DECISION ON ADMISSIBILITY AND MERITS

(delivered on 10 October 2003)

Case no. CH/02/9834

Miloš ERBEZ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 4 September 2003 with the following members present:

Mr. Mato TADIĆ, President
Mr. Jakob MÖLLER, Vice-President
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

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

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. On 22 October 2001, he was arrested by members of the Doboj Municipality Police Force and held in police custody until 25 October 2001, on which date the Public Prosecutor filed a request for investigation. On the same day, 25 October 2001, the investigative judge issued the decision opening an investigation and ordering pre-trial detention. On 19 April 2002, an indictment was filed. The applicant is accused of comitting the criminal offences of fraud, illicit commerce and forgery of documents. The criminal proceedings are still pending before the First Instance Court in Doboj.

2. The applicant complains of various violations of his rights in relation to his arrest, his police detention, his detention ordered by the court, and the prolongation of his detention.

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

II. PROCEEDINGS BEFORE THE CHAMBER

4. The applicant submitted his application to the Chamber on 2 April 2002.

5. In his application the applicant requested the Chamber, as a provisional measure, to order the respondent Party to release him from pre-trial detention. On 2 July 2002, the Chamber decided to refuse the applicant's request. On 8 July 2002, the case was transmitted to the respondent Party in relation to Articles 5 and 6 of the Convention.

6. On 12 September 2002, the respondent Party submitted to the Chamber its observations, which were transmitted to the applicant on 13 September 2002.

7. On 1 October 2002, the applicant submitted additional information in the case and on 9 October 2002, he submitted the minutes from the main hearings in the criminal proceedings conducted against him before the First Instance Court in Doboj.

8. On 20 January 2003, the Chamber sent a letter to the respondent Party requesting information and additional documents.

9. On 18 February 2003, the respondent Party sent the Chamber some of the requested additional information and documents.

10. On 20 March 2003, the Chamber requested further additional information from the respondent Party concerning the applicant's arrest.

11. On 31 March 2003, the respondent Party submitted to the Chamber additional information and documents.

12. The Chamber deliberated on the admissibility and merits of the case on 2 July 2002, 8 November 2002, 6 March 2003, 10 May 2003, and 3 and 4 September 2003. On the latter date the Chamber adopted the present decision on admissibility and merits.

III. FACTS

13. Starting in May 1999 and during the course of the year 2000, the applicant was involved in representing the private company "Magis" with the authorisation of its director and the owner.

14. On 22 October 2001, the applicant was arrested by the police at the "Žorž" restaurant in Doboj and brought to the Public Security Centre in Doboj. The same day, the criminal police department in Doboj issued a procedural decision ordering police custody against the applicant, which started running from 9 p.m. on 22 October 2001. The decision ordering custody stated that

the applicant did not have a registered address and that therefore the conditions referred to in Article 191 paragraph 2[1], subparagraphs 1 and 2 of the Code of Criminal Procedure of the Republika Srpska were met, *i.e.* that there existed the strong possibility of flight and the warranted suspicion that he might destroy, hide, alter or falsify evidence (see paragraph 37 below).

15. On 23 October 2001, the applicant gave a statement in the Public Security Centre in Doboj on the circumstances of the acquisition and sale of goods on behalf of the Magis company.

16. On 25 October 2001, the investigative judge of the First Instance Court in Doboj issued a procedural decision to conduct an investigation against the applicant. The investigation was based on the warranted suspicion that, in the period from 7 April to 29 June 2000, the applicant committed the criminal offences of fraud, illicit commerce and forgery of documents.

17. On the same day, 25 October 2001, the investigative judge of the First Instance Court in Doboj issued a procedural decision ordering detention against the applicant in the duration of one month. It was specified in the procedural decision that the detention started running already on 22 October 2001. The decision ordering detention was based on Article 191 paragraph 2(1) and (3)[2]. The reasoning of the decision states that the applicant's address was unknown and that circumstances existed suggesting the strong possibility of flight, especially having in mind that the applicant tried to hide the identity of the person in possession of documents and a false stamp used for the crime.

18. On 22 November 2001, a panel of the First Instance Court in Doboj issued a procedural decision extending the applicant's detention until 22 December 2001. The detention was based on Article 191 paragraph 2(1) and (3). The reasoning of this decision stated that the applicant could influence the witnesses and repeat the crime. The applicant filed an appeal against this procedural decision to the Second Instance Court in Doboj. On 3 December 2001, the panel of the Second Instance Court issued a procedural decision refusing the applicant's appeal as ill-founded. In addition, the Second Instance Court found that the detention should be based on Article 191 paragraph 2(2) and (3) and rather than on paragraph 2(1) and (3)[3].

19. On 21 December 2001, the panel of the First Instance Court in Doboj extended the applicant's detention for another month. The detention was ordered based on Article 191 paragraph 2(1) and (2). The applicant filed an appeal against this procedural decision. On 27 December 2001, the panel of the Second Instance Court in Doboj refused the applicant's appeal as ill-founded. In addition, the Second Instance Court found that the detention should be based on Article 191 paragraph 1(1) and (2)[4].

20. On 22 January 2002, the Panel of the Second Instance Court in Doboj extended the applicant's detention for another month based on Article 191 paragraph 1(1) and (2)[5]. According to this procedural decision, the one-month extension of the detention started running on 22 January 2002.

21. The applicant filed an appeal against this procedural decision to the Supreme Court of the Republika Srpska ("the Supreme Court"), which rejected his appeal on 8 February 2002. The procedural decision of the Supreme Court of 8 February 2002 was delivered to the applicant only on 12 February 2003, one year and four days after it was issued. It was delivered to the applicant's lawyer on 13 February 2003.

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[1] According to the Decision of the Law of Amendments to the Code of Criminal Procedure, which entered into force on 8 November 2001, published in the Official Gazette on 3 December 2001, the old Article 191 paragraph 1 of the Code of Criminal Procedure was deleted. Article 191 paragraph 2 mentioned in the present case then became paragraph 1 (Official Gazette of the Republika Srpska no. 61/01).
[2] The Chamber notes that this procedural decision does not refer to the correct Article of the Code of Criminal Procedure.
[3] see footnote 1 above.
[4] see footnote 1 above.
[5] see footnote 1 above.

22. On 21 February 2002, the panel of the Second Instance Court in Doboj issued a procedural decision based on Article 191 paragraph 1(1) and (2)[6] extending the applicant's detention for another two months.

23. On 19 April 2002, the public prosecutor filed an indictment against the applicant, which was delivered to the applicant on 22 April 2002. The applicant is accused of comitting the criminal offences of fraud, punishable under Article 229 paragraph 3 in conjunction with paragraph 1, illicit commerce, Article 271 paragraph 4 in conjunction with paragraph 1, and forgery of documents, Article 364 paragraph 1 of the Criminal Code of the Republika Srpska.

24. On 21 April 2002, after confirming the indictment, the panel of the First Instance Court in Doboj issued a procedural decision based on Article 265 paragraph 1 extending the applicant's detention for another two months. The decision stated that the additional period of detention started running from 21 April 2002. It is based on Article 191 paragraph 1(1), the suspicion that applicant might escape.

25. The applicant appealed against this decision. On 29 April 2002, the panel of the First Instance Court issued a decision rejecting the appeal.

26. On an unknown date, the applicant filed an objection against the indictment. On 24 May 2002, the panel of the First Instance Court issued a decision rejecting the applicant's appeal.

27. On 30 May 2002, a first main hearing was scheduled. It was held on 13 June 2002.

28. On 26 June 2002, another main hearing was held. During that hearing the witness M.J. testified; he stated that he agreed with the fact that the applicant had previously used his address and continued to do so.

29. Also on 26 June 2002, the First Instance Court in Doboj issued a decision terminating the applicant's detention, and he was released. In the reasoning of this decision it is stated that there are no circumstances indicating that the applicant could escape or any other circumstances under the law justifying his further detention.

30. The criminal proceedings against the applicant before the First Instance Court in Doboj are pending to date. On 11 September 2002, the last main hearing was held. On that day the panel issued a procedural decision to postpone a further main hearing for an indefinite time and to return the case to the investigative judge so that he could hear certain witnesses in the case.

IV. RELEVANT DOMESTIC LEGISLATION

A. Criminal Code of the Republika Srpska

31. A new Criminal Code of the Republika Srpska entered into force on 1 July 2003 (Official Gazette of the Republika Srpska — hereinafter "OG RS" — no. 50/03). However, the previous Criminal Code of the Republika Srpska (OG RS nos. 22/00, 33/00 and 37/01) is applicable in the present case, and the relevant provisions from this previous Criminal Code are cited below.

32. Article 229, titled "Fraud", provides as follows:

> "(1) Whoever, with the intention of making unlawful material gain for himself or for another person, deceives someone through false representation or suppression of facts, or maintains him in deception, inducing him thereby to do or omit to do something to the detriment of his or someone else's property, shall be punished by imprisonment not exceeding three years.
> (2) If the offence described under paragraph 1 of this Article has resulted in material benefit not exceeding 200 KM, and the perpetrator had the intention of acquiring such benefit

[6] see footnote 1 above.

or to cause such damage, then the perpetrator shall be fined or punished by imprisonment not exceeding one year.
(3) If the offence described under paragraph 1 of this Article has resulted in material benefit or property damage exceeding 10,000 KM, then the perpetrator shall be punished by imprisonment ranging from six months to five years; and if the amount exceeds 50,000 KM, then the perpetrator shall be punished by imprisonment ranging from one to ten years.
(4) Whoever commits the offence referred to in paragraph 1 of this Article solely for the purpose of causing harm to another, shall be fined or punished by imprisonment not exceeding one year.
(5) The attempt to commit the offence described under paragraph 1 of this Article shall be punishable. Prosecution for the offence described under paragraph 2 of this Article shall be instituted upon a private complaint."

33. Article 271, titled "Illicit Commerce", provides as follows:

"(1) Whoever without authorisation to trade procures goods or other objects of general consumption in a larger amount or value for the purpose of selling them, or whoever without authorisation carries out trade or mediation in trade or representation of a domestic organisation in trafficking of goods and services, shall be fined or punished by imprisonment not exceeding two years.
(2) Whoever sells the goods whose production he organised without proper authorization, shall be punished by imprisonment ranging from six months to five years.
(3) The punishment from paragraph 2 of this Article shall also be imposed on whoever sells, keeps for the purpose of sale, buys, or exchanges goods or objects whose sale or trafficking is restricted or prohibited.
(4) If the perpetrator of the offence referred to in paragraphs 1, 2 and 3 of this Article has set up a ring of middlemen or retailers or has made a profit that exceeds 10,000 KM, then he shall be punished by imprisonment ranging from one to eight years.
(5) Goods and commodities of illicit commerce shall be forfeited."

34. Article 364, titled "Forgery of Documents", provides as follows:

"(1) Whoever drafts a false document or alters a genuine document for the purpose of using such document as genuine, or whoever uses a false or altered document as genuine, shall be fined or punished by imprisonment not exceeding three years.
(2) Whoever makes a false public document, will, bill of exchange, check, public or official book, or some other book that must be maintained by virtue of a legal provision, or whoever alters a real document, or whoever puts into circulation such false or altered document or keeps it to use as real or uses it as real, shall be punished by imprisonment ranging from three months to five years.
(3) The attempt to commit the offence under paragraph 1 of this Article is punishable."

B. Code of Criminal Procedure of the former Socialist Federal Republic of Yugoslavia

35. A new Code of Criminal Procedure of the Republika Srpska entered into force on 1 July 2003 (OG RS no. 49/03). 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, 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 (OG RS nos. 26/93, 14/94, 6/97, 60/01). This former Code of Criminal Procedure is applicable in the present case and its relevant provisions are cited below.

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

37. Article 191 provides as follows:

"1. If there are grounds for suspicion that a person has committed a crime, but the conditions do not exist for mandatory custody, then custody may be ordered against that person in the following cases:

1) if he conceals himself 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 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 and for those offences a sentence of imprisonment of three years or a more severe penalty is prescribed;
4) if the crime is one for which a prison sentence of ten years or a more severe penalty may be pronounced under the law and if, because of the manner of execution, consequences 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."

38. Article 192 provides 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, an instruction as to the right of appeal, a brief substantiation in which the basis for ordering custody is specifically argued, the official seal, and the signature of the judge ordering custody.
3) The decision on custody shall be presented to the person to whom it pertains at the moment when he is arrested, and no later than 24 hours from the moment he is deprived of his liberty. The time of his detention 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, then he may file an appeal at the time of examination. The appeal, a copy of the transcript of the examination, whether 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, then he shall seek a decision on the issue from the panel of judges (Article 23 paragraph 6). A person taken into custody may file an appeal against the decision of the panel of judges who ordered the 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."

39. Article 196 provides as follows:

"1) In exceptional circumstances custody can be ordered by the law enforcement agency before the initiation of an investigation, provided it is necessary for establishing the identity, checking an alibi, or for other reasons to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 paragraph 1 and paragraph 2 points 1 and 3 of this Law exist, although in cases prescribed by Article 191 paragraph 2 point 2, this can be done only if there is a warranted fear that the person at issue will destroy clues to the crime….

2) Custody ordered by an authority of the Ministry of Internal Affairs may last up to three days, from the moment of apprehension. The provisions of Article 191 paragraphs 2 and 3 of this Law shall apply to this custody. A detained person may appeal against a decision on custody to the panel of judges of the competent court within 24 hours from the moment of receipt. The panel is obliged to render a decision on appeal within 48 hours from the moment of receipt of the appeal. The appeal has no suspensive effect. An authority of the Ministry of Internal Affairs shall provide a detainee with legal aid for the lodging of his appeal."

40. Article 197 provides as follows:

"1) On the basis of the investigative judge's decision the accused may not be held in pre-trial custody more than 1 month from the date of his apprehension. At the end of that period the accused may be kept in custody only on the basis of a decision to extend pre-trial custody.
2) Pre-trial custody may be extended a maximum of 2 months under a decision of the panel of judges. An appeal is permitted against the panel's decision, but the appeal does not stay execution of the decision. If proceedings are conducted for a crime carrying a prison sentence of more than 5 years or a more severe penalty, then a panel of the Supreme Court may for important reasons extend pre-trial custody by not more than another 3 months."

