DECISION ON THE ADMISSIBILITY

of

CASE No. CH/96/21

Krstan ČEGAR

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 11 April 1997 with the following members present:

Peter GERMER, President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Mehmed DEKOVIĆ
Giovanni GRASSO
Manfred NOWAK
Vitomir POPOVIĆ
Viktor MASENKO-MAVI

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the Application by Krstan ČEGAR against the Federation of Bosnia and Herzegovina submitted on 23 October 1996 by the Human Rights Ombudsperson for Bosnia and Herzegovina under Article V paragraph 5 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and registered on 29 October 1996 under Case No. CH/96/21;

Takes the following decision on the admissibility of the Application under Article VIII paragraph 2 of Annex 6 to the General Framework Agreement:

I. THE FACTS

1. The facts of the case, as they appear from the Decision of the Ombudsperson referring the case to the Chamber and from the other documents in the case-file, may be summarised as follows:

2. The applicant is a citizen of the Republika Srpska resident in Banja Luka. On 1 June 1996 while travelling in the Federation of Bosnia and Herzegovina, he was arrested by Bosnian-Croat police officers near Glamoč. His car, a trailer and some agricultural tools and equipment were seized by the police.

3. The applicant was subsequently detained in a prison in Glamoč. On 3 June 1996 he was transferred to a prison in Livno. On 11 June 1996 he was transferred to the Radoč military prison near Mostar. He received visits on 12 June 1996 from the International Police Task Force and on 13 June 1996 from the International Committee of the Red Cross (ICRC).

4. According to the Decision of the Ombudsperson the applicant was released on 16 June 1996 following an intervention of the ICRC in Mostar. According to information given by the applicant in his application form and a letter to the Chamber, the date of his release was 16 July 1996.

5. The applicant's car and trailer were returned to him in August 1996. The other items of seized property have not, according to the applicant, been returned.

6. The applicant was not given any reasons for his arrest and detention and was not brought before a judge or other judicial officer.

II. COMPLAINTS

7. The applicant complains that his rights to liberty and private property have been violated through his arrest, detention and the seizure of his property. He claims compensation of 3500 DEM. The Ombudsperson has found that the case raises issues under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and under Article 1 of Protocol No. 1 to the Convention.

III. PROCEEDINGS BEFORE THE CHAMBER

8. The case was referred to the Chamber by Decision of the Ombudsperson dated 23 October 1996. It was received on 29 October 1996 and registered on the same day. On 3 February 1997 the Chamber decided under Rule 49 (3) (b) of its Rules of Procedure to give notice of the application to the respondent Party and invite them to submit written observations on the admissibility and merits of the application. The Chamber fixed a time limit expiring on 26 March 1997 for the submission of these observations. Additional information received from the applicant was transmitted to the respondent Party on 27 February and 12 March 1997. No response has been received from the respondent Party to any of the communications sent.

IV. THE LAW

9. The applicant complains that he was unlawfully deprived of his liberty and also that his property was unlawfully seized.

10. Before examining the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII paragraph 2 of the Agreement.

11. The Chamber first notes that the respondent Party has not put forward any objection to the admissibility of the case. It has not, in particular, suggested that any alternative "effective remedy" was available to the applicant for the purposes of Article VIII paragraph 2 (a) of the Agreement. In this respect the Chamber refers to the principles applied by the European Court of Human Rights in relation to the rule as to exhaustion of domestic remedies under Article 26 of the European Convention on Human Rights, which the Chamber has itself applied in previous decisions, (see Eur. Court HR, Akdivar v. Turkey, Judgement of the Grand Chamber of 16 September 1996; *Case No. CH/96/9*, Marković v. State and Federation of Bosnia and Herzegovina, Decision of 4 February 1997). In particular the Chamber recalls that in the *Akdivar* case the Court stated:

> "Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness" (ibid. para. 66).

12. As regards the burden of proof the Court also stated:

> "In the case of exhaustion of remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy...was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances...or that there existed special circumstances absolving him or her from the requirement..." (ibid., para. 68).

13. In para. 69 of the Judgement the Court further emphasised that the application of the domestic remedies rule "must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up." Accordingly, the Court said, it must be applied "with some degree of flexibility and without excessive formalism" and it is necessary to "take realistic account not only of the existence of formal remedies in the legal system...but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

14. In the present case, as the Chamber has pointed out, the respondent Party has not suggested that any effective alternative remedy was available. On the information available to it the Chamber finds that it is not established that any such remedy was available.

15. As to the substance of the applicant's complaint concerning his arrest and detention the Chamber first notes that under Article 1 of the Agreement the Parties undertake to secure to all persons within their jurisdiction *inter alia* the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the right to liberty and security of person and the right to property.

16. Article 5(1) of the Convention provides that no one shall be deprived of his liberty save in certain cases there specified. The respondent Party has not argued that the applicant's arrest and detention fell within any of the cases set out and the information in the case-file does not suggest that it did so. Nor is it apparent from the information available that the arrest and detention were "in accordance with a procedure prescribed by law" as Article 5 further requires. The applicant does not appear to have been given any reasons for his arrest as required by Article 5(2) of the Convention. Nor does it appear that he was brought before a judge or other judicial officer as Article 5(3) requires in the case where a person is arrested on suspicion of an offence. Furthermore there is no information available to suggest that the applicant was able "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" as required by Article 5(4) of the Convention. In the Chamber's opinion the applicant's complaints concerning his arrest and detention therefore raise issues of substance under Article 5 of the Convention.

17. The Chamber also considers that the applicant's complaints concerning the seizure of his property raise issues of substance under Article 1 of Protocol No. 1 to the Convention, which guarantees the right to "peaceful enjoyment of ... possessions" and provides that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...." Although some of the applicant's property was returned to him the question still arises whether its seizure and retention by the police, even for a limited time, was compatible with these provisions. The applicant also claims that some items were not returned to him and a question therefore arises as to whether he has been unlawfully deprived of those items.

18. In these circumstances the Chamber finds that the case raises issues under the provisions of the European Convention which should be examined on the merits. No ground of inadmissibility is established and the case should therefore be declared admissible.

19. For these reasons the Chamber, without prejudging the merits, unanimously

DECLARES THIS APPLICATION ADMISSIBLE

(signed)	Andrew GROTRIAN Registrar of the Chamber	(signed)	Peter GERMER President of the Chamber