DECISION ON ADMISSIBILITY AND MERITS
(delivered on 9 June 2000)

Case no. CH/98/896

Mirko ČVOKIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 10 May 2000 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

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

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb descent, resident in Banja Luka. On 1 June 1996 he was detained by Bosnian Croat police officers in Glamoč in the Federation of Bosnia and Herzegovina, together with Mr. Krstan Čegar, who was the applicant to the Chamber in case no. CH/96/21 (decision on admissibility and merits delivered on 6 April 1998, Decisions and Reports 1998).

2. The case raises issues principally under Articles 3, 4 and 5 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention, and under the provisions of the Agreement guaranteeing the right not to be discriminated against in the enjoyment of the rights enumerated in the Appendix thereto.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant is represented by Ms. Vesna Rujević, a lawyer practising in Banja Luka.

4. On 5 March 1997 the applicant submitted an application to the Human Rights Ombudsperson for Bosnia and Herzegovina. On 26 January 1998, through his representative, he lodged a written submission to the Chamber. On 24 August 1998, pursuant to a request by the Chamber, the applicant's representative submitted a completed application form, which was registered on the same date.

5. On 19 April 1999 the applicant's representative informed the Chamber that he wished to pursue his application to the Chamber and withdraw his application to the Ombudsperson. Confirmation of this withdrawal was submitted on 27 June 1999.

6. On 22 September 1999 the application was transmitted to the Federation for its observations on admissibility and merits, which were duly received on 19 November 1999 and transmitted to the applicant's representative on 3 December 1999. A further statement from the applicant's representative was received on 30 December 1999 and transmitted to the Federation on 27 January 2000 for information.

7. The Chamber deliberated upon the admissibility and merits of the application on 6 April and 10 May 2000 and on the latter date adopted its decision.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the case

8. The facts of the case are substantively the same as those in case no. CH/96/21 *Čegar* (sup. cit.). As they appear from the application and the submissions of the parties in the present case, they may be summarised as follows.

9. Before the war, the applicant, who was born in 1945, lived in Glamoč, which is now in the Federation. He currently lives in Banja Luka. On 1 June 1996, together with some other persons, he drove to Glamoč to view his pre-war home. Finding it destroyed, he left. Just outside Glamoč, he was stopped and arrested by Bosnian Croat police officers.

10. Until 3 June 1996 he was detained in a prison in Glamoč, when he was transferred to a prison in Livno. On 11 June 1996 he was again transferred, now to the Rodoč military prison near Mostar. On 12 June 1996 the applicant was visited in Rodoč by representatives of the International Committee of the Red Cross ("ICRC") and registered as a detainee with that organisation. On the same date and also on 13 June 1996 he was visited by monitors of the United Nations International Police Task Force. The applicant claims that certain items of personal property were taken from him upon his arrest and never returned to him.

11. While in detention he was told that he was being detained for the purposes of exchange for prisoners of Croat origin held by the authorities of the Republika Srpska. He was also subjected to verbal abuse, including being called a "Četnik" and being told that he should be killed because of his Serb origin. He was also forced to perform hard labour, including unloading and moving heavy materials, and the rations he was given were rare and of poor quality. For the entire duration of his detention - 46 days - he was not allowed access to clean underwear.

12. On 16 July 1996, following the intervention of the ICRC, the applicant was released.

13. The applicant was never given any information concerning the reasons for his arrest and detention, other than that he was being held for the purposes of exchange. He was not brought before a judge or other officer exercising judicial power at any time during his detention.

B. Relevant legislation

14. The Law on Criminal Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – nos. 26/86, 74/87, 57/89 and 3/90, and Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 9/92, 16/92 and 13/94) governed criminal procedure in the Federation at the time of the applicant's detention. This law has been replaced by the new Law on Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98) which entered into force on 28 November 1998. The following provisions, quoted from the old law, were taken over without substantive changes.

15. Article 542(2):

> "Before submitting a claim for compensation for damages, the person concerned is obliged to address his request to the administrative authority of the Republic which is competent for legal matters."

16. Article 543(1):

> "If a claim for compensation for damages is not accepted or no decision by the relevant organ has been made within three months since the date of making it, the person concerned may submit a complaint to the competent court for compensation for damages suffered. If an agreement has been reached concerning part of the claim, the damaged person may submit a complaint regarding the remainder of the claim."

17. Article 545(3):

> "The right to compensation for damage belongs ... to a person who is, as a result of a mistake or an illegal act of an organ, deprived of his or her freedom or kept for a longer period of time in custody than is provided for by law."

18. The above provisions were suspended from 2 June 1992 until 23 December 1996 by the Law on Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95). Since 23 December 1996 they have been in force once more.

IV. COMPLAINTS

19. In his application to the Chamber the applicant complains of violations of his rights as guaranteed by Articles 3 and 4, Article 5 paragraphs 1(c), 2, 3, 4 and 5, and Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. The full text of these Articles is set out in the relevant sections of Chapter VI of the present decision. He also complains of discrimination in the enjoyment of these rights.

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Facts

20. The Federation disputes certain of the facts as presented by the applicant. It claims that the Federation, due to the complex legal and constitutional arrangements in Canton 10, where Glamoč is situated, did not have control over the actions of the authorities there. In addition, the applicant should have been aware of the fact that unknown persons were at great risk if they visited Glamoč, due to the attitude of the authorities there as a result of the war.

21. The Federation also claims that it has no knowledge of the applicant's arrest and claims that no evidence has been provided to the Chamber showing that any authorities for whose actions it is responsible detained the applicant. It claims that all military prisons on the territory of the former "Croatian Republic of Herzeg Bosna" were closed on 30 July 1995, in pursuance of legislation passed by that body. The Federation further disputes the applicant's claim that he was mistreated during his detention and contests the medical evidence he submitted, on the ground that it does not comply with the formal requirements for medical evidence and also as the applicant was treated some five months after his release from detention.

2. Admissibility

22. The Agent of the Federation of BiH first claims that the application to the Chamber has not been fully and properly completed and that the Chamber should refuse to accept it on this ground.

23. The Agent of the Federation contested the admissibility of the application, in light of Article VIII(2)(a) of the Agreement. This provision requires the Chamber to consider, in deciding which applications to accept, whether effective remedies exist in the domestic system, whether the applicant has demonstrated that he has exhausted them and whether the application was lodged to the Human Rights Commission (composed of the Ombudsperson and Chamber) within six months of the date of the final decision at domestic level concerning the matter.

24. The Federation further states that the applicant did not seek to avail himself of the domestic remedies available to him, although the Law on Criminal Procedure (see paragraphs 14-18 above) sets out a procedure whereby persons can seek compensation for allegedly illegal arrest. It claims that this remedy is an effective one in practice and that as a result the application is inadmissible under Article VIII(2)(a) of the Agreement

25. The Federation claims that as the applicant has not sought to avail himself of this remedy, there is no final decision in his case within the meaning of Article VIII(2)(a), so therefore the six-month period provided for by that provision has not commenced.

3. Merits

26. The Federation claims that the applicant was not physically mistreated during his detention and therefore there has been no violation of his rights as protected by Article 3 of the Convention.

27. Concerning Article 4 of the Convention, the Federation claims that the work he was forced to perform during his detention did not constitute a violation of this provision.

28. The Federation states that it does not have any information concerning the circumstances of the arrest of the applicant. It goes on to claim that the applicant was detained for his own safety, in view of the tense situation in Glamoč at the time. In conclusion, as it does not have any details concerning the arrest of the applicant, and in view of the prevailing circumstances at the time, the arrest and detention should be considered to be in accordance with the applicant's right to liberty and security of person as guaranteed by Article 5 of the Convention.

29. Concerning the applicant's right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention, the Federation states that as the applicant has not proved his ownership of the goods he claims were taken from him upon his arrest, it cannot be considered to be responsible for any such goods that may have been taken from him.

30. Finally, the Federation claims that the applicant has not provided any evidence that he was discriminated against in the enjoyment of any of the rights as guaranteed by the Agreement, and that a claim of discrimination by itself is insufficient to establish that a person actually has been discriminated against.

B. The applicant

31. The applicant maintains his complaints. In his further observations, he claims that the remedies available to him were insufficiently certain both in theory and practice and that therefore he was justified in applying to the Chamber. Concerning the standpoint of the Federation on the facts of the case, the applicant states that it merely contests the facts as presented by him, without presenting contrary evidence.

VI. OPINION OF THE CHAMBER

A. Admissibility

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

1. Exhaustion of domestic remedies

33. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

34. The Federation claims that the applicant had not sought to avail himself of the domestic remedies available to him. It claims that he could have sought compensation for alleged damages under the Law on Criminal Procedure (see paragraphs 14-18 above).

35. The Chamber firstly recalls the general principle, which it has applied on numerous previous occasions (see, e.g., case no. CH/98/764, *Kalik*, decision on admissibility and merits delivered on 10 September 1999, paragraph 27, Decisions August-December 1999):

> "the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants."

36. The Chamber first notes that the provisions referred to by the Federation were not in force at the time of the applicants release, as they had been suspended by the Law on Application of the Law on Criminal Procedure (see paragraph 18 above). It was not until 23 December 1996 that these provisions were again applicable, some five months after the release of the applicant. Accordingly, he had no remedy at all available to him until that time.