41. Article 199 provides 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 decision referred to in paragraphs 1 and 2 of this Article shall not stay execution of the decision.
4) An appeal is not permitted against the decision of the panel that rejects a proposal to order or terminate pre-trial custody."

42. Chapter XIX of the Code of Criminal Procedure, concerning the indictment and objection against the indictment, provides as follows:

43. Article 265 provides as follows:

"If the indictment recommends that the accused be taken into custody or released, then the panel (Article 23 paragraph 6) shall decide this issue immediately, within 48 hours at the latest. If the accused is in custody and the indictment does not recommend his release, then within three days from the day of receiving the indictment, the panel referred to in paragraph 1 of this Article shall automatically examine whether grounds still exist for custody and shall render a decision extending or terminating custody. An appeal against this decision shall not stay execution of the decision."

C. The Constitution of the Republika Srpska

44. Article 17 of the Constitution provides as follows:

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

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

V. COMPLAINTS

45. The applicant complains that there was no reason to send out an arrest warrant for him. He further complains that he was heard at the Doboj Public Security Centre without the presence of a lawyer and that he was not told the reasons for his detention. He complains that he was heard before the investigative judge without knowing why and for what he was charged. He alleges that he was held in detention for several months without an indictment being raised, and that there were no real reasons for ordering pre-trial detention.

46. The applicant notes that the court wanted to hear as a witness the director of the company "Magis", the applicant's former employer. However, the director died whilst the investigation against the applicant was conducted and he was in pre-trial detention. The applicant argues that it is not understandable why the court claims that it learned the fact of the director's death only after four months, thereby prolonging the investigation against the applicant, since the applicant states that he informed the court of the director's death much earlier. The applicant also alleges that the court constantly emphasised the fact that he changed his addresses very often and kept moving from place to place, whereas the applicant claims that the competent authorities knew about his residence at all times.

47. The applicant complains that in January 2002 he appealed against the decision prolonging his detention. At the moment when he submitted his application to the Chamber, the applicant complained that he had never received the decision upon his appeal and that the length of his detention exceeded the limits of reasonableness.

48. The applicant doubts the impartiality of the court because the court did not accept witnesses he proposed. He also alleges that the lawyer he engaged in this case did not show up for a while.

49. The applicant concludes that as a result of these facts, his rights protected under Articles 5 and 6 of the Convention have been violated.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

50. The respondent Party considers that the application is inadmissible, as the applicant did not exhaust the available remedies. In particular, with regard to the applicant's allegations that the duration of the detention was unjustifiably long, the applicant could have claimed compensation in accordance with Chapter XXXII of the Code of Criminal Procedure, in particular Article 545 that regulate the terms of compensation for persons unlawfully detained. The respondent Party further states that Article 17 of the Constitution of the Republika Srpska entitles a person lawfully detained but longer than it is necessary to ask for compensation before the civil court.

51. With regard to the applicant's claim that he was not delivered the procedural decision of the Supreme Court deciding on his appeal against the procedural decision extending the detention, the respondent Party claims that this decision was delivered to his lawyer, which is in accordance with Article 123 of the Code of Criminal Procedure, so it does not matter that it was not delivered to the applicant himself.

2. As to the merits

a. Article 5 of the Convention

52. The respondent Party maintains that the applicant's detention was at all times in accordance with domestic law. The respondent Party cites the European Court of Human Rights judgments of *Benham v. United Kingdom* (Eur. Court HR, judgment of 10 June 1996, Reports 1996-III Vol. 10) and

Winterwerp v. Netherlands (Eur. Court HR, judgment 24 October 1979, Series A No. 33, paragraph 20) as authority on the point that the Strasbourg bodies are obliged to assume the compliance with national legislation and should not interpret it.

53. With regard to the length of the proceedings, the respondent Party points out that a large number of witnesses was heard in the investigation and that the complexity of the case caused the investigation to last for six months.

54. The respondent Party claims that the applicant's detention started on 22 October 2001, based on the investigative judge's procedural decision, then it was extended by the panel of the First Instance Court in Doboj for another two months, and finally it was extended by the Supreme Court's procedural decision for three months, all in accordance with domestic law.

55. In the additional information submitted by the respondent Party, the investigative judge explains that the Second Instance Court in Doboj was competent to extend the detention for another three months in accordance with Article 197 paragraph 2 of the Code of Criminal Procedure in cases in which the sentence provided for that criminal offence exceeds five years.

56. The respondent Party claims that the detention ordered by the domestic courts is in accordance with the Article 5 paragraph 1(c) of the Convention. First of all, the detention was in accordance with the law. The purpose of the applicant's detention was to bring him before the investigative judge, to prevent him from influencing the witnesses, as well as the existence of fear that he could repeat the criminal offence. The length of the detention was "reasonable" because the applicant himself delayed the proceedings.

57. The respondent Party claims that the indictment was submitted to the court on 22 April 2002 (Sunday), within the six-month time limit, as provided for in the law.

58. The respondent Party concludes that the allegation of a violation of Article 5 of the Convention is manifestly ill-founded.

b. Article 6 of the Convention

59. With regard to the applicant's complaint under Article 6 of the Convention, the respondent Party points out that the indictment was delivered to the applicant on 22 April 2002. The applicant then filed an objection that was refused. The main hearing was scheduled for 13 June 2002. After that, main hearings were held on 18 June, 26 June, 24 July, 22 August and 11 September 2002. The respondent Party claims that these hearings were held within a reasonable time and that therefore there is no violation of Article 6 of the Convention.

60. In addition, the respondent Party submits that during these main hearings, the court found that for conducting the proceedings and establishing the truth, it would be necessary to examine certain witnesses in order to check the allegations of the applicant's defence counsel. However, it appeared that the witnesses' addresses were either unknown to the First Instance Court in Doboj or the witnesses were outside the territory of Bosnia and Herzegovina. For these reasons, the court, on 22 September 2002, decided to return the criminal proceedings against the applicant to the investigative stage and returned the case to the investigative judge, thereby suspending the main hearing.

B. The applicant

61. The applicant maintains his complaints.

VII. OPINION OF THE CHAMBER

A. Admissibility

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

1. Non-exhaustion of domestic remedies

63. The respondent Party submits that the applicant has failed to exhaust the available domestic remedies, as he was given the possibility to do in accordance with Chapter XXXII of the Code of Criminal Procedure, in particular Article 545, and Article 17 of the Constitution of the Republika Srpska.

64. The Chamber notes that Chapter XXXII of the Code of Criminal Procedure provides that the damage suffered by a defendant due to unlawful deprivation of liberty can be taken into consideration. Under Article 545 of the Code of Criminal Procedure, a defendant is entitled to initiate proceedings for compensation for being kept in detention because of a mistake of the competent organs. Under Article 17 of the Constitution of Republika Srpska, a defendant is entitled to initiate a civil action for compensation for damage suffered due to the fact that he was kept in lawful detention longer than necessary. To sum up, the respondent Party argues that the applicant has an enforceable claim for compensation if his detention was unlawful or excessive, which he has not availed himself of.

65. The Chamber notes that it has previously ruled that domestic remedies concerning compensation for detention are not relevant to complaints of a violation of paragraphs 1 to 4 of Article 5 of the Convention (see case no. CH/01/7488, *Vlatko Buzuk*, decision on admissibility and merits of 3 July 2002, paragraph 81, Decisions July-December 2002):

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

66. Regarding the question whether the applicant has exhausted the available domestic remedies against possible violations of Article 5 paragraphs 1, 3, and 4 of the Convention, the Chamber notes that the applicant did not challenge the period of police custody from 22 October to 25 October 2001 and the custody initially ordered by the investigative judge on 25 October 2001. The Chamber also notes that the respondent Party has not submitted that the applicant should have done so. The Chamber further notes that the applicant unsuccessfully challenged the lawfulness of his detention by appealing against the decisions of 22 November 2001, 21 December 2001, 22 January 2002,

and 21 April 2002 prolonging his custody. He further filed an objection against the indictment. The Chamber is satisfied with the applicant's attempts to challenge his detention through the domestic courts.

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

2. Manifestly ill-founded under Article 6 of the Convention

68. The Chamber notes that at the time of the application, on 2 April 2002, the applicant complained about the fairness of the criminal procedure against him.

69. The Chamber notes the main hearing only started on 13 June 2002 and was soon thereafter interrupted. The Chamber considers that the complaint relating to the fairness of the trial is premature.

70. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible as being premature.

3. Conclusion as to admissibility

71. The Chamber finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber declares the application admissible insofar as it relates to the alleged violations of Article 5 paragraphs 1, 3, and 4 of the Convention. The Chamber declares the remainder of the application inadmissible for the reasons stated above.

B. Merits

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

1. Article 5 paragraph 1 of the Convention

73. The applicant claims that his rights with regard to Article 5 paragraph 1 of the Convention have been violated. Article 5 paragraph 1 of the Convention reads, in relevant parts, 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."

74. With regard to the requirement of "lawfulness" of arrest or detention, the respondent Party argues that the Strasbourg bodies are "obliged to accept compliance with national legislation and should not interpret it" and that this applies equally to the Chamber. The respondent Party refers to *Winterwerp v. Netherlands* (Eur. Court HR, judgement of 24 October 1979, Series A No. 33, paragraphs 45-47) and *Benham v. United Kingdom* (Eur. Court HR, judgment of 10 July 1996, Reports 1996-III, paragraph 41), in which the European Court of Human Rights stated that it was in the first place for the national authorities to interpret and apply the domestic law, as the words "in accordance with a procedure prescribed by law" essentially refer back to the domestic law. The respondent Party appears to interpret this statement of the European Court as meaning that the Chamber may not question whether the national authorities acted in accordance with domestic law.

75. The Chamber observes that this manifestly is not what the European Court stated. Whilst it is not normally the European Court's or the Chamber's task to review the observance of domestic law by the national authorities, in such a case where disregard entails a breach of the Convention, then the European Court and the Chamber may and should exercise a certain power of review (see the above-mentioned *Winterwerp* decision, paragraph 46).

a. In relation to apprehension by the police

76. The applicant complains of his arrest by the police on 22 October 2001 at the "Žorž" restaurant in Doboj, and of the fact that he was held in police custody for three days until 25 October 2001. He argues that there was no need to issue an arrest warrant because his address was known by the authorities at all times.

77. With regard to the applicant's complaint that he was arrested on 22 October 2001 without any reason, the Chamber notes that, according to the procedural decision issued by the police as a basis for the applicant's police detention following his arrest, the applicant did not have a registered address and it was therefore unknown. The decision states further that circumstances existed suggesting a strong possibility of flight and the warranted fear that the applicant might destroy, hide, alter or falsify evidence.

78. The Chamber recalls that the question of where the applicant lived was clarified only during the main trial on 26 June 2002 by the statement of the witness M.J. (see paragraph 28 above) and that, at the time of his arrest, the applicant had no officially registered addressed.

79. It recalls further that Article 196 paragraph 1 of the Code of Criminal Procedure provides that "in exceptional circumstances custody can be ordered by the law enforcement agency before the initiation of investigation, provided it is necessary for establishing the identity, checking an alibi, or for other reasons to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 paragraph 1 and paragraph 2 points 1 and 3 of this Law exist, although in cases prescribed by Article 191 paragraph 2 point 2, this can be done only if there is a warranted fear that the person at issue will destroy clues to the crime… ". Article 196 of the Code of Criminal Procedure must be understood to allow in exceptional cases of great urgency, where there are indications that the suspect might flee, repeat his crime or destroy evidence, that the suspect can be arrested by the police without previously obtaining an order by the competent investigative judge.

80. The Chamber finds that under the circumstances of the case, and in particular because the applicant had no registered address, he could be arrested based on Article 196 paragraph 1 of the Code of Criminal Procedure. Therefore the applicant's arrest, based on an arrest warrant issued by the police without previously obtaining an order by the competent investigative judge, did not violate of Article 5 paragraph 1 of the Convention.

b. In relation to the fact that police custody lasted for three days

81. With regard to the fact that the police custody then lasted for three days, the Chamber notes that Article 196 paragraph 2 states that "Custody ordered by an authority of the Ministry of Internal Affairs may last up to three days, from the moment of apprehension."

82. The Chamber recalls that Article 196 paragraph 2 of the Code of Criminal Procedure provides for the possibility of holding someone in police custody up to three days. Therefore, formally custody for this period of time was legal. The question whether a detention in police custody of three days is necessary or reasonable falls under Article 5 paragraph 3 of the Convention. Therefore, the Chamber finds that there has been no violation of Article 5 paragraph 1 of the Convention in respect to the applicant's arrest by the police in the evening of 22 October 2001 and his subsequent police custody until 25 October 2001, the date when he was brought before the investigative judge.

2. Article 5 paragraph 3 of the Convention in relation to pre-trial detention

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

84. 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. ..."

85. The provision under subparagraph (c) in Article 5 paragraph 1 of the Convention permits arrest or detention if there is a reasonable suspicion that a criminal offence has been committed, or if this measure is reasonably necessary to prevent a criminal offence or to prevent the flight after an offence has been committed. The third paragraph of Article 5 requires that everyone who is detained under subparagraph 5(1)(c) be brought promptly before a judicial authority and is entitled to trial within a reasonable time or to release pending trial.

a. Right to be brought promptly before a judge

86. The purpose of this provision is to prevent individuals from being arbitrarily deprived of their liberty and to ensure that the period of arrest and detention is kept as short as possible (Eur. Court HR, *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A No. 34, paragraph 30).

87. In the present case the applicant was brought before the investigative judge for the first time on the third day after his arrest. The Chamber must assess whether this time period of three days is in accordance with the Convention under which everyone arrested should be brought "promptly" before a judicial body.

88. The Chamber notes that the European Court's practice interprets the word "promptly" restrictively. The Chamber recalls that the applicant was arrested on 22 October 2001 at 9 p.m. in Doboj. The next day, 23 October 2001, he gave his statement before the organ of the Ministry of Internal Affairs. Only on 25 October 2001, was he brought before an investigative judge, who then ordered his pre-trial detention.

89. The Chamber recalls that the day of the applicant's arrest was a Monday. It notes that in the court in Doboj there is an investigative judge permanently on duty and that there were no holidays or other special circumstances that could have delayed the proceedings. The Chamber notes further that according to domestic law, interrogation by the organs of the Ministry of Interior during police custody only has the character of an informative conversation and information gathered cannot be used as evidence in a later trial. Also, the person who has been interrogated is not entitled to have a lawyer present. Even though the law allows in Article 196 of the Code of Criminal Procedure under exceptional circumstances for police custody to last for three days (see paragraph 39 above), these elements add to the obligation on the respondent Party's authorities to act promptly.

90. The Chamber finds that the fact that the applicant was arrested on 22 October 2001 but was brought before the investigative judge only on 25 October 2001 does not, in the circumstances of the present case, satisfy the requirement of Article 5 paragraph 3 of the Convention to be brought "promptly" before a judge.

b. Entitlement to a trial within a reasonable time

91. The applicant further complained that his detention was unreasonably long.

92. The Chamber recalls that in its decision *Buzuk v. The Federation Bosnia and Herzegovina* (see case no. CH/01/7488, *Vlatko Buzuk*, decision on admissibility and merits of 3 July 2002,

paragraphs 103 and 104, Decisions July-December 2002), it explained the meaning of the "trial within a reasonable time" in the context of the length of detention:

> "103. Furthermore, the European Court of Human Rights has held in *Neumeister v. Austria* (Eur. Court HR, judgment of 7 May 1974, Series A no. 8), that "reasonable time" in this context does not refer to the processing of the prosecution and the trial, but to the length of detention. This must be distinguished from the concept of reasonableness under Article 6, paragraph 1 …. The length of the trial may be reasonable under Article 6, paragraph 1 due to complexity and the number of witnesses to be heard, but this does not mean that the continued detention will be reasonable under Article 5, paragraph 3. ….
>
> 104. The European Court of Human Rights has therefore developed two questions in order to determine whether the length of detention is reasonable. Firstly, whether the grounds given by the national authorities are "relevant and sufficient" to justify continued detention. Secondly, whether the national authorities displayed "special diligence" in the conduct of the proceedings. If the answer to either question is negative, it may be that the length of continued detention will be considered unreasonable. …."

93. The Chamber recalls that the pre-trial detention of the applicant has been extended four times, always based on the same three reasons. The first reason was the risk of flight based on the consideration that applicant had changed his address very often. The second reason for ordering detention was the possibility of destroying evidence. Finally, the pre-trial detention also was based on the possibility that applicant could repeat the crime.

94. The applicant claims that the statements of the court that he has not reported his correct address were not true since "those who arrested him" knew his whereabouts at all times. He further complains about the fact that his detention was extended because the court failed to hear the director of the company, his former employer, due to the fact that the court acknowledged the director's death four months after it occurred even though he, the applicant, had informed the court of the death much earlier.

95. The Chamber recalls that the domestic law imposes an obligation on the respondent Party to act immediately in the proceedings where detention has been ordered and to investigate whether pre-trial detention is still justified. The Chamber will therefore analyse the existence of the reasons for pre-trial detention from the moment of the decision on detention until the applicant's release. It will examine whether the grounds given by the national authorities are "relevant and sufficient" to justify continued detention and, secondly, whether the national authorities displayed "special diligence" in the conduct of the proceedings.

96. With regard to the first reason for detention, the possibility of flight, the Chamber recalls that in the first statement given before the investigative judge on 25 October 2001, the applicant stated that he lives in ulica Cara Dušana 6/5 in Doboj with a certain M.J.. The Chamber notes that this was confirmed on 26 June 2002 in the main hearing by M.J., who was heard as a witness. He stated that he agreed with the applicant using his address. The Chamber notes that the applicant's detention was terminated on 26 June 2002, while he still did not have a registered address. The Chamber also notes that the respondent Party's authorities should have heard M.J. already at a much earlier stage of the proceedings rather than to wait for eight months.

97. With regard to the second reason, that the applicant might influence witnesses or destroy evidence, the Chamber notes that one of the witnesses named in the decision ordering pre-trial detention, the director of the company, apparently had died before he was heard. The applicant raised the fact that this witness was deceased already in his appeal against the procedural decision prolonging his detention of 21 December 2001, but the court took notice of this fact only several months later.

98. The Chamber notes that the court based several of its decisions prolonging the applicant's detention on circumstances justifying the fear that the applicant might influence the statements of witnesses, naming different witnesses in these decisions including Đ.T., H.Š. and M.K. With regard to witness Đ.T., the Chamber notes that he was heard before the court on 7 February 2002, so that

at the latest on that date he could not be the reason for keeping the applicant in custody. The Chamber also notes that although on 21 February 2002 the prolongation on the applicant's detention was, *inter alia*, based on the fear that the applicant might influence the statements of two new witnesses, H.Š. and M.K., it appears that these two witnesses have not been heard by the court to date.

99. The third reason for detention was the possibility that the applicant might repeat his crime. In the early stages of the proceedings the court found that this possibility existed because the applicant was hiding the identity of the person who was in possession of the stamp and the documents used for the crime. Since 21 December 2001, the court no longer based its orders of detention on this reason. In the decision of 21 April 2002, the court even explicitly stated that the possibility of repeating the crime did not exist.

100. On the basis of the above, Chamber finds that the length of the applicant's detention, more than eight months, was grossly unreasonable. The Chamber notes in particular that, whilst the applicant was in pre-trial detention, the respondent Party was under a particular obligation to examine the witness and gather evidence as speedily as possible, with which it failed to comply. However, in spite of more than eight months of investigation, during which the applicant was held in pre-trial custody, the facts of the case have not been sufficiently established, so that to date the main hearing is suspended and the case has been returned to the investigative judge.

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

101. The Chamber therefore finds that the applicant was not brought promptly before a judge and that the length of his detention from February 2002 onwards until his release on 26 June 2002 exceeded the limits of reasonableness. Consequently, the respondent Party violated the applicant's rights as guaranteed by Article 5 paragraph 3 of the Convention.

3. Article 5 paragraph 4 of the Convention

102. Article 5 paragraph 4 of the Convention provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful."

103. In his application of 2 April 2002, the applicant complains that he was never delivered the procedural decision on his appeal against the procedural decision extending the detention of 22 January 2002.

104. In its first observations, the respondent Party asserted that it delivered the procedural decision to the lawyer, which was sufficient under domestic law. However, from additional information submitted by respondent Party at a later stage, it follows that the procedural decision of 8 February 2002 of the Supreme Court on the applicant's appeal against the procedural decision extending the detention of 22 January 2002, was delivered to the applicant and his lawyer on 12 and 13 February 2003, respectively. That means that the applicant received this decision one year and four days after it was issued. However, the respondent Party considers that by this action the applicant's rights were not violated, particularly if taken into consideration that "neither the applicant nor his lawyer showed any interest in the procedural decision".

105. Article 5 paragraph 4 of the Convention grants everyone who is deprived of his liberty by arrest or detention the right to take proceedings by which the lawfulness of such deprivation of liberty will be reviewed speedily by a court and his release ordered if the latter decides that the detention is unlawful. Article 5 paragraph 4 of the Convention grants to the person detained on remand a right of recourse to a court after the judicial decision to detain him or to prolong the detention has been taken. The Chamber finds that the right to a speedy decision under Article 5 paragraph 4 of the Convention also clearly implies that the person detained and his lawyer are informed of the court's decision on the lawfulness of his detention within a reasonable time.

106. The Chamber cannot find any possible reason why the respondent Party waited for more than one year to communicate the Supreme Court's decision to the applicant. It finds that such an extended period of time is completely unreasonable. Therefore, the Chamber finds that the respondent Party violated the applicant's rights as guaranteed by Article 5 paragraph 4 of the Convention.

4. Conclusions as to the merits

107. The Chamber therefore finds, in conclusion, that the respondent Party has not violated the applicant's right as guaranteed under Article 5 paragraph 1 of the Convention. The Chamber further finds that respondent Party has violated the applicant's rights as guaranteed under Article 5 paragraphs 3 and 4 of the Convention.

VIII. REMEDIES

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

109. The applicant did not request compensation before the Chamber.

110. The Chamber notes that serious violations have been established in the present case of Articles 5(3) and 5(4) of the Convention. The Chamber finds it appropriate, considering the case in general terms, to award compensation for non-pecuniary damage for the harm suffered by the applicant in the amount of 2000 (two thousand) Convertible Marks (*Konvertibilnih Maraka,* "KM"). This amount is to be paid within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

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

IX. CONCLUSIONS

112. For the above reasons, the Chamber decides,

1. unanimously, to declare the application in relation to the complaints under Article 5 paragraphs 1, 3 and 4 of the European Convention on Human Rights admissible;

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

3. unanimously, that there has been no violation of the applicant's right to liberty guaranteed by Article 5 paragraph 1 of the European Convention on Human Rights;

4. unanimously, that there has been a violation of the applicant's right to be brought promptly before a judge and to be released pending trial once the reasons for his pre-trail detention ceased to exist 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;

5. unanimously, that there has been a violation of the applicant's right under Article 5 paragraph 4 of the Convention that the lawfulness of his detention shall speedily be decided by delivering the Supreme Court's decision on appeal against the decision prolonging the pre-trial detention more than one year after it had been issued, the Republika Srpska thereby being in breach of Article I of the Agreement;

6. unanimously, to order the Republika Srpska to pay to the applicant, within one month of the

date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 2000 KM (two thousand Convertible Marks) by way of compensation for non-pecuniary damage;

7. unanimously, that simple interest at an annual rate of 10% (ten percent) will be payable on the sum awarded in conclusion no. 6 above from the expiry of the one-month period set for such payment until the date of final settlement of the sum 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 on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel