DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/02/12336

Branko ŠUBARIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 6 May 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. On 23 December 1997 the applicant was arrested on the suspicion of killing Milenko Perić, his distant cousin, in Bijeljina, the Republika Srpska. It is undisputed that the applicant went to the Milenko Perić's house armed with an automatic rifle. Knowing that R.Đ., V.Đ. and M.P. were also there, he states that he intended to take them to the police, because of an earlier dispute over his car. The applicant maintains that he did not intend to kill anyone, but only fired a few shots in the air to get R.Đ, V.Đ and M.P. to come out of the house. On 10 June 2002, the Supreme Court of the Republika Srpska issued a final and binding decision declaring the applicant guilty of murder and sentencing him to nine years of imprisonment.

2. The applicant complains of various violations of his rights in relation to his detention, trial and sentence. The application raises issues primarily in connection with paragraphs 1 and 3 of Article 5 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced to the Chamber on 15 October 2002 and registered on the same day. The applicant was initially represented before the Chamber by Mr. Živorad Vujović, a lawyer practicing in Bijeljina. In his original submission, the applicant requested the Chamber to order the respondent Party, by way of a provisional measure, to release him from custody until the Chamber issued its final and binding decision in his case.

4. On 3 December 2003, the Chamber rejected the applicant's request for a provisional measure and decided to transmit the application to the respondent Party for its observations on the admissibility and merits under Articles 3, 5 and 6 of the Convention. On 13 January 2004 the Republika Srpska submitted its observations on the admissibility and merits, which were forwarded to the applicant.

5. On 4 and 5 March; 22, 28 and 29 April; and 3 and 5 May 2004, the respondent Party submitted additional information upon the requests of the Commission, which was also forwarded to the applicant. On 24 May 2004 the respondent Party submitted an additional factual clarification at the Commission's request.

6. The applicant submitted his comments on the observations of the respondent Party on 23 March 2004. At the same time he submitted a letter of authorisation for Mr. Momir Radulović, a lawyer practicing in Bijeljina, to represent him before the Commission, because his earlier representative died.

III. ESTABLISHMENT OF THE FACTS

7. On 23 December 1997, at approximately 16:00, Milenko Perić was shot dead in his home located at Ulica Banja Lučka 21 in Bijelina, the Republika Srpska. The police detained the applicant on the same day at approximately 17:00 on the reasonable suspicion of having participated in the murder of Milenko Perić.

8. On the same day, the Ministry of Interior Police Station in Bijeljina (*Ministarstvo unutrašnjih poslova Centar Javne Bezbjednosti Brčko, Stanica Javne Bezbjednosti Bijelina*) issued a procedural decision (*rješenje*) authorising the detention (*odrejuje se pritvor*) of the applicant for three days based on the reasonable suspicion (*osnovana sumnja*) that he committed the offence of murder as defined by Article 36, paragraph 2, sub-paragraph 2 of the Criminal Code of the Republika Srpska—Special Part ("Criminal Code") (see paragraph 72 below). In the explanation, it is noted that the applicant is suspected of the murder of Milenko Perić, and at the same time, that he endangered the lives of three other persons who were in the vicinity of the victim. Thus, the

conditions for mandatory detention as set forth in Article 191, paragraph 1 of the Code of Criminal Procedure of the Republika Srpska ("Code of Criminal Procedure") were met (see paragraph 81 below).

9. On 25 December 1997 Dr. Ljubomir Curkić, a forensic medical expert, performed an autopsy on the victim's body.

10. On 26 December 1997 the investigative judge of the District Court in Bijeljina (*Okružni sud u Bijeljini*) ("the Court") questioned the applicant and two of the other persons who were in the house with the victim. The investigative judge issued a procedural decision ordering the opening of an investigation and also ordering the applicant's detention for a period of one month, beginning on 23 December 1997, in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure, which provided for mandatory detention in cases where the crime carries the sentence of the death penalty or imprisonment of ten years or more. The Public Prosecutor noted that the applicant had admitted during questioning that he went to the house of Milenko Perić knowing that R.Đ. and V.Đ. were there, and that he fired shots in the air yelling at all of them to come out so he could take them to the police station. From the evidence submitted, the investigative judge concluded there was a reasonable suspicion that the applicant committed the crime of murder as defined by Article 36, paragraph 2, sub-paragraph 2, which carries a sentence of a minimum of ten years imprisonment (see paragraph 72 below).

11. On 23 January 1998 the Court issued a procedural decision (*rješenje*) ordering the applicant's detention based on Article 191, paragraph 1 of the Code of Criminal Procedure for a maximum period of two months, or until 23 March 1998. The applicant did not appeal this decision.

12. On 17 March 1998 the District Public Prosecutor's Office in Bijeljina (*Okružno javno tužilaštvo*) indicted the applicant for murder in accordance with Article 36, paragraph 2, sub-paragraph 2 of the Criminal Code (see paragraph 72 below).

13. On 19 March 1998 the Court issued a procedural decision again ordering the applicant's detention, in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure. The Court determined that the applicant's detention was warranted because the applicant was indicted for a crime for which the minimum sentence was ten years. The applicant did not appeal, and therefore the decision became final and binding on 22 March 1998.

14. The first hearing was scheduled for 21 May 1998, but it was postponed because the President of the panel of judges hearing the applicant's case was required to be present at an exhumation. The hearing was re-scheduled for 6 July 1998.

15. Between 22 May 1998 and 6 July 1998 the applicant was held in detention without any decision authorising his detention.

16. The first hearing was held on 6 July 1998. The applicant was present and represented by defence counsel, Messrs. Londrović and Kaurinović. The victim's mother (*oštećena*) was present and represented by Mr. Marković. At this hearing five witnesses testified. The applicant requested that the Court obtain the minutes taken at the scene of the crime (*zapisnik o uviđaju*). The mother of the victim requested that the neuro-psychiatrist Dr. Kovačević examine the accused. The Court agreed to both of these requests. The applicant also requested that he be released from detention, given that none of the witness testimony provided any support for his continued detention and because a significant amount of time had already passed since the event, such that his release would not cause any public disturbance. The Public Prosecutor and the victim's mother objected to the applicant's release. Without providing any reasons, the Court ordered the applicant's detention in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure. This decision became final and binding on 9 July 1998, because the applicant did not submit an appeal.

17. On 9 September 1998 the decision authorising the applicant's detention expired, and the next decision authorising his detention was issued on 10 September 1998 (see paragraph 19 below). On the same day, the Court received the minutes taken at the scene of the crime by the investigating judge.

18. On 10 September 1998 a hearing was held during which neuro-psychiatrist Dr. Ratko Kovačević testified, and he submitted his written statement to the Court. Dr. Kovačević stated that the accused did not suffer from any mental illness but that he displays symptoms of "over-estimation of self" (*precijenjene ideje*), which, at the time of the crime, contributed to his inability to weigh the consequences of his actions. The applicant requested an additional neuro-psychiatrist examination and appointment of a forensic medical expert to review the witness statements and the autopsy. The victim's mother requested that Dr. Jovan Marić be appointed to conduct a new neuro-psychiatric examination of the accused. The applicant requested that he be released from detention, because the death penalty was no longer permitted and thus mandatory detention in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure was not warranted. The Public Prosecutor objected to the accused's proposals and in particular asserted that detention was still warranted in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The Court decided to order the neuro-psychiatrist Dr. Marić to examine the accused, and in particular to determine his mental state at the time of the crime.

19. Also on 10 September 1998, the Court issued a procedural decision ordering the applicant's detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The Court noted the following: (1) that the applicant had earlier worked in Germany; (2) that the case concerned a crime for which the minimum sentence is ten years or more; and (3) that the applicant opened fire in an area with a number of persons around. The Court concluded that the applicant's release could upset the victim's family and bring public unrest to the community of Bijeljina. The applicant did not appeal this decision, and it became final and binding on 13 September 1998.

20. On 6 November 1998 a hearing was held where the neuro-psychiatrist Dr. Marić testified that the accused displayed some paranoid affect, but that he could not assess his state of mind at the time of the crime before obtaining a psychological assessment. Dr. Marić proposed Dr. Nada Janković, his colleague at the Psychiatric Institute in Belgrade (*Instituta za psihijatriju Kliničkog centra Srbije u Beogradu*) perform the assessment. The applicant objected, stating that this was an unnecessary, and that he accepted the findings of the earlier neuro-psychiatrist. The Court accepted Dr. Marić's proposal. The applicant requested that he be released from detention, because the conditions for his continued detention were no longer met. Nevertheless, the Court ordered the applicant's detention in accordance with Article 191 paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure, without specifying any reasons for the extension. The applicant did not appeal this decision, and thus it became final and binding on 9 November 1998.

21. On 21 November 1998 Drs. Marić and Janković submitted their written findings to the Court.

22. A hearing was scheduled for 3 December 1998. On 2 December 1998, the applicant submitted a written request to the Court to postpone the hearing because his defence counsel was unable to attend. The hearing was postponed until 25 December 1998.

23. On 25 December 1998 a hearing was held where the applicant requested the reconstruction of the crime scene with a forensic medical expert and a ballistic forensic expert present. He also requested that the forensic medical expert who conducted the autopsy on the victim's body testify. The Court rejected the applicant's request regarding the reconstruction of the crime scene, determining that the facts did not warrant the expense, and nothing new would be learned, but it accepted the proposal to call the forensic medical expert. The applicant requested to be released from detention, stating that the reasons for his detention no longer existed. The Public Prosecutor and the victim's mother objected. The Court decided to order the applicant's

detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The applicant did not appeal this decision, and it became final and binding on 28 December 1998.

24. On 26 February 1999 a hearing was held where the forensic medical expert Dr. Curkić testified. Again the applicant requested the reconstruction of the crime scene in the presence of two forensic experts, which was accepted by the Court. The applicant requested that he be released from detention, stating that the reasons for his detention no longer existed and that the testimony given to date called into question the legal qualification of the crime. The applicant proposed to post bail in the amount of 30,000 Deutsche Marks (DM). The Court rejected the applicant's request and again ordered his detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The applicant did not appeal this decision, and it became final and binding on 1 March 1999.

25. On 5 March 1999 the forensic ballistic expert Mr. Zoran Jovanović of Belgrade performed a reconstruction of the crime scene. The applicant and his legal representatives were also present. The forensic ballistic expert submitted his written findings to the court.

26. On 1 May 1999 the decision authorising the applicant's detention expired, but the applicant continued to be detained without any decision authorising his detention until 10 February 2000.

27. On 25 May 1999 the Republika Srpska Ministry of Interior Criminal Science Institute in Banja Luka ("Criminal Science Institute") (*Institut Kriminalističke tehnike MUP-a Repbulike Srpske Banja Luka)* submitted a report to the Court on the bullet uncovered during the reconstruction of the crime scene.

28. On 9 June 1999 the applicant submitted an application to be released from detention to the Court on the grounds that the reasons given for his detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure had ceased to exist. The applicant also stated that, should the Court believe that there still exists the risk of flight, he was ready to submit bail in the amount of 30,000 DEM and pledge that he would not leave his place of habitual residence without the permission of the Court. The applicant pointed out that the lawful two-month period of his detention had expired, and that a procedural on detention had not been issued, despite the Court being *ex officio* required to do so. The applicant further asserted that a considerable amount of time had passed since the events in question, and that there was no evidence that his release would in any way pose a threat to public order. Furthermore, he asserted that he posed no risk of fleeing the country because he is a citizen of the Republika Srpska with his place of permanent residency in Bijeljina, his work visa for Germany and his passport had expired, and his passport had been taken away from him.

29. On 14 June 1999 the Court issued a procedural decision (*rješenje*) rejecting the applicant's application to be released from detention. The Court found that detention was warranted because the circumstances from the time of issuing the previous decision on detention had not changed. The Court considered that the applicant posed a risk of flight because he had previously worked in Germany. The Court also considered the manner in which the crime was committed and the possible minimum sentence, and it concluded that his release could cause public unrest and upset the victim's family. As to the offer to post bail (*jemstvo*), the Court noted that this could be considered if the only reason for his continued detention was the risk of flight, which was not herein the case. The applicant received the decision on 15 June 1999, and an appeal against such decision is not permitted. The decision made no mention of ordering the applicant's continued detention.

30. On 12 August 1999 the applicant requested that the President of the panel of judges, Judge Milena Zorić, be recused from his case. The Court therefore postponed the hearing that was scheduled for 13 August 1999.

31. On 18 August 1999 the Court issued a procedural decision refusing the applicant's request for the recusal of Judge Zorić. The Court first noted the applicant's stated reasons for the request: (1) the minutes of the crime scene were not made available until the trial was well underway; (2) the reconstruction of the crime scene was not performed until almost a year after he first made such request; (3) the bullet found at the crime scene was handed over to the competent officials without his presence or notice; (4) his detention was not timely reviewed every two months; and (5) the reasons for his detention were not reviewed. The Court conceded that there was a delay in obtaining the crime scene report, and that the applicant's detention was not timely reviewed every two months, but it held that this in no way indicated that Judge Zorić was biased or in any way incapable of fairly trying the applicant.

32. On 1 October 1999 a main hearing was scheduled, but it was postponed when the applicant withdrew the authorisation for his legal counsel shortly before the hearing. He re-engaged the same legal counsel within the eight-day time limit set by the Court.

33. On 17 January 2000 the applicant again requested the recusal of the President of the panel of judges and also requested the recusal of the President of the Court. The request for the recusal of the President of the Court was forwarded to the Supreme Court of the Republika Srpska ("the Supreme Court").

34. On 19 January 2000, the applicant submitted to the Court an application to be released from detention, identical to the one he submitted on 9 June 1999.

35. On 20 January 2000 the Court issued a procedural decision rejecting the applicant's application for release of 19 January 2000. The Court observed that the last decision on detention was issued on 14 June 1999,[1] and that reasons still existed for the applicant's detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The Court also noted that the offer of bail could only be considered if the risk of flight was the only reason for the applicant's continued detention, which it was not.

36. On 2 February 2000 the Supreme Court sent a letter to the Court regarding the request for the recusal of the President of the Court. The Supreme Court noted that such a request was not allowed according to the law. The Supreme Court also observed that the proceedings had been pending for an unacceptably long time and that the Court had not respected Article 199 of the Code of Criminal Procedure in relation to the requirement to review the applicant's detention every two months. The Supreme Court concluded that the Court must work on the case more intensively in order to finalise the proceedings.

37. On 10 February 2000 the Court issued a decision ordering the applicant's detention as ordered by the previous decision of 14 June 1999.[2] The Court considered the following: (1) the risk that the applicant may abscond to Germany, (2) that the minimum sentence for the crime charged is ten years imprisonment, (3) the manner in which the crime was committed (in broad daylight firing on his cousin with other people in the near vicinity); and it concluded that the applicant's release could cause unrest in the community of Bijeljina, and particularly for the victim's family. The Court ordered the applicant's detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure.

38. The applicant received the decision of 10 February 2000 on 25 February 2000, and he appealed this decision to the Supreme Court on 28 February 2000. The applicant asserted that

[1] The Commission notes that it has determined that no decision on detention was issued on 14 June 1999, but rather a decision rejecting the applicant's application to be released from detention (see paragraph 29 above).

[2] Again the Commission notes that no decision on detention was issued on 14 June 1999, but rather a decision rejecting the applicant's application to be released from detention (see paragraph 29 above).

the Court did not sufficiently assess the reasons for his detention, and pointed out that he had been in detention for over two years and that the victim's family was living in Austria, so his release would not disturb the public order or the victim's family. The Court also failed to recognise that he had his house and family in Bijeljina, and that the Bijeljina Police Station held his passport.

39. A hearing scheduled for 21 February 2000 was postponed due to the applicant's 17 January 2000 request for the recusal of the President of the panel of judges and the President of the Court (see paragraph 33 above).

40. On 1 March 2000 the Supreme Court issued a procedural decision rejecting the applicant's request for the recusal of the President of the District Court in Bijeljina as ill-founded.

41. On 9 March 2000 the Court issued a procedural decision refusing to recuse the President of the panel of judges, relying on Article 42 paragraph 4 of the Code of Criminal Procedure (see paragraph 78 below). The Court noted that the same request had been made on 18 August 1999 and rejected by the President of the Court, and that no new reasons were presented in this request. The Court also took into consideration the 2 February 2000 letter from the Supreme Court of (see paragraph 36 above).

42. On 23 March 2000 the Supreme Court issued a procedural decision rejecting the applicant's appeal against the 10 February 2000 decision on continued detention as ill-founded. The Supreme Court found that: (1) the applicant's detention was warranted, taking into consideration that the minimum sentence for the crime with which the applicant is indicted is ten years; (2) the manner in which the crime was committed; and (3) that his release from detention could disturb the public. The Court concluded that the applicant's detention was necessary for reasons of public security and to avoid any disruptions to the criminal proceedings, in accordance with Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure. This decision became valid on its date of issuance.

43. On 10 May 2000 the Court issued a decision ordering the applicant's detention in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure because the accused was suspected of a crime that carries a minimum sentence of ten years. The Court also referred to the letter from the Supreme Court of 23 March 2000 in deciding to extend his detention.[3] The applicant received the decision on 11 May 2000 and he did not appeal; therefore it became final and binding on 14 May 2000.

44. On 26 May 2000 a hearing was held where the forensic ballistic expert (*vještak balističar*) Mr. Zoran Jovanović testified. The Public Prosecutor requested a new forensic ballistic examination, and that the weapon used be obtained from the Stabilisation Forces ("SFOR"), and submitted for forensic analysis. The applicant requested that the clothing of the victim be analysed, and he proposed that he be released from detention because the reasons for his detention no longer existed. The applicant noted that mandatory detention was not necessary because the death penalty was no longer in force, and he also pointed out that it had been shown that he suffered from diminished capacity to reason at the time of the crime. The Court agreed to request SFOR to furnish the weapon and to submit it, along with the victim's clothing, to the Institute for Ballistics in Belgrade (*Institu za balistiku*), but it rejected the applicant's request to be released from detention.

45. On 10 July 2000 another hearing was held where the Court announced that the Republika Srpska Ministry of Interior had informed it that weapons could not be taken across the border into Serbia and Montenegro, such that the forensic analysis could not be conducted at the Institute for Ballistics in Belgrade. The Public Prosecutor proposed that the entire criminal file be submitted to the Criminal Science Institute. The Court agreed to request the Criminal Science Institute to submit a forensic report on the entire criminal file.

[3] The letter of 23 March 2000 was not submitted to the Commission.

46. Also on 10 July 2000, the Court issued a decision ordering the applicant's detention in accordance with Article 191, paragraph 1 of the Code of Criminal Procedure. On 11 July 2000 the applicant and one of his legal counsel submitted separate appeals against this decision to the Supreme Court.

47. On 20 July 2000 the Supreme Court issued a procedural decision rejecting the applicant's appeal against the 10 July 2000 decision as ill-founded, but accepting the appeal of the applicant's representative. The Supreme Court held that the applicant's detention could not be based on Article 191, paragraph 1 of the Code of Criminal Procedure because the possibility existed to decrease the applicant's sentence based on the neuro-psychiatrists' and psychologist's findings. The Supreme Court quashed the decision of 10 July 2000 and ordered the lower court to consider, in renewed proceedings, whether the applicant's detention was necessary in accordance with Article 191, paragraph 2 of the Code of Criminal Procedure.

48. On 21 July 2000, in the renewed proceedings, the Court issued a procedural decision ordering the applicant's detention based on Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure. It appears that the applicant did not appeal this decision, and thus it became final and binding three days after the applicant received it. The respondent Party did not inform the Commission when the applicant received this decision, nor is it apparent from the case file.

49. On 25 September 2000 the Court issued a procedural decision ordering the applicant's detention. The Court determined that valid reasons for his detention still existed and it decided to extend the detention in accordance with Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The applicant submitted an appeal against this decision to the Supreme Court on 28 September 2000.