37. The Chamber considered a similar argument in case no. CH/98/1374, *Pržulj* (decision on admissibility and merits delivered on 13 January 2000, paragraphs 120-124). In that case, at paragraph 124, the Chamber found in its examination of the remedy apparently provided for by the Law on Criminal Procedure as a remedy for a violation of Article 5 of the Convention that it was, *inter alia*, insufficient in theory to redress the harm complained of.

38. In addition, the Federation itself has claimed that due to the specific situation in Canton 10, where Glamoč is situated, it had limited, if any, control over the authorities there. As the Chamber has itself found, the courts in Canton 10 are subject to political interference and discriminate against applicants on the grounds of their ethnic origin (see case no. CH/98/756, *Đ.M.,* decision on admissibility and merits delivered on 14 May 1999, paragraphs 76-80, Decisions January-July 1999).

39. The Chamber therefore finds that the treatment of the applicant in the present case and the general situation in Canton 10 are such that the applicant had no prospect in practice of success were he to seek to pursue such a remedy.

40. In conclusion, the Chamber finds that there was no effective remedy available to the applicant which could remedy the matters he complains of and therefore the case is not inadmissible under this provision.

2. The six-month rule

41. Article VIII(2)(a) of the Agreement requires the Chamber, when deciding upon the admissibility of an application, to take into account, *inter alia*, whether the application was filed with the Human Rights Commission within six months from the date of the final decision was taken in the matter at national level. The Federation claims that as the applicant has not sought to avail himself of any remedies at the domestic level, there is no final decision in his case and therefore the six-month period has not commenced.

42. The Chamber has previously held that in a situation where there is no decision concerning the matter at national level, the six-month period commences on the day when the alleged violations of the applicant's rights ended (case no. CH/98/1021, *Agić,* decision on admissibility of 5 October 1999, paragraph 12, Decisions August-December 1999).

43. The alleged violations of the applicant's rights ended on 16 July 1996, the date of his release from detention. The applicant submitted an application to the Ombudsperson on 5 March 1997, that is, one month and twenty days after the six-month time limit expired on 16 January 1997.

44. The Chamber has, however, a certain discretionary power to take into account special circumstances which might prevent an applicant from submitting an application within this period of six months (see case no. CH/99/1433, *Smajić,* decision on admissibility of 4 November 1999, paragraph 16, Decisions August-December 1999). In the present case, the applicant has provided evidence that he had been hospitalised between 19 December 1996 and 28 January 1997 and again between 6 February and 3 March 1997. In these circumstances the Chamber accepts the reasons for the delay provided by the applicant as justified and considers his application admissible under the six-month rule as set out in Article VIII(2)(a) of the Agreement.

45. The Chamber does not consider that any of the other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber decides to accept the case.

B. Merits

46. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention and the other treaties listed in the Appendix to the Agreement.

47. Under Article II(2) of the Agreement the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement (including the Convention), where such a violation is alleged to or appears to have been committed by the Parties, including by any

organ or official of the Parties, Cantons or Municipalities or any individual acting under the authority of such an official or organ.

1. Article II(2)(a) of the Agreement

(a) Article 3 of the Convention

48. Article 3 of the Convention provides as follows:

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

49. The applicant claims that he had been a victim of a violation of his rights as guaranteed under this provision.

50. The Federation claims that the applicant's rights as guaranteed by this provision were not violated. It denies that the applicant was mistreated during his arrest and detention. At the same time, it states that it has no knowledge of the applicant's arrest and adds that it did not have control over the actions of the authorities in Canton 10 (see paragraphs 20-21 above). In these circumstances, a refutation in general terms by the respondent Party of the applicant's allegations cannot be relied on. Due weight must therefore be given to the applicant's description of what took place from the time of his arrest until his release.

51. The Chamber finds it established that the applicant was in a state of total uncertainty regarding his fate during the entire period of his detention and was subjected to verbal abuse, including being called a "Četnik", which is an extremely abusive term used to describe persons of Serb origin, as well as being told that he should be killed because of his Serb origin. In addition, the rations he was given were small and of poor quality and for the entire duration of his detention he was not allowed access to clean underwear.

52. The Chamber considers that the conditions of the applicant's detention, including being subjected to such threats as described above on the basis of his origin, would give rise to serious concern as to his safety. Being held in such poor conditions for a total period of 46 days, without proper food and access to clean clothes, undoubtedly had a serious effect on the applicant. The Chamber must now consider whether the circumstances of the applicant's detention were so serious as to amount to a breach of Article 3 of the Convention. The Chamber will consider this aspect of the case in the context of the guarantee of freedom from inhuman and degrading treatment contained in that provision.

53. The Chamber has previously found (*Hermas,* sup. cit., paragraph 28):

> "Article 3 enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment and punishment … Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation."

