DECISION ON ADMISSIBILITY AND MERITS

(delivered on 8 November 2002)

Case no. CH/00/3880

Momčilo MARJANOVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 11 October 2002 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. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement and Rules 52 and 66 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. On 18 July 1994 the applicant was arrested by members of the Municipality of Stari Grad Police Force for the murder of Mlađen Radonja, allegedly committed the previous day in Gornje Biosko, on the territory of the Municipality of Stari Grad in the Republika Srpska. The applicant was held in police custody until 21 July 1994 whereupon criminal charges were filed against him by the Public Prosecutor. On 17 November 1994 an indictment was filed and on 18 July 1996 the applicant was convicted of premeditated murder under Article 36, paragraph 1 of the Criminal Code of the Republika Srpska "Special Part"[1] (Official Gazette for the Republika Srpska, no. 21/92, hereinafter the "Criminal Code"). The Department of the Court of First Instance of Sokolac sitting in Rogatica (the "Court of First Instance in Sokolac") sentenced him to 7 years imprisonment. Both the applicant and the Public Prosecutor filed appeals against the First Instance judgment and on 20 December 1996 the District Court of Second Instance in Bijeljina[2] (the "Court of Second Instance in Bijeljina") accepted the applicant's appeal and ordered a re-trial. On 14 May 1998 the applicant's retrial commenced before the Court of Second Instance in Bijeljina and on 31 August 1999 he was convicted of murder and sentenced to 7 years imprisonment. On 22 May 2000 the Supreme Court of the Republika Srpska accepted an appeal submitted by the Public Prosecutor and modified the applicant's sentence to 8 years imprisonment. On 18 March 2002 he was released on conditional discharge.

2. The applicant complains of various violations of his rights in relation to his detention, trial and imprisonment. He further complains that his case was arbitrarily transferred to the Republika Srpska and due to his Serb origin he was discriminated by the authorities of the Republika Srpska in the enjoyment of these rights.

3. The case raises issues under Article 5, paragraphs 1, 3 and 4, Article 6, paragraphs 1 and 3(c) and Article 8 of the European Convention on Human Rights (the "Convention").

II. PROCEEDINGS BEFORE THE HUMAN RIGHTS OMBUDSPERSON FOR BOSNIA AND HERZEGOVINA

4. The application was introduced to the Ombudsperson on 5 March 1997 and registered on the same day.

5. In the proceedings before the Ombudsperson, the applicant was represented by Mr. Miloje Marjanović.

6. On 17 February 1998 the Ombudsperson decided, pursuant to Rule 25 of its Rules of Procedure, to open an investigation into the case in relation to the applicant's complaints under Articles 5, 6 and 8 of the Convention. The Ombudsperson did not investigate the applicant's complaints in relation to Articles 3 and 4 of the Convention, and restricted its investigation into the Article 6 complaint to the 'trial within a reasonable time' requirement.

7. On 9 April 1998 the Ombudsperson adopted her report finding violations of Article 5, paragraphs 1, 3 and 4 and of Article 6, paragraph 1 of the Convention. The Ombudsperson did not separately examine the complaint under Article 8 of the Convention. The report was transmitted to

[1] On 28 February 1992 the Bosnia and Herzegovina Serb People's Assembly (Skupština srpskog naroda Bosne i Hercegovine) adopted the Act on the Constitution of the Republika Srpska. Under Article 12 of the Act on the Constitution the Criminal Law of the Socialist Republic of Bosnia and Herzegovina was adopted as the law of the Republika Srpska – "special part". Article 36(1) of this law (Official Gazette of the Republika Srpska, no. 15/92, 4/93, 17/93, 26/93, 14/94, 3/96) is now to be found under Articles 128 and 129 of the Criminal Code of the Republika Srpska, entered into force on 31 July 2000.

[2] During the period of 1996 to 1998 the Court of Second Instance in Bijeljina was referred to as the Higher Court of Bijeljina (Višl sud u Bijeljini) and from 1998 onwards as the District Court of Bijeljina (Okružni sud u Bijeljini). However, the Chamber notes that this refers to the same Court of Second Instance and for consistency it has been referred to throughout the decision as the Court of Second Instance in Bijeljina.

the respondent Party in accordance with Article V paragraph 4 of Annex 6 to the Agreement with the following recommendations:

a. ensure that the applicant is **immediately** released from prison or to issue the relevant decisions on his continued detention in accordance with domestic law;

b. confirm to the Ombudsperson in writing, **within a week of receipt of this report**, that the competent authorities have done so;

c. ensure that the first hearing in the applicant's retrial is scheduled before the competent court **within four weeks of receipt of this report**;

d. pay to the applicant, **within four weeks of receipt of this report**, a nominal sum of 3,000 DEM, it being understood that this sum constitutes recognition of the wrong done to him and does not amount to compensation for damage suffered;

e. issue, **within four weeks of receipt of this report**, a written and public apology to the applicant in respect of his illegal detention.

8. It appears from the case-file that the respondent Party ignored the Ombudsperson's recommendations in every respect.

9. On 1 July 1998 the case lawyer from the Ombudsperson's office visited the Court of Second Instance in Bijeljina in order to ascertain whether a decision had been issued on the applicant's continued detention. The case lawyer visited the judge in charge of the case, Mr. Ljubomir Kitić, who informed him that such a decision had not been issued, but would be as soon as was practicable.

10. On 10 September 1998 a legal expert from the Ombudsperson's office, visited the Court of Second Instance in Bijeljina in order to obtain further information on any developments in the applicant's case. The case lawyer met with Mr. Kitić. Mr. Kitić gave the case lawyer a copy of the decision of 23 July 1998 according to which the Court had reviewed the grounds for the applicant's continued detention. The Ombudsperson's office was content that the Court had acted in compliance with its recommendations.

11. On 1 December 1999 the then Ombudsperson, Dr. Gret Haller, wrote to the then High Representative, Mr. Wolfgang Petritsch, confirming that as of July 1998 she was satisfied that the respondent Party had complied with her recommendations concerning the violations of Articles 5 and 6 of the Convention.

III. PROCEEDINGS BEFORE THE CHAMBER

12. The application was introduced to the Chamber on 5 June 2000 and registered on the same day. In the proceedings before the domestic courts the applicant was represented by Mr. Veljko Čivša, a lawyer practising in Belgrade, and in the proceedings before the Chamber, up until the applicant's release, he was represented by Mr. Miloje Marjanović. The applicant, since 16 June 2002, has been represented before the Chamber by Mr. Bajazit Krehić, a lawyer practising in Sarajevo.

13. On 12 June 2002 the case was transmitted to the respondent Party with a time limit of one month to respond.

14. On 12 June 2002 the Chamber wrote to Ms. Valerija Šaula, the Deputy Ombudsperson, asking whether any of their recommendations to the respondent Party were followed, and if not, what steps the Ombudsperson had taken to enforce implementation of its report of 9 April 1998.

15. On 14 June 2002 the applicant, accompanied by his lawyer, Mr. Bajazit Krehić, met at the request of the Chamber with the Registry. The applicant was asked to clarify certain aspects of his application, particularly in light of his release. The applicant elaborated, at this stage, the complaints concerning his treatment during detention under Articles 3 and 4 of the Convention and a complaint

of not receiving a fair hearing by an independent and impartial tribunal. He further clarified his complaint under Article 8 of the Convention to include the right to correspondence during detention.

16. On 24 June 2002 the applicant submitted a claim for compensation not previously stated in his original application to the Chamber.

17. On 25 June 2002 the Chamber received a reply from the Deputy Ombudsperson enclosing the relevant documentation on the action taken by the Ombudsperson subsequent to the issuance of the report.

18. On 4 July 2002 the Chamber received the respondent Party's first written observations. The respondent Party noted that due to the complexity of the issues and the length of time that had passed it would be unable to fully respond with such a short time limit. The Chamber wrote to the respondent Party on 15 July 2002, extending the time limit until 20 August 2002, and outlining the applicant's additional complaints concerning Articles 3 and 4 of the Convention. The respondent Party's further written observations were received by the Chamber on 15 August 2002. These were transmitted to the applicant on the following day with a time limit of two weeks to reply.

19. On 19 September 2002 the Chamber received the applicant's response to the written observations of the respondent Party in which he maintains his complaints in relation to his unlawful detention for a period of six years and three months and states that he was subjected to inhuman and degrading treatment during his detention.

20. On 10 September 2002 the Chamber wrote to the applicant requesting him to substantiate his allegations that the prison authorities had obstructed his right of access to a telephone and right to correspondence, by intercepting both incoming and outgoing mail whilst he was held in pre-trial detention. The Chamber received this information from the applicant on 19 September 2002 and it was transmitted to the respondent Party for its reply on the same day. The applicant subsequently submitted further written observations on 23 September 2002 in which he maintained that during the entirety of his pre-trial detention at Srpsko Sarajevo, Foča/Srbinje and Bijeljina he was prevented from using a telephone and from sending and receiving mail. He alleges that all pre-trial detainees held in the Republika Srpska were prevented from corresponding with persons outside of the prison. These further allegations were submitted to the respondent Party. The Chamber received the respondent Party's additional observations on 30 September 2002.

21. The Chamber deliberated on the admissibility and merits of the case on 7 June, 3 July, 7 September, 7 and 11 October 2002. On the latter date the Chamber adopted the present decision.

IV. FACTS

22. At approximately 4.00 p.m. on 17 July 1994 an exchange of firing took place in Gornje Biosko, on the territory of the Municipality of Sarajevo Stari Grad. The applicant does not contest that he fired shots, although he contests that this was done with malice. The prosecuting authorities alleged that the shooting was commenced by the applicant due to a land dispute with the victim, Mlađen Radonja. Nonetheless, at some point, the precise details of which remain unclear, Mlađen Radonja, the applicant's neighbour, was fatally wounded.

23. During the hours of 11.00 p.m. and 2.20 a.m. on 18 and 19 July 1994, a crime scene investigation took place, as a result of which the applicant was arrested by members of the Municipality of Stari Grad Police Force and taken into police custody. A record of the investigation was completed by the Republika Srpska Ministry of Internal Affairs (no. 15-1/02-S1/94) that detailed the on-site investigation.

24. As a result of the investigation, the Chief of Police of the Municipality of Stari Grad ordered the applicant's immediate detention under Article 191, paragraph 2, point 4 of the Code of Criminal Procedure of the Former Socialist Federal Republic of Yugoslavia (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 26/86, 74/87, 57/89, 3/90 adopted by the Republika Srpska

Official Gazette of the Republika Srpska nos. 26/93, 14/94 entered into force on 1 July 1977, hereinafter the "Code of Criminal Procedure") on the ground of a "reasonable suspicion" that he had, on 18 July 1994, murdered Mlađen Radonja.

25. On 21 July 1994 the Police of Stari Grad filed criminal charges against the applicant with the Public Prosecutor.

26. On 17 August 1994 the investigative judge of the Court of First Instance in Srpsko Sarajevo[3] ordered a medical examination of the applicant in order to determine his mental capacity at the time of allegedly committing the offence. The applicant refused to comply with the order and lodged a written complaint with the court. It appears that no hearing took place and no further procedural decision was issued dealing with the applicant's complaint.

27. On 17 November 1994 the Srpsko Sarajevo Public Prosecutor of First Instance filed an indictment against the applicant for the offence of murder under Article 36, paragraph 1 of the Criminal Code (see paragraph 63 below).

28. At some point, the precise details of which remain unclear, the jurisdiction of the Court was transferred from the Court of First Instance in Srpsko Sarajevo to the Court of First Instance in Sokolac. The trial judge, Miloš Vukašinović, who had presided over the proceedings in Srpsko Sarajevo was also transferred to hear the case in the Court of First Instance in Sokolac. The Chamber has no details as to why jurisdiction was transferred at this stage.

29. The applicant's trial commenced at the Court of First Instance in Sokolac sometime between November and December 1994. He was represented during the trial by Mr. Veljko Čivša, a lawyer practising in Belgrade. During the trial, pursuant to the aforementioned court order, the applicant was sent to the Sokolac Mental Hospital from 18 January 1995 to 4 April 1995 with a view to ascertaining his mental condition at the time of committing the offence. On 7 April 1995 Dr. Zorica Lazarević wrote to Judge Miloš Vukašinović, the judge conducting the proceedings before the Court of First Instance in Sokolac, stating that she was unable to conduct the necessary tests on the applicant as he was unwilling to co-operate. Dr Lazarević stated that she was therefore unable to state an opinion, as tests could not be conducted without the applicant's consent.

30. The applicant was subsequently detained at the Belgrade Central Prison Hospital[4] from 21 January 1996 to 21 March 1996 in order to further determine his mental responsibility at the time of committing the said offence and whether the level of alcohol in his blood at the relevant time had contributed to a state of 'automatism'. The applicant states that he was detained in a damaging environment surrounded by mentally ill patients for a lengthy period of time against his will and without any legal basis.

31. On 17 July 1996 the applicant filed an objection to the findings of the Belgrade Central Prison Hospital concerning his accountability at the time when the offence was committed. The applicant complained that the findings of the neuro-psychiatric expertise should be rejected as it was obtained against his will and that any finding of 'alcohol induced automatism' should be rejected as the tests were conducted two years after the incident.

32. On 18 July 1996 the Court of First Instance in Sokolac found the applicant guilty of murder under Article 36, paragraph 1 of the Criminal Code and sentenced him to 7 years imprisonment. On the same day the Court issued a separate decision on the applicant's continued detention pursuant to Article 353, paragraphs 6 (in conjunction with paragraph 1) and 7 of the Code of Criminal Procedure of the Former Socialist Federal Republic of Yugoslavia (hereinafter the "Code of Criminal

[3] During 1994 the Courts of First and Second Instance in Srpsko Sarajevo were referred to as the Courts of First and Second Instance in Sarajevo. However, the Chamber notes that the Courts, which the applicant was brought before, were on the territory and under the unique jurisdiction of the Republika Srpska. For consistency they have been referred to throughout the decision as the Courts of First and Second Instance in Srpsko Sarajevo.

[4] The Chamber notes that, due to the fact that the independent states of the Former Yugoslavia had once been a single nation, many of the major institutions were installed in larger cities. There has therefore been a history of practical co-operation over many years due to the lack of specialised institutions in individual states.

Procedure", see paragraph 67 below). The procedural decision stated that the applicant, as a person sentenced for a period over 5 years, was subject to obligatory detention. Furthermore, pursuant to paragraph 7 of the same provision the applicant could be detained until the first instance judgment became final. The applicant was informed of this decision. As a result of this order the applicant was transferred from the Pre-trial Section of the District Prison in Srpsko Sarajevo to the Correctional Institution in Foča/Srbinje to serve his sentence.

33. On 16 August 1996 the Public Prosecutor of the Court of First Instance in Sokolac lodged an appeal against the First Instance judgment. He requested that the verdict be modified reflecting the applicant's accountability at the time of committing the offence and that the sentence be modified accordingly.

34. On 23 August 1996 the applicant also lodged an appeal against the First Instance judgment. He requested that the verdict be quashed on the grounds of various violations of the Code of Criminal Procedure. He further requested that a retrial be granted, that his release be ordered pending a retrial, or a shorter sentence imposed reflecting the true level of his accountability.

35. The Court of Second Instance in Srpsko Sarajevo had jurisdiction to hear the applicant's appeal. However, the Court of Second Instance in Srpsko Sarajevo submitted a request to the Supreme Court of the Republika Srpska (the "Supreme Court") to transfer jurisdiction to another Court of Second Instance as it lacked sufficient personnel to deal with the applicant's appeal.[5] On 8 November 1996 the Supreme Court accepted the request of the Court of Second Instance in Srpsko Sarajevo and by its procedural decision appointed the Court of Second Instance in Bijeljina as the competent court of second instance to hear the applicant's appeal.

36. On 20 December 1996 the Court of Second Instance in Bijeljina accepted the applicant's appeal. It held that the first instance proceedings were flawed in several respects and pursuant to Article 385, paragraph 1 of the Code of Criminal Procedure that decision could not be upheld. In particular the Court of Second Instance in Bijeljina held that it was a violation of the Code of Criminal Procedure to read the statement from the Belgrade Central Prison Hospital without summoning the expert who made it, and by failing to hear the parties in respect of that statement. The Court of Second Instance in Bijeljina annulled the First Instance judgment and referred the matter back to the Court of First Instance in Sokolac for retrial. It stated, *inter alia*, that in the retrial proceedings, the Court of First Instance would have to re-examine the applicant, previous evidence heard in the first trial, as well as any new evidence necessary for the complete and proper establishment of the facts. The Court would further have to re-evaluate the expert medical and psychiatric opinion and request the attendance of the authors of such opinion in order to establish the applicant's degree of mental capacity to have committed the offence at the relevant time. Neither the applicant requested, nor the court of its motion issued any procedural decision as to costs. On the same day, the Court issued its procedural decision extending the applicant's detention in accordance with Article 191, paragraph 2, subparagraph 4 of the Code of Criminal Procedure (see paragraph 65 below) on the grounds that a reasonable suspicion existed that he had committed the offence charged and that, if convicted, he risked being sentenced to a long term of imprisonment. This procedural decision extending the applicant's detention was to expire on 20 February 1997.

37. The case file was subsequently returned to the Court of First Instance in Sokolac sometime at the beginning of 1997 for the applicant's retrial. However, at some point thereafter, the exact details of which are unknown to the Chamber, the applicant's case was transferred to the Court of Second Instance in Srpsko Sarajevo. [6]

38. On 20 February 1997 the applicant received the procedural decision of the Court of Second Instance in Bijeljina of 20 December 1996. On the same day the procedural decision extending the

[5] Under Article 23 paragraph 2 of the Code of Criminal Procedure, the Court of Second Instance shall be composed of five judges for criminal offences for which the law provides a sentence of 15 years or above and three members for criminal offences for which the law provides a less severe sentence.

[6] Under Article 385 paragraph 1 of the Code of Criminal Procedure, the Court of Second Instance, on accepting an appeal submitted by the applicant shall return the case to the court of original jurisdiction for retrial. However, under Article 35 paragraph 1 of the same law a court designated by law may assign another court competent within its district.

applicant's detention expired. No further decision on the applicant's continued detention was issued until 9 September 1997, notwithstanding the applicant's repeated requests.

39. On 5 March 1997 the applicant submitted his application to the Ombudsperson.

40. On 19 May 1997 the Court of Second Instance in Srpsko Sarajevo requested the Supreme Court to appoint the Court of Second Instance in Bijeljina as the competent court to hear the applicant's case due to lack of personnel. On 26 May 1997 the Supreme Court rejected this request on the basis that three judges who worked in the Court of Second Instance in Srpsko Sarajevo were sufficient to constitute a "panel" as prescribed under Article 23(2) of the Code of Criminal Procedure (see paragraph 64 below). This decision was delivered to Court of Second Instance in Srpsko Sarajevo on 4 June 1997.

41. On 9 June 1997 the Court of Second Instance in Srpsko Sarajevo renewed its request to the Supreme Court on the previous grounds stated in its request of 19 May 1997. On 4 July 1997 the Supreme Court rejected the request on the same grounds as previously stated.

42. On 22 August 1997 the applicant was returned to the Pre-trial Section of the District Prison in Srpsko Sarajevo, pending retrial.

43. On 9 September 1997 the Court of Second Instance in Srpsko Sarajevo issued a decision extending the applicant's detention pursuant to Article 191, paragraph 2, subparagraph 4 of the Code of Criminal Procedure. It appears that this decision was never delivered to the applicant.

44. On 10 September 1997 the applicant submitted a written complaint to the Court of Second Instance in Srpsko Sarajevo. He complained, *inter alia*, that no retrial had been scheduled, despite the issuance of the procedural decision of the Court of Second Instance in Bijeljina on 20 December 1996. He requested that the Court schedule a hearing immediately. The applicant failed to receive any reply to this request.

45. On 18 September 1997 the applicant informed the Court of Second Instance in Srpsko Sarajevo that he had withdrawn his defence counsel, Veljko Čivša, due to lack of money. The applicant alleges that, contrary to the Code of Criminal Procedure, no alternative legal representation was provided. However, on examination of the case file the Chamber notes that on 22 April 1998 the Court of Second Instance in Bijeljina appointed Nadežda Milosević, a lawyer practising in Bijeljina, to the applicant as *ex officio* legal representation.

46. On 1 October 1997 the applicant filed an appeal to the Supreme Court. In his appeal he requested that the Supreme Court, in the shortest possible delay, refrain from applying Article 191 of the Code of Criminal Procedure in his case and to order the competent court dealing with his case to refrain from applying subparagraphs 2, 4 and 6 of the same Article. He further requested that the Supreme Court reject the indictment against him as ill founded, as it was not in accordance with law and to order his release forthwith.

47. On 1 October 1997 the applicant lodged another appeal with the Supreme Court. He submitted that he was being unlawfully detained and that he had been forcibly and unlawfully detained in the Sokolac Mental Hospital and the Belgrade Central Prison Hospital. He further stated that his first trial had been unfair. He requested the Supreme Court to quash the detention order and release him forthwith. He further requested the Supreme Court to order the re-examination of his case. The applicant failed to receive any reply to this request.

48. On 3 October 1997 the Court of Second Instance in Srpsko Sarajevo issued a third proposal to the Supreme Court requesting that it appoint the Court of Second Instance in Bijeljina as the competent court to hear the applicant's case. On 28 October 1997 the Supreme Court agreed to the proposal of the Court of Second Instance in Srpsko Sarajevo and appointed the Court of Second Instance in Bijeljina as the competent court to hear the applicant's retrial. The Supreme Court stated in its reasoning that there was insufficient personnel at the Court of Second Instance in Srpsko Sarajevo to constitute a "panel" of judges in accordance with domestic law, and secondly, that the absence of a Public Prosecutor and Deputy Public Prosecutor of Second Instance would prevent the

case from being dealt with properly and in a timely manner. The case file was subsequently transmitted to the Court of Second Instance in Bijeljina on 13 November 1997 and registered under a different file number.

49. On 17 February 1998 the Ombudsperson opened an investigation in relation to the applicant's complaints (see paragraph 6 above).

50. On 20 February 1998 the Court of Second Instance in Bijeljina, acting through Ms. Ozrenka Nešković, requested the Public Prosecutor of Second Instance in Bijeljina to submit its opinion concerning the indictment issued by the Public Prosecutor of First Instance in Srpsko Sarajevo. The case file was delivered to the Public Prosecutor of Second Instance.

51. On 26 February 1998 the Public Prosecutor of Second Instance in Bijeljina informed the court that he deemed the indictment lawful and returned the case file to the court for further action.

52. On 9 April 1998 the Ombudsperson issued a report finding that the applicant's detention from 20 February 1997 until the issuance of her report constituted a violation of Articles 5, paragraph 1 of the Convention. She also found that the length of the applicant's detention was unduly prolonged by the national authorities, thus constituting a violation of Article 5, paragraph 3 of the Convention. The Ombudsperson further found that the applicant did not have an opportunity to challenge the lawfulness of his detention, thus constituting a violation of Article 5, paragraph 4 of the Convention. In considering the length of time that the applicant was detained without having his case finally determined by a court, the Ombudsperson also found this to be a violation of the requirement of a fair trial within a reasonable period as guaranteed under Article 6, paragraph 1 of the Convention. As to the applicant's complaint concerning his right to private and family life under Article 8 of the Convention, the Ombudsperson did not consider it necessary to separately examine the complaint under this provision, taking into consideration the violations already found. The Ombudsperson, as a result of her findings, issued certain recommendations (see paragraph 7 above) to the respondent Party.

53. On 14 May 1998 the first hearing in the applicant's retrial took place before the Court of Second Instance in Bijeljina, almost 17 months after the same court had ordered that a retrial should take place.

54. On 21 July 1998 the applicant was transferred from the Pre-trial Section of the District Prison in Srpsko Sarajevo to the Pre-trial Section of the District Prison in Bijeljina. The applicant maintains that this was done arbitrarily and in the absence of any court order. The applicant further states that during his detention at the Pre-trial Section of the District Prison in Srpsko Sarajevo he went on a hunger strike as a result of not being given access to a telephone and of all correspondence both to and from the applicant being obstructed. The applicant specifically states that letters to his family and complaints to international organisations were obstructed. In the words of the applicant, his "rights" were reinstated as a result of his hunger strike.

55. On 23 July 1998 the Court of Second Instance in Bijeljina issued a procedural decision extending the applicant's detention.

56. At some stage between March and April 1999 the case lawyers in charge of the application before the Ombudsperson visited the applicant in prison. The applicant alleges that he complained at this stage that the prison authorities prevented him, at times, from using a telephone and further prevented him from sending and receiving mail. The applicant also alleges to have submitted that he wanted to be transferred from the detention facility in Bijeljina to Srpsko Sarajevo so that he could have greater contact with his family. He requested, at this stage, application forms in order to apply to the Chamber. The application forms were sent to the applicant at some point after this visit. The applicant further stated that the proceedings were still pending before the Court of Second Instance in Bijeljina and hearings were scheduled approximately once per month.

57. On 31 August 1999 the Court of Second Instance in Bijeljina issued its judgment finding the applicant guilty of murder under Article 36, paragraph 1 of the Criminal Code (see paragraph 63

below). The court rejected the applicant's defence of intoxication or in the alternative that he acted in self-defence. The applicant was consequently sentenced to 7 years imprisonment.

58. On 22 November 1999 the applicant submitted an appeal to the Supreme Court against the decision of his retrial before the Court of Second Instance in Bijeljina. At some stage, the precise details of which are unknown, the Public Prosecutor also submitted an appeal.

59. On 22 May 2000 the Supreme Court rejected the applicant's appeal. The Supreme Court however, accepted the appeal submitted by the Public Prosecutor and sentenced the applicant to 8 years imprisonment on the basis of Articles 5 and 33 of the then Criminal Code.[7]

60. On 19 September 2000 the applicant allegedly applied to the United Nations' International Police Task Force (the "IPTF") Office in Bijeljina. He asked the IPTF, after an oral conversation that had taken place some days earlier, to intervene due to the fact that he had been unlawfully transferred from the Pre-trial Section of the District Prison in Srpsko Sarajevo to the Pre-trial Section of the District Prison in Bijeljina in order to distance him from his family. The applicant also submitted an appeal for assistance to the IPTF sometime prior to the above application. In the previous request the applicant complained that he was a victim of numerous violations under Articles 2, 3, 4, 5, 6 and 14 of the Convention. He placed particular emphasis on the fact that he was a victim of discrimination because of his Serb origin. However, on examination of the case file it appears that this conversation took place during August 1997, some time before the applicant's transfer to Bijeljina. It is unclear as to whether the applicant was visited again by IPTF on 19 September 2000.

61. The applicant has elaborated in his application to the Chamber further petitions that were submitted at various stages during his detention, although the precise dates that these were submitted is unknown. These requests were submitted to the High Representative, Mr. Wolfgang Petritsch, the Governor of the Correctional Institution of the Pre-trial Section of the District Prison in Bijeljina, Mr. Jezdimir Spasojević, the Bijeljina Section Human Rights Board through the Administration of the Pre-trial Section of the District Prison in Bijeljina, the Helsinki Committee for Human Rights in the Brčko District, the successive Governor of the Correctional Institution of the Pre-trial Section of the District Prison in Bijeljina, Mr. Živojin Filipović, the IPTF and the Supreme Court of Republika Srpska. The applicant failed to receive a reply to any of his requests and believes that the prison authorities retained them unsent.

62. On 18 March 2002 the applicant was released from custody on conditional discharge for a period of 4 months. His sentence was to expire on 18 July 2002.

V. RELEVANT DOMESTIC LEGISLATION

A. Criminal Code of the Republika Srpska (Special Part) (Official Gazette of Republika Srpska nos. 15/92-616, 4/93-94, 17/93-69, 26/93-1006, 14/94-533, 3/96-41)

63. Article 36 provides as follows:

> "(1) Whoever deprives another person of his life shall be punished by imprisonment for not less than five years.
>
> "(2) The punishment of imprisonment for not less than 10 years or the death penalty shall be imposed on a person who:
>
> "(1) deprives another person of his life in a cruel or insidious way;
>
> "(2) deprives another person of his life and in doing so intentionally endangers the lives of other persons;
>
> "(3) deprives another person of his life whilst acting ruthlessly and violently:

[7] These provisions are now provided under Articles 5 and 31 of the new Criminal Code of the Republika Srpska.

"(4) deprives another person of his life out of greed, in order to commit or cover up another criminal act, out of unscrupulous vengeance or from other base motives;

"(5) takes the life of an official or military person in the exercise of their duties of safeguarding public or state security or the duty of keeping public order, or apprehending the perpetrator of a criminal act or guarding a person deprived of his freedom, or who deprives another person of his life while the person was carrying out his duties in the function of public self-protection."

B. Code of Criminal Procedure of the Former Socialist Federal Republic of Yugoslavia (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 26/86, 74/87, 57/89, 3/90) adopted by the Republika Srpska (Official Gazette of the Republika Srpska nos. 26/93, 14/94):

64. Chapter II of the Code of Criminal Procedure, concerning jurisdiction of the court, provides as follows:

Article 23

"(1) Courts of original jurisdiction shall sit in panels consisting of two judges and three lay judges in trying cases of crimes for which the law allows pronouncement of a sentence of imprisonment for 15 years or a heavier penalty, and they shall sit in panels of one judge and two lay judges for which a less severe penalty has been prescribed...

"(2) Courts examining cases in the second instance shall sit in panels consisting of five judges for crimes for which the law allows pronouncement of a 15-year prison sentence or more severe penalty, and they shall sit in panels consisting of three judges in examining crimes for which a less severe penalty has been prescribed. The panel to try a criminal case in the second instance on the basis of a trial shall consist of two judges and three lay judges."

Article 26

"(1) The court within whose district the crime was committed...shall as a rule be competent as place to try the case."

Article 34

"(1) When the competent court is prevented from acting for reasons of law or reasons of subject matter, it must notify the immediately superior court, which after hearing the public prosecutor, if proceedings are conducted in response to the public prosecutor's complaint, shall designate another court in its district which is competent with respect to subject matter.

"(2) No appeal is permitted against the decision."

Article 35

"(1) The court designated by the law of the republic or autonomous province may assign another court competent with respect to subject matter within its district to conduct proceedings if it is obvious that proceedings will then be conducted more easily or if other important grounds exist."

65. Chapter XVII of the Code of Criminal Procedure, concerning pre-trial detention, provides as follows:

Article 190

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

"(2) The duration of the 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 exist."

Article 191

"(2) If there exists a warranted suspicion that an individual has committed a crime, but the conditions do not (exist) for mandatory custody, custody may be ordered against that person in the following cases:

"...

"(4) If the crime is one for which a prison sentence of 10 years or more severe penalty may be pronounced under the law and if because of the manner of the execution, consequence or other circumstances of the crime there has been or might be such disturbance of the citizenry that the ordering of custody is urgently necessary for the unhindered conduct of criminal proceedings or human safety."

Article 192

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

"(2) Custody shall be ordered in a written document 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 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 his 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 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 in paragraphs 3 and 4 of this Article shall apply in connection with the 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 199

"(1) Once the bill of indictment has been presented to the court and until the end of the main trial custody may be ordered or terminated only by a decision of the panel of judges after hearing the public prosecutor if proceedings are being conducted on his petition.

"(2) Two months after the last decision on custody was taken, even in the absence of motions by the parties, the panel shall examine whether the grounds still exist for custody and shall make a decision to extend or terminate custody."

66. Chapter XVIII of the Code of Criminal Procedure, concerning the investigatory actions, provides as follows:

Article 258

"(1) Should a suspicion arise that the accountability of the accused has been removed or diminished because of a permanent or temporary mental illness, temporary mental disturbance or

retarded mental development, expert evaluations consisting of examination of the accused by a psychiatrist shall be ordered.

"(2) If in the expert's opinion longer observation is required, the accused shall be sent for observation to the appropriate medical institution. The investigative judge shall render the decision to that effect. The examination may extend beyond 2 months only on the basis of the documented recommendation of the director of the medical institution after having obtained the opinion of the expert, but in no case may it last longer than the period allowed for pre-trial custody.

"(3) Should the experts establish that the mental condition of the accused is disturbed, they shall define the nature, type, degree and duration of the disturbance and shall furnish their opinion concerning the kind of influence this mental state has had and still does have on the comprehension and actions of the accused and as to whether and in what degree the disorder of his mental state existed at the time when the crime was committed.

"(4) If an accused who is in pre-trial custody is sent to a medical institution, the investigative judge shall inform that institution of the reasons why pre-trial custody was ordered so that the necessary measures can be taken to achieve the purposes of custody.

"(5) Time which an accused spent in a medical institution shall be included in the time of custody or credited against his sentence should a sentence be pronounced."

Article 259

"(1) A clinical examination of the accused shall also be undertaken without his consent if this is necessary to ascertain facts important to criminal proceedings..."

67. Chapters XXI and XXII of the Code of Criminal Procedure, concerning the trial, examining of witnesses and verdicts, provides as follows:

Article 326(7)

"If the expert evaluation has been done in a specialised institution..., it may be decided not to summon specialists to whom the institution...has assigned the expert evaluation if in view of the nature of the evaluation made, one cannot expect a fuller explanation than contained in the written finding and opinion. In this case the panel may decide in the trial that the finding and opinion of the specialised institution...be merely read. If it finds it necessary in view of the other evidence given and comments of the principals (Article 335), the panel may subsequently decide that the specialists who performed the expert evaluation be questioned in person."

Article 353

"(1) In pronouncing a verdict which sentences the accused to 5 years imprisonment or more severe punishment, the court shall order custody if the accused is not already in custody.

"(6) If the accused is already in custody and the panel finds that the reasons for ordering custody still obtain or that the grounds exist as referred to in paragraphs 1 and 2 of this article, it shall render a separate decision to extend custody. The panel shall also render a separate decision when custody is to be ordered or terminated. An appeal of the decision shall not stay its execution.

"(7) Custody ordered or extended under the provisions of the provisions of the previous paragraph may last until the verdict becomes final, but it may not last longer than the time called for in the sentence pronounced in the verdict in the first instance."

68. Chapter XXIII of the Code of Criminal Procedure, concerning legal remedies, provides as follows:

Article 385

"(1) On accepting an appeal, or ex officio, the court in the second instance shall render a decision annulling the first instance verdict and shall return the case for retrial if it finds that there has been an essential violation of the principles of criminal procedure or if it feels that because the state of the fact was erroneously or incompletely established a new trial should be ordered before the court of original jurisdiction.

"(4) If the accused is in custody, the court in the second instance shall examine whether the grounds still exist for custody and shall issue a decision to extend or terminate custody. No appeal is permitted against that decision."

Article 389

"(2) If the accused is in custody, the court in the second instance must deliver its decision and the record to the court in the first instance no later than three months from the date when it received the file from that court."

Article 390

"(5) When a case is returned to the court in the first instance for retrial, if the accused is in custody, the panel of the court in the first instance must proceed in accordance with Article 199, paragraph 2 of this law."

C. The Constitution of the Republika Srpska

69. Article 17 of the Constitution provides as follows:

"Everyone shall be entitled to compensation for the damage inflicted on him by unlawful or irregular work of an official or a State agency or a body vested with public powers.

"A person convicted unjustifiably or deprived of his liberty unlawfully or with no grounds shall have the right to rehabilitation, compensation for damage, a public apology and other rights determined by law."

VI. COMPLAINTS

70. The applicant complains that the entirety of his detention was unlawful under Article 5, paragraph 1(a) and (c) of the Convention. His prolonged detention exceeded the limits of reasonableness of time under Article 5, paragraph 3 of the Convention. He was unable to challenge the lawfulness of his detention in contravention of Article 5, paragraph 4 of the Convention. The criminal proceedings before the domestic courts exceeded the limits of reasonableness under Article 6, paragraph 1 of the Convention. He complains that he did not receive a fair trial by an independent and impartial tribunal as guaranteed under the same provision. Furthermore, during his retrial, he was impeded by the court from presenting an adequate defence as he was prevented from calling witnesses of his own and cross-examining prosecution witnesses as guaranteed under Article 6, paragraph 3(d) of the Convention. He further maintains that he was denied the right to legal representation for a period of 7 months thus violating his rights as guaranteed under Article 6, paragraph 3(c) of the Convention.

71. The applicant states that he was forcibly detained against his will, and in the absence of any court order, at the Sokolac Mental Hospital and the Belgrade Central Prison Hospital.

72. The applicant states that his detention in Bijelina, several hundred kilometres away from his family home, interfered with his right to respect for family life under Article 8 of the Convention. Furthermore, the prison authorities prevented him access to a telephone and refused him access to mail, thus interfering with his right to respect for correspondence under Article 8 of the Convention.

73. The applicant states that during his detention at the Pre-trial Section of the District Prison in Bijeljina he was repeatedly physically beaten and subjected to inhuman and degrading treatment in contravention of Articles 2 and 3 of the Convention. He does not specifically point to any point of time, but maintains that this took place during the entirety of his detention in Bijeljina. He further states that he was forced to go on a hunger strike due to the authorities' interference with his family life and correspondence and the general conditions he was subjected to whilst in detention in Srpsko Sarajevo, Srbinje/Foča and Bijeljina.

74. He also states that he was forced to undertake severe agricultural work and was made to work barefoot; thus amounting to forced labour as prohibited by Article 4 of the Convention. The

applicant does not specify at which stage in his detention this took place, but indicates that it was whilst he was detained in Bijeljina. The applicant further complains that he was discriminated against in the enjoyment of the above rights in contravention of Article II(2)(b) of the Agreement because of his Serb origin. The applicant submits that his case was arbitrarily transferred to the Republika Srpska and that the courts of the Federation of Bosnia and Herzegovina had jurisdiction to try him. He states that he was discriminated in the enjoyment of various rights because of his Serb origin by the judicial and penal system of the Republika Srpska.[8] The Chamber observes that the allegation of discrimination submitted by the applicant in this respect is incomprehensible.

VII. SUBMISSIONS OF THE PARTIES

A. The respondent party

1. As to the facts

75. The respondent Party contests the facts as stated in the application. In its written observations of 12 August 2002 the respondent Party states that the applicant's complaints concerning Articles 3 and 4 of the Convention are false and motivated by the sole intention of attempting to discredit the judiciary of the Republika Srpska.

2. Admissibility

a. Non-exhaustion of domestic remedies

76. The respondent Party, in its written observations of 4 July 2002, has based its submissions solely on the Ombudsperson's report and therefore does not consider matters that have been raised subsequent to the issuance of the report. The respondent Party states that the application is inadmissible under Article VIII(2)(a) of the Agreement in that domestic remedies exist and have not been exhausted by the applicant. The respondent Party states that the applicant has failed to exhaust domestic remedies for compensation in accordance with Chapter XXXII of the Code of Criminal Procedure, in particular Articles 541-549 that regulate the terms of compensation for persons unlawfully detained. The respondent Party further states that Article 17 of the Constitution of the Republika Srpska entitles a person unlawfully detained to rehabilitation, compensation, public apology and other legally established rights.

77. Furthermore, Chapter XXXII of the Code of Criminal Procedure provides for a "property law claim" for the damage suffered by a defendant due to unlawful deprivation of liberty. Under Article 545 of the same law, a defendant is entitled to compensation for damage suffered due to the postponement of a main trial.[9]

b. *Ratione temporis*

78. The respondent Party further maintains that all complaints relating to the applicant's custody from 18 July 1994 to 14 December 1995 are outside the competence of the Chamber *ratione temporis*.

[8] The Chamber notes that the courts of the Republika Srpska had sole jurisdiction to try the applicant and that his case was never before the courts of the Federation of Bosnia and Herzegovina.

[9] For the sake of clarification, the concept of "property law claims" in the domestic law and domestic practice is not exclusively related to property claims, but rather applies more broadly to civil claims (*i.e.*, tort claims or *constitution de partie civile*) for compensation for damages arising out of or related to the commission of a crime.

c. Continuing detention after 14 December 1995

79. As for the period after 14 December 1995 until the applicant's release on 18 March 2002, the respondent Party submits that such detention was ordered in accordance with domestic law, and therefore addresses this point in its consideration of the merits of the application.

3. Merits

a. Article 5 of the Convention

80. The respondent Party maintains that the applicant's detention was at all times in accordance with domestic law. It further considers that the applicant's application to the Chamber in this respect is an abuse of the right of petition under Article VIII(2)(c) of the Agreement. It further states that the applicant submitted numerous appeals to the domestic organs based on the same statement of claim and continually attempted to discredit the legal system of the Republika Srpska. It states that the applicant received a procedural decision by the Court of Second Instance in Bijeljina on 23 July 1998 and two subsequent appeals to the Supreme Court dated 28 September 1998 and 1 October 1998. The respondent Party is therefore of the opinion that these procedural decisions comply with the requirement of Article 5, paragraph 1(c) of the Convention, that the detention was in accordance with law. The respondent Party cites the European Court of Human Rights judgments of *Benham v. United Kingdom* (Eur. Court HR, judgment of 10 June 1996, Reports 1996-III Vol. 10) and *Winterwerp v. Netherlands* (Eur. Court HR, judgment 24 October 1979, Series A No. 33, paragraph 20) as authority on the point that the Strasbourg bodies are obliged to assume the compliance with national legislation and not to interpret it.

81. The respondent Party states that the present case concerns the application of Article 5, paragraph 1(a) and (c). It states that the applicant was convicted and sentenced for a criminal offence for which the law envisages a punishment of 10 years imprisonment. Furthermore, the wording of Article 5, paragraph 1(a) "after the verdict is issued" means that from the moment a verdict is handed down and sentence pronounced, a person may be lawfully detained in accordance with that provision. The fact that an appeal is pending will not alter the lawfulness of the detention and it will cease to be governed by Article 5, paragraph 1(c). The respondent Party maintains that this was complied with at all times.

b. Article 6 of the Convention

82. The respondent Party restricts its observations in relation to Article 6 of the Convention solely to the reasonable time requirement.[10] It states that there are three criteria to consider:

a. the complexity of the case;

b. the conduct of the applicant; and

c. the conduct of the relevant authorities.

With respect to the complexity of the case, the respondent Party notes that the court must take into account the nature of the facts to be established, the expertise and number of witnesses. The respondent Party further suggests that the applicant may have contributed to the length of proceedings by evading the psychiatric expertise for a period of 6 months.

83. The respondent Party states that the delay in the proceedings was caused, *inter alia*, by the delegation of competence of the court trying the applicant in order to comply with the Code of Criminal Procedure. Furthermore, it states, citing *Pretto & Others v. Italy* (Eur. Court HR, judgment of 8 December 1983, Series A no.71), that 6 years at national level meets the requirement of 'reasonable time' under Article 6, paragraph 1 of the Convention.

[10] The respondent Party bases its observations on the Ombudsperson's report and as the Ombudsperson only considered the reasonableness of time under Article 6, paragraph 1 and therefore the respondent Party has followed suit.

c. Article 3 of the Convention

84. The respondent Party submits in its written observations of 16 August 2002 that the applicant's complaint concerning Article 3 of the Convention is manifestly ill-founded and that the applicant received frequent medical examinations during the entirety of his detention at the District Prison in Bijeljina.

d. Article 4 of the Convention

85. The respondent Party submits in its written observations of 16 August 2002 that the applicant was never engaged in any form of labour prohibited by Article 4 of the Convention. The respondent Party states that the applicant performed light sanitary work for which he was reimbursed between 13 and 24 KM per month. Furthermore, as stated above, during the entirety of his detention, the applicant received frequent medical examinations and was in good health upon his release on 20 March 2002.

e. Article 8 of the Convention

86. The respondent Party submits in its written observations of 16 August 2002 that the applicant was detained at Bijeljina District Prison in accordance with domestic law. In its additional written observations of 30 September 2002, the respondent Party states that the applicant never requested to be transferred from Bijeljina District and was frequently visited by his family. Additionally, he was released from prison for a total of 96 days during his detention.

87. In relation to the applicant's complaints concerning his right to correspondence and use of a telephone, the respondent Party states that these allegations are untrue. The applicant was never prevented from sending and receiving mail or from using a telephone. He exercised this right frequently and the prison records confirm this. Therefore, the alleged violation of Article 8 is manifestly ill-founded.

B. The applicant

88. In his written submissions to the Chamber the applicant maintains his complaints under Articles 2, 3, 4, 5, 6, and 8 of the Convention and Article II(2)(b) of the Agreement as detailed in his application.

89. The applicant further maintains that the entire investigation was conducted in a careless manner. The on-site investigation was carried out during the middle of the night, in the absence of the investigating judge. The Coroner's inquest was performed by a medical technician and not by a forensic expert and was done at the victim's house, and not at the location where he was allegedly shot. The victim's family prevented the exhumation of the body so it was impossible to conduct an autopsy and therefore question the evidence concerning the entry wound of the bullet(s) that killed him. It is also unclear whether the police officer who performed the investigation undertook any gun shot residue test on any person other than the applicant, or indeed on the applicant himself or his rifle in order to determine who fired the shot which had killed the victim. Neither the Public Prosecutor nor the investigating judge ordered the exhumation of the victim to determine the trajectory of entry or indeed conduct a search to find the bullet that had killed the victim.

90. The applicant further maintains that during the proceedings there were numerous procedural irregularities. He specifically states that he never received any procedural decision on the transfer of jurisdiction from the Court of First Instance in Srpsko Sarajevo to the Court of First Instance in Sokolac. He states that he never received any procedural decision concerning his mental evaluation at the Sokolac Mental Hospital or the Belgrade Central Prison Hospital. He maintains that he was detained at these mental institutions against his will and in the absence of any court order. He further maintains that the judge, Miloš Vukašinović, who was in charge of his case at the Court of First Instance in Srpsko Sarajevo was also transferred to the Court of First Instance in Sokolac.

91. In relation to both trials, the applicant states that he was impeded from examining or calling expert witnesses and that the court wrongly assessed the expert psychiatric evidence. He was further

prevented from addressing the panel of judges when they deliberated on his case. He further states that a judge sitting on the panel who heard his case at the Court of Second Instance in Bijeljina also sat on the panel hearing his appeal in the Supreme Court. During his trial[11] the applicant was provided with trial transcripts on which to base his defence, however, he maintains that the transcripts he received were not an accurate account of the proceedings, and in some circumstances, were in fact intentionally altered.

92. In relation to his detention, he states that he was never served with a procedural decision concerning his transfer to the Pre-trial Section of the District Prison in Bijeljina and believes that he was unnecessarily moved great distances away from his family. He further states that during his detention he was frequently prevented from using a telephone and from sending and receiving mail, thus preventing him from maintaining any contact with his family. He alleges that it was not until he went on a hunger strike and sought the assistance of the IPTF that he was permitted to communicate freely with his family.

93. He submits that it was not until 22 May 2000 that the matter was finally dealt with when he was sentenced to serve 8 years imprisonment, this was 5 years and 10 months after the date of his arrest. His sentence, by the procedural decision of the Supreme Court of 22 May 2000, was to commence on 18 July 1994 and expire on 18 July 2002. He was released on 18 March 2002 on 4 months conditional discharge; his sentence would expire on 18 July 2002.

94. In relation to the alleged violation of Article 3 of the Convention the applicant maintains that he was physically beaten during the entirety of his detention in Bijeljina. He states that he was beaten by the prison authorities and by fellow inmates. He does not specify any particular dates, but maintains this occurred intermittently during his detention between November 1996 when he was transferred to Bijeljina and 18 March 2002, when he was released. The applicant does not state that he was regularly beaten during this five-year period, but maintains it frequently occurred. He further maintains that his transfer to the Sokolac Mental Hospital and Belgrade Central Prison Hospital amounted to a violation of Article 3.

95. In relation to the alleged violation of Article 4 of the Convention the applicant maintains that during the entirety of his detention in Bijeljina from November 1996 until 18 March 2002 he was subjected to forced labour. He states that he was forced to undertake agricultural work barefoot, despite his age and increasing ill-health. The applicant maintains that this work has caused a decrease in general life expectancy and has directly contributed to his ill-health to such an extent that he is unable to undertake work of a physical nature.

VIII. OPINION OF THE CHAMBER

A. Admissibility

96. Before considering the merits of the case the Chamber must first decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted and whether the application has been filed within six months from such date on which the final decision was taken. Article VIII(2)(c) states that the Chamber shall dismiss any application it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right to petition.

1. Compatibility *ratione temporis* with the Agreement

97. The Chamber will first address the question whether the Chamber is competent, *ratione temporis*, to consider the case, bearing in mind that the applicant was deprived of his liberty before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively (see case no. CH/96/1, *Matanović*,

[11] It is unclear at this stage whether the applicant refers to his first trial or his retrial.

decision on admissibility of 13 September 1996, Decisions on Admissibility and Merits 1996-1997). Accordingly, the Chamber is not competent to find violations with regard to events that took place prior to 14 December 1995, including the arrest and detention of the alleged victim up to 14 December 1995. However, in so far as it is claimed that the alleged victim has continued to be arbitrarily detained and thus deprived of his liberty after 14 December 1995, the subject matter is compatible with the Agreement and comes within the competence of the Chamber *ratione temporis*.

98. The Chamber notes that although it must confine its examination of the case to considering whether the human rights of the applicant have been violated or threatened with violation since that date (see case no. CH/97/30, *Damjanović*, decision on admissibility of 11 April 1997, paragraph 13, Decisions on Admissibility and Merits 1996-1997), the Chamber may consider events prior to that date in order to assess the general manner in which the applicant's case has been dealt with.

2. The six-months rule

99. The Chamber notes that the application was lodged on 5 June 2000, but the alleged violations of Articles 3 and 4 of the Convention were not submitted until 14 June 2002. The Chamber finds that the final decision for the purposes of Article VIII(2)(a) of the Agreement, was issued by the Supreme Court on 22 May 2000. This date is more than six months before the date on which the complaints in respect of Articles of 3 and 4 of the Convention were made with the Chamber. However, the Chamber notes that the alleged violations of Articles 3 and 4 were raised in the application to the Ombudsperson during 1999. The Chamber finds that, although not specifically detailed in the application to the Chamber, the applicant had signalled an intent during the relevant time frame to rely on these provisions. Accordingly, the Chamber concludes that the application in this respect complies with the requirements of Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare this part of the application admissible under the six months rule.

3. Non-exhaustion of domestic remedies

100. The respondent Party submits that the applicant has failed to exhaust the available domestic remedies, as he was given the possibility to do in accordance with Chapter XXXII of the Code of Criminal Procedure, in particular Articles 541-549, and Article 17 of the Constitution of the Republika Srpska. The Chamber notes that Chapter XXXII of the Code of Criminal Procedure provides that only the damage suffered by a defendant due to unlawful deprivation of liberty can be taken into consideration. Under Article 545 of the same law, a defendant is entitled to initiate a civil action for compensation for damage suffered due to the postponement of a main trial. However, the Chamber notes that it has previously ruled that such domestic remedies need not be exhausted if the applicant has unsuccessfully challenged, through the domestic courts, all decisions pertaining to his detention (see case no. CH/01/7488, *Vlatko Buzuk*, decision on admissibility and merits of 3 July 2002, paragraph 81, Decisions July-December 2002):

> "81. The respondent Party also argues that the applicant has failed to exhaust domestic remedies under Article 525 of the Code of Criminal Procedure in that he could have addressed a claim for compensation to the Federation Ministry of Justice. The respondent Party's argument is that the applicant has an enforceable claim under domestic law and that he has not exhausted this remedy, as he is required to do. The Chamber notes however, that this enforceable right to compensation for unlawful detention is relevant to the admissibility and merits under an alleged violation of Article 5, paragraph 5 of the Convention, which provides:
>
> > "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."
>
> However, the Chamber notes that the applicant has not complained of a lack of an enforceable right to claim compensation. Therefore, the Chamber will not consider the respondent Party's objections insofar as they concern the admissibility of the applicant's alleged violations of Article 5, paragraph 1 and Article 5, paragraph 3 of the Convention, as the objections are irrelevant to these provisions of the Convention."

101. The Chamber notes that the applicant made numerous requests to challenge the lawfulness of his detention. The respondent Party in its written observations of 4 July 2002 confirms that the

applicant made numerous complaints concerning his detention. The applicant also submitted numerous appeals to the courts, prison authorities and international bodies in order to have the lawfulness of his detention determined. The Chamber is therefore satisfied that the applicant challenged, through the domestic courts, all decisions pertaining to his detention.

102. The Chamber therefore decides not to declare the application inadmissible on grounds of failure to exhaust domestic remedies.

4. Manifestly ill-founded

a. Article 2 of the Convention

103. The applicant complains that the respondent Party violated his right to life, but he has failed to substantiate his allegation. It follows that the application is manifestly ill-founded in this respect, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

b. Article 3 of the Convention

104. The applicant complains that he was subjected to physical and mental ill-treatment during his detention in Bijeljina and was forced to go on a hunger strike, thus amounting to inhuman or degrading treatment or punishment under Article 3 of the Convention. He submits that he was physically and mentally assaulted during the entirety of his detention in Bijeljina, but fails to indicate any specific incidents and provide any medical evidence establishing such ill-treatment. The Chamber notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see e.g., Eur. Court HR, *Ireland v. United Kingdom*, judgment of 18 January 1978, Series A no.25, paragraph 65) and the provision will not be engaged by normal prison conditions. However, it cannot be seen from the case file that the applicant raised this complaint before the courts or any other domestic body. The Chamber further finds that the applicant has failed to substantiate his allegations in any way and takes note of the respondent Party's written observations of 16 August 2002 that frequent medical examinations were conducted and that the applicant was concluded to be in good health throughout his detention in Bijeljina. Therefore, the Chamber finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that the application, in this respect, is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application inadmissible in respect of Article 3 of the Convention.

c. Article 4 of the Convention

105. The applicant complains that he was also subjected to forced or compulsory labour prohibited under Article 4 of the Convention. The applicant states that during his detention on remand in the Pre-trial Section of the District Prison in Bijeljina he was forced to undertake harsh agricultural work barefoot. He states that this occurred during the entirety of his detention on remand in Bijeljina. The Chamber notes that paragraph 3 of Article 4 provides as follows:

> "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 ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention."

106. The European Court, in its constant jurisprudence, has given a useful indication of the circumstances in which compulsory labour is permissible to persons detained under Article 5 of the Convention. The Strasbourg authorities have stated that forced labour is permissible if it is done 'in the ordinary course of detention' (see e.g., Eur. Court HR, *De Wilde, Ooms & Versyp v. Belgium*, judgment of 18 June 1971, Series A no.12) and that such labour is permissible in the ordinary course of detention not only in relation to convicted offenders, but also to those held on remand (see e.g., *X v Switzerland*, decision of 14 December 1979, p.238 at pp.248-249)

107. The Chamber notes that the work the applicant complains of consists of agricultural work. He has failed to substantiate why this work should not have been "required in the course of ordinary detention" and furthermore, it appears that he refused to do any work at all during his detention in Bijeljina. It follows that in this respect the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

5. Discrimination in the enjoyment of various rights

108. The applicant has alleged that he has been discriminated against because of his Serb origin in the enjoyment of his rights under Articles 2, 3, 4, 5, 6 and 8 of the Convention. However, the Chamber notes that the particular facts of the case do not lead the Chamber to believe that the applicant was a victim of any discrimination. The Chamber recalls that the applicant is of Serb origin and all the parties in the proceedings were of Serb origin. The applicant's case was tried by courts within the Republika Srpska and the applicant was detained in a detention facility within the Republika Srpska. The Chamber finds that the facts of this case do not indicate that the applicant has been the victim of discrimination on any of the grounds set forth in Article II(2)(b) of the Agreement. It follows that the application in respect of discrimination is inadmissible as manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

6. Conclusion as to admissibility

109. The Chamber finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber declares the application admissible insofar as it relates to the alleged violations of Articles 5, 6 and 8 of the Convention. The Chamber declares the remainder of the application inadmissible for the reasons stated above.

B. Merits

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

a. Article 5, paragraph 1 of the Convention

111. The Chamber finds that the application raises issues with regard to Article 5, paragraph 1 of the Convention, which in the relevant part reads as follows:

> "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;
>
> "(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."

112. The applicant was held in detention from his arrest on 18 July 1994 until his release on 18 March 2002. This period covers pre-trial detention, detention during trial and detention after a conviction by a competent court. The application in this respect raises issues with regard to the lawfulness of the applicant's detention during several periods.

i. Period of 14 December 1995 to 18 July 1996

113. The Chamber firstly notes that it is not competent *ratione temporis* to examine whether there has been a violation regarding the period of detention between 18 July 1994 and 14 December 1995

(see paragraphs 97 to 98 above). However, the Chamber will take into consideration events prior to 14 December 1995, but only insofar as they are relevant to any period subsequent to that date as a 'continuing period' and only in order to assess the circumstances under which the proceedings were conducted (see Eur. Court HR, *Kalashnikov v. Russia*, judgment on the merits of 15 July 2002, paragraphs 109-111).

114. The Chamber notes that an indictment was filed against the applicant on 17 November 1994 by the Public Prosecutor of First Instance. The applicant's detention during this period – up until his conviction by the Court of First Instance in Sokolac on 18 July 1996 – was therefore governed by Article 199 of the Code of Criminal Procedure (see paragraph 65 above) as a bill of indictment had been presented to the Court. This period of detention therefore falls to be considered under Article 5, paragraph 1(c) of the Convention.

115. The respondent Party maintains in its written observations of 4 July 2002 that the applicant was detained in accordance with Article 199 of the Code of Criminal Procedure, which states that custody may be ordered once a "bill of indictment" has been presented to the court until the end of the main trial. It further states that custody may only be ordered by the panel of judges and this must be reviewed every 2 months, irrespective of whether a motion has been filed by the parties. The respondent Party further states that the procedural safeguards provided in the Code of Criminal Procedure – in particular Articles 186, 197, and 199 – are sufficient to comply with its obligations under the Agreement and Article 5 of the Convention.

116. The Chamber notes that the Ombudsperson found this period of detention to be in accordance with Article 5, paragraph 1(c). The Ombudsperson stated at paragraph 72 of her written report of 9 April 1998:

> "As to the compatibility of the applicant's deprivation of liberty after 14 December 1995 with paragraph 1 of Article 5 of the Convention…that the applicant's detention between 18 July 1994 and 18 July 1996 can be considered as "lawful detention" within the meaning of subparagraph (c) of Article 5 para. 1…"

117. The Chamber notes that this provision permits the arrest and detention of a person for the purpose of bringing that person before the competent legal authority on reasonable suspicion of having committed a criminal offence. The applicant maintains that there could have been no reasonable suspicion had the investigation been conducted properly and that no grounds existed for denying him bail at that stage. The European Court observed in *Murray v. United Kingdom* (Eur. Court HR, judgment of 28 October 1994, Series A no.300-A, paragraph 55) that the object of detention under Article 5, paragraph 1(c) is to enable the authorities to further criminal investigations by confirming or discounting suspicions which provide the grounds for the detention. In *Fox, Campbell & Hartley v. United Kingdom* (Eur. Court HR, judgment of 30 August 1990, Series A no.182, paragraph 32) the European Court stated:

> "The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention…having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."

118. The Chamber is satisfied that sufficient reasons existed for the applicant's arrest and detention during this preliminary period.

119. The Chamber recalls that during this period under consideration the applicant was detained at Belgrade Central Prison Hospital from 21 January 1996 until 21 March 1996 and that this period may fall under Article 5, paragraph 1(b). The applicant was detained during this period pursuant to a court order and enforcement could be imposed under Article 258, paragraph 2 of the Code of Criminal Procedure (see paragraph 66 above) and therefore detention could be enforced under the second limb of paragraph 1(b), i.e., in order to secure the fulfilment of any obligation prescribed by law. However, in the circumstances of the present case, the Chamber finds that this period of

detention was also governed by paragraph 1(c) and that it is unnecessary to separately examine the complaint under Article 5, paragraph 1(b).

120. The Chamber finds, therefore, that there has been no violation of Article 5, paragraph 1(c) in this respect.

ii. Period of 18 July 1996 to 20 February 1997

121. As previously stated, the applicant was convicted by the Court of First Instance in Sokolac on 18 July 1996 and sentenced to 7 years imprisonment. His immediate and continued detention was ordered pursuant to Article 353, paragraph 6 (in conjunction with paragraph 1) of the Code of Criminal Procedure. As a person convicted by a competent court for a criminal offence carrying a penalty of more than 5 years imprisonment the applicant's continued detention was obligatory. Furthermore, under paragraph 7 of the same provision, the applicant's detention could be lawfully ordered until the first instance judgment became final and binding (see paragraph 67 above). The applicant appealed this decision and on 20 December 1996, the Court of Second Instance in Bijeljina overturned the first instance judgment and referred the matter back to the Court of First Instance in Sokolac. At the same time the Court of Second Instance in Bijeljina issued a procedural decision in accordance with Article 385, paragraph 4 of the Code of Criminal Procedure, in conjunction with Article 191 paragraph 2, point 4 of the same law (see paragraph 65 above), by which it extended the applicant's detention for a further period of 2 months on the grounds that a reasonable suspicion existed that he had committed the offence charged and that, if convicted, he risked being sentenced to a long term of imprisonment. This order expired on 20 February 1997.

122. The respondent Party has submitted that the applicant's detention from 18 July 1996 to 20 December 1996 was in accordance with Article 5, paragraph 1(a) and that the period of 20 December 1996 to 20 February 1997 was in accordance with Article 5, paragraph 1(c).

123. The Chamber recalls that according to domestic law, the judgment of 18 July 1996 was not a final and binding decision until appeals had been exhausted. Consequently, the period of detention from 18 July to 20 December 1996 was still governed by Article 5, paragraph 1(c), as detention for the purpose of bringing the applicant before the competent authorities on the grounds that a reasonable suspicion existed of having committed the offence charged. The same applies to the applicant's detention subsequent to the ordering of a retrial, when the applicant was detained under Article 191 paragraph 2, point 4 of the Code of Criminal Procedure on the same grounds as mentioned above.

124. The Chamber finds that during this period the applicant's detention was at all times covered by decisions ordering detention in accordance with domestic law. The Chamber therefore finds that this period of detention was in accordance with Article 5, paragraph 1(c) of the Convention for the purpose of bringing the applicant before the competent legal authority on the ground of a reasonable suspicion existing that he had committed the offence charged.

125. The Chamber notes, however, that the applicant was detained for a long period under the ground of a reasonable suspicion and it would seem that whilst such grounds are sufficiently adequate during the investigative stage they may cease to be after the passage of time. However, the Chamber recalls, as was stated in *De Jong, Baljet & Van Den Brink v. Netherlands* (Eur. Court HR, judgment of 22 May 1984, Series A no.77, paragraph 44), that the question of whether detention remains reasonable after a certain lapse of time is not covered by Article 5, paragraph 1(c) but by Article 5, paragraph 3 (see e.g. Eur. Court HR, *Letellier v. France*, judgment of 26 June 1991, Series A no.207, paragraph 35). There has therefore been no violation of Article 5, paragraph 1(c) for the above-mentioned period in this respect.

iii. Period of 20 February 1997 to 9 September 1997

126. Pursuant to Article 199, paragraph 2 of the Code of Criminal Procedure (see paragraph 65 above) continued detention must be reviewed by the panel of judges 2 months after the last decision was taken. The fact that no procedural decision was issued on the applicant's continued detention between 20 February 1997 and 9 September 1997 indicates that this period of detention was not in

accordance with a procedure prescribed by law. The Chamber notes the respondent Party's argument in its written observations of 4 July 2002, that the Strasbourg bodies are "obliged to accept compliance with national legislation and not to interpret it" and that this will apply equally to the Chamber. The respondent Party refers to *Winterwerp v. Netherlands* (Eur. Court HR, judgement of 24 October 1979. Series A no.33, paragraphs 45-47) and *Benham v. United Kingdom* (Eur. Court HR, judgment of 10 July 1996, Reports 1996-III, paragraph 41) in which the European Court stated that it was in the first place for the national authorities to interpret and apply the domestic law as the words "in accordance with a procedure prescribed by law" essentially refer back to the domestic law. The respondent Party appears to interpret this statement of the European Court as meaning that the Chamber may not question whether the national authorities acted in accordance with domestic law. The Chamber observes that this manifestly is not what the European Court stated. Whilst it is not normally the European Court's or the Chamber's task to review the observance of domestic law by the national authorities, in such a case where disregard entails a breach of the Convention, the European Court and the Chamber may and should exercise a certain power of review (see the above-mentioned *Winterwerp* decision, paragraph 46). Returning to the case before it, the Chamber notes that the panel of judges under whose care the applicant's case remained, failed to issue any procedural decision extending the applicant's detention between 20 February 1997 and 9 September 1997. Therefore, without any need to venture into interpreting the domestic law, the applicant's detention during this period cannot be considered to be "in accordance with a procedure prescribed by law".

127. The Chamber further takes note that the Ombudsperson found this period of detention to be unlawful under Article 5, paragraph 1(c). The Ombudsperson stated at paragraph 76 of her written report of 9 April 1998:

> "...after 20 February 1997 the competent authorities have failed to issue regularly two-monthly decisions on the applicant's continuing detention. In view of the above the Ombudsperson considers that the applicant's detention after 20 February 1997 to date is neither "in accordance with a procedure prescribed by law" nor "lawful" within the meaning of Article 5 para. 1 of the Convention."

128. The Chamber therefore finds that the respondent Party violated the applicant's rights as guaranteed under Article 5(1)(c) by failing to issue bi-monthly decisions on his detention.

iv. Period of 9 September 1997 to 9 November 1997

129. During this period the applicant's detention was ordered by the decision of the Court of Second Instance in Srpsko Sarajevo of 9 September 1997. The Chamber finds that this period of detention was in accordance with a procedure prescribed by law for the purpose of bringing the applicant before the competent legal authority on the ground of a reasonable suspicion existing that he had committed the offence charged in accordance with Article 5, paragraph 1(c).

v. Period of 9 November 1997 to 14 May 1998

130. The Chamber notes that following the procedural decision of 9 September 1997 no further procedural decision was issued concerning the applicant's continued detention until the first hearing of his re-trial at the Court of Second Instance in Bijeljina. The procedural decision of 9 September 1997 therefore expired 2 months later, on 9 November 1997. Therefore, the Chamber finds that the period of detention from 9 November 1997 to 14 May 1998 was not in accordance with a procedure prescribed by law for the reasons stated in paragraphs 126-128 above, and consequently the respondent Party violated the applicant's rights as guaranteed under Article 5, paragraph 1(c) of the Convention, in this respect.

vi. Period of 14 May 1998 to 23 July 1998

131. On 14 May 1998 the applicant's retrial proceedings commenced before the Court of Second Instance in Bijeljina. The Chamber notes that his detention would have been governed at this stage by Article 199 of the Code of Criminal Procedure (see paragraph 65 above) and under such a provision detention may be extended until the end of the trial by a decision of the panel of judges. However, Article 199, paragraph 2 stipulates that at the expiry of a period of two months from the

date of the last decision, the panel of judges "shall examine whether the grounds still exist for custody and shall make a decision to extend or terminate custody". The burden of proving that such decisions were taken falls on the respondent Party and it has failed to show that any procedural decision was issued until 23 July 1998.

132. The applicant's detention from 14 May 1998 to 23 July 1998 was therefore not in accordance with a procedure prescribed by law and thus a violation of Article 5, paragraph 1(c) of the Convention.

vii. Period of 23 July 1998 to 31 August 1999

133. On 23 July 1998 a procedural decision was issued by the Court of Second Instance in Bijeljina reviewing the grounds of the applicant's detention during the retrial proceedings. It appears that the court thereafter scheduled monthly reviews of the applicant's detention up until 31 August 1999. The Chamber finds that this period of detention was in accordance with Article 199 of the Code of Criminal Procedure for the purpose of bringing the applicant before the competent legal authority on the ground of a reasonable suspicion existing that he had committed the offence charged in accordance with Article 5, paragraph 1(c).

134. The applicant's detention at this stage was therefore again in accordance with a procedure prescribed by law for the purpose of bringing the applicant before the competent legal authority on the ground of a reasonable suspicion existing that he had committed the offence charged in accordance with Article 5, paragraph 1(c) of the Convention.

viii. Period of 31 August 1999 to 22 May 2000

135. The applicant was convicted by the Court of Second Instance in Bijeljina on 31 August 1999 and sentenced to 7 years imprisonment. His immediate and continued detention was ordered pursuant to Article 353, paragraph 6 (in conjunction with paragraph 1) of the Code of Criminal Procedure. On 22 May 2000 the applicant's appeal was denied and his conviction upheld by the Supreme Court and his sentence altered to 8 years imprisonment.

136. The Chamber notes that the period from 31 August 1999 until 22 May 2000 was governed by Article 5, paragraph 1(c) as his conviction and sentence did not become final and binding until the finalisation of the appeal submitted by the applicant and the Cantonal Prosecutor to the Supreme Court. This period of detention as ordered by the Court of Second Instance was therefore in accordance with Article 5, paragraph 1(c) of the Convention.

ix. Period of 22 May 2000 to 18 March 2002

137. The applicant's conviction and sentence became final and binding on 22 May 2000 upon the denial of his appeal by the Supreme Court and his detention was subsequently governed under Article 5, paragraph 1(a) as a person convicted by a competent legal authority. The Chamber therefore concludes that the applicant's detention from 22 May 2000 until his release on 18 March 2002 was in accordance with Article 5, paragraph 1(a).

x. Conclusion as to Article 5, paragraph 1 of the Convention

138. In conclusion, the Chamber finds that for the period from 14 December 1995 to 20 February 1997 the applicant's detention was in accordance with a procedure prescribed by law for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence under Article 5, paragraph 1(c) of the Convention.

139. The Chamber finds that for the period from 20 February 1997 to 9 September 1997 the applicant's detention was not in accordance with a procedure prescribed by law and therefore a violation of his rights as guaranteed under Article 5, paragraph 1(c).

140. The Chamber finds that for the period from 9 September 1997 to 9 November 1997 the applicant's detention was in accordance with a procedure prescribed by law for the purpose of

bringing him before the competent legal authority on reasonable suspicion of having committed an offence under Article 5, paragraph 1(c) of the Convention.

141. The Chamber finds that for the period from 9 November 1997 to 23 July 1998 the applicant's detention was not in accordance with a procedure prescribed by law and therefore a violation of his rights as guaranteed under Article 5, paragraph 1(c).

142. The Chamber finds that for the period from 23 July 1998 to 22 May 2000 the applicant's detention was in accordance with a procedure prescribed by law for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence under Article 5, paragraph 1(c) of the Convention.

143. The Chamber finds that the period from 22 May 2000 to 18 March 2002 was in accordance with a procedure prescribed by law for the lawful detention after conviction by a competent court under Article 5, paragraphs 1(a).

b. Article 5, paragraph 3 of the Convention

144. Article 5, paragraph 3 of the Convention, insofar as relevant, provides as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be…entitled to trial within a reasonable time, or to release pending trial…".

145. The applicant complains that he was detained for an unreasonable length of time thus constituting a violation of Article 5, paragraph 3 of the Convention.

146. Article 5, paragraph 3 requires the authorities to conduct proceedings with particular expedition for persons in detention, and that acceptable reasons are given for continued detention. Such acceptable reasons may be gauged on the risk of flight, risk of tampering with evidence, influencing witnesses or the repetition of further offences. In *Neumeister v. Austria* (Eur. Court HR, judgment of 27 June 1968, Series A No. 8, paragraph 4) the European Court stated that:

> "…[t]he reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable."

147. Furthermore, in *W v. Switzerland* (Eur. Court HR, judgment of 26 January 1993, Series A no. 254, p. 15, paragraph 30) the European Court stated:

> "…[c]ontinued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty."

148. The Chamber notes that the approach of the European Court (see e.g., Eur. Court HR, *Neumeister v. Austria*, judgment of 7 May 1974, Series A no. 8) in this context means that 'reasonable time' does not refer to the processing of the prosecution and the trial, but to the overall length of detention.

149. In order to determine the reasonableness, the Chamber notes that the starting point for calculating whether there has been a trial within a reasonable period is arrest or initial detention (see e.g., *Wemhoff v, Germany*). The Chamber recalls that the applicant was arrested on 18 July 1994, but that it only has competence to find a violation of his detention from 14 December 1995. However, the Chamber will take into consideration the fact that on 14 December 1995, the applicant had already been in detention for seventeen months. In *Kalashnikov v. Russia* (see the above-mentioned *Kalashnikov* decision, paragraphs 110-111) the European Court stated in assessing the reasonableness of the length of detention:

> "110. The Court first recalls that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is

> taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among other authorities, the Wemhoff v. Germany judgment of 27 June 1968, Series A no. 7, p. 23, § 9, and *Labita v. Italy* cited above, § 147). Thus, in the present case the applicant's detention on remand began on 29 June 1995, when he was arrested, and ended on 3 August 1999, when he was convicted and sentenced by the Magadan City Court. The further remand on outstanding charges did not alter the fact that, as of 3 August 1999, the applicant was serving a sentence after his conviction by a competent court, within the meaning of Article 5 § 1 (a) of the Convention. The total period of the applicant's detention of remand amounted thus to four years, one month and four days
>
> "111. As the period before 5 May 1998 lies outside its jurisdiction *ratione temporis*, the Court can only consider the period of one year, two months and twenty-nine days, which elapsed between that date and the judgment of the Magadan City Court of 3 August 1999. However, it must take into account the fact that by 5 May 1998 the applicant, having been placed in detention on 29 June 1995, had already been in custody for two years, ten months and six days (see, for example, *mutatis mutandis*, the Mansur v. Turkey judgment of 8 June 1995, Series A, no. 319-B, p. 49, § 51)."

150. The European Commission has in the past stated that in determining the reasonableness of time, the period ends with the commencement of the criminal proceedings. This is to a great extent based upon the wording of Article 5, paragraph 3 in the English text "entitled to trial within a reasonable time". The respondent Party submits that this is the correct position when assessing the reasonableness of the length of detention. However, consideration of the French text "*le droit d'être jugée*" (the right to be judged) indicates that the relevant period will end with the reasoned judgment of the court. The European Court has now adopted this position, as there is clearly no rationale in stating that the protection against an accused detained on remand is less important once the criminal proceedings have commenced and any period to be calculated will include detention during appeal proceedings. Accordingly, in the present case the period of detention therefore ends upon the delivery of the procedural decision of the Supreme Court on 22 May 2000.[12] Consequently, for the purposes of Article 5, paragraph 3, the relevant period in the present case is from 14 December 1995 until 22 May 2000, that is to say over four years and five months. However, the Chamber recalls that the applicant had already been in detention for almost seventeen months by 14 December 1995, thus making his overall detention almost six years and two months.

151. In determining whether the length of the applicant's detention during this period was reasonable, the Chamber notes that the European Court is reluctant in applying any rigid test and will instead apply a case by case assessment. In *Wemhoff v. Germany* (see the above-mentioned *Wemhoff* decision, paragraph 10) the European Court stated in each case the court should examine whether the reasons given by the national authorities are 'relevant and sufficient' to justify continued detention according to its special features. Secondly, the court is to assess whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see Eur. Court HR, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, paragraph 84). If the answer to either question is negative, it may be that the length of continued detention will be considered unreasonable. Finally the court must assess whether the applicant has contributed to such a delay.

i. Relevant and sufficient reasons

152. In relation to the first question, the Chamber takes note of the respondent Party's written observations of 4 July and 12 August 2002 and the Ombudsperson's report of 8 April 1998. The applicant's detention was initially ordered under Article 191 of the Code of Criminal Procedure and subsequently, upon the filing of a bill of indictment, his detention was governed by Article 199 of the same law (see paragraphs 131 to 132 above). The Chamber recalls that the reasons given were: (i) that there was a reasonable suspicion that the applicant had committed the offence charged; and (ii) that the applicant faced a sentence of long-term imprisonment if convicted. However, as stated above in *Letellier v. France*, the European Court held that the reasons given by the national authorities as acceptable reasons for detention, "cannot be gauged solely on the basis of the severity of the sentence risked", as other factors must be considered, too. In *Wemhoff v Germany* (see the above-mentioned *Wemhoff* decision, paragraph 12) the European Court stated that the

[12] The European Court has stated that the period of detention ends with the judgment at First Instance, but has recognised that in certain jurisdictions the judgment does not become final and binding until all appeals have been exhausted. In such a case the prolongation of such detention has the appearance of detention on remand (see e.g., the *Wemhoff* decision).

court:

> "…must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention was not unreasonably prolonged and contrary to article 5(3) of the Convention."

153. The Chamber notes that the European Court has consistently stated that the acceptable grounds the Court will accept as justification for continued detention would include:

i. If, from the severity of the proposed sentence, and the detainee's own circumstances, it is likely that he or she will escape;

ii. If it appears likely that the accused person will interfere with the course of justice, by destroying documents or colluding with other possible suspects and interfering with witnesses, continued detention will be justified.

iii. The public interest in the prevention of crime is another ground for justification; this will be relevant if there are good reasons to believe that the accused will re-offend on release.

iv. The final ground for continuing detention is the preservation of public order, although this argument will only succeed if there is objective justification for the prospect of a risk to public order posed by the accused's release.

154. The Chamber finds that in the applicant's case the authorities failed to consider the elements stated above that could have been "relevant and sufficient" to justify continued detention within the meaning of Article 5, paragraph 3 of the Convention.

ii. Due diligence

155. As previously stated, the applicant was arrested on 18 July 1994 and held in police custody until 21 July 1994. His first hearing in the criminal proceedings against him commenced at the Court of First Instance in Srpsko Sarajevo sometime towards the end of July 1994. On 17 August 1994 the investigative judge of the Court of First Instance in Srpsko Sarajevo ordered the psychiatric examination of the applicant. On 17 November 1994 an indictment was filed against him and at some stage thereafter his case was transferred from the Court of First Instance in Srpsko Sarajevo to the Court of First Instance in Sokolac. On 18 January 1995 the applicant was sent to the Sokolac Mental Hospital and detained there until 4 April 1995. On 21 January 1996 the applicant was sent the Belgrade Central Prison Hospital and detained there until 21 March 1996. His trial commenced at the Court of First Instance in Sokolac sometime between November and December 1994 and on 18 July 1996 the applicant was convicted by that court for the offence of murder and sentenced to seven years imprisonment. On 16 and 23 August 1996 the Public Prosecutor and the applicant appealed this decision, respectively. On 25 October 1996, the Court of Second Instance in Srpsko Sarajevo, which had jurisdiction to hear the appeal, submitted a request to the Supreme Court to transfer jurisdiction to an alternative court in Republika Srpska. This was granted on 8 November 1996 and on 20 December 1996 the Court of Second Instance in Bijeljina partly accepted the applicant's appeal and quashed the First Instance judgment, referring the matter back to the Court of First Instance for a re-trial. For some reason unknown to the Chamber, the applicant's case was transferred to the Court of Second Instance in Srpsko Sarajevo for retrial. On 19 May 1997, 9 June 1997 and 3 October 1997 the Court of Second Instance in Srpsko Sarajevo submitted requests to the Supreme Court to transfer jurisdiction to an alternative Court of Second Instance in the Republika Srpska. On 28 October 1997 the Supreme Court appointed the Court of Second Instance in Bijeljina as the competent court to retry the applicant. On 14 May 1998 the applicant's retrial commenced at the Court of Second Instance in Bijeljina and on 31 August 1999 the applicant was convicted and sentenced to seven years imprisonment. Both the applicant and the Public Prosecutor appealed against this decision and on 22 May 2000 the Supreme Court rejected the applicant's appeal and accepted the Public Prosecutor's appeal, altering the sentence to eight year's imprisonment.

156. The Chamber notes that this summary of the proceedings in the applicant's case shows that the events can be characterised as a long series of prolonged periods of inactivity interrupted by brief

periods of activity of the Republika Srpska judiciary. It appears that again and again the applicant's case was "forgotten" for several months at a time.

157. The respondent Party has submitted that the reasons for such a delay in the proceedings was partly attributable to the lack of personnel in the domestic courts and partly attributable to the applicant. The Chamber accepts that the conflict in Bosnia and Herzegovina destabilised its legal infrastructure considerably. However, this will not absolve the respondent Party for such an unreasonable delay in the proceedings. Firstly, the Chamber notes that the criminal charge against the applicant was not overly complicated and did not require a lengthy investigation. Secondly, the court was not inundated with witnesses for the prosecution. On the contrary, very few witnesses were contacted and only a handful was actually called to give evidence. Thirdly, as to the delay as a result of the lack of personnel in the Court of Second Instance, the Chamber finds that the applicant's retrial was pending for over a year and this was as a result of the Supreme Court refusing to expedite proceedings and to transfer jurisdiction from the Court of Second Instance in Srpsko Sarajevo to an alternative Court of Second Instance. The Chamber finds that the administrative running of a legal system is the responsibility of the respondent Party and any delays caused as a result will be directly attributable to the respondent Party (see, e.g., Eur. Court HR, *Ledonne (No. 2) v. Italy*, judgment on the merits of 12 May 1999, paragraph 23). Therefore, the Chamber rejects the respondent Party's submissions as to reasons given for the delay in the proceedings.

iii. Conduct of the applicant

158. The respondent Party submitted in its written observations of 4 July 2002 that such a delay was partially the fault of the applicant. The respondent Party states that the applicant delayed the proceedings for a period of six months, by evading the psychiatric expertise. The Chamber recalls however, that the applicant refused to comply with the order for psychiatric assessment. The Chamber notes that the order was issued on 17 August 1994 and the applicant was subsequently detained from 18 January 1995 until 4 April 1995 and from 21 January 1996 to 21 March 1996. Firstly, the Chamber notes that the first period is not within the Chamber's competence *ratione temporis*, however the Chamber will, as it has previously done, take this period into consideration when assessing the conduct of the applicant during the proceedings. Secondly, as was noted in the *Buzuk* case (see the above-mentioned *Buzuk* decision, paragraph 113), the applicant is under no obligation to assist the prosecution in expediting their case. However, if the applicant prolongs the proceedings then this must be a consideration. The Chamber notes that the applicant refused to comply with the mental assessment ordered by the court. The Chamber notes that he was acting within his rights to refuse to comply, but such refusal meant that a second internment in the Belgrade Central Prison Hospital was necessary. The Chamber recalls that the applicant's complaint to the initial psychiatric assessment was never dealt with (see paragraph 26 above) and as such he refused to comply until heard by the court. The Chamber finds that the applicant was detained for a period of five months for psychiatric assessment, but it cannot be said that this period was solely due to applicant. The Chamber therefore concludes that the applicant partially contributed to the delay caused by the second period of psychiatric assessment. Nonetheless, despite the applicant's conduct and considering the overall length of the proceedings, his contribution cannot absolve the respondent Party of its responsibility for the delay in the proceedings.

iv. Conclusion as to Article 5, paragraph 3 of the Convention

159. The Chamber therefore finds that the length of the applicant's detention from 14 December 1995 until the decision of the Supreme Court on 22 May 2000 exceeded all limits of reasonableness. Consequently, the respondent Party violated the applicant's rights as guaranteed by Article 5, paragraph 3 of the Convention.

c. Article 5, paragraph 4 of the Convention

160. Article 5, paragraph 4 of the Convention provides:

> "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 his detention is not lawful."

161. The applicant complains that he was unable to challenge his detention at certain stages in the proceedings. The Chamber recalls that it has found a violation under Article 5, paragraph 1(c) for the periods from 20 February 1997 to 9 September 1997 and from 9 November 1997 to 31 August 1999 for the absence of bi-monthly reviews of his detention. It will now go on to consider his detention under Article 5, paragraph 4 of the Convention.

162. The right of *habeas corpus*, the right to judicial review of the lawfulness of detention, entitles a detained person to take proceedings by which the lawfulness of his detention is decided speedily by a court. The right applies to all forms of detention and is not dependant upon detention being unlawful under Article 5, paragraph 1 (see e.g., Eur. Court HR, *De Wilde, Ooms and Versyp v. Belgium* (*The 'Vagrancy' Cases*), judgement of 18 November 1970, Series A no.12, paragraph 73 and *Kolompar v. Belgium*, judgment of 24 September 1992, Series A no.235-C, paragraph 45). Furthermore, such procedure is to be considered independent of applying for release on bail, as the right under paragraph 4 is solely to test the lawfulness. The absence or restriction of such a right will amount to a violation of the provision.

163. The Strasbourg bodies have consistently stated that any procedure must be in compliance with domestic law and that such procedure must also be consistent with the Convention (see e.g., Eur. Court HR, *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no.50, paragraph 48). Such procedure (as stated above) must also comply with the second paragraph of that provision, in that such determination is conducted 'speedily'. In this respect the Chamber has already noted that under Article 199 of the Code of Criminal Procedure, detention shall be reviewed at bi-monthly intervals "…even in the absence of motions by the parties…". The fact that such procedure is determined by the panel of judges in the presence of the parties – and in public – satisfies the criteria of paragraph 4. Furthermore, the fact that review is scheduled – in the absence of motions by the parties – at intervals of 2 months, also satisfies the requirement of 'speedy determination'.

164. The Chamber recalls that it has already found the periods of detention from 20 February 1997 to 9 September 1997 and from 9 November 1997 to 23 July 1998 to be unlawful in the absence of bi-monthly reviews and as such the applicant was unable to have the lawfulness of his detention examined in this respect. The Chamber recalls that the applicant made numerous requests to challenge the lawfulness of his detention before the Court of First Instance in Sokolac, the Court of Second Instance in Srpsko Sarajevo, the Court of Second Instance in Bijeljina and the Supreme Court. During the entirety of this period the applicant was completely isolated from the courts and unable to challenge the lawfulness of his detention. Furthermore, as noted under Article 5, paragraph 3, where the initial basis for detention was lawful, but where circumstances may have changed and there is a question mark over the lawfulness of continued detention, Article 5, paragraph 4 is particularly relevant (see Eur. Court HR, *Bezicheri v. Italy*, judgment of 25 October 1999, Series A no.164, paragraphs 21-22).

165. The Chamber therefore finds that for the periods of detention from 20 February 1997 to 9 September 1997 and from 9 November 1997 to 23 July 1998 the applicant was prevented from taking proceedings by which the lawfulness of his detention could be decided speedily by a court. Consequently, the respondent Party violated the applicant's rights as guaranteed by Article 5, paragraph 4 of the Convention.

d. Article 6, paragraph 1 of the Convention

166. Article 6, paragraph 1 of the Convention provides insofar as is relevant as follows:

> "In the determination…of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

167. The applicant complains that the manner in which the entire proceedings were conducted violated his right to receive a fair trial by an independent and impartial tribunal. He states that from the moment he was arrested his proceedings were handled in such a way as to remove any impartiality. He states that the jurisdiction of the court was transferred from Srpsko Sarajevo to the Court of First Instance in Sokolac without any lawful basis. He further states that Judge Miloš

Vukašinović, who presided over his proceedings at the Court of First Instance in Srpsko Sarajevo was also transferred to the Court of First Instance in Sokolac. He alleges that his trial was transferred to the Court of First Instance in Sokolac in order for the proceedings to be conducted in the Republika Srpska. The Chamber recalls that proceedings were never 'arbitrarily' transferred to the Republika Srpska, as submitted by applicant, as the courts of the Republika Srpska had sole jurisdiction to try the applicant. In fact the criminal proceedings against the applicant were at all times before the courts of the Republika Srpska. The applicant further complains that the whole investigation and subsequent trial was conducted in a wholly unprofessional manner and with the sole intention of implicating him in a crime that he had not committed. The applicant maintains that his rights as guaranteed under Article 6, paragraph 1 have been violated, in this respect. In addition there was no respect for the presumption of innocence as guaranteed under Article 6, paragraph 2. The applicant states that at both trials the psychiatric evidence was wrongly assessed and various provisions of the Code of Criminal Procedure violated. He maintains that the psychiatric opinion from both institutions were contradictory and inconclusive. He maintains that the psychiatric opinion from the Belgrade Central Prison Hospital commented on the amount of alcohol in his blood at the time of allegedly committing the offence, despite such tests being conducted almost two years after the event. The applicant states that during his trial, the applicant's defence counsel and the court rejected the findings of the psychiatric opinion. However, instead of instructing a new expert, the panel of judges merely accepted certain parts from each report in order to formulate an opinion on which to base the applicant's responsibility at the time of allegedly committing the offence. The applicant further maintains that a judge sitting on the panel at the Court of Second Instance in Bijeljina also sat on the panel who heard his appeal at the Supreme Court.

168. In relation to the applicant's complaints of events that occurred prior to the entering into force of the Agreement, the Chamber recalls that such assessment falls outside the Chamber's competence *ratione temporis*. However, as stated previously (see the above-mentioned *Kalashnikov* decision, paragraphs 110-111) the Chamber may consider events prior to that date in order to assess the complaints that refer to events that occurred after the entry into force of the Agreement.

169. The Chamber notes that the majority of the applicant's complaints in relation to Article 6, paragraph 1 relate to the domestic courts' assessment of the facts pertaining to his case and alleged wrongful application of the law. The Chamber recalls that Article 6 of the Convention guarantees the right to a fair hearing. However, the Chamber has stated on several occasions that it has no general competence to substitute its own assessment of the facts and application of the law for that of the national courts (see, e.g., case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, Decisions August-December 1999, and case no. CH/00/4128, *DD "Trgosirovina" Sarajevo (DDT)*, decision on admissibility of 6 September 2000, paragraph 13, Decisions July-December 2000). Therefore, insofar as the applicant complains that the courts wrongly assessed the facts or misapplied the law, such complaints are outside of the Chamber's competence. As a result, the Chamber will address the applicant's trial in only three respects:

(a) the failure to allow the applicant to cross-examine the author of the expert opinion on his mental health;

(b) independence and impartiality of the courts;

(c) reasonableness of the length of the trial.

i. Right to cross-examine expert witnesses

170. The applicant complains of a violation of his right to a fair trial under Article 6, paragraph 1 taken together with Article 6, paragraph 3(d) entitling him "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". The applicant complains that admitting into evidence the psychiatric opinion by Dr. Ratko Kovačević, the examining neuro-psychiatrist from the Belgrade Central Prison Hospital, without him being called as a witness was a violation of the Code of Criminal Procedure. The Chamber notes that on 20 December 1996 the Court of Second Instance in Bijeljina accepted the applicant's appeal against the first instance judgment in which it specifically stated that by not summoning Dr. Kovačević the applicant's rights, as guaranteed under the Code of Criminal

Procedure, were violated. The Chamber notes therefore that any defects in the first trial in this respect were effectively remedied by the retrial proceedings.

171. In relation to the applicant's retrial, the Chamber notes that Dr. Kovačević was summoned and cross-examined by the applicant's lawyer. The expert opinion was accepted by the court after the parties had had a reasonable opportunity to cross-examine its contents. The Chamber finds therefore that there has been no violation of Article 6, paragraph 1 in this respect.

ii. Lack of independence or impartiality of the Republika Srpska judiciary

172. The applicant has stated, in general terms, that there is a lack of independence and impartiality of the judiciary in Republika Srpska. Specifically, he has stated that the panel of judges from the Court of First Instance in Sokolac failed to act impartially and violated provisions of the Code of Criminal Procedure. The applicant further states that a judge sitting on the panel at the Court of Second Instance in Bijeljina also sat on the panel who heard his appeal at the Supreme Court.

173. The Chamber recalls that Article 39, paragraph 5 of the Code of Criminal Procedure provides that a judge may not perform his judicial duties if in the same case he had participated in rendering a decision of a lower court. The Chamber concurs with the applicant that had a specific judge sat in both courts then this would amount to a violation of the general right to a fair trial under Article 6, paragraph 1 of the Convention. However, the Chamber notes that the applicant has failed to specify which judge had acted in both courts. The Chamber further finds on examination of the trial transcripts that this is a false allegation. Therefore, there has been no violation of Article 6, paragraph 1 in this respect.

174. As for the remainder of the applicant's complaints concerning the general lack of independence and impartiality of the courts in the Republika Srpska, the Chamber finds that the applicant has failed to substantiate his allegations. Therefore, the Chamber finds that the application in this respect does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement.

iii. Reasonable time requirement

175. The applicant complains, and the Ombudsperson concurred in its report of 9 April 1998, that he has been deprived of a trial within a reasonable time as guaranteed under Article 6, paragraph 1 of the Convention.

176. The respondent Party states in its written observations of 4 July 2002 that the proceedings were not unreasonably long. It states that proceedings were delayed due to the complexity of the subject matter, the number of witnesses and because of the delegation of competence of the court in order to comply with the Code of Criminal Procedure. The respondent Party cites *Pretto & Others v. Italy* (Eur. Court HR, judgment of 8 December 1983, Series A no.71) as authority that in a criminal trial, a period of six years was held to comply with the standard of reasonable time under Article 6 of the Convention. The respondent Party states that the relevant time for assessing whether there is a violation of Article 6 is from the moment a bill of indictment is presented to the court as it is only from that moment that consideration of any criminal charge can commence. In the circumstances of the present case, the respondent Party concludes that the delay was not unreasonable.

177. In determining whether there has been a violation of the reasonable time requirement the Chamber must firstly address the relevant period to be assessed. The Chamber disagrees with the respondent Party that time started to run from the issuance of a bill of indictment, but recalls that time will start to run from the moment the applicant was charged. The meaning of charge for the purposes of the Convention is "the official notification given to an individual by the competent legal authority of an allegation that he has committed a criminal offence" (Eur. Court HR, *Eckle v. Germany*, judgment of 21 June 1983, Series A no. 65, paragraph 73). In the *Buzuk* case (see the above-mentioned *Buzuk* decision, paragraph 109) the Chamber noted that:

> "…the moment when time begins to run is not necessarily when an indictment is served or charges formally filed, as an arrest may precede charge. Once an individual is aware that he is officially suspected of a criminal offence, from that moment he has an interest in an expeditious decision about his guilt or innocence being made by the court, whether or not an indictment has been filed, and whether or not he has been arrested."

178. The Chamber therefore concludes that time started to run from 18 July 1994. However, the Chamber recalls that it only has competence to find a violation for the period after the entering into force of the Agreement, that is to say from 14 December 1995. However, as mentioned previously, the Chamber will take into consideration the time period prior to the entering into force of the Agreement, but only insofar as it is relevant in assessing the reasonable time requirement.

179. The next consideration is when time ceases to run. For the purposes of Article 6, paragraph 1, time ceases to run when the proceedings have been concluded or when the determination becomes final (Eur. Court HR, *Scopelliti v. Italy*, judgment of 23 November 1993, Series A no. 278). In the present case, the proceedings were finalised on 22 May 2000 when the Supreme Court issued its procedural decision sentencing the applicant to 8 years imprisonment.

180. The Chamber notes that once the time period has been established, the reasonabless for any delay must be established. The European Court has held that three criteria should be applied to the specific facts of each case:

(a) the complexity of the case;

(b) the conduct of the applicant; and

(c) the conduct of the relevant authorities.

181. The question of complexity is one that is difficult to assess in general and must be adjudged on a case by case basis. However, the European Court has attached importance to several factors, such as the nature of the facts to be assessed, the number of accused persons, and the number of witnesses to be heard. This consideration may well concern issues of law as well as of fact.

182. Firstly, the complexity of the case. The Chamber notes that the material facts of the case may be summarised in the following way. At approximately 4.00 p.m. on 17 July 1994 the applicant fired several shots in the direction of the victim's house. According to the applicant, he was highly intoxicated and unaware of his actions. According to the prosecution, there was a land dispute between the applicant and the victim and the killing was intentional. An investigation was carried out and the applicant was charged with murder. At some stage, the mental health of the applicant was questioned and he was subsequently sent to two separate institutions for evaluation. At the trial the only witnesses called by the prosecution were those present at the relevant time and those engaged in the investigation (i.e., ballistics, pathologist, forensic experts and Dr. Ratko Kovačević). The Chamber concludes that the facts of the case as presented were not overly complex and could not have been reason enough to delay the proceedings.

183. Secondly, as noted in paragraph 158 above, the applicant is under no obligation to assist the prosecution in expediting their case. However, if the applicant prolongs the proceedings then this must be a consideration. The Chamber recalls that the applicant refused to comply with the mental assessment ordered by the court, and such refusal meant that a second internment in the Belgrade Central Prison Hospital was necessary. The Chamber recalls that the applicant's complaint to the initial psychiatric assessment was never dealt with (see paragraph 26 above) and as such he refused to comply until heard by the court. The Chamber finds that the applicant was detained for a period of five months for psychiatric assessment, but it cannot be said that this period was solely due to applicant. The Chamber therefore concludes that the applicant partially contributed to the delay caused by the second period of psychiatric assessment.

184. Thirdly, the conduct of the relevant national authorities plays an important part in determining the reasonableness of any delay. The Chamber firstly notes that, as conceded by the respondent Party, a large portion of the delay was due to the domestic courts being unable to effectively deal with the case.

185. The Chamber recalls that in *Majaric v. Slovenia* (Eur. Court HR, judgment of 8 February 2000, paragraph 39) the European Court stated that the workload of the court is not a reason for long delays and in *Ledonne (No. 2) v. Italy* (Eur. Court HR, judgment of 12 May 1999, paragraph 23) the European Court stated that Article 6, paragraph 1 imposed on Contracting States the duty to organise their judicial system in such a way that their courts can meet the requirement to hear a case within a reasonable time. Furthermore, in *Zimmerman & Steiner v. Switzerland* (Eur. Court HR, judgment of 13 July 1983, Series A no. 66, paragraphs 27-32) the European Court stated that the administrative and judicial organisation referred equally to the appointment of additional judges or administrative staff. The European Court further stated in *Ledonne (No. 2)* that in a straightforward case, a period of inactivity of one year is unduly long and amounted to a violation of the reasonable time requirement.

186. Therefore, the argument that insufficient personnel at the Court of Second Instance in Srpsko Sarajevo meant that the case was delayed from 20 December 1996, when the retrial was ordered, until 14 May 1998, when the retrial started, will not absolve the respondent Party of its responsibility. The Chamber finds that the relevant authorities did contribute to this delay. The Court of Second Instance in Srpsko Sarajevo submitted requests on 19 May 1997, 9 June 1997 and 3 October 1997 requesting the Supreme Court to transfer jurisdiction to an alternative Court of Second Instance in Republika Srpska. Whilst the Supreme Court rejected these requests and the Court of Second Instance in Srpsko Sarajevo renewed them there was no progress in the applicant's case.

187. The Chamber therefore concludes that the respondent Party violated the applicant's right to be tried within a reasonable time as guaranteed under Article 6, paragraph 1 of the Convention.

e. Article 6, paragraph 3(c) of the Convention

188. Article 6, paragraph 3(c) of the Convention provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> > "(c) to defend himself…through legal representation of his own choosing or, if he has not sufficient means to pay legal assistance, to be given it free when the interests of justice so require."

189. The applicant complains that on 18 September 1997 he informed the Court of Second Instance in Srpsko Sarajevo that he had withdrawn his defence counsel due to financial difficulties. However, he was not appointed *ex officio* legal representation as per the legal duty until 22 April 1998.

190. According to Article 70 paragraph 2 of the Code of Criminal Procedure an accused must be legally represented as from the moment an indictment is served for a criminal offence in which the accused may be sentenced to 10 years imprisonment or for a more severe penalty. The Chamber recalls that the applicant was charged with murder under Article 36 of the Criminal Code, which provides a sentence under paragraph 1 of that provision of not less than 5 years, and under paragraph 2 of that provision of not less than 10 years. Therefore the applicant was a person who 'risked' being sentenced to 10 years imprisonment or more. Furthermore, under Article 70 paragraph 4 of the Code of Criminal Procedure, it is the duty of the president of the court to appoint to the accused legal representation if at any time the accused does not continue to retain his own legal representation. Furthermore, under Article 71 of the same law, even in circumstances were there are no conditions for compulsory legal representation and the accused is to be tried for an offence punishable by a sentence of at least 3 years imprisonment and the accused has requested legal representation and he is unable to afford legal representation himself he may be appointed legal representation *ex officio* by the president of the court.

191. The European Court has stated that whilst the right to legal representation is not an absolute right, it is for the domestic authorities to legislate in what circumstances the appointment of legal representation shall be appropriate. The second limb of Article 6, paragraph 3(c) states that if the

accused is unable to pay for legal representation he shall be appointed free legal assistance when the interest of justice so require. The European Court has stated that, in assessing whether there has been a violation, it should consider the applicant's means, the complexity of the proceedings, the capacity of the applicant to represent himself and the severity of the potential sentence (see Eur. Court HR, *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no.205).

192. The Chamber notes that the considerations for providing free legal assistance as outlined in *Quaranta* are not in dispute. In fact the applicant was provided with free legal assistance on 22 April 1998. However, the applicant was without any legal representation for 7 months and the respondent Party has provided no reasons for this. Furthermore, the Chamber finds that effective legal representation during this period was strictly necessary as the applicant's retrial proceedings were transferred from the Court of Second Instance in Srpsko Sarajevo to the Court of Second Instance in Bijeljina and he was forced to submit numerous appeals as to his detention to the Court of Second Instance and the Supreme Court without legal representation.

193. In conclusion, the Chamber finds that there has been a violation of Article 6 paragraph 3(c) of the Convention in this respect.

f. Article 8 of the Convention: Right to respect for private and family life and correspondence

194. Article 8 of the Convention provides:

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

195. The applicant complains that his rights as guaranteed under Article 8 have been violated in two respects. Firstly, the applicant complains that his right to respect for family life was violated as a result of being transferred from the Pre-trial Section of the District Prison in Srpsko Sarajevo to the Pre-trial Section of the District Prison in Bijeljina, thus preventing him from maintaining any kind of family life during his prolonged detention. Secondly, the applicant complains that the prison authorities interfered with his right of access to a telephone and right to correspondence, by intercepting both incoming and outgoing mail. In this respect, he states that all pre-trial detainees were prevented from corresponding with persons outside of the prison. The applicant further states that it was not until the IPTF visited him during August 1997 that his mail was delivered to the Ombudsperson. He further states that during his detention at Bijeljina it was not until he went on a hunger strike that his right to correspondence was reinstated. The Chamber notes that these complaints are an extension of his complaint under Article 3 of the Convention in that as a result of his isolation from his family he was detained in such conditions that amounted to inhuman treatment.

196. The Chamber observes that imprisonment by its very nature has a profound impact on a prisoner's private and family life. The European Court has stated that whilst such conditions often invoke important consideration of the rights under Article 8, existing prison rules and procedures provide guidelines on family visits, prison association, correspondence and access to a telephone. Should such prison rules restrict the contact of a person with the outside world to an extent which is not necessary, in a democratic society, in the interests of public safety, for the prevention of disorder or crime or any other reason provided by paragraph 2 of Article 8, they may be deemed incompatible with the Convention. Whilst many applications by prisoners to the European Commission and Court of Human Rights under Article 8 have failed, the European Court has recognised that it is an essential part of both private and family life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as is practicable, with a view to facilitating their rehabilitation and eventual release. However, meeting this obligation will only exceptionally require the transfer of a prisoner from one prison to another (see e.g., Eur. Commission HR, *Ouinas v. France*, no.

13756/88, decision of 12 March 1990, Decisions and Reports 65, p.265). The Strasbourg approach shows a consistent pattern of finding that such an interference is present, but going on to find that such an interference is justified under paragraph 2 of Article 8.

197. The respondent Party submits in its written observations of 16 August and 30 September 2002 that the applicant was detained at the Pre-trial Section of the District Prison in Srpsko Sarajevo from his arrest until 6 August 1996. He was subsequently transferred to the Srbinje Correctional Institution to serve his sentence imposed by the Court of First Instance in Sokolac. On 22 August 1997 he was returned to the Pre-trial Section of the District Prison in Srpsko Sarajevo as his conviction had been overturned by the Court of Second Instance in Bijeljina. On 21 July 1998 the applicant was transferred to the Pre-trial Section of the District Prison in Bijeljina as his case had been transferred to the Court of Second Instance in Bijeljina and on 18 October 2000 he commenced serving his sentence imposed by the Supreme Court. He was released on 20 March 2002.

198. The respondent Party further maintains that the applicant was released on authorised leave from his detention at the District Prison in Bijeljina sixteen times, thus amounting to a total of 96 days and was visited on numerous occasions by members of his family. The respondent Party maintains that the prison records confirm this. Furthermore, the respondent Party notes that during the applicant's detention at the District Prison Bijeljina he failed to submit any formal request to be transferred to a prison closer to his family.

199. In relation to the applicant's complaint of the interference with his right to correspondence, the respondent Party states that this is untrue. The applicant was provided with free access to a telephone and his mail was never, at any stage, obstructed or interfered with in any way. Again the prison records confirm this.

200. On examination of the internal memorandum of the IPTF written by the officer who had visited the applicant, it appears that no complaint was made concerning the alleged interference with his right to correspondence. The Chamber further notes that the applicant complains that his correspondence was not delivered to the Ombudsperson until the IPTF visited him. However, it appears that the applicant lodged his application with the Ombudsperson on 12 March 1997 and was not in fact visited by the IPTF until August 1997. The Chamber recalls, from the respondent Party's observations of 30 September and 16 August 2002, that the prison records reflect the applicant's complaints to be untrue. The Chamber is inclined, in the absence of specific proof to the contrary, to accept the respondent Party's submissions. The applicant has therefore failed to substantiate his allegations that he was totally deprived of his right to correspondence, by an interference with his mail and/or use of a telephone.

201. In relation to his detention in Bijeljina, the Chamber considers that the applicant's separation from his family during his detention at the District Prison in Bijeljina amounts to an 'interference' within the meaning of Article 8 of the Convention (see e.g., Eur Commission HR, *Wakefield v. United Kingdom* decision of 1 October 1990, Decisions & Reports 66, p.251 at p.255). However, the Chamber must go on to consider whether the interference was compatible with paragraph 2 of Article 8 of the Convention.

202. The Chamber recalls that the applicant's transfer to Bijeljina was a result of the jurisdiction of his retrial being transferred to Bijeljina by the Supreme Court and his subsequent detention ordered by a valid conviction. The Chamber finds therefore that this was in accordance with law and pursued the legitimate aim of bringing the applicant before the competent legal authority and subsequently the enforcement of a sentence handed down by the competent legal authority (see the above-mentioned *Ouinas* decision, p.265 at p.277). The Chamber must now go on to consider whether it was necessary in a democratic society and whether the legitimate aim pursued was proportionate.

203. It is noted that up until the procedural decision of the Supreme Court on 22 May 2000 the applicant's case remained pending before the domestic organs and it was necessary for him to be detained in close proximity to where his case was being heard, namely Bijeljina. However, once his sentence had been handed down there was nothing to prevent the authorities from transferring the applicant to an alternative detention facility closer to his family.

204. Nonetheless, the Chamber must assess this in light of relevant circumstances. In particular the Chamber takes note of the fact that the applicant was detained in Bijeljina from 21 August 1998 until 20 March 2002 and during that time he spent a total of 96 days on authorised leave from the prison and was visited on numerous occasions by members of his family. Taking into account all possibilities to keep contact with the outside world, including correspondence, family visits and authorised leave, the interference with his family life by not transferring him to Srpsko Sarajevo was within the margin of appreciation of the respondent Party and can be considered as proportionate.

205. The Chamber therefore concludes that there has been no violation of Article 8 in this respect.

IX. REMEDIES

206. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the breaches of the Agreement which it has found, "including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures".

207. In his application the applicant requested, in addition to compensation, the following:

1. to order the respondent Party to follow the recommendations of the Ombudsperson's report of 9 April 1998;

2. to transfer the case to a court with full jurisdiction;

3. to order the Republika Srpska to issue a lawful order by which his continued detention would be determined;

4. to instruct the applicant on his rights and freedoms as guaranteed under the Dayton Peace Agreement;

5. advise him as to how he may publicise his complaints to the media; and

6. advise him as to how he may bring a civil suit against the authorities of the Republika Srpska before an International Court of Human Rights.

208. The Chamber does not consider the remedies requested by the applicant, with the exception of compensation, to be appropriate to the violations established by the Chamber.

209. As to the issue of compensation, the Chamber notes that the applicant requested that the respondent Party be ordered to compensate him for pecuniary and non-pecuniary damage. He claims a total of 700 KM per month until the realisation of his pension plus 35,280 KM for loss of contribution payments as a result of detention. He claims an additional 3,000 KM for the loss of the right of a terminal wage and 15,000 KM for decreased life capability and labour capacity. He further claims 35,000 KM for non-pecuniary damage.

210. The respondent Party considers the applicant's request for compensation ill-founded and unsubstantiated. It further notes that the Strasbourg Court stated in *Wassink v. Netherlands* (Eur. Court HR, judgment of 27 September 1999, Series A No. 185-A) that the courts were entitled to award compensation depending on a "real existence of damage as a consequence of the violation of Article 5". In the present application the respondent Party submits that there has been no "real existence of damage".

211. The Chamber firstly notes that the applicant was convicted of murder by a valid court judgment and was sentenced in accordance with domestic law reflecting the level of culpability according to domestic law. The time spent by the applicant in detention before and during trial was counted fully towards his sentence. Therefore, any remedies that the Chamber orders must take this into consideration. However, the Chamber stresses that this in no way diminishes the respondent Party's responsibility in the violations committed against the applicant.

212. The Chamber notes that it has found that the applicant has suffered violations of his right to liberty and security of person (Article 5, paragraph 1(c)), his right to be tried within a reasonable time or to release pending trial (Article 5, paragraph 3), his right to take proceedings by which the lawfulness of his detention shall be decided speedily by a court (Article 5, paragraph 4), his right to a trial within a reasonable time ((Article 6, paragraph 1) and his right to legal representation (Article 6, paragraph 3(c)). In relation to the violation of Articles 5(1)(c) and 5(3) the Chamber finds that due to the fact that these periods of detention counted towards the applicant's final sentence, finding a violation is just satisfaction.

213. However, the Chamber finds that the violations found with regards to Article 5, paragraph 4 for the periods from 20 February 1997 to 9 September 1997 and from 9 November 1997 to 23 July 1998, and Article 6, paragraph 3(c) for the period from 18 September 1997 to 22 April 1998, taken together, indicate that during this period the applicant was unable to challenge the legality of his detention. Furthermore, the Chamber has found that the overall length of the proceedings was unreasonable under Article 6, paragraph 1. In light of the above, the Chamber finds it appropriate, taking the established violations in general terms, to award the applicant compensation for non-pecuniary damage in the amount of 3,000 KM. This amount is to be paid within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

214. The Chamber further awards simple interest at an annual rate of 10% as of the date of expiry of the one-month period set in paragraph 213 above for the implementation of the compensation awards in full or any unpaid portion thereof until the date of settlement in full.

X. CONCLUSIONS

215. For the above reasons, the Chamber decides,

1. unanimously, to declare the application in relation to the complaints under Articles 5, 6, and 8 of the European Convention on Human Rights admissible;

2. unanimously, to declare the remainder of the application inadmissible;

3. unanimously, that, in the absence of judicial review at two month intervals, the applicant's detention for the periods from 20 February 1997 to 9 September 1997 and from 9 November 1997 to 23 July 1998 was not in accordance with a procedure prescribed by law within the meaning of Article 5, paragraph 1(c) of the European Convention on Human Rights, thus constituting a violation of that Article, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, that the period of the applicant's detention from 14 December 1995 until 22 May 2000 constitutes a violation of his right to be tried within a reasonable time or released pending trial as guaranteed by Article 5 paragraph 3 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, that for the period from 20 February 1997 to 9 September 1997 and for the period from 9 November 1997 to 23 July 1998 the applicant was prevented from taking proceedings by which the lawfulness of his detention could be decided speedily by a court, thus violating the applicant's rights as guaranteed under Article 5, paragraph 4 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

6. unanimously, that the duration of the applicant's trial from 14 December 1995 to 22 May 2000 exceeded the limits of reasonableness, thus violating his right to be tried within a reasonable time as guaranteed by Article 6, paragraph 1 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

7. unanimously, that there has been no violation of the applicant's right to a fair and public hearing by an independent and impartial tribunal established by law as guaranteed under Article 6, paragraph 1 of the European Convention on Human Rights;

8. unanimously, that the applicant was not provided with free legal representation for a period of 7 months as guaranteed under Article 6, paragraph 3(c) of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

9. unanimously, that there has been no violation of the applicant's right to respect for private and family life and his correspondence as guaranteed under Article 8 of the European Convention on Human Rights;

10. unanimously, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 3,000 KM (three thousand Convertible Marks) by way of compensation for non-pecuniary damage;

11. unanimously, to dismiss the remainder of the applicant's claim for compensation;

12. unanimously, that simple interest at an annual rate of 10% (ten percent) will be payable on the sum awarded in conclusion 10 above from the expiry of the one-month period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

13. unanimously, to order the Republika Srpska to report to it within three months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel