DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 November 1999)

Case no. CH/98/946

H.R. and Mohamed MOMANI

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 6 October 1999 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 two applicants were arrested by Bosnian Croat police on 10 February 1996 and detained together with Samy Hermas, who was the applicant in case no. CH/97/45 in which the Chamber delivered its decision on admissibility and merits on 18 February 1998 (Decisions and Reports 1998).

II. PROCEEDINGS BEFORE THE CHAMBER

2. This case was referred to the Chamber by the Ombudsperson on 9 September 1998. It originated in an application lodged with the Ombudsperson on 29 January 1997 by H.R. and Mohamed Momani (hereinafter "the applicants") against the Federation of Bosnia and Herzegovina (hereinafter "the respondent Party") and registered on 3 February 1997.

3. The Office of the Ombudsperson contacted the respondent Party in an attempt to achieve a friendly settlement to this case on the basis of the findings by the Human Rights Chamber in the *Hermas* case. However, they found that it was not possible to reach a friendly settlement between the two parties.

4. On 16 October 1998 the Chamber decided to transmit the application to the respondent Party for observations pursuant to Rule 49(3)(b) of the Rules of Procedure.

5. The respondent Party did not submit any written observations on admissibility and merits. On 9 March 1999 the applicants submitted their claims for compensation. On 16 April 1999 the respondent Party submitted its observations on these claims.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

6. The following is a summary of the facts as found in the applicants' applications to the Ombudsperson, and the Ombudsperson's report in the Hermas case.

7. The applicant H.R. is a citizen both of Bosnia and Herzegovina and of Jordan. He is of Arab descent. The applicant Mohamed Momani is a Palestinian citizen of Palestinian descent. They were born in 1972 and 1968 respectively and reside in Sarajevo. At the time of their detention, both applicants were students at Sarajevo University and Mr. Momani was also an employee of the United Nations.

8. On 10 February 1996 the applicants and two others, including Samy Hermas mentioned above, were driving from Kiseljak to Sarajevo when they were arrested by members of the Military Police of the Croat Defence Council ("hereinafter HVO") at Kreševo. Neither the applicants nor the others were in possession of their passports, but they presented other documents as identification, e.g. United Nations identification cards, university booklets and driving licenses.

9. The applicants were not given any reason for their arrest. The military police confiscated all of their purchased goods and money.

10. The applicants were taken to the HVO barracks at Kiseljak and questioned for approximately five-and-one-half hours.

11. The applicant H.R. asked for the reason for his detention and he was told that he would have to spend the night at the HVO barracks until his identity could be determined in the morning.

12. The applicants and the others were detained in the Kiseljak military prison for 22 days. On the first night they were threatened by the guards that they would be killed or badly hurt. The threats continued throughout the time of their detention in Kiseljak. The applicants were subjected to

derogatory remarks (e.g. being called "Balija", an extremely derogatory term for persons of the Muslim faith). The applicants were detained in an unheated room infested with mice. Only one meal was served each day, usually consisting of one piece of bread and some tinned fish.

13. On 12 February 1996 the HVO Military police, accompanied by three journalists, came to the applicants' cell and the journalists took a picture of them. On 16 February and 24 February 1996 articles were published about the detention of the applicants and fellow detainees in the Hrvatska Riječ and the Slobodna Dalmacija newspapers.

14. The applicants were visited by a representative of the International Committee for the Red Cross ("hereinafter ICRC") and registered as detained persons. They were informed by an ICRC official that they were considered prisoners of war and that they were to be exchanged for prisoners of war of Croat descent being held by the Bosnian Government forces.

15. On 2 March 1996 the applicants and Samy Hermas were taken by helicopter to "the HVO" military prison "Heliodrom", a former helicopter base located in Rodoč Barracks near Mostar, by members of the anti-terrorist branch of the HVO Military Police and three civilians. The applicants claim that they were repeatedly beaten before their departure, during the flight, and upon their arrival in Rodoč.

16. The applicant Mohamed Momani claims that on this occasion he was hit with a rifle butt on his right temple and above his left eye. As a consequence, he still suffers difficulty breathing.

17. During the applicants' detention the Bosnian Croats' administrative body named "Hrvatska Republika Herceg Bosna (hereinafter "the HRHB") and Croatian media repeatedly presented the applicants as members of the "El mudžahid" unit.

18. The applicants were kept in Rodoč until 27 June 1996. During this time, the applicants were forced to work for up to ten hours each day without remuneration. This involved cleaning the inside of the barracks and the surrounding area and removing equipment.

19. On 7 June 1996 the Higher Court of Travnik of the HRHB, sitting in Vitez, allocated a lawyer to the applicants. The decision states that the Higher Public Prosecutor of the "HRHB" had requested that an investigation be opened against the applicants on 27 May 1996. The applicants were not informed of either of these developments.

20. On 18 June 1996 the HRHB Office for the Exchange of Prisoners and Other Persons made a written proposal for exchange of the applicants and their co-detainee, Mr. Hermas. According to this written proposal the HRHB agreed to release "three Jordanian citizens in exchange for Mr. M.B., who was being detained in Zenica."

21. On 24 June 1996 the HRHB Office for the Exchange of Prisoners and Other Persons, in a letter to the Ambassador of Bosnia and Herzegovina in Croatia, repeated the same written proposal for, referring to the applicants and their friend as "…three Islamic citizens from Arab countries."

22. The applicants were not brought before any judge or authorised official until 27 June 1996. They met their allocated lawyer for the first time on this date and were questioned by the investigative judge of the Higher Court. The judge issued a decision on investigation and detention, which allowed for their detention for a maximum of one month from that date. This decision was taken in accordance with Article 191 paragraph 1 of the Law on Criminal Procedure.

23. According to the above decision, the Higher Public Prosecutor's Office had requested on 27 May 1996 that an investigation be opened against the applicants on the ground that they were suspected of having committed criminal acts and war crimes against civilians within the meaning of Article 142 paragraph 1 of the Penal Code and that their detention be ordered. It further appeared that it was on 27 May 1996 that the fourth Military Police of the HVO from Vitez had itself made an application to the Higher Public Prosecutor that a criminal investigation be carried out. This is in contrast to the decision of 7 June 1996, referred to above, that suggests that the date of the Higher Public Prosecutor's Office request was 7 May 1996.

24. The decision on detention states that an investigation would be opened in respect of the allegations against the applicants on the ground that there was a substantiated suspicion that on 8 June 1993 they had committed war crimes as members of the Army of the RBiH unit "El mudžahid" during the general attack on the following Croat villages located in the territory of the municipality of Travnik: Maline, Bikoše, Podovi, Orašac and Čukle. The decision listed thirty-six names of individuals the applicants were suspected of having singled out from the Croat prisoners and killed in the village of Bihoše using an automatic weapon. Further, it stated that on 18 September 1993 they had taken part in the attack on the village of Bobaši in the municipality of Vitez and that on that occasion they had killed a large number of civilians, burned and destroyed the whole village and took civilians to the concentration camp in Krušćica in the municipality of Vitez. It further stated that they had taken part in the torture of F. by stamping with their heavy boots on her bare toes, putting a knife under her throat, punching and kicking her, hitting her with their weapons and threatening to kill her.

25. According to the decision on detention, the applicants were to be detained for a maximum of one month from noon on 27 June 1996 in accordance with Article 191 paragraph 1 of the Law on Criminal Procedure.

26. The applicants had a right of appeal against this decision that had to be lodged within 24 hours from the moment of receipt of the decision. Neither of the applicants appealed the decision.

27. On 25 July 1996 the applicants were brought before a woman alleged to have been tortured by them. She did not recognise them. The investigating judge ordered the applicants' release in accordance with Article 198 paragraph 1 of the Law on Criminal Procedure, to take place on the following day. However, the Public Prosecutor lodged an appeal against this decision. The appeal was granted and the applicants were ordered to be detained for another month.

28. The applicants' representative appealed this decision, claiming that it was in violation of Article 190 paragraph 2 of the Law on Criminal Procedure and asking that the matter be referred to the Supreme Court in Mostar. This appeal was unsuccessful.

29. Meanwhile, the Office for the Exchange of Prisoners and Other Persons of HRHB had made numerous attempts to have the applicants exchanged. The applicants were finally exchanged for Bosnian Croat prisoners of war on 7 August 1996.

30. The facts of the case, as thus established by the Ombudsperson, were not disputed by the respondent Party. The Chamber will therefore base its decision on the facts as so established.

B. Relevant legislation

1. The Penal Code of the Socialist Federal Republic of Yugoslavia

31. Article 142 paragraph 1 of the Penal Code of the former Socialist Federal Republic of Yugoslavia, adopted by the then Republic of Bosnia and Herzegovina (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90, and Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94) reads as follows:

> "A person who, in violation of rules of the International Law during a period of war, armed conflict or occupation, has ordered that civilians be subjected to: killing, torture, inhuman actions, biological experiments, major suffering, violations of their bodily integrity or health; displacing or moving to other places, changing of their nationality and taking of another religion; forcible prostitution or rape; measures of fear and terror, being hostages, collective punishment, being taken into concentration camps, illegal detention, being deprived of the right to a fair and impartial trial; forcibly joining the enemy armed forces or intelligence service or administration; forced labour, starvation, confiscation of property, looting; a person who has ordered that the following be done: illegal and unlawful extirpation or usurpation of a great amount of property which is not justified by military needs, taking an illegal and disproportionate amount of contribution and requisition, reduction of the value of the domestic currency or illegal printing of money; or who has executed any of the above

mentioned actions, will be punished by at least five years of imprisonment or by death penalty."

2. The Law on Criminal Procedure, the Law on Application of the Law on Criminal Procedure and the Law on Internal Affairs

32. The provisions on arrest, detention and related issues are provided in the Law on Criminal Procedure, the Law on Application of the Law on Criminal Procedure and the Federation of Bosnia and Herzegovina Law on Internal Affairs.

33. Relevant Articles of the Law on Criminal Procedure (Consolidated text) (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90, and OG RBiH nos. 2/92, 9/92, 16/92 and 13/94) read as follows:

Article 157:

"(1) An investigation shall be instituted against a particular individual if there is a ground for suspicion that he has committed a crime."

Article 158:

"(1) The investigation shall be conducted on the application of the public prosecutor.

(2) The application to conduct the investigation shall be submitted to the investigative judge of the competent court.

(3) The application must indicate the following: the person against whom the investigation is to be conducted, a description of the act which has the legal attributes of a crime, the legal name of the crime, the circumstances justifying suspicion and the evidence that exists.

(4) The application to conduct the investigation may include a proposal that certain circumstances be investigated, that certain actions be taken, and that certain persons be examined with respect to certain points, and it may also be recommended that the person against whom the investigation is being applied for be taken into custody.

(5) The public prosecutor shall deliver to the investigative judge the criminal charge and all papers and records concerning actions which have been taken. The public prosecutor shall at the same time deliver to the investigative judge physical objects which may serve as evidence or shall indicate where they are located."

Article 159:

"(1) When the investigative judge receives the application for the conduct of the investigation, he shall examine the records, and if he concurs in the application, he shall order that the investigation be conducted; the decision to that effect should contain the data referred to in Article 158 paragraph 3 of this law. The decision shall be delivered to the public prosecutor and to the accused.

(2) Before making the decision the investigative judge shall question the person against whom the conduct of the investigation is applied for unless there is a risk of delay.

(3) Before deciding on the public prosecutor's application the investigative judge may summon the public prosecutor and the person against whom conduct of the investigation has been applied for to come before the court on a specified date, if this is necessary in order to clarify circumstances which may be important in deciding on the petition, or if the investigative judge feels that an oral hearing would be advisable for other reasons. On that occasion the parties to the proceedings may present their motions orally, and the public prosecutor may amend or supplement his application for conduct of an investigation and he may also propose that proceedings be conducted on the basis of an indictment (Article 160).

(4) Provisions on the summoning and examining of an accused shall be applied to the summoning and examining of the person against whom the conduct of an investigation has been applied for. A person summoned under paragraph 3 of this article shall be instructed by the investigative judge in conformity with Article 218 paragraph 2 of this law.

(5) An appeal is allowed against the decision of an investigative judge to conduct an investigation. If the decision was communicated orally, the appeal may be filed for the record at that time."

Article 190:

"(1) Custody may be ordered only under the conditions envisaged in this law.

(2) The length of custody must be limited to the shortest necessary time. It is the duty of all bodies and agencies participating in criminal proceedings and of agencies providing legal aid to proceed with particular urgency if the accused is in custody.

(3) Throughout the entire course of the proceedings custody shall be terminated as soon as the grounds on which it was ordered cease to obtain."

Article 191:

"(1) Custody shall always be ordered against a person if there is a reasonable suspicion that he has committed a crime for which the law prescribes the death penalty. Custody need not to be ordered if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced.

(4) A person committing a criminal offence that is automatically prosecuted can be deprived of his liberty by any person. The person deprived of his liberty must immediately be delivered to the investigative judge or to the Ministry of Internal Affairs authority, and if this is not possible, one of the latter must immediately be informed. The Ministry of Internal Affairs authority shall proceed according to Article 195 of this law."

Article 192:

"(1) Custody shall be ordered by the investigative judge of the competent court.

(2) Custody shall be ordered in a written decision containing the following: the first and the last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instruction as to the right of appeal, a brief substantiation in which the basis for ordering custody is specifically argued, the official seal, and the signature of the judge ordering custody.

(3) The decision on custody shall be presented to the person to whom it pertains at the moment when he is arrested, and no later than 24 hours from the moment he is deprived of liberty. The time of his detainment and the time of presentation of the warrant must be indicated in the record.

(4) An individual who has been taken into custody may appeal the decision on custody to the panel of judges (Article 23 paragraph 6) within 24 hours from the time when the warrant was presented. If the person taken into custody is examined for the first time after that period has expired, he may file an appeal at the time of his examination. The appeal, a copy of the transcript of the examination, if the person taken into custody has been examined, and the decision on custody shall be immediately delivered to the panel of judges. The appeal shall not stay execution of the warrant.

(5) If the investigative judge does not concur in the public prosecutor's recommendation that custody be ordered, he shall seek a decision on the issue from the panel of judges (Article 23 paragraph 6). A person taken into custody may file an appeal against the decision

of the panel of judges which ordered custody, but that appeal shall not stay execution of the order. The provisions of paragraphs 3 and 4 of this Article shall apply in connection with presentation of the warrant and the filing of the appeal.

(6) In the cases referred to in paragraphs 4 and 5 of this Article the panel of judges ruling on an appeal must render a decision within 48 hours."

Article 193:

"(1) The investigative judge must immediately inform a person who has been detained and brought before him that he may engage defence counsel, who may attend his examination, and, if necessary, he shall help him to find defence counsel. If within 24 hours of the time of this communication a person taken into custody does not provide the presence of defence counsel, the investigative judge must immediately examine that person.

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

(3) If, in a case in which legal representation is obligatory (Article 70 paragraph 1), a person taken into custody does not engage defence counsel within 24 hours from the date when he is informed of his right to do so, or if he declares that he will not engage defence counsel, counsel shall be appointed for his defence ex officio.

(4) Immediately after the examination the investigative judge shall decide whether to release the individual who has been taken into custody. If he considers that the person arrested should be detained, the investigative judge shall immediately inform the public prosecutor to that effect unless the latter has already submitted an application for the conduct of an investigation. If within 48 hours from the time of being informed about custody the public prosecutor does not file an application for the conduct of an investigation, the investigative judge shall release the person who has been taken into custody."

Article 195:

"(1) Authorised officials of the Ministry of Internal Affairs authority may detain a person if any of the reasons envisaged in Article 191 of this law obtain, but they must bring that person without delay before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, if the seat of that court can be reached more quickly. When the authorised official of the law enforcement agency brings the person before the investigative judge, he shall inform him of the reasons at the time of his arrest.

(2) If impediments which could not be overcome made it impossible to bring a person who has been arrested before the investigative judge within 24 hours, the officer must give a specific justification for this delay. The delay must also be justified when an individual is being brought in at the request of the investigative judge.

(3) If, because of the delay in bringing the accused before the investigative judge, the latter is unable to make the decision on custody within the period referred to in Article 192, paragraph 3, of this law, he is obliged to render a decision on custody as soon as the person who has been arrested is brought before him."

34. Article 4 paragraph (a) of the Law on the Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95) supersedes and is identical to Article 196 of the Law on Criminal Procedure[1]. Insofar as relevant it provides as follows:

[1] The original Article 196 was deleted from the Law on Criminal Procedure by the Law on the Adoption of the Law on Criminal Procedure (OG RBiH nos. 2/92, 9/92 and 13/94), but was introduced again by Article 4 paragraph (a) of the Law on the Application of the Law on Criminal Procedure. Since the original text of this Article has not changed, the use of the words "this law" in Article 4 paragraph (a) in fact refer to the Law on Criminal Procedure.

"(1) In exceptional circumstances custody can be ordered by the Ministry of Internal Affairs authority before an investigation is carried out, if it is necessary for establishing an identity, checking an alibi or for other reasons it is necessary to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 paragraph 1 and paragraph 2 points 1 and 3 of this law exist, although in cases prescribed by Article 191 paragraph 2 point 2 this can be done only if there is a well-founded fear that the person at issue will destroy evidence of the criminal act.

(3) Custody ordered by the Ministry of Internal Affairs authority may last up to three days, from the moment of arrest. The provisions of Article 192 paragraphs 2 and 3 of this law shall apply to custody. A detained person may appeal against a decision on custody before the panel of judges of the competent court within 24 hours from the moment he receives the decision. The panel is obliged to render a decision on appeal within 48 hours from the moment of receipt of appeal. The appeal has no suspensive effect. The Ministry of Internal Affairs authority shall provide a detainee with legal aid for the lodging of his appeal.

(5) If, after the expiry of the three days time-limit, the detainee is not released, the Ministry of Internal Affairs authority shall act in accordance with Article 195 of this law, and the investigative judge before whom the detainee is brought shall act in accordance with Article 193 of this law."

35. The Law on Criminal Procedure (Consolidated text) continues as follows:

Article 197:

"(1) On the basis of the investigative judge's decision the accused may not be held in custody more than 1 month from the date of his arrest. At the end of that period the accused may be kept in custody only on the basis of a decision to extend custody.

(2) Custody may be extended for a maximum period of 2 months under a decision of the panel of judges (Article 23 paragraph 6). An appeal is permitted against the panel's decision, but the appeal does not stay the execution of the decision. If proceedings are conducted for a crime carrying a prison sentence of more than 5 years or a more severe penalty, a panel of the Supreme Court of the Republic may for important reasons extend custody by not more than another 3 months. The decision to extend custody shall be made on the agreed recommendation of the investigative judge or public prosecutor.

(3) If a bill of indictment is not brought before the expiration of the periods referred to in paragraph 2 of this Article, the accused shall be released."

Article 198:

"In the course of the preliminary examination the investigative judge may terminate custody on agreement with the public prosecutor when proceedings are being conducted on his petition, unless custody is terminated because the period of its duration has expired. If the investigative judge and public prosecutor do not reach agreement on this point the investigative judge shall ask the panel of judges to decide the issue, which it must do within 48 hours."

36. On 10 January 1996 the Federation of Bosnia and Herzegovina passed a new Law on Internal Affairs (Official Gazette of the Federation of Bosnia and Herzegovina no. 1/96). This Law entered into force on 1 February 1996.

Article 35:

"If necessary in the course of duty and for the execution of assignments, authorised officers may request persons to identify themselves, and in cases prescribed by Federal Law, bring them in or have them brought before the competent authority."

Article 36:

"In cases prescribed by the law regulating criminal procedure, authorised officers may bring in the persons, if the criminal act falls within the competence of the Ministry."

37. The Law on Criminal Procedure (Consolidated text) imposes in Article 205 a duty on the President of the court to survey and visit detainees at least once a week and to take all necessary steps to remedy irregularities.

38. Article 13 of the Law on the Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95) *inter alia*, provides:

"(1) Provisions of the Law on Criminal Procedure in regard to ... procedures for the compensation of damage, rehabilitation and procedures for the achievement of other rights of persons unjustly convicted and unjustly deprived of liberty, shall not apply."

39. The Law on the Application of the Law on Criminal Procedure was in force from 2 June 1992 until 23 December 1996, i.e. from the day of its publication in the Official Gazette until the cessation of the imminent threat of war. Since the day it was repealed, the provisions of Articles 541 to 549, relating to the procedure for compensation for damage, rehabilitation and realisation of other rights of persons who had been unjustly sentenced and whose detention was ill-founded, have been fully applicable once more.

40. Articles 542 paragraph 2, 543 paragraph 1, 545 paragraph 3 of the Law on Criminal Procedure provide as follows:

Article 542 paragraph 2:

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

Article 543 paragraph 1:

"If a claim for compensation for damages is not accepted or no decision by the authority organ has been taken on it within three months since the date of laying it, the person concerned may submit a complaint to a competent court for compensation for damages. If an agreement has been made in respect to a part of the claim, the damaged person concerned may submit a complaint regarding the remainder of the claim."

Article 545 paragraph 3:

"The right to compensation for damage belongs also to a person who is, because of a mistake or the illegal act of an organ, deprived of his/her freedom or kept for a longer period of time under custody or in prison than would otherwise have been the case."

3. The Rome Agreement, Agreed Measures ("The Rules of the Road")

41. On 18 February 1996 the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, meeting in Rome, agreed on certain measures to strengthen and advance the peace process. The second paragraph of item 5, entitled "Cooperation on War Crimes and Respect for Human Rights", reads as follows:

"Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

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

IV. COMPLAINTS

42. The applicants complain that they were unlawfully arrested and detained for a total period of 179 days without being charged with an offence, informed of the reasons for their detention, brought before a judge, or given the possibility of starting proceedings for the first 139 days of that period. They further complain that they have not been compensated for their detention in violation of Article 5 of the Convention. The applicants also complain that during their detention they were subjected to torture and inhuman and degrading treatment in violation of Article 3 of the Convention and required to perform forced labour in violation of Article 4 of the Convention.

43. The applicants complain that they were discriminated against in violation of Article 14 of the Convention in the enjoyment of their rights under Articles 3, 4 and 5 of the Convention.

44. Finally, the applicants complain that they had no effective remedy against their deprivation of liberty. They allege, in substance, a violation of Article 13 of the Convention.

V. FINAL SUBMISSIONS OF THE PARTIES

45. The respondent Party has not submitted observations concerning the admissibility or merits of the case. On 16 April 1999 the respondent Party submitted its response to the applicants' claims for compensation, which it claims are ill-founded and excessive.

46. The applicants submit that they suffered violations of their rights under Articles 3, 4, 5, 13 and 14 of the Convention and that the Chamber should award them monetary and other relief therefor.

47. The representatives of the Ombudsperson maintain the conclusions reached in her Report in the *Hermas* case, as also applicable to the present case, to the effect that the applicants' rights under the above-mentioned Articles of the Convention have been violated.

VI. OPINION OF THE CHAMBER

A. Admissibility

48. The respondent Party has not made any submissions on the admissibility of the case. Nor does the Chamber find any apparent grounds that would justify declaring the application inadmissible in whole or in part. The Chamber will therefore declare the application admissible in its entirety.

B. Merits

1. Article 3 of the Convention

49. Article 3 of the Convention reads as follows:

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

50. The applicants and the Ombudsperson are of the opinion that the applicants' rights under Article 3 of the Convention were violated. The following facts are established in the Ombudsperson's report in the *Hermas* case, which the Ombudsperson also refers to for the present case:

> "The applicants had to spend almost four-and-one-half months deprived of their liberty without

any information as to the reason and purpose of their detention. In this period they lived in a state of constant uncertainty as to their eventual fates, which would have given rise to great fear and caused significant stress in even the most healthy person. In addition, the conditions of detention in Kiseljak appear to have been very difficult: four, and on occasion more, people were kept in a single unheated room, which at the time – in February and March – must have been extremely cold. The applicants were unable to leave the room during this period and they and the other detainees were forced to share minimum sanitary facilities in the cell, running water being rare. The food supplied was minimal.

During the transfer of the applicants and their companions from Kiseljak Military Prison to Rodoč Barracks, the applicants were seriously beaten by the members of the HVO military police, being punched and kicked and struck with rifle butts. During this episode they had been handcuffed and unable to defend themselves in any way.

The uncertainty in which the applicants were left for so protracted a period, the physical violence to which they were subjected and the living conditions in Kiseljak Military Prison all constituted serious violations of Article 3 of the Convention."

51. The respondent Party did not submit observations disputing the facts established by the Ombudsperson.

52. The Chamber recalls that Article 3 enshrines one of the fundamental values of 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 or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, 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 (see the *Hermas* decision, paragraph 28, citing, *inter alia*, the judgment of the European Court of Human Rights in the case of *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI, paragraph 62).

53. It is further recalled that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (Eur. Court HR, *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, paragraph 38).

54. There can be no doubt that the physical violence committed on the applicants while they were in captivity and thus at the mercy of their captors constitutes inhuman and degrading treatment. In the Chamber's opinion, the same applies to the applicants being kept in a state of prolonged uncertainty as to their eventual fates, which was further aggravated by threats of death and grievous injury. Having found serious violations of Article 3 of the Convention on these grounds, the Chamber does not consider it necessary on this occasion to examine the conditions of the applicants' detention in detail despite certain misgivings.

55. In conclusion, Article 3 of the Convention has been violated.

2. Article 4 of the Convention

56. Article 4 of the Convention reads 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:

(a) 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;

(b) 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;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations."

57. The applicants and the Ombudsperson consider that the applicants were the victims of a violation of this provision in that, for the latter part of their detention at Rodoč Barracks, they were required to clean the barracks, to carry machinery and to unload food into the kitchens for nine to ten hours each day. They received no remuneration for this work. Nor were they in a position to refuse, as to do so would have put their safety at risk.

58. In the view of the Ombudsperson, given that the applicants were illegally detained, the exception provided for by Article 4 paragraph 3(a) of the Convention did not apply. Moreover, she was of the opinion that the applicants had been held in "servitude".

59. The respondent Party did not submit observations disputing the facts established by the Ombudsperson.

60. As did the European Court of Human Rights in the case of *Van der Mussele v. Belgium* (judgment of 23 November 1983, Series A no. 70), the Chamber will take as its starting point the definition of "forced or compulsory labour" given in Article 2 paragraph 2 of Convention No. 29 of the International Labour Organisation concerning Forced or Compulsory Labour, namely "... 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".

61. It is clear that the applicants, who were detained against their will, did not offer themselves voluntarily for the work that they were required to perform in Rodoč Barracks. Moreover, like the Ombudsperson, the Chamber accepts that the applicants could reasonably believe that they were under threat of violence against their persons had they refused. In this regard the Chamber cannot overlook the fact that they had already been physically assaulted and were entirely at the mercy of the persons keeping them in detention. It must therefore be accepted that the work exacted from the applicants amounted to "forced or compulsory labour". This will constitute a violation of Article 4 of the Convention if it is not covered by one of the exceptions provided for by Article 4 paragraph 3.

62. The Chamber finds that this is not the case. Given that the applicants' detention was not lawful under Article 5 of the Convention (see below), Article 4 paragraph 3 (a) cannot apply. The other exceptions, provided for by Article 4 paragraph 3, are obviously irrelevant.

63. However, on the ordinary meaning of the expression "servitude" and in view of the clear wording of Article 4 paragraph 3(a) – which, it is true, applies only to detention which is legal under Article 5 – the Chamber cannot find that work exacted from a prisoner in the normal course of his detention amounts to "servitude" prohibited by Article 4 paragraph 1 for the sole reason that the detention is illegal.

64. In conclusion, Article 4 paragraph 2 of the Convention has been violated.

3. Article 5 of the Convention

65. Article 5 of the Convention reads 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 fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose 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 diseases, 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 that 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."

66. The applicants and the Ombudsperson consider that the applicants were the victims of violations of Article 5 paragraphs 1, 2, 3, 4 and 5.

67. The respondent Party made no submission on the facts.

68. The Chamber notes at the outset that it is not open to doubt that the applicants were deprived of their liberty.

(a) Article 5 paragraph 1 of the Convention: whether the applicant's detention was "lawful"

69. The applicants and the Ombudsperson observe that the applicants were brought before a court only on 27 June 1996, four months and seventeen days after their arrest. As of that date, they were kept in detention for the stated purpose of investigating their involvement in war crimes. Since these were crimes for which the death penalty might be imposed (Article 142 paragraph 1 of the Penal Code of the former Socialist Federal Republic of Yugoslavia, see paragraph 9 above), it was mandatory to remand the applicants in custody (Article 191 of the Law on Criminal Procedure, see paragraph 10 above). Consequently, while it would have been lawful under domestic law for the applicants' arrest to have been carried out without a warrant by the law enforcement bodies acting in accordance with Article 195 of the Law on Criminal Procedure, they should then have been brought before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, without delay (Article 195 paragraph 1 of the Law on Criminal Procedure). The failure to bring the applicants before the investigating judge within 24 hours required the enforcement authorities to provide specific justification for the delay (Article 195 paragraph 2 of the Law on Criminal Procedure), which was never done. Alternatively, if the law enforcement bodies had been acting in accordance with Article 4(a) of the Law on Application of the Law on Criminal

Procedure, after a maximum of three days in detention, the applicants should have been brought without delay before the competent investigative judge of the lower court in whose jurisdiction the crime was committed.

70. In the opinion of the Ombudsperson, the failure to observe the rules of procedure laid down by national law was in itself sufficient to render the whole period of detention contrary to Article 5 paragraph 1.

71. The respondent Party submitted no observation on this point.

72. On the facts of the case, the Chamber has come to the conclusion that the applicants were arrested and detained by agents of the respondent Party for the sole purpose of exchanging them against prisoners held by others.

73. It is to be recalled that Article 5 paragraph 1 is intended to guarantee freedom from arbitrary detention. The enumeration therein given of grounds which may justify deprivation of liberty is exhaustive (see Eur. Court HR, *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, paragraph 194) and arrest or detention for the purpose of exchange is not to be found there. That is sufficient for the Chamber to find that the detention of the applicants was not "lawful" under Article 5 paragraph 1 of the Convention and thus to find that the applicants have been the victims of a violation of Article 5 paragraph 1.

74. Moreover, although the Chamber does not distinguish the period after 27 June 1996 from the preceding period, it notes that in so far as the reason for the detention of the applicants as from that date was the suspicion that they had committed war crimes, the "Rules of the Road" contained in the Rome Agreement of 18 February 1996 which are directly applicable in the legal system of Bosnia and Herzegovina (see case no. CH/97/41, *Marčeta*, decision on admissibility and merits delivered on 6 April 1998, paragraphs 40-41, Decisions and Reports 1998), required that the relevant order, warrant or indictment be reviewed beforehand by the International Criminal Tribunal for the former Yugoslavia. That requirement was not complied with in this respect. In this respect also, the deprivation of liberty was inconsistent with Article 5 paragraph 1.

75. The Chamber concludes that Article 5 paragraph 1 of the Convention has been violated.

(b) Article 5 paragraph 1(c) of the Convention

76. The applicants and the Ombudsperson are of the opinion that the applicants were not detained on a "reasonable suspicion" that they had committed an offence and, thus, that their rights under Article 5 paragraph 1 (c) were violated.

77. The respondent Party has not submitted observations concerning the alleged deprivation of the applicants' freedom without reason.

78. In view of its finding above that the detention of the applicants was in any case unlawful, the Chamber does not consider it necessary to address separately the question whether Article 5 paragraph 1 (c) was applicable.

(c) Article 5 paragraph 2 of the Convention

79. The applicants and the Ombudsperson were of the opinion that the failure to inform the applicants of the reasons of their arrests or of any charges against them until four-and-a-half months had passed constituted a violation of the applicants' rights, guaranteed by Article 5(2) of the Convention, to be given such information "promptly".

80. The respondent Party submitted no observations on this issue.

81. As the European Court of Human Rights stated in the case of *Fox, Campbell and Hartley v. the United Kingdom* (judgment of 30 August 1990, Series A no. 182, paragraph 40), Article 5 paragraph 2 contains the elementary safeguard that any person arrested should know why he is

being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 the person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.

82. Although it appears that the detention of the applicants was for the purpose of exchange against other prisoners and that they were so informed in May 1996 by the commanding officer of the Heliodrom prison, no legal grounds were given at all. In these circumstances the Chamber takes the view that the date on which the applicants were informed of the reasons for their arrest and of any charge against them was 27 June 1996. That was the date on which the investigative judge gave them the information which enabled them to take any proceedings to challenge the lawfulness of their detention.

83. The Chamber agrees with the Ombudsperson that a delay of some four-and-one-half months in providing such essential information cannot in any circumstances be considered compatible with Article 5 paragraph 2 of the Convention.

84. In conclusion, Article 5 paragraph 2 has been violated.

(d) Article 5 paragraph 3 of the Convention

85. The applicants and the Ombudsperson are of the opinion that the applicants were the victims of a violation of Article 5 paragraph 3 of the Convention because they were not brought promptly before a judge, brought to trial within a reasonable time or released pending trial.

86. The respondent Party did not submit any observations on this issue.

87. The Chamber recalls that Article 5 paragraph 3 applies only to persons arrested or detained in accordance with Article 5 paragraph 1(c). In view of its findings with regard to that provision, there is no call for the Chamber to consider the case under Article 5 paragraph 3.

(e) Article 5 paragraph 4 of the Convention

88. The applicants and the Ombudsperson are of the opinion that the applicants were the victims of a violation of Article 5 paragraph 4 in that the applicants had not been able to take proceedings by which the lawfulness of their detention would be decided speedily by a court and their release ordered if the detention was not lawful.

89. The Ombudsperson points to the fact that the applicants were detained without a legal order from 10 February until 27 June 1996. Only on the latter date did it become possible for them to take proceedings to challenge the lawfulness of their detention. Until then it was, in the Ombudsperson's view, unlikely that any request by the applicants to be brought before a court would have been acceded to.

90. The respondent Party offered no observation on this issue.

91. The finding of a violation of Article 5 paragraph 1 in the present case does not dispense the Chamber from proceeding to inquire whether there was a failure to comply with Article 5 paragraph 4, as the two provisions are distinct (see Eur. Court HR, *Bouamar v. Belgium* judgment of 29 February 1988, Series A no. 129, paragraph 55).

92. The Chamber recalls that, as was held by the European Court of Human Rights in the case of *Chahal v. the United Kingdom* (judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V), Article 5 paragraph 4 provides a *lex specialis* in relation to the more general requirements of Article 13.

93. As was held by the European Court of Human Rights in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series A no. 145-B), 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.

94. This means that, in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements laid down by domestic law but also the reasonableness of any suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrests and the ensuing detention (compare the *Brogan* judgment, loc. cit.).

95. Furthermore, as appears from the wording of Article 5 paragraph 4 itself, the remedy in question must be such as to allow the lawfulness of the arrest or detention to be decided "speedily" by a body possessing the attributes of a "court".

96. Like the Ombudsperson, the Chamber accepts that no remedy at all was available to the applicants until 27 June 1996 and the respondent Party has not suggested otherwise. This is in itself sufficient to find that there has been a violation of Article 5 paragraph 4.

97. It should be noted that, although it appears that a judicial remedy became available to the applicants on 27 June 1996 (of which the applicants did not avail themselves), no argument has been made by the respondent Party that this remedy met the requirements of Article 5 paragraph 4. In view of its finding in the preceding paragraph, the Chamber does not consider it necessary to address this matter of its own motion.

98. In conclusion, Article 5 paragraph 4 has been violated.

(f) Article 5 paragraph 5 of the Convention

99. The applicants claim that their rights were violated under Article 5 paragraph 5 of the Convention in that they were unable to claim compensation for their illegal detentions.

100. The Ombudsperson considers that Article 13 of the Law on Application of the Law on Criminal Procedure was apparently repealed by Article 545 of the Law on Criminal Procedure, thus making it impossible for the applicants to claim such compensation; there was, accordingly, a violation of Article 5 paragraph 5.

101. In the *Hermas* case, the Agent of the respondent Party stated that it would have been open to the applicant under Article 524 paragrah 2 of the Law on Criminal Procedure (the Agent was apparently referring to Article 542 paragraph 2) to apply to the Minister of Justice of the Canton for compensation for damage arising from his illegal detention and thereafter to apply to the competent court. However, only pecuniary damage could be compensated. There was no provision for compensation of non-pecuniary damage.

102. It appears to the Chamber that Article 545 paragraph 3 of the Law on Criminal Proceedings recognises a right to compensation for illegal detention. According to Article 542 paragraph 2 of that Law, the person who has been illegally detained may apply to the competent authority for such compensation. An appeal against the decision of that authority (or against a failure to decide) may be filed to a court (Article 543 paragraph 1).

103. It appears that Article 545 paragraph 3 was not repealed entirely, as stated by the Ombudsperson in the public hearing in the *Hermas* case, but only suspended for the duration of the hostilities, and that it is now once again in force.

104. Be that as it may, the Chamber will approach the question whether Article 5 paragraph 5 of the Convention was violated as follows.

105. Firstly, although the Chamber accepts that the law of the Federation provides for a right to compensation in relation to illegal detention and thus that "formal remedies" exist in theory, the Chamber must have regard to the general legal and political context in which they operate.

106. As has been seen, the present case concerns two persons who were illegally detained for the purpose of exchanging them against prisoners held by another of the former belligerent factions. At the time, shortly after the end of active hostilities, there was widespread uncertainty prevailing throughout Bosnia and Herzegovina, and central authority was apparently not in a position to ensure observance of the rule of law by its subordinate executive authorities. This is reflected by the fact that the applicants' case is not unique. In these circumstances it falls to the respondent Party to satisfy the Chamber that the remedies allegedly available were "effective", or in other words, that the right to compensation which it was claimed existed as a matter of Federation law was "enforceable".

107. Because the respondent Party has not submitted observations on the merits, the Chamber must find that the respondent Party has not discharged its burden of proof (see the above-mentioned *Sakik and Others v. Turkey* judgment, paragraph 60).

108. The Chamber will now address the question whether the compensation to which a formal right is recognised meets Convention standards.

109. In the case of *Tsirlis and Kouloumpas v. Greece* (judgment of 29 May 1997, Reports of Judgments and Decisions 1997-III, paragraphs 66 and 80), the European Court of Human Rights found a violation of Article 5 paragraph 5 of the Convention and went on to award compensation of pecuniary and non-pecuniary damage under Article 50 of the Convention. It did likewise in the above-mentioned *Sakik and Others* judgment (paragraphs 61 and 66). The Chamber accordingly finds that the "enforceable right to compensation" referred to in Article 5 paragraph 5 of the Convention encompasses compensation for non-pecuniary damage as well as pecuniary damage. The respondent Party submits no comment on this issue. In these circumstances the Chamber finds that it is not established that the right to compensation meets the standards of Article 5 paragraph 5.

110. In conclusion, the Chamber finds that Article 5 paragraph 5 of the Convention has been violated.

4. Article 13 of the Convention

111. Article 13 of the Convention reads as follows:

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

112. The applicants claim that their rights under Article 13 of the Convention were violated in that they did not have available to them an effective remedy against the violations of Articles 3, 4 and 5.

113. The Ombudsperson considers that, in view of her opinion with respect to Article 5 paragraph 5 of the Convention, no separate issue arose under Article 13 with regard to the violation of Article 5.

114. The Ombudsperson considers that the applicants could not be said to have had available to them an effective remedy against the violations of Articles 3 and 4.

115. It was true that the applicants could in theory have brought criminal proceedings against those responsible for the commission of illegal acts against them. However, in view of the failure of the public prosecutor and the Higher Court of Travnik sitting at Vitez to take into account the fact that by the time the applicants' continued detention was ordered, on 27 June 1996, they had already been in illegal detention for four-and-a-half-months, the Ombudsperson considered it unlikely that either would have acted on the applicants' allegations.

116. As to the possibility of civil proceedings, the Ombudsperson took the view that the applicants ought not to be expected to return to the territory controlled by the Bosnian Croat authorities. Given that it did not appear that the criminal investigation against them had been closed or that they had been pardoned, they might reasonably fear re-arrest.

117. Quite apart from the question of whether the remedies open to the applicants were "effective", there remained the fact that the public prosecutor failed in his duty to carry out an investigation. He had ignored the visible evidence before him that the applicants had been ill-treated and forced to perform labour.

118. The Chamber notes at the outset that no separate issue arises under Article 13 of the Convention with regard to the violations of Article 5. It refers to its findings of violations of Article 5 paragraphs 4 and 5. With regard to Article 5 paragraph 4 of the Convention, reference may be made to the judgment of the European Court of Human Rights in the case of *Murray v. the United Kingdom* (judgment of 28 October 1994, Series A no. 300-A, paragraph 97), and, with regard to Article 5 paragraph 5, to the Court's above-mentioned judgment in the case of *Tsirlis and Kouloumpas v. Greece* (paragraph 73).

119. Moreover, since the Chamber's finding of a violation of Article 4 follows directly from its finding of a violation of Article 5, no separate issue arises in this respect either.

120. There remains the question whether an effective remedy was available to the applicants with regard to the violation of Article 3 of the Convention.

121. The Chamber recalls that the European Court of Human Rights has held, most recently in the case of *Aydin v. Turkey* (judgment of 25 September 1997, Reports of Judgments and Decisions 1997-VI, paragraph 103):

> "The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.
>
> Furthermore, the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.
>
> Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, such a requirement is implicit in the notion of an "effective remedy" under Article 13."

122. Given the absolute nature of the prohibition enshrined in Article 3 of the Convention, the Chamber finds that this applies equally to forms of inhuman or degrading treatment short of torture.

123. Whether or not it would be, or would have been, open to the applicants to take civil proceedings against the respondent Party or a subordinate authority with a view to obtaining compensation, the Chamber is not convinced that a remedy involving a "thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure" was in fact available. Like the Ombudsperson, the Chamber cannot overlook the fact that the public prosecutor failed to make use of his powers to carry out any investigations directed against the applicant's captors.

124. In conclusion, Article 13 has been violated in that there was no "effective remedy" available to the applicants with regard to the violation of Article 3. No separate issue arises under Article 13 with regard to the violations of Article 4 and Article 5.

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

125. The Chamber observes that under Article I(14) of the Agreement, the Parties are bound to secure to all persons within their jurisdiction, without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status, the highest level of internationally recognised human rights and fundamental freedoms. Article II(2)(b) of the Agreement, confers on the Chamber jurisdiction to consider allegations of discrimination arising in the enjoyment of the rights and freedoms concerned. Among these rights are those set out in Articles 3, 4, and 5 of the Convention.

126. The applicants and the Ombudsperson allege that the applicants were discriminated against in relation to the rights guaranteed by Articles 3, 4 and 5 of the Convention.

127. The Ombudsperson considered that until the applicants were brought before the investigative judge on 27 June 1996, they were held for no other purpose than to exchange them against other prisoners. In May 1996, they were informed by the commanding officer of the Rodoč Barracks that they continued to be detained because the Government of Bosnia and Herzegovina had not agreed to a proposed exchange of prisoners of war. On 18 June 1996 there had been a written proposal to exchange the applicants against other prisoners, which offer was repeated in a letter dated 24 June 1996 in which the names of the applicants were specifically mentioned. Only on 27 June 1996 were the applicants notified of allegations that they had been involved in war crimes. Nonetheless, no charges were in fact ever brought against them, and on 29 July 1996 a further offer of exchange was made in respect of the applicants. The offers of exchange had referred to the applicants variously as "Jordanian citizens", "Islamic citizens of an Arab country" and "Islamic citizens". There had accordingly been a "difference in treatment" based on the applicants' "origin" and "faith".

128. The difference in treatment related not only to the applicants' illegal detention but also to the forced or compulsory labour exacted from them, and to the inhuman and degrading treatment meted out to them. The use of abusive and discriminatory language provides sufficient evidence of that.

129. The respondent Party submited no observations on this issue.

130. On the facts of the case as established, the Chamber, like the Ombudsperson, finds that the applicants were detained for no better reason than to exchange them against other prisoners. During their detention, they were subjected to ill-treatment and forced labour on the ground of their religion and national origin. Since no objective and reasonable justification is conceivable for such treatment, the Chamber concludes that the applicants have been discriminated against in the enjoyment of their rights under Articles 3, 4, and 5 of the Convention.

VII. REMEDIES

131. The applicants state that they suffered damage to their reputations through having been presented in the media as members of the "El mudžahid" unit and thus as bearing responsibility for atrocities committed against the civilian population. They further claim that they suffered damage for which monetary compensation is in order.

132. The applicants' claims are as follows:

Mohamed Momani:

(1) 10,000 German Marks (DEM) compensation for loss of one year of study;

(2) DEM 6,000 compensation for physical and psychological harm suffered;

(3) DEM 5,000 compensation for the damage done to his reputation through the media, which labelled him as a member of the "El mudžahid";

(4) DEM 5,000 for the hard physical labour performed during his detention;

(5) DEM 2,000 to compensate his parents for the expenses that they incurred for telephone bills during his illegal detention.

H.R.:

(1) DEM 8,000 compensation for the loss of one year of study;

(2) DEM 6,000 compensation for physical and psychological harm suffered;

(3) DEM 5,000 compensation for damage done to his reputation by statements in the media which said that he was a member of the "El mudžahid";

(4) DEM 5,000 compensation for the hard physical labour performed;

(5) DEM 1,000 compensation for his property that was confiscated (DEM 700 taken while at Kiseljak; DEM 200 for a gold chain taken while at the Heliodrom prison, and DEM 100 for a gold ring also taken while at the Heliodrom).

133. The respondent Party submits that the applicants' compensation claims under (1) are ill-founded because it assumes that the applicants would have, had they not been detained, used the time to study.

134. The respondent Party submits that the applicants' claims under (2) are also ill-founded and excessive because the applicants did not suffer physical or psychological pain to warrant compensation.

135. Regarding the applicants' claims under (3), the respondent Party submits that they are ill-founded and unjustified. The respondent Party further submits that it cannot be held responsible for the actions of the media.

136. In response to the applicants' claims under (4), the respondent Party claims that they are ill-founded because the work performed by the applicants does not constitute "forced" or "compulsory labour". The respondent Party further submits that the applicants' claims are too high.

137. In response to Mr. Momani's claim under (5) for expenses incurred by his parents for telephone bills during his detention, the respondent Party submits that the applicant may submit a claim for damages only on his own behalf. Furthermore, the respondent Party submits that even if the applicant's family was injured, the applicant did not substantiate the claim.

138. As for H.R.'s claim under (5), the respondent Party submits that the applicant did not prove that his property had actually been taken. Furthermore, the respondent Party submits that these claims must be brought against the individuals responsible for the actual confiscation of his property.

139. Article XI paragraph 1 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina defines the Chamber's jurisdiction with regard to remedies. It provides as follows:

"Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address:

(a) whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so

(b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures."

140. Where it has found a breach of the Agreement, the steps which the Chamber may order the respondent Party to take include measures which will remove, alleviate or prevent damage to the applicant, as well as payment of compensation. Compensation may be awarded in particular in respect of pecuniary or non-pecuniary (moral) damage and may include costs and expenses incurred by the applicant in order to prevent the breach found or to obtain redress therefor. The Chamber may also address to the respondent Party orders to cease or desist, that is orders to discontinue, or refrain from taking, specific action.

141. With regard to the applicants' claims under (1) for the compensation for the loss of a year's study, the Chamber notes that the loss suffered cannot be calculated with any precision. The Chamber will award a token sum of 1,500 Convertible Marks (*Konvertibilnih Maraka*; "KM") to each applicant.

142. With regard to the applicants claim for compensation for moral damages under paragraphs (2), (3), and (4), it is appropriate to make an award. The Chamber considers that the applicants are each entitled to KM 10,000.

143. With regard to applicant Momani's claim under (5) for the expenses that his parents incurred for telephone bills during his illegal detention, the Chamber notes that it is competent only to award damages to the applicant and not third parties.

144. With regard to applicant H.R.'s claim under (5) for his property that was confiscated during his detention, the Chamber notes that the respondent Party is liable for the applicant's loss of property while in its custody. The Chamber will award the sum claimed of KM 1,000.

145. Additionally, the Chamber awards 4 percent interest as of the date of the expiry of a three-month time period set for the implementation of the present decision, on the sums awarded in the relevant conclusion below.

146. The Chamber has found a violation of Article 13 of the Convention on the ground that the public prosecutor had failed to carry out any investigations directed against the applicants' captors. In arriving at this conclusion, it relied on the jurisprudence of the European Court of Human Rights that the notion of an "effective remedy" entails, in cases of arguable torture claims, "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure" (paragraph 121 above).

147. The Chamber finds it, therefore, appropriate to order the respondent Party to carry out a thorough and effective investigation of the arrest, ill-treatment and forced labour of the applicants, to identify those responsible, to bring the perpetrators to justice and to provide effective access for the applicants to the investigatory procedure.

VIII. CONCLUSION

148. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that there has been a violation of Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Human Rights Agreement;

3. unanimously, that there has been a violation of Article 4 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Agreement;

4. unanimously, that there has been a violation of Article 5 paragraphs 1, 2, 4 and 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Agreement;

5. unanimously, that there has been a violation of Article 13 of the Convention with regard to the violation of Article 3 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Agreement;

6 unanimously, that no separate issue arises under Article 13 of the Convention with regard to the violations of Articles 4 and 5 of the Convention;

7. unanimously, that the applicants have been discriminated against in the enjoyment of their rights under Articles 3, 4 and 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Agreement;

8. by 4 votes to 3, to order the Federation of Bosnia and Herzegovina to carry out a thorough and effective investigation of the arrest, ill-treatment and forced labour of the applicants, to identify those responsible, to bring the perpetrators to justice and to provide effective access for the applicants to the investigatory procedure;

9. unanimously,

a) to order the Federation of Bosnia and Herzegovina to pay to Mr. Momani, within three months of the delivery of this decision, the sum of 11,500 (eleven thousand five hundred) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for pecuniary and non-pecuniary injury;

b) to order the Federation of Bosnia and Herzegovina to pay to H.R., within three months of the delivery of this decision, the sum of 12,500 (twelve thousand five hundred) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for pecuniary and non-pecuniary injury;

c) that simple interest at an annual rate of 4 per cent will be payable over this sum or any unpaid portion thereof from the day of expiry of the above-mentioned three-month period until the date of settlement;

10. unanimously, to dismiss the remainder of the applicants' claims for remedies; and

11. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber, by 5 February 2000, 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