54. The Federation asserts that the applicant is himself at least partially to blame for having gone to Glamoč without having registered with the local police or international organisations. The Chamber rejects this argument as unacceptable. Although the situation throughout Bosnia and Herzegovina was extremely tense at the time of the applicant's detention, which was approximately nine months after the war, such a situation can in no circumstances constitute a justification for the treatment he suffered. The Chamber notes that the applicant was never charged with any criminal offence, nor informed that he was suspected of having committed any such offence. He was told that he was arrested merely for the purposes of exchange for prisoners held by the authorities of the Republika Srpska.

55. The Chamber considers that to be subjected to threats of the nature as the applicant was subjected to, to be kept in a period of prolonged uncertainty concerning his fate and to be deprived of

proper food and access to clean clothes constituted inhuman and degrading treatment in violation of the guarantees provided by Article 3. The Federation is responsible for this treatment.

56. In conclusion there has been a violation of the applicant's right not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the Convention.

(b) Article 4 of the Convention

57. Article 4 of the Convention provides as follows:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
>
> - any work required to be done in the course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention;
>
> - any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> - any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> - any work or service which forms part of normal civic obligations."

58. The applicant complains that the work he was forced to perform during his detention, being physically very demanding, was such as to constitute a violation of Article 4 of the Convention. The Federation states that the work he was forced to perform during his detention was not such as to violate this provision.

59. The Chamber accepts that the applicant was forced to work during his detention and that this work was of a heavy nature, involving unloading and moving heavy materials.

60. In *Hermas,* the Chamber adopted the definition of forced or compulsory labour as used by the International Labour Organisation, which defines such labour as "... all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (sup. cit., paragraph 35).

61. It is clear that the applicant did not offer himself for work voluntarily, as he was detained illegally. The Chamber finds that the circumstances of his detention were such that he would have feared serious consequences were he to refuse to perform such work. Accordingly, the work exacted from the applicant constituted "forced or compulsory labour". This will constitute a violation of Article 4 of the Convention, unless it is covered by one of the exceptions provided for in paragraph 3 of Article 4 of the Convention. The Chamber finds that the exception provided for in paragraph 3(a) is inapplicable as the applicant was arbitrarily detained in contravention of Article 5 of the Convention. The other exceptions are obviously inapplicable in the present case.

62. In conclusion, the Chamber finds that the work exacted from the applicant during his detention constituted a violation of the right not to be subjected to forced or compulsory labour contained in Article 4 of the Convention.

(c) Article 5 of the Convention

63. Article 5 of the Convention provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligations prescribed by law;
>
> (c) the lawful arrest of any detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purposes of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious disease, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

64. The applicant claims to have been a victim of a violation of all paragraphs of this Article.

65. The Federation states that it does not have any information concerning the reasons for the arrest and detention of the applicant, and that it has no evidence that the applicant's detention was in accordance with the requirements of Article 5. It states, however, that it is "convinced" that his arrest and detention were justified, because of the prevailing situation in Glamoč at the time. It claims that at the time it was insecure for unknown persons to go there and that the applicant put himself in a position of danger by so doing without registering with the police or international organisations. It also claims that there is no evidence that the applicant was not informed of the reasons for his arrest and that he was detained for his own safety. It concludes that there has been no violation of Article 5 of the Convention, bearing in mind the prevailing circumstances at the time, the fact that the applicant was given the opportunity to have the legality of his detention established and the fact that he was released after a visit of the ICRC.

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

(i) *Article 5 paragraph 1 - lawfulness of the applicant's detention*

67. The Chamber considers that the arguments of the Federation concerning the lawfulness of the applicant's detention are totally devoid of merit. Whatever the circumstances prevailing in an area at a particular time, the detention of a person can only take place if it complies with Article 5 paragraph 1.

68. The Chamber found in *Čegar* that the applicant in that case, who was detained together with the present applicant, was detained by agents of the respondent Party for the sole purpose of exchanging him for prisoners held by others, and that this finding was sufficient for it to find that the detention was contrary to Article 5 paragraph 1 of the Convention (see paragraphs 35-36 of the *Čegar* decision). As there is no substantive difference between the two cases in this respect, the Chamber makes the same finding in respect of the present applicant, who was arbitrarily arrested and detained. Accordingly the arrest and detention of the applicant was in violation of Article 5 paragraph 1 of the Convention.

(ii) *Article 5 paragraph 2 – right to be informed of reasons for arrest*

69. As the Chamber pointed out in its decision in *Čegar* (at paragraph 39), Article 5 paragraph 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty.

70. The applicant was kept in detention for 46 days. On the second day of his detention he was told that he was being held for the purpose of exchanging him for prisoners held by the authorities of the Republika Srpska. Furthermore, no legal grounds for his detention were given to him at any stage during his detention. Such behaviour by an authority cannot in any circumstances be considered compatible with Article 5 paragraph 2 of the Convention and accordingly there has been a violation of that paragraph.

(iii) *Article 5 paragraph 3 – right to be brought promptly before a judge*

71. As the Chamber pointed out in its decision in *Čegar* (at paragraph 44), Article 5 paragraph 3 applies only to persons arrested or detained in accordance with Article 5 paragraph 1(c) of the Convention. As the applicant was not arrested in accordance with that provision, Article 5 paragraph 3 is not applicable in the present case.

(iv) *Article 5 paragraph 4 – right to review of detention*

72. The Federation claims that the applicant had available to him a right of review of his detention. It however did not seek to show that the applicant was given any opportunity to avail of any such right at any time during his detention and the Chamber finds it established that he was never in fact given any such opportunity.

73. In *Čegar*, the Chamber held that Article 5 paragraph 4 of the Convention constitutes a separate guarantee from the guarantee contained in Article 5 paragraph 1 and a finding of a violation of that provision does mean that there is no requirement to examine the case under Article 5 paragraph 4 (see paragraph 47 of the *Čegar* decision).

74. The Chamber also pointed out in *Čegar* (at paragraph 49):

> "the notion of lawfulness under Article 5 paragraph 4 has the same meaning as in Article 5 paragraph 1; and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1. By virtue of Article 5 paragraph 4 arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty…."

75. The effect of this is that the applicant is entitled to have available to him a remedy allowing the competent court to examine not only the compliance of his detention with the requirements of national law, but also the reasonableness of any suspicion as a basis for the arrest and also the legitimacy of the purpose pursued by the arrest and the ensuing detention. In addition the remedy must allow the review of the lawfulness of the detention to be decided "speedily" by a body possessing the attributes of a "court". (*ibid.*, paragraph 50).

76. The Chamber finds it established that no remedy at all was available to the applicant during the 46 days of his detention and that therefore his rights under Article 5 paragraph 4 of the Convention have been violated.

(v) *Article 5 paragraph 5 – right to compensation for illegal detention*

77. The respondent Party, in its observations on the merits of the case, did not submit any observations on this provision. However, in the context of the admissibility of the case, the Federation states that the applicant could have sought compensation under the procedure provided for by the Law on Criminal Procedure. Such a remedy could have the effect that there had been no violation of Article 5 paragraph 5 of the Convention.

78. The Chamber will therefore examine whether the provisions of the Law on Criminal Procedure meet the requirements of Article 5 paragraph 5 of the Convention.

79. Firstly, the Chamber notes that the relevant provisions were not in force until 23 December 1996 (see paragraph 18 above). After that date the law of the Federation provided for a right to compensation for illegal detention.

80. In its decision in *Pržulj* (case no. CH/98/1374, decision on admissibility and merits delivered on 14 January 2000), the Chamber noted that "in order to meet the standards of the Convention, the legal system must provide for the right to claim compensation for both pecuniary and non-pecuniary damages" (at paragraph 122). Notwithstanding that this was in the context of the admissibility of the *Pržulj* case, the Chamber considers that the same applies to the present case in the context of Article 5 paragraph 5 of the Convention. As the Chamber also noted, the Law on Criminal Procedure has been interpreted as providing for pecuniary damages arising from unlawful detention and only for non-pecuniary damages in extremely limited circumstances and there is no indication that a person has ever received an award in respect of non-pecuniary damages (*ibid.*, paragraph 123).

81. In addition, as the Chamber held in *H.R. and Momani* (case no. CH/98/946, decision on admissibility and merits delivered on 5 November 1999, paragraph 105, Decisions August-December 1999), it must have regard to the general and legal and political context in which such remedies operate. The Agent of the Federation has not provided evidence to the Chamber that any person has ever received compensation for the type of damages suffered by the applicant.

82. The Chamber considers that the reasoning of the Chamber in the *H.R. and Momani* case on this issue is particularly relevant to the present case. At paragraph 106 of its decision, the Chamber found that in that case, which also involved the detention of persons for the sole reason of exchange for prisoners held by other authorities, the general situation in the country was uncertain and "the central authority was apparently not in a position to ensure observance of the rule of law by its subordinate executive authorities".

83. The Chamber does not consider it established that the formal right to compensation provided for by the Law on Criminal Procedure was in fact enforceable, in view of the fact that the Federation has not sought to provide any evidence of such enforceability and that no other such evidence is available to the Chamber. Furthermore, the Chamber has decided a number of cases involving illegal arrest and detention by authorities on the territory of the Federation (e.g. *H.R. and Momani*, sup. cit., *Hermas*, sup. cit., *Čegar*, sup. cit., *Pržulj*, sup. cit. and *Marčeta*, case no. CH/97/41, decision on admissibility and merits delivered on 6 April 1998, Decisions and Reports 1998). In none of these cases has the applicant received compensation on the basis of the Law on Criminal Procedure.

84. In conclusion, there has been a violation of Article 5 paragraph 5 of the Convention.

(d) Articles 8 and 13 of the Convention

85. Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

86. Article 13 of the Convention provides as follows:

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

87. The applicant alleges violations of his rights as guaranteed by these provisions. The Federation states that there has been no violation of these Articles in the applicant's case.

88. The Chamber, having regard to the other violations of the applicant's rights it has found, does not consider it necessary to examine the case under these provisions.

(e) Article 1 of Protocol No. 1 to the Convention

89. Article 1 of Protocol No. 1 to the Convention provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

90. The applicant claims that a number of items of his property were taken from him when he was arrested and that they were never returned to him. These items are an agricultural plough (valued at 1,000 German marks (DEM)), four balloons made of glass with a capacity of 20 litres (valued at DEM 120), approximately 100 kilogrammes of soap (valued at approximately DEM 120), and cash totalling DEM 70. The Federation claims that the applicant has not proved that he was the owner of the items in question nor that they were taken from him by any authority of the Federation.

91. The applicant specifies the items concerned in detail, and the Chamber sees no indication that the applicant has been other than truthful in listing them. The items he mentions are not of particularly high value and he only claims to have had a relatively small amount of cash on him. The Federation merely refutes the claim, without providing any evidence to the contrary, e.g. any official records of the items the applicant was carrying upon his arrest. The Chamber considers it established that the items mentioned by the applicant were taken from him upon his arrest and that they were his property.

92. Accordingly, the Chamber must consider whether the interference with the applicants right to peaceful enjoyment of his possessions can be justified under Article 1 of Protocol No. 1. For this to be the case, the interference must have been "in the public interest" and "subject to the conditions provided for by law and by the general provisions of international law".

93. In the present case there is no apparent justification, either from the Federation or from the circumstances of the case, that the interference complied with these requirements. The Chamber can

find no justification for what amounts to the theft of the applicant's property by agents of the Federation and therefore there has been a violation of Article 1 of Protocol No. 1.

2. Article II(2)(b) of the Agreement

94. The Chamber has previously held on a number of occasions that the prohibition of discrimination is a central objective of the General Framework Agreement for Peace in Bosnia and Herzegovina to which the Chamber must attach particular importance (see, *inter alia*, case no. CH/98/1786, *Odobašić,* decision on admissibility and merits delivered on 5 November 1999, paragraph 127, Decisions August-December 1999). Article II(2)(b) affords to it the jurisdiction to consider alleged or apparent discrimination on any ground in the enjoyment of any of the rights contained in the 16 treaties in the Appendix to the Agreement.

95. The Chamber notes that it has already found violations of the rights of the applicant as protected by Articles 3, 4 and 5 of, and Article 1 of Protocol No. 1 to, the Convention. It will now consider whether he has suffered discrimination in the enjoyment of those rights.

96. In examining whether there has been discrimination contrary to the Agreement the Chamber has consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations (see, *inter alia*, *Đ.M.* sup. cit., paragraph 73), Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

97. The Chamber must first consider whether the applicant was treated differently from others in the same or relevantly similar situations. The Chamber has found (at paragraph 68 above) that the applicant was arrested and detained solely for the purpose of exchanging him for prisoners held by the authorities of the Republika Srpska. Accordingly, the reason the applicant was detained was because he is of Serb origin. In addition, the applicant was verbally abused on the basis of his origin. The applicant therefore underwent differential treatment solely on the basis of his national origin.

98. The Chamber considers that this differential treatment extended also to the inhuman and degrading treatment as well as the forcing of the applicant to perform labour and to the taking of his personal belongings, which the Chamber has found to be violations of his rights as protected by Articles 3 and 4 of the Convention and Article 1 of Protocol No. 1 to the Convention respectively.

99. It is clear that the differential treatment to which the applicant was subjected had no reasonable or objective justification.

100. The applicant has therefore been discriminated against in the enjoyment of his rights as guaranteed by Articles 3, 4 and 5 of the Convention and by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

101. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

102. The Chamber notes that it has found that the applicant has suffered violations of his rights not to be subjected to inhuman and degrading treatment, not to be subjected to forced or compulsory labour, to liberty and security of person as well as to peaceful enjoyment of his possessions. It has also found that he was discriminated against in the enjoyment of those rights.

103. The applicant claimed compensation for the following matters:

- for items taken from him upon his arrest and not returned to him, consisting of an agricultural plough (valued at DEM 1,000), four balloons made of glass with a capacity of 20 litres (valued at DEM 120), approximately 100 kilogrammes of soap (valued at approximately DEM 120), and cash totalling DEM 70:

- for illegal deprivation of freedom: DEM 100 per day, for a total of 46 days, totalling DEM 4,600;

- for lost income due to his inability to work as a truck driver during his detention: DEM 150 per day for a total of 46 days, totalling DEM 6,900;

- for severe mental suffering, damage to his reputation, deprivation of freedom and serious fear: DEM 20,000.

104. The Federation contests the claim for compensation made by the applicant. Firstly, it states that the Chamber should declare the case inadmissible and therefore there is no need to consider the claim at all. Concerning the applicant's claim for the fear he suffered, the Federation claims that as the applicant was registered by the ICRC, he had no reason to fear for his safety and therefore the claim should be rejected. Concerning the claim for pecuniary damages for the items taken from the applicant, the Federation states that he has not provided any evidence that these belongings were taken from him. Accordingly, it claims, the applicant did not have these items with him and therefore the Federation cannot be held responsible for them. Regarding the claims of the applicant for lost income, it states that the applicant should be required to provide certificates showing such lost income.

105. The Chamber notes that it has found that the items the applicant claimed to have had taken from him were actually taken and that the Federation is responsible for this. Accordingly, having established this fact, and considering that the applicant's claim is not unreasonable or excessive, the Chamber will accept those claims. It therefore awards the applicant the sum claimed in respect of items taken from him upon his arrest, the value of which totals DEM 1,310. The Chamber will order this sum to be paid in Convertible marks (*Konvertibilnih Maraka,* "KM").

106. Concerning the claim of the applicant for lost incomes during the period, the Chamber first finds that the sum claimed, DEM 150 per day for a total of 46 days, is excessive. The Chamber considers that in 1996, in view of the prevailing situation in the country at the time, it is highly unlikely that a truck driver would have been able to obtain 46 days uninterrupted work, and that even if he did, the salary would have been far less than DEM 150 per day, especially in view of the fact that the current average monthly wage in the Republika Srpska, where the applicant lives, is approximately KM 210. In addition, the claim is totally unsubstantiated. Accordingly, it must be rejected.

107. Regarding the applicant's claims for damages for illegal deprivation of freedom, the Chamber does not consider it established that the applicant has suffered any specific pecuniary damage solely as a result of his being detained. The Chamber will consider this as a claim for non-pecuniary damage.

108. In addition, the applicant claimed the sum of DEM 20,000 for non-pecuniary damages caused by mental suffering, damage to his reputation, deprivation of freedom and serious fear. Therefore the total amount of non-pecuniary damages the applicant claims is DEM 24,600. The Chamber considers that although the fear the applicant suffered may well have reduced after he was registered by the ICRC, he would have suffered great fear prior to that especially in view of the verbal abuse he was subjected to, including being told that he should be killed. In addition, this head does not only cover the fear the applicant may have suffered; it also covers the moral suffering he underwent in general as a result of his arrest and detention.

109. In *Čegar* (sup. cit.), the applicant in that case claimed the same amount under this head. The Chamber found in that case that this sum was too high. It did find it appropriate, however, to award

the applicant a sum under this head, in view of the fact that he was "kept in illegal detention for six weeks, [and that this] was apparently motivated solely by the desire to exchange him against prisoners held by another authority" (see paragraph 66). As in that case, the Chamber takes a very serious view of the treatment of the applicant by agents of the Federation. The Chamber considers it appropriate to award the applicant the same sum as in the Ćegar case, in view of the great similarities between the two cases. Accordingly, as in that case, it will award the applicant the sum of KM 5,000 under this head.

110. Additionally the Chamber awards 4 % (four per cent) interest as of the date of expiry of the three month period set for the implementation of the present decision on the sums awarded in paragraphs 105 and 109 above.

IX. CONCLUSION

111. For the above reasons, the Chamber decides,

1. by 5 votes to 2, to declare the application admissible;

2. by 6 votes to 1, that the arrest and detention of the applicant by the police in Glamoč between 1 June and 16 July 1996 constituted a violation of the right of the applicant not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

3. by 6 votes to 1, that the forcing of the applicant to carry out hard labour during his detention constituted a violation of his right not to be subjected to forced or compulsory labour as guaranteed by Article 4 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. by 6 votes to 1, that the arrest and detention of the applicant by the police in Glamoč between 1 June and 16 July 1996 constituted a violation of the right of the applicant to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. by 4 votes to 3, that the failure to inform the applicant promptly of the reason for his arrest constituted a violation of his right as guaranteed by Article 5 paragraph 2 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that Article 5 paragraph 3 of the Convention is inapplicable in the present case;

7. by 6 votes to 1, that the inability of the applicant to take proceedings to challenge the lawfulness of his detention constituted a violation of his right as guaranteed by Article 5 paragraph 4 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

8. by 6 votes to 1, that the non-availability to the applicant of an enforceable right to compensation in respect of the illegal arrest and detention he suffered constituted a violation of the right of the applicant as guaranteed by Article 5 paragraph 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

9. unanimously, that it is not necessary to examine the application under Articles 8 and 13 of the Convention;

10. by 6 votes to 1, that the taking from the applicant of his personal property upon his arrest and the failure to return it to him constituted a violation of the right of the applicant to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

11. by 6 votes to 1, that the applicant has been discriminated against in the enjoyment of his rights as guaranteed by Articles 3, 4 and 5 of the Convention and by Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

12. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chambers Rules of Procedure, the sum of KM 5,000 (five thousand *Konvertibilnih Maraka*) by way of compensation for moral damage suffered;

13. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Rules, the sum of KM 1,310 (one thousand three hundred and ten *Konvertibilnih Maraka*) by way of compensation for pecuniary damage suffered;

14. unanimously, to reject the remainder of the applicant's claim for compensation;

15. by 6 votes to 1, that simple interest at an annual rate of 4 % (four per cent) will be payable on the sum awarded in conclusions number 12 and 13 above from the expiry of the period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

16. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within three months from the date on which this decision becomes final and binding in accordance with Rule 66 on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex Dissenting opinion of Mr. Mehmed Deković

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Mehmed Deković.

DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

I voted against conclusion no. 1, in which the Chamber decided to declare the application admissible. Having in mind circumstances as presented in paragraphs 41-44 of its decision, the Chamber concluded that it "accepts the reasons for the delay provided by the applicant as justified and considers his application admissible under the six-month rule as set out in Article VIII(2)(a) of the Agreement". With due respect, I cannot accept the position of the majority for the following reasons:

First of all, I wish to state that the Dayton Agreement is a *sui generis* legal act in its nature. It is not necessary to point out particularly that it governs extremely important issues, among others the respect for human rights as one of the fundamental guidelines for the successful implementation of the Agreement. In that context, it is necessary to bring in line both the work and jurisdiction of the Chamber with the provision of Article VIII(2)(a). Under this provision, when deciding which application to accept, the Chamber must consider two criteria. The first one is whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted and the second one is whether the application *was submitted within six months after the issuance of the final decision in the case*. In considering whether the second criterion has been met, which is very important in the present case, the Chamber should first determine what kind of time-limit this is. More concretely, it should determine whether it is a legal, strict and preclusive time-limit which has to be complied with or a judicial one which can be extended subject to certain conditions. Considering the manner in which the provision of Article VIII(2)(a) has been stipulated, I am of the opinion that this time-limit is a legal and preclusive one which the applicant is obliged to comply with in order to have his application accepted by the Chamber. Otherwise, any failure to comply with this time-limit would result in his application being rejected as ill-founded.

In the *Agić* case, the Chamber took the position that if no final decision has been taken in the domestic proceedings, the six-month period starts to run on the day when the alleged violations of the applicant's rights ended. In the present case the violation ended on 16 July 1996. The applicant submitted an application to the Human Rights Ombudsperson for Bosnia and Herzegovina on 5 March 1997, thus one month and twenty days after the six-month period expired on 16 January 1997. However, having noted that the applicant was hospitalised between 19 December 1996 and 28 January 1997 and again between 6 February and 3 March 1997 and having found that it has "a certain discretionary power to take into account special circumstances which might prevent an applicant from submitting an application within this period of six months", the Chamber accepted the reasons for the delay in the present case, as presented by the applicant, and found that his application was admissible on this particular ground. It may be concluded on the basis of the above stated that the Chamber has interpreted the six-month time-limit in a very extensive manner which is unacceptable in my opinion. There are several reasons on which my opinion is based. First of all, the above time-limit constitutes a preclusive and strict time-limit. Furthermore, this is not a short time-limit of, for instance, 8, 15 or 30 days, but a time-limit of six months. The circumstance that the applicant was hospitalised at the end of this six-month period is not of importance and cannot extend the time-limit for the applicant to submit his application. In addition, the applicant could have submitted his application through a representative. The position of the Chamber that it has "a certain discretionary power" in assessing whether the time-limit has been complied with does not have support in the provision of Article VIII(2)(a) or in the intention of this time-limit, and the Chamber does not have the authority to amend it under the Agreement. The present case confirms this. If the hospitalisation of the applicant constitutes a ground for extending the six-month time-limit, it loses its purpose and the Chamber not only has "a certain discretionary power" but can extend it for an indefinite period of time. This is not acceptable. Finally, the Chamber uses in its decision the term "six-month rule". Under domestic legislation, "rule" and "time-limit" cannot be considered equal neither as terms nor in their content. I consider that the Chamber could interpret a "rule" in a broader sense, but for a fixed "time-limit" there is no such possibility. It is true that the domestic legislation affords a possibility for a party who fails to take certain action within a fixed time-limit to request that

the proceedings be restored to their previous stage. This does not mean, however, that the party must be successful with such a request, especially in a case like the present one.

On the basis of the above stated, I consider that the present application is inadmissible and that it should have been rejected as ill-founded.

(signed)
Mehmed Đeković