50. On 16 October 2000 the Supreme Court issued a procedural decision rejecting the applicant's appeal against the decision of 25 September 2000, finding that the Court properly assessed that detention was required because of the manner the crime was committed, the possible threat to public security if the applicant would be released, and the possibility that he would try to flee the country. As to the applicant's complaint that his detention lasted too long, the Supreme Court noted that Article 190 paragraph 2 of the Code of Criminal Procedure requires that detention be as short as possible and that courts finalise criminal proceedings as soon as possible. The Supreme Court also noted that, in this phase of the proceedings, the detention had to be extended officially every two months, and if the trial proceedings lasted unjustifiably long, there was a possibility of engaging administrative and judicial measures to speed up the proceedings. However, because reasons for the applicant's detention still existed, he could not be released. As to the applicant's objection that the proceedings were pending for an extensively long period, the Supreme Court stated that it could not consider that issue because it was not within its competence to reason or justify the length of proceedings before the lower courts.

51. On 20 October 2000 the Criminal Science Institute submitted its written evaluation to the Court (see paragraph 45 above).

52. On 3 November 2000 a hearing was held where the ballistic forensic experts Messrs. Vranješević and Novković of the Criminal Science Institute testified. The applicant objected to the expert testimony, stating that it was contrary to the testimony of the forensic ballistic expert Mr. Zoran Jovanović. The applicant requested that a new hearing be held where all three forensic ballistic experts and a court forensic medical expert present their findings, and that a new reconstruction of the crime scene be executed in the presence of the ballistic forensic experts and the court forensic medical expert. The applicant also requested that he be released from detention, and he offered 30,000 DEM bail. The Public Prosecutor objected to these proposals. The Court rejected the proposal to call the three ballistic forensic experts to testify again, and it rejected the request to conduct the reconstruction of the crime scene because this had already

been done. The Court also refused to release the accused because his detention was authorised by the decision of 25 September 2000.

53. On 6 November 2000 the Court issued a judgement finding the applicant guilty of aggravated murder in accordance with Article 128, paragraph 1, sub-paragraph 4 of the Criminal Code of the Republika Srpska[4] and sentencing him to twelve years of imprisonment, to be calculated starting from the date of his detention on 23 December 1997 (see paragraph 73 below). On 12 February 2001 the applicant's defence counsel, Messrs. Kaurinović and Londrović, submitted an appeal on his behalf to the Supreme Court. On the same day the applicant submitted a hand-written four-page appeal to the Supreme Court, and on 16 February 2001 the applicant's defence counsel Mr. Vujović submitted an appeal to the Supreme Court.

54. On 6 November 2000 the Court issued a procedural decision authorising the applicant's detention in accordance with Article 353, paragraph 1, sub-paragraphs 6 and 7 until the judgement of 6 November 2000 became final and binding (see paragraph 86 below). The applicant appealed against this decision to the Supreme Court.

55. On 7 December 2000 the Supreme Court rejected the applicant's appeal against the decision on detention of 6 November 2000.

56. On 24 September 2001 the Supreme Court issued a judgement annulling the judgement of 6 November 2000, and returning the case to the District Court in Bijeljina for a renewed trial before a new panel of judges. The Supreme Court was of the opinion that the Court wrongly assessed the facts and incorrectly applied the material law. It appears that the applicant received this decision on 4 October 2001.

57. On 25 September 2001 the Supreme Court, issued a procedural decision authorising the applicant's detention on the basis of Article 385, paragraph 4 of the Code of Criminal Procedure. The Supreme Court stated that the applicant's detention was warranted considering the potential sentence and the manner in which the crime was committed, in accordance with Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure.

58. The applicant states that he submitted a petition to be released from detention on 24 September 2001, which was presented at the public hearing held on the same day. In this petition, the applicant submitted that the two reasons given for his detention were not well-founded. First, regarding the assertion that he would flee, the applicant stated that he had been released from prison on five occasions, and every time promptly returned to the prison facility. Furthermore, as to his passport, the applicant stated that it could be taken away from him if that was the only reason for his continued detention. Second, regarding the alleged threat to public security, the applicant stated that three years and nine months after the event, most citizens would not even remember what happened, and when hearing of the length of imprisonment, many citizens would actually support his release from prison. The applicant attached a letter of guarantee (*garancija*) from his son dated 19 September 2001 stating that he is willing to provide bail in the amount of 50,000 KM and a mortgage on his house (*zalog za kuću*) to secure his father's release from detention. The applicant also attached the written statement of his sister wherein she submitted that she was willing to guarantee her brother's release against a mortgage (*hipoteka*) of 80,000 KM. The applicant also stated that he could have another 100 citizens submit letters of guarantee for his release.

59. On 29 October 2001, in the renewed proceedings, a hearing was held where the applicant testified. The applicant requested to be released from detention, and the Court also noted a written request to that effect was in the file. The Court determined that the applicant's detention was warranted in accordance with Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure, without any further explanation or, debate on the merits of the applicant's

[4] The Court relied on the Criminal Code that came into force on 1 October 2000 (see paragraph 73 below).

written submission (see paragraph 58 above). The Court did not issue a decision specifically ordering the applicant's continued detention at this time.

60. On 8 November 2001 the High Representative issued the Decision on the Law of Amendments to the Code of the Criminal Procedure of the Republika Srpska (Official Gazette of the Republika Srpska no. 61/01), abolishing the measure of compulsory detention by deleting Article 191 paragraph 1 of the Code of Criminal Procedure.

61. On 16 November 2001 a hearing was held where the forensic ballistic experts Messrs. Vranješević, Novković, and Jovanović testified, as well as the forensic medical expert, Dr. Curkić. The applicant requested that a new forensic ballistic expert from Novi Sad or Belgrade be engaged, and that he be released from custody. The Public Prosecutor stated that he was against both proposals. The Court rejected the proposal to engage a new forensic ballistic expert, and it also rejected the proposal to release the applicant from detention, noting that this had already been decided at the previous hearing.

62. The previous decision on the applicant's detention expired on 25 November 2001, and therefore from 25 November 2001 until 7 December 2001 the applicant was held in detention without any decision authorising his detention.

63. On 7 December 2001 another hearing was held where all of the witnesses testified again. The applicant requested that another forensic ballistic report be obtained from an appropriate institute. The Court agreed to submit the evidence to the Criminal Science Institute in Belgrade (*Kriminalištko tehničkom centru MUP-a Srbije u Beogradu*). In response to the applicant's request to be released, the Court concluded that the applicant should remain in detention until the end of the trial period.

64. On 7 December 2001 the Court issued a procedural decision ordering the applicant's detention in accordance with Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure. The Court considered that the applicant was accused of murder under Article 36 paragraph 2, sub-paragraph 2 of the Criminal Code, for which the minimum sentence is ten years, and considering the circumstances in which the crime was committed, it concluded that the applicant's detention was necessary to ensure public safety. On 10 December 2001 the applicant and his defence counsel submitted separate appeals to the Supreme Court.

65. On 13 December 2001 the Supreme Court issued a procedural decision rejecting the applicant's appeals against the decision of 7 December 2001 as ill-founded deciding that the applicant's detention was warranted in accordance with Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure. Specifically, recalling that a minimum sentence of ten years imprisonment could be imposed for the crime with which the accused had been indicted, and considering the manner in which the crime was committed, the Supreme Court concluded that the applicant's detention was necessary for the orderly conduct of the investigation and to maintain the public order. Finally, the Supreme Court noted that the fact that the applicant had been held in detention for four years was not relevant to the determination of whether further detention was warranted.

66. On 13 February 2002, in the renewed proceedings, the District Court issued a judgement finding the applicant guilty of the crime of murder as defined by Article 36, paragraph 2, sub-paragraph 2 of the Criminal Code and sentencing him to ten years of imprisonment (see paragraphs 72 and 74 below). The Court found that the applicant was guilty of firing shots with an automatic rifle in front of the house of Milenko Perić and specifically towards the window where the victim was standing. In the same room were R.Đ., V.Đ. and M.P. The bullet that hit Milenko Perić fatally injured him.

67. On 13 February 2002 the Court also issued a procedural decision authorising the applicant's detention in accordance with Article 353 paragraph 6 of the Code of Criminal Procedure until the judgement of 13 February 2002 became final and binding.

68. The applicant and each of his defence counsel, as well as the Public Prosecutor, submitted separate appeals to the Supreme Court against the decision of 13 February 2002.

69. On 10 June 2002 the Supreme Court issued a judgement declaring the applicant guilty of murder as defined by Article 36, paragraph 1 of the Criminal Code and sentencing him to nine years of imprisonment (see paragraphs 72 and 74 below). The Supreme Court found that the District Court, in the renewed proceedings, had not sufficiently established that the defendant had put the lives of other people in danger. Specifically, the lower court had not mentioned the names of the other people present in the room that the defendant fired upon, nor explained how they had been directly endangered. For these reasons the Supreme Court changed the legal qualification to murder as defined by Article 36, paragraph 1 of the Criminal Code and reduced the sentence to nine years.

70. The applicant is currently serving his sentence in the detention facility (*Kazneni popravni Dom*) in Foča/Srbinje, the Republika Srpska.

IV. RELEVANT DOMESTIC LEGISLATION

A. Criminal Code

71. A new Criminal Code of the Republika Srpska entered into force on 1 July 2003 (Official Gazette of the Republika Srpska ("OG RS") no. 49/03). At the time of the applicant's arrest and initial detention, however, the Criminal Code of the Republika Srpska (Special Part) [5] was in force (OG RS nos. 15/92, 4/93, 17/93, 26/93, 14/94, and 3/96).

72. On 17 March 1998 the applicant was indicted with murder as defined by Article 36, paragraph 2, sub-paragraph 2 of the Criminal Code of the Republika Srpska (Special Part). This provision provided 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:
>
> "(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] 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".

> "(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."

73. The Republika Srpska adopted another Criminal Code that entered into force on 1 October 2000 (OG RS nos. 22/00, 33/00, and 37/01). The Court relied on this Code in issuing its judgement of 6 November 2000, whereby the applicant was found guilty of aggravated murder under Article 128, paragraph 1, sub-paragraph 4 of this Code. This provision stipulated:

> "The punishment of not less than ten years of imprisonment or life imprisonment shall be imposed on a person who:
>
> "1) deprives another person of his life in a particularly cruel or utterly insidious way;
>
> "(2) deprives another person of his life out of greed, in order to commit or cover up another criminal offence, out of unscrupulous vengeance or from other particularly low motives;
>
> "(3) whoever deprives another of life while whilst acting ruthlessly and violently;
>
> "(4) deprives another person of his life and in doing so intentionally endangers the lives of several persons;…"

74. On 13 February 2002, in the renewed proceedings before a new panel of judges, the applicant was convicted of murder as defined by Article 36, paragraph 2, sub-paragraph 2 of the Criminal Code of the Republika Srpska (Special Part). On 10 June 2002, the Supreme Court overturned this conviction and found the applicant guilty of murder in accordance with Article 36 paragraph 1 of the Criminal Code of the Republika Srpska (Special Part), (see paragraph 72 above). The respondent Party did not offer any explanation as to why the former Criminal Code of the Republika Srpska (Special Part) was used after the entry into force of the Criminal Code of October 2000.

B. Code of Criminal Procedure

75. A new Code of Criminal Procedure of the Republika Srpska entered into force on 1 July 2003 (OG RS no. 50/03). However, the previous 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, and 3/90) was applied in the Republika Srpska by the Law on Application of the Code of Criminal Procedure (OG RS no. 4/93), as later amended by the Law on Amendments of the Code of Criminal Procedure of the Republika Srpska (OG RS nos. 26/93, 14/94, 6/97, and 60/01). That Code of Criminal Procedure is applicable in this case, and the relevant provisions are cited below.

76. Article 39, paragraph 6, related to the recusal of judges, provided as follows:

> "A judge or lay judge may not perform his judicial duties in the following cases: …
>
> "(6) if circumstances exist which engender doubt as to his impartiality."

77. Article 41, also related to the recusal of judges, provided as follows:

> "(1) The parties may also seek disqualification.
>
> "(2) The parties may petition for disqualification before the main trial commences; but if they have learned of the reason for disqualification as referred to in Article 35, points 1 through 5, of this law after the main trial has begun, they shall file the motion immediately after learning of it.

"(3) The parties may include a petition for disqualification of a judge of a higher court in an appeal or in an answer to an appeal.

"(4) A party may seek disqualification of a particular judge or lay judge referred to by name who is involved in the case or of a judge of a higher court.

"(5) The party must cite in the petition the circumstances which he deems to represent legal grounds for disqualification. Reasons presented in a previous petition for disqualification which has been rejected may not be cited again in a petition."

78. Article 42 provided as follows:

"(1) The president of the court shall rule on the petition for disqualification referred to in Article 41 of this law.

"(2) If a petition seeks the disqualification of the president of the court alone or of the president of the court and a judge or lay judge, the decision on disqualification shall be made by the president of the immediately higher court; if a petition seeks the disqualification of the president of the Supreme Court of the Republika Srpska, the decision on qualification shall be made by a sitting of the court en banc.

"(3) Before the decision on disqualification is taken, a statement shall be taken from the judge, lay judge or president of the court, and other inquiries shall be conducted as needed.

"(4) No appeal is permitted against a decision granting a petition for disqualification. A decision rejecting a petition for disqualification may be contested with a specific appeal; but if this decision was made after the indictment was brought, then it can be contested only by an appeal of the verdict.

"(5) If the petition for disqualification referred to in Article 39, point 6, of this law is filed after commencement of the main trial or if it does not conform to the provisions of Article 41, paragraphs 4 and 5, of this law, the petition shall be rejected in its entirety or in part. No appeal is permitted against a decision rejecting a petition. The president of the court shall issue the decision rejecting the petition, and if the motion is made during the main trial, it shall be made by the entire panel of judges. The judge whose disqualification is being sought may participate in rendering this decision."

79. Article 186 regarding bail provided as follows:

"An accused who is to be taken into custody or who has already been taken into custody solely because of a fear that he will flee may be left at liberty or released if he personally or someone else on his behalf furnishes surety that he will not flee before the end of criminal proceedings, and the accused himself pledges that he will not conceal himself and will not leave the place where he resides without permission."

80. Article 190 provided as follows:

"(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."

81. Article 191[6] paragraphs 1 and 2 provided as follows:

> "1. Custody shall always be ordered against a person if there is a warranted suspicion that he has committed a crime for which the law prescribes a sentence of long-term imprisonment. If circumstances show that the case is such that the law prescribes a less severe sentence, custody is not necessarily ordered.
>
> "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:
>
> "(1) if he conceals himself or his identity cannot be determined or if other circumstances exist which suggest the strong possibility of flight;
>
> "(2) if there is a warranted fear that he will destroy, hide, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, fellow accused or accessories in terms of concealment;
>
> "(3) if particular circumstances justify the fear that the crime will be repeated or an attempted crime will be completed or a threatened crime will be committed;
>
> "(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."

82. Article 192 provided as follows:

> "(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

[6] The High Representative for Bosnia and Herzegovina issued a Decision on the Code of Criminal Proceedings of the Republika Srpska, which entered into force on 8 November 2001, and which quashed the measure of mandatory detention by deletion of Article 191, paragraph 1. Subsequently, paragraph 2 of Article 191 was referred to as paragraph 1 (OG RS no. 61/01).

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."

83. On 23 December 1997 the Police Station in Bijeljina issued a procedural decision authorising the applicant's detention for a three-day period. This decision was issued based on Article 196, paragraph 1, which provided as follows:

"(1) Exceptionally, custody may be ordered also by the law enforcement agency before opening the investigation if, for the establishment of identity, for the confirmation of alibi or for other reasons, it is necessary to gather essential data for conducting proceedings against the certain person, and there are reasons for the custody as stipulated in Article 191 paragraph 1 and paragraph 2, sub-paragraphs 1 and 3 of this Law and in the case under Article 191 paragraph 2, sub-paragraph 2 of this Law – only if there is a warranted fear that this person will destroy traces of the criminal act.

"(2) A law enforcement agency may order custody also if the investigative judge entrusted it other investigation actions (Article 162 paragraph 4), and there are reasons for custody as stipulated in Article 191 of this Law.

"(3) Custody ordered by a law enforcement agency may last not longer than three days, starting from the moment when a person is deprived of liberty. The provisions of Article 192, paragraphs 2 and 3 of this Law are consequently applied to this custody as well. A person taken into custody may file an appeal to the panel of judges no later than within 24 hours from the time when he was presented the warrant. The panel of judges must render a decision within 48 hours from the moment it received the appeal. The appeal has no suspensive effect."

84. At the time of the applicant's arrest, Article 197, as amended read as follows:

"(1) On the basis of the investigative judge's decision the accused may be held in detention up to one month from the date of his arrest. At the end of that period the accused may be kept in detention only on the basis of a decision to extend detention.

"(2) The panel of judges (Article 23 Paragraph 6) may extend one's detention for up to two months. An appeal is permitted against the panel's decision, but the appeal shall not have suspensive effect. If proceedings are being conducted against the accused for a crime carrying a prison sentence of more than five years or a more severe penalty, a panel of the Supreme Court may for important reasons extend one's detention for up to another three months. The decision to extend detention shall be made on the argued recommendation of the investigative judge or public prosecutor.

"(3) If an indictment is not brought before the expiry of the time-limits referred to in paragraph 2 of this Article, the accused shall be released."

85. Article 199 provided as follows:

"(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."

"(3) An appeal against the procedural decision referred to in paragraphs 1 and 2 of this Article shall not stay execution of the decision.

"(4) An appeal shall not be permitted against the procedural decision of the panel of judges rejecting a proposal to order or to terminate pre-trial custody."

86. On 7 December 2000, the Supreme Court rejected the applicant's request to be released from prison following the judgement of 6 November 2000 on the basis of Article 353, paragraphs 1 and 6. This provision, in relevant part, provided as follows:

"(1) In pronouncing a verdict which sentences the accused to five 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 of judges finds that the reasons for ordering custody still remain 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 of judges 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 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."

87. The Supreme Court relied on Article 364, paragraph 1, sub-paragraph 11 in determining that a retrial in the applicant's case was warranted in its judgement of 24 September 2001. This provision provided as follows:

"(1) A substantial violation of the provisions of criminal procedure will be found:

…

(11) if the operative part of the judgement is incomprehensible, internally inconsistent or inconsistent with the reasoning of the judgement, or if the judgement has no grounds at all or if it does not cite reasons concerning the decisive facts or if those reasons are altogether unclear or contradictory to a considerable extent, or if there is a considerable discrepancy between the facts cited in the reasoning of the judgement and the facts contained in the documents or the records on testimonies given in the proceedings and the documents or records themselves."

88. Chapter XXIII of the Code of Criminal Procedure, concerning legal remedies, provided 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.

"(2) The court in the second instance may order that the new main trial before the court in the first instance be held before an entirely replaced panel of judges.

…

"(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) 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."

Article 397

"(3) In ruling on an appeal, the court may issue a procedural decision to refuse the appeal because it is either late or inadmissible, to reject the appeal as ill-founded, or to accept the appeal and alter or annul the procedural decision and if necessary return the matter for reconsideration."

V. COMPLAINTS

89. The applicant claims that the respondent Party has violated his rights protected by Articles 3, 5 and 6 of the Convention. The applicant complains that the courts did not investigate the facts sufficiently and that there was not enough evidence against him to convict him of murder. Moreover, the applicant asserts that he should have been sentenced to three years of imprisonment because he had no intention to kill anyone. In that respect, the courts wrongly applied the law because they applied Article 36 of the Criminal Code and they should have applied Article 38 – negligent homicide -- for which the possible punishment is from six months to five years. The applicant also complains that his detention pending a final and binding decision lasted too long, and that the detention was not in accordance with the law.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

90. On 22 January 2004 the respondent Party submitted its observations on the admissibility and merits of the application. Attached to these observations was a submission from the District Court in Bijeljina dated 5 January 2004, which the respondent Party identifies as an integral part of its submission.

1. As to the facts

91. The respondent Party asserts that the facts as stated in the application are disputable, insufficient, unsubstantiated, and contrary to the submission of the District Court in Bijeljina of 5 January 2004. The respondent Party particularly refers to the applicant's alleged torture and inhuman treatment.

2. As to the admissibility

92. As to the admissibility of the application, the respondent Party asserts that the application, in connection with Article 3 of the Convention, is manifestly ill-founded because the applicant did not substantiate his allegations that he was physically and mentally abused. He did not state any specific incident, nor did he address any domestic organ with this claim. The respondent Party considers the application admissible in connection with Articles 5 and 6 of the Convention.

3. As to the merits

93. With regard to Article 5 of the Convention, the respondent Party notes that the Code of Criminal Procedure, as amended by the decision of the High Representative, differentiates between detention ordered prior to, and after, the filing of the indictment. In this particular case, the detention ordered before the indictment was filed was in accordance with the law because it did not last longer than six months. As to the detention after the indictment was filed, the respondent Party notes that Article 199 of the Code of Criminal Procedure requires the detention to be ordered *ex officio* before the expiration of the two-month period of the previous decision on detention. Referring to the information submitted to it by the District Court in Bijeljina, the respondent Party admits that on three occasions the applicant's detention was extended only after the lawful time limit had expired. Specifically, the procedural decisions issued on 6 July 1998, 14 June 1999, and 20 January 2000 ordering the applicant's detention were issued after the legally prescribed time limit had expired. The applicant was thus held in detention without any decision authorising his detention, which amounts to a violation of the applicant's rights as protected by Article 5 of the Convention. As to the length of the detention, the respondent Party states that the applicant himself contributed to this because he requested the recusal of the judge, withdrew the authorisation letter for his defence counsel, and requested the postponement of hearings, among other things.

94. Although the respondent Party considers the application generally admissible as to Article 6 of the Convention, it asserts that the allegations with regard to the conduct of the proceedings are ill-founded, because the applicant was heard by an impartial and independent court. As to the applicant's allegations that the trial was not conducted within a reasonable period, the respondent Party repeats that the applicant contributed to the length of the proceedings by his own actions.

B. The applicant

95. The applicant maintains the claims in his application in full. He asserts that he was not properly tried, and that the very fact that he was held in detention for four and one half years without a final and binding judgement having been issued is in itself a form of torture. The applicant states that he tried on many occasions to contest his detention, but without success. He considers that he has exhausted all of the domestic remedies available.

96. As to the merits, the applicant asserts that his detention, without a final and binding decision being issued for four and one half years, constitutes a violation of Article 5, paragraph 1 of the Convention, regardless of whether there were formal decisions authorising his detention or not. The applicant points out that Article 190 of the Code of Criminal Procedure in force at the time required that detention must be kept to the minimum time possible. Furthermore, the detention should have only been authorised if there were substantiated reasons for it, which, he argues, was not the case. In fact, the District Court and Supreme Court never determined that the surrounding circumstances required his detention.

VII. OPINION OF THE COMMISSION

A. Admissibility

97. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

1. Manifestly ill-founded

98. In accordance with Article VIII(2) of the Agreement, … (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

a. Article 3 of the Convention

99. Article 3 of the Convention provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

100. The respondent Party asserts that the applicant's claim related to his torture and ill-treatment while in detention in connection with Article 3 of the Convention is manifestly ill-founded because the applicant has failed to substantiate this claim. The Commission notes that the applicant, in response to these observations of the respondent Party, asserts that the mere fact that he was held in detention without a final and binding decision being issued for four and one half years constitutes a form of torture.

101. The Commission notes that ill-treatment must obtain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention (see e.g., Eur. Court HR, *Ireland v. United Kingdom*, judgement of 18 January 1978, Series A no. 25, paragraph 162), and the provision will not be engaged by normal prison conditions. The Commission notes that the applicant has failed to substantiate his allegations of torture or inhuman treatment in any way. His mere detention awaiting sentencing cannot amount to torture or inhuman treatment within the meaning of Article 3 of the Convention. Therefore, the Commission 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 this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Commission therefore decides to declare the application inadmissible with respect to Article 3 of the Convention.

b. Article 6 of the Convention

102. The applicant complains that the courts have wrongly assessed the facts and incorrectly applied the substantive law. The Commission 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 11, 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). The same applies to the Commission. There is no evidence that the courts failed to act fairly as required by Article 6 of the Convention. Therefore, insofar as the applicant complains that the courts wrongly assessed the facts or misapplied the substantive law, such complaints are outside of the Commission's competence. It follows that this part of the application is manifestly ill-founded within the meaning of Article VIII(2)(c) of the Agreement.

103. The applicant also generally complains that his right to a fair trial within a reasonable time as guaranteed by Article 6 paragraph 1 of the Convention has been violated. As this aspect of Article 6 overlaps substantially with the reasonable time requirement of Article 5, paragraph 3 of the Convention, the Commission will address the reasonableness of the length of detention pending the final and binding decision in his case in connection with Article 5 of the Convention.

2. Conclusion

104. The Commission decides to declare the application inadmissible in connection with Article 3 of the Convention as manifestly ill-founded. As to Article 6 of the Convention and the fair hearing requirement, the Commission also decides to declare this complaint inadmissible as manifestly ill-founded. The Commission declares the remainder of the application admissible.

B. Merits

105. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above 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 freedoms," including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Article 5, paragraph 1 of the Convention

106. The Commission finds that the application raises issues with regard to the lawfulness of the applicant's detention, as protected by Article 5 paragraph 1 of the Convention, which in 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:
>
> …
>
> (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."

107. In determining the lawfulness of detention, the Commission must first examine whether the domestic legal provisions were followed and whether such provisions are compatible with the Convention. The Commission recalls that, in examining the lawfulness of detention, consideration must be given to whether the detention conforms with the substantive and procedural rules of domestic law, and, even if in compliance with domestic law, whether detention was nevertheless arbitrary (Eur. Court HR, *Kemmache v. France (No. 3)*, judgement of 24 November 1994, Series A no. 296-C, paragraphs 36-37).

a. Detention prior to the filing of an indictment

108. The Commission notes that the applicant was arrested on 23 December 1997 and held in pre-trial detention for a period of one month on the basis of the procedural decision of 26 December 1997 in accordance with Article 191 paragraph 1 of the Code of Criminal Procedure. On 23 January 1998, the Court issued a procedural decision authorizing the applicant's detention in accordance with Article 191 paragraph 1 of the Code of Criminal Procedure. On 17 March 1998, the indictment was filed, at which time his detention was governed by Article 199 of the Code of Criminal Procedure. Accordingly, during the period leading up to the filing of an indictment on

17 March 1998, the applicant's detention was in accordance with a procedure prescribed by domestic law.

b. Detention subsequent to the filing of an indictment

109. The Commission recalls that in accordance with Article 199 of the Code of Criminal Procedure (see paragraph 85 above), once a bill of indictment has been filed, detention may only be extended or terminated by a decision of the panel of judges at the expiry of the two-month period from which the last decision became valid, and the panel of judges must review whether grounds still exist for continued detention.

110. The respondent Party states that the domestic laws regarding the applicant's detention were not respected on three occasions, and concludes that the applicant's rights in connection with Article 5 of the Convention were violated. In making this conclusion, the respondent Party referred to the submission of the District Court in Bijeljina of 5 January 2004 where the President of the Court states, "it is important to state that on three occasions the detention was extended after the expiry of the two months". Specifically, the respondent Party states that the decisions issued on 19 March 1998, 14 June 1999, and 10 February 2000 expired without the next decision on detention having been timely issued.

111. Based on information obtained from the respondent Party, the Commission observes that decisions on the applicant's detention were issued on the following dates:

1. 19 March 1998, which became valid on 22 March 1998, thereby expiring on 22 May 1998;

2. 6 July 1998, which became valid on 9 July 1998, thereby expiring on 9 September 1998;

3. 10 September 1998, which became valid on 13 September 1998, thereby expiring on 13 November 1998;

4. 6 November 1998, which became valid on 9 November 1998, thereby expiring on 9 January 1999;

5. 25 December 1998, which became valid on 28 December 1998, thereby expiring on 28 February 1999;

6. 26 February 1999, which became valid on 1 March 1999, thereby expiring on 1 May 1999;

7. 10 February 2000, which the applicant appealed against and which the Supreme Court rejected on 23 March 2000, thereby expiring on 23 May 2000;

8. 10 May 2000, which became valid on 14 May 2000, thereby expiring on 14 July 2000;

9. 10 July 2000, which the applicant appealed against and which the Supreme Court accepted on 20 July 2000, and the renewed decision was issued by the Court on 21 July 2000;

10. 25 September 2000, which the applicant appealed against and which the Supreme Court rejected on 16 October 2000, thereby expiring on 16 December 2000;

11. 6 November 2000, which the applicant appealed against and which the Supreme Court rejected on 7 December 2000, thereby authorising his detention until the judgement of 6 November 2000 became final and binding, which was on 24 September 2001;

12. 25 September 2001, which became valid on the same day, thereby expiring on 25 November 2001;

13. 7 December 2001, which the applicant appealed against, and which the Supreme Court rejected on 13 December 2001, thereby expiring on 13 February 2002;

14. 13 February 2002, which authorised his detention until the judgement of 13 February 2002 became final and binding, which was on 10 June 2002.

112. The Commission recalls that Article 5, paragraph 1 of the Convention states that an individual may only be detained "in accordance with a procedure prescribed by law" and provided that such detention falls within one of the conditions contained within sub-paragraphs (a) to (f). On examination of the dates of the procedural decisions extending detention, as set out above, during the period from the filing of an indictment until the final and binding decision of 10 June 2002, the Commission agrees with the respondent Party that the authorities failed to timely review the applicant's detention, but does not find that this occurred on the dates as set forth by the respondent Party. Rather, the Commission finds that the applicant was unlawfully held in detention during the following periods:

1. 23 May – 5 July 1998, or 44 days;

2. May 1999 – 9 February 2000, or 284 days; and

3. 26 November 2001 – 6 December 2001, or 10 days.

113. The total time therefore that that the applicant was held in detention without a legal decision authorising such detention amounts to 338 days. The Commission also notes that the applicant on 9 June 1999, in his application to be released from detention, pointed out to the Court that the decision authorising his detention had expired and that the Court had failed to review his detention. Again on 19 January 2000, the applicant filed an application to be released from detention and pointed out that the decision authorising his detention had expired, and the Court did not react until 10 February 2000, following the written admonishment of the Supreme Court (see paragraph 36 above).

114. The Commission therefore finds that for the three periods specified above, totaling 338 days, the applicant was not held in detention in accordance with a procedure prescribed by law, and therefore finds a violation of Article 5, paragraph 1 of the Convention.

2. Article 5, paragraph 3 of the Convention

115. The applicant further claims that his rights as guaranteed under Article 5, paragraph 3 of the Convention have been violated.

116. 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 brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time, or to release pending trial…".

117. The Commission recalls that the purpose of Article 5, paragraph 3 of the Convention is to prevent individuals from being arbitrarily deprived of their liberty and to ensure that the period of detention following arrest is kept as short as possible (Eur. Court HR, *Schiesser v. Switzerland*, judgement of 4 December 1979, Series A no. 34, paragraph 30). In accordance with the previous jurisprudence of the Chamber, the Commission will address two issues in relation to Article 5, paragraph 3 of the Convention. First, whether the judges who authorised the applicant's detention were a "judge or other officer authorised by law" for the purposes of Article 5, paragraph 3 of the Convention. Second, whether the length of detention pending the final and binding decision was excessive, and if the detention was based on relevant and sufficient reasons (see, e.g.*,* case no. CH/01/7488 *Buzuk,* decision on admissibility and merits of 5 July 2002, Decisions July-December 2002; case nos. CH/02/11108 and CH/02/11326 *Bašić and Ćosić*, decision on admissibility and merits of 9 May 2003).

a. The requirement to be brought promptly before a judge or other officer authorised by law to exercise judicial power

118. The Commission recalls that the applicant was arrested on 23 December 1997 and brought before the investigative judge of the District Court in Bijeljina on 26 December 1997. The applicant has not complained that the length of time from his arrest until his first appearance before the judge was unduly long, and therefore, no issue as to "promptness" under Article 5, paragraph 3 of the Convention arises in this regard.

119. The next consideration is whether the judges that the applicant was brought before may be considered "a judge or other officer authorised by law to exercise judicial power" for the purposes of Article 5, paragraph 3 of the Convention. In *Schiesser* (see the above-mentioned *Schiesser v. Switzerland* judgement, paragraphs 30-31), the European Court set forth criteria for determining whether a person can be regarded as such an officer. It noted that, while the meaning of "officer authorised by law" is not the same as "judge", the former must have some of the latter's attributes:

1. independence from the executive and from the parties;

2. the officer is obliged to hear personally the applicant brought before him; and

3. there is a substantive requirement which places the officer under an obligation to review "the circumstances militating for or against detention" and to decide "by reference to legal criteria whether there are justifications for maintaining detention" and, if there are not, to order the release.

120. The Commission notes that there is no indication of a lack of independence from the executive on the part of the judges who authorised the applicant's detention, neither is it suggested that the judges failed to hear the applicant personally. Accordingly, the Commission will confine its assessment of the proceedings solely to the third criterion. In *Buzuk* (see the above-mentioned *Buzuk* decision, paragraphs 99 and 100), the Chamber stated:

> "99. The third criterion places a positive obligation on the "judge" or "officer authorised by law" to consider the reasons for maintaining detention. Moreover, it requires that the "judge" or "officer authorised by law" must have the power to discontinue detention if there are no justifications for continuing detention. In *De Jong, Baljet and Van Den Brink v. The Neth*erlands (Eur. Court HR, judgement of 4 May 1984, Series A no. 77 [paragraph 47]), the European Court of Human Rights held, referring to the requirements in *Schiesser*, that if an officer of the court lacked the power to release the applicant, then the continued detention would be unlawful in this respect. In the present case, the applicant's pre-trial detention was ordered on the basis of the then Article 183, paragraph 1 of the Code of Criminal Procedure. This provided for mandatory pre-trial detention if there existed a "warranted suspicion" that the offence had been committed. The judge was prevented from considering the elements contained in Article 183, paragraph 2 (now to be read as Article 183, paragraph 1), requiring

deliberation of the risk of flight, tampering with evidence, influencing witnesses or repetition of offences.

> "100. The European Court of Human Rights has consistently stated that in any case where judicial discretion is removed by law this will be incompatible with the Convention and any detention based on such provisions unlawful... In the instant case, the power of the judge to release the applicant was not entirely removed, as the judge could still have ordered the applicant's release if he had found that there was no "warranted suspicion" that the applicant committed the offences he was charged with. However, the Chamber finds that in the circumstances, taking the domestic provisions into consideration, the investigative judge did not have any discretion to review the circumstances militating for or against detention, such as, (1) danger of failure to appear for trial, (2) interference with the course of justice, (3) prevention of further offences, (4) the preservation of public order and (5) consideration of the presumption of innocence. The investigative judge also could not exercise discretion by reference to legal criteria whether there were justifications for maintaining detention and if there were not, to order the release, as stated in paragraph 31 of *Schiesser*."

121. The applicant was brought before the investigative judge on 26 December 1997, and his detention was ordered in accordance with the former Article 191, paragraph 1 of the Code of Criminal Procedure, which provided for mandatory detention, as did Article 183, paragraph 1 of the Code of Criminal Procedure mentioned in the excerpt above from the *Buzuk* decision. After that, the District Court in Bijeljina ordered the applicant's detention based on Article 191, paragraph 1 of the Code of Criminal Procedure on 23 January 1998, 19 March 1998, and 6 July 1998. Then, on 10 September 1998, the Court ordered the detention of the applicant based on Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure. The Court continued to rely on Article 191, paragraph 2 until 10 May 2000, when again it issued a decision based on Article 191, paragraph 1 of the Code of Criminal Procedure, and in the following decision of 10 July 2000. The Commission notes that both of these decisions issued in 2000 reference a letter from the Supreme Court of 23 March 2000 related to the ordering of detention based on Article 191, paragraph 1 of the Code on Criminal Procedure. This letter was not submitted to the Commission.

122. In its submission received on 28 April 2004, the respondent Party attached the statement of the President of the District Court in Bijeljina where he explains that Article 191, paragraph 1 of the Code of Criminal Procedure was used on 10 May and 10 July 2000 as the grounds for detention because the Supreme Court did not agree with the Court's use of Article 191, paragraph 2 to authorise detention in this case. The respondent Party submitted no further information or evidence in this regard.

123. The Commission recalls that the European Court has consistently found that a lack of judicial discretion on the part of the judge or officer authorised to exercise judicial power is incompatible with the requirements of Article 5, paragraph 3 of the Convention. The fact that additional reasons supporting the detention may have existed is irrelevant if the judge has no power to consider them. Moreover, the fact that the judge was competent and was required to examine the reasonableness of the suspicion against the applicant is not sufficient for the purpose of Article 5, paragraph 3 of the Convention (see the above-mentioned *Buzuk* decision, paragraphs 99-100, quoted above).

124. The Commission notes that the facts of this case present an unusual situation. The former Article 191, paragraph 1 of the Code of Criminal Procedure set forth mandatory detention when there was a warranted suspicion that the suspect was the perpetrator of the crime and the crime in question carried a sentence of long-term imprisonment, defined as ten years or longer. While this provision was initially used as the grounds for the applicant's detention, ten months later the Court discarded Article 191, paragraph 1 in favour of Article 191, paragraph 2, sub-paragraphs 1 and 4 of the Code of Criminal Procedure, demonstrating that the judges were able to weigh the reasons for and against his detention. Then approximately a year and a half later, for reasons that remain

unclear to the Commission, the Court again relied on Article 191, paragraph 1 of the Code of Criminal Procedure. The Commission notes that the President of the District Court explained that Article 191, paragraph 1 was used again because the Supreme Court did not accept their use of paragraph 2 of that Article. The respondent Party did not submit any evidence supporting this statement however, nor is there any indication in the case file. In fact, the Supreme Court also issued decisions authorising the applicant's detention relying on Article 191, paragraph 2 of the Code of Criminal Procedure on 23 March 2000 and 25 September 2001 (see paragraphs 42 and 57 above).

125. In accordance with the Chamber's jurisprudence, the Commission finds that the judges who issued decisions on detention based on Article 191, paragraph 1 of the Code of Criminal Procedure, cannot be considered to be "judges" for the purposes of Article 5, paragraph 3 of the Convention, because they had no discretion to release the applicant once it was established that there existed a "warranted suspicion" that he had committed the offence with which he was charged. Such decisions were taken by the investigative judge on 26 December 1997, and by the panel of judges of the Court on 23 January 1998, 19 March 1998, 6 July 1998, 10 May 2000, and 10 July 2000. Accordingly, for the periods of detention following these decisions, that is from 26 December 1997 until 9 September 1998 and from 10 May 2000 until 21 July 2000, the Commission finds that the respondent Party violated the applicant's rights as guaranteed under the first limb of Article 5, paragraph 3 of the Convention.

b. The entitlement to trial within a reasonable time, or to release pending trial

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

(1) Period to be taken into consideration

127. The Commission recalls, as a preliminary point, that the jurisprudence of the Chamber interpreting the jurisprudence of the European Court consistently determined that "reasonable length" in this context does not only refer to the processing of the prosecution up to the commencement of the trial, but also to the length of the overall detention (*see* the above-mentioned *Buzuk* decision, paragraph 103, citing Eur. Court HR, *Neumeister v. Austria*, judgement of 27 June 1968, Series A no. 8).

128. For the purposes of Article 5, paragraph 3 of the Convention, the period to be taken into consideration in the instant case includes two periods of detention, from 23 December 1997 to 6 November 2000, and from 24 September 2001 to 13 February 2002, which amounts to a total of nearly three years and four months.

(2) Reasonableness of the length of the detention

129. In determining whether the overall length of the applicant's detention during this period was reasonable, the Commission notes that the European Court is reluctant to apply any rigid test and instead applies a case-by-case assessment.

130. The Commission recalls that it falls in the first instance to the domestic authorities to ensure that, in a given case, the overall detention of an accused person does not exceed a reasonable time. To this end the domestic court must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty. The domestic court must set those reasons out in its decisions, and it is therefore essentially on the basis of the reasons given by the court and on the facts mentioned by the applicant in his requests for release and his appeals that the Commission is called upon to decide whether or not there has been a violation of Article 5, paragraph 3 of the Convention (see, e.g., the

above-mentioned *Bašić and Ćosić* decision, paragraphs 164-165, citing Eur. Court HR, *Toth v. Austria*, judgement of 25 November 1991, Series A no. 224, paragraph 67, and the above-mentioned *Neumeister* judgement p. 37*,* paragraphs 4-5).

131. The Commission recalls that the European Court has consistently stated that the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of continued detention, but, after a certain lapse of time, it no longer suffices. The Commission must then establish whether the other grounds cited by the domestic courts continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Commission must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings and whether the subject matter for consideration was particularly complex in nature, thus justifying such length (see, Eur. Court HR, *Kemmache v. France*, judgement of 27 November 1991, Series A no. 218, paragraph 45). The Commission must also examine whether the applicant or his lawyers have contributed to any delay in the proceedings, because an applicant cannot properly complain of procedural delays of which he is the architect.

(a) Relevant and sufficient reasons

132. The Commission recalls that the European Court has consistently stated that grounds which the Court will accept as justification for continued detention of individuals prior to and during their criminal trial may include:

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

- 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;

- The public interest in the prevention of crime, this will be relevant if there are good reasons to believe that the accused will re-offend on release and a genuine requirement of public interest, notwithstanding the presumption of innocence, outweighs the respect for individual liberty;

- 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.

133. The Commission recalls that it has already found a violation of the first limb of Article 5, paragraph 3 of the Convention (see paragraphs 118 to 125 above) for the period from 26 December 1997 until 9 September 1998, and again from 10 May 2000 to 21 July 2000 for the reason that the judicial authorities had no power to review the grounds for detaining the applicant once it had been established that there existed a warranted suspicion that he had committed the offence with which he was charged. Accordingly, the Commission will not examine the reasons given for the applicant's detention during those periods. Rather, the Commission will assess whether, with regard to the decisions that relied on Article 191, paragraph 2 of the Code of Criminal Procedure, the domestic courts relied on relevant and sufficient reasons for the applicant's detention.

134. The Commission notes that the respondent Party, in its submission of 24 March 2004, states that the applicant was held in detention based on legal grounds. The applicant, in his submissions to the Commission, asserts that the courts never supported the reasons for his detention. The Commission notes that the applicant, as of the first hearing of 6 July 1998, orally requested to be released from detention, and appears to have made the same request at every subsequent hearing. Additionally, he submitted two separate applications to the

Court requesting his release from detention (9 June 1999 and 19 January 2000) and also appealed the decisions on detention issued on 10 February 2000, 10 July 2000, 25 September 2000, 6 November 2000, and 7 December 2001.

135. The Commission observes that the Court essentially used two grounds to support the applicant's continued detention. First, the risk that the applicant would abscond to Germany, based on Article 191, paragraph 2, sub-paragraph 1 of the Code of Criminal Procedure. Second, the possible minimum sentence and the manner in which the crime was committed indicated that the applicant posed a threat to public security, and to permit the unhindered conduct of the criminal proceedings based on Article 191, paragraph 2, sub-paragraph 4 of the Code of Criminal Procedure. The Commission will examine both of these in turn.

(i) Risk of flight

136. Decisions on the applicant's detention that relied on Article 191, paragraph 2, sub-paragraph 1 of the Code of Criminal Procedure (risk of flight) were taken on 10 September 1998, 6 November 1998, 25 December 1998, 26 February 1999, 10 February 2000, and 25 September 2000. The Court believed that the applicant would try to abscond to Germany because he previously worked there. The Commission recalls that the European Court has held that the danger of flight must be assessed in light of many factors, including the character of the person, his morals, his home, his occupation, his assets, his family ties, and all links with the country in which he is being prosecuted. The European Court also noted that the risk of flight decreases over time, given that the length of time spent in detention on remand is generally applicable towards the total prison sentence imposed, which reduces the incentive to flee (see, the above-mentioned *Neumeister* judgement, p. 39*,* paragraph 10).

137. As of his first appeal to be released of 6 July 1998, the applicant asserted that he had no intention of absconding. The applicant made the same statement in each request to be released from detention. On 26 February 1999, the applicant offered to post bail in the amount of 30,000 DEM and on 9 June 1999 he again proposed bail and submitted letters of guarantee from his son and sister. On 24 September 2001 the applicant submitted another application for release stressing that he did not pose a risk of flight, and he proposed that the Court seize his passport. Also in this application, the applicant submitted proposals for bail on his behalf submitted by his sister and his son. During the second period of detention on remand, beginning with the decision issued on 25 September 2001, the Court ceased to rely on Article 191, paragraph 2, sub-paragraph 1, and relied exclusively on Article 191 paragraph 2, sub-paragraph 4; that is to say the Court agreed that the risk of flight was not a reason warranting the applicant's detention.

138. The Commission notes that the applicant first applied to be released from detention in July 1998, seven months after the crime was committed, and with each subsequent application for release and the passage of time, the risk of flight decreased. The Commission also notes that it remains unclear from the case file whether the applicant possessed a valid passport or not, and, in any case, the applicant proposed that his passport be taken from him if this was the reason for his continued detention. The Commission finds that the reasoning put forth by the Court for the applicant's detention based on his risk of flight was not sufficiently supported or explained. The Court failed to take into consideration the numerous other considerations relevant to assessing whether the applicant poses a real risk of flight, such as his ties to his community, his family life, his assets, etc. Moreover, the applicant offered to post bail and obtained letters of guarantee, and still the Court failed to seriously assess the applicant's risk of flight. Therefore, the Commission finds that, to the extent the risk of flight was one of the grounds on which the applicant was held in detention, the Court did not adequately establish this ground.

(ii) Threat to public security

139. The Court also relied on Article 191, paragraph 2, sub-paragraph 4 of the Law on Criminal Procedure to find that the applicant's continued detention was necessary because his release

would pose a threat to public security. Decisions that relied on this provision were issued on 10 September 1998, 6 November 1998, 25 December 1998, 26 February 1999, 10 February 2000, 23 March 2000, 21 July 2000, 25 September 2000, 25 September 2001, and 7 December 2001. The Court considered the manner in which the crime was committed and the potential minimum sentence, and concluded that his release could disturb the victim's family and the greater community in Bijeljina. The Commission recalls that the European Court has found that detention ordered on the grounds of preserving public security requires that this reasoning be based on facts capable of showing that the accused's release would actually disturb the public order (Eur. Court HR, *Letellier*, judgement of 26 June 1991, Series A no. 207, paragraph 51).

140. In the applicant's first application for release in July 1998, he asserted that, given the considerable time that had passed, there was no risk of his release upsetting the public order. In each application for release, the applicant insisted that his release would not upset the public order, and in his applications of 9 June 1999 and 24 September 2001, he also attached letters from his son and sister in favour of his release. The applicant stated that he could also submit a petition from other members of the community in favour of his release. The Commission notes that the Public Prosecutor and the mother of the victim continually insisted on the applicant's detention. The Commission recognises that the authorities initially had a strong "warranted suspicion" that the applicant committed the crime in question. He immediately admitted to possessing the automatic rifle and to firing it in the air to force the persons in the house to come out. No other persons in the vicinity possessed any firearms. The Commission can concede that the initial detention was warranted and based on relevant and sufficient reasons.

141. However, the fact that the detention was initially warranted does not necessarily justify the applicant's continued detention over such a long period of time. In the case at hand, the Commission notes that the judicial authorities never explained in what manner the applicant's release would cause public disorder or pose a threat to public security. The only point specifically noted by the Court was that the applicant's release would upset the victim's family. The Supreme Court, in its decision rejecting the applicant's application for release from detention of 13 December 2001, also noted that his detention was necessary for the unhindered conduct of the criminal proceedings, but again, this was not elaborated upon, nor is it apparent from the case file that the Supreme Court had any specific evidence that the applicant would interfere with the proceedings if released from detention. The Commission finds that the mere fact that a prison sentence of ten years or more could be imposed is not sufficient to justify such an inordinately long period of detention on remand (see the above-mentioned *Kemmache* judgement of 27 November 1991, paragraph 52). The Commission concludes that the courts failed to provide reasons why the applicant's detention was necessary to preserve the public order or for public safety reasons.

(b) The conduct of the proceedings

142. The Commission recalls that if the prolonging of detention on remand is based on well-founded reasons, then the question remains whether the domestic authorities displayed "special diligence". In this respect the question cannot be answered in the abstract and Article 5, paragraph 3 of the Convention does not imply a maximum length of detention. Instead, the European Court attaches particular importance to the complexity of the case, the conduct of the domestic authorities, and the conduct of the applicant. If the length of detention on remand does not appear connected to the complexity of the case or the conduct of the applicant and the authorities have not acted with necessary promptness, then Article 5, paragraph 3 will be violated (see, e.g., Eur. Court HR, *Tomasi v. France*, judgement of 27 August 1992, Series A no. 241-A). Moreover, the mere fact that the domestic authorities have shown that "relevant and sufficient" reasons existed will not exonerate them of their duty to expedite the proceedings, as what may be considered relevant and sufficient during the early stages of the proceedings may cease to be considered so after the passage of time. In *Kemmache v. France* (Eur. Court HR, *Kemmache v. France*, judgement of 27 November 1991, Series A no. 218, paragraph 52), the European Court made it clear that detention may only be justified for as long as the risk persists.

143. The respondent Party admits that the proceedings in the case were somewhat long, especially considering that the applicant was in detention. The respondent Party, via the submission of the President of the District Court in Bijeljina, concedes that the Court faced difficulties in gathering evidence and in obtaining the expert witness testimony, particularly the forensic ballistic reports. The President of the District Court in Bijeljina also pointed out that the panel of judges should have ruled more decisively on the applicant's numerous requests, i.e. it should have disallowed some of his requests. The respondent Party lists the following actions attributable to the applicant which contributed to the length of the proceedings: he sought the introduction of new evidence at the end of the proceedings; he sought the recusal of the President of the panel of judges on two occasions; he requested the recusal of the President of the Court, he twice requested the postponement of hearings; he withdrew the letter of authorisation for his defence counsel shortly before the commencement of a main hearing, only to later submit the letter of authorisation for the same defence counsel; and he requested that the expert witnesses appear in court in person. The respondent Party concludes that the applicant significantly contributed to the length of the proceedings.

144. As previously stated, the applicant was arrested on 23 December 1997, and on 17 March 1998 an indictment was filed. According to information obtained from the respondent Party, hearings took place on 6 July 1998, 10 September 1998, 6 November 1998, 25 December 1998, 26 February 1999, 26 May 2000, 10 July 2000, and 3 November 2000, for a total of eight hearings prior to the issuance of the judgement. One hearing was postponed upon the initiation of the respondent Party, and three hearings were postponed due to the applicant's interventions. The Court issued its judgement on 6 November 2000. The applicant appealed, and on 24 September 2001 the Supreme Court annulled the first instance judgement and ordered a retrial. Before a new panel of judges, the Court held hearings on 29 October 2001, 16 November 2001, and 7 December 2001, and issued its judgement on 13 February 2002. The applicant also appealed this judgement, and four months later, on 10 June 2002, the Supreme Court issued the final and binding decision finding the applicant guilty of murder.

(c) Complexity of the case

145. As the Chamber consistently stated in its jurisprudence, in assessing the diligence of the domestic authorities it is important to consider the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses required, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial. The Commission considers that this case involves a criminal trial of a fairly typical nature; the question is whether the murder was intentional, and with what intent. The Commission cannot find that the case at hand was a particularly complex and difficult one.

(d) Conduct of the domestic authorities

146. The Commission recognises that Article 5, paragraph 3 of the Convention imposes a strict requirement that, once the court has ordered that an accused must remain in custody pending trial, special diligence must be exercised and priority given to the accused's trial. However, this requirement must be carefully balanced against the duty of the court to fully ascertain the facts and permit the parties to thoroughly present their respective cases.

147. The Commission recalls that the domestic authorities, prior to the first instance decision, scheduled hearings with two to four month intervals, except for one hearing that was scheduled five months from the previous hearing. The first hearing was scheduled for 21 May 1998, but was postponed because the President of the panel of judges had to attend an exhumation. However, instead of being timely re-scheduled, it was postponed for another two months. Thus, from the time of the filing of the indictment until the first hearing, four months had passed. The Commission also notes that the Court did not obtain a fundamental evidentiary element of the trial, the record of the crime scene, until 9 September 1998. Following the hearing of 26 February 1999, a

reconstruction of the crime scene was performed on 5 March 1999, and the next hearing was not scheduled until 13 August 1999. This hearing was postponed due to the applicant's request for the recusal of the President of the panel of judges. This issue was resolved on 18 August 1999, but the next hearing was not scheduled until 1 October 1999. The hearing of 1 October 1999 was also postponed due to the applicant's request to withdraw his defence counsel, but again, instead of being timely rescheduled, the next hearing was scheduled for 21 February 2000; but this was again postponed due to the applicant's intervention. The Supreme Court, in its letter of 2 February 2000 to the Court, even noted that the proceedings were lasting an unacceptably long time and urged the Court to finalise the proceedings. The next hearing was held on 26 May 2000, at which time it was decided to obtain a forensic report from an institute in Serbia and Montenegro, two months later, at the next hearing held in July, the Court reported that this was not practically possible, and it was decided to obtain a forensic report from an institution in Banja Luka. This report was submitted to the Court in October 2000. Thus the delay between May to October 2000 was essentially related to obtaining an additional forensic report, and apparent poor planning on the part of the Court in doing so. The Commission acknowledges that some of the applicant's requests contributed to some delays, as discussed below in paragraph 148, but the Commission nevertheless considers that, on the whole, the authorities failed to display the "special diligence" required to comply with its obligations under Article 5, paragraph 3 of the Convention.

(e) Conduct of the applicant

148. The respondent Party asserts that the applicant's conduct substantially contributed to the delays in the proceedings. The Commission recalls that the applicant made numerous requests and appeals during his detention on remand. In this respect, the Commission also recalls that the applicants are perfectly entitled to take legitimate points by way of appeal (see, e.g., Eur. Court HR, *Ledonne (No. 1) v. Italy*, judegment of 12 May 1999, paragraph 25). In this regard, the Commission considers that the applicant's applications for release, appeals against the procedural decisions authorising his detention, and appeals against the sentencing judgements were all of a legitimate nature and did not purposefully contribute to the length of the proceedings; nor should they have necessarily led to the delays which were present in the case.

149. The Commission agrees with the respondent Party that some of the applicant's requests would appear to have led to a certain amount of delay in the proceedings. The Commission can concede that the last-minute request for the recusal of the judge on 12 August 1999, when the hearing was scheduled for 13 August 1999, would, by virtue of the timing of the request, appear to be in bad faith. However the Court promptly dealt with the matter in its decision of 18 August 1999, but failed to schedule the next hearing until 1 October 1999. Shortly before the scheduled hearing, the applicant cancelled his authorisation for his defence counsel and requested eight days to find new counsel. The applicant later submitted the authorisation for the same defence counsel. The Commission concedes that this would also appear to be a request that lacked a legitimate basis; however, this should have only contributed to a short delay in the proceedings. On 17 January 2000 the applicant again submitted a request for the recusal of the President of the panel of judges and also the recusal of the President of the Court, which was forwarded to the Supreme Court. This request led to the postponement of the hearing scheduled for 21 February 2000, because the Supreme Court had not yet ruled on the request regarding the recusal of the President of the District Court. The Supreme Court issued its decision in this matter on 1 March 2000, and the next hearing was not scheduled until 26 May 2000. The Commission concludes that, on the whole, the applicant did not contribute to the significant length of the proceedings.

(3) Conclusion as to the reasonableness of the length of detention

150. As the Chamber had cause to state in the *Bašić and Ćosić* decision, the administration 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. Additionally, it is the responsibility of the respondent Party to organise its judicial system in such a way as to ensure the reasonably

expeditious conduct of individual cases and to organise its legal system so as to allow the courts to comply with the requirements of Article 5, paragraph 3 of the Convention (see the above-mentioned decision, paragraph 183). It is apparent that the length of proceedings here is only partly attributable to the conduct of the applicant. Having regard to the substantial delays in the court proceedings, the Commission considers that the domestic authorities did not act with the "special diligence" required under Article 5 paragraph 3 of the Convention in the instant case.

151. Having regard to the above, the Commission finds that the overall period spent by the applicant in detention, including pre-trial detention and detention on remand, exceeded a "reasonable time". Thus there has been a violation of Article 5, paragraph 3 of the Convention in this respect.

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

152. In sum, the Commission therefore finds that the applicant was not brought before a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5, paragraph 3 of the Convention during the period between 26 December 1997 until 9 September 1998 and again from 10 May 2000 until 20 July 2000, and that the length of his detention during pre-trial detention and detention on remand exceeded the limits of reasonableness. Consequently, the respondent Party violated the applicant's rights guaranteed by Article 5, paragraph 3 of the Convention.

VIII. REMEDIES

153. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

154. The applicant has not submitted any claims for a specified amount of compensation. In his application, the applicant states that his compensation claim for pecuniary and non-pecuniary damages and lawyer's fees would be specified later, but he has failed to do this. The respondent Party did not submit any observations in this regard.

155. The Commission notes that it has established violations of Article 5, paragraphs 1 and 3 of the Convention in the present case. It finds it appropriate, considering the case in general terms, and following the previous jurisprudence of the Chamber (see, e.g., the above-mentioned *Bašić and Ćosić* decision, paragraphs 210-211), to award the applicant compensation for non-pecuniary damages for the harm suffered in the amount of 2,000 Convertible Marks (*Konvertibilnih Maraka*, "KM"). This amount is to be paid within one month of the date of receipt of this decision.

156. The Commission further finds it appropriate to award simple interest at an annual rate of 10% (ten percent) from the due date for the implementation of the compensation award, on the full amount of the award or any unpaid portion thereof until the date of settlement in full.

157. The Commission will further order the respondent Party to report to it on the steps taken to comply with the above orders within three months of the date of receipt of this decision.

IX. CONCLUSIONS

158. For the above reasons, the Commission decides,

1. unanimously, to declare the application admissible as directed against the Republika Srpska under Article 5, paragraphs 1 and 3 of the European Convention on Human Rights;

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

3. unanimously, that, during the periods of detention for which the courts failed to timely issue procedural decisions on his continued detention, the applicant's detention was in violation of Article 5, paragraph 1 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that, for the period from 26 December 1997 until 9 September 1998 and from 10 May 2000 until 21 July 2000, the judges whom the applicant was brought before were not a "judge or other officer authorised by law" for the purposes of Article 5, paragraph 3 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 Human Rights Agreement;

5. unanimously, that the length of the applicant's detention on remand 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 Human Rights Agreement;

6. unanimously, to order the Republika Srpska to pay to the applicant, within one month of the date of receipt of this decision, the sum of 2,000 (two thousand) Convertible Marks by way of compensation for non-pecuniary damages;

7. unanimously, that simple interest at an annual rate of 10% (ten percent) will be payable on the sum awarded in conclusion number 6 above from the due date set for such payment until the date of final settlement of all sums due to the applicant under this decision; and,

8. unanimously, to order the Republika Srpska to report to it within three months of the date of receipt of this decision on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission