DECISION ON ADMISSIBILITY

Cases nos. CH/98/904, CH/98/1061 and CH/99/2238

Sifet DURMIŠ, Asim KOVAČ and Rifet DURMIŠ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 12 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 Article VIII(2) of the Agreement and Rule 52 of the Chamber's Rules of Procedure:

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I. FACTS

1. The applicants are citizens of Bosnia and Herzegovina. Messrs. Rifet and Sifet Durmiš are brothers and Asim Kovač is their cousin. By judgement of the (then) High Court in Zenica of 1 July 1996 they were convicted of murdering a policeman. Mr. Kovač was sentenced to 20 years of imprisonment, Mr. Sifet Durmiš to 14 and Mr. Rifet Durmiš to 13 years. Upon the applicants' appeal, the Supreme Court of the Federation of Bosnia and Herzegovina confirmed the first instance judgment by decision of 6 November 1996. The applicants were represented by legal aid counsels during the proceedings before the High Court and the Supreme Court.

2. On 20 June 1997 the Cantonal Court in Zenica rejected a petition by Mr. Kovač to reopen his case. On 16 February 1998 this decision was confirmed by the Supreme Court.

3. On 4 May 1998 the Cantonal Court in Zenica rejected petitions by Messrs. Sifet and Rifet Durmiš to reopen their cases. This decision was confirmed by the Supreme Court of the Federation on 2 March 1999 in respect of Mr. Sifet Durmiš. The decision in respect of Mr. Rifet Durmiš was quashed by the Supreme Court of the Federation on 23 December 1998. By decision of 23 April 1999 the Cantonal Court again rejected Mr. Rifet Durmiš's petition. The applicant did not appeal this decision.

4. Mr. Kovač lodged an application with the Human Rights Ombudsperson for Bosnia and Herzegovina (hereinafter "the Ombudsperson") on 31 March 1999. By letter of 22 September 1999 he was informed that the Ombudsperson would not open an investigation in his case, on the ground that she was not competent to examine complaints of erroneous application of national law by domestic courts or of wrong establishment of the facts.

5. Mr. Rifet Durmiš lodged an application with the Ombudsperson on 9 May 1999. By letter of 21 July 1999 the Ombudsperson informed him that she was not competent to examine complaints of erroneous application of national law by domestic courts or of wrong establishment of the facts. Therefore the Ombudsperson concluded that she would probably not register the application unless the applicant insisted on its registration. According to the most recent information received by the Chamber, the application has not been registered.

II. COMPLAINTS

6. The applicants primarily complain of the Zenica High Court's alleged failure to correctly assess the facts of their case and of their resulting conviction. They also claim that crucial witnesses were not heard in the course of the trial and that the first instance judgment untruthfully reflects the testimony of witnesses which actually had not been heard. The applicants complain that all this resulted in a violation of their right to a fair trial by an impartial tribunal.

7. Mr. Sifet Durmiš also complains of not having been able to afford being defended by counsel of his own choosing. Mr. Rifet Durmiš further complains that the defence counsel assigned to him did not represent him effectively.

8. In his reply to observations of the respondent Party, finally, Mr. Sifet Durmiš complained of ill-treatment suffered during pre-trial custody.

III. PROCEEDINGS BEFORE THE CHAMBER

9. The application of Mr. Sifet Durmiš was lodged on 27 August 1998 and registered on the following day. On 20 July 1999 the case was transmitted to the respondent Party for its observations on admissibility and merits of the complaint. On 16 August 1999 the Chamber received additional submissions and documents from the applicant. The observations by the Federation were received on 20 September 1999. Observations in reply by the applicant were received on 5 November 1999.

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10. The application of Mr. Kovač was received and registered on 12 November 1998. Mr. Kovač made further submissions on 7 December 1998, 13 February, 23 August and 27 October 1999. The application of Mr. Rifet Durmiš was received and registered on 28 May 1999. On 27 October 1999 he made further submissions. On 15 October 1999 the applications were transmitted to the respondent Party for its observations on admissibility and merits, which were received on 15 December 1999. Mr. Kovač replied on 24 December 1999 and Mr. Rifet Durmiš on 5 January 2000. Mr. Rifet Durmiš submitted further observations on 27 March 2000.

11. On 8 February 2000 the Chamber decided to join the applications.

IV. SUBMISSIONS OF THE PARTIES

A. The respondent Party

12. The Federation asks the Chamber to declare the applications inadmissible on the ground that the applicants have not exhausted the available domestic legal remedies, as there were further extraordinary remedies available to them. The Federation makes specific reference to the failure of Mr. Rifet Durmiš to appeal against the second procedural decision of the Cantonal Court rejecting his petition for retrial.

13. Furthermore, the Federation submits that the applications are inadmissible under Article VIII(2)(a) of the Agreement, as they were all lodged more than six months after the final decision in the applicants' case. In this respect, the Federation claims that it has in many ways complied with its obligation, mandated in Article XV of the Agreement, to give effective notice of the terms of the Agreement throughout its territory. Namely, it is submitted that the General Framework Agreement was published on 28 November 1995 by the nationally and internationally widely distributed newspaper *Dnevni avaz*, in December 1995 "by the Presidential Council and the House of Representatives of the so-called Herceg-Bosna" and (at an unspecified moment of time) by "the newspapers in the Republika Srpska". Also the firm *Službeni list RBiH* ("Official Gazette of the Republic of Bosnia and Herzegovina") published a booklet containing the text of the General Framework Agreement and all its Annexes upon request of the General Secretary of the Assembly of the Republic of Bosnia and Herzegovina of 25 October 1996. Moreover, it is argued that the Agreement, according to Article XVI thereof, entered into force upon signature. The Federation concludes that every citizen of Bosnia and Herzegovina was in a position to be familiar with the Agreement and the time-limits set therein as of December 1995, and that the principle *ignorantia iuris nocet* applies also to the Agreement.

14. As to the merits, the Federation states that all requirements of a fair trial set forth in Article 6 paragraphs 1 and 3 of the European Convention on Human Rights were complied with and that the legal system of the respondent Party ensures the independence and impartiality of the courts.

B. The applicants

15. Mr. Sifet Durmiš claims that during the criminal proceedings no substantive evidence was presented which would prove his guilt. On the contrary, he submits that crucial witnesses were not heard in the course of the trial and that the first instance judgment untruthfully reflects the testimony of witnesses which actually had not been heard. The applicant claims that the strongest evidence of his innocence is the lie detector test to which he was allegedly subjected on 20 or 21 December 1995. Finally, the applicant complains that the (legal aid) defense counsel assigned to him was not of his own choosing.

16. Mr. Kovač proclaims his innocence, maintains that he has evidence indicating the real culprit and claims that his human rights have been violated. The applicant states that the first-instance judgment indicates that certain witness statements were read out, which in fact were not read out, and that he based his appeal on this ground and asked to be allowed to confront those witnesses. The applicant also alleges that he suffers from a permanent mental illness confirmed by a court in 1991. During those proceedings the court had heard two experts psychiatrists, one expressed the opinion that the applicant was not sane, the second took the opposite view. In 1991 the Court

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followed the experts opinion stating that the applicant was not mentally sane. During the 1996 proceedings, the Court called to testify the expert who in 1991 had taken the view that the applicant was sane. This time it followed this expert's opinion, which the applicant complains of.

17. Mr. Rifet Durmiš asks the Chamber to refer to applicant Kovač's application to integrate his statements. The applicant alleges incomplete and wrong establishment of the facts and material breaches of the criminal law. He also complains that his defence counsel did not effectively represent him. As to the admissibility under the six-month rule, the applicant states that he awaited the outcome of the proceedings upon his request for review before addressing the Human Rights Commission.

V. OPINION OF THE CHAMBER

18. Before considering the merits of the applications the Chamber must decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a) in deciding which applications to accept the Chamber shall take into account whether the applicants have exhausted domestic remedies and whether "the application has been filed with the Commission within six months from such date on which the final decision was taken".

A. Exhaustion of domestic remedies

19. The Federation asks the Chamber to declare the applications inadmissible on the ground that the applicants failed to make use of all extraordinary remedies and, in the case of Mr. Rifet Durmiš, in particular of the possibility to appeal the procedural decision of the Cantonal Court rejecting his petition for retrial. The Chamber recalls that under Article VIII(2)(a) of the Agreement applicants are required to make use of available ordinary remedies before they address the Chamber, not to pursue extraordinary remedies (such as proceedings to reopen their case after a final decision has been rendered). Consequently, with regard to the Federation's objection, the Chamber finds that the applicants have complied with the requirement to exhaust domestic remedies.

B. Admissibility under the six-month rule

20. The Federation also asks the Chamber to declare the applications inadmissible on the ground that the applicants failed to comply with the six-month time-limit for the submission of applications.

21. In applying the six-month time-limit under Article VIII(2)(a) of the Agreement the Chamber has considered that it enjoys a certain margin of appreciation depending on the circumstances of the particular case. The Chamber considers that, although the Agreement was never published in the Official Gazette of the Federation (nor of the State of Bosnia and Herzegovina), as can also be seen from the submissions of the Federation (see paragraph 13 above), it may be argued that the efforts of the Federation were sufficient to fulfil its obligation "to give effective notice of the terms of this Agreement" under Article XV of the Agreement.

22. Notwithstanding, the Chamber has rejected a strict approach to the application of the six-month rule and evaluated on a case-by-case basis whether genuine reasons for the failure to comply with the dead-line have been submitted by the applicant or are apparent from the case-file.

23. As to the cases before it, the Chamber notes that, for the purposes of the six-month rule in Article VIII(2)(a), the "final decision" is the judgment of the Supreme Court of 6 November 1996, which put an end to the ordinary proceedings in the applicants' case. Mr. Sifet Durmiš lodged his application with the Chamber on 27 August 1998, that is more than 21 months after the final decision. Mr. Kovač filed the application to the Chamber (which precedes the one to the Ombudsperson) on 12 November 1998, that is two years after the final decision. Mr. Rifet Durmiš addressed the Ombudsperson (and thereby the Human Rights Commission) on 9 May 1999, that is more than two-and-a-half years after the final decision in their case.

24. As stated above with regard to the Federation's objection of non-exhaustion of domestic remedies, a petition for a retrial is an extraordinary remedy. The proceedings upon the applicants' requests to reopen their cases are therefore not relevant for the application of the six-month time-

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limit. The statement of Mr. Rifet Durmiš that he awaited the outcome of the proceedings upon his request to reopen his case before applying to the Human Rights Commission can accordingly not be accepted as a reason capable of justifying this applicant's failure to comply with the six-month time-limit. The other two applicants have not indicated any reason as to why they did not submit their application within six months of the Supreme Court decision finally rejecting their appeal against the judgment of the Cantonal Court in Zenica. As a consequence, the Chamber decides that in accordance with Article VIII(2)(a) of the Agreement it shall not accept the applications before it.

V. CONCLUSION

25. For these reasons, the Chamber, by 6 votes to 1,

DECLARES THE APPLICATION INADMISSIBLE.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex Dissenting Opinion of Mr. Nowak

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ANNEX

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

DISSENTING OPINION OF MR. MANFRED NOWAK

1. I disagree with the application of the six-month rule in the present case. As I have argued in my dissenting opinion concerning the case of *Zimjonić* (case no. CH/99/1736, decision on admissibility of 4 April 2000), the umbrella paragraph of Article VIII(2) of the Human Rights Agreement (Annex 6), which states that the Chamber "shall decide which applications to accept" and that, in deciding so, it shall "take into account" a number of admissibility criteria, authorises the Chamber to make use of a certain margin of appreciation in applying these criteria and balancing them against each other. One of these criteria is the six-month rule under Article VIII(2)(a), another one the requirement to give priority to allegations of discrimination and other serious human rights violations under Article VIII(2)(e).

2. As far as the six-month rule is concerned, the Chamber does not seem to be very clear and consistent in its jurisprudence. During the first years, it did not pay much attention to this provision at all (cf. the Chamber's Annual Report for 1999 at p. 8). For instance, in the case of *Herak* (case no. CH/97/69, decision on admissibility and merits delivered on 12 June 1998, Decisions and Reports 1998), the final judgment of the Supreme Court dated from 29 December 1993 and the application was submitted to the Chamber on 13 October 1997, i.e. almost two years after the entry into force of the Dayton Peace Agreement. Without even asking for the reasons for this delay, the Chamber declared the application admissible and found violations of the Agreement.

3. The six-month rule was applied for the first time by the Chamber only on 9 July 1999 in the cases of *Jandrić and Vuleta* (case nos. CH/98/905 and 906, decision on admissibility, Decisions August-September 1999). The applicants had filed their applications more than two years after their release from detention. The Chamber asked them to forward the specific reasons for the delay in lodging their applications. Since they failed to reply, the plenary Chamber delared the applications inadmissible. In a dissenting opinion, Mr Rauschning expressed the view that the six-month rule should not be applied to the disadvantage of citizens because the Agreement had not been officially publicised in Bosnia and Herzegovina. In a similar case, the Chamber decided on 5 October 1999 that the applicant had failed to provide "justifiable reasons for his failure to comply with the six-month time-limit" (case no. CH/98/1021, *Agić*, decision on admissibility, paragraph 14, Decisions August-December 1999). In both cases the Chamber did not give explicit reasons for this approach, but it seems to have followed the "special circumstances" case-law of the European Commission of Human Rights.

4. The first attempt to develop and explain its own approach to the six-month rule was provided on 4 November 1999 by the First Panel in the case of *Smajić* (case no. CH/99/1433, decision on admissibility, Decisions August-December 1999). Whereas the final judgment of the Supreme Court had been delivered on 10 March 1997, the application was submitted to the Chamber only on 24 December 1998. In declaring the application inadmissible, the First Panel rightly recognised that the Chamber enjoys under the umbrella paragraph of Article VIII(2) a greater discretion than the European Court of Human Rights, and it also took into account the argument of Mr Rauschning cited above that no official notice had been given of the Agreement in Bosnia and Herzegovina. It, therefore, concluded that "the Chamber may more easily excuse a failure to comply with the six-month rule if the applicant is able to provide an adequate explanation for this failure" (paragraph 17).

5. The Second Panel, on the other hand, seems to apply a much stricter and less balanced approach. In the *Zimjonić* case cited above, the application which involved an allegation of discrimination had been introduced less than one year after the final judgement of the Municipal Court. Without even asking the applicant to explain the reasons for this comparably short delay, and without attempting to balance the six-month rule with the priority rule in Article VIII(2)(e), the Panel simply held that the time-limit prescribed in Article VIII(2)(a) had been exceeded.

6. In the case of *Čvokic* (case no. CH/98/896, decision on admissibility and merits adopted on 10 May and delivered on 9 June 2000), the Second Panel departed from this strict approach and

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recalled the *Agić* and *Smajić* decisions cited above. The application had been submitted seven months and twenty days after the applicant's release from detention but the Panel took into account that he had been in hospital during this period for more than two months. For the first time the Panel recognised a certain discretionary power and accepted the reasons for the delay as justified. In a dissenting opinion Mr. Deković seems to take a view which is even stricter than that of the European Court and Commission of Human Rights. In his opinion, the six-month time-limit "is a legal and preclusive one" which does not permit any exception or discretionary power on the part of the Chamber.

7. In the present case the Second Panel pretends to follow the jurisprudence of the Chamber by alleging "that it enjoys a certain margin of appreciation depending on the circumstances of the particular case" (paragraph 21) and that it "has rejected a strict approach to the application of the six-month rule" (paragraph 22). The decision in the present case, in particular in relation to the application of Mr. Rifet Durmis, points, however, into the opposite direction. Mr. Rifet Durmis was sentenced in last instance by the Supreme Court of the Federation on 6 November 1996 to 13 years of imprisonment and complains of serious violations of his right to a fair trial. His petition to reopen the trial was rejected on 4 May 1998, but that decision was quashed by the Supreme Court on 23 December 1998. On 23 April 1999 the Cantonal Court again rejected his petition. One month later, on 28 May 1999, he applied to the Chamber and explained that he had awaited the outcome of the proceedings upon his request for review before addressing the Human Rights Commission (paragraph 17).

8. From a very strict legal approach, as it has been developed by the Strasbourg institutions, it is correct that a petition for a retrial is an extraordinary remedy which does not have to be exhausted before applying to the Chamber and that the six-month dead-line, therefore, had expired already in May 1997. But can we really assume that an applicant, who is serving a prison sentence in Bosnia and Herzegovina, should know the highly sophisticated Strasbourg case-law concerning the difficult question of which remedies need to be exhausted and when the six-month dead-line, therefore, starts to run? In my opinion, the explanation of the applicant that he awaited the outcome of the proceedings to reopen his case before applying to the Chamber is a perfectly reasonable one which justified his failure to comply with the six-month rule. I cannot understand how my colleagues can reconcile this harsh "Strasbourg approach" with their allegation that the Chamber "has rejected a strict approach to the application of the six-month rule and evaluated on a case-by-case basis whether genuine reasons for the failure to comply with the dead-line have been submitted by the applicant" (paragraph 22).

(signed)
Manfred Nowak

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