DECISION ON THE MERITS

of

CASE No. CH/96/15

Ratko GRGIĆ

against

Republika Srpska

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 5 August 1997, with the following members present:

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

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the merits of the Application on behalf of Ratko GRGIĆ against the Republika Srpska, registered under Case No. CH/96/15 and declared admissible by the Chamber on 5 February 1997 under Article VIII paragraph 2 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 on the merits of the case under Article XI of the Agreement and Rules 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. This application was submitted to the Chamber on 18 June 1996 by the German Section of the International Society for Human Rights ("the IGFM") acting on behalf of the applicant, Father Ratko GRGIĆ, who is allegedly missing. The case relates to the alleged unlawful detention of the applicant. It is alleged that he was arrested at his flat in Nova Topola in 1992 by members of an armed organisation integrated into the military forces of the Republika Srpska and that he is still held incommunicado. It is contended that his rights to liberty and security of person and other rights guaranteed under Article I of the Agreement have been violated.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was submitted to the Chamber on 18 June 1996. In response to a request by the Registrar, further information and legal submissions were submitted on behalf of the applicant on 15 October 1996. On 17 October 1996 the Chamber decided to invite the respondent Party to submit written observations on the admissibility and merits of the case in so far as it was alleged that the applicant had been held in detention by authorities of the Republika Srpska since 14 December 1995. A time limit expiring on 22 November 1996 was fixed for the submission of these observations. No response to this invitation was received from the respondent Party. On 5 February 1997 the Chamber declared the application admissible in so far as it relates to the allegation that the applicant has been detained since 14 December 1995, the date on which the Agreement came into force.

3. The respondent Party was invited, in accordance with Rule 53 of the Chamber's Rules of Procedure, to submit written observations on the merits of the case before 23 April 1997. The respondent Party's observations were submitted on 24 April 1997. The IGFM were invited to submit written observations in reply on behalf of the applicant before 9 June 1997. They submitted their observations on 10 June 1997.

III. THE FACTS AS PRESENTED BY THE PARTIES

4. The facts of the case are in dispute. There follows a brief outline of the facts as presented by the parties and of their submissions on questions of fact and evidence.

(a) The Applicant

5. According to the IGFM the applicant was arrested at 01.30 hours on 16 June 1992 at his service flat in Nova Topola, where he was the Roman Catholic priest. The arrest was carried out by several male persons wearing military uniforms with white waist and shoulder belts and emblems of the "White Eagles" militia. He was driven away in a white car to an unknown destination. It is suggested that local police tried to establish his whereabouts on the same day but that "no results have been given." The IGFM state that information made available to them suggests that Mr Vladan Vesić, head of Bosanska Gradiška police, Mr Nebojša Ivaštanin, Municipal President of Bosanska Gradiška, and a Mr Savo Vekić, a Serb still living in Bosanska Gradiška are informed about the case and should be questioned about it. They state that the information available does not permit a determination whether these persons obtained information on the arrest and abduction of the applicant from witnesses or other third parties or from persons actively involved in the abduction.

6. The IGFM submit that the information they have given as to the arrest and abduction of the applicant justifies the assumption that he was taken into custody by military elements under effective control of the Republika Srpska and that consequently it must be assumed that he is still held incommunicado by elements under such control. This assumption would have to be maintained until

the Republika Srpska has given a sufficiently substantiated explanation as to when and how the custody of the applicant was terminated and identifies the personnel involved in the action. Due substantiation of the allegation that the applicant was held in custody by forces under control of the Republika Srpska results in a shifting of the burden of proof, so that the Republika Srpska would have to substantiate their allegation that the applicant was no longer in their custody on the date of entry into force of the Dayton Agreement. In this respect they refer to the Report of the European Commission of Human Rights in Application No. 8007/77, Cyprus v. Turkey, where the failure of Turkey to account for the fate of persons in Turkish detention was regarded as a violation of Article 5 of the European Convention on Human Rights.

7. The IGFM submit that even if the applicant has not been registered as a missing person under the procedures mentioned by the respondent Party that would not refute the substantiated allegation that he has been in its custody, or in the custody of elements under its control, since June 1992 and after the entry into force of the Dayton Agreement. This is especially so since the respondent Party do not appear to deny the fact that the applicant was arrested by elements under its control prior to 14 December 1995. They further submit that whilst they lack information as to the whereabouts of the applicant since the entry into force of the Dayton Agreement, they could try to substantiate the fact of his arrest with information from an eyewitness of the arrest.

(b) The Respondent Party

8. The respondent Party denies that the burden of proof lies on it and submits that it is the applicant's duty to produce evidence to substantiate the statement of facts on which his application is founded. The Chamber may also obtain evidence not proposed by the parties, if it is important for its decision to do so. The respondent Party claims that the applicant has not been held after 14 December 1995 by it and that there have not been registered any "elements under its control" since the entry into force of the Dayton Agreement. The applicant has not been registered as a prisoner by the State Commission for the Exchange of War Prisoners nor as a missing person.

IV. FINAL SUBMISSIONS OF THE PARTIES

(a) The Applicant

9. The IGFM submit that the following rights of the applicant under the Agreement have been violated:

- the right to liberty and security of person, (Article I, paragraph 4);
- the right to a fair hearing in criminal matters, (Article I, paragraph 5);
- the right to private life and home, (Article I, paragraph 6);
- the freedom of thought, conscience and religion, (Article I, paragraph 7).

(b) The Respondent Party

10. The respondent Party submits that the application should be declared inadmissible under Article VIII paragraph 2 of the Agreement.

V. OPINION OF THE CHAMBER

11. In terms of Article XI paragraph 1 (a) of the Agreement the Chamber must, in the present decision, address the question whether the facts found indicate a breach by the respondent Party of its obligations under the Agreement.

12. The Chamber first recalls that the application has been declared admissible only " in so far as it relates to the allegation that Father Grgić has been detained since 14 December 1995." As it pointed out in the admissibility decision, the Chamber has no competence to consider whether violations of human rights have occurred before that date, which is the date when the Agreement came into force. It therefore has no jurisdiction in the present case to rule on the question whether the applicant's alleged arrest in 1992 and any period of detention up to 14 December 1995 violated his rights. The respondent Party denies that the applicant has been detained since the relevant date. The IGFM submit that it is to be presumed that the applicant has been in detention since his arrest in 1992, and that he remains there, unless the respondent Party proves otherwise.

13. The Chamber notes that the IGFM has produced no concrete information or evidence which could show that the applicant has been in detention at any time after his arrest in 1992. It is apparent from their submissions that they are not in possession of information as to the situation of the applicant after 14 December 1995, or, indeed, at any time after his arrest. In the Chamber's view the question which arises is therefore whether the fact of the applicant's arrest and abduction in 1992, assuming it were proved to have occurred as alleged by the IGFM, could give rise to a presumption that he remained in detention after the relevant date.

14. The Chamber recalls that in Application No. 8007/77 Cyprus v. Turkey, the European Commission of Human Rights considered allegations relating to persons who had been missing since the Turkish military action in northern Cyprus in 1974 and who had last been seen in Turkish custody at that time. It found that the fact that the persons in question had last been seen in Turkish custody created "a presumption of Turkish responsibility for their fate" and, noting that Turkey had failed to account for the fate of these persons, found that Turkey had violated Article 5 of the European Convention on Human Rights, (see Report of the Commission, 72 DR p. 5 at pp. 37-39, paras. 116-123). The Chamber further recalls that the European Commission of Human Rights adopted a similar approach in the case of Kurt v. Turkey where it held that there had been a breach of Article 5 of the Convention on the basis that the applicant's son had last been seen in the custody of Turkish security forces, "that this creates a presumption of responsibility of the Turkish Government for his fate" but that Turkey had failed to account for his fate, (see Report of the Commission of 5 December 1996, paras. 198-215). The IGFM invite the Chamber, on the basis of the Cyprus v. Turkey case in particular, to hold that in the absence of any adequate explanation of the fate of the applicant, he must be presumed to remain in the custody of the respondent Party.

15. In the Chamber's opinion there are important distinctions between the present case and the two cases before the European Commission which it has referred to. In particular in both the Cyprus v. Turkey and the Kurt cases the arrest and disappearance of the persons concerned had occurred at a time when the European Convention was in force as regards Turkey. It was therefore possible for the Commission to hold that Turkey was to be presumed responsible under the Convention for their fate as a result of its having detained them and of its failure to account for them or to conduct adequate investigations. In the present case the respondent Party cannot be held responsible under the Agreement for acts or omissions which occurred before it came into force. The Chamber could therefore only find that the respondent Party had breached its obligations under the Agreement if there were evidence before it which showed that the applicant had been unlawfully detained, or that his rights under the Agreement had otherwise been infringed, at some time after 14 December 1995.

16. The question in the present case is therefore whether the fact of the applicant's arrest and abduction in 1992, assuming it were proved to have occurred as alleged, is sufficient in the absence of any other explanation, to show that he remained in detention after 14 December 1995. In this connection the Chamber notes that in neither of the cases referred to above did the European Commission hold as a matter of fact that the persons concerned, who had last been seen in Turkish detention a considerable time before, were still in detention.

17. The Chamber has held in the case of Matanović v. Republika Srpska (Decision on the Merits adopted on 11 July 1997) that the obligation on the Parties to the Annex 6 Agreement to ensure human rights "entails positive obligations to protect these rights." In the Chamber's opinion this responsibility of the Parties to ensure and protect human rights means that the Parties have to provide not only the appropriate structures to guarantee the exercise of rights, but also appropriate means whereby violations will be prevented and, where necessary, punished. As to the forced

disappearance of persons this positive obligation encompasses, according to the jurisprudence of the Inter-American Court of Human Rights, the obligation "to carry out a serious investigation of violations within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation..." (Velasquez Rodriguez v. Honduras, Judgement of 29 July 1988, para. 174). However this obligation applies, in the Chamber's view, only if there is evidence (including circumstantial or presumptive evidence) indicating that the detention has continued after the entry into force of the Agreement.

18. As it indicated in its decision on the admissibility of the case the Chamber considers that evidence of detention prior to the entry into force of the Agreement may well be relevant to the question whether the person concerned has been in custody since (see also Matanović v. Republika Srpska, Decision on the Merits, para. 32). The weight to be attached to it will vary with the circumstances, including the length of time which has elapsed since the person concerned was last shown to have been in custody, and any explanation or lack of explanation as to the fate of the person. Normally, however, it would be essential that there should be some other evidence (even circumstantial or presumptive evidence), pointing to the detention having continued after the Agreement came into force, before the Chamber could conclude that the Agreement had been violated.

19. In the present case the only evidence offered by the IGFM relates to the alleged arrest and abduction of the applicant, which is said to have occurred over three years before the Agreement came into force. Having regard to the background of war and inter-communal strife which prevailed during that period, the Chamber holds that such evidence would not of itself be sufficient to support the conclusion that the applicant has remained in detention after the Agreement came into force. No violation of the Agreement is therefore established in this case.

VI. CONCLUSION

20. For the reasons given above, the Chamber **decides,** by ten votes against three, that no violation of the Agreement has been established.

(signed) Andrew GROTRIAN
Registrar of the Chamber

(signed) Jakob MÖLLER
Vice-President of the Chamber
(Acting President)

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate dissenting opinion of MM Vlatko MARKOTIĆ and Želimir JUKA.

DISSENTING OPINION OF MM VLATKO MARKOTIĆ AND ŽELIMIR JUKA

I. 1. In relation to the fact that the arrest took place in 1992 and the detention still continues, the applicant IGFM suggested the questioning of Vladan Vesić, head of police, Nebojša Ivaštanin, President of Municipality, and Savo Vekić, the officials mainly responsible for the whereabouts of Father Grgić, with the special observation on the information that in this case there are sources that they were asked not to reveal.

2. The respondent Party claims that the applicant has not been held after 14 December 1995 and that the burden of proof lies on the applicant to substantiate the statement that Father Grgić is still held in prison. (This is the way the respondent Party has chosen to defend itself - with total passiveness in relation to important facts.)

II. The Chamber reached its conclusion that the violation of the Agreement is not established, only on the basis of the previously mentioned facts presented by the parties, with the following explanation:

1. "The Chamber considers that evidence of detention prior to the entry into force of the Agreement may well be relevant to the question whether the person concerned has been in custody since" (para. 18, Decision on the Merits).

2. "The Chamber notes that the IGFM has produced no concrete information or evidence which could show that the applicant has been in detention at any time after his arrest in 1992" (para. 13, Decision on the Merits).

3. "In the Chamber's opinion there are important distinctions between the present case and the two cases before the European Commission which it has referred to. In particular in both the Cyprus v. Turkey and the Kurt cases..." (para. 15, Decision on the Merits).

III. We cannot agree with the above reasoning of the Chamber for these reasons:

1. The Human Rights Commission for Bosnia and Herzegovina (the Office of the Ombudsperson and the Human Rights Chamber) established under the Agreement on Human Rights in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina in this case was absolutely passive and did not conduct the necessary procedure by which it would thoroughly investigate whether there was or was not a breach of the Agreement.

2. The burden of proof that the detention is still going on is not only on the applicant but the respondent Party is obliged to take an active part in the procedure as well, and to provide evidence that the victim has been liberated.

3. There is no important distinction between this case (for the purpose of this case) and the case of Cyprus v. Turkey and the Kurt case. This case-law is applicable in the present case as well as in other cases of a similar kind.

4. It is absurd to require the victim in custody, or the applicant on behalf of the victim, to provide evidence that he has not been liberated before 14 December 1995 and that the detention continued after 14 December 1995.

IV. The reasons for our dissenting opinion, as previously stated, are set forth as follows:

1. The Agreement on Human Rights set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina represents the most recent, the strongest, the most perfect and the most efficient mechanism for efficient establishment of violations and for protection of human rights. By this Agreement the Commission is established, which is made up of two parts: the Office of the Ombudsperson and the Human Rights Chamber. The fundamental right of the Ombudsperson, according to this Agreement, is conducting of

investigation of violation of human rights and, on its own initiative and at any moment, referring the application to the Human Rights Chamber (Article V of Annex 6). In order to conduct a proper investigation, the Ombudsperson has access to and may examine all official documents, including classified ones, and may enter and inspect any place where persons deprived of their liberty are confined (Article VI of Annex 6). The main competence of the Chamber is to make final and binding decisions (Article XI of Annex 6). If the Parties do not provide all relevant information and do not cooperate fully with the Chamber (Article X of Annex 6), the Chamber has the power to order provisional measures, to appoint experts, and TO COMPEL THE PRODUCTION OF WITNESSES AND EVIDENCE (Article X para. 1 of Annex 6). The Chamber may meet in any other location for the inspection of documents (Article III of Annex 6).
In the Grgić case the Commission (the Ombudsperson and the Chamber) did not use its powers and the prescribed mechanism by which it is to establish whether a violation of the Agreement occurred or not. The Chamber does not have the right to be passive in its procedure, as it was in the Grgić case.

2. The case-law has developed a great number of perfect instruments by which it is made impossible for the parties to avoid cooperation with the institutions for protection of human rights. There are a few cases in which the positions taken are in the main part applicable in the Grgić case, and which do not bear exceptions and should stay intact.

a) The Chamber itself took the following position in its Decision on Case No. CH/96/1 on 11 July 1997 (para. 32 of the Decision): "In particular evidence that an applicant was arrested or in detention before the agreement came into force, or evidence that he was released, may well be relevant to the question whether he has been in custody since."

b) The European Commission of Human Rights in its Report on the case of Kurt v. Turkey on 5 December 1996 took the view that the respondent Government must provide a credible and substantiated explanation of what has happened to the detained person and that disappearance from an official prison creates a presumption of responsibility of the respondent Government. The Commission also considers that "any unaccounted disappearance of a detained person" must be regarded as a particularly serious violation of Article 5 of the European Convention and that that Article "can ... be understood as a guarantee against such disappearances" (Application No. 8007/77 Cyprus v. Turkey). In the case of Kurt v. Turkey the European Commission in its opinion notes that the state authorities are responsible for the control of the detained persons. The conclusion can be drawn from the case No. 8007/77 Cyprus v. Turkey that in the absence of any adequate explanation as to the fate of a detained person, it must be presumed that the person is still in the custody of the respondent Party.

c) The Inter-American Court for Human Rights in its judgement of 29 July 1988 in the case of Velasquez Rodriguez v. Honduras explains: "Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim."

d) The Chamber also correctly followed the perfect instruments of the European Commission and the Inter-American Court in its Decision on Case No. CH/96/1 of 11 July 1997 and in paras. 36 and 59 of that Decision took the following position: "There is no direct evidence before the Chamber as to the fate of the applicants after their disappearance in September 1995. The respondent Party has provided no explanation of the applicants' disappearance from house arrest" (para. 36 of the Decision). "In the Chamber's opinion the respondent Party has failed either to provide a credible and substantiated explanation for the applicants' disappearance or to show that they have taken effective steps to investigate the matter" (para. 59 of the Decision). If the Chamber had heard the evidence of the witnesses proposed by the applicant's representative IGFM which is in possession of a source of information who wanted to stay unknown, if an investigation had been carried out, if the respondent Party had gathered relevant information on the period before and after 14 December 1995, only then could a decision be issued as to whether there was or was not a breach of the Agreement.

e) The above mentioned case-law found support and confirmation in the Declaration of the UN General Assembly of 18 December 1992 which relates to cases of enforced disappearances: "in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their

liberty by officials of different branches or levels of Government, or by organised groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of the liberty, which places such persons outside the protection of the law."

V. The above mentioned statements, interpreted or quoted, of the case-law and the UN Declaration are for the most part applicable in the Grgić case, but because of the passiveness of the respondent Party, of the Ombudsperson for Bosnia and Herzegovina and of the Human Rights Chamber, the illusion is created in the Decision of the Chamber that there are important differences between this case and the Cyprus v. Turkey and Kurt cases.

VI. On the basis of all that is stated we can conclude that the Chamber did not establish whether the respondent Party violated the agreement or not.

(signed) Vlatko MARKOTIĆ

(signed) Želimir JUKA