HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 10 SEPTEMBER 1998

in

CASE No. CH/97/34

Jasmin ŠLJIVO

against

Republika Srpska

The Human Rights Chamber for Bosnia and Herzegovina, in a Panel sitting on 16 July 1998 composed of the following Members:

Manfred NOWAK, President
Giovanni GRASSO, Vice-President
Vlatko MARKOTIĆ
Jakob MÖLLER
Mehmed DEKOVIĆ
Vitomir POPOVIĆ
Viktor MASENKO-MAVI

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the admissibility and merits of the application by Jasmin ŠLJIVO against the Republika Srpska, registered under Case No. CH/97/34;

Adopts the following Decision on the admissibility and merits of the case under Article VIII (2) and Article XI of the Human Rights Agreement (hereinafter "Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Rules 52 (1), 57 and 58 of its Rules of Procedure.

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I. INTRODUCTION

1. This case arises from the applicant's arrest by Republika Srpska police on 22 March 1996 on charges of terrorism and "associating for the purpose of performing enemy activities". The applicant's complaints concern the arrest itself, the proceedings following his arrest, the conduct and fairness of the trial, his treatment during detention and the investigation for war crimes following his detention. The applicant alleges, in particular, the violations of his rights guaranteed by Articles 3, 5, 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") and Article 2 of Protocol No. 4 to the Convention ("Protocol No. 4").

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was submitted to the Chamber by the applicant's father Mr. Huso Šljivo on 28 February 1997 and registered on the same day. The application was directed against the Republika Srpska and included a request that the Chamber issue a provisional measure ordering the release of the applicant in order that he might receive medical treatment for epilepsy. The applicant subsequently submitted an undated letter authorising his father to represent him in the proceedings before the Chamber. On 16 April 1997 the applicant's father submitted a letter of authority authorising Ms. Emira Ruždić, a lawyer practising in Sarajevo, to represent his son before the Chamber.

3. On 17 March 1997 the Chamber considered the case and decided not to order the provisional measures requested. It also decided to request the respondent Party to submit further information about the case. In response to this request, which was made on 26 March 1997, the respondent Party submitted information by letter dated 11 April 1997. The applicant submitted observations on the respondent Party's submissions by letter dated 27 May 1997.

4. On 11 July 1997 the Chamber again considered the case and decided to ask the applicant and the respondent Party for certain further information. In reply to this request, which was made on 21 July 1997, the respondent Party submitted further information on 12 August 1997. The applicant did not submit any information. On 20 August 1997 the Chamber transmitted the respondent Party's observations of 12 August 1997 to the applicant and again asked for the additional information referred to in its previous correspondence.

5. On 4 November 1997 the Chamber considered the state of proceedings in the case and decided to inform the applicant that the Chamber may take a decision on the basis of documents in its case-file if no further information was received before the Chamber's next session. The applicant submitted the requested information by letter dated 28 November 1997.

6. On 15 May 1998 the case was transferred from the plenary Chamber to Panel II of the Chamber. After considering the case the Panel decided to hold a public hearing concerning both the admissibility and merits of the application during its next session.

7. On 12 June 1998 the Panel held the hearing in the case at the Holiday Inn Hotel in Sarajevo. There appeared before the Chamber:

Mr. Jasmin Šljivo, applicant:

Ms. Emira Ruždić, lawyer, representing the applicant;

Mr. Stevan Savić, agent of the Republika Srpska.

8. Immediately following the hearing and also by letter dated 15 June 1998 the agent of the respondent Party submitted copies of additional documents relevant to the case at the Panel's request.

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III. ESTABLISHMENT OF THE FACTS

A. Facts of the Case

9. The facts of the case, as they appear from the oral and written submissions of the parties and the documents in the case-file, are disputed in part. The facts, with those in dispute so indicated, are established as follows:

1. Arrest and Detention

10. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin born on 20 January 1976 and a resident of Sarajevo. At approximately 16:00 hours on 22 March 1996 the applicant and two friends were arrested by the Republika Srpska (Srpsko Sarajevo) police as they walked on the Republika Srpska side of the inter-entity boundary line along the Vraca-Pale Road in Zlatiste. The applicant and his friends had in their possession one landmine and some wire. The mine was carried by one of the applicant's friends inside his shirt and trousers. According to the applicant, he and his friends had found the landmine which they intended to turn in to the International Police Task Force ("IPTF") or authorities of the Army of the Federation of Bosnia and Herzegovina.

11. Following his arrest the applicant was taken to the Srpsko Sarajevo police station and detained. On the same day at approximately 21:00 hours the applicant was given a procedural decision issued by the Republika Srpska Ministry of Internal Affairs State Security Department Center. This decision, based on Article 196 (1) and Article 191 (2) of the Republika Srpska Law on Criminal Procedure ("RS Law on Criminal Procedure"), ordered the applicant's detention from 22 March 1996 to 25 March 1996 based on the existence of "reasonable suspicion" that he had attempted to commit an act of terrorism under Article 125 of the Republika Srpska Criminal Law ("RS Criminal Law") in conjunction with Article 19 of the same law.

12. On 27 March 1996 at 11:30 hours the applicant was examined by Investigative Judge Mr. Dragan Boročanin of the Court of First Instance in Sokolac for criminal acts under Articles 125 and 136 (1) of the RS Criminal Law. According to the court's Examination Record ("Record"), the examination was attended by the investigative judge, Public Prosecutor Vesna Tupajić-Škiljević, the applicant and the recording secretary. The Record notes that the applicant was informed of his rights to a lawyer under Articles 67 and 218 of the RS Law on Criminal Procedure but that he stated that he did not wish to engage a lawyer at the present state of proceedings. According to the Record, the applicant stated that at the time of his arrest he was working with a group to lay landmines with the aim of "killing Serbs, inflicting material damage and even killing members of IFOR to create suspicion that the Serbs themselves were taking subversive actions in the area". The Record also indicates that the applicant stated that (on unspecified dates) he had killed 200 citizens of Serb origin in the pit "Kazani" (near Boguščevac) and participated in the rapes of 40 Serb women. At the end of the Record is the applicant's signature attesting that the Record was read to him "loudly and clearly", that he does not have any objections to its contents, that "every single word" he stated was included and that he does not have anything further to state.

13. At the Chamber's hearing the applicant admitted that he made the statements recorded in the Examination Record but that he did so because he was physically assaulted and verbally threatened by the police at the Srpsko Sarajevo police station. According to the applicant, he was punched on the hands, legs and feet, threatened with a gun and told that he would be sentenced to death if he did not confess to the criminal acts for which he was arrested as well as to war crimes. The applicant defended himself at trial by confirming the statements he made before the investigative judge.

14. On 27 March 1996 following the examination of the applicant by the investigative judge, he issued a procedural decision based on Article 191 (1) - (2) of the RS Law on Criminal Procedure ordering the applicant's detention for a thirty-day period beginning 27 March 1996. The decision was based on the "well-founded suspicion" that the applicant had committed criminal acts in violation of Articles 125 and 136 (1) of the RS Criminal Law and the risk that the applicant might interfere with the investigation by influencing witnesses, destroying evidence of the alleged criminal acts and

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completing the act he allegedly attempted to commit. On the same day the applicant was transferred to the Kula prison.

2. Trial

15. On 27 March 1996 the Court of First Instance issued a procedural decision finding that it did not have competence to consider the case and referred it to the Military Court in Bileća. On 14 May 1996 the Military Court issued a procedural decision finding that it was not competent to consider the case and initiated proceedings before the Supreme Court of Republika Srpska to resolve the conflict of competencies. On 13 June 1996 the Supreme Court issued a decision stating that military courts can try only those cases which involve military personnel and that the applicant was not to be considered as such. It accordingly found that the Court of First Instance in Sokolac had competence over the case.

16. On 2 September 1996 the applicant was issued (and received) a copy of the indictment charging him with criminal offences under Articles 125 and 136 (1) of the RS Criminal Law.

17. On 14 October 1996 the applicant was tried by the Court of First Instance in Sokolac. According to the Official Minutes of the trial ("Minutes") the hearing was held in public before a five-member panel composed of the President of the Panel, Ms. Biljana Čuković, one professional judge and three lay judges. The applicant was defended by Ms. Milena Gavrilović, a lawyer practising in Sokolac (Republika Srpska), who was appointed by the court. Also present were Ms. Vesna Tupajić of the Public Prosecutor's Office in Sokolać and three witnesses, all of them Republika Srpska police officers who had participated in the applicant's arrest and who seized the landmine.

18. According to the Minutes the applicant was questioned first. He stated that he understood the indictment and that he "maintained in whole" the statements he had made before the investigative judge during his examination on 27 March 1996. The court next heard the three witnesses who testified concerning the circumstances surrounding the applicant's arrest. Both the Public Prosecutor and the defence counsel were given the opportunity to question these witnesses and raise objections. The court then read out the Examination Records of the two friends who were with the applicant at the time of his arrest but who did not appear before the court because they had been exchanged in accordance with a decision of the "State Commission for Exchange of Prisoners".

19. The Minutes indicate that the court next inspected various documents in the case-file, including the police certificate on temporary confiscation dated the day of the applicant's arrest. It then considered the proposal of the defence counsel that the applicant be given a psychiatric evaluation in order to assess his accountability at the time he allegedly committed the criminal acts for which he was charged. The court found it established that the applicant was completely aware of the criminal acts and their consequences and accordingly denied the proposal as ill-founded. In her final submission the defence counsel claimed that the applicant did not commit the crimes with which he was accused and that he either be released or given a light sentence. The applicant himself stated in his final submission that he was not guilty.

20. Following the trial, by judgment dated the same day, the court found the applicant guilty of committing acts of terrorism under Article 125 of the RS Criminal Law and of "associating for the purpose of performing enemy activities" under Article 136 (1) of the same law, and sentenced him to seven years and six months' imprisonment for both charges.

21. Also on 14 October 1996 the Court of First Instance ordered the applicant's detention from that date until its decision becomes final.

3. Appeal

22. On 5 November 1996 the applicant's court-appointed lawyer filed an appeal with the District Court in Doboj against the decision of the Court of First Instance of 14 October 1996. The appeal included four arguments: 1) that the applicant's rights were violated at the trial because he had new facts to submit besides those already given during his examination before the investigative judge prior to the trial; 2) that the court incorrectly and incompletely established the facts, e.g., that it sentenced

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the applicant for completing a criminal act under Article 125 of the RS Criminal Law rather than for attempting such an act after the court had found only that the applicant attempted the act; 3) that the court also failed to consider the applicant's mental illness; and 4) that the applicant's sentence was excessive. The appeal accordingly proposed that the District Court annul the lower court's decision and return the case to the lower court for a new trial, or to modify the lower court decision in accordance with the appeal and release the applicant of the charges completely or lessen his sentence.

23. On 5 August 1997 the District Court of Doboj denied the applicant's appeal as ill-founded and confirmed the decision of the lower court.

24. The applicant informed the Chamber by letter dated 28 November 1997 that he submitted a Request for the Extraordinary Inquiry of a Final Judgement on an unspecified date.

4. Investigation for War Crimes

25. On 23 October 1996 the Republika Srpska Public Prosecutor's Office in Srpsko Sarajevo transmitted a request to the Court of First Instance in Srpsko Sarajevo for an investigation of the applicant for war crimes under Article 142 of the RS Criminal Law.

26. Based on the Public Prosecutor's request the Court of First Instance in Srpsko Sarajevo issued on 30 January 1997 a procedural decision to conduct an investigation for war crimes. The decision also ordered the applicant to be detained for a period of one month from the date of the decision.

27. On 29 July 1997 the Court of First Instance in Srpsko Sarajevo issued a procedural decision terminating the investigation against the applicant for war crimes based on the withdrawal of those charges by the Public Prosecutor on 28 July 1997.

5. Applicant's Current Status

28. On 6 August 1997 the Psychiatric Hospital in Sokolac issued a letter recommending that the applicant continue the neuropsychiatric treatment for epilepsy which he had been receiving since his visit to the hospital on 10 April 1997. On the same day the Ministry of Justice of the Republika Srpska issued a decision temporarily releasing the applicant from imprisonment in order to obtain medical treatment for epilepsy. According to that decision, the applicant was to be released for the period beginning 6 August 1997 and ending 6 February 1998. At the end of that period, the applicant was required to return to the prison to complete his sentence.

29. Since 6 August 1997 the applicant has not been imprisoned. At the Chamber's hearing the applicant stated that he had not reported to Republika Srspka authorities after the authorisation for his release expired on 6 February 1998 and that he had no intention to return to the Republika Srpska to serve the remainder of his prison term. In response to the applicant's statement the agent for the respondent Party stated that the applicant was obligated to return to the prison after the period of temporary release ended. He also stated that the applicant had not requested an extension of his release.

B. Relevant Provisions of National Law

1. RS Criminal Law

30. The applicant was arrested for terrorism under Article 125 of the RS Criminal Law (Službeni list SRFY, Nos. 44/76, 34/84, 74/87, 57/89, 38/90; Službeni glasnik RS, Nos. 12/93, 19/93, 26/93, 14/94, 3/96) and convicted of both terrorism under that article and associating for the purpose of enemy activities under Article 136 (1) in conjunction with Article 19 of the same law.

31. Article 125, which relates to terrorist acts, provides as follows:

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> "Anyone who, with the purpose of jeopardising the constitutional state and social establishment or security of the Republika Srpska, causes an explosion or fire, or takes another publicly dangerous action or act of violence which creates uncertainty among citizens, shall be sentenced to a term of imprisonment of at least three years."

32. Article 136 (1), which relates to the crime of "associating for the purpose of enemy activities", provides as follows:

> "Anyone who contrives a plot, organises a gang, group or any other organisation for the purpose of committing crimes under Articles 114 to 119 (2), Articles 120 to 123, Articles 125 to 127 and Article 132 of this law, shall be sentenced to a term of imprisonment of one to ten years."

33. Article 19 of the RS Criminal Law relates to attempts. It provides as follows:

> "(1) Anyone who, with premeditation, proceeds with the commission of a criminal act, but does not complete it, shall be punished for an attempted crime for which the law provides a term of imprisonment of five years or a more severe penalty, and for another attempted criminal offence only when the law explicitly prescribes a punishment for attempt.
>
> (2) The offender shall be punished within the scope of the penalty provided for the relevant criminal act, and he may also be punished less severely."

34. The decision of the Court of First Instance of Srpsko Sarajevo dated 30 January 1997 authorises the opening of an investigation for war crimes, as defined in Article 142 of the RS Criminal Law. Article 142 provides, in relevant part, as follows:

> "(1) A person who, in violation of the rules of international law during a period of war, armed conflict or occupation, has ordered an armed attack against civilians, a dwelling, individual civilian persons or persons who are not able to fight, which results in death, severe bodily injury badly affecting the general health of the population; an attack with no particular aim which affects civilians; biological experiments, taking tissue or organs for the purpose of transplantation, major suffering, violations of their bodily integrity or health; displacement or relocating to other places, changes of their nationality and forced conversion to another religion; forcible prostitution or rape; measures of fear and terror, the taking hostages, collective punishment, the taking into concentration camps, illegal detention, deprivation of the right to a fair and impartial trial; forcibly joining the enemy armed forces or intelligence services or administration; forced labour, starvation, confiscation of property, looting; a person who ordered that the following be done: illegal and unlawful removal or usurpation, not justified by military necessity, of a significant amount of property, taking illegal and disproportionate amounts of contribution and requisition, reduction of the value of the domestic currency or illegal printing of money; or who carries out any of the above-mentioned actions, shall be punished by at least five years of imprisonment or by the death penalty.
>
> (...)"

2. RS Law on Criminal Procedure

35. The relevant provisions of the RS Law on Criminal Procedure (Službeni list SFRY Nos. 14/85, 74/87, 57/89, 3/90, 27/90; Službeni glasnik RS Nos. 4/93, 26/93, 14/94, 6/97) are as follows:

a. Detention

36. Article 191 (1) and (2) provides as follows:

> "(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 is not mandatory if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced.

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(2) If there is a reasonable suspicion that an individual has committed a crime, but the conditions do not obtain for mandatory custody, custody may be ordered against that person in the following cases:

1. if he is in hiding or if his identity cannot be established, or if there are circumstances indicating that he might escape;

2. if there is a reasonable fear that he will destroy the evidence to allow a severe penalty to be pronounced under the law and if because of the manner of execution, the consequences or other circumstances of the crime, there has been or might be such disturbance of the citizenry that the ordering of custody is urgently necessary for the unhindered conduct of criminal proceedings or human safety;

3. if particular circumstances indicate that he will hinder the investigation by influencing witnesses, fellow defendants or accessories after the fact;

4. if particular circumstances provide justified fear that the crime will be repeated, or an attempted crime completed, or a threatened crime committed."

37. Article 353 (1) provides as follows:

"In pronouncing a judgment which sentences the accused to five years' imprisonment or a more severe penalty, the court shall order custody if the accused is not already in custody."

b. Investigative Judge

38. Article 192 provides as follows:

"(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 detention 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 against 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.

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(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."

39. Article 193 provides as follows:

"(1) The investigative judge shall 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 engage defence counsel, the investigative judge shall immediately examine that person.

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

(3) If in the case of mandatory defence (Article 70, paragraph 1) a person taken into custody does not engage defence counsel within 24 hours from the time when he is instructed concerning that right or if he declares that he will not engage defence counsel, counsel shall be automatically appointed for his defence.

(4) Immediately after the examination the investigative judge shall decide whether to release the individual who has been taken into custody. If he feels 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 a petition for the conduct of an investigation. If within 48 hours from the time of being informed about custody the public prosecutor does not file a petition for the conduct of an investigation, the investigative judge shall release the person who has been taken into custody."

40. Article 195 provides as follows:

"(1) Authorised officials of the Ministry of Internal Affairs 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 Ministry of Internal Affairs brings the person before the investigative judge, the official shall inform him of the reasons and the time of the person's apprehension.

(2) If impediments which could not be overcome made it impossible to bring a person who has been apprehended 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.

(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 apprehended is brought before him."

41. Article 196 provides as follows:

"(1) In exceptional circumstances custody can be ordered by an authority of the Ministry of Internal Affairs 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 paragraph 1 and paragraph 2 points 1 and 3 of this law exist, although in cases prescribed by Article 191 paragraph 2 point 2 this can be done only if there is a well-founded fear that the person will destroy evidence of the crime.

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(2) The Ministry of Internal Affairs may also order pre-trial custody if the investigative judge has entrusted it to perform certain investigatory actions (Article 162, para. 4) and the grounds for pre-trial custody obtain as envisaged in Article 191 of this law.

(3) Custody ordered by an authority of the Ministry of Internal Affairs may last at most for three days, from the moment of apprehension. The provisions of Article 192 paragraphs 2 and 3 of this law shall apply to this custody. A detained person may appeal against a decision on custody to the panel of judges of the competent court within 24 hours from the moment of receipt. 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 authority of the Ministry of Internal Affairs shall provide the detainee with legal assistance for the lodging of his appeal.

(4) The Ministry for Internal Affairs is obliged to communicate promptly the order for the detention to the public prosecutor, and in the case referred to in paragraph 2 of this Article to the investigative judge, who may request that the detained person is brought before him without delay.

(5) If, after the expiry of the three days time-limit, the detainee is not released, the authority of the Ministry of Internal Affairs 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."

c. Defence Counsel

42. Article 67 provides as follows:

"(1) An accused may have the assistance of defence counsel throughout the entire course of criminal proceedings.

(2) An accused shall be instructed before the first examination takes place, that he has the right to engage defence counsel and that his defence counsel may attend his examination.

(3) Defence counsel may be engaged for the accused by his legal representative, spouse, blood relative, adoptive parent, adopted child, brother, sister, and foster parent.

(4) Only a member of the bar may be engaged as defence counsel, but an attorney in training may replace the member of the bar. If proceedings are being conducted for a crime for which punishment of imprisonment for more than five years or a more severe penalty may be pronounced under the law, a member of the bar may be replaced by an attorney in training only if he has passed the professional examination provided for in the statute of the republic or autonomous province. Only a member of the bar may be defence counsel before the Federal Court and the supreme court of the republic or autonomous province.

(5) If there are not enough members of the bar at the seat of the court, upon the petition of the accused or the persons referred to in paragraph 3 of this article the president of the court may allow engagement as defence counsel of a graduate of law school capable of furnishing the accused aid in his defence.

(6) Defence counsel must submit his power of attorney to the agency or body before which proceedings are being conducted. The accused may also give defence counsel power of attorney orally for entry in the record of the agency or body before which proceedings are being conducted."

43. Article 218, in relevant part, provides as follows:

"(1) …

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(2) Thereafter the accused shall be informed of charges against him and the grounds on which he is suspected, he shall be asked what he has to say in his defence and he shall be told that he need not present his defence nor answer the questions put to him.

(3) If the accused does not wish to answer at all or he does not wish to answer questions put to him he shall be advised, if necessary, that this could impede the gathering the evidence for his defence.

(4) The accused shall be examined orally. In the examination the accused may be allowed to use his own notes.

(5) In the examination the accused shall be allowed to present without hindrance his position concerning all circumstances tending to incriminate him and to present all facts in his favour.

(6) When the accused completes his statement, questions shall be put to him if this is necessary to fill gaps or remove contradictions and clarify other points in his presentation.

(7) The examination shall be conducted so that the personality of the accused is fully respected.

(8) The statement of confession may not be extorted from the accused by use of force, threat or other similar means (Article 259(3)).

(9) The accused may be examined in the absence of defence counsel if he has explicitly waived this right, and defence is not mandatory, if defence counsel has been denied presence when an investigative action is being conducted, if defence counsel is not present though he has been informed of the examination (Article 168), or if the accused has not provided for the presence of defence counsel for the first examination even when given 24 hours from the moment when he was informed of this right (Article 67(2)), except in the case of mandatory defence.

(10) If action is taken contrary to the provisions of paragraphs 8 and 9 of this law or if the statements of the accused referred to in paragraph 9 of this Article concerning presence of defence counsel have not been entered in the record, a court decision may not be based on the testimony of the accused."

44. Article 259 (3) provides as follows:

"It is prohibited to perform medical operations on an accused or witness or to administer to them agents which would affect their will in giving testimony."

d. Witnesses

45. Article 235 provides as follows:

"A witness may be required to take an oath. Before the trial the witness may be sworn only before the court, which is to be done if there is a fear that because of illness or other reasons he will not be able to appear at the trial. The reason for swearing the witness shall be entered in the record. The oath shall be taken in the manner specified in Article 325 of this law."

46. Article 313 provides as follows:

"After the identity of the accused has been established the president of the court panel shall direct the witnesses and experts to the space assigned to them, where they shall wait to be called in for the trial. If necessary the president may invite the experts to stay and follow the course of the trial."

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47. Article 316 provides as follows:

> "(1) Once the indictment or private complaints have been read or their contents presented orally, the presiding judge shall commence the examination of the accused.
>
> (2) Co-defendants who have not yet been examined may not be present during the examination of the accused.
>
> (3) The President of the panel shall ask the accused if he has understood the charge. If the President finds that the accused did not understand the charge, he shall once again summarise its contents in the manner which the accused can most easily understand.
>
> (4) The President shall then ask the accused to make a declaration concerning each point in the charge and present his defence.
>
> (5) The accused is not obliged to declare his position concerning the charge nor to present his defence."

48. Article 317 provides as follows:

> "(1) The provisions which apply to the examination of the accused in the preliminary examination shall be applied analogously as when the accused is examined at trial.
>
> (2) If the accused refuses to answer at all or refuses to answer a particular question, his previous statement or a portion of his previous statement shall be read out.
>
> (3) If during his examination at trial the accused departs from his previous testimony, the President of the panel shall inform him of the departure and shall ask him why he is now making a different statement, and if necessary he shall read his prior statement or portion of his statement.
>
> (4) When the examination of the accused is completed, the President must ask the accused whether he has anything to say in his defence."

3. **RS Law on Legal Profession** (Službeni glasnik RS, No. 17/92)

49. Legal professionals in the Republika Srpska are regulated by the RS Law on Legal Profession. Article 18 provides as follows:

> "The right to practice the legal profession is acquired by the issuance of a final decision on registration in the advocates' directory.
>
> The advocates' directory is a public book and is kept by the Bar Association."

50. Article 19 provides as follows:

> "Any person who fulfils the following requirements has the right to register into the advocates' directory:
>
> 1. that he is a citizen of Republika Srpska;
>
> 2. that he is professionally capable and in a physical condition to practice law;
>
> 3. that he is a graduate in law, and that he has passed the qualifying examination for judges or that he has rights equivalent to those of a person who passed such an examination;

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4. that he has human and professional qualities worthy of legal practice;

5. that he does not have a criminal record and has not been sentenced to a prison term for criminal acts against the establishment and security of Republika Srpska, against professional or other responsible duty or for any other offence committed with theft or bad intention as a motive, unless five years have passed since the sentence was served, pardoned or expired.

6. All other employment of a lawyer who acquired the right to register as provided in the above provisions, will be terminated on the date of registration."

51. Article 61 provides as follows:

"Advocates and advocates' assistants who have been entered into the register of the former Bar Association of SRBiH as of the date of the entry into force of this law will be registered into the directory of Republika Srpska, and they acquire equal rights to practice law with any advocate and advocate's assistant who registers into the above directory under provisions of this law."

4. Memorandum of Understanding on the Regulation of Legal Assistance

52. The Memorandum of Understanding on the Regulation of Legal Assistance Between Institutions of the Federation of Bosnia and Herzegovina and the Republika Srpska (20 May 1998, Banja Luka) provides, in relevant part, as follows:

"Section IV: In the interest of unimpeded functioning of the legal practice in the entire territory of Bosnia and Herzegovina, both Entities commit themselves to harmonise their legislation concerning legal practice, in order to ensure that lawyers can register with any Bar Association in Bosnia and Herzegovina and will be eligible to exercise their duties in both Entities without further requirements (official translation)."

5. Rome Agreement ("Rules of the Road")

53. On 18 February 1996 the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, including Bosnia and Herzegovina, met in Rome and agreed on certain measures to strengthen and advance the peace process. Item 5 paragraph 2 of the Rome Agreement provides as follows:

"Persons, other than those already indicted by the International Tribunal (ICTY), 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."

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

55. At the hearing before the Chamber the agent for the respondent Party stated that the Rome Agreement was binding on the Republika Srpska.

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IV. SUMMARY OF THE SUBMISSIONS OF THE PARTIES

A. The Applicant

56. The applicant submitted that his arrest, the proceedings following his arrest, the conduct and fairness of the trial, his treatment during detention and the investigation for war crimes following his detention was in violation of Articles 3, 5, 6 and 7 of the Convention and Article 2 of Protocol No. 4. For these violations the applicant submitted that the Chamber should award him monetary relief for pecuniary and non-pecuniary damage.

B. The Respondent Party

57. The respondent Party submitted that the applicant had been lawfully arrested and detained and that his trial was conducted fairly. The respondent Party also claimed that the applicant had not submitted any complaints to the courts regarding his medical treatment during detention, nor submitted any other medical documentation. As to the allegations concerning the investigation for war crimes, the respondent Party submitted that the applicant was already in custody when the decision on opening an investigation including the order for detention was issued, and furthermore that the competent court had since terminated the proceedings. For these reasons, the respondent Party argued that the application should be declared inadmissible. No observations were submitted by the respondent Party concerning the applicant's claim for compensation.

V. OPINION OF THE CHAMBER

A. Admissibility

58. The applicant alleged violations of Articles 3, 5, 6 and 7 of the Convention and Article 2 of Protocol No. 4. Before considering the application on its merits the Chamber must decide whether to accept the application taking into account the admissibility criteria set out in Article VIII (2) of the Agreement.

59. At the Chamber's hearing the agent of the respondent Party submitted that the application should be considered "inadmissible on its merits".

60. The Chamber will construe the respondent Party's submission as a statement that the application should be declared inadmissible because it is manifestly ill-founded. Article VIII (2) (c) of the Agreement provides as follows:

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

61. In the *Airey* Case, the European Court of Human Rights held that "A submission by a Government to the Court that an application is manifestly ill-founded does not in reality raise an issue concerning those conditions (allowing it to deal with the merits of the case). It amounts to a pleading that there is not even a *prima facie* case against the respondent State" (Airey v. Ireland, Judgment dated 9 October 1979, Series A, No. 32, para. 18).

62. The Chamber finds that the facts of the case as established raise issues under Articles 3, 5 and 6 of the Convention. A *prima facie* case exists against the respondent Party with regard to these provisions and the applicant's allegations concerning them cannot be considered manifestly ill-founded. As regards these provisions the Chamber finds therefore that the application is admissible.

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63. In addition, while the applicant did not specifically allege violations of his right to be brought "promptly" before a "judge" under Article 5 (3) of the Convention, the Chamber finds that the application also raises issues under this provision.

64. On the other hand, Article 7 of the Convention would not seem to be relevant to the case. Article 7 (1) provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

65. The applicant complained that the decision on opening an investigation for war crimes was in violation of Article 7. However, since war crimes are clearly recognised as a criminal offence under international law and were also considered as such under national law at the time of the applicant's arrest, questions regarding *ex post facto* criminal acts or *ex post facto* criminal penalties do not arise in the present case. The Chamber thus finds the applicant's complaint with regard to Article 7 to be manifestly ill-founded.

66. In addition, Article 2 of Protocol No. 4 also would not seem relevant to the case. Article 2 (1) of Protocol No. 4 provides as follows:

> "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

67. Whereas Article 5 of the Convention concerns the deprivation of personal liberty, Article 2 of Protocol No. 4 concerns restrictions upon freedom of movement. In the Chamber's view, the applicant's arrest and detention concerns the deprivation of his personal liberty which also entails a restriction upon his freedom of movement. No separate issue therefore arises with regard to the applicant's freedom of movement. The Chamber thus finds the applicant's complaint with regard to Article 2 of Protocol No. 4 to be manifestly ill-founded.

68. No other grounds have been stated, or become apparent, which would justify declaring the application inadmissible under Article VIII (2) of the Agreement. The Chamber concludes therefore that the application should be declared inadmissible as regards Article 7 of the Convention and Article 2 of Protocol No. 4 to the Convention, and admissible in so far as it relates to alleged violations of the applicant's human rights under Articles 3, 5 and 6 of the Convention.

B. Merits

69. Article I of the Agreement provides that:

> "the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex".

70. Under Article II of the Agreement the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the European Convention and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the other international agreements listed in the Appendix to the Agreement.

1. Article 3 of the Convention

71. Article 3 of the Convention provides as follows:

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

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a. Alleged Police Abuse

72. At the Chamber's hearing the applicant alleged that he was physically assaulted and verbally threatened by the police following his arrest on 22 March 1996. The applicant claimed that as a result of such maltreatment he felt compelled to admit his participation in acts of terrorism as well as war crimes during his examination by the investigative judge on 27 March 1996. The applicant also said during the hearing that neither the investigative judge nor the public prosecutor threatened him.

73. With regard to the assault of a person who has been deprived of liberty, the Chamber recalls that 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 Article 3 of the Convention (Case No. CH/96/45, Hermas v. Federation of Bosnia and Herzegovina, Decision on Admissibility and Merits of 18 February 1998, paras. 28 - 29).

74. It further recalls, however, that the European Court of Human Rights has found suffering at the level and of the kind required to amount to inhuman treatment under Article 3 only when there was sufficient evidence of the resulting injuries. In such cases it is then for the State to show that its agents were not responsible. In the *Tomasi* case, the Court found that the applicant suffered inhuman treatment during police custody based on three factors: 1) that no one had claimed that the marks on the applicant's body were the result of events pre-dating his arrest, carried out by the applicant himself, or caused by an escape attempt; 2) that the applicant drew attention to his marks at his first appearance before the investigative judge; and 3) that four different doctors, including an official of the prison authorities, issued certificates containing precise and concurring medical observations and indicating dates for the occurrence of the injuries which corresponded to the period spent in police custody (Tomasi v. France, Judgment of 27 August 1992, Series A, No. 241, para. 110).

75. In the present case the Chamber does not find any evidence that the applicant was beaten by the police. Firstly, although the agent of the respondent Party did not explicitly address the applicant's complaint that he was beaten by the police, the applicant did not present any evidence of his alleged injuries. Secondly, the applicant did not report the alleged injuries to the investigative judge or to any other official and only informed his parents after he was released from the prison more than sixteen months after the alleged beatings. Furthermore, the applicant did not raise the alleged ill treatment at his trial or in his appeal to the District Court against the decision of the Court of First Instance. The Chamber thus finds no evidence that he was physically assaulted so as to have suffered inhuman or degrading treatment under Article 3 of the Convention.

76. For similar reasons, the Chamber finds no evidence that the applicant was verbally threatened by the police. Again, while the agent of the respondent Party did not explicitly address the applicant's allegations, the applicant did not report the alleged threats to the investigative judge or other authorities. While it is possible that the applicant was fearful of the police, the Chamber does not find that he was verbally harassed and accordingly does not find that the applicant suffered inhuman or degrading treatment in violation of Article 3 in this regard either.

77. For the reason that it does not find it established that the applicant was either physically assaulted or verbally threatened by the police, the Chamber also does not find it established that the applicant was subsequently compelled to make false and self-incriminating statements during his examination by the investigative judge. The Official Minutes of the trial note that the applicant confirmed the statements he made during the examination. In addition the applicant stated at the Chamber's hearing that there were no police present during the examination and that the investigative judge himself had not threatened him in any way.

78. In conclusion, there was no violation of Article 3 of the Convention with regard to the applicant's treatment by the police.

b. Medical Treatment

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79. The applicant's complaints concerning his medical treatment are two-fold: first, that he was not provided any medical care during the five-day period when he was detained at the Srpsko Sarajevo police station; and second, that his transfer to the Psychiatric Hospital in Sokolac would have been appropriate for persons with psychiatric or mental illnesses, but not persons such as himself who suffers from epilepsy. The applicant submitted that both the lack of medical attention and his subsequent transfer to the psychiatric hospital violated Article 3 of the Convention.

80. The respondent Party stated at the public hearing that the applicant did not make such claims before the Court of First Instance or the District Court, nor had he submitted any documents regarding his medical condition.

81. In the *Hurtado* case, the European Commission of Human Rights found that the failure of prison officials to provide medical treatment until six days after it was requested constituted inhuman treatment. In that case, the Commission held that "the State has a specific positive obligation to protect the physical well-being of persons deprived of their liberty" and that "the lack of adequate medical treatment in such a situation must be classified as inhuman treatment" (European Commission of Human Rights, Hurtado v. Switzerland, Opinion of 28 January 1994, Series A, No. 280-A, Com. Rep. para. 79).

82. In the present case, as claimed by the respondent Party, the applicant did not submit any documents concerning his medical condition. He also failed to submit any evidence that he had requested medical attention during the five-day period he was detained by the police. The Chamber thus finds no evidence that the applicant requested or was denied medical treatment during his detention at the Srpsko Sarajevo police station.

83. As for the applicant's complaint that his hospitalisation at the Sokolac Psychiatric Hospital constituted inhuman treatment, the Chamber notes that the letter of 6 August 1997 issued by the hospital confirms the applicant's epileptic condition and recommends treatment by an "authorised neuropsychiatrist." While it is possible that the applicant may have been hospitalised with persons suffering from psychiatric or mental illnesses, the Chamber does not find it established that the applicant was not given adequate treatment for epilepsy at the Sokolac hospital. The Chamber thus does not find that the applicant's complaint in this regard gave rise to a violation of Article 3 of the Convention.

84. The Chamber concludes that there is not sufficient evidence to find a violation of Article 3 of the Convention with regard to the applicant's medical treatment.

2. Article 5 of the Convention

85. Article 5 of the Convention, in relevant part, 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:
>
> (...)
>
> 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;
>
> (...)
>
> 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

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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 before trial."

a. Arrest and Detention on Terrorism Charges

(i) Article 5 (1) of the Convention

86. The applicant alleged that his arrest was not in accordance with Article 5 (1) (c) of the Convention, which requires that there be "reasonable suspicion" that an offence was committed.

87. Speaking at the Chamber's hearing the agent of the respondent Party submitted that the allegation was ill-founded because the applicant and his two friends were apprehended by the police while attempting to commit a criminal act.

88. The Chamber recalls the decision of the European Court of Human Rights in the Fox, Campbell and Hartley case with regard to the reasonableness of a person's deprivation of liberty. In that case the Court held as follows:

> "The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 (1) (c)...having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances." (Fox, Campbell and Hartley, Judgment of 30 August 1990, Series A, No. 182, para. 32.)

89. In the present case the Republika Srpska police arrested the applicant and his friends who were in possession of a landmine and some wire as they walked on the Republika Srpska side of the inter-entity boundary line. At the time the applicant was arrested on 22 March 1996, only several months had passed since the cessation of war, and freedom of movement was, in fact, still strictly limited between the entities. Furthermore, as the applicant stated at the hearing, the landmine was concealed underneath the clothing of one of the applicant's friends.

90. Although the applicant claims that he and his friends had found the landmine and were on their way to turn it in to the International Police Task Force ("IPTF") or authorities of the Army of the Federation of Bosnia and Herzegovina, the Chamber finds that in the circumstances the police had "reasonable suspicion" that the applicant had committed a criminal offence or that the arrest was necessary to prevent his committing an offence or fleeing.

91. In conclusion, the Chamber finds that the police had "reasonable suspicion" to arrest the applicant and thus that no violation of Article 5 (1) occurred.

(ii) Article 5 (2) of the Convention

92. The applicant alleged that he was not properly informed of the basis for his arrest and detention in violation of Article 5 (2) of the Convention.

93. At the Chamber's hearing, the respondent Party submitted that all procedural decisions ordering the applicant's detention (see para. 11 above) were delivered to the applicant and that receipts for delivery were available.

94. The Chamber recalls, as it did in the *Hermas* case, that Article 5 (2) contains the elementary safeguard that any person who is arrested should know why he is being deprived of his liberty. While this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (sup. cit., para. 53).

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95. In the present case, the Republika Srpska Ministry of Internal Affairs State Security Department Center issued a procedural decision on 22 March 1996 – the day of the applicant's arrest – ordering the applicant's detention based on a "reasonable suspicion" that the applicant had attempted to commit an act of terrorism under Article 125 of the RS Criminal Law. On 27 March 1996 the Court of First Instance issued a procedural decision ordering the applicant's detention for an additional month based on a "well-founded suspicion" that the applicant had attempted to commit criminal acts in violation of Articles 125 and 136 (1) of the RS Criminal Law. In view of the facts before it, the Chamber does not find any evidence that the applicant was not informed of the basis for his arrest and detention nor that he was not informed "promptly".

96. In conclusion, there was no violation of Article 5 (2) of the Convention.

(iii) Article 5 (3) of the Convention

97. Two aspects of the case appear to raise issues under Article 5 (3) of the Convention.

98. Firstly, the question arises whether the applicant was brought before a "judge or other officer authorised to exercise judicial power". The European Court of Human Rights has held that an official, to be considered a "judge" or other comparable officer for the purposes of Article 5 (3), has the obligation of "reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and or ordering release if there are no such reasons" (Schiesser v. Switzerland, Judgment of 4 December 1979, Series A, No. 34, para. 31).

99. In the present case the investigative judge who examined the applicant on 27 March 1996 and who on the same day issued the procedural decision ordering his detention had the power to release the applicant following a review of the relevant circumstances. Under Article 193 (4) of the RS Law on Criminal Procedure, the investigative judge is required to "immediately after the examination … decide whether to release the individual who has been taken into custody" (see para. 39 above). Similarly, the panel of judges ruling on any appeal lodged against the decision on custody in accordance with Article 192 (4) - (6) of the RS Law on Criminal Procedure also has the power to decide whether or not to release the detained person (see para. 38 above).

100. There is thus no violation with regard to the applicant's right to be brought before a "judge or other officer" for the purposes of Article 5 (3) of the Convention.

101. Secondly, the facts of the case raise the question whether the applicant was brought "promptly" before a judge. The European Court of Human Rights has defined "promptness" in the context of Article 5 (3) of the Convention:

> "Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 (3), that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority." (Brogan v. UK, Judgment of 29 November 1988, Series A, No. 145-B, para. 59.)

102. In the *Brogan* case, the European Court found that detention for a period of four days and six hours for persons suspected of acts of terrorism was a violation of the requirement of "promptness".

103. In the present case the applicant was arrested at 16:00 hours on 22 March 1996 and was issued the decision on custody at 21:00 hours on the same day (see paras. 10 - 11 above). He was brought before the investigative judge on 27 March 1996 at 11:30 hours (see para. 12 above). Under Article 196 of the RS Law on Criminal Procedure, an accused must be brought before an investigative judge immediately after the expiration of the three-day time limit for detention ordered by the police (see para. 41 above). Accordingly, the applicant should have been brought before a judge on 25 March 1998 at the latest. In light of the circumstances, relevant domestic law and the case-law of the European Court of Human Rights, the Chamber cannot find that the applicant's detention for nearly two days after the time limit expired before he was brought before a judge was in accordance with the requirement of promptness laid out in Article 5 (3) of the Convention.

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104. In conclusion there was a violation of Article 5 (3) of the Convention in so far as the applicant was not brought "promptly" before a judge.

b. Detention on War Crimes Charges

105. The applicant alleged that the decision to open an investigation against him for war crimes of the Court of First Instance in Srpsko Sarajevo dated 30 January 1997, which included an order to detain the applicant pending the investigation, was unlawful. The ICTY had not reviewed the order before it was issued as required by the "Rules of the Road".

106. At the Chamber's hearing the agent of the respondent Party did not contest the allegation that the applicant's case had not previously been reviewed by the ICTY. However, he argued firstly that the Court of First Instance, as the competent court in the proceedings, had issued a procedural decision on 29 July 1997 terminating the investigation. Secondly, the agent argued that the applicant was already under lawful custody following his conviction and sentencing for the terrorism charges.

107. Article 5 (1) of the Convention requires that any deprivation of a person's liberty be "in accordance with a procedure prescribed by law". The Chamber noted in the *Marčeta* case that the lawfulness of detention presupposes conformity with domestic law and with the purpose of the restrictions permitted by Article 5 (1), namely the protection of individuals from arbitrariness (Case No. CH/97/41, Marčeta v. Federation of Bosnia and Herzegovina Decision on Admissibility and Merits of 6 April 1998, para. 57).

108. As the agent of the respondent Party stated at the Chamber's hearing, the "Rules of the Road" are binding on the Republika Srpska. It appears from the facts that the order to detain the applicant was issued before any review had been made, or even requested from the ICTY. Absent such a review the applicant could not at any relevant time be arrested or kept in detention on war crimes charges. That the applicant was already in custody for acts of terrorism did not alter the fact that no review of the war crimes charges had taken place as required under the "Rules of the Road". Neither did the termination of the decision on investigation (more than seven months after it was issued) offset the earlier failure of the authorities to seek proper and prior approval from the ICTY.

109. In conclusion, the order to detain the applicant pending an investigation against him for war crimes was not in accordance with the law and thus inconsistent with the requirements of Article 5 (1) of the Convention. The Chamber notes, however, that the applicant did not suffer adverse consequences on account of the order as he was already in custody following his conviction on terrorism charges (see paras. 86 - 91 above on the Chamber's conclusions regarding the applicant's arrest and detention on terrorism charges).

3. Article 6 of the Convention

110. Article 6 of the Convention, in relevant part, provides as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (…)
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

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a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

a. Accusation

111. The applicant alleged that he was not "informed promptly…of the nature and cause of the accusation against him" in violation of his rights under Article 6 (3) (a) of the Convention because the decision on opening an investigation was not issued until 9 July 1996, almost four months after his arrest.

112. At the Chamber's hearing the respondent Party acknowledged that the decision on opening an investigation was issued almost four months after the applicant's arrest, but submitted that procedures prescribed by law were followed. On 27 March 1996 the Court of First Instance in Sokolac transferred the case to the Military Court in Bileća after declaring itself not competent to consider the case. The Military Court then issued its own decision on 14 May 1996 referring the conflict over judicial competencies to the Supreme Court of Republika Srpska, which did not issue a decision until 13 June 1996. The Court of First Instance issued its decision on opening an investigation shortly thereafter, on 6 July 1996.

113. Article 6 (3) (a) of the Convention, which requires that persons charged with a criminal offence be promptly informed of the nature and cause of the accusation against him, is intended to provide an accused person with the information necessary to prepare his defence (European Commission of Human Rights, Bricmont v. Belgium, Decision of 15 July 1986, No. 10857/84, 48 DR 106, 149). The Chamber recalls the finding of the European Court of Human Rights that a person is considered "charged" from the moment that he is "substantially affected" by the steps taken against him (Deweer v. Belgium, Judgment of 27 February 1980, Series A, No. 35, para. 46). Such a person must be informed of both the "nature" of the accusation (the offence with which he is charged), and also its "cause" (the material facts upon which the charges are based) (Albert and le Compte v. Belgium, Judgment of 10 February 1983, Series A, No. 58, para. 41).

114. In the present case the Chamber finds that the applicant was "substantially affected" and therefore "charged" for the purposes of Article 6 (3) (a) upon his arrest by the police on 22 March 1996. However, it does not appear that the applicant was not notified of the allegations of terrorism against him, nor of the facts upon which those charges were based, namely the circumstances surrounding his arrest. On the contrary, the applicant was issued a procedural decision by the Ministry of Internal Affairs State Security Department Center on the day of his arrest which informed him of the "nature" and "cause" of the allegations against him. In the Chamber's view, the information provided the applicant upon his arrest was therefore sufficient for the purpose of preparing for his defence in accordance with Article 6 (3) (a) of the Convention.

115. In conclusion there was no violation of Article 6 (3) (a) of the Convention.

b. Defence Counsel

(i) Legal Assistance of One's Own Choosing

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116. The applicant alleged that he was unable to obtain legal assistance of his own choosing because Federation lawyers were not permitted to appear before the Republika Srpska courts and that as a result his rights under Article 6 (3) (c) of the Convention were violated.

117. At the Chamber's hearing the agent of the respondent Party stated that the applicant's right to legal assistance of his own choosing was not violated because the applicant had never submitted any documents to the Court of First Instance in Sokolac requesting or authorising his own lawyer to represent him. In addition, the applicant did not appear to have requested his mother to contact a lawyer of his own choice although his mother visited him in detention on a regular basis. Finally, the agent of the respondent Party stated that there was no evidence that any lawyer engaged by the applicant had attempted to reach the applicant via post or international organisations such as the IPTF.

118. The Chamber first notes that the applicant stated, at the public hearing, that he did not inform anyone that he wanted to engage a lawyer of his own choice. In addition, the Chamber observes that the applicant did not dispute the assertion of the agent of the respondent Party that neither the applicant nor anyone on his behalf had filed any requests with the competent court or authorities to be represented by a lawyer engaged by him. Finally, it notes the Record of the applicant's examination by the investigative judge, which indicates that he was informed of his right to a lawyer in accordance with Articles 67 and 218 of the RS Law on Criminal Procedure, but that he stated that he did not wish to have one at that time.

119. In view of the circumstances, the Chamber does not find that the applicant ever indicated his wish to engage any particular lawyer at any stage of the proceedings. Accordingly, the applicant was not denied his right under Article 6 (3) (c) of the Convention to legal assistance of his own choice. Furthermore, for the reason that the applicant did not request his own lawyer the Chamber does not find it necessary to examine the issue of whether Federation lawyers were prevented from appearing before the courts of the Republika Srpska.

120. In conclusion, there was no violation of the applicant's right to legal assistance of his own choosing as guaranteed by Article 6 (3) (c) of the Convention.

(ii) Adequate Facilities for Preparation of Defence

121. The applicant alleged that his court-appointed lawyer did not meet with him at any time and that she failed to defend him adequately.

122. Speaking at the public hearing, the agent of the respondent Party stated that the applicant's court-appointed lawyer, who was assigned on the same day that the Public Prosecutor issued the indictment against the applicant, i.e., on 2 September 1996, fulfilled her duties in accordance with the law. The agent did not dispute the applicant's allegation that the lawyer did not meet with him, but denied that the lawyer was ineffective.

123. Article 6 (3) (b) of the Convention ensures that accused persons have "adequate facilities" to prepare for their defence. The Chamber refers to the interpretation of this provision by the European Commission of Human Rights that an accused person be allowed the "opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings" (Can v. Austria, Opinion of 30 September 1985, Series A, No. 96, para. 5).

124. The Chamber also recalls the finding of the European Court of Human Rights that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial guaranteed under paragraph 1 (see, *inter alia*, Granger v. UK, Judgment of 28 March 1990, Series A, No. 174, para. 43). It is thus appropriate to examine the applicant's complaints in relation to Article 6 (3) (b) taken together with Article 6 (1).

125. In the present case the applicant, upon questioning by the Chamber at its public hearing, stated that his court-appointed lawyer did not meet or otherwise communicate with him at anytime in preparation for the trial or any other stage of proceedings. The applicant saw his lawyer only at the

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trial before the Court of First Instance and at the subsequent appeal before the District Court. Given that the lawyer was appointed by the court, the Chamber finds that the applicant was not provided with "adequate facilities" for the preparation of his defence and therefore was not provided with a fair trial as required by Article 6 (3) (b) of the Convention taken together with Article 6 (1).

126. In conclusion, there has been a violation of Article 6 (3) (b) taken together with the guarantee of a fair trial in Article 6 (1) in so far as the applicant was not provided "adequate facilities" for the preparation of his defence.

c. Witnesses

127. The applicant alleges that his lawyer wished to call certain witnesses at the trial, but that the Court of First Instance did not allow her to do so in violation of Article 6 (3) (d) of the Convention.

128. This allegation was not addressed by the agent of the respondent Party at the public hearing.

129. The Chamber notes the practice of the European Court of Human Rights to allow national courts, as a general rule, to assess whether it is appropriate to call witnesses (see, *inter alia*, Asch v. Austria, Judgment of 26 April 1991, Series A, No. 203, paras. 25 - 26; Vidal v. Belgium, Judgment of 22 April 1992, Series A, No. 232-A, para. 33).

130. In the present case the Minutes of the trial show that three witnesses (police officers who arrested the applicant) were heard at the trial, and that the Examination Records of two others (the applicant's friends who were with him at the time of his arrest) were read out. Both the prosecutor and the defence counsel were given the opportunity to examine these witnesses and raise any objections. No objections however appear to have been raised by the defence counsel with regard to witnesses, whether as to those present or absent from the trial. Under the circumstances and in accordance with the relevant case-law of the European Court, the Chamber does not find any evidence before it which would lead it to conclude that the applicant was unable to exercise his right to examine witnesses as guaranteed under Article 6 (3) (d) of the Convention.

131. In conclusion, there was no violation of Article 6 (3) (d) of the Convention.

d. Public Trial

132. The applicant alleged that the trial was not held in public, that his family was not informed about the trial, and that representatives of the international community did not attend the trial.

133. The agent of the respondent Party submitted that the trial was held publicly as indicated in the official Minutes of the trial, that the respondent Party had no obligation to inform the family, and that the international community was not excluded from the trial.

134. Article 6 (1) of the Convention guarantees the right to a public hearing although the press and public may be excluded from the trial under certain specified circumstances. As interpreted by the European Court of Human Rights, the public character of proceedings before judicial bodies protects against the administration of justice in secret with no public scrutiny, thereby enabling public confidence in the courts (Axen v. FRG, Judgment of 8 December 1983, Series A, No. 72, para. 25).

135. Given the lack of any evidence that the public, including the applicant's family and representatives of the international community, was excluded from the trial, the Chamber finds no indication that the trial was not held in public. The mere absence of family members or representatives of the international community from the trial in and of itself is not evidence that it was not held publicly. Moreover, the Minutes of the trial explicitly indicate the public nature of the trial proceedings (see para. 17 above). As a result, the Chamber does not find it necessary to assess whether any of the exceptions in Article 6 (1) permitting the exclusion of the public were applicable to the present case.

136. In conclusion, there was no violation of Article 6 (1) in so far as the trial was held in public.

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VI. REMEDIES

137. Article XI (1) of the Agreement 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."

138. Where it has found a breach of the Agreement, the Chamber may order the respondent Party to remove, alleviate or prevent damage to the applicant, as well as pay compensation. Compensation may be awarded 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 order the respondent Party to cease or desist, that is to discontinue or refrain from taking, specific action.

139. Speaking at the Chamber's hearing, the applicant claimed DEM 50,000 for mental suffering, fear, and physical pain resulting from the lack of adequate medical treatment during detention, which in turn has prevented him from continuing his education.

140. The applicant's representative stated her wish to relinquish any claims for legal costs and expenses in lieu of compensation for the applicant's further medical treatment, but also stated that the sum of DEM 50,000 could be seen as including legal fees.

141. The agent of the respondent Party did not submit any specific observations on the applicant's claim for compensation.

142. With regard to compensation claimed for mental suffering and fear, the Chamber notes its finding above (see paras. 72 - 78) that the applicant was not physically or verbally assaulted by the police and that the applicant therefore did not suffer inhuman or degrading treatment in violation of Article 3 of the Convention. Accordingly, the Chamber rejects the applicant's claim for mental suffering and fear.

143. With regard to the applicant's claim for compensation for physical pain resulting from inadequate medical treatment, the Chamber notes its finding above (see paras. 79 - 84) that there is no evidence that the applicant was not given proper medical treatment during his five-day detention at the Srpsko Sarajevo police station. Accordingly, the Chamber rejects the applicant's claim for compensation for physical pain resulting from inadequate medical treatment.

144. Similarly, the Chamber cannot accept the applicant's claim for the cost of further medical treatment as he has not submitted any evidence that his present medical condition is in any way related to his lack of adequate medical treatment during his detention at the Srpsko Sarajevo police station.

145. With regard to the applicant's claim for compensation due to his being prevented from continuing his education, the Chamber does not find any evidence of a direct link between the applicant's lack of adequate medical care and his educational opportunities. Accordingly, the Chamber rejects the applicant's claim in this regard.

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146. In conclusion, the Chamber decides not to award any monetary compensation. However, the Chamber is of the opinion that a judgment finding a violation of the applicant's human rights is an appropriate remedy for the moral harm suffered by him.

VIII. CONCLUSIONS

147. For the above reasons the Chamber:

1. **Decides by six votes against one** to declare the application admissible in so far as it relates to Articles 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

2. **Decides by six votes against one** to declare the application inadmissible in so far as it relates to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention;

3. **Decides by six votes against one** that there has not been a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

4. **Decides by six votes against one** that there has not been a violation of Article 5 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in so far as the police had "reasonable suspicion" to arrest the applicant on terrorism charges;

5. **Decides by six votes against one** that there has been a violation of Article 5 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the order to detain the applicant on war crimes charges was not in accordance with a procedure "prescribed by law" and that the respondent Party is thereby in breach of its obligations under Article I of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

6. **Decides by six votes against one** that there has not been a violation of Article 5 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the applicant was promptly informed of the reasons for his arrest and any charges against him;

7. **Decides by six votes against one** that there has been a violation of Article 5 (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the applicant was not brought "promptly" before a judge and that the respondent Party is thereby in breach of its obligations under Article I of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

8. **Decides by six votes against one** that there has not been a violation of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in so far as the public nature of the trial is concerned;

9. **Decides by six votes against one** that there has not been a violation of Article 6 (3) (a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the applicant was promptly informed of the nature and cause of the accusation against him;

10. **Decides by six votes against one** that there has been a violation of Article 6 (3) (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, taken together with Article 6 (1) of Convention, in that the applicant was not provided "adequate facilities" for the preparation of his defence and thus not provided a fair trial, and that the respondent Party is thereby in breach of its obligations under Article I of the Human

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Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

11. **Decides by six votes against one** that there has not been a violation of Article 6 (3) (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the applicant was not denied the right to legal assistance of his own choosing;

12. **Decides by six votes against one** that there has not been a violation of Article 6 (3) (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that the applicant was not denied the right to examine witnesses;

13. **Rejects by six votes against one** the applicant's claims for compensation and decides that this Decision is an appropriate remedy for the moral damage suffered by the applicant.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Manfred NOWAK
President of the Panel

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ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate dissenting opinion by Mr. Mehmed DEKOVIĆ.

DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

1. The conclusions of the Chamber in its Decision in the Case of Jasmin Šljivo against the Republika Srpska, under paragraph 147 sub-paragraphs 1,2,5,7,10 and 13 are only partly accepted. As it appears from my other conclusions, the respondent Party has not violated the European Convention for the Protection of Human Rights and Fundamental Freedoms and this is the reason for my separate dissenting opinion.

2. Under paragraph 147 sub-paragraph 3 of the Chamber's Decision it was concluded that in the Case of Šljivo, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had not been violated. However, Article 3 of the Convention states that "No one shall be subjected to torture or inhuman or degrading treatment or punishment". Therefore, there is a violation of Article 3 of the Convention in four cases. The Panel did not find any evidence that the applicant had been beaten by the police nor that he had reported the alleged injuries to the investigative judge or to any other officials; however, regarding the incorrect behaviour of the police he had informed his parents after he was released from prison. With regard to the circumstances under which he had been arrested and how the proceedings were conducted, the applicant stated that he did not want to do so because it would lead him into an even more difficult situation. However, the Panel on this point could not reach the right conclusions, regardless of the statements of the witnesses with whom the applicant was arrested and the persons with whom he was examined because, as officials of the Republika Srpska, they were in some way interested in the resolution of the Šljivo Case.

3. The Panel in its Decision did not find that the medical treatment which the applicant had received was inadequate and accordingly that there had been a violation of Article 3 of the Convention. This conclusion is difficult to accept. The fact is that Šljivo did not request medical attention during his five-day detention nor did he submit any evidence related to his illness. However, the applicant alleged that he told officials in the prison about his illness, that he is suffering from epilepsy and that regardless of that he was transferred from "Kula" prison to the Psychiatric Hospital in Sokolac. The transfer of the applicant for hospitalisation to the named hospital where persons with serious mental illnesses are hospitalised represents inadequate treatment of the applicant. J. Šljivo, as a sufferer of epileps, was not dangerous to his surroundings. Nevertheless, epilepsy is a dysfunction of the brain which develops suddenly and stops spontaneously and has the tendency to repeat. The attacks last for a certain period of time. In its typical form epilepsy is characterised by a sudden loss of consciousness which can be accompanied by spasms and twitching of the body or muscles. (Prof. Dr. Borivoje Radojčić "Bolesti nervnog sistema" published by Medicinska knjiga, second edition, page 163). Therefore, Šlivo could not been treated as a mental patient or a person with mentally incorrect behaviour. Actually, persons who suffer from epilepsy attacks are criminally responsible. When a person who suffers from epilepsy commits a crime he is responsible for his actions even during the epilepsy attacks. (Jurisdiction of the Federal Court of Yugoslavia KSZ 21/83 of 24.5.1983 published in "Zbirka sudskih odluka iz oblasti krivičnog prava", author Mustafa Bisić, Studentska štamparija 1996, Sarajevo, page. 32). The applicant, as a mentally sound person, was admitted to the hospital which is well known for treating seriously mentally ill patients (Psychiatric Hospital in Sokolac). The admittance of the applicant into such an institution could only aggravate his health because patients admitted to such institutions could seriously and significantly jeopardize their own life and health as well as the life and health of others (Dr. Emberger ist Jurist unde Kammeramts-direktor der Ärztekammer für Steiermerk, Unterbingungsgesetz, Z Gäz 80/90 Seite 39 und 40). The admission of the applicant to the named medical institution did not allow him to obtain the appropriate medical treatment and his health was only aggravated. For this reason I believe that there is a violation of Article 3 of the European Convention.

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4. According to the facts, one of the three young men was carrying the landmine, they were moving along on the inter-entity boundary line, the mine was not ready for placement and for eventual activation, they were moving normally, and no excitement was noticed which would have been unavoidable if they were to place and eventually activate the landmine. The police could suspect and arrest Šljivo and the others but not accuse them of terrorism. Terrorism is serious illegal behaviour committed by well qualified persons. The mere fact of carrying a landmine cannot be categorised even as an attempt of terrorism. Terrorists without a doubt do not behave in the manner in which the applicant and his friends behaved. Accordingly, Article 5 (3) of the European Convention has been violated, because Šljivo was tried for terrorism and not for the attempt of terrorism as it is stated in the Chamber's Decision. The behaviour of Šljivo and his friends did not correspond with the suspicion of attempted terrorism nor for terrorism for which they were pronounced guilty.

5. There is no evidence that the applicant was informed immediately after his arrest of the basis for his arrest and the indictment against him. Those who arrested him, with all respect to their abilities and their knowledge to accuse the applicant for terrorism, certainly could not have done so immediately after the arrest based strictly upon the fact that the landmine was carried by one of Šljivo's friends. Terrorism is certainly not committed in the manner and actions which the applicant and his friends undertook. They acted too naively for J.Šljivo to be accused and pronounced guilty of terrorism which leads me to find a violation of Article 5 (2) European Convention.

6. The trial, as I see it, was not conducted publicly. According to the statements given, it is evident that during the trial only the officials of the Republika Srpska were present. (Court Panel, Police, Lawyer appointed by the RS). Under the circumstances in which the trial was conducted and the situation at that time the Court was obliged to summon at least the parents of the applicant to allow them freedom of movement and an opportunity to attend the trial. All of this was left out, which in my opinion, constitutes a violation of Article 6 (1) of the Convention.

7. According to the Decision of the Panel, the applicant had not been denied the right to legal assistance of his own choosing. That conclusion does not appear from the provided evidence and documentation in the case-file. The defence counsel from the Republika Srpska was appointed to the applicant and not from the Federation as requested and as needed to provide him legal assistance. Here, I encounter a violation of Article 6 (3) (c) of the European Convention which provides that persons who are accused of criminal actions have the right to defend themselves or by a lawyer of their own choice. The applicant is subsequently allowed this right. Accordingly, the conclusion that there is no violation of Article 6 (3) (c) of the Convention is wrong. The basis for my conclusion appears from the fact that for the accused, before the Court in Zvornik, was not allowed legal assistance from the Federation but only from the Republika Srpska.

(signed) Mehmed DEKOVIĆ

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