extend custody.

[1] The original Article 196 was deleted from the Law on Criminal Procedure by the Law on the Adoption of the Law on Criminal Procedure ("Official Gazette RBiH", no. 2/92, 9/92 and 13/94), but was introduced again by Article 4(a) of the Law on the Application of the Law on Criminal Procedure. Since the original text of this Article has not changed, the use of the words "this law" in Article 4(a) in fact refer to the Law on Criminal Procedure.

(2) Custody may be extended for a maximum period of 2 months under a decision of the panel of judges (Article 23, § 6). An appeal is permitted against the panel's decision, but the appeal does not stay the execution of the decision. If proceedings are conducted for a crime carrying a prison sentence of more than 5 years or a more severe penalty, a panel of the Supreme Court of the Republic may for important reasons extend custody by not more than another 3 months. The decision to extend custody shall be made on the agreed recommendation of the investigative judge or public prosecutor.

(3) If a bill of indictment is not brought before the expiration of the periods referred to in paragraph 2 of this Article, the accused shall be released."

Article 198

"In the course of the preliminary examination the investigative judge may terminate custody on agreement with the public prosecutor when proceedings are being conducted on his petition, unless custody is terminated because the period of its duration has expired. If the investigative judge and public prosecutor do not reach agreement on this point the investigative judge shall ask the panel of judges to decide the issue, which it must do within 48 hours."

13. On 10 January 1996 the Federation of Bosnia and Herzegovina passed a new Law on Internal Affairs ("Official Gazette FBiH", no 1/96). This Law entered into force on 1 February 1996

Article 35

"If necessary in the course of duty and for the execution of assignments, authorised officers may request persons to identify themselves, and in cases prescribed by Federal Law, bring them in or have them brought before the competent authority."

Article 36

"In cases prescribed by the law regulating criminal procedure, authorised officers may bring in the persons, if the criminal act falls within the competence of the Ministry."

14. Law on Criminal Procedure (Consolidated text) (continued)

Article 205 imposes a duty on the President of the court to survey and visit detainees at least once a week and to take all necessary steps to remedy irregularities.

15. Law on the Application of the Law on Criminal Procedure ("Official Gazette RBiH", no. 6/92, 9/92, 13/94 and 33/95):

Article 13, *inter alia*, provides:

"1) Provisions of the Law on Criminal Procedure in regard to ... procedures for the compensation of damage, rehabilitation and procedures for the achievement of other rights of persons unjustly convicted and unjustly deprived of liberty, shall not apply."

The Law on the Application of the Law on Criminal Procedure was in force from 2 June 1992 until 23 December 1996, i. e. from the day of its publication in the "Official Gazette RB&H" until the cessation of the imminent threat of war. Since the day it was repealed, the provisions of Articles 541 to 549, relating to the procedure for compensation for damage, rehabilitation and realisation of other rights of persons who had been unjustly sentenced and whose detention was ill-founded, have been fully applicable once more.

16. Articles 542 § 2, 543 § 1, 545 § 3 of the Law on Criminal Procedure provide as follows:

Article 542 § 2:

(2) Before submitting a claim for compensation for damages, the person concerned is obliged to address his request to the Administration authority of the Republic which is competent for the legal matters.

Article 543 § 1:

(1) If a claim for compensation for damages is not accepted or no decision by the authority organ has been taken on it within three months since the date of laying it, the person concerned may submit a complaint to a competent court for compensation for damages. If an agreement has been made in respect to a part of the claim, the damaged person concerned may submit a complaint regarding the remainder of the claim.

Article 545 § 3:

"The right to compensation for damage belongs also to a person who is, because of a mistake or the illegal act of an organ, deprived of his/her freedom or kept for a longer period of time under custody or in prison than would otherwise have been the case."

(c) The Rome Agreement of 18 February 1996, Agreed Measures ("The Rules of the Road")

17. On 18 February 1996, the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, meeting in Rome, agreed on certain measures to strengthen and advance the peace process. The second paragraph of item 5, entitled "Cooperation on War Crimes and Respect for Human Rights", reads as follows:

> "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

The expressions "International Tribunal" and "Tribunal" refer to the International Criminal Tribunal for the Former Yugoslavia, which has its seat in The Hague. The above-quoted provision is normally referred to as the "Rules of the Road".

18. At the hearing before the Chamber the Agent of the respondent Party stated, in relation to the legal status of the Rome Agreement, as follows:

> "Legally the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law"

IV. FINAL SUBMISSIONS OF THE PARTIES

19. The applicant submitted that he had been the victim of violations of his rights under Articles 3, 4, 5, 13 and 14 of the Convention and that the Chamber should award him monetary and other relief therefor.

20. The representatives of the Ombudsperson maintained the conclusions reached in her Report to the effect that the applicant's rights under the above-mentioned Articles of the Convention had been violated.

21. The respondent Party accepted that the applicant had been unlawfully detained but submitted firstly that the application was premature in that the possibility of claiming compensation under the ordinary law was open to the applicant and, secondly, that the compensation claimed by the applicant was in any event excessive.

V. OPINION OF THE CHAMBER

A. Admissibility

22. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that it would have been open to the applicant under Article 524 § 2 of the Law on Criminal Procedure to apply to the competent Minister of Justice for compensation for damage arising from his illegal detention and thereafter to apply to the competent court.

23. The Chamber will construe the above submission of the Agent as a statement that the law of the Federation provides for an "enforceable right to compensation" for detention suffered in violation of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Were the Chamber to accept it, the implication would be that there had been no violation of Article 5 § 5 of the Convention. Accordingly this argument cannot be considered as a preliminary matter. This objection must accordingly be joined to the merits (see the judgment of the European Court of Human Rights in the case of Sakik and Others v. Turkey, *Reports of Judgments and Decisions* 1997, § 57, and paragraph 78 below).

24. No other grounds have been stated, or become apparent, which would justify declaring the application inadmissible in whole or in part. The Chamber will therefore declare the application admissible in its entirety.

B. Merits

1. Article 3 of the Convention

25. Article 3 of the Convention provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

26. The applicant and the Ombudsperson were of the opinion that the applicant had been the victim of violations of Article 3 of the Convention.

The applicant had had to spend almost four and a half months deprived of his liberty without any information as to the reasons and purpose of his detention. In this period he had lived in a state of constant uncertainty as to his eventual fate, which would have given rise to great fear and caused significant stress in even the most healthy person. In addition, the conditions of detention in Kiseljak appeared to have been very difficult: four, and on occasion more people had been kept in a single unheated room, which at the time – in February and March – must have been extremely cold. The applicant had been unable to leave the room during this period and he and the other detainees had been forced to share minimum sanitary facilities in the cell, running water being rare. The food supplied had been minimal.

During the transfer of the applicant and his companions to Kiseljak Military Prison to Rodoč Barracks, the applicant had been seriously beaten by the authorities, being punched and kicked and struck with rifle butts. During this episode he had been handcuffed and unable to defend himself in any way.

The uncertainty in which the applicant was left for so protracted a period, the physical violence to which he was subjected and the living conditions in Kiseljak Military Prison all constituted serious violations of Article 3 of the Convention.

27. The Agent of the respondent Party did not dispute the facts established by the Ombudsperson (see paragraph 7 above). Nor did he deny that there had been violations of Article 3.

28. The Chamber recalls that Article 3 enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see, *inter alia*, the judgment of the European Court of Human Rights in the case of Aksoy v. Turkey, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 62).

29. It is further recalled that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (see the judgment of the European Court of Human Rights in the case of Ribitsch v. Austria, 4 December 1995, Series A no. 336, § 38).

30. There can be no doubt that the physical violence committed on the applicant while he was in captivity and thus at the mercy of his captors constitutes inhuman and degrading treatment. In the Chamber's opinion, the same applies to the applicant's being kept in a state of prolonged uncertainty as to his eventual fate, which was further aggravated by threats of death and grievous injury. Having found serious violations of Article 3 of the Convention on these grounds, the Chamber does not consider it necessary on this occasion to examine the conditions of the applicant's detention in detail despite certain misgivings.

31. In conclusion, Article 3 of the Convention has been violated.

2. Article 4 of the Convention

32. Article 4 of the Convention provides as follows:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention;

(b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations."

33. The applicant and the Ombudsperson considered that the applicant had been the victim of a violation of this provision in that, for the latter part of his detention at Rodoč Barracks, he had been required to clean the barracks, to carry machinery and to unload food into the kitchens for nine to ten hours each day. He had received no remuneration for this work. Nor had he been in a position to refuse, as to do so would have been to put his safety at risk.

In the view of the Ombudsperson, given that the applicant was illegally detained, the exception provided for by Article 4 § 3 (a) of the Convention did not apply. Moreover, she was of the opinion that the applicant had been held in "servitude".

34. The Agent of the respondent Party did not dispute the facts established by the Ombudsperson (see paragraph 7 above). Nor did he deny that there had been violations of Article 4.

35. As did the European Court of Human Rights in its judgment in the case of Van der Mussele v. Belgium of 23 November 1983 (Series A no. 70), the Chamber will take as its starting point the definition of "forced or compulsory labour" given in Article 2 § 2 of Convention no. 29 of the International Labour Organisation concerning Forced or Compulsory Labour, namely "... all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

36. It is clear that the applicant, who was detained against his will, did not offer himself voluntarily for the work he was required to perform in Rodoč Barracks. Moreover, like the Ombudsperson, the Chamber accepts that the applicant could reasonably believe that he was under threat of violence against his person should he refuse. In this regard the Chamber cannot overlook the fact that he had already been physically assaulted and was entirely at the mercy of the persons keeping him in detention. It must therefore be accepted that the work exacted from the applicant amounted to "forced or compulsory labour". This will constitute a violation of Article 4 of the Convention if it is not covered by one of the exceptions provided for by Article 4 § 3.

37. The Chamber finds that this is not the case. Given that the applicant's detention was not lawful under Article 5 of the Convention (see paragraphs – below), Article 4 § 3 (a) cannot apply. The other exceptions provided for by Article 4 § 3 are obviously irrelevant.

38. However, on the ordinary meaning of the expression "servitude" and in view of the clear wording of Article 4 § (a) – which, it is true, applies only to detention which is legal under Article 5 –, the Chamber cannot find that work exacted from a prisoner in the normal course of his detention amounts to "servitude" prohibited by Article 4 § 1 for the sole reason that the detention is illegal.

39. In conclusion, Article 4 of the Convention has been violated.

3. Article 5 of the Convention

40. Article 5 of the Convention provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

41. The applicant and the Ombudsman considered that the applicant had been a victim of violations of Article 5 §§ 1, 2, 3, 4 and 5.

The Agent of the respondent Party, speaking at the Chamber's hearing, admitted that the applicant had been detained without just cause.

42. The Chamber notes at the outset that it is not open to doubt that the applicant was deprived of his liberty.

(a) Article 5 § 1 of the Convention: whether the applicant's detention was "lawful"

43. The applicant and the Ombudsperson observed that the applicant had been brought before a court only on 27 June 1996, four months and seventeen days after his arrest. As of that date, he was kept in detention for the stated purpose of investigating his involvement in war crimes. Since these were crimes for which the death penalty might be imposed (Article 142 § 1 of the Penal Code of the Former Socialist Federate Republic of Yugoslavia, see paragraph 9 above), it was mandatory to remand the applicant in custody (Article 191 of the Law on Criminal Procedure, see paragraph 10 above). Consequently, while it would have been lawful under domestic law for the applicant's arrest to have been carried out without a warrant by the law enforcement bodies acting in accordance with Article 195 of the Law on Criminal Procedure, he should then have been brought before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, without delay (Article 195 § 1 of the Law on Criminal Procedure). The failure to bring the applicant before the investigating judge within 24 hours required the enforcement authorities to provide specific justification for the delay (Article 195 § 2 of the Law on Criminal Procedure), which was never done. Alternatively, if the law enforcement bodies had been acting in accordance with Article 4(a) of the Law on Application of the Law on Criminal Procedure, after a maximum of three days in detention, the applicant should have been brought without delay before the competent investigative judge of the lower court in whose jurisdiction the crime was committed.

In the opinion of the Ombudsperson, the failure to observe the rules of procedure laid down by national law was in itself sufficient to render the whole period of detention contrary to Article 5 § 1.

44. The Agent of the respondent Party offered no argument to the contrary.

45. On the facts of the case, the Chamber has come to the conclusion that the applicant was arrested and detained by agents of the respondent Party for the sole purpose of exchanging him against prisoners held by others.

It is to be recalled that Article 5 § 1 is intended to guarantee freedom from arbitrary detention. The enumeration therein given of grounds which may justify deprivation of liberty is exhaustive (see the judgment of the European Court of Human Rights in the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, § 194) and arrest or detention for the purpose of exchange is not to be found there. That is sufficient for the Chamber to find that the applicant's detention was not "lawful" under Article 5 § 1 of the Convention and thus to find that the applicant has been a victim of a violation of Article 5 § 1.

46. Moreover, although the Chamber would not be seen to distinguish the period after 27 June 1996 from the preceding period, it notes that in so far as the reason for the applicant's detention as from that date was the suspicion that he had committed war crimes, the "Rule of the Road" contained in the Rome Agreement of 18 February 1996 required that the relevant order, warrant or indictment be reviewed beforehand by the International Criminal Tribunal for the Former Yugoslavia. As stated by the Agent of the respondent Government at the Chamber's hearing, the "Rules of the Road" apply as domestic law in the Federation.

Given that, as stated by the Agent (see paragraph 18 above), the "Rules of the Road" had been circulated to all the courts in the Federation, the investigative judge who ordered the applicant's detention cannot have been unaware of them. Yet they were not followed.

47. The Chamber concludes that there has been a violation of Article 5 § 1 of the Convention.

(b) Article 5 § 1 (c)

48. The applicant and the Ombudsperson were of the opinion that there had been a violation of Article 5 § 1 (c) in that the applicant had not been detained on a "reasonable suspicion" that he had committed an offence.

49. As already noted, the Agent of the respondent Party admitted at the Chamber's hearing that the applicant had been deprived of his freedom without reason.

50. In view of its finding in paragraph 47 above that the applicant's detention was in any case unlawful, the Chamber does not consider it necessary to address separately the question whether Article 5 § 1 (c) was applicable.

(c) Article 5 § 2

51. The applicant and the Ombudsperson were of the opinion that the failure to inform the applicant of the reasons of his arrest or of any charges against him until four and a half months had passed constituted a violation of the applicant's right, guaranteed by Article 5§2 of the Convention, to be given such information "promptly".

52. The Agent of the respondent Party offered no argument to the contrary.

53. As the European Court of Human Rights stated in its Fox, Campbell and Hartley judgment of 30 August 1990 (Series A, no. 182), Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 the person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (loc. cit., § 40).

54. Although it appears that the applicant's detention was for the purpose of exchange against other prisoners and that he was so informed in May 1996 by the commanding officer of the Heliodrom prison (see paragraph 7 above), no legal grounds were given at all. In these circumstances the Chamber takes the view that the date on which the applicant was "informed ... of the reasons for his arrest and of any charge against him" was 27 June 1996. That was the date on which the investigative judge gave him the information which enabled him to take any proceedings to challenge the lawfulness of his detention (see paragraph 7 above).

The Chamber agrees with the Ombudsperson that a delay of some four and a half months in providing such essential information cannot in any circumstances be considered compatible with Article 5 § 2 of the Convention.

55. In conclusion, Article 5 § 2 has been violated.

(d) Article 5 § 3 of the Convention

56. The applicant and the Ombudsperson were of the opinion that the applicant had been the victim of a violation of Article 5 § 3 of the Convention in that he had not been brought promptly before a judge, brought to trial within a reasonable time or released pending trial. He had not even been given the opportunity to offer any guarantees to appear for trial.

57. The Agent of the respondent Party did not offer any arguments to the contrary.

58. The Chamber recalls that Article 5 § 3 applies only to persons arrested or detained in accordance with Article 5 § 1 (c). In view of its findings with regard to that provision, there is no call for the Chamber to consider the case under Article 5 § 3.

(e) Article 5 § 4 of the Convention

59. The applicant and the Ombudsperson were of the opinion that the applicant had been the victim of a violation of Article 5 § 4 in that the applicant had not been able to take proceedings by which the lawfulness of his detention would be decided speedily by a court and his release ordered if the detention was not lawful.

The Ombudsperson pointed to the fact that the applicant had been detained without a legal order from 10 February until 27 June 1996. Only on the latter date did it become possible for him to take proceedings to challenge the lawfulness of his detention. Until then it was, in the Ombudsperson's view, unlikely that any request by the applicant to be brought before a court would have been acceded to.

60. The Agent of the respondent Party did not offer any arguments to the contrary.

61. The finding of a violation of Article 5 § 1 in the present case does not dispense the Chamber from proceeding to inquire whether there was a failure to comply with Article 5 § 4, as the two provisions are distinct (see the European Court of Human Rights' Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, § 55).

62. The Chamber recalls that, as was held by the European Court of Human Rights in its Chahal v. the United Kingdom judgment of 15 November 1996 (*Reports of Judgments and Decisions* 1996), Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13.

63. As was held by the European Court of Human Rights in its Brogan and Others v. the United Kingdom judgment of 29 November 1988 (Series A no. 145-B), the notion of "lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1; and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. By virtue of Article 5 § 4, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty (loc. cit., § 65).

64. This means that, in the instant case, the applicant should have had available to him a remedy allowing the competent court to examine not only compliance with the procedural requirements laid down by domestic law but also the reasonableness of any suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (compare the Brogan judgment, loc. cit.).

Furthermore, as appears from the wording of Article 5 § 4 itself, the remedy in question must be such as to allow the lawfulness of the arrest or detention to be decided "speedily" by a body possessing the attributes of a "court".

65. Like the Ombudsperson, the Chamber accepts that no remedy at all was available to the applicant until 27 June 1996 and indeed the Agent of the respondent Party has not suggested otherwise. This is in itself sufficient to find that there has been a violation of Article 5 § 4.

66. It should be noted that, although it appears that a judicial remedy became available to the applicant on 27 June 1996 (of which the applicant did not avail himself), the Agent of the respondent Party did not argue that this remedy met the requirements of Article 5 § 4. In view of its finding in the preceding paragraph, the Chamber does not consider it necessary to address this matter of its own motion.

67. In conclusion, Article 5 § 4 has been violated.

(f) Article 5 § 5 of the Convention

68. The applicant claimed that he had been a victim of a violation of Article 5 § 5 of the Convention in that he had been unable to claim compensation for his illegal detention.

69. The Ombudsperson considered that Article 13 of the Law on Application of the Law on Criminal Procedure (see paragraph 15 above) had apparently repealed Article 545 of the Law on Criminal Procedure (see paragraph 16 above), thus making it impossible for the applicant to claim such compensation; there had, accordingly, been a violation of Article 5 § 5.

70. The Agent of the respondent Party stated that it would have been open to the applicant under Article 524 § 2 of the Law on Criminal Procedure (the Agent was apparently referring to Article 542 § 2 - see paragraph 16 above) to apply to the Minister of Justice of the Canton for compensation for damage arising from his illegal detention and thereafter to apply to the competent court. However, only pecuniary damage could be compensated. There was no provision for compensation of non-pecuniary damage.

71. Given that the Agent of the respondent Party raised a preliminary objection of non-exhaustion which the Chamber has joined to the merits of the case (see paragraph 23 above), the Chamber will have regard to the case-law of the European Court of Human Rights with regard to Article 26 of the Convention (see, particularly, the statement of principle in the Court's Akdivar and Others v.Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996). The Court held in paragraphs 66-69 of that judgment:

> "66. Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, the Vernillo v. France judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27, and the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 22, § 45).
>
> Article 26 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the 'generally recognised rules of international law' there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, pp. 18-19, §§ 36-40). The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 159, and the report of the Commission in the same case, Series B no. 23-I, pp. 394-97).

68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, the Commission's decision on the admissibility of application no. 788/60, Austria v. Italy, 11 January 1961, Yearbook, vol. 4, pp. 166-168; application no. 5577-5583/72, Donnelly and Others v. the United Kingdom (first decision), 5 April 1973, Yearbook, vol. 16, p. 264; also the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the Velàsquez Rodríguez case, Preliminary Objections, Series C no. 1, § 88, and that Court's Advisory Opinion of 10 August 1990 on Exceptions to the 'Exhaustion of Domestic Remedies' (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Series A no. 11, p. 32, § 41). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism (see the above-mentioned Cardot judgment, p. 18, § 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see the above-mentioned Van Oosterwijck judgment, p. 18, § 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

72. It appears to the Chamber that Article 545 § 3 of the Law on criminal proceedings (see paragraph 16 above) recognises a right to compensation for illegal detention. According to Article 542 § 2 of that Law (see paragraph 16 above), the person who has been illegally detained may apply to the competent authority for such compensation. An appeal against the decision of that authority (or against a failure to decide) may be filed to a court (Article 543 § 1 - see paragraph 16 above).

It appears that Article 545 § 3 was not repealed entirely, as stated by the Ombudsperson, but only suspended for the duration of the hostilities, and that it is now once again in force (see paragraph 15 above).

Be that as it may, the Chamber will approach the question whether Article 5 § 5 of the Convention was violated as follows.

73. Firstly, although the Chamber accepts that the law of the Federation provides for a right to compensation in relation to illegal detention and thus that "formal remedies" exist in theory, the Chamber must have regard to the general legal and political context in which they operate.

74. As has been seen, the present case concerns a person who was illegally detained for the purpose of exchanging him against prisoners held by another of the former belligerent factions (see paragraph 45 above). At the time, shortly after the end of active hostilities, there was widespread uncertainty prevailing throughout Bosnia and Herzegovina, and central authority was apparently not in a position to ensure observance of the rule of law by its subordinate executive authorities. This is reflected by the fact that the applicant's case is not unique. Indeed, a similar case was heard by the Chamber simultaneously with the present one and more are pending before the Ombudsperson (including, as appears from the Ombudsperson's report, cases brought by some of the persons arrested at the same time and place as the applicant). In these circumstances it falls to the respondent Party to satisfy the Chamber that the remedies allegedly available were "effective", or in other words, that the right to compensation which it was claimed existed as a matter of Federation law was "enforceable".

75. The Agent of the respondent Party has not cited any case-law of any court in the Federation from which it would appear that the procedure provided for by Article 542 § 2 had ever been successfully followed by any person in the applicant's position. In these circumstances the Chamber must find that the respondent Party has not discharged its burden of proof (see the above-mentioned Sakik and Others v. Turkey judgment, § 60).

76. The Chamber will now address the question whether the compensation to which a formal right is recognised meets Convention standards.

77. In its Tsirlis and Kouloumpas v. Greece judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997, the European Court of Human Rights found a violation of Article 5 § 5 of the Convention (loc. cit., § 66) and went on to award compensation of pecuniary and non-pecuniary damage under Article 50 (loc. cit., § 80). It did likewise in the above-mentioned Sakik and Others judgment (loc. cit., §§ 61 and 66). The Chamber accordingly finds that the "enforceable right to compensation" referred to in Article 5 § 5 of the Convention encompasses compensation for non-pecuniary damage as well as pecuniary damage. Yet, according to the Agent of the respondent Party, there is no provision for compensation of non-pecuniary damage. In these circumstances the Chamber finds that it is not established that the right to compensation meets the standards of Article 5 § 5.

78. In conclusion, the Chamber rejects the respondent Party's preliminary objection and finds that Article 5 § 5 of the Convention has been violated.

4. Article 14 of the Convention

79. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

80. The applicant and the Ombudsperson alleged that the applicant had been a victim of discrimination contrary to this provision, in relation to the rights guaranteed by Articles 3, 4 and 5 of the Convention.

81. The Agent of the respondent Party did not offer any argument to the contrary.

82. The European Court of Human Rights has held in its Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45) that where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a breach has been found of the substantive Article, it is not generally necessary also to examine the case under Article 14, though the position is

otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (loc. cit., § 67).

However, in deciding whether to examine a question of discrimination under Article 14 the Chamber must take into account that, as confirmed by Article II § 2 (b) of Annex 6, the prohibition of discrimination is a central objective of the Dayton Agreement to which the Chamber must attach particular importance.

83. The Ombudsperson expressed the opinion that the central issue in the present case did in fact involve the question of existence of an inequality of treatment, because the applicant was held by the Bosnian Croat authorities for the purpose of exchanging him against Bosnian Croat prisoners held by the Government of Bosnia and Herzegovina.

(a) The Chamber's general approach

84. The Chamber has already found that the applicant's detention was not "lawful" within the meaning of Article 5 § 1 of the Convention. It has also found violations of Articles 3 and 4 of the Convention. The factual circumstances of the latter are closely connected with the applicant's illegal detention.

85. However, the Chamber has not yet considered the reasons for the applicant's detention in detail. Like the Ombudsperson, the Chamber finds it important to examine the allegation that the applicant was detained because the detaining authorities, considering the applicant to be associated with a former belligerent faction other than that to which they themselves belonged, wished to exchange him for a member or members of their own faction. Whether or not it is, as the Ombudsperson states, "the central issue" in the case, it is certainly of fundamental significance.

86. As the European Court of Human Rights has held on many occasions, Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction (see, as a recent authority, the Court's judgment in the case of the National and Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom of 23 October 1997, *Reports of Judgments and Decisions* 1997, § 88).

(b) Whether there was a "difference in treatment" between the applicant and other persons in an analogous or relevantly similar situation

87. The Ombudsperson considered that until the applicant was brought before the investigative judge on 27 June 1996, he was held for no other purpose than to exchange him against other prisoners. In May 1996, he was informed by the commanding officer of the Rodoč Barracks that he continued to be detained because the Government of Bosnia and Herzegovina had not agreed to a proposed exchange of prisoners of war. On 18 June 1996 there had been a written proposal to exchange the applicant against other prisoners, which offer was repeated in a letter dated 24 June 1996 in which the name of the applicant was specifically mentioned. Only on 27 June 1996 was the applicant notified of allegations that he had been involved in war crimes. Nonetheless, no charges were in fact ever brought against him, and on 29 July 1996 a further offer of exchange was made in respect of the applicant. The offers of exchange had referred to the applicant variously as a "Jordanian citizen", an "Islamic citizen of an Arab country" and an "Islamic citizen". There had accordingly been a "difference in treatment" based on the applicant's "origin" and "faith".

The difference in treatment related not only to the applicant's illegal detention but also to the forced or compulsory labour exacted from him, and to the inhuman and degrading treatment meted out to him. The use of abusive and discriminatory language used provided sufficient evidence of that.

88. The Agent of the respondent Party offered no arguments to the contrary.

89. On the facts of the case as established, the Chamber, like the Ombudsperson, finds that the applicant was detained for no better reason than to exchange him against other prisoners. In the circumstances, this constitutes a "difference in treatment" as regards the guarantees to which the applicant was entitled under Articles 3, 4 and 5 of the Convention. This difference was based on the applicant's "religion" and "national origin".

(c) Whether there was an "objective and reasonable justification" for the difference in treatment complained of

(i) Article 14 of the Convention taken together with Article 5

90. In the Ombudsperson's view, the exchange of prisoners of war must always be *de facto* discriminatory, as the value of a war prisoner was the very fact that he or she belonged to a specific category of persons, namely "the perceived enemy".

In addition, Article IX § 1 (c) of Annex 1A to the General Framework Agreement for Peace in Bosnia and Herzegovina provided that all prisoners were to be released and transferred within thirty days of the transfer of authority between UNPROFOR and IFOR, that is, no later than 19 January 1996. The applicant was, however, detained after that date.

91. The Agent of the respondent Party did not seek to justify the difference in treatment complained of.

92. The Chamber observes that the detention of persons for the purpose of exchanging them against other persons is in itself prohibited as it is not provided for by Article 5 § 1 of the Convention. Where persons so detained are selected on the basis of their belonging to a specific category of human beings, such detention accordingly constitutes a difference in treatment for which there is no conceivable justification.

93. In conclusion, there has been a violation of Article 14 of the Convention taken together with Article 5.

(ii) Article 14 of the Convention taken together with Article 4

94. The Ombudsperson considered that during the period of his detention contrary to Article 14 taken together with Article 5, the applicant was forced to work.

95. The Agent of the respondent Party did not seek to justify the difference in treatment complained of.

96. The Chamber confines itself to referring to its finding of a violation of Article 4 in paragraph 39 above. Given that the violation of Article 4 found results directly from the finding of a violation of Article 5, the finding of a violation of a violation of Article 14 taken together Article 4 must also follow from the finding of a violation of Article 14 taken together with Article 5.

97. In conclusion, there has been a violation of Article 14 of the Convention taken together with Article 4.

(iii) Article 14 of the Convention taken together with Article 3

98. The Ombudsperson found it established, on the ground that abusive and racist language had been used against the applicant, that it was his origin and faith which had led to his being treated harshly while in detention.

99. The Agent of the respondent Party did not seek to justify the difference in treatment complained of.

100. The Chamber is satisfied that the applicant was maltreated for no other reason than his religion and his national origin. This adds to the violation of Article 3 found in paragraph 31 above the element of discrimination.

101. In conclusion, there has been a violation of Article 14 of the Convention taken together with Article 3.

5. Article 13 of the Convention

102. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

103. The applicant claimed to have been a victim of Article 13 of the Convention in that he had not had available to him an effective remedy against the violations of Articles 3, 4 and 5.

104. The Ombudsperson considered that, in view of her opinion with respect to Article 5 § 5 of the Convention, no separate issue arose under Article 13 with regard to the violation of Article 5.

The Ombudsperson considered that the applicant could not be said to have had avilable to him an effective remedy against the violations of Articles 3 and 4.

It was true that the applicant could in theory have brought criminal proceedings against those responsible for the commission of illegal acts against him. However, in view of the failure of the public prosecutor and the Higher Court of Travnik sitting at Vitez to take into account the fact that by the time the applicant's continued detention was ordered, on 27 June 1996, he had already been in illegal detention for four and a half months, the Ombudsperson considered it unlikely that either would have acted on the applicant's allegations.

As to the possibility of civil proceedings, the Ombudsperson took the view that the applicant ought not to be expected to return to the territory controlled by the Bosnian Croat authorities. Given that it did not appear that the criminal investigation against him had been closed or that he had been pardoned, he might reasonably fear re-arrest.

Quite apart from the question of whether the remedies open to the applicant were "effective", there remained the fact that the public prosecutor had failed in his duty to carry out an investigation. He had ignored the visible evidence before him that the applicant had been ill-treated and forced to perform labour.

105. The Agent of the respondent Party confined himself to arguing that the applicant could have claimed compensation for his illegal detention (see, particularly, paragraph 22 above). He offered no further argument.

106. The Chamber notes at the outset that no separate issue arises under Article 13 of the Convention with regard to the violations of Article 5. It refers to its findings of violations of Article 5 § 4 and 5 § 5 (see paragraphs 67 and 78 above). With regard to Article 5 § 4 of the Convention, reference may be made to the judgment of the European Court of Human Rights in the case of Murray v. the United Kingdom (judgment of 28 October 1994, Series A no. 300-A, § 97); with regard to Article 5 § 5, to the Court's above-mentioned judgment in the Tsirlis and Kouloumpas case (loc. cit., § 73).

107. Moreover, since the Chamber's finding of a violation of Article 4 follows directly from its finding of a violation of Article 5 (see paragraph 37 above), no separate issue arises in this respect either.

108. There remains the question whether an effective remedy was available to the applicant with regard to the violation of Article 3 of the Convention.

The Chamber recalls that the European Court of Human Rights has held, most recently in § 103 of its judgment of 25 September 1997 in the case of Aydin v. Turkey (*Reports of Judgments and Decisions* 1997):

> "The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 26, § 95).
>
> Furthermore, the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims (see paragraphs 81 and 83 above), Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.
>
> Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed (see paragraph 48 above). However, such a requirement is implicit in the notion of an "effective remedy" under Article 13 (see the Aksoy judgment cited above, § 98)."

109. Given the absolute nature of the prohibition enshrined in Article 3 of the Convention (see paragraph 28 above), the Chamber finds that this applies equally to forms of inhuman or degrading treatment short of torture.

110. Whether or not it would be, or would have been, open to the applicant to take civil proceedings against the respondent Party or a subordinate authority with a view to obtaining compensation, the Chamber is not convinced that a remedy involving a "thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure" was in fact available. Like the Ombudsperson, the Chamber cannot overlook the fact that the public prosecutor failed to make use of his powers to carry out any investigations directed against the applicant's captors.

111. In conclusion, Article 13 has been violated in that there was no "effective remedy" available to the applicant with regard to the violation of Article 3. No separate issue arises under Article 13 with regard to the violations of Article 4 and Article 5.

6. Remedies

112. The applicant stated that he had suffered damage to his reputation through having been presented in the media as a member of the "El Mudzahid" unit and thus as bearing responsibility for atrocities committed against the civilian population. He further claimed to have suffered damage for which monetary compensation was in order.

113. The applicant's claims were the following:

(a) a written apology for the violations of Articles 3, 4 and 5 of the Convention of which he had been a victim;

(b) a written certificate from the authorities of the Federation that he is not under investigation or suspicion regarding his role in the war in Bosnia and Herzegovina;

(c) a sum of 10,000 German Marks (DEM), not as compensation for damage but as recognition that wrongs had been inflicted on him;

(d) DEM 6,500 for loss of income;

(e) DEM 10,000 to compensate him for loss of a year of study.

114. The Ombudsperson, in her report, made recommendations corresponding to the applicant's claims under (a), (b) and (c).

115. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that the applicant's monetary claims were too high.

116. Article XI § 1 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina defines the Chamber's jurisdiction with regard to remedies. It provides as follows:

"Following the conclusion of the proceedings, the chamber shall promptly issue a decision, which shall address:

(a) whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so

(b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures."

117. Where it has found a breach of the Agreement, the steps which the Chamber may order the respondent Party to take include measures which will remove, alleviate or prevent damage to the applicant, as well as payment of compensation. Compensation may be awarded in particular in respect of pecuniary or non-pecuniary (moral) damage and may include costs and expenses incurred by the applicant in order to prevent the breach found or to obtain redress therefor. The Chamber may also address to the respondent Party orders to cease or desist, that is orders to discontinue, or refrain from taking, specific action.

118. With regard to the applicant's claim under (a) for a written apology, the Chamber observes that it is part of the Commission on Human Rights set up by the Parties to the Agreement with a view to securing to all persons within their jurisdiction the rights and freedoms set forth in Article I of the Agreement. That being so it considers that this Decision, which is public, constitutes in this regard a sufficient remedy.

119. With regard to the applicant's claim under (b), the Chamber observes that it is outside the scope of the case. This part of the claim must accordingly be dismissed.

120. With regard to the applicant's claim under (c), which the Ombudsperson endorsed, the Chamber notes that its phrasing is such that it may be interpreted as a claim for punitive damages as well as a claim in respect of moral damage.

The Chamber considers an award of punitive damages inappropriate.

On the other hand, in so far as the applicant's claim is for compensation of moral damage, it is appropriate to make an award. The Chamber considers that the applicant is entitled to DEM 10.000 under this head.

121. With regard to the applicant's claim under (d) for loss of income, the Chamber notes that it was not contested that the applicant actually suffered such damage. The sum claimed - DEM 6.500 - appears reasonable and the Chamber will award it in its entirety.

As to the applicant's claim under (e) for compensation for the loss of a year's study, the Chamber notes, on the one hand, that the applicant must have incurred loss on this account, but on the other, that the applicant was not prevented by the fact of his being a student from working as an interpreter at the same time. The loss suffered cannot be calculated with any precision. The Chamber will award a token sum of DEM 1500.

VI. CONCLUSIONS

For the above reasons the Chamber decides

1. unanimously, to declare the application admissible;

2. unanimously, that there has been a violation by the respondent Party of Article 3 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

3. unanimously, that there has been a violation of Article 4 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

4. unanimously, that there has been a violation of Article 5 § 1 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

5. unanimously, that there has been a violation of Article 5 § 2 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

6. unanimously, that there has been a violation of Article 5 § 4 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

7. unanimously, that there has been a violation of Article 5 § 5 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

8. by 11 votes to 2, that there has been a violation of Articles 14 and 5 of the Convention taken together and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

9. by 9 votes to 4, that there has been a violation of Articles 14 and 4 of the Convention taken together and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

10. by 12 votes to 1, that there has been a violation of Articles 14 and 3 of the Convention taken together and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

11. unanimously, that there has been a violation Article 13 of the Convention with regard to the violation of Article 3 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

12 by 12 votes to 1, that no separate issue arises under Article 13 of the Convention with regard to the violation of Article 4 of the Convention;

13. unanimously, that no separate issue arises under Article 13 of the Convention with regard to the violation of Article 5 of the Convention;

14. unanimously, that the present Decision constitutes in itself a sufficient remedy in respect of the applicant's claim for a written apology;

15. unanimously,

a) to order the respondent Party to pay to the applicant, within three months, the sum of DEM 18,000 (eighteen thousand German Marks), by way of compensation for pecuniary and non-pecuniary injury,

b) that simple interest at an annual rate of 4 % will be payable over this sum or any unpaid portion thereof from the day of expiry of the above-mentioned three-month period until the date of settlement;

16. unanimously, to dismiss the remainder of the applicant's claims for remedies;

17. unanimously, to order the respondent Party to inform the Chamber, within three months, on the steps taken by it to comply with the above orders.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber