DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 April 2001)

Case no. CH/98/1018

Zoran POGARČIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 3 April 2001 with the following members present:

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

Mr. Peter KEMPEES, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a 62 year-old man of Croat national origin. He is a mechanical engineer who taught classes in technical drawing and basics of technique and production at the School of Electrical Engineering in Sarajevo (hereinafter "the School") for almost 30 years. The applicant was unable to continue working at the School on or around 31 May 1992 when the war hostilities made it impossible for him to get to work in Sarajevo. He was living in the suburb of Grbavica, which was then held by Bosnian Serb forces.

2. At the end of the hostilities, the applicant reported to the School and requested reinstatement. He was not reinstated. On 13 September 1996 the Labour Inspector issued a procedural decision finding that the School had violated the applicant's rights under Article 10 of the Law on Labour Relations During the State of War or the Immediate Threat of War (OG R BiH 21/92) and Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations (OGSFRJ 60/89 and 42/90). Accordingly, the School was ordered to resolve the applicant's labour status. In accordance with the order of the Labour Inspector, on 25 October 1996, the School issued a procedural decision authorising the applicant's leave without pay from 30 April 1992 until 10 June 1996 and placing him on a waiting list, thereafter. The stated reason for putting him on the waiting list was that there were not enough classes for him to teach and that he was not qualified to teach technical drawing.

3. The applicant appealed to the School against the 25 October 1996 decision. The School did not respond. On 24 December 1996 the applicant submitted a complaint to the Court of First Instance II in Sarajevo challenging the 25 October 1996 decision. As far as the Chamber is aware, these proceedings are still pending before that court today[1].

4. The applicant complains that he has been discriminated against because of his national origin in his right to employment. He also complains of the fact that there has been no significant development in the proceedings before the court for over four years.

II. PROCEEDINGS BEFORE THE CHAMBER

5. The application was introduced on 9 October 1998 and registered on that same day.

6. At its session in June 1999 the Chamber, sitting in Panel II, decided, pursuant to Rule 49(3)(b) of the Rules of Procedure, to transmit the application to the respondent Party for its observations on admissibility and merits.

7. The Federation submitted its observations on 17 August 1999. The applicant replied and submitted a claim for compensation on 1 November 1999. The Federation submitted observations on the compensation claim on 4 January 2000. In response to requests for additional information from the Chamber, the Federation submitted further observations on 11 October 2000, 3 January and 23 January 2001. Further observations were received from the applicant on 26 October 2000, 26 January and 12 February 2001. On 28 February 2001 the applicant confirmed that the proceeding before the Municipal Court II were still pending.

8. The Second Panel deliberated on the case on 8 March and 3 April 2001 and adopted the present decision on the latter date.

[1] It should be noted that in 1997 the Court of First Instance II in Sarajevo was renamed the Municipal Court II, Sarajevo.

III. ESTABLISHMENT OF THE FACTS

9. The applicant is a 62 year-old man of Croat national origin. He is a mechanical engineer and has taught classes in technical drawing and basics of technique and production for almost 30 years at the school of Electrical Engineering in Sarajevo ("the School"). From 1988 through 1990 the applicant was declared "thecnically redundant" due to reduced workload at the School. Pursuant to paragraph 1, Article 21 of the Law on Fundamental Rights Arising from Employment, the applicant found work at another school in Ilidža. The applicant's employment at the school in Ilidža was regulated by a contract between the School in Sarajevo and the school in Ilidža. The contract indicates that the applicant's labour rights will continue to be regulated by the School in Sarajevo. There is no indication in that contract that the applicant's employment was terminated.

10. The applicant states that during the second half of 1991 he returned to the School in Sarajevo and taught a course called Defence and Protection until 31 May 1992 when the war hostilities made it impossible for him to continue working. He was living in the suburb of Grbavica, which was then held by Bosnian Serb forces.

11. By a procedural decision dated 28 September 1992, the School terminated the employment of the applicant, as well as 42 other persons. The reason stated for their termination was unjustified absence and failure to carry out their work for twenty (20) days. The respondent Party states that of the 43 persons whose employment were terminated, 5 were of Bosniak origin, 26 were of Serbian origin, and 12 were of Croat origin. The applicant alleges that he only received a copy of this procedural decision on 13 October 2000, when the Chamber forwarded it to him.

12. After the war, on 15 February 1996, the applicant states that he reported to the School and requested reinstatement. However, he was not reinstated. The applicant alleges that he was told that another teacher would be covering his classes because he had not been able to come to work during the state of war. By a decision of the School dated 27 June 1996, the school stated that "insight into the registry and official documentation of the school confirmed that the applicant worked in the School until 30 April 1992." However, since, according to the School, the curricula had been reduced there was no need for a teacher with the applicant's qualifications and that the class of technical drawing was being taught by another teacher. The School referred to a decision issued by the Republic Institution for Development, Training and Education issued in December of 1988, that established that the applicant was qualified to teach within the mechanical profession in secondary schools for vocational education. It appears that the applicant had applied to the Institute for this decision as a result of having being declared redundant.

13. In June of 1996, the applicant submitted a petition to the Labour Inspector regarding his employment status. The Labour Inspector investigated his case. On 13 September 1996 the Labour Inspector issued a procedural decision finding that the School had, in fact, violated the applicant's labour rights. Specifically, the Labour Inspector found that the applicant's rights had been violated under Article 10 of the Law on Labour Relations During the State of War or the Immediate Threat of War (OG R BiH 21/91) and under Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations (OG SFRJ 60/89 and 42/92). Accordingly, the Labour Inspector ordered the School to refer the applicant to unpaid leave for the period of time that the applicant was unable to come to work due to the war hostilities and to resolve the applicant's employment rights under the law.

14. In accordance with the procedural decision of the Labour Inspector, the School issued a procedural decision on 25 October 1996 authorising the applicant's leave without pay from 30 April 1992 to 10 June 1996 and placing him on the waiting list thereafter. The reason stated for placing him on the waiting list was "reduced workload". The School further asserted that a person with a degree in mechanical engineering could not teach technical drawing and, therefore, there was no need for the applicant. It should be noted that documents later submitted by the respondent Party to the Chamber, in fact, indicate that a person with a degree in mechanical engineering is qualified to teach technical drawing.

15. The applicant appealed against the 25 October 1996 decision, placing him on the waiting list, within the prescribed time-limit. He argued that he was, in fact, qualified to teach courses in the School and that he should be re-employed. The School did not respond.

16. On 24 December 1996 the applicant submitted a complaint to the Court of First Instance II in Sarajevo (later called the Municipal Court II) challenging the procedural decision that placed him on the waiting list. He provided further information to the Court on 22 May 1997 informing the Court that the School had "employed several employees for duties which the plaintiff was supposed to and could have performed, and therefore violated the rights of the plaintiff." The applicant further asked the Court to order the School to alter his unpaid leave status so as to reflect the fact that the state of war ended on 31 December 1995 and that he was placed on the waiting list effective 1 January 1996. Further, the applicant requested compensation in the amount of his full salary effective 15 February 1996.

17. In May 1998, the School submitted papers to the Municipal Court II. The School argued, for the first time, that the applicant had been deemed "technically redundant" in 1989 and in that decision it was stated that the applicant taught elements of technique and production, not technical drawing. The School further argued that the course of technical drawing was being taught by another teacher assigned on 15 February 1996 and accordingly there was no position for him. In those papers, the School acknowledges, however, that a person with a degree in mechanical engineering is qualified to teach technical drawing. Finally, the School questions the applicant's whereabouts during the war since the applicant claims to have come to the School requesting reinstatement on 15 February 1996 and Grbavica was only re-integrated into Bosnia and Herzegovina in April of 1996.

18. On 30 July 1998 the School advertised vacancies for teachers with the applicant's qualifications whilst the applicant remained on the waiting list. Additionally, the applicant alleged that the number of courses being taught in technical drawing had increased since he was placed on the waiting list and that another teacher had been hired to teach those courses. This was recently confirmed by the respondent Party.

19. On 11 April 2000 the School filed a counter-claim. The School requested that the Municipal Court II annul the procedural decision of the School of 25 October 1996 and allow the School to issue a decision finding that the applicant's employment was terminated as of 30 September 1990. The School argued that it is entitled to this decision because the applicant had been declared redundant in 1988[2], a fact that allegedly the applicant had kept from the Labour Inspector. According to the School, under Article 21 of the Law on Fundamental Rights on Working Relations, the applicant's employment could have been terminated within two years of having been declared redundant if he failed to use his rights under Article 21 of the Labour Law. In response, the applicant claimed, and there is evidence, that he availed himself of his rights under Article 21.[3] Further, he states that he did not hide this information from the labour inspector.

20. Numerous hearings have been held in the applicant's case before the Municipal Court II. However, the case is still pending and there have been three different judges assigned to the case. Further, in light of the information regarding the fact that the applicant had been declared "technically redundant" in 1989, the Labour Inspector reopened the case in April 2000 and has not completed his investigation.

21. In response to questions submitted by the Chamber, the respondent Party states that since 1995 the school is comprised of teachers with the following ethnic origins: 2 teachers of Serb origin, 4 teachers of Croat origin, and 34 persons of Bosniak Origin. With respect to the 43 employees whose employment were terminated by the procedural decision of 28 September 1992 (see paragraph 11 above), only one person, who is of Bosniak origin, has been re-employed.

IV. RELEVANT DOMESTIC LAW

[2] It should be noted that in the papers it submitted to the Court in 1998, the School stated that the applicant had been declared technically redundant in 1989 not 1988.

[3] It should be noted that in its observations, the Federation argues that by a procedural decision of 31 May 1992, the applicant's employment was terminated for his failure to use his rights under Article 21. The Federation was unable to provide a copy of that decision.

A. Employment legislation

22. The following three laws were in force in the Federation until the entry into force of a new Labour Law on 5 November 1999.

1. The Law on Fundamental Rights in Working Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 60/89 and 42/90), taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH – no. 2/92);

2. The Former Socialist Republic Law on Working Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 20/90), as applicable in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement);

3. The Decree with Force of Law on Labour Relations during the State of War and Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992), adopted as the Law on Labour Relations by the Assembly of the Republic of Bosnia and Herzegovina (OG RBiH no. 13/94).

23. As indicated above, the above laws were replaced by a new Labour Law (OG FbiH 43/99) which entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Labour Law (OG FbiH 32/00) which entered into force on 7 September 2000.

24. Article 21 of the Law on Fundamental Rights in Working Relations provided that:

"Employee whose services are no longer required due to technological or other advancement that is contributing to the increase of productivity and improves the success of the organisation, i.e. of the employer, cannot get the cancellation of his employment until he is provided with, in accordance with the criteria determined by the law and general acts, i.e. work agreements, one of the following working rights:

1. right to work in other organisation, i.e., with the employer on the basis of the agreement between the competent bodies, on the working assignment that corresponds to his knowledge and skill, i.e., his working ability;

…
Employee that is not provided with one of the rights from para. 1 of this Article is entitled to pecuniary compensation in, at least, the amount of guaranteed personal income until the conditions for realisation of his right are obtained, up to two years the longest."

25. Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations provided that:

"A written decision ruling the realisation of worker's individual rights, obligations and responsibilities shall be delivered to a worker obligatorily"

26. Article 10 of the Law on Labour Relations During the State of War provided that:

"An employee can be sent on unpaid leave due to his inability to come to work in the following cases:

if he lives or if his working place is on occupied territory or on territory where fighting is taking place.

…
Unpaid leave can last until the termination of the circumstance mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he

or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended."

27. Article 15 of the Law on Labour Relations During the State of War provided that:

"The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive days without good cause, or if he took the side of the aggressor against the Republic of Bosnia and Herzegovina."

28. Article 5 of the new Labour Law provides that:

"A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, political or other opinion, ethnic or social background, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment.

29. Article 143 of the new Labour Law provides that:

"An employee who has the status of a laid off employee on the effective date of this law shall retain that status no longer than six months of the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline"

....
"An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had not accepted employment from another employer during this period, shall also be considered a laid off employee."

...
"While laid off, the employee shall be entitled to a compensation in the amount specified by the employer"

...
"If a laid off employee is not invited to work within the deadline referred to in paragraphs 1 and 2 of this Article, his or her employment shall be terminated with a right to severance pay which shall not be less than two thirds of the average monthly salary paid at the level of the Federation valid at the time of enactment of this Law, as published by the Federal Statistics Bureau, for up to five years of working experience, and with an additional one third of the average monthly salary for persons with 6-10 years of working experience, and a further one third for persons with 11-19 years of working experience, and further one third of the average monthly salary for those with 20 or more years of working experience." (Article 50 of the Law on Amendments to Labour Law)

...
"If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed."

30. Article 51 of the Law on Amendments to Labour Law:

In the Labour Law, a new Article 143a shall be added to read as follows:

"An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to

Labour Law, introduce a claim to the Commission, established in accordance with Article 143b, that his violated right be protected."

"If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the Article 143 has been instituted before a Court, this Court shall refer the case to the Commission, established in accordance with Article 143b, and interrupt the procedure."

B. The Law on Civil Procedure

31. Article 434 of the earlier Law on Civil Proceedings (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77) states that in disputes concerning employment, the Court shall pay special attention to the need to solve such disputes as a matter of urgency. The new Law on Civil Proceedings contains the same provision in Article 426 (OG FBiH no. 42/98).

V. COMPLAINTS

32. The applicant alleges that he was discriminated against in his right to work on the ground of his ethnic origin. He asserts that workers of Bosniak origin have been employed, rehired, or given overtime assignments, whilst he remained on the waiting list and that the School advertised vacancy announcements for positions with similar qualifications as the ones he held.

33. The applicant further complains that there has been a violation of Article 6 of the European Convention of Human Rights (hereinafter"ECHR") in that he has been denied his right to a fair hearing within a reasonable time as a result of the Municipal Court II's failure to ensure participation by the School or render a decision for over four (4) years.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Admissibility

34. The Federation claims that the case is inadmissible because the applicant has not exhausted available domestic remedies. The Federation argues that the applicant could have filed an appeal to an administrative body dealing with labour disputes. Instead, the applicant submitted on, 24 December 1996, a complaint to the then Court of First Instance II in Sarajevo

35. The Federation further claims that the 6-month rule has not been complied with, as there has not been a final decision from which the applicant could apply to the Chamber.

2. Merits

36. Firstly, the respondent Party submits that the applicant has not provided any evidence that he has been discriminated against in this matter. The Federation then points out that a number of relevant facts are in dispute, making the case difficult to decide. Secondly, the respondent Party concedes that the applicant was referred to unpaid leave as of 30 April 1992 and that he was placed on the waiting list on 10 June 1996. However, they state that the applicant was declared redundant by a decision of the school counsel dated 7 June 1990 because the subject he was teaching, "basics of technique and production," was removed from the curriculum. Accordingly, the School had issued a decision terminating the applicant's employment on 31 May 1992. In response to the Chamber's request for a copy of that decision, the respondent Party provided a procedural decision of 28 September 1992 terminating the applicant's employment on different grounds. The respondent Party alleges that the 31 May 1992 decision was destroyed during the war.

37. Thirdly, the respondent Party states that the Labour Inspector's decision requiring that the applicant's labour rights be assessed under Article 10 of the Decree with the Force of Law was

incorrect since the applicant's employment had been terminated on 31 May 1992 and the Decree came into force on 23 November 1992. Further, that the applicant was declared redundant as early as 1989 and his employment should have been terminated already on 21 June 1991 in accordance with Article 21 of the Law on Fundamental Rights Arising from the Employment and Articles 6-11 of the Law on Labour Relations. Accordingly, the respondent Party claims that the applicant's employment was legally terminated and illegally re-established as a result of the decision of the Labour Inspector.

38. Fourthly, the respondent Party states, in its observations of 17 August 1999, that the class to which the applicant claims he should be reinstated, technical drawing, was assigned to a teacher of non-Bosniak descent before the applicant was put on the waiting list. However, when asked directly by the Chamber for the name of the person who has been teaching technical drawing since 1995, the respondent Party stated that it was Mirsada Kršlć, who is of Bosniak origin. In further observations, the respondent Party then stated that starting from the school year 1997/98 Desanka Zaimović, who is of Serb origin, has been teaching technical drawing. The Federations further states that Ms. Zaimović was engaged by the School on 2 February 1997. However, the respondent Party has not submitted conclusive evidence to establish when Ms. Zaimović was engaged.

39. With respect to the applicant's complaint regarding the length of proceedings under Article 6, the respondent Party claims that the length of the proceedings is due in large part to the actions of the applicant. The respondent Party states that he has prolonged the proceedings by amending his claim on 22 May 1997. Further, the Federations states that the applicant has received favourable court decisions that he has not had implemented. The respondent Party seems to be referring to the 25 October 1996 decision of the School, not court decisions.

B. The Applicant

40. The applicant maintains that the course of technical drawing was initially taught by Mirsada Kršić, a woman of Bosniak origin, since February 1996. Further, he asserts that Ms. Kršić taught these classes in addition to her full employment in other subjects. The applicant complained to the School about the fact that Ms. Kršić was teaching in addition to her full workload. The School responded by hiring Desanka Zaimović in February 1997. The applicant further maintains that the number of classes being taught in technical drawing has increased from 8 to 18 between 1996 and 1999. In fact, during the 1996-1997 school year, the applicant alleges that three engineers left the school and the school had to reduce the number of classes taught in engineering. Classes in technical drawing were not taught for one and one half months during the 1996-1997 school year.

41. The applicant further points out that he used his rights under Article 21 and was, in fact, teaching at the School at the end of 1991. Finally, he points out that, according to the Law on Civil Procedure, employment disputes are to be dealt with urgently. The applicant asks to be reinstated and for compensation in the amount of 30,000 KM. The applicant further states that on 15 January 2000 the School stopped paying him any compensation. He states that since the end of 1996, he received approximately 75 KM per month for one year, 100 KM per month for 2 years and 200 KM per month for 8 months.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Requirement to exhaust effective domestic remedies

42. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the criteria for admissibility set out in Article VIII (2) of the Agreement. According to Article VIII(2)(a), the Chamber shall take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In this regard, it is incumbent on the respondent Party, arguing non-exhaustion to show that there was a remedy available to the applicant and to satisfy the Chamber that the remedy was an effective one.

43. In the present case, the Federation argues that the applicant had at his disposal effective remedies that have not yet been exhausted. Specifically, the Federation argues that the applicant could have filed an appeal to an administrative body dealing with labour disputes. However, the Chamber notes that the applicant was not required to bring his complaint before an administrative body. This was not a prerequisite to filing a lawsuit with the Court of First Instance II.

44. As noted above, the applicant applied to the Labour Inspector in June of 1996 to have his labour status resolved. In response to the Labour Inspector's decision, the School issued a procedural decision on 25 October 1996. However, unsatisfied with the fact that he was placed on a waiting list, because the applicant alleges that there were courses available that he was qualified to teach, the applicant appealed against that decision, in a timely manner, to the School without success. He then initiated proceedings before the then Court of First Instance II in Sarajevo on 24 December 1996. The case is still pending, over four (4) years later. The Court is under an obligation, pursuant to Article 51 paragraph 2 of the Law on Amendments to the new Labour Law, to refer the case to the Commission. The applicant is not required to initiate any further proceedings under this law. Accordingly, the Chamber does not consider that there is any additional remedy available to the applicant that he should be required to exhaust. It follows that, in this regard, the Federation's arguments must be rejected.

2. Competence *ratione temporis*

45. The Chamber will next address, *sua sponte*, the question to what extent it is competent *ratione temporis* to consider this case, bearing in mind that some of the impugned acts occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively. It is thus outside the competence of the Chamber *ratione temporis* to decide whether events occurring before the entry into force of the Agreement gave rise to violations of human rights (see, e.g., case no. CH/96/1 *Matanović,* decision on admissibility of 13 September 1996, at section IV, Decisions 1996-97). However, evidence relating to such events may be relevant as a background to events occurring after the Agreement entered into force (see, e.g., case no. CH/97/42, *Eraković*, decision on admissibility and merits of 15 January 1999, paragraph 37, Decisions and Reports January – July 1999). Moreover, in so far as an applicant alleges a continuing violation of his rights after 14 December 1995, the case may fall within the Chamber's competence *ratione temporis.* (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraph 106, Decisions and Reports January-July 1999).

46. In the present case, the applicant complains primarily against the 25 October 1996 decision placing him on the waiting list, when others have been hired to teach courses for which he is qualified, and the School's subsequent removal of the applicant from the waiting list, without being re-employed. Therefore, the thrust of the applicant's complaints relate to acts that occurred after 14 December 1995. To this extent, the situation therefore falls within the Chamber's competence *ratione temporis*.

47. In response to the applicant's allegations, the respondent Party has given several different reasons for the initial termination of his employment, and has argued that the 25 October 1996 decision was illegal and incorrect, in light of the initial termination of the applicant's employment. The alleged termination(s) of the applicant's employment occurred prior to 14 December 1995. However, according to legal norms of labour relations in the Federation of Bosnia and Herzegovina, a decision to terminate employment does not become effective until the employee is notified of his or her dismissal. In this case, the applicant alleges, and the respondent Party has not denied, that he was never properly informed of the reasons for his dismissal. In fact, the only time he received a written procedural decision concerning his dismissal was when it was forwarded to him, in October 2000, by the Chamber. In any event, the applicant began court proceedings in 1996 after the School attempted to resolve his labour status and relegated him to the waiting list. The applicant's grievances relate therefore to a situation that took place after the Agreement entered into force. The Chamber is therefore competent *ratione temporis* to examine this case in so far at it relates to events that occurred after 14 December 1995. (see e.g., case no. CH/98/948, *Mitrović,* decision on admissibility of 7 September 1999, paragraph 23, Decisions and Reports July-December 1999).

48. The Chamber finds that there are no other grounds for declaring the application inadmissible. Accordingly, the case is to be declared admissible.

B. Merits

49. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation 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 by the Convention and the other international agreements listed in the Appendix to the Agreement.

50. Under Article II of the Agreement, the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the ECHR and its protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix. Under Article I(14) of the Agreement, the Parties shall secure to all persons within their jurisdiction the enjoyment of the aforementioned rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status.

51. The Chamber has held in the case of *Hermas* (case no. CH/97/45, decision on admissibility and merits delivered on 18 February 1998, paragraph 118, Decisions and Reports 1998) that the prohibition on discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Under Article II(2)(b) it has jurisdiction to consider alleged or apparent discrimination in the enjoyment of the rights and freedoms provided for in, inter alia, the International Covenant on Economic Social and Cultural Rights (hereinafter "ICESCR") and the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

1. Discrimination in the enjoyment of the right to work, free choice of employment and protection against unemployment, as guaranteed by ICESCR and the CERD

52. The Chamber will first consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Article 6(1) of the ICESCR and Articles 1(1) and 5(e)(i) of the CERD which, as far as relevant, reads as follows:

> Article 6(1) of the ICESCR:
>
> "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."
>
> Article 1(1) of the CERD:
>
> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
>
> Article 5 of the CERD:
>
> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> ...
> (e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

…"

(a) Impugned acts and omissions

53. The Chamber will now examine which precise acts and omissions affecting the applicant can be imputed to the Federation. The Chamber has already found itself competent to examine the fact that the applicant was placed on the waiting list after 14 December 1995. Further acts possibly attracting the responsibility of the Federation under the Agreement include the School's hiring of a new teacher to teach a class for which the applicant was qualified whilst the applicant remained on the waiting list; the School's vacancy announcement for a teacher to teach classes for which the applicants is qualified; and the cessation of payment to the applicant of compensation and contributions to the pension fund and for social security.

54. All these acts comprise an interference with the applicant's rights under Article 6(1) of the ICESCR and under Article 5(e)(I) of the CERD, as well as a potential failure of the Federation's positive obligation to secure protection of those rights without discrimination.

(b) Differential treatment and possible justification

55. In order to determine whether the applicant has been discriminated against, the Chamber must first determine whether the applicant was treated differently from others in the same or a relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see e.g. cases nos. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions and Reports January-July 1999; *Rajić*, decision on admissibility and merits delivered on 7 April 2000, paragraph 53, Decisions and Reports January-July 2000).

56. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment based on any ground mentioned in Article I(14) of the Agreement or in Article 1 of the CERD, such as race, colour and ethnic or national origin. In previous cases, the Chamber has taken a similar approach (see e.g., the above-mentioned *Hermas* decision paragraphs 86 et seq., case no. CH/97/46, Kevešević, decision on the merits delivered on 10 September 1998, paragraph 92, Decisions and Reports 1998; and case no. CH/98/756, D.M., decision on admissibility and merits delivered on 14 May 1999, paragraph 72, Decisions and Reports January-July 1999).

57. The applicant has essentially argued that he was placed and kept on a waiting list merely due to his Croat origin. The Federation has argued, for its part, several different reasons for the actions of the School vis-à-vis the applicant's employment. First, the Federation argues that the applicant was put on the waiting list because he was not qualified to teach technical drawing; second, the Federation argues that there was no need for the applicant because the number of classes for which he was qualified had decreased; and finally, the Federation argues that the Labour Inspector's decision of 13 September 1996, which obligated the School to regulate the applicant's employment status, was based on an incorrect establishment of the facts. Namely, the Federation states that the applicant's employment had been terminated on 31 May 1992 because he had been declared "technically redundant" in 1990 and had failed to use his rights under Article 21 of the Law on Fundamental Rights in Working Relations, and therefore he never should have been put on the waiting list in the first place.

58. The Chamber has already delimited its competence *ratione temporis* and can only consider the alleged discrimination in so far as it is alleged to have taken place or continued after 14 December 1995. It cannot therefore adjudicate whether any of the stated reasons for the applicant's termination were discriminatory. In its subsequent examination, the Chamber must nevertheless take account of those events occurring before 14 December 1995 that led to the applicant's placement on the waiting list.

59. The respondent Party states that the applicant's employment was terminated on 31 May 1992 because he had been declared redundant in 1990. However, the respondent Party was unable to supply a copy of that decision. It supplied a copy of the 28 September 1992 decision upon which the applicant's employment was terminated on different grounds. Regardless, of whether there ever was a 31 May 1992 decision, the Chamber finds it of little relevance, as it would have been superseded by the decision of 28 September 1992, in any event. Furthermore, the Chamber finds it curious that the applicant's employment would have been terminated in September of 1992 if there already had been a procedural decision terminating his employment in May of 1992.

60. Accordingly, with respect to the initial termination of the applicant's employment, the Chamber finds it established that 43 persons' (including the applicant's) employment were terminated by the procedural decision of 28 September 1992 on the purported grounds of "unjustified absence and failure to carry out their work for 20 days." Of those 43 persons, 26 were of Serb origin, 12 were of Croat origin, and 5 were of Bosniak origin. It is also established that of those 43 persons, only one person has been re-employed and that person is of Bosniak origin.

61. As found by the Labour Inspector, the applicant's Labour Relations should have been regulated according to Article 10 of the Decree with the Force of Law During the State of War or Immediate State of War. Regardless, of whether the 28 September 1992 decision was in accordance with the law, the Chamber finds that this decision had a disparate impact on persons of non-Bosniak origin and resulted in the differential treatment of non-Bosniaks subsequent to 14 December 1995 because the majority of employees who were required to reapply for their jobs after the war ended were non-Bosniaks.

62. With respect to the applicant being placed and remaining on the waiting list since 10 June 1996, the Chamber notes that the respondent Party has provided different and contradictory reasons for the interference with the applicant's rights. At various stages of the proceedings before both the domestic court and the Chamber the reasons put forward by the respondent Party and the School have either been rescinded and/or contradicted.

63. In its decision of 27 June 1996, the School confirmed that the applicant was qualified to teach technical drawing. However, due to a reduced workload the School stated that there was no need for the applicant. Subsequently, in its observations the respondent Party confirmed, what the applicant had stated, namely, that the number of classes in technical drawing has increased since 1996. Then in its procedural decision of 25 October 1996, the School's stated reason for placing the applicant on the waiting list was that that the applicant, who is a mechanical engineer, was not qualified to teach technical drawing. Then the respondent Party subsequently acknowledged that he was qualified. Finally, the respondent Party alleged that the procedural decision placing the applicant on the waiting list, in the first place, was illegal because the applicant had been declared redundant and his employment terminated as a result. As such, the respondent Party argues, his labour relations should not have been regulated in the way the Labour Inspector ordered. However, the respondent Party has provided no evidence for this. In fact, the evidence establishes that the applicant's employment was not terminated based on the fact that he had been declared redundant.

64. Further, the respondent Party conceded that Desanka Zaimović a person of Serb origin married to a person of Bosniak origin was employed after the applicant was already placed on the waiting list. Additionally, on 15 January 2000 the School stopped paying the applicant any compensation at all. The respondent Party has not provided the Chamber with a justification for this action.

65. The Chamber finds that the net result of the above stated is that the respondent Party has provided no credible reason for either placing the applicant on the waiting list in the first place, keeping him on the waiting list since 10 June 1996, or stopping his compensation payments. Accordingly, the Chamber cannot accept the Federations arguments that the applicant's differential treatment was justified on any ground.

66. The Chamber furthermore notes, that the respondent Party stated that the post for teaching technical drawing had been filled by a person of "non-bosniak" origin. After requesting the name of

this person, on several occasions, the respondent Party finally conceded that initially the course was taught by Mirsad Kršlć, who is of Bosniak origin, and it was later taught by Desanka Zaimović, a person of Serb origin who is apparently married to a person of Bosniak origin. Further, it is established that since 1995, only 2 persons of Serb origin and 4 persons of Croat origin have been employed by the School in comparison with 34 persons of Bosniak origin. Additionally, of those 43 persons, whose employment had been terminated by the decision of 28 September 1992, only one person was rehired and that person was of Bosniak origin. These facts, coupled with the respondent Party's contradictory statements in this case, strongly suggest that there has been discriminatory treatment of the applicant based on his Croat origin.

67. The Chamber, therefore, concludes that that the applicant has been discriminated against on the ground of national and ethnic origin in his enjoyment of the right to work under Article 6 of the ICESCR and Article 5 of the new Labour Law.

68. The application also raises an issue under Article 5(e)(i) of the CERD. That provision, in conjunction with Article 1 of the CERD, obliges a state to prohibit racial discrimination, i.e. also on the grounds of national or ethnic origin, in the enjoyment of the rights to work, to free choice of employment and to protection against unemployment. The Chamber has already found that the applicant was subject to differential treatment in his right to work according to Article 6 of the ICESCR. It has also established that this treatment was the result of discrimination on the ground of his national and ethnic origin.

69. The Chamber therefore finds it established that the applicant has been discriminated against also in the enjoyment of his rights as guaranteed by Article 5(e)(i) of the CERD, in particular his right to protection against unemployment.

70. In light of the above, the Federation is in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the treaties in question.

2. Article 6 of the Convention

71. The Chamber will continue to consider, under Article II(2)(a) of the Agreement, the allegation that there has been a violation of Article 6 of the Convention in that the proceedings in the applicant's case have not been determined within a reasonable time. The relevant part of Article 6 paragraph 1 provides as follows:

> "In the determination of his civil rights and obligations. . ., everyone is entitled to a fair. . hearing within a reasonable time…"

72. In the first instance, the Chamber must examine whether the resolution of the applicant's employment status concerns a "civil right" within the meaning of Article 6 of the Convention. Although the applicant was an employee of a public institution, his employment was regulated by the Law on Labour Relations which applied to employment relations in general. In the present case, the Chamber finds that there is a dispute before the Municipal Court II in Sarajevo relating to the applicant's working relations, thereby affecting a civil right of the applicant (see e.g., case no. CH/97/50, *Rajić*, decision on admissibility and merits of 7 April 2000, paragraph 66, Decisions and Reports January-July 2000). Article 6(1) therefore applies to the proceedings before the Municipal Court II in Sarajevo.

73. The Chamber has already noted that the applicant initiated proceedings before that Court on 24 December 1996. It is from this date that the Chamber must consider the reasonableness of the length of proceedings under Article 6. The proceedings have lasted for approximately four years and three months as of April 2001.

74. When assessing the reasonableness of the length of proceedings, for the purpose of Article 6 paragraph 1 of the Convention, the Chamber must take into account, *inter alia*, the complexity of the case, the conduct of the applicant and the authorities, and the matter at stake for the applicant (see

e.g. case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 12, Decisions and Reports 1998).

75. The issues in the applicant's case are whether his working relationship was terminated in accordance with the law and whether he was improperly placed on the waiting list. Although there are a number of factual disputes in this case, the Chamber cannot find that the issues are of a particularly complex nature. The Chamber further notes that there is no indication that the length of the proceedings can be imputed to the applicant. The statement by the respondent Party that the applicant has contributed to the delay, because he asserted a second claim in 1997, does not establish that he has contributed to the length of the proceedings. The respondent Party has not provided any explanation from which it would appear that the delays could not be imputed to the judicial authorities and the respondent Party itself.

76. In fact, the Chamber takes note that the School has significantly prolonged the proceedings by continuously changing its defence in this case both before the domestic court and the Chamber. A review of the documents establish that, initially the School stated that the applicant's employment was terminated because of his failure to appear for work for 20 consecutive days during the war, and that during that time another teacher was teaching the courses he was qualified to teach. Then in a procedural decision of 27 June 1996, the School confirmed that the applicant worked in the School until 30 April 1992 and that he was qualified to teach technical drawing, however, due to a reduced workload, there was no need for the applicant. However, in subsequent observations provided to the Chamber, the respondent Party confirmed the applicant's allegation, that, in fact, the number of courses being taught in technical drawing has increased since 1995. In fact, at least one new teacher was engaged, after the applicant was placed on the waiting list, to teach classes for which the applicant was qualified.

77. Thereafter, in its procedural decision of 25 October 1996, the School stated that the applicant was not, in fact, qualified to teach technical drawing, and therefore there was no need for him. In subsequent documents submitted to the Chamber, it is evident that the applicant is and has been, qualified. Thereafter, the School asked that the Municipal Court II issue a decision dismissing the applicant retroactive to 30 September 1990, due to the fact that the applicant had been declared redundant in 1988, and failed to use his rights under Article 21 of the Labour Law. However, in its observations to the Chamber, the respondent Party states that the applicant had, in fact, been dismissed by a procedural decision dated, 31 May 1992, for failure to use his rights under Article 21. When asked for a copy of that procedural decision, the respondent Party submitted a procedural decision, dated 28 September 1992, wherein the applicant and forty-two (42) other persons were dismissed for unjustified absence and failure to carry out their work for twenty (20) days. (see paragraphs 10-19 above).

78, In light of the above, it clearly cannot be found that the applicant has contributed to the delay. The respondent Party's argument on this point must be firmly rejected.

79. The Chamber also notes that an employee who considers that his working relationship was wrongly terminated has an important personal interest in a speedy outcome of the dispute and in securing a judicial decision on the lawfulness of this measure considering that his very livelihood depends on it. Further, domestic law requires that matters concerning employment are to be resolved as a matter of urgency (see Article 426 of the Law on Civil Proceedings, Official Gazette of the FBiH no. 42/98). The Chamber therefore finds that what was at stake for the applicant called for particular speed.

80. In the circumstances of the present case, the Chamber finds that there has been a violation of the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the Convention, for which the Federation of Bosnia and Herzegovina is responsible.

VIII. REMEDIES

81. Under Article XI(b) of the Agreement the Chamber must next address the question of what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found.

82. The applicant requests that the Federation be ordered to reinstate him and pay him compensation in the amount of 30,000 KM. This number seems to amount to approximately 500 KM for each month of unemployment. The Federation objects to this request on the grounds that it is not specified.

83. The Chamber finds that the applicant's claim for compensation cannot be rejected on the above stated ground. The Chamber has found the Federation in breach of its obligations under the Agreement by discriminating against the applicant on the basis of national and ethnic origin in the enjoyment of his rights under Article 6 of the ICESR and Article 5(e)(i) of the CERD and by violating his right to a fair hearing within a reasonable time under Article 6 of the ECHR. Therefore, the Chamber finds it appropriate to award the applicant pecuniary compensation for lost income.

84. The Chamber notes that, according to the Official Gazette of the Federation of Bosnia and Herzegovina (nos. 5/97, 4/98, 5/99, 500/99 and 501/2000), the average net salary in "non-economic employment relationships" (including school teachers) amounted to KM 239 in 1996, to KM 348 in 1997, to KM 406 in 1998, to 435.80 KM 1999, and to 412.72 KM in 2000.[4] Having regard to the general depreciation due to inflation and the fact that the net average salary does not include contributions to pension funds, the Chamber considers that applicant's claim of approximately 500 KM for each month of unemployment is, as a whole, reasonable (see case no. CH/97/90, *Rajić,* delivered on 7 April 2000 Decisions and Reports January-August 2000). However, the applicant states that from approximately the end of 1996 until 15 January 2000 he received some compensation from the School. He states that he received approximately 75 KM per month for one year, 100 KM per month for 2 years and then 200 KM per month for 8 months. Accordingly, over the course of 3 years and 8 months, the applicant received a total of 4,900 KM. The Chamber finds it appropriate to subtract these amounts from the total award. From June 1996 until and including April 2001 the total amount of lost salary amounts to 29,500 KM. Having deducted the payment of 4,900 KM the Chamber awards the applicant 24, 600 KM in pecuniary compensation for lost income and unpaid contributions from June 1996, the first time the applicant applied to the School in writing for reinstatement, up to and including, April 2001.

85. In the present case, the Chamber also finds it appropriate to order the respondent Party to undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work, and that he be offered the possibility of resuming his work, or a fair and just retirement, on terms equal with those enjoyed by other employees and commensurate with his qualifications as a teacher, and in any event not later than three months after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

86. The Chamber considers it appropriate that the respondent Party must pay to the applicant the sum of KM 500 per month for each month the applicant continues not to be reinstated into his employment or until another settlement between the Parties is reached. This sum is payable beginning from 1 May 2001.

87. Additionally, the Chamber has found the Federation in breach of its obligations under the Agreement with respect to the applicant's right to a fair hearing within a reasonable time. As a result, the applicant has suffered some non-pecuniary damage stemming from the absence of a final decision regarding his employment status. However, taking into account the award for compensation for material damages, the Chamber considers that the finding of a violation would provide just and sufficient satisfaction for moral damages.

IX. CONCLUSION

For these reasons, the Chamber decides

1. unanimously to declare the application admissible:

[4] It should be noted that all employment categories were calculated together for the year 2000.

2. unanimously, that the applicant has been discriminated against in the enjoyment of his right to work as guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of his right to work, to free choice of employment and to protection against unemployment under Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Human Rights Agreement;

3. unanimously, that the applicant's right to a hearing within a reasonable time under Article 6 paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously to order the Federation of Bosnia and Herzegovina to pay the applicant, not later than one month after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules o Procedure, the sum of 24,600 KM by way of compensation for lost income and unpaid contributions;

5. unanimously to order that the Federation of Bosnia and Herzegovina, through its authorities, undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work, and that he be offered the possibility of resuming his work or a fair and just retirement on terms equal with those enjoyed by other employees and commensurate with his qualifications as a teacher;

6. unanimously to order the Federation of Bosnia and Herzegovina to pay, beginning from 1 May 2001, the sum of KM 500 per month for each month the applicant continues not to be reinstated into his employment or until another settlement between the Parties is reached;

7. unanimously to order that simple interest at an annual rate of 10% (ten percent) will be payable over the above sums or any unpaid portion thereof from the day of expiry of the above mentioned one-month period until the date of settlement;

8. unanimously, that the award for compensation for material damages provides just and sufficient satisfaction with regard to the non-pecuniary damages;

9. unanimously to order the Federation of Bosnia and Herzegovina to report to it within three months after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above order.

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 6 April 2001)

Case no. CH/98/1019

Sp.L., J.L., Sv.L. and A.L.

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 3 April 2001 with the following members present:

Ms. Michèle PICARD, President
Mr. Dietrich RAUSCHNING, Vice-President
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

Mr. Peter KEMPEES, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina. Sp.L. ("the first applicant"), his wife ("J.L.") and his two sons ("Sv.L." and "A.L.") are the holders of savings accounts with Kristal Banka AD, a limited company. J.L., Sv.L. and A.L. are represented by the first applicant in the proceedings before the Chamber and have been represented by him in all domestic proceedings. On 23 July 1993 the Court of First Instance in Doboj ordered the Bank to pay to the applicants the sums they have on deposit with it. This decision entered into force. The applicants have sought execution of the decision, without success.

2. The case raises issues principally under Article 6 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was registered on 12 October 1998.

4. On 14 May 1999 the Chamber decided to transmit the case to the respondent Party for its observations on admissibility and merits. The respondent Party submitted its observations on 23 July 1999.

5. The applicants' further observations, including a compensation claim, were received on 6 August 1999 and transmitted to the respondent Party. On 14 September 1999 the respondent Party submitted its further observations.

6. On 7 June 2000 the Chamber requested that the applicants submit further information. On 22 July 2000 the Chamber received the information.

7. By a submission dated 26 October 2000 the applicants informed the Chamber about procedural changes in their favour. On 7 November 2000 the Chamber received further observations from the respondent Party in relation to the above-mentioned changes.

8. The Chamber deliberated upon the admissibility and merits of the application on 5 September 2000 and on 2 April 2001. On the latter date it adopted the present decision.

III. THE FACTS

9. The facts of the case as they appear from the applicants' submissions and the documents in the case-file may be summarised as follows.

10. The first applicant represents his wife, Mrs. J.L. and his two sons, Mr. Sv.L. and Mr. A.L. in the different proceedings. The applicants are the holders of savings accounts at Kristal Banka AD, Banja Luka, Branch Office Doboj. On 18 December 1992 the applicants initiated proceedings before the Municipal Court in Doboj seeking disbursement of their savings and compensation for loss of profit due to their inability to withdraw their savings from the Bank.

11. On 23 July 1993 the court in Doboj issued a partial decision, deciding only upon the request for disbursement of savings. It ordered the Bank to pay to J.L. 7554,21 German marks ("DEM"), to A.L. 187,78 DEM from one savings account and 3050,97 Swiss francs ("CHF") from another, to Sv.L. 36,60 CHF and to the first applicant 22,04 American dollars ("US $"). In addition the Bank was ordered to pay them interest, which would be calculated according to the policy of the Bank, taking into account the default interest on the sum awarded as and from 18 December 1992 until the date of payment. This sum was not quantified in the decision.

12. On 17 November 1993 the Court of First Instance, pursuant to a request of the applicants, ordered the enforcement of the decision of 23 July 1993. The enforcement was stopped by a court procedural decision dated 26 July 1994 at the applicants' request, in which they expressed their

willingness to give up their claims to receive assets in foreign currency if they could be compensated in Yugoslav dinars ("YUD") within the time-limit of 30 days. This payment has never taken place.

13. On 12 April 1994 the Court of First Instance in Doboj rejected the compensation claims of the applicants. While deciding upon the applicants' appeal dated 23 May 1994, the Regional Court in Doboj overturned the decision of 12 April 1994, finding a procedural mistake in the first instance proceedings, and returned it for reconsideration to the Court of First Instance.

14. On 24 August 1995 the Court of First Instance decided in renewed proceedings to reject the above-mentioned request. On 8 March 1996 the Regional Court rejected the applicants' appeal filed against the decision of 24 August 1995. On 29 March 1996 the applicants initiated proceedings before the Supreme Court of the Republika Srpska requesting review of the Regional Court's decision. The Supreme Court decided upon this request on 27 December 1999 and rejected the request for review.

15. On 31 May 1996, while deciding upon the applicants' appeal against the decision of 26 July 1994, the Regional Court in Doboj overturned it and returned the case for deliberation to the Municipal Court. This court issued a conclusion dated 16 July 1996 requiring the applicants to specify the suggestion for enforcement by specifying the amount of foreign currency debt stated in YUD.

16. On 26 November 1996, while deciding upon the Bank's appeal against the above mentioned conclusion, the Regional Court overturned it due to the failure of the First Instance Court to observe a formality and returned the case to it for reconsideration. On 24 December 1996 this court decided in the same manner but in proper form.

17. On 25 January 1997 the Bank informed J.L. that banks were forbidden to carry out any disbursement due to the Decision on Suspension of Payments from "Frozen" Bank Accounts. According to the applicants' allegations, the reason for this is the decision of the Government of the Republika Srpska dated 3 May 1996, which purports to prevent the payment of so-called "old" foreign currency savings.

18. On 6 June 1997 the Regional Court in Doboj accepted the appeal of the Bank and returned the case once again to the Court of First Instance, finding it doubtful whether the conditions as provided by law to declare the enforcement impermissible were fulfilled. This was to be considered in separate proceedings. On 11 May 1998 the Court of First Instance decided to delay the enforcement of the decision of 17 November 1993 until the proceedings initiated by the Bank were concluded.

19. On 3 October 2000 the Court of the First Instance, while deciding upon the Bank's appeal, held that there was no reason for the non-enforcement of the decision of 23 July 1993. The Bank appealed against the decision dated 3 October 2000. These proceedings are still pending.

IV. RELEVANT DOMESTIC LAW

20. The Law on Enforcement Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 20/78), as amended, is still in force in the Republika Srpska and sets out a detailed regime for the enforcement of court decisions. Article 2 states that such enforcement is initiated at the request of the person in whose favour the decision was given. Article 3 states that enforcement is carried out by the regular courts. Article 7 provides for the issuing of a decision on enforcement by the competent court. Enforcement proceedings are, according to Article 10, to be carried out as a matter of urgency.

21. The Decision on Suspension of Payment of "Frozen" Bank Accounts, issued by the Government of the Republika Srpska on 3 May 1996, provides that all payments of "frozen" bank accounts are temporarily suspended (both the capital amount and the interest). However, the Constitutional Court of Republika Srpska, by a decision dated 30 March 1999, has declared this governmental decision incompatible with the Constitution of the Republika Srpska.

V. COMPLAINTS

22. The applicants allege violations of the right to a fair trial and complain of the length of the court proceedings.

VI. SUBMISSIONS OF THE PARTIES

23. The respondent Party in its submission dated 22 July 1999 is of the opinion that the application should be declared inadmissible because the applicants have not exhausted the domestic remedies. The above was stated again in further observations of the respondent Party of 7 October 2000.

24. The applicants maintain their complaint.

VII. OPINION OF THE CHAMBER

A. Admissibility

25. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

26. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. The Chamber notes that the respondent Party has not identified any "effective remedy" available to the applicants for the purposes of Article VIII(2)(a) of the Agreement.

27. The applicants initiated proceedings before the Court of First Instance on 18 December 1992, which issued its decision on 23 July 1993. This decision became final. The applicants sought execution of the decision, which the court ordered on 17 November 1993. However, this order was withdrawn at a request of the applicants, which was made under a particular condition and for a limited period of time, as mentioned in paragraph 12. Since that time the applicants have been seeking the execution of the decision dated 23 July 1993. In these circumstances, the Chamber finds that the remedies available have not proved effective in practice. Accordingly, the applicants have exhausted the remedies available to them.

28. The Chamber considers that no other ground for declaring the application inadmissible has been established. Accordingly, the case is to be declared admissible.

B. Merits

29. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

1. Article 6 of the Convention

30. The applicants did not specifically allege a violation of their rights as protected by Article 6 of the Convention. The Chamber raised it on its own motion when transmitting the application to the respondent Party. Article 6 paragraph 1, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and

public hearing within a reasonable time by an independent and impartial tribunal established by law ...."

2. Reasonable time

31 The Chamber has already noted that the applicant initiated proceedings before the competent authorities on 18 December 1992. The period to be taken into consideration starts on 14 December 1995 when the Agreement entered into force.

32. When assessing the reasonableness of the length of proceedings, for the purposes of Article 6 paragraph 1 of the Convention, the Chamber must take into account, *inter alia*, the complexity of the case and the conduct of the applicant and the authorities. The Chamber has held that one of the guarantees provided by Article 6 of the Convention is the right to a fair trial within a reasonable time (see case no. CH/97/54 *MITROVIĆ,* decision on admissibility, adopted on 10 June 1997, paragraph 10, Decisions and Reports 1998).

33. The proceedings in question are still pending because the question of the enforceability of the decision of 23 July 1993 has not been finally determined (see paragraph 19 above). The relevant period therefore exceeded five years.

34. The main question in the present case is whether the particular difficulties associated with the present case can be attributed to the applicants' conduct or rather to that of the State authorities, which have the duty to organise their judicial system in such a way as to meet each of the requirements in Article 6 paragraph 1 (European Court for Human Rights, *Garyfallou AEBE v. Greece,* judgment of 24 September 1997, Rep.1997-V, fasc.49, p.1821). Due to the conduct of relevant national authorities, although the courts issued a certain number of decisions in order to resolve the case, the proceedings were unnecessarily prolonged. Having in mind that the decision of the Government dated 3 May 1996 was declared unconstitutional, it cannot be seen that there was any reason for this delay. The length of the proceedings must be imputed to the authorities of the Republika Srpska. It follows that there has been a violation of Article 6 of the Convention on this point.

3. Article 1 of Protocol No. 1 to the Convention

35. The applicants did not specifically complain that their right to peaceful enjoyment of their possessions has been violated as a result of the non-enforcement of the decision of the Court of First Instance of 23 July 1993. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

36. The respondent Party did not submit any observations under this provision.

37. The Chamber finds that the applicants' deposits with the Bank constitute "possessions" within the meaning of Article 1 of Protocol No. 1. The expression a "possession" within the meaning of Article 1 Protocol No. 1. also includes an enforceable claim (European Court for Human Rights, *Pressos Compania Naviera S.A. and others* v. Belgium judgment of 20 November 1995,Series A no.332, p.50, paragraph 59).

38. The Chamber has held that positive obligations on the Parties to provide effective protection for the rights of an individual includes the enforcement of court decisions such as that concerned in the present case. In the present case the failure of the courts of the respondent Party to determine finally and within a reasonable time whether the decision of 23 July 1993 is enforceable has

prevented the applicants from benefiting from a *prima facie* valid court decision in their favour. In the proceedings before the Chamber no convincing reason has been put forward as to why the decision should not be enforced. In particular, although the Bank maintained that the decision of the Government of 3 May 1996 prevented it from paying to applicants, that decision has been declared unconstitutional. In these circumstances, the Chamber finds that the respondent Party has failed effectively to secure the applicants' rights to peaceful enjoyment of their possessions. Thus, there has been a breach of their rights as guaranteed by Article 1 of Protocol No. 1.

VIII. REMEDIES

39. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

40. The Chamber notes that the applicants' aim is that the decision of the Court of First Instance of 23 July 1993 be enforced. The Chamber has found that the failure to do so involves a breach by the respondent Party of the applicants' rights as protected by Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention. It is accordingly appropriate that the respondent Party ensure the enforcement of the decision in full as soon as possible. The applicants also claimed compensation for loss of profit. This claim was rejected because it is to be paid through the interest rate as provided by the court verdict of 23 July 1993.

IX. CONCLUSION

41. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the failure to take adequate steps to enforce the decision of the Court of First Instance of 23 July 1993, number P.451/92, in the applicants' favour constitutes a violation of their rights to a fair hearing within a reasonable time in the determination of their civil rights as protected by Article 6 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of its obligations under Article I of the Human Rights Agreement;

3. unanimously, that this failure also constitutes a violation of the applicants' rights to peaceful enjoyment of their possessions as protected by Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of its obligations under Article I of the Agreement;

4. unanimously, to order the Republika Srpska to ensure the full enforcement of the decision of the Court of First Instance in Doboj of 23 July 1993, number P.451/92, in the applicants' proceedings against Kristal Banka AD without further delay and in any case not later than one month after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure; and

5. unanimously, to order the Republika Srpska to report to it, within one month of the date of the present decision becoming final in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken by it to comply with the above order.

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 9 June 2000)

Cases nos. CH/98/1027 and CH/99/1842

R.G. and Predrag MATKOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 12 May 2000 with the following members present:

Ms. Michèle PICARD, President
Mr. Andrew GROTRIAN, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The first applicant, R.G., is a citizen of Bosnia and Herzegovina of Serb descent, resident in Trnovo, Republika Srpska. The second applicant, Mr. Matković, is a citizen of Yugoslavia of Montenegrin descent, resident in Serbia.

2. The applications concern their allegations that on 6 September 1996, while driving in the Federation of Bosnia and Herzegovina near Sarajevo, they were shot at and detained by soldiers of the Army of Bosnia and Herzegovina ("BH Army") and that they were detained without any legal basis, until 30 October 1996. R.G. claims that he suffered serious gunshot wounds, that he was treated in hospital under a false name (Mustafa Osmanović) and that after his release from hospital on 23 September 1996 he was detained in different places by the BH Army. Mr. Matković claims that he was detained in various places by the same army until 15 October 1996.

3. On 14 October 1996 an investigation was opened against the applicants on suspicion that they had committed war crimes. On 15 October 1996, they were brought before a judge who ordered their detention. On 30 October 1996 their release from detention was ordered by the (then) Higher Court in Sarajevo and they were released that day.

4. Both cases were referred to the Chamber by the Human Rights Ombudsperson for Bosnia and Herzegovina. They raise issues principally under Articles 3 and 5 of the European Convention on Human Rights and under the provisions of the Agreement guaranteeing freedom from discrimination in the enjoyment of the rights set out in the Appendix to the Agreement.

II. PROCEEDINGS BEFORE THE OMBUDSPERSON

A. Case no. CH/98/1027 R.G.

5. The Ombudsperson adopted her report in the above case (which was registered at her office under number 331/97) on 6 April 1998. The application had been submitted on 6 October 1996. In her report, she established the facts and concluded that there had been violations of the rights of the applicant as protected by Article 3 and Article 5 paragraphs 1, 2, 4 and 5 of the Convention. She also found a violation of the applicant's rights as guaranteed by Article 13 of the Convention, taken together with Article 3 and of his rights as guaranteed by Article 14 of the Convention, taken together with Articles 3 and 5.

6. She recommended to the Government of the Federation that, within four weeks of the date of the report, it pay to the applicant the sum of 15,000 German marks (DEM) as compensation for the non-material damage he suffered and that it issue a written and public apology to the applicant in respect of the illegal detention.

7. Neither of these recommendations has been complied with.

B. Case no. CH/99/1842 Predrag Matković

8. The Ombudsperson decided to open an investigation in the above case (which was registered at her office under number 718/97) on 25 June 1998. The application had been submitted on 6 October 1996. On 29 January 1999, in pursuance of paragraph 5 of Article V of the Agreement, she referred the case to the Chamber.

III. PROCEEDINGS BEFORE THE CHAMBER

9. In relation to the case of R.G., on 1 October 1998 the Ombudsperson, pursuant to paragraph 7 of Article V of the Agreement, initiated proceedings before the Chamber based on her Report referred to at paragraph 5 above. On 12 October 1998 the application was registered under the

above case number. Both applicants are represented by Ms. Gordana Vlačić, a lawyer practising in Pale in the Republika Srpska.

10. On 12 November 1998 the Chamber decided to transmit the application to the Federation for observations on its admissibility and merits, which were received on 18 March 1999. On 7 April 1999 these observations were transmitted to the applicant, who was asked to submit his further observations and also any claim for compensation or other relief which he wished to make. On 7 May 1999 these were received and on 18 June 1999 they were sent to the Federation. The Federation's observations on the claim for compensation were received on 16 July 1999 and on 26 July 1999 they were transmitted to the applicant. All of the above observations were also transmitted to the Ombudsperson, who did not submit any additional observations.

11. The case of Mr. Matković was registered at the Chamber on 16 February 1999 under the above case number.

12. On 18 March 1999 the Chamber transmitted this application to the Federation for its observations on its admissibility and merits, which were received on 18 May 1999. On 1 June 1999 these observations were transmitted to the applicant, who was asked to submit his further observations and also any claim for compensation or other relief which he wished to make. On 16 August 1999 these were received and on 24 August 1999 they were sent to the Federation. The Federation's observations on the claim for compensation were received on 23 September 1999 and on 13 October 1999 they were transmitted to the applicant. All of the above observations were also transmitted to the Ombudsperson, who did not submit any additional observations at that stage.

13. On 20 September 1999 the Chamber wrote to the parties asking them to suggest witnesses for a public hearing on the admissibility and merits of the case. The replies of the parties were received on 11 October 1999 in the case of the Federation and on 22 October 1999 in the case of the applicants.

14. On 21 February 2000 the parties were informed that the Chamber would hold a public hearing on the admissibility and merits of the cases on 8 March 2000.

15. The Chamber summoned the following persons to appear before it as witnesses: Mr. Sekula Mandić, Mr. Čedo Vukadin, Mr. Azim Zulić, Mr. Amir Imamović, Mr. Željko Golijanin, Dr. Bakir Nakaš and Dr. Sead Bašić. The Chamber attempted also to summon Mr. Mustafa Osmanović, but despite prolonged efforts was unable to trace him. The evidence of each of the witnesses as presented at the public hearing is set out in section IV(C) below.

16. On 8 March 2000 the Chamber held a public hearing on the admissibility and merits of the application in the Cantonal Court building in Sarajevo. The applicants were present together with their representative, Ms. Vlačić. The Federation was represented by its agent before the Human Rights Commission for Bosnia and Herzegovina, Ms. Seada Palavrić and by her adviser, Ms. Edina Arnautović. The Ombudsperson was represented by her deputy, Mr. Nedim Osmanagić and by her legal adviser, Mr. Faris Vehabović. All of the witnesses summoned by the Chamber attended.

17. The Chamber heard addresses from the representative of the applicants, the Federation and the Ombudsperson. It also heard the evidence of each of the witnesses set out at paragraph 15 above. The parties requested that the Chamber permit them to submit certain additional documentation. The Chamber decided to grant them a period of fifteen days to do so.

18. The Federation submitted additional information and documents on 23 March 2000. These were transmitted to the applicants on 10 April 2000 and they were given until 25 April 2000 to submit any observations in reply. No such observations were received. The Ombudsperson submitted an intervention in the cases on 28 March 2000.

19. The applicants submitted certain additional information on 21 March 2000, which on 12 April 2000 was sent to the Federation for information.

20. The Chamber deliberated upon the admissibility and merits of the application on 10 March, 6 April and 11 and 12 May 2000. On the latter date it adopted the present decision.

IV. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

21. The facts of the case are established by the Chamber on the basis of the reports of the Ombudsperson referred to at paragraphs 4-9 above, the submissions of the applicants and the Federation, reports of the United Nations International Police Task Force ("UNIPTF") referred to at paragraphs 33-34 below and the information and evidence presented at the public hearing. The contents of certain documents considered by the Chamber are set out at paragraphs 35-37 below.

22. The facts of the cases are in dispute between the parties. The version of events as put forward by the parties are set out in Section V below. In its establishment of the facts, the Chamber has considered the following factors to be of particular importance: the failure of the Federation to establish the whereabouts of Mr. Mustafa Osmanović, the cogent and convincing evidence of the applicants and their co-detainees Messrs. Mandić and Vukadin, the fact that police officers from both the Federation and the Republika Srpska confirmed that R.G.'s car was seen at Pendičići junction on 6 September 1996 with bullet holes and bloodstains, the fact that the release of the applicant R.G. (treated under the name Mustafa Osmanović) from the State hospital in Sarajevo was requested by members of the 1st Corpus of the BH Army, the fact that a passenger in R.G.'s car went to Trnovo police station in the Republika Srpska on the morning of the abduction in a distressed state, saying that armed men had shot at the car and taken two of the passengers away, the fact that the Federation has failed to provide any record of the alleged arrest of the applicants on 15 October 1996 and also the fact that Dr. Bašić conceded that the wounds of the person treated by him under the name Mustafa Osmanović coincided with those suffered by R.G. (see paragraph 50 below).

23. The facts as established by the Chamber are as follows.

24. On 6 September 1996 the applicants, together with the mother of the first applicant and two minors, were driving in R.G.'s Yugo 45 car from Trnovo in the Republika Srpska to Yugoslavia. Just after setting out, they were driving along the road between Trnovo and Sarajevo. This road enters the Federation for a short distance. When they came to a small junction at Pendičići, which is in the Federation, a group of armed men appeared before them and opened fire on the car with automatic weapons. R.G. received three bullet wounds, to his left leg, right shoulder and the right-hand part of his chest. One of the other passengers in the car, who is not an applicant to the Chamber, also received bullet wounds. The car then came to a stop and the armed men approached it. They removed the applicants from the car and handcuffed them. The applicants were then taken by the armed men and put in a white Lada Niva car, with registration plates of the BH Army. The applicants were then driven around the Sarajevo area for some time, while being continuously beaten by their captors. During this period they were handcuffed and therefore unable to seek to shield themselves from the blows they received.

25. Members of the NATO Intervention Force ("IFOR") and UNIPTF arrived at the scene shortly afterwards. In addition, police officers from the Federation and Republika Srpska were called and attended. An investigation was opened by the Federation police, involving the Security Service Centre of the Federal Ministry of Internal Affairs. The attendees noted that the car at the scene, owned by R.G., had numerous bullet holes in it and that there were bloodstains on it. Further details, including oral testimony from Federation and Republika Srpska police officers, UNIPTF reports and certain written evidence submitted to the Chamber, are set out at paragraphs 33, 35, 52-53, 55 and 58-60 below.

26. After approximately one hour, the applicants were brought to the BH Army barracks in Sezimovac. Mr. Matković remained there, while R.G. was brought to the State Hospital (formerly the Military Hospital) in Marijn Dvor in Sarajevo. When he arrived there his captors registered him under the name Mustafa Osmanović, which is a Bosniak name. He received emergency treatment for his wounds. The doctor who treated him was Dr. Sead Bašić. During his time at the hospital, R.G. was

guarded by soldiers of the BH Army. They warned him not to disclose his true identity and warned him that if he did he would be killed. They insisted on him using Islamic greetings. R.G. remained at the State Hospital until 23 September 1996, all the time receiving professional medical care appropriate to his injuries.

27. Mr. Matković was detained at the Semizovac barracks from 6 September 1996. During his detention he was beaten by his captors on a regular basis. He was told that he was being detained for the purpose of exchange for prisoners held by the authorities of the Republika Srpska and that he would be charged with certain criminal offences in order to "regularise" his detention. On 23 September 1996 he was transferred to another place of detention, a private house at Sokolivić Kolonija. There he was detained with two other persons, Mr. Čedo Vukadin and Mr. Sekula Mandić. These persons appeared as witnesses before the Chamber and their evidence is summarised at paragraphs 61-67 below.

28. On 23 September 1996 R.G. was discharged from the State Hospital, at the request of the 1st Corpus of the BH Army. He was brought to Sokolivić Kolonija, where Mr. Matković had been moved the same day. The applicants were detained there together with Messrs. Mandić and Vukadin. They were often blindfolded and kept in a small dark room. They were guarded by a number of men wearing military uniforms. During their detention here they were forced to sign blank papers. They were all told that they were to be charged with war crimes in order to "regularise" their detention.

29. On 15 October 1996 the applicants were taken to the Viktor Bubanj military prison in Sarajevo. On the same day they were taken to the Higher Court in Sarajevo where they appeared before a judge, in pursuance of a request from the Higher Public Prosecutor's Office in Sarajevo. On that day, the investigative judge issued a decision opening an investigation against the applicants and Messrs. Mandić and Vukadin, on the basis that there was a suspicion that they had committed war crimes. The decision also ordered their detention for a maximum period of three months. The following day the applicants were transferred to the Central Prison in Sarajevo.

30. On 21 October 1996 the Higher Court in Sarajevo issued a decision reducing the length of detention ordered in respect of the applicants from three months to one month, commencing on 16 October 1996. On 30 October 1996 the same court issued a further decision, annulling the decision of 16 October 1996 opening the investigation against the applicants. It also ordered their immediate release from detention, which happened the same day.

31. On 31 October 1996 the Kasindo hospital, in the Republika Srpska, issued a report on R.G.'s medical condition, stating that he was suffering from post-traumatic syndrome and that he had suffered gunshot wounds.

B. Written evidence

32. The Chamber has received certain written evidence, which is summarised briefly below.

1. UNIPTF Reports

33. The Chamber has received a document entitled "Interoffice memorandum" dated 19 September 1996 prepared by the UNIPTF station in Kula and addressed to the UNIPTF Commissioner. It recounted the events of 6 September 1996 and mentioned that R.G.'s mother had heard the abductors say that the action was in retaliation for the arrest a few days earlier by security forces of the RS of a number of members of the Black Swans, a special unit of the BH Army. In addition, a white Lada Niva car was stated to have been seen travelling in the area at around the time the applicants were abducted. UNIPTF monitors ascertained that a number of members of the Black Swans were being detained in prison in Kula, having been detained by security forces of the Republika Srpska on 30 August 1996. The memorandum concludes by noting that the arrest of the applicants had increased tension in the area around the Inter-Entity Boundary Line.

34. The Chamber has also received two documents entitled "Complaint about a human rights violation", dated 6 October 1996, prepared by the UNIPTF and addressed to the Human Rights Commission. These documents contain brief details of the arrest of the applicants.

2. Report of Federal Ministry of Internal Affairs – Security Service Centre

35. The Chamber has received a report, dated 7 September 1996, of the Security Service Centre of the Federal Ministry of Internal Affairs, prepared by Dragan Mioković, an Inspector in the Centre's Department for Blood and Sexual Offences. He had been summoned to attend the scene of the abduction of the applicants. In his report he notes that a green Yugo vehicle, registration SA 345-672, was located on the main road near Mount Igman leading towards Sarajevo. Mr. Mioković found that the vehicle had a number of bullet holes in it and that there were numerous bloodstains and bullet shells in it. The report records a conversation with Mr. Željko Golijanin (see paragraph 59 below), in which Mr. Golijanin stated that he had spoken to one of the passengers in the car, who had informed him that the applicants were abducted by a number of armed men and taken away in an unknown direction.

36. Mr. Mioković states that he was informed by UNIPTF monitors that a white Lada Niva car was seen in the area at the time of the abduction and that soldiers of the BH Army, stationed nearby, had seen his vehicle. Mr. Mioković states that he sought information from this BH Army station but was refused permission to talk to the Commander and ordered to leave the building, which he did.

3. Newspaper article from "Evening News"

37. The representative of the applicants submitted a copy of a newspaper article from the "Evening News" ("*Večernje Novosti*") published in Belgrade, Yugoslavia, on 7 September 1996, the day after the abduction of the applicants. The front page caries the headline "Two Serbs abducted" and also carries a photo of a green Yugo car, with licence plates "SA 345-672". An article in the newspaper refers to the abduction of Messrs. R.G. and Matković the previous day on the road between Trnovo and Sarajevo.

C. Oral testimony

1. Dr. Bakir Nakaš

38. Dr. Bakir Nakaš was the Director of the Sarajevo State hospital in September 1996, and holds the same function today.

39. Dr. Nakaš stated that until May 1992 the hospital was a military hospital and became the State Hospital thereafter. There is no dedicated military hospital in Bosnia and Herzegovina.

40. Dr. Nakaš pointed out that he holds a purely administrative function at the hospital and is not involved in the admission, treatment or discharge of patients. He has no recollection of the admission of a patient under the name of Mustafa Osmanović on 6 September 1996. He stated that he had examined the hospital records of 6 September 1996 and found that a person was admitted under that name on that date, having been brought to the hospital by members of the BH Army. Dr. Nakaš claimed that this was not unusual, in view of the fact that the BH Army does not have its own hospital.

41. Concerning the procedure for admission of patients, Dr. Nakaš stated that a patient should normally have a referral letter and evidence that he or she is insured for medical treatment. In urgent cases, there is no strict requirement to have any such document. There is no obligation on the medical staff at the hospital to seek evidence of identity of a patient. In the case of members of the BH Army treated at the hospital, evidence of insurance would not be sought as they are considered to be insured by virtue of the fact that they are members of that Army.

42. As regards the procedure when a patient is under guard, Dr. Nakaš asserted that the institution responsible for guarding a patient in each case requests approval from the hospital to do so. Approval of such requests is to be sought from the director of the hospital, but there are cases where such approval is given by the head of the relevant department in the hospital. Dr. Nakaš stated that he had no record of the receipt or approval of any such request in respect of the patient

treated under the name Mustafa Osmanović. In cases where a patient is guarded, this is apparent due to the presence of guards.

43. According to Dr. Nakaš, there existed the possibility that a person could be treated at the hospital under a false name, for a number of reasons, including where a person wishes to avail of medical insurance held by another person. He stated that he had never seen documents concerning such a situation but that it did occur occasionally.

44. Referring to the hospital documentation in respect of the persons treated under the name of Mustafa Osmanović, Dr. Nakaš claimed that it is obvious that the discharge of the patient was requested by the 1st Corpus of the BH Army.

2. Dr. Sead Bašić

45. Dr. Bašić was, in September 1996, an orthopaedic surgeon in the State Hospital in Sarajevo, a function which he still holds today. He stated that he treated a patient registered under the name of Mustafa Osmanović between 6 and 23 September 1996. He claimed that he recalled certain details of this patient from memory, but due to the time-lapse he did not have a full recollection. He stated that when a person was admitted who was in need of urgent treatment, he or she would be brought to an operating room straight away. According to Dr. Bašić, when he operates upon a patient he would visit that patient for a number of days afterwards, and manage their care himself until their condition had stabilised. This would include dressing the patient's wounds. He stated that he would only engage in conversation with a patient to the extent necessary to complete the medical records in respect of the patient.

46. Concerning patient records, he, as a doctor, was concerned only with the medical aspects of such records. He would not be responsible for ensuring the veracity of personal details of patients. This is done by administrative staff at the hospital.

47. Dr. Bašić asserted that the national origin or religion of a patient was irrelevant at the hospital and that all patients were treated in the same manner and with the same level of care. He pointed out that persons of all origins and religions are employed at the hospital and always have been.

48. Allegedly, it was not unusual for patients at the hospital to be guarded. He would not inquire as to the reasons for this as it was not relevant to his work as a doctor. In addition, in the event that a patient is admitted with gunshot wounds, the witness stated that he would only inquire from the patient as to how he acquired such wounds insofar as it is relevant for medical purposes. He would not inquire in a general manner concerning such wounds.

49. Dr. Bašić stated that he remembered some details specific to the patient registered under the name Mustafa Osmanović, as his wounds were of an unusual nature. He mentioned that he was surprised at the time that there had not been more serious damage to the patient as the bullets had entered an area of the body where there were a lot of major blood vessels and nerves. He further stated that he would probably be able to recognise the patient by examination of the scars left after the wounds. When asked if he recognised R.G. as the person he treated between 6 and 23 September 1996, he said he did not.

50. Dr. Bašić was asked to examine certain medical reports issued by Kasindo hospital in respect of R.G., with a view to ascertaining whether these referred to the same person in respect of which the medical records issued by the Sarajevo State hospital in respect of Mr. Mustafa Osmanović. Having examined both records, he stated that it was possible that the two sets of records concerned the same person. He stated that it would be impossible to state with total certainty, even after a physical examination and examining X-rays, whether the applicant R.G. was the person treated at the hospital at the relevant time.

3. Mr. Asim Zulić

51. Mr. Asim Zulić was in September 1996 the Chief of the Ledići police station, and still is today.

52. He stated that at about 8 am on the morning of 6 September 1996 he was informed by telephone that an incident had occurred on the road between Sarajevo and Trnovo, at Pendičići. Due to the lack of telephone communication with Sarajevo at the time, he sent one of his officers to summon an expert to conduct a forensic examination. He also ordered certain of his officers to establish road-blocks on the relevant part of the road and to secure the scene. Having done so, he himself went to the scene. There, he met UNIPTF monitors and members of IFOR as well as Mr. Željko Golijanin (see paragraph 56 below). He saw a green Yugo car, registration SA 345-672, at the scene, and some bullet shells around it. He examined the car from a distance of a few metres as the scene had been secured pending the arrival of experts to examine it. At approximately 11 am Mr. Dragan Mioković (see paragraph 35 above) arrived together with an assistant and conducted an examination of the scene.

53. Mr. Zulić stated that he spoke with certain of the other witnesses present concerning the events and was informed of the names of the persons present in the vehicle and of the nature of those events. He also stated that he spoke to members of the BH Army stationed nearby who said that they had seen a white Lada Niva in the area at the time of the abduction of the applicants.

4. Mr. Amir Imamović

54. Mr. Amir Imamović was a Head of Shift at the Federal Trnovo police station in September 1996, a position which he still holds today.

55. He stated that at approximately 8 am on the morning of 6 September 1996 members of the IFOR battalion stationed nearly came to the station and informed him that there had been an incident at Pendičići junction. He immediately sent two officers to the scene and informed Ledići police station. He then went to the scene himself, where he met representatives of IFOR and UNIPTF, as well as Mr. Željko Golijanin. He spoke to a member of the BH Army who stated that at about 7 am that morning he had heard a burst of automatic weapons fire and had seen a white Lada Niva driving very fast towards Mount Igman, in the Federation. He then contacted Ledići police station by radio and requested that they set up road blocks and seek to apprehend the Lada Niva vehicle. He explained that the licence plate of the green Yugo car at the scene was a pre-war (i.e. former Yugoslav) licence plate.

5. Mr. Željko Golijanin

56. Mr. Željko Golijanin was, in September 1996, Head of the Department of Criminal Police in the Trnovo police station in the Republika Srpska and still is today.

57. He first stated that he was distantly related to the applicant R.G. but had never met him before 1996.

58. At approximately 8 am on 6 September 1996 representatives of UNIPTF came to his station and requested that an officer come to the scene of an abduction at Pendičići junction in the Federation. He stated that his colleagues refused to do so, due to fears for their safety. He himself then agreed to go. At the scene he met members of IFOR and representatives of UNIPTF as well as a number of police officers from the Federation. The witness also saw a Yugo car, which had bullet holes in it, and bullet shells scattered on the ground. He also saw bloodstains in the car. He remained at the scene while representatives of the Security Service Centre of the Federal Ministry of Internal Affairs conducted an investigation at the scene.

59. He stated that a young girl, the sister of the applicant R.G., had earlier come to his station in a distressed state, stating that armed men had shot at the car in which she was travelling and abducted two of the passengers.

60. Regarding the level of traffic on the road where the abduction of the applicants occurred, he stated that there was very little traffic on it at the time, due to the prevailing situation in that area. He stated that he himself avoided travelling along the road due to fears for his personal safety.

6. Mr. Sekula Mandić

61. Mr. Sekula Mandić was detained together with the applicants from 23 September until 30 October 1996. He stated that he had been arrested on 2 July 1996 in Trnovo in the Federation, together with Mr. Čedo Vukadin (see paragraphs 66-67 below). He was first brought to Semizovac barracks and then later the same day transferred to Sokolović Kolonija in Stup, a suburb of Sarajevo.

62. He stated that at approximately 8 pm on 23 September 1996 two men were brought to the place where he was detained. He did not know these men at the time but ascertained that they were the applicants before the Chamber. He noticed that one of them had wounds. They remained together in Sokolović Kolonija until 7 October, when they (i.e. Mr. Mandić, the applicants and Mr. Vukadin, in respect of whom see paragraphs 66-67 below) were transferred to Semizovac. They were detained there until 15 October 1996, when they were again transferred to Viktor Bubanj military prison. Soon afterwards they were transferred yet again, this time to the Central Prison in Sarajevo. Mr. Mandić could not remember the exact date, but thought it was 16 October 1996.

63. He confirmed that the two men who were brought to Sokolović Kolonija on 23 September 1996 were the applicants. He also stated that a female doctor came regularly to treat the wounds of the applicant R.G.

64. Mr. Mandić claimed that during his detention, he was charged with having committed war crimes, and that he had been forced to sign a blank piece of paper. He stated that he did so as he had been detained for 75 days without any legal basis and was informed that failure to do so would have adverse consequences for him. He was threatened and told by a general of the BH Army that he had to sign this paper as the BH Army needed a confession from him to be able to inform appropriate international organisations of his detention.

65. During their detention at Sokolović Kolonija, Mr. Mandić and his co-detainees were guarded by persons wearing uniforms of the BH Army. They were periodically blindfolded and all kept in a small room.

7. Mr. Čedo Vukadin

66. Mr. Čedo Vukadin was detained together with the applicants from 23 September until 30 October 1996. He stated that he had been detained on 2 July 1996 in Trnovo in the Federation, together with Mr. Sekula Mandić. As the evidence of this witness is in many respects the same as that of Mr. Mandić, only additional evidence given by Mr. Vukadin is set out below.

67. On 23 September 1996, while being detained at Sokolivić Kolonija, two persons, whom Mr. Vukadin recognised as the applicants, were brought there and held in the same room as him. He stated that during his detention he was forced to sign a blank piece of paper. He was released on 30 October 1996, together with the applicants.

D. Relevant legislation

1. Penal Code of the (former) Socialist Federal Republic of Yugoslavia

68. The Penal Code of the former Socialist Federal Republic of Yugoslavia (Official Gazette of the former Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – no. 44/76, as amended, and Official Gazette of the former Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – no. 2/92, as amended) was in force in the Federation at the time of the arrest of the applicants. It has since been replaced.

69. Article 142 of the Code reads as follows:

> "Anyone who - in violation of the rules of international law in time of war, armed conflict or occupation - orders the subjection of the civilian population to murders, torture, inhuman treatment, biological experiments, great suffering, injuries to physical integrity or health, expatriation or displacement, deprivation of national identity by force, conversion to another religion, forced prostitution or rape, acts of intimidation or terror, the taking of hostages, collective punishment, unlawful confinement in concentration camps or other unlawful taking into custody, deprivation of the right to a fair and impartial hearing, forced service in the enemy armed forces or intelligence service or administration, the performance of forced labour, starvation, confiscation of property, looting of property, excessive confiscation of property without military necessity, unlawful and deliberate devastation, the taking of unlawful, substantial and disproportionate contributions and requisitions, inflation of the domestic currency, or unlawful issue of currency, or anyone who commits any of the aforementioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

2. The Law on Criminal Procedure

70. The Law on Criminal Procedure (OG SFRY 26/86, as amended, and OG RBiH 2/92, as amended), was in force in the Federation at the time of the arrest of the applicants.

71. Article 157 reads as follows:

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

72. Article 158 provides:

> "(1) The investigation shall be conducted on the application of the public prosecutor.
>
> (2) The application to conduct an investigation shall be submitted to the investigative judge of the competent court.
>
> (3) The application must indicate the following: the person against whom the investigation is to be conducted, a description of the act which has the legal attributes of a crime, the legal name of the crime, the circumstances justifying the suspicion and the evidence that exists."
>
> (4) The application to conduct an investigation may include a proposal that certain circumstances be investigated, that certain actions be taken, and that certain persons be examined with respect to certain issues, and it may also be recommended that the person against whom the investigation is requested be taken into custody.
>
> (5) The public prosecutor shall deliver to the investigative judge the criminal charge and all papers and records concerning actions which have been taken. The public prosecutor shall at the same time deliver to the investigative judge physical objects which may serve as evidence or shall indicate where they are located."

73. Article 159 paragraph 1 reads, insofar as relevant, as follows:

> "When the investigative judge receives the application for the opening if an investigation, he shall examine the documentation, and if he agrees with the application, he shall order that an investigation be opened .... The decision shall be delivered to the public prosecutor and to the accused."

74. Article 190, insofar as relevant, reads as follows:

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

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

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

75. Article 197 paragraph 1 states as follows:

"On the basis of the decision of the investigative judge the accused may not be held in custody for longer than one month from the date of his arrest. At the end of that period the accused may be kept in custody only on the basis of a decision to extend custody.

76. Article 205 imposes a duty on the President of the competent court to survey and visit detainees at least once a week and to take all necessary steps to remedy and irregularities he finds.

77. The Law on Criminal Procedure (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90 and OG RBiH nos. 2/92, 9/92, 16/92 and 13/94) governed criminal procedure in the Federation at the time of the applicant's detention. This law has been replaced by the new Law on Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98) which entered into force on 28 November 1998. The following provisions, quoted from the old law, were taken over without substantive changes.

78. Article 542(2) reads as follows:

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

79. Article 543(1) reads as follows:

"If a claim for compensation for damages is not accepted or no decision by the relevant organ has been made within three months since the date of making it, the person concerned may submit a complaint to the competent court for compensation for damages suffered. If an agreement has been reached concerning part of the claim, the damaged person may submit a complaint regarding the remainder of the claim."

80. Article 545(3) reads as follows:

"The right to compensation for damage belongs ... to a person who is, as a result of a mistake or an illegal act of an organ, deprived of his or her freedom or kept for a longer period of time in custody than is provided for by law."

81. The above provisions were disapplied from 2 June 1992 until 23 December 1996 by the Law on Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95). Since 23 December 1996 they have been in force once more.

3. The Rome Agreement of 18 February 1996, Agreed Measures ("The Rules of the Road")

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

"Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with

international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

83. The term "International Tribunal" refers to the International Criminal Tribunal for the Former Yugoslavia in the Hague.

84. The procedures referred to in the above text were communicated to, *inter alia*, the Minister of Justice of the Federation by the Prosecutor of the International Tribunal on 10 September 1996.

V. COMPLAINTS

85. The applicant R.G. complains of violations of his rights as guaranteed by Articles 2, 3, 4 and 5 of the Convention. He also complains of violations of his right to freedom of movement, as guaranteed by Article 2 of Protocol No. 4 to the Convention.

86. The applicant Mr. Matković complained in a general manner of his arrest and detention.

VI. FINAL SUBMISSIONS OF THE PARTIES

A. The Ombudsperson

87. The Ombudsperson maintained her conclusions as set out in her Report in the case of R.G. (see paragraph 5 above). On 28 March 2000 she submitted an intervention in the cases. This intervention is briefly summarised below.

1. Facts

88. The Ombudsperson states that the establishment of the facts by her Office in the case of R.G. was hampered by the failure of the Federation to cooperate in her investigation. In respect of Mr. Matković, the Federation did not submit any relevant facts additional to those established by the Ombudsperson. The Ombudsperson states that she is satisfied that she established the facts of the cases beyond a reasonable doubt and refers to the failure of the Federation to investigate the credible claims of the applicants.

2. Admissibility

89. The Ombudsperson first considers to the compliance of Mr. Matković with the six-month time-limit set out in Article VIII(2)(a) of the Agreement. She points out that the date of introduction of an application is considered to be the date of the first submission to her office which identifies the applicant and the substance of the complaint. She states that such a submission was received in respect of Mr. Matković on 6 October 1996, in the form of a "complaint" submitted on his behalf by UNIPTF. In response to the claim by the Federation that this submission is not valid as it was not submitted personally by the applicant, the Ombudsperson points out that this was so as he had been abducted and was being held *incommunicado*. Concerning her decision of 20 October 1997 not to open an investigation in the case due to non-compliance with the six-month time-limit, the Ombudsperson states that this was due to an internal error. This error was corrected by her decisions of 25 June 1998 to open an investigation into the case and of 29 January 1999 to refer the matter to the Chamber.

3. Merits

90. The Ombudsperson first points out that she did not establish the facts of the case of Mr. Matković, as she referred the case to the Chamber. She claims that, insofar as the facts of that case are the same as in the case of R.G., her interventions on the merits of that case also apply equally to the case of Mr. Matković.

91. Concerning Article 2 of the Convention, the Ombudsperson states that as R.G. was not deprived of his life, there has been no violation of this provision of the Convention.

92. The Ombudsperson states that the shooting of R.G., his detention and treatment by members of the BH Army and the fact that the Public Prosecutor took no action against these matters constituted inhuman and degrading treatment, in violation of Article 3 of the Convention.

93. Regarding Article 5 of the Convention, the Ombudsperson states that the applicant R.G. was clearly deprived of his liberty within the meaning of Article 5 paragraph 1 of the Convention. She notes that he was detained for the purposes of exchange against prisoners held by the Republika Srpska and was subsequently charged with war crimes, in violation of the Rules of the Road. Therefore, his detention was not in compliance with Article 5 paragraph 1 of the Convention.

94. Concerning the requirement in paragraph 2 of Article 5 that he be informed of the reasons for his detention, the Ombudsperson states that R.G. was not so informed and therefore this provision was violated. The guarantee contained in paragraph 4 of Article 5, that he have a right to a judicial review of his detention, was also violated as he had no access to such a review.

95. She also states that there has been a violation of the right of the applicant to an enforceable right to compensation for the violations of his rights he suffered, referring to the Chamber's case law in support of her contention that he had no such right available to him in the legal system of the Federation. Therefore there has been a violation of Article 5 paragraph 5 of the Convention.

96. The Ombudsperson also states that the applicant was subjected to discriminatory treatment, as his arrest was solely for the purposes of exchange against prisoners held by the Republika Srpska. Finally she states that no separate issue arises in respect of the right of R.G. to an effective remedy, as guaranteed by Article 13 of the Convention.

B. The respondent Party

1. Facts

97. The Federation contests the facts as presented by the applicants and as found by the Ombudsperson. It significantly changed its version of the facts during the proceedings before the Chamber.

98. The Federation contested the allegation of R.G. that he was shot at and wounded and thereafter treated at the State Hospital in Sarajevo. It claims that Mr. Mustafa Osmanović was treated as a member of the BH Army. However despite having sought to find Mr. Osmanović, it was unable to do so.

99. At first, it denied that the applicants were arrested on 6 September 1996. It claimed that the applicants were detained by officials of the Federal Ministry of Defence on 15 October 1996 and on the following day handed over to the custody of the Regional Military Public Prosecutor. It claimed that the applicants were arrested as they did not possess identification when asked to produce it by officials of the Ministry of Defence. In addition, Mr. Matković was arrested as he is a citizen of Yugoslavia. Despite being requested by the Chamber, the Federation was unable to provide any records of the arrest of the applicants on 15 October 1996. In addition, the Federation claimed that on 14 October 1996 the 1st Corpus of the BH Army submitted a request to the Regional Military Prosecutor in Sarajevo for the opening of an investigation against the applicants (and also against Messrs. Mandić and Vukadin) on the ground that they were suspected of having committed war crimes. On 15 October 1996 the prosecutor did so, before the Higher Court in Sarajevo. The Higher Court ordered the opening of an investigation against the applicants, as well as Messrs. Mandić and Vukadin, the following day.

100. However, after the public hearing the Federation significantly changed its version of the facts. It admitted that the applicants were detained on 6 September 1996 but denied that this detention was carried out by persons for whose actions it is responsible. It maintained its claim that the

applicants were detained by officials of the Federal Ministry of Defence from 15 until 30 October 1996.

101. In conclusion, the Federation claims that the detention of the applicants was legal as it was ordered due to the suspicion of their having committed war crimes. In addition, the applicants' detention was only for a short period of time, as they were released after 15 days.

2. Admissibility

102. In respect of the applicant Mr. Matković, the Federation first claims that as he is a citizen of Yugoslavia, the Chamber has no competence *ratione personae* to consider whether his rights have been violated.

103. The Federation claims that the applicants could have claimed compensation for illegal detention under the Law on Criminal Procedure (see paragraphs 70-81 above). It claims that this is an effective remedy in the legal system of the Federation and therefore the applicants are required to exhaust it before applying to the Chamber, as required by Article VIII(2)(a) of the Agreement.

104. In the case of Mr. Matković, the Federation also contests the admissibility of his application on the ground of non-compliance with the six-month requirement as set out in Article VIII(2)(a) of the Agreement. It claims that the application was submitted to the Ombudsperson on 14 August 1997, after the expiry of this period. The Federation claims that in the event that the applicant was not familiar with this requirement, the Federation cannot be held responsible for this as the Dayton Agreement was published in a number of newspapers throughout Bosnia and Herzegovina.

3. Merits

105. Concerning Article 3 of the Convention, the Federation denies that the applicants were subjected to torture or inhuman or degrading treatment or punishment. It claims that the organs of the Federation acted in a fast and efficient manner and that the detention of the applicants lasted for a very short time, i.e. from 15 until 30 October 1996.

106. The Federation denies that the applicants' rights under Article 5 of the Convention were violated. The Federation claims that the applicants were arrested for a valid reason, as there was a suspicion that they had committed war crimes. In addition, the applicants were informed of the reasons for their arrest and further, their detention only lasted for a very short period of time. Finally, they were brought before a judge the day after their arrest. In conclusion, the Federation claims that there has been no violation of the applicants' rights under this provision.

107. The Federation also denies that the applicants had been discriminated against in the enjoyment of their rights as protected by the Agreement. It reiterates that the detention of the applicants had been legal and therefore no question of discrimination arose.

108. In conclusion, the Federation suggests to the Chamber to declare the applications inadmissible.

C. The applicants

109. The applicants maintain their complaints and previous submissions to the Chamber.

VII. OPINION OF THE CHAMBER

A. Admissibility

110. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. The Chamber's competence *ratione personae*

111. The Federation claims that as Mr. Matković is a citizen of Yugoslavia, the Chamber has no competence *ratione personae* to consider his application and should refuse to accept it on this ground.

112. In accordance with paragraph 2 of Article II of the Agreement, the Chamber is competent to consider, *inter alia*, allegations of violations of human rights committed by the parties to the Agreement (i.e. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) or by any body for whose actions they are responsible. Paragraph 1 of Article VIII of the Agreement sets out the persons and categories of persons who may lodge applications with the Chamber. This provision does not limit by nationality the categories of persons who may lodge applications with the Chamber. There is therefore no impediment to a person who is not a citizen of Bosnia and Herzegovina from applying to the Chamber. Accordingly this argument of the Federation is without merit and must be rejected.

2. The six-month rule

113. Article VIII(2) of the Agreement requires the Chamber, when deciding upon the admissibility of an application, to take into account, *inter alia*, whether the application was filed with the Human Rights Commission within six months from the date on which the final decision was taken in the matter at national level. The Federation objected to the admissibility of the application submitted by Mr. Matković under this provision, stating that he lodged his application to the Ombudsperson on 7 August 1997, more than six months after his release from detention.

114. The Chamber notes that an application was submitted to the Ombudsperson on 6 October 1996 on behalf of the applicant by UNIPTF. This application was registered on 14 August 1997. Accordingly, the application was submitted to the Ombudsperson during the detention of the applicant and the six-month period had not at that stage begun to run. The Chamber therefore considers that no issue of admissibility arises under this head.

3. Exhaustion of domestic remedies

115. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

116. The Federation claims that it was open to the applicants to seek compensation for alleged illegal detention under the Law on Criminal Procedure (see paragraphs 70-81 above). The applicants denied that this remedy would have been effective in their cases and refer to the jurisprudence of the European Court of Human Rights, stating that the effectiveness of domestic remedies must be looked at in the light of the prevailing circumstances. They claim that the fact that they were only brought before a judge after being detained for 40 days shows that they had no prospect of achieving justice before the organs of the Federation.

117. The Chamber notes that it has established that the applicants were shot at and detained for no reason. They were then detained in unofficial places of detention, and were subsequently charged with war crimes offences, solely to seek retrospectively to justify their detention. In addition, the provisions of the Law on Criminal Procedure were suspended until 23 December 1996 (see paragraph 81 above) and were thus not in force when the applicants were released from detention. The Law on Application of the Law on Criminal Procedure does not specify whether, once the suspension of those provisions has been lifted, claims can be brought in respect of alleged illegal detention prior to 23 December 1996 or only in respect of such detention that occurred after that date. The Chamber therefore considers that this lack of precision would have had the effect of making it even more difficult for the applicants to succeed in any claim under the Law on Criminal Procedure. These facts, coupled with the fact that the Federation still maintains that they were only arrested on 15 October 1996, shows that the applicants would have had no chance of success if they were to initiate proceedings before the organs of the Federation claiming that their arrest and detention had been illegal.

118. The Chamber therefore finds that the remedy apparently available to the applicants in the legal system of the Federation offered no prospect of success and therefore they cannot be required to exhaust it. The applications are therefore not inadmissible on the ground of non-exhaustion of domestic remedies.

119. The Chamber does not consider that any of the other grounds for declaring the cases inadmissible have been established. Accordingly, they are to be declared admissible.

B. Merits

120. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

121. Under Article II(2) of the Agreement the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix to the Agreement (including the Convention), where such a violation is alleged to or appears to have been committed by the Parties, including by any organ or official of the Parties, Cantons or Municipalities or any individual acting under the authority of such an official or organ.

1. Article II(2)(a) of the Agreement

(a) Article 3 of the Convention

122. Article 3 of the Convention provides as follows:

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

123. The applicant R.G. claimed that he had been a victim of a violation of his rights as guaranteed under this provision. Mr. Matković did not specifically claim to be a victim of a violation of his rights under this provision. The Chamber raised it of its own motion when transmitting the case to the Federation for observations on its admissibility and merits.

124. The Ombudsperson found that the arrest and detention of the first applicant, R.G., constituted "inhuman and degrading treatment and punishment" and therefore violated the applicant's rights as protected by Article 3 of the Convention.

125. The Federation denies that the applicant's rights as guaranteed by this provision has been violated. It claims that the arrest and detention of the applicants was lawful.

126. The Chamber has established that the applicants were shot at and arrested by members of the BH Army on 6 September 1996, for no reason other than that army apparently wished to arrest Serbs to exchange for members of one of its units who had been arrested by security forces of the Republika Srpska. In respect of the applicant R.G., it has also established that he was seriously wounded and that both applicants were physically maltreated after their arrest. They were then detained in fear of their lives until 15 October 1996, when they were charged with war crimes, having been forced to sign blank pieces of paper which were then used by the BH Army to procure "confessions" that they had committed war crimes. There is no evidence at all that the applicants were involved in the commission of any crime. On the contrary, they were merely driving down a road when they were arrested.

127. As the Chamber has noted before, Article 3 enshrines one of the fundamental values of a democratic society (case no. CH/97/45, *Hermas,* decision on admissibility and merits delivered on

18 February 1998, paragraph 28, Decisions and Reports 1998). The Chamber considers that all of the above factors, coupled with the fact that the applicants were then charged with the most serious crimes, constituted inhuman and degrading treatment and that the Federation is responsible.

128. In conclusion there has been a violation of the applicants' rights not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the Convention.

129. The European Court of Human Rights has described torture as "deliberate inhuman treatment causing very serious and cruel suffering" (*Ireland v. United Kingdom* judgment of 18 January 1978, Judgments and Decisions, Series A vol. 25, paragraph 167). There is therefore a difference in the level of severity of the treatment – for such treatment to constitute torture it must cause very serious and cruel suffering. The Chamber will consider whether the treatment it has found that R.G. was subjected to constitutes torture. It considers that the finding that the treatment suffered by Mr. Matković was inhuman and degrading to be sufficient, but points out that it was merely a matter of good fortune that he was not seriously injured as well.

130. As the Chamber has found, R.G. was shot three times by members of the 1st Corpus of the BH Army and suffered serious injuries. These injuries doubtless caused him excruciating pain and required immediate emergency medical treatment. However, instead of receiving this treatment, he was handcuffed and bundled roughly into a military vehicle by his attackers. He was then driven around Sarajevo for approximately one hour, being beaten regularly and then brought to a military barracks. He doubtless suffered extreme mental and physical distress during this time, as he was being held captive and beaten by persons who had just shot him. Only afterwards was he finally brought to hospital. When he arrived he was told by his captors that if he revealed his true identity, he would be killed. He was threatened with serious consequences if he did not comply with the arbitrary and racist commands of his captors and forced to use Islamic greetings, being beaten when he did not do so. R.G. was, therefore, exposed to recreational and sadistic violence by persons acting with apparent impunity.

131. The Chamber notes that the medical treatment he received at the state hospital in Sarajevo was of a professional standard and appropriate to his medical needs. After being treated at the hospital he was taken by his captors, and detained in an unofficial place of detention. His wounds still required constant medical attention, which he received. During his detention he would doubtless have been in constant pain as a result of his wounds. On 15 October 1996, he was finally charged with the most serious crimes, i.e. with having committed war crimes against the general population, without any basis at all. Finally, on 30 October 1996, he was released from detention.

132. The Chamber notes that the applicant, on the day he was abducted, was driving down a road with friends and family. Therefore the treatment he received is all the more reprehensible.

133. In light of the above, the Chamber considers that the treatment suffered by R.G. at the hands of the 1st Corpus of the BH Army was of such a severe nature and lasted for such a long time, as to constitute torture. Accordingly, there has been a violation of his right to freedom from torture as guaranteed by Article 3 of the Convention.

(b) Article 5 of the Convention

134. Article 5 of the Convention provides, in relevant part, as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligations prescribed by law;
>
> (c) the lawful arrest of any detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence

or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purposes of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious disease, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

...

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

135. R.G. claimed to have been a victim of a violation of his rights as guaranteed by this provision. Mr. Matković did not specifically claim to be a victim of a violation of his rights under this provision. The Chamber raised it of its own motion when transmitting the case to the respondent Party for observations on its admissibility and merits.

136. The Ombudsperson, in her report into the case of R.G., found that that applicant's detention had violated paragraphs 1, 2, 4 and 5 of Article 5 of the Convention.

137. The Federation denies that the applicants suffered violations of any of their rights as guaranteed by Article 5 of the Convention, claiming that their detention as and from 15 October 1996 was in accordance with the law and that it was not responsible for their detention prior to that date. It claims that the applicant's detention was lawful as they were detained for failure to provide identification to an authorised person and because Mr. Matković is a citizen of Yugoslavia. They were then charged with war crimes, as a suspicion of their having committed such crimes existed.

(i) *Article 5 paragraph 1 – lawfulness of the applicants' detention*

138. Article 5 of the Convention guarantees in essence the right to liberty and security of person. Article 5 paragraph 1 sets out in detail the permitted circumstances in which a person may be deprived of his liberty.

139. The Chamber has established that the applicants were arrested by members of the BH Army on 6 September 1996, solely for the purposes of exchange against prisoners held by the authorities of the Republika Srpska. This is not a valid reason for deprivation of liberty. The argument of the Federation, that the applicants were not arrested until 15 October 1996 is, in the light of the evidence established by the Chamber, clearly wrong. The Chamber notes that even if the argument of the Federation was true, the arrest of Mr. Matković on the basis of his nationality would constitute a violation of Article 5 paragraph 1 of the Convention.

140. The Chamber notes that the detention of the applicants was ordered by the Higher Court in Sarajevo on 15 October 1996. The question therefore arises of whether their detention was in accordance with the law as and from that date. Article 5 paragraph 1(c) of the Convention allows a person to be detained where there is a reasonable suspicion of him having a committed a criminal offence. In the present case, however, the charges were obviously fabricated, a fact which is borne

out by the fact that the applicants had been forced to sign blank pieces of paper in order that their detention could be regularised (see paragraph 28 above). In any event, the Chamber notes that the law in force at the time provided for a maximum period of detention of one month. The applicants were ordered to be detained for a period of three months and therefore the decision ordering their detention was not even in accordance with the domestic law. In addition, the detention of the applicants was not in accordance with the Rules of the Road (see paragraphs 82-84 above).

141. For these reasons, the arrest and detention of the applicants constituted a violation of their rights as guaranteed by this provision.

(ii) *Article 5 paragraph 2 – right to be informed of reasons for arrest*

142. The Chamber has received no evidence that the applicants were informed of the reasons for their arrest until 15 October 1996. It therefore finds that there has been a violation of their right to be informed promptly of the reasons for their arrest.

(iii) *Article 5 paragraph 4 – right to review of detention*

143. Article 5 paragraph 4 of the Convention, in essence, guarantees the right to a person detained to have a judicial review of that detention. As the Chamber has previously held, even in a case where a violation of Article 5 paragraph 1 has been found, this does not mean that there is no requirement to examine the compliance with Article 5 paragraph 4 (see case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 61, Decisions and Reports 1998). In Hermas, the Chamber held that "arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty...." (sup. cit., paragraph 63).

144. The Chamber notes that it has found that R.G. was treated at the state hospital in Sarajevo under a false name until 23 September 1996. Thereafter, until 15 October 1996, he was held in various places, together with Mr. Matković who had been detained since his abduction on 6 September 1996. At no stage during this period were they able to have the legality of their detention reviewed. Therefore until 15 October 1996 they had no remedy at all available to them and therefore there has been a violation of Article 5 paragraph 4 of the Convention.

(iv) *Article 5 paragraph 5 – right to compensation for illegal detention*

145. Article 5 paragraph 5 requires that national law provide for an enforceable right to compensation in respect of detention which is in contravention of the guarantees provided for in Article 5.

146. The Chamber notes that the legal system of the Federation did not contain a right to compensation for unlawful detention at the time of the applicants' release from detention, 30 October 1996. This is because the relevant provisions of the Law on Criminal Procedure were suspended until 23 December 1996 (see paragraph 81 above).

147. The Chamber therefore finds that there has been a violation of the rights of the applicants as guaranteed by Article 5 paragraph 5 of the Convention.

(c) Articles 6 and 13 of the Convention

148. In view of the findings it has already made, the Chamber does not consider it necessary to examine whether there has been any violation of the rights of the applicants as guaranteed by Articles 6 and 13 of the Convention.

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

149. The Chamber has previously held on a number of occasions that the prohibition of discrimination is a central objective of the General Framework Agreement for Peace in Bosnia and Herzegovina to which the Chamber must attach particular importance (see, *inter alia*, case no. CH/98/756, *Đ.M.*, decision on admissibility and merits delivered on 14 May 1999, paragraph 68, Decisions January-July 1999). Article II(2)(b) affords to it the jurisdiction to consider alleged or apparent discrimination on any ground in the enjoyment of any of the rights listed in the Appendix to the Agreement.

150. The Chamber notes that it has already found violations of the rights of the applicants as protected by Articles 3 and 5 of the Convention. It must now consider whether they have suffered discrimination in the enjoyment of those rights.

151. In examining whether there has been discrimination contrary to the Agreement the Chamber recalls its previous jurisprudence on the issue of discrimination in the enjoyment of the rights guaranteed under the Agreement. In *Đ.M.* (sup. cit., paragraph 73), the Chamber drew on the experience of other international judicial bodies such as the European Court of Human Rights and the United Nations Human Rights Committee, who have consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations.

152. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in the relevant provisions, including religion or national origin.

153. In *Hermas* (sup. cit., paragraph 92), the Chamber found that the arrest and detention of persons on the basis of their belonging to a specific category of persons, for the purpose of exchange of prisoners, "constitutes a difference in treatment for which there is no conceivable justification."

154. Accordingly the applicants were discriminated against on the grounds of their religion and national origin in the enjoyment of their rights to liberty and security of person as guaranteed by Article 5 of the Convention.

155. Concerning the violations of the rights of the applicants as guaranteed by Article 3 of the Convention, the Chamber considers that the fact that they were treated to abusive language and treatment on the basis of their religion and national origin constitutes differential treatment for which there is no possible justification. The Chamber therefore finds that they were subjected to discrimination in the enjoyment of this right also.

156. In conclusion, the Chamber finds that the applicants were discriminated against in the enjoyment of their rights as guaranteed by Articles 3 and 5 of the Convention.

IX. REMEDIES

157. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

158. The applicants, at the public hearing before the Chamber, both requested monetary compensation of DEM 50,000. The Chamber notes that the applicant R.G. had previously requested the sum of DEM 15,000 in his written claim for compensation submitted on 7 May 1999.

159. R.G.'s claim for compensation was not broken down into specific heads nor specified.

160. In respect of Mr. Matković, his claim was broken down into DEM 30,000 for pain and fear he suffered during his detention, DEM 10,000 for his damaged reputation and honour and DEM 5,000 in respect of a reduction of his general ability due to his detention. He also claimed DEM 2,000 for medical expenses and DEM 3,000 for lost income. At the public hearing the representative of the applicants was asked to submit any substantiation of these claims. She did not do so.

161. The Federation first contends that the claims submitted by the applicants are too high and points out that it has contested that they suffered any violations of their human rights and therefore denies that they are entitled to any compensation at all. It also points out that the claim submitted by R.G. is totally unspecified.

162. In respect of Mr. Matković, the Federation states that he has not sought to specify his claim for fear and suffering. It claims that he was not in a situation which would reasonably cause fear and suffering. Regarding his claim for damage to his reputation and honour, it claims that as he was released from detention it is clear that he was innocent and therefore he has not suffered any such damage.

163. The Federation also disputes Mr. Matković's claim for damages for reduced general ability and for medical expenses, stating that he has not provided any evidence, for example medical documentation, to support this claim. Finally, the Federation disputes his claim for compensation for lost income, stating that he has not provided any evidence of lost income or even of the type of employment in which he was engaged. At the public hearing before the Chamber the Agent of the Federation stated that if even if all of the allegations made by Mr. Matković were true, it considered that, in light of the jurisprudence of the Chamber, the maximum amount to which he would be entitled was 1,750 Convertible marks (*Konvertibilnih Maraka*, "KM").

164. The Chamber first notes that it has established that the applicants have suffered violations of their rights as protected by Articles 3 and 5 of the Convention and that they have been discriminated against in the enjoyment of those rights. The violations they suffered are of a very serious nature, particularly in the case of R.G. where the Chamber has found that the ill-treatment he suffered amounted to torture. It is therefore appropriate to award the applicants a substantial amount of compensation. The Chamber notes that the applicants, despite having been requested to do so, have not submitted any evidence to support their claims for pecuniary damage, for example certificates of lost earnings etc. The fact that the claims for compensation for pecuniary damage submitted by the applicants have not been substantiated does not preclude the Chamber from awarding them a sum for the moral damages they suffered as a result of their treatment at the hands of the BH Army.

165. In the *Hermas* case (sup. cit.), the Chamber awarded the applicant DEM 18,000 for both pecuniary and non-pecuniary injury. In that case, the Chamber found violations of the applicant's rights as guaranteed by Articles 3, 4 and 5 of the Convention and that he had been discriminated against in the enjoyment of those rights. While the violations suffered by the applicant in that case were of an extremely serious nature, the Chamber considers that the fact that the one of the applicants in the present case suffered serious gunshot wounds to make this case even more serious.

166. Therefore, taking into account the severity of the treatment suffered by R.G., especially the fact that he suffered extremely painful injuries as a result of being shot, and was tortured, the Chamber considers it appropriate to award him the sum of KM 25,000.

167. In respect of Mr. Matković, the Chamber notes that he was not injured during his abduction but otherwise suffered very serious violations of his human rights. Taking into account the jurisprudence of the Chamber, in particular the *Hermas* case, the Chamber considers it appropriate to award Mr. Matković KM 10,000 for moral damage.

168. Additionally the Chamber awards 4 % (four per cent) interest as of the date of expiry of the three month period set for the implementation of the present decision on the sum awarded in paragraphs 166 and 167 above.

X. CONCLUSION

169. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. unanimously, that the treatment of the applicants by the Army of Bosnia and Herzegovina between 6 September until 15 October 1996 constituted a violation of their rights not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that the treatment of the applicant R.G. during his arrest and detention on 6 September 1996 by the Army of Bosnia and Herzegovina constituted a violation of his right not to be subjected to torture as guaranteed by Article 3 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that the arrest and detention of the applicants by the applicants by the Army of Bosnia and Herzegovina constituted a violation of their rights to liberty and security of person as guaranteed by Article 5 paragraphs 1, 2, 4 and 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, that it is not necessary to examine the applications under Articles 6 and 13 of the Convention;

6. unanimously, that the applicants have been discriminated against in the enjoyment of their rights as guaranteed by Articles 3 and 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant R.G., within one month of the date on which this decision becomes final and binding within the meaning of Rule 66 of the Chamber's Rules of Procedure, the sum of KM 25,000 (twenty five thousand Convertible marks) by way of compensation for moral damage suffered;

8. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant Mr. Matković, within one month of the date on which this decision becomes final and binding within the meaning of Rule 66 of the Chamber's Rules of Procedure, the sum of KM 10,000 (ten thousand Convertible marks) by way of compensation for moral damage suffered;

9. unanimously, that simple interest at an annual rate of 4 % (four per cent) will be payable on the sum awarded in conclusions 7 and 8 above from the expiry of the one-month period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

10. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within one month of the date on which this decision becomes final and binding within the meaning of Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 11 May 2001)

Case no. CH/98/1066

Savka KOVAČEVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 May 2001 with the following members present:

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

Mr. Peter KEMPEES, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant, Savka Kovačević, has been the occupancy right holder of an apartment in Novo Sarajevo, which she left in March 1996 to care for her sick mother in Ljubljana. The case concerns the applicant's attempts to regain possession of her apartment. Ms. Kovacević pursued repossession of her apartment not only through competent local administrative bodies (commencing in May 1998), but also filed an application with the Commission for Real Property Claims of Displaced Persons and Refugees (hereinafter "CRPC") (in October 1998). In January 1999 CRPC issued a decision confirming the applicant's status as the occupancy right holder of the apartment at issue and finding that the applicant is entitled to regain possession of the apartment. In May 2000, the local administrative body also issued a decision confirming that the applicant is the occupancy right holder of the apartment and allowing her to repossess the apartment. However, it was not until 4 December 2000 that the applicant finally repossessed her apartment.

2. The case raises issues under Article 8 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 16 November 1998 and registered on the same day.

4. On 21 February 2000 the Chamber transmitted the application to the respondent Party for observations on the admissibility and merits thereof. The respondent Party submitted its observations on 21 April 2000.

5. The applicants' further observations, including claims for compensation, were submitted on 31 May 2000 and transmitted to the respondent Party. The respondent Party filed additional written observations on the claim for compensation on 12 July 2000.

6. On 17 October 2000, the applicant wrote to the Chamber concerning recent factual developments in her case, including the fact that as of 5 August 2000, the temporary occupant of her apartment subleased the apartment to subtenants in exchange for rent.

7. At the request of the Chamber, CRPC contacted the applicant through her neighbour to attempt to obtain updated information on implementation of the CRPC decision of 28 January 1999 in the applicant's favour. On 15 January 2001, the applicant presented herself to CRPC and informed it that on 4 December 2000, she had repossessed her apartment.

8. On 16 February 2001, the applicant wrote to the Chamber and informed it that she had finally been reinstated into possession of her apartment, "two years, six months, and seven days" after she submitted her request for repossession to the Novo Sarajevo Administration for Housing Affairs of Sarajevo Canton on 18 May 1998. The applicant confirmed that she would maintain her claim for compensation made on 31 May 2000. On 9 March 2001, the respondent Party filed additional written observations to the applicant's submission.

9. On 13 January 2001, 4-5 April 2001, and 7 May 2001, the Chamber considered the admissibility and merits of the application. On 7 May 2001, the Chamber adopted the present decision.

III. FACTS

A. Domestic Proceedings.

10. As of 30 April 1991, the applicant has been the occupancy right holder of a two room apartment in Novo Sarajevo located at Hamdije Čemerlića Str. 41/II (formerly Bratstva i Jedinstva Str. 41/II). On 16 March 1996 the applicant left her apartment to go to Ljubljana to care for her sick,

elderly mother. The applicant states that she returned 23 days later to find the locks to her apartment changed and another name on her door. (Presumably thereafter the applicant returned once again to Ljubljana.) The respondent Party, however, claims the applicant did not return until May 1998. The applicant states that she returned to Sarajevo with her mother in May 1998.

11. After the applicant returned home from Ljubljana, she learned that the Novo Sarajevo Administration for Housing Affairs of Sarajevo Canton (the competent municipal organ, herein after the "Administration") had declared her apartment temporarily abandoned on 6 May 1996 and permanently abandoned on 30 May 1997, and had thereafter, on 10 June 1997, allocated her apartment to a work colleague, Mr. S.B. Mr. S.B. is the occupancy right holder of another apartment in the Federation of Bosnia and Herzegovina, located at Rudija Alvađa Str. 8/1 in Sarajevo. (There is some dispute over the condition of Mr. S.B.'s apartment. The applicant submitted a certificate of ownership which indicates that as of 22 June 2000, Mr. A.G. is the occupant of the apartment over which Mr. S.B. possesses an occupancy right. However, the Administration found that the apartment was devastated during the war and is not suitable for living.)

12. On 28 May 1998, the applicant submitted a request to the Administration to recognise her occupancy right and to return possession of her apartment. On 1 September 1998, the Administration issued a decision establishing that the applicant had the right to submit a request for repossession of her apartment. The Administration further confirmed the allocation of the apartment on 10 June 1997 to the new occupancy right holder, Mr. S.B.

13. On 9 November 1998, the applicant appealed against the Administration's procedural decision of 1 September 1998 to the Cantonal Ministry for Urban Planning, Housing and Communal Affairs in Sarajevo (hereinafter the "Ministry"). On 14 September 1999, the Ministry annulled the procedural decision of the Administration and returned the case for renewed proceedings. The Ministry explained that the Administration failed to decide on the applicant's request for repossession of her apartment and that Mr. S.B., according to Article 1, paragraph 1 of the Law Amending the Law on Cessation of Application of the Law on Abandoned apartments (OG FBiH no. 18/99), is now a temporary user of the apartment in question.

14. On 24 November 1999, the Administration, Department Novo Sarajevo, held a hearing in renewed proceedings in the case. On 24 December 1999, the applicant urged the Administration to issue its decision in the case.

15. On 6 May 2000, the Administration issued a new procedural decision, no. 23/6-372-1088/98, invalidating its earlier decision of 1 September 1998 and confirming that the applicant is the occupancy right holder of the apartment at issue, allowing the applicant to repossess the apartment, terminating the temporary use right of the temporary occupant, ordering the temporary occupant to vacate the apartment within 90 days, and recognizing the right of the temporary occupant to alternative accommodation. The Administration further found that Mr. S.B. had used his own resources to reconstruct the applicant's apartment and that he could commence separate proceedings before the competent court for compensation for his expenditures under the Law on Obligation Relations.

16. On 24 August 2000, the applicant requested enforcement of the Administration's decision of 6 May 2000.

17. Throughout the proceedings in her case, the applicant repeatedly states that she was homeless and suffered significant hardship without possession of her apartment. She further alleges that throughout her attempts to obtain repossession of her apartment, she has suffered offensive, humiliating, and psychologically abusive treatment by the domestic authorities, which she attributes to discrimination based on her national origin as a non-Bosniak.

B. Proceedings relating to the CRPC decision.

18. In addition to her proceedings before the competent domestic organs, the applicant also filed a claim with CRPC on 6 October 1998. On 28 January 1999, CRPC issued a decision, no. 201-8196-1/1, confirming the applicant's status as the occupancy right holder to the apartment in Novo

Sarajevo. CRPC found that the applicant was entitled to regain possession of the apartment in accordance with Article 1 to Annex 7. It further overruled all acts of judicial or administrative organs issued after 30 April 1991 which terminated or limited the occupancy right of the applicant to the apartment in question.

19. On 19 March 1999, the applicant requested that the Administration execute the CRPC decision and forcibly evict the temporary occupant. On 15 December 1999, she amended her proposal for execution according to the Law on Implementation of the Commission for Property Claims of Displaced Persons and Refugees.

C. Reinstatement into Possession of the Apartment.

20. Finally, on 4 December 2000, the applicant regained possession of her apartment. Although this is not clear from the documents and submissions contained in the case file, it appears that the applicant was reinstated into possession of her apartment pursuant to the 6 May 2000 decision of the Administration rather than the 28 January 1999 decision of CRPC.

IV. RELEVANT LEGAL PROVISIONS

A. The 1992 Law on Abandoned Apartments.

21. On 1 June 1994 the Assembly of the Republic of Bosnia and Herzegovina adopted the Decree with force of Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina, Nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95; hereinafter the "old Law"). The old Law governed the re-allocation of occupancy rights over socially-owned apartments which had been abandoned. On 4 April 1998, the old Law was repealed by the Law on the Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98; hereinafter the "new Law"), which entered into force on that day.

22. Under Article 1 of the old Law an occupancy right was suspended if the holder of that right and the members of his or her household abandoned the apartment after 30 April 1991. Article 2 defined an apartment as abandoned if, even temporarily, it was not used by the occupancy right holder or the members of his or her household. Article 3 provided for some exceptions to this definition, including the following:

> a. if the holder of the occupancy right and members of his or her household had resumed using the apartment either within seven days from the issuing of the declaration on the cessation of the state of war (if the holder of the right had been staying within the territory of the Republic of Bosnia and Herzegovina) or within fifteen days from the issuing of this declaration (if he or she had been staying outside that territory); or
>
> b. if the holder of the occupancy right or members of his or her household had, within the terms of the requisite permission to stay abroad or in another place within the country, left the apartment for the purpose of effecting a private or business journey; had been sent as a representative of a state authority, enterprise, state institution or other organisation or association upon the request of, or with the approval of, a competent state authority; had been sent for medical treatment; or had joined the armed forces of the Republic of Bosnia and Herzegovina.

23. A state organ, a holder of an allocation right, a political organisation, a social organisation, an association of citizens or a housing board could initiate proceedings seeking to have an apartment declared abandoned. The competent municipal housing authority was to decide on a request to this end within 7 days and could also *ex officio* declare an apartment abandoned. Failing a decision within this time limit, the decision was to be made by the Minister for Urban Planning, Construction and Environment (Articles 4-6). Interested parties could challenge a decision by the municipal organ before the same Ministry, but an appeal had no suspensive effect.

24. An apartment declared abandoned could be allocated for temporary use to "an active

participant in the fight against the aggressor against the Republic of Bosnia and Herzegovina" or to a person who had lost his or her apartment due to hostile action. Such temporary use could last up to one year after the date of the cessation of the imminent threat of war. A temporary user was obliged under the threat of eviction to vacate the apartment at the end of that period and to place the apartment at the disposal of the organ which allocated it (Articles 7-8).

25. If the holder of the occupancy right failed to resume using the apartment within the applicable time limit laid down in Article 3, read in conjunction with Article 10, he or she was regarded as having abandoned the apartment permanently. The resultant loss of the occupancy right was to be recorded in a decision by the competent authority (Article 10).

B. The 1998 Law on the Cessation of the Application of the Law on Abandoned Apartments.

26. The Law on the Cessation of the Application of the Law on Abandoned Apartments ("the new Law") entered into force on 4 April 1998. According to this legislation all administrative, judicial, and other decisions terminating occupancy rights on the basis of regulations issued under the old Law shall be null and void. Nevertheless, all decisions establishing a right of temporary occupancy shall remain effective until revoked in accordance with the new Law. Moreover, all decisions establishing a new occupancy right shall remain in force unless revoked in accordance with the new Law (Article 2). The holder (or a member of his or her household) of an occupancy right in respect of an apartment which has been declared abandoned is referred to in the new Law as "the occupancy right holder" (Article 3(1)). The holder of a newly allocated occupancy right based either on a decision of the holder of the right of allocation or on a contract is referred to as "the current occupant" (Article 3(6)).

27. The occupancy right holder shall be entitled to seek his or her reinstatement into the apartment at a certain date which must not be earlier than 90 days and no later than one year from the submission of the claim (Articles 3, 4, and 7). The competent authority shall decide on such a repossession claim within 30 days (Articles 6-7). The decision shall be delivered to the occupancy right holder, the holder of the allocation right, and the current occupant within five days from its issuance. An appeal lies to the Cantonal Ministry for Housing Affairs within 15 days from the date of receipt of the decision. An appeal shall not suspend the execution of the decision (Article 8). In no event shall a failure either of the cantonal authorities or the holder of the allocation right to meet their obligations under Article 3, or a failure of "the current occupancy right holder" to accept another apartment, delay the attempts of "an occupancy right holder" to reclaim his or her apartment (Article 3(9)).

28. If the apartment is occupied without a legal basis or was vacant when the new Law entered into force, the occupancy right holder shall be granted repossession of the apartment without any restriction and any temporary user shall be evicted (Article 3(3)). A person who is temporarily occupying the apartment and whose housing needs are otherwise met shall vacate the apartment within 90 days from the decision pursuant to Article 6 (Article 3(4)). If his or her housing needs are not otherwise met, he or she shall be provided with accommodation in accordance with the Law on the Taking Over of the Law on Housing Relations (OG FBiH, No. 11/98). In such a case the period within which the apartment must be vacated shall not be shorter than 90 days from the issuance of the decision pursuant to Article 6 of the new Law. The apartment must be vacated before the day of the intended return of the occupancy right holder but the intended return must not be sooner than 90 days from the date when the claim for repossession was submitted (Articles 3(5), 7(2)).

29. In exceptional circumstances the deadline for vacating an apartment may be extended to up to one year if the municipality or the allocation right holder responsible for providing alternative accommodation provides the cantonal administrative authority with detailed documentation about the efforts to secure alternative accommodation and if the cantonal authority finds that there is documented lack of available housing. In every individual case, the requirements of the Convention and its Protocols must be met, and the occupancy right holder must be notified of the decision extending the deadline, including its reasoning, 30 days before the initial deadline expires (Article 7(3)).

30. According to Article 7, a decision within the meaning of Article 6 shall contain a confirmation that the claimant is the holder of the occupancy right; a decision granting repossession of the

apartment to the occupancy right holder if the dwelling is temporarily occupied by someone else, is vacant, or is occupied without legal basis; a decision terminating the right of temporary occupancy if the apartment is in temporary use; a time limit by which a temporary user or another person occupying the apartment shall vacate it; and a decision as to whether the temporary user is entitled to accommodation in accordance with the Law on Housing Relations. Under Article 10 of the Instruction of 30 April 1998 on the Application of Article 4 of the new Law, the authority issuing the decision within the meaning of Article 6 of the new Law shall verify the status of the occupancy right; verify whether the apartment is uninhabitable, vacant, or occupied; and verify the status of any current occupant (illegal, temporary occupant, or person living in the apartment prior to 7 February 1998 on the basis of an occupancy right acquired before that date). Contracts on the use of apartments declared abandoned pursuant to regulations issued under the old Law and decisions on the allocation of such an apartment shall be null and void, if concluded or issued after 7 February 1998 (Article 16).

31. If "a person occupying the apartment" fails to comply voluntarily with a decision ordering him to vacate the apartment, the competent administrative body shall take enforcement measures at the request of the occupancy right holder (Article 11).

32. Pursuant to Article 14, the occupancy right holder (and any other person affected by a decision issued under Article 7), may "at any time file a claim with [CRPC]". Moreover, with regards to determining the rights and obligations of the occupancy right holder, a decision of CRPC "has the same power as a decision by any competent domestic body issued in accordance with this law."

C. The General Framework Agreement for Peace in Bosnia and Herzegovina – Annex 7, Agreement on Refugees and Displaced Persons.

33. The General Framework Agreement for Peace in Bosnia and Herzegovina ("the General Framework Agreement") was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (the "Parties") in Paris on 14 December 1995. Annex 7 to the General Framework Agreement deals with refugees and displaced persons, and in accordance with Article VII of Annex 7 an independent Commission for Displaced Persons and Refugees, later renamed Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), was established.

34. CRPC shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of that property (Article XI). CRPC shall determine the lawful owner of the property – a concept which CRPC has construed to include an occupancy right holder - according to Article XII(1). According to Article XII(7), decisions of CRPC are final, and any title, deed, mortgage, or other legal instrument created or awarded by CRPC shall be recognised as lawful throughout Bosnia and Herzegovina.

35. The Parties shall cooperate with the work of CRPC and shall respect and implement its decisions expeditiously and in good faith (Article VIII).

D. The Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees.

36. The Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees (OG FBiH 43/99 – hereinafter the "Law on Implementation"), which entered into force on 28 October 1999, regulates the enforcement of decisions of CRPC.

37. The administrative body responsible for property-related legal affairs in the municipality where the property is located shall enforce decisions of CRPC relating to real property owned by citizens (Article 3, paragraph 2). Decisions of CRPC relating to an apartment for which there is an occupancy right shall be enforced by the administrative body for housing affairs in the municipality where the apartment is located (Article 3, paragraph 3). CRPC decisions shall be enforced if a request for the enforcement has been filed with the relevant organ. The following persons are entitled to file such a

request: the right holder specified in the CRPC decision and his/her heirs relating to real property owned by citizens (Article 4, paragraph 1) and relating to apartments for which there is an occupancy right; the occupancy right holder referred to in a CRPC decision and the persons who, in compliance with the Law on Housing Relations, are considered to be members of the family household of the occupancy right holder (Article 4, paragraph 2).

38. The right to file a request for enforcement of a CRPC decision confirming a right to private property is not subject to any statute of limitation (Article 5, paragraph 1). The request for enforcement of a CRPC decision confirming an occupancy right must be submitted within 18 months from the date when the CRPC decision was issued, or for decisions issued before this Law entered into force, within 18 months from the entry into force of this Law (Article 5, paragraph 2, as amended by the High Representative, effective 28 October 2000). (Previously, the time limit had been one year.)

39. The request for enforcement of a CRPC decision shall include two photocopies of the CRPC decision relating to real property owned by citizens, and three photocopies of the CRPC decision relating to the occupancy right (Article 6). The administrative organ responsible for the enforcement of a CRPC decision is obliged to issue a conclusion on the permission of enforcement within a period of 30 days from the date when the request for enforcement was submitted and shall not require any confirmation of the enforceability of the decision from CRPC or any other body (Article 7, paragraphs 1 and 2). The conclusion shall contain the following:

1. in the case of property or apartments that have been declared abandoned, a decision terminating the municipal administration of the property;
2. a decision on repossession of the property or apartment by the right holder or other requestor of enforcement;
3. a decision terminating the right of the temporary user (where there is one) to use the property or apartment;
4. a time limit for the enforcee to vacate the property;
5. a decision on whether the enforcee is entitled to accommodation in accordance with applicable laws; and
6. a requirement that the premises shall be vacated of all persons and possessions other than those belonging to the person authorised to return into possession.

40. According to Article 7, paragraph 5, the time limit for vacating the house or apartment shall be the minimum time limit applicable under the Law on the Cessation of the Application of the Law on Abandoned Apartments (OG FBiH nos. 11/98, 38/98, 12/99, 18/99, 27/99 and 43/99) or the Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens (OG FBiH 11/98, 29/98, 27/99 and 43/99).

41. Article 9 states that a decision of CRPC is enforceable against the current occupants of the property concerned, regardless of the basis on which they occupy it.

42. Under the terms of Article 10, paragraph 1, the right holder referred to in the CRPC decision and/or any other person who held a legal interest in the property or apartment at issue on the date referred to in the dispositive of the CRPC decision, is entitled to submit a request for reconsideration to CRPC in accordance with CRPC regulations. Additionally, Article 10, paragraph 2 provides that a person with a legal interest in the property or apartment at issue which was acquired after the date referred to in the dispositive of the CRPC decision may lodge an appeal against the conclusion on permission of enforcement issued by the competent administrative organ. The appellant is required to prove that the right holder named in the Commission's decision voluntarily and lawfully transferred his or her rights to the appellant since the date referred to in the dispoisitive of the CRPC decision (Article 12, paragraph 2).

43. Enforcement of the CRPC decision shall not be suspended by the use of any legal remedy, except in the following two cases:

1. the competent administrative authority may suspend enforcement if it is notified by CRPC that a request for reconsideration of the CRPC decision has been lodged in accordance with CRPC regulations (Article 11, paragraph 2);

2. the court before which an appeal lodged under Article 10, paragraph 2 is pending may suspend enforcement if a verified contract on the transfer of rights was made after 14 December 1995 (Article 12, paragraph 4).

E. The Law on Administrative Proceedings.

44. Under Article 216, paragraph 1 of the Law on Administrative Proceedings (OG FBiH nos. 2/98, 48/99), the competent administrative organ must issue a decision to execute an administrative decision within 30 days of the receipt of a request to this effect. Article 216, paragraph 3 provides for an appeal to the administrative appellate body if a decision is not issued within this time limit, as if the request were denied (appeal against "silence of the administration"). In order to commence execution of an administration decision, Article 275, paragraph 1 states that the competent administrative organ shall adopt the conclusion on the permission of the execution of a decision. This conclusion shall state that the decision to be executed has become effective and shall outline the manner of execution. According to Article 275, paragraph 2, this conclusion shall be adopted without delay once the decision has become effective and no later than 30 days after the decision has become effective.

F. The Law on Administrative Disputes.

45. Article 1 of the Law on Administrative Disputes (OG FBiH nos. 2/98, 8/00) provides that the courts shall decide administrative disputes on the lawfulness of second instance administrative acts concerning rights and obligations of citizens and legal persons.

46. Article 22, paragraph 3 provides that an administrative dispute may also be instituted if the administrative second instance organ fails to render a decision within the prescribed time limit, whether the appeal to it was against a decision or against the first instance organ's silence.

V. COMPLAINTS

47. The applicant claims that her right to respect for her home as guaranteed by Article 8 of the European Convention and her right to peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 to the European Convention have been violated.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

48. The respondent Party contends that the application, the subject matter of which, it submits, is implementation of a decision of CRPC, is inadmissible or ill-founded on the merits. With respect to admissibility, the respondent Party objects to the application on the ground of *lis alibi pendens* and for failure to exhaust domestic remedies. It points out that the applicant sought enforcement of a CRPC decision. The High Representative issued the Law on Enforcement of Decisions Issued by the Commission for Property Claims of Refugees and Displaced Persons on 28 October 1999. The applicant submitted her claim under this new law on 15 December 1999. Thus, at the time the respondent Party submitted its observations, this administrative procedure was still pending and the applicant had various domestic remedies available to appeal or hasten this process. In addition, the respondent Party points out that the applicant regained possession of her apartment on 4 December 2000.

49. With regard to the merits of the applicant's claims under Article 8 and Article 1 of Protocol No. 1, the respondent Party emphasizes that the applicant left her apartment voluntarily, without any

influence from the respondent Party, in March 1996 and allegedly did not return until 1998. The respondent Party argues that there has been no violation of the applicant's rights because it has passed legislation which enables all persons to repossess their real property.

B. The applicant

50. The applicant maintains her complaints and notes that she waited for repossession of her apartment for "two years, six months, and seven days" after she submitted her request for repossession to the Novo Sarajevo Administration for Housing Affairs of Sarajevo Canton and for over 22 months after the CRPC decision in her favour. Meanwhile, she claims that during this time, her former colleague, who holds an occupancy right to another apartment in Sarajevo, possessed her apartment. For most of this time, the applicant cared for her ill, elderly mother, and they both suffered during the extended period the applicant was without a home.

VII. OPINION OF THE CHAMBER

A. Admissibility

51. Before considering the merits of this case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

52. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In the *Blentić* case (case no. CH/96/17, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21, Decisions on Admissibility and Merits 1996-1997), the Chamber considered this admissibility criterion in light of the corresponding requirement to exhaust domestic remedies in the former Article 26 of the Convention (now Article 35(1) of the Convention). The European Court of Human Rights has found that such remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The Court has, moreover, considered that in applying the rule on exhaustion, it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as of the personal circumstances of the applicants.

53. In the present case the Federation objects to the admissibility of the application on the ground that the domestic remedies provided by the Law on Administrative Proceedings and by the Law on Administrative Disputes have not been exhausted. Whilst these laws afford remedies which might qualify as effective ones within the meaning of Article VIII(2)(a) of the Agreement insofar as the applicant sought to return to the apartment in question and was faced with the authorities' inaction, the Chamber must ascertain whether, in the case now before it, these remedies could also be considered effective in practice.

54. The Chamber notes that the applicant filed a request for repossession of her apartment with the Administration on 28 May 1998. The Administration issued a decision on that request on 1 September 1998, but that decision failed to respond to the applicant's specific request for repossession. On appeal by the applicant, the Ministry, on 14 September 1999, finally addressed the previous error by invalidating the procedural decision on 1 September 1998 and returning the case to the Administration for reconsideration and renewed proceedings. The Administration conducted a hearing one month later, and then, on 6 May 2000, issued a procedural decision in the applicant's favour confirming her occupancy right over her apartment and allowing her to repossess her apartment. However, despite a request for enforcement by the applicant on 24 August 2000, she did not in fact repossess her apartment until 4 December 2000, almost seven months after the favourable decision entitling her to such repossession and over thirty months after her initial request.

55. The Chamber further notes that the applicant also filed a request with CRPC with a view to being reinstated into her apartment. CRPC issued a decision on 28 January 1999 confirming the applicant's status as the occupancy right holder of the apartment, from which it follows that she was

entitled to seek the removal of the temporary occupant and to repossess the apartment. However, as explained above, the applicant did not in fact repossess her apartment until 4 December 2000, despite the applicant's specific request to the Administration on 19 March 1999, amended on 15 December 1999, to enforce the CRPC decision.

56. Under the Law on the Cessation of the Application of the Law on Abandoned Apartments (OG FBiH no. 11/98), the applicable law at the time the applicant filed her initial requests for repossession to the Administration and CRPC, if a person occupying an apartment fails to comply voluntarily with a decision ordering him to vacate the apartment, the competent administrative body shall, at the request of the occupancy right holder, take enforcement measures (Article 11 of the new Law). Article 14 of the new Law further confirms that a decision of CRPC on the rights and obligations of the occupancy right holder has the same power as a decision by any competent domestic body issued in accordance with this law.

57. Moreover, under Article 216, paragraph 1 of the Law on Administrative Proceedings (OG FBiH no. 2/98), the competent administrative organ must issue a decision to execute an administrative decision within 30 days of the receipt of a request to this effect. Additionally, in order to commence execution of an administrative decision, Article 275, paragraphs 1 and 2 of the Law on Administrative Proceedings provides that the competent administrative organ shall adopt the conclusion on the permission of the execution of a decision without delay once the decision has become effective and in any event no later than 30 days after the decision has become effective.

58. The Chamber notes that the applicant did finally, after repeated requests and proceedings before competent administrative bodies and CRPC, regain possession of her apartment. However, the remedies provided by the new Law, the Law on Administrative Proceedings, and the Law on Administrative Disputes could not remedy the applicants' complaints insofar as they relate to the failure of the authorities to enforce the decisions of the Administration and CRPC within the time-limits prescribed by law. Furthermore, there is no reason to suppose that the responsible authorities, which for a long period disregarded their legal obligations to enforce the decisions of the Administration and CRPC, would have treated the decisions of the courts with any greater respect.

59. In these circumstances the Chamber is satisfied that the applicant could not be required, for the purposes of Article VIII(2)(a) of the Agreement, to pursue any further remedy provided by domestic law.

60. The Chamber further finds that no other ground for declaring the case inadmissible has been established. Accordingly, the case is to be declared admissible.

B. Merits

61. Under Article XI of the Agreement the Chamber must next address the question 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.

1. Article 8 of the Convention

62. The relevant portion of Article 8 of the Convention provides as follows:

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

63. The Chamber notes that the applicant lived in the apartment and used it as her home until such time as she discovered that the locks were changed and another person had taken over her apartment. The Chamber has previously held that links that persons in similar situations as the applicant in the present case retained to their dwellings were sufficient for them to be considered to be their "homes" within the meaning of Article 8 of the Convention (see case no. CH/97/58, *Onić,* Decision on the admissibility and merits, delivered on 12 February 1999, paragraph 48, Decisions, January-July 1999; and case no. CH/97/46, *Kevešević*, decision on the merits, delivered on 10 September 1998, paragraphs 39-42, Decisions and Reports 1998).

64. Moreover, the respondent Party states in its observations of 21 April 2000 that it "considers as indisputable the fact that the housing premises in question are the applicant's home".

65. It is therefore clear that the applicant's apartment is to be considered as her home for the purposes of Article 8 of the Convention.

66. It is the Federation's assertion that it has passed legislation which enables all persons to repossess their homes and that therefore there has been no violation of Article 8 of the Convention.

67. The Chamber notes that it is correct that legislation is in force in the Federation that in theory enables persons to repossess their homes. However, both the Chamber and the European Court of Human Rights have held that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the authorities, it may also give rise to positive obligations (see, e.g., case no. 96/17, *Blentić*, decisions on admissibility and merits delivered on 22 July 1998, paragraph 27, Decsions and Reports 1998, *Marckx v. Belgium*, 13 June 1979, Series A No. 31, paragraph 31; *Airey v. Ireland*, 9 October 1979, Series A No. 32, paragraph 32*; Velosa Barreto v. Portugal*, 21 November 1995, Series A No. 334, paragraph 23). Therefore, the Chamber considers that the Federation not only must pass legislation, but that the legislation also must be implemented. Otherwise, the legislation is not effective.

68. In the present case the Chamber recalls that both the Administration and CRPC issued decisions confirming the applicant's status as the occupancy right holder and her right to repossess the apartment. For many months (over 30 months after her initial request to the Administration and over 22 months after the CRPC decision in her favour) the applicant was unable to regain possession of her apartment due to the failure of the authorities of the Federation to deal effectively, in accordance with Federation law, with the applicant's requests for repossession and thereafter, with her requests for enforcement of the decisions in her favour by the Administration and CRPC. It follows that during that time, there were ongoing interferences with the applicants' right to respect for her home.

69. The Chamber must therefore examine whether these interferences were in accordance with paragraph 2 of Article 8 of the Convention.

70. The Chamber notes that the applicant filed a request for repossession of her apartment with the Administration on 28 May 1998. The Administration initially responded to this request on 1 September 1998. However, according to the subsequent decision by the Ministry on 14 September 1999, which decision invalidated the Administration's decision of 1 September 1998, the Administration's initial decision on the applicant's request for repossession "confirms that the applicant is entitled to the right to file a request for repossession of the apartment in question, instead of deciding upon the request already filed in accordance with the Law on Cessation of the Application of the Law on Abandoned Apartments." Thus, the Administration failed to deal properly with the applicant's initial request for repossession. This failure resulted in a delay of the applicant's repossession of her apartment. The Administration did not finally issue a procedural decision in the applicant's favour confirming her occupancy right over her apartment and allowing her to repossess her apartment until 6 May 2000. However, despite a request for enforcement by the applicant on 24 August 2000, she did not in fact repossess her apartment until 4 December 2000, over thirty months after her initial request.

71. The Chamber further notes that the applicant filed an additional request to CRPC with a view to being reinstated into her apartment. CRPC issued a decision on 28 January 1999 confirming the

applicant's status as the occupancy right holder of the apartment, from which it follows that she was entitled to seek removal of the temporary occupant and to repossess the apartment. On 19 March 1999, the applicant specifically requested that the Administration execute the CRPC decision and evict the temporary occupant, and on 15 December 1999, she resubmitted her request under the Law on Implementation. However, it appears from the submissions in the case file that at no time did the competent authorities enforce the decision of CRPC. The applicant did eventually regain possession of her apartment, but this appears to have resulted from the Administration's decision of 6 May 2000.

72. As explained above, under Article 216, paragraph 1 of the Law on Administrative Proceedings, the competent administrative organ must issue a decision to execute an administrative decision within 30 days of the receipt of a request to this effect. Additionally, in order to commence execution of an administrative decision, Article 275, paragraphs 1 and 2 of the Law on Administrative Proceedings provides that the competent administrative organ shall adopt the conclusion on the permission of the execution of a decision without delay once the decision has become effective and in any event no later than 30 days after the decision has become effective.

73. The Chamber notes that the applicant specifically sought enforcement of the CRPC decision of 28 January 1999 on 19 March 1999 and that she further sought enforcement of the Administration's decision of 6 May 2000 on 24 August 2000. Thus, the latest date on which the respondent Party should have issued a conclusion on the CRPC decision is 30 days after 19 March 1999, *i.e.*, on 18 April 1999, and the latest date on which the respondent Party should have issued a conclusion on the Administration's decision is 30 days after 24 August 2000, i.e., on 23 September 2000. However, the applicant was not reinstated to her apartment until 4 December 2000, despite the fact that the applicable time limits for enforcement had expired. Accordingly, the failure of the competent administrative organ to decide upon the applicant's enforcement requests in a timely manner was not "in accordance with the law."

74. Furthermore, the Chamber considers that had the Administration properly acted on the applicant's initial request for repossession, it would have decided in the applicant's favour in its decision of 1 September 1998. Thus, the failure of the competent administrative organ to decide properly upon the applicant's initial request for repossession in a timely manner was also not "in accordance with the law."

75. As the interferences with the applicant's right to respect for her home referred to above were not "in accordance with the law", it is not necessary for the Chamber to examine whether the acts complained of pursued a "legitimate aim" or were "necessary in a democratic society".

76. In conclusion, there has been a violation of the right of the applicant to respect for her home as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1

77. The applicant complains also that her right to peaceful enjoyment of her possessions has been violated as a result of her inability to regain possession of her apartment in a timely manner. Article 1 of Protocol No. 1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

78. It is the Federation's assertion that it has passed such legislation which enables all persons to repossess their apartments and that the applicant was not deprived of her right to return into possession of her apartment.

79. The Chamber notes that the applicant is the occupancy right holder of the apartment in question and that the apartment constitutes her "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber considers that the failure of the authorities of the Federation to allow the applicant to regain possession of her apartment in a timely manner constituted an "interference" with her right to peaceful enjoyment of that possession. This interference was ongoing until the applicant finally regained possession of her apartment on 4 December 2000.

80. The Chamber must therefore examine whether this interference could be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law. This means that the deprivation must have a basis in national law and that the law concerned must be both accessible and sufficiently precise.

81. As the Chamber noted in the context of its examination of the case under Article 8 of the Convention, the Law on Administrative Proceedings provides in Article 216, paragraph 1 that the competent administrative organ must issue a decision to execute an administrative decision within 30 days of the receipt of a request to this effect. Additionally, in order to commence execution of an administrative decision, Article 275, paragraphs 1 and 2 of the Law on Administrative Proceedings provides that the competent administrative organ shall adopt the conclusion on the permission of the execution of a decision without delay once the decision has become effective and in any event no later than 30 days after the decision has become effective.

82. Accordingly, the failure of the competent administrative organ to decide upon the applicant's enforcement request of the CRPC decision by 18 April 1999 and the failure of the competent administrative organ to decide upon the applicant's enforcement request of the Administration's decision by 23 September 2000 were contrary to the law. This is in itself sufficient to justify a finding of a violation of the applicant's right to peaceful enjoyment of her possessions as guaranteed by Article 1 of Protocol No. 1. Accordingly, the rights of the applicant under this provision have been violated.

VIII. REMEDIES

83. 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 established. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief, as well as provisional measures. The Chamber is not necessarily bound by the claims of the applicant.

84. In her submissions of 31 May 2000 and 17 October 2000, the applicant requested that she be enabled to regain possession of the apartment. In addition, the applicant requested compensation in the amount of 400 Convertible Marks (Konvertibilnih Maraka, "KM") per month for 50 months on account of the rent she was forced to pay because she could not use her apartment. She also requested compensation in the amount of 8000 KM by way of moral damages for the suffering and humiliation she was subjected to in the proceedings before the state authorities. In her supplemental submission to the Chamber dated 16 February 2001, the applicant confirmed that she wanted to maintain her claim for compensation in the total amount of 28,000 KM.

85. The respondent Party in its observations of 12 July 2000 argued that the claims for compensation were ill-founded, unsubstantiated, and excessive. In its additional observations submitted on 7 March 2001, the respondent Party further argued that because the applicant regained possession of her apartment on 4 December 2000, the remainder of her application should be struck out.

86. With regard to possible compensatory awards the Chamber considers it appropriate to award a sum to the applicant in recognition of the sense of injustice she has suffered as a result of her inability to regain possession of her apartment in a timely manner, especially in view of the fact that the applicant took all necessary steps to have the two decisions in her favour enforced.

87. Accordingly, the Chamber will order the respondent Party to pay to the applicant the sum of 2000 KM in recognition of her suffering as a result of her inability to regain possession of her apartment in a timely manner.

88. In accordance with its decision in *Turundžić and Frančić* (cases nos. CH/00/6143 and CH/00/6150, decision on admissibility and merits delivered on 8 February 2001, paragraph 70, not yet published), the Chamber considers that the sum of KM 200 per month is appropriate to compensate for the loss of use of the apartment and any extra costs for each month the applicant was forced to live in alternative accommodation. The Chamber considers that this sum should be payable from 1 September 1998 (the date of the initial decision of the Administration which failed to respond to the applicant's request for repossession) up to and including December 2000 when the applicant finally regained possession of her apartment. Thus, the total award for pecuniary compensation for the loss of use of the apartment and any extra costs is 5600 KM (that is, 200 KM per month for 28 months). The Chamber considers it appropriate in the present case to order the respondent Party to pay the sums mentioned in paragraphs 87 and 88 within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

89. Additionally, the Chamber awards simple interest at an annual rate of 10% on the sums awarded to be paid to the applicant in paragraphs 87 and 88 above. Interest shall be paid as of one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on each sums awarded or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSION

90. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the failure of the Administration to issue a decision awarding the applicant repossession of her apartment in a timely manner and the delayed enforcement of the Administration's eventual decision constitute violations of the right of the applicant to respect for her home within the meaning of Article 8 of the Convention, the Federation thereby being in breach of Article I of the Agreement;

3. unanimously, that the non-enforcement of the CRPC decision constitutes a violation of the right of the applicant to respect for her home within the meaning of Article 8 of the Convention, the Federation thereby being in breach of Article I of the Agreement;

4. unanimously, that the failure of the Administration to issue a decision awarding the applicant repossession of her apartment in a timely manner and the delayed enforcement of the Administration's eventual decision constitute violations of the right of the applicant to peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Federation thereby being in breach of Article I of the Agreement;

5. unanimously, that the non-enforcement of the CRPC decision constitutes a violation of the right of the applicant to peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Federation thereby being in breach of Article I of the Agreement;

6. unanimously, to order the respondent Party to pay to the applicant, no later than one month from 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 in respect of non-pecuniary damage;

7. unanimously, to order the respondent Party to pay to the applicant, no later than one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures, the sum of 5600 KM as compensation for the loss of use of the

apartment and for any extra costs during the time the applicant was forced to live in alternative accommodation until 4 December 2000;

8. unanimously, to order the Federation to pay simple interest at the rate of 10 % (ten per cent) per annum over the above sums or any unpaid portion thereof after the expiry of one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure until the date of settlement in full; and

9. unanimously, to order the respondent Party to report to it by one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 9 June 2000)

Cases nos. CH/98/1124, CH/98/1126, CH/98/1127, CH/98/1130, CH/98/1131, CH/98/1132, CH/98/1133, CH/98/1134, CH/98/1135, CH/98/1136, CH/98/1139, CH/98/1141, CH/98/1144, CH/98/1145, CH/98/1146, CH/98/1147, CH/98/1148, CH/98/1149, CH/98/1150, CH/98/1151, and CH/98/1153

Fehreta and Refik DIZDAREVIĆ, Munib RAKOVIĆ, Hasan HATIĆ, Mirsad PIVAČ, Ziza DEMO, Avdo ĆIRKIĆ, Šukrija HATIĆ, Atifa RIZVANOVIĆ, Kadir LOJIĆ, Ismet LOJIĆ, Šaban NEŠKIĆ, Muhamed ANADOLAC, Ibrahim DRNDIĆ, Šerif CRNKIĆ, Muharem HALILOVIĆ, Hakija HADŽIHAFIZOVIĆ, Ramadan MESIĆ, Ramadan SAMARDŽIĆ, Said ŠARAC, Sakib NEŠKIĆ, and Enes PORIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 10 May 2000 with the following members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina of Bosniak descent. They are owners of real property in the Gradiška area in the Republika Srpska, who were forced to leave them during the war. Their properties are or were occupied by refugees and internally displaced persons of Serb origin, most of whom received decisions from the authorities of the Republika Srpska entitling them to do so. Most of the applicants left the Republika Srpska during the war and have now returned to the area. In two of the cases (CH/98/1124 Mr. Ćirkić and CH/98/1134 Ms. Rizvanović) the applicants have regained possession of their properties and in one further case (CH/98/1124 Mr. and Mrs. Dizdarević) the applicants have succeeded in regaining possession of part of their property.

2. The cases concern their attempts before various authorities of the Republika Srpska to regain possession of their property. The applicants have taken all or some of the following steps to this end: applying to the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Gradiška ("the Commission") and the Ministry for Refugees and Displaced Persons ("the Ministry") under the Law on Use of Abandoned Property which entered into force in February 1996 ("the old law", see paragraphs 97-105 below), initiating proceedings before the Court of First Instance in Gradiška ("the court"), applying to the Commission under the Law on Cessation of Application of the Law on Use of Abandoned Property which entered into force in December 1998 ("the new law", see paragraphs 106-119 below) and applying to various political institutions of the Republika Srpska. The Commission is competent to decide on applications for repossession of property under both the old and new laws. The facts of each individual case are set out briefly at Section III below.

3. The cases raise issues principally under Articles 6 and 8 of the European Convention on Human Rights, under Article 1 of Protocol No. 1 to the Convention and under Article II(2)(b) of the Agreement in relation to discrimination in the enjoyment of the above-mentioned rights.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The applications were submitted and registered between 16 July and 14 September 1998. The applicants are all represented by the legal assistance centre "Terra" in Gradiška.

5. A number of the applicants requested that the Chamber order the respondent Party as a provisional measure that they be allowed to regain possession of their properties. At its sessions in December 1998 and January 1999 the Chamber decided to reject such requests where they were made and to transmit the cases to the Republika Srpska for observations on their admissibility and merits. These observations were received on 19 March 1999.

6. The observations were sent to the representative of the applicants on 13 April 1999 and the applicants were requested to submit any further observations or requests for compensation or other relief they wished to make. On 14 April 1999 these were received by the Chamber and on 20 April 1999 were sent to the Republika Srpska for its further observations. These were received on 22 June 1999 and sent to the representative of the applicants on 5 July 1999 for information.

7. On 22 February 2000 the Chamber wrote to the representative of the applicants requesting a factual update on the cases. This update was received by the Chamber on 13 April 2000 and sent to the Republika Srpska for information.

8. The Chamber deliberated on the admissibility and merits of the applications on 10 May 2000 and decided to join the applications and adopted the present decision.

III. FACTS

A. The facts of the individual cases

9. All of the applications concern land situated in villages or settlements in the Gradiška area, on which houses and certain accessory buildings are situated. The applicants lost possession of their properties during the war.

10. All of the properties either are or were occupied by refugees or displaced persons of Serb origin. In all but two of the cases, the applicants have stated that these persons did so in accordance with decisions of the Commission. The applicants in the other two cases, Mr. Raković (CH/98/1126) and Ms. Demo (CH/98/1131), state that they have no specific confirmation concerning the legal basis, if any, upon which their properties are occupied.

11. In the course of 1997 and 1998, all of the applicants applied to the Commission under the old law to regain possession of their properties and made additional submissions regarding their applications to the Ministry at second instance. None of them ever received any decision on any of their applications. The date of the first application in this regard made by each applicant is set out below.

12. Unless otherwise specified, the applicants have not initiated court proceedings seeking to regain possession of their properties.

13. In addition, all of the applicants have applied under the new law to regain possession of their properties. The details of such applications are set out below in respect of each case.

1. Case no. CH/98/1124 Fehreta and Refik Dizdarević

14. The applicants are the owners of land in Gradiška as evidenced by extract numbers 428 and 509 from the Cadastral Registry in Gradiška.

15. The applicants first applied to the Commission under the old law on 19 February 1998.

16. In the course of 1998 they initiated proceedings against the current occupants of the property before the court, seeking their eviction. On 24 November 1998 the court issued its decision, in which it declared itself incompetent to consider the matter as it concerned abandoned property. On 4 January 1999 the applicants appealed to the Regional Court against this decision. According to the information available to the Chamber, there has been no decision on this appeal to date.

17. On 29 December 1998 the applicants applied to the Commission under the new law to regain possession of their property. On 3 March 1999 it issued a decision entitling them to regain possession of it. The date set for such reentry was 5 March 1999. On that date they succeeded in regaining possession of part of the property, consisting of one floor of their house. The remainder is still occupied by displaced persons of Serb origin from the Federation of Bosnia and Herzegovina. The applicants have sought execution of the decision of 3 March 1999, so far without success.

2. Case no. CH/98/1126 Munib Raković

18. The applicant is the owner of land in Gradiška as evidenced by extract number 667 from the Cadastral Registry in Gradiška.

19. The applicant first applied to the Commission under the old law on 4 June 1998.

20. On 30 December 1998 he applied to the Commission under the new law to regain possession of the property. On 30 March 1999, after the applicant had lodged a complaint concerning the failure to issue a decision within the relevant time-limit, the Commission issued a decision entitling him to regain possession of the property and ordering the current occupants to

vacate it. The applicant has sought execution of this decision, but has not yet succeeded in regaining possession of the property to date.

3. Case no. CH/98/1127 Hasan Hatić

21. The applicant is the owner of land in Gradiška as evidenced by extract number 786 from the Cadastral Registry in Gradiška.

22. The applicant first applied to the Commission under the old law on 27 May 1998.

23. On 11 March 1999 he applied to the Commission under the new law to regain possession of the property. On 26 June 1999 it issued a decision entitling him to regain possession of the property and ordering the current occupants to vacate it. The applicant has sought execution of this decision, but has not yet succeeded in regaining possession of the property to date.

4. Case no. CH/98/1130 Mirsad Pivač

24. The applicant is the owner of land in Gradiška as evidenced by extract number 809 from the Cadastral Registry in Gradiška.

25. The applicant first applied to the Commission under the old law on 29 May 1998.

26. After the entry into force of the new law, the applicant applied to the Commission to regain possession of the property. In August 1999 it issued a decision entitling him to regain possession of the property and ordering the current occupants to vacate it. The date set for this was 11 November 1999, but the applicant did not succeed in regaining possession of the property on that date. The applicant has sought execution of the decision of the Commission, so far without success.

5. Case no. CH/98/1131 Ziza Demo

27. The applicant is the owner of land in Gradiška as evidenced by extract number 71 from the Cadastral Registry in Gradiška.

28. The applicant first applied to the Commission under the old law on 24 December 1998.

29. On 26 January 1999 the applicant applied to the Commission under the new law to regain possession of the property. On 28 March 1999 it issued a decision entitling her to regain possession of it. The date set for such reentry was 28 June 1999. The applicant did not succeed in regaining possession of the property on that date. She states that she has requested execution of the decision.

6. Case no. CH/98/1132 Avdo Ćirkić

30. The applicant is the owner of land in Gradiška as evidenced by extract number 667 from the Cadastral Registry in Gradiška.

31. The applicant first applied to the Commission under the old law on 12 November 1997.

32. He applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to reenter the property and on 23 April 1999 the applicant succeeded in doing so as a result of this decision.

7. Case no. CH/98/1133 Šukrija Hatić

33. The applicant is the owner of land in Gradiška as evidenced by extract number 237 from the Cadastral Registry in Gradiška.

34. The applicant first applied to the Commission under the old law on 6 July 1998.

35. On 12 January 1999 he applied to the Commission under the new law to regain possession of the property. On 20 March 1999 it issued a decision entitling him to reenter the property. The date set for such reentry was 12 April 1999. The applicant did not succeed in regaining possession of the property on that date and has on various occasions requested execution of the decision, so far without success.

8. Case no. CH/98/1134 Atifa Rizvanović

36. The applicant is the owner of land in Gradiška as evidenced by extract number 2272 from the Cadastral Registry in Gradiška.

37. The applicant first applied to the Commission under the old law on 30 June 1998.

38. On 15 September 1998 she initiated proceedings against the current occupants of the property before the court, seeking their eviction. On 21 December 1998 the court issued its decision, in which it declared itself incompetent to consider the matter as it concerned abandoned property. On 29 December 1998 the applicant appealed to the Regional Court against this decision. According to the information available to the Chamber, there has been no decision on this appeal to date.

39. On 4 February 1999 the applicant applied to the Commission under the new law to regain possession of the property. On 18 March 1999 it issued a decision entitling her to do so on 4 May 1999. She did not regain possession of it on that date. On 4 October 1999 she succeeded in regaining possession of the property on the basis of the decision of 18 March 1999.

9. Case no. CH/98/1135 Kadir Lojić

40. The applicant is the owner of land in Gradiška as evidenced by extract number 380 from the Cadastral Registry in Gradiška.

41. The applicant first applied to the Commission under the old law on 11 June 1998.

42. In early 1999 he applied to the Commission under the new law to regain possession of his property. On 28 March 1999 it issued a decision entitling him to reenter the property. The date set for such reentry has passed but the applicant has not yet succeeded in regaining possession of the property. He has requested execution of the decision.

10. Case no. CH/98/1136 Ismet Lojić

43. The applicant is the owner of land in Gradiška as evidenced by extract number 972 from the Cadastral Registry in Gradiška.

44. The applicant first applied to the Commission under the old law on 11 June 1998.

45. In early 1999 he applied to the Commission under the new law to regain possession of his property. On 28 March 1999 it issued a decision entitling him to reenter the property. The date set for such reentry has passed but the applicant has not yet succeeded in regaining possession of the property. He has requested execution of the decision.

11. Case no. CH/98/1139 Šaban Neškić

46. The applicant is the owner of land in Gradiška as evidenced by extract number 567 from the Cadastral Registry in Gradiška.

47. The applicant first applied to the Commission under the old law on 30 July 1998.

48. In early 1999 he applied to the Commission under the new law to regain possession of his property. On 29 March 1999 it issued a decision entitling him to reenter the property. The date set for such reentry has passed but the applicant has not yet succeeded in regaining possession of the property. He has requested execution of the decision.

12. Case no. CH/98/1141 Muhamed Anadolac

49. The applicant is the owner of land in Gradiška as evidenced by extract number 65 from the Cadastral Registry in Gradiška.

50. The applicant first applied to the Commission under the old law on 25 June 1997.

51. He initiated proceedings against the current occupants of the property before the court, seeking their eviction. On 22 December 1998 the court issued its decision, in which it declared itself incompetent to consider the matter as it concerned abandoned property. On 13 January 1999 the applicant appealed to the Regional Court against this decision. According to the information available to the Chamber, there has been no decision on this appeal to date.

52. In early 1999 the applicant applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry was 19 April 1999. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

13. Case no. CH/98/1144 Ibrahim Drdić

53. The applicant is the owner of land in Gradiška as evidenced by extract number 196/5 from the Cadastral Registry in Gradiška.

54. The applicant first applied to the Commission under the old law on 4 August 1998.

55. In early 1999 he applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to reenter the property. The date set for such reentry has passed but the applicant has not yet succeeded in regaining possession of the property. He has requested execution of the decision.

14. Case no. CH/98/1145 Šerif Crnkič

56. The applicant is the owner of land in Gradiška as evidenced by extract number 140 from the Cadastral Registry in Gradiška.

57. The applicant first applied to the Commission under the old law on 15 June 1998.

58. On 5 January 1999 the applicant applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry was 5 April 1999. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

15. Case no. CH/98/1146 Muharem Halilović

59. The applicant is the owner of land in Gradiška as evidenced by extract number 100 from the Cadastral Registry in Gradiška.

60. The applicant first applied to the Commission under the old law on 13 May 1998.

61. In January 1999 he applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry has passed. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

16. Case no. CH/98/1147 Hakija Hadžihafizovič

62. The applicant is the owner of land in Gradiška as evidenced by extract number 786 from the Cadastral Registry in Gradiška.

63. The applicant first applied to the Commission under the old law on 20 July 1998.

64. He initiated proceedings against the current occupants of the property before the court, seeking their eviction. On 21 December 1998 the court issued its decision, in which it declared itself incompetent to consider the matter as it concerned abandoned property. On 28 December 1998 the applicant appealed to the Regional Court against this decision. According to the information available to the Chamber, there has been no decision on this appeal to date.

65. On 30 December 1998 the applicant applied to the Commission under the new law to regain possession of his property. On 16 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry was 30 March 1999. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

17. Case no. CH/98/1148 Ramadan Mesić

66. The applicant is the owner of land in Gradiška as evidenced by extract number 513/7 from the Cadastral Registry in Gradiška.

67. The applicant first applied to the Commission under the old law on 21 April 1998.

68. In January 1999 he applied to the Commission under the new law to regain possession of his property. On 28 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry has passed. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

18. Case no. CH/98/1149 Ramadan Samardžić

69. The applicant is the owner of land in Gradiška as evidenced by extract number 251 from the Cadastral Registry in Gradiška.

70. The applicant first applied to the Commission under the old law on 6 May 1998.

71. In January 1999 he applied to the Commission under the new law to regain possession of his property. On 28 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry has passed. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

19. Case no. CH/98/1150 Said Šarac

72. The applicant is the owner of land in Gradiška as evidenced by extract numbers 1252 and 622 from the Cadastral Registry in Gradiška.

73. The applicant first applied to the Commission under the old law on 4 August 1998.

74. In January 1999 he applied to the Commission under the new law to regain possession of his property. On 15 February 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry was 15 May 1999. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

20. Case no. CH/98/1151 Sakib Neškić

75. The applicant is the owner of land in Gradiška as evidenced by extract numbers 870 and 566 from the Cadastral Registry in Gradiška.

76. The applicant first applied to the Commission under the old law on 4 June 1998.

77. In January 1999 he applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to regain possession of the property.

78. The date set for such reentry has passed. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

21. Case no. CH/98/1153 Enes Porić

79. The applicant is the owner of land in Gradiška as evidenced by extract number 498 from the Cadastral Registry in Gradiška.

80. The applicant first applied to the Commission under the old law on 10 July 1998.

81. On 18 January 1999 the applicant applied to the Commission under the new law to regain possession of his property. On 20 March 1999 it issued a decision entitling him to regain possession of the property. The date set for such reentry was 19 April 1999. The applicant did not succeed in regaining possession of the property on that date and has requested execution of the decision.

B. Relevant legal provisions

1. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7

82. Paragraph 1 of Article I of Annex 7 states, insofar as relevant as follows:

> "All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 …. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries."

83. Article XIII of Annex 7, entitled "Use of Vacant Property" states:

> "The Parties, after notification to the Commission and in coordination with the UNHCR and other international and nongovernmental organisations contributing to relief and reconstruction, may temporarily house refugees and displaced persons in vacant property, subject to final determination of ownership by the Commission and to such temporary lease provisions as it may require."

2. Constitution of Bosnia and Herzegovina

84. Article II of the Constitution of Bosnia and Herzegovina ("the BH Constitution"), entitled "Human Rights and Fundamental Freedoms", sets out the mechanism for the protection of human rights and fundamental freedoms within Bosnia and Herzegovina.

85. Article II(1) of the BH Constitution, entitled "Human Rights", reads as follows:

> "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. …."

86. Article II(2) of the BH Constitution, entitled "International Standards", reads as follows:

> "The rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

87. Article II(4) of the BH Constitution, entitled "Non-Discrimination", reads as follows:

> "The enjoyment of the rights and freedoms (guaranteed by the BH Constitution) shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

88. Article II(5) of the BH Constitution, entitled "Refugees and Displaced Persons", reads as follows:

> "All refugees and displaced persons have the right freely to return to their homes of origin. …. "

89. Article II(6) of the BH Constitution, entitled "Implementation", reads as follows:

> "Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above."

3. Constitution of the Republika Srpska

90. Title II of the Constitution of the Republika Srpska ("the RS Constitution") is entitled "Human Rights and Freedoms".

91. Article 10 of the RS Constitution reads as follows:

> "Citizens of the Republic are equal in the enjoyment of rights, freedoms and duties, they are equal before the law and shall enjoy legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status or other personal attributes."

92. Article 16 of the RS Constitution reads as follows:

> "Everyone has the right to equal protection of their rights before the courts and other state organs and organisations.
>
> Everyone has the right to appeal or otherwise institute legal proceedings against a decision concerning his rights or legal interests."

93. Article 17 of the RS Constitution reads as follows:

> "Everyone has the right of redress for loss caused by illegal or unjust actions by official persons or state organs or institutions acting in an official capacity. …."

94. Article 56 of the RS Constitution reads as follows:

> "In accordance with the law, rights of ownership may be limited or expropriated, subject to payment of fair compensation."

95. This provision was supplemented on 11 November 1994 by Amendment XXXI, which reads as follows:

"During the state of war, immediate danger of war or during the state of emergency the disposal of properties or use of property of legal or natural persons can be regulated by law."

96. Article 121 of the Constitution reads as follows:

"The judicial function is performed by the Courts. The Courts are independent and decide upon the basis of the Constitution and laws.

The Courts protect human rights and freedoms, established rights and interests of legal entities and legality."

4. The Law on Use of Abandoned Property

97. The Law on Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 3/96; "the old law") was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present cases, are summarised below.

98. Articles 2 and 11 define "abandoned property" as real and personal property which has been abandoned by its owners and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

99. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property to persons within the categories set out in Article 15. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

100. Article 15 reads as follows:

"Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:
- to the families of killed soldiers
- war invalids with injuries in categories I-V
- war invalids with injuries in categories V-X
- qualified workers of whom there is a lack in the Republika Srpska."

101. Article 15A (which was inserted by an amendment of 12 September 1996) adds a further category of persons to this list. This category is bearers of state honours, deputies of the National Assembly of the Republika Srpska and other officials of the Republika Srpska who have the status of refugees or displaced persons.

102. Articles 39-42 set out the terms upon which the owner of a property which has been declared abandoned may seek to regain possession of it.

103. Article 39 reads as follows:

"The owner of abandoned property, in the event of permanent return, may claim the right to return of his property, or the right to a fair reimbursement within the context of a settlement between the Republika Srpska, the Federation of Bosnia and Herzegovina and the Republic of Croatia."

104. Article 40 reads as follows:

> "In the event referred to in the previous Article, if the abandoned property or apartment has not been allocated for utilisation, it shall be possible for the owner to regain possession of the property or apartment within 15 days of the date of lodging the request for return of possession.
>
> If in the situation referred to in the previous Article the abandoned property or apartment has been allocated to someone whose own property or apartment is located in the Federation of Bosnia and Herzegovina or the Republic of Croatia, such property or apartment shall be returned to the owner:
> - within 30 days from the day the person who was the occupier of the property returns to his property or apartment
> - at the latest after 60 days have expired from the date of payment of compensation to the user of the property or apartment for the property he himself has abandoned as well as possible costs incurred by the previous user, or after the provision of suitable alternative accommodation.
>
> (...)"

105. Article 42 reads as follows:

> "The provisions of Articles 39-41 of this law shall be applied on the basis of reciprocity."

5. The Law on Cessation of Application of the Law on Use of Abandoned Property

106. The Law on Cessation of Application of the Law on Use of Abandoned Property of 11 December 1998 (OG RS no. 38/98; "the new law"), as amended, establishes a detailed framework for persons to regain possession of property considered to be abandoned. The new law puts the old law out of force.

107. Article 2 states that all decisions made under the old law granting temporary or permanent rights to occupy property shall be treated as being of a temporary nature and shall remain effective until cancelled in accordance with the new law.

108. Article 3 gives the owner, possessor or user of real property who abandoned such property the right to repossess it and enjoy it on the same terms as he or she did before 30 April 1991 or the date of its becoming abandoned. Article 4 states that the terms "owner", "possessor" or "user" shall mean the persons who had such status under the applicable legislation at the time the property concerned became abandoned or when such persons first lost possession of the property, in the event that the property was not declared abandoned.

109. Article 6 concerns the arrangements to be made for persons who are required to vacate property (described as "temporary users") in order to allow the previous owner, possessor or user to return.

110. The responsible body shall determine, within the thirty-day time-limit for deciding upon a request for repossession of property, whether the temporary user is entitled under the new law to be provided with alternative temporary accommodation. If it determines that this is the case, the relevant body of the Ministry (i.e. the local Commission) shall provide the temporary user with appropriate accommodation before the expiry of the deadline for him or her to vacate the property concerned.

111. Any failure of the responsible authority to provide alternative accommodation for a temporary user cannot delay the return of the owner, possessor or user of such property.

112. If a temporary user of a property occupies it without a legal basis, the Ministry is not obliged to provide him or her with alternative accommodation.

113. Article 7 states that the owner, possessor or user of real property shall have the right to submit a claim for repossession of his or her property at any time. Article 8 states that such claims may be filed with the responsible body of the Ministry. This Article also sets out the procedure for lodging of claims and the information that must be contained in such a claim.

114. Article 9 states that the responsible body of the Ministry shall be obliged to issue a decision to the claimant within thirty days from the receipt by it of a claim.

115. Article 10 states that proceedings concerning return of property shall, unless otherwise specified, be carried out in accordance with the Law on General Administrative Procedures (see paragraphs 120-125 below) and treated as an expedited procedure.

116. Article 11 sets out the information that must be contained in a decision entitling an applicant to regain possession of property. This includes basic details concerning the applicant and property. A decision entitling a person to regain possession of his or her property may not set a time-limit for such repossession sooner than 90 days from the date of the decision, nor after the date for return requested by the applicant. The applicant may not request a date for return into possession of the property which is sooner than 90 days from the date of lodging of the application. If a property is not currently occupied, the owner, possessor or user may regain possession of it immediately upon receipt of a decision. The deadline for return may be extended to up to one year in exceptional circumstances, which shall be agreed upon by the Office of the High Representative. The relevant Commission must also provide detailed documentation to the Ministry regarding the lack of available alternative accommodation to the Ministry.

117. Article 12 requires that the decision of the Commission be delivered to the current occupants of the property concerned. An appeal may be lodged against a decision within fifteen days of its receipt. However, the lodging of an appeal does not suspend the execution of the decision.

118. Article 13 states that a claimant for the return into possession of real property may at any time apply to the Commission for Real Property Claims of Refugees and Displaced Persons ("the Annex 7 Commission"). In the event that an application by a claimant has been rejected by the responsible body (i.e. the local Commission) on either formal or material grounds, the proceedings before the responsible body may be suspended pending the final decision of the Annex 7 Commission, if the Annex 7 Commission so requests. Any decision of the Annex 7 Commission shall be enforced by the appropriate authorities of the Republika Srpska.

119. Article 29 requires the Minister for Refugees and Displaced Persons to pass an instruction on the application of, *inter alia*, Articles 8 to 11 inclusive of the law. This instruction was published in OG RS no. 1/99 and entered into force on 21 January 1999. An amended instruction was contained in a decision of the High Representative dated 27 October 1999 and entered into force on 28 October 1999.

6. The Law on General Administrative Procedures

120. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

121. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be regulated by the Law on General Administrative Procedures.

122. Chapter XVII (Articles 270 – 288) is concerned with the procedure for enforcement of rulings and conclusions.

123. Article 270 states that a decision issued in an administrative procedure shall be enforced once it has become enforceable. This occurs, for example, when the deadline for submission of any appeal expires without any such appeal having been submitted.

124. Article 274 states that execution of a decision shall be carried out against the person who is ordered to fulfil the relevant obligation. Execution may be conducted *ex officio* or at the request of a party to the proceedings. *Ex officio* execution shall occur when required by the public interest. Execution which is in the interest of one party shall be conducted at the request of that party.

125. Article 275 states that execution shall be carried out either through an administrative or court procedure, as prescribed by the law. The execution of decisions of the type concerned in the present case (i.e. of reinstatement to property) is to be carried out by an administrative procedure.

7. The Law on Administrative Disputes

126. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25 paragraph 1, if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued on the appeal in response to such a reminder within 7 days of it being lodged, the applicant may initiate an administrative dispute before the Supreme Court of the Republika Srpska in respect of this failure to decide upon the appeal.

8. The Law on Regular Courts

127. The Law on Regular Courts (OG RS nos. 22/96 and 25/96) regulates the court system in the Republika Srpska.

128. Article 2 reads as follows:

> "The courts shall protect liberties and rights of citizens, lawfully established rights and interests of legal subjects and shall safeguard constitutionality and legality."

129. Article 17 reads as follows;

> "The Court of First Instance ("*Osnovni Sud*") shall be competent:
> …
> 2) in civil suits, to try at first instance;
> a) civil legal disputes,
> b) disputes in respect of disturbance of property
> …"

130. Article 21 reads as follows;

> "The Regional Court ("*Okružni Sud*") shall be competent:
> 1) to decide on appeals against decisions of basic courts and decisions of magistrates
> …"

IV. COMPLAINTS

131. The applicant in case no. CH/98/1131, Ms. Demo, complains in general of a violation of her rights caused by her inability to regain possession of her property.

132. The applicants in all of the other cases complain of violations of their rights as protected by Articles 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

133. The Republika Srpska submits that the Chamber is not competent to decide upon the applications. It states that the applications are, in essence, requests for the return of real property into their possession. Such claims should be decided by the Annex 7 Commission or the competent organ in the Republika Srpska under the new law. The respondent Party further claims that the applicants have not exhausted the domestic remedies available to them and that accordingly the Chamber should refuse to accept their applications in accordance with the terms of Article VIII(2)(a) of the Agreement.

134. In conclusion, the respondent Party submits that the Chamber should refuse to accept the applications or postpone consideration of them until the domestic remedies available to the applicants have been exhausted.

B. The applicants

135. The applicants maintain their complaints. In addition, those that have not yet regained possession of their property state that they have exhausted all of the domestic remedies available to them without success and that as a result the Chamber is competent to decide upon the applications. They deny that their requests to regain possession of their properties should be decided solely by the Annex 7 Commission. They claim that they have the right under the new law to regain possession of their property, but that most of them have been unable to realise this right due to the inaction of the authorities of the Republika Srpska. All of the applicants maintain their claims for compensation.

VI. OPINION OF THE CHAMBER

A. Admissibility

136. Before considering the merits of the cases the Chamber must decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. Requirement to exhaust effective domestic remedies

137. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted. The respondent Party contends that the cases should be declared inadmissible on this ground. It refers to Article 7 of the new law (see paragraph 113 above), stating that all of the applicants have applied to regain possession of their properties under this provision and that the proceedings under this provision are still pending. A general statement to the effect that domestic remedies have not been exhausted is not sufficient. It is incumbent on the respondent Party to specify such remedies and to show that they are effective in practice.

138. In the *Onić* case (case no. CH/97/58, decision on admissibility and merits delivered on 12 January 1999, paragraph 38, Decisions January-July 1999), the Chamber held that the domestic remedies available to an applicant "must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. ...[M]oreover, ... in applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system ... concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants."

139. The Chamber notes that all of the applicants unsuccessfully applied to the relevant organ under the old Law to regain possession of their properties. Accordingly, they have all sought to avail themselves of this remedy which turned out to be ineffective and illusory in practice.

140. The Chamber further notes that the applicants in three of the cases also initiated proceedings before the Court in Gradiška against the current occupants of their properties, seeking to regain possession of those properties (the specific situation in respect of each applicant is set out in Section III above). Those applicants who did not initiate such proceedings claimed that the reason for not doing so was the fact that the Court declined to consider the cases on the ground that it did not have jurisdiction over "abandoned property".

141. The Chamber has previously noted that the Supreme Court of the Republika Srpska has held that matters concerning abandoned property are within the sole competence of the Ministry, as such issues should be decided by an administrative procedure rather than by the courts (see cases nos. CH/98/659 *et al.*, *Pletilić and others,* decision on admissibility and merits delivered on 10 September 1999, paragraphs 151–152, Decisions August-December 1999). Accordingly, having recourse to the courts, as provided for in the Law on Regular Courts (see paragraphs 127-130 above), does not appear to be a remedy at all.

142. The Chamber notes that in all of the cases, the applicants have applied under the new Law to regain possession of their properties. All of them have received decisions from the Commission, entitling them to regain possession of their properties within a specified time-period. In two cases the applicants regained possession of their properties on or after the date specified for this in the decision. In one further case, the applicants partly regained possession of their property. In the remaining eighteen cases the applicants have not, so far, regained possession of their properties, although the time-limits for such regaining of possession have expired.

143. As the Chamber noted in its decision in *Pletilić and others* (sup. cit., paragraph 154) a remedy such as that provided for by the new law could in principle qualify as an effective one. The Chamber notes that all of the applicants have received a decision under the new law in their favour and that in two cases they have already regained possession of their properties on the basis of such decisions and in one further case the applicants have regained possession of part of their property. However, the Chamber notes with grave concern that over one and a half years after the adoption of the new law, the applicants in the remaining eighteen cases have been unable to regain possession of their properties. The Chamber cannot therefore conclude that the new law has been effective in most of the cases before it. Further, the Chamber wishes to stress that even in the cases where the new law has proved to be effective, it only puts an end to the ongoing violations of the applicants' rights, without providing redress for the past violations which they suffered.

144. The Chamber finds, in the circumstances, the requirements of Article VIII(2)(a) of the Agreement have been met.

2. Possibility of seizing the Annex 7 Commission

145. The Republika Srpska also claimed that the applications should be declared inadmissible as the applicants have not applied to the Annex 7 Commission seeking a decision on their request for the return of their property (see paragraph 133 above).

146. The above provision establishes a mechanism under which persons may be declared to be the lawful owners of real property and authorised to regain possession of that property. It is therefore an integral and extremely important part of the mechanism established by the General Framework Agreement for Peace for the return of refugees and displaced persons to their properties. Article VIII(2)(d) of the Agreement enables the Chamber to declare an application inadmissible if the same matter is already pending before the Annex 7 Commission. However, in the present cases, none of the applicants has applied to the Annex 7 Commission, but have chosen instead to apply to the Chamber. Therefore, Article VIII(2)(d) is inapplicable in the present cases and they are therefore not inadmissible under that provision.

147. The Chamber further finds that none of the other grounds for declaring the cases inadmissible have been established. Accordingly, the cases are to be declared admissible.

B. Merits

148. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

149. Under Article II(2) of the Agreement the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix to the Agreement (including the Convention), where such a violation is alleged to or appears to have been committed by the Parties, including by any organ or official of the Parties, Cantons or Municipalities or any individual acting under the authority of such an official or organ.

1. Article II(2)(a) of the Agreement

(a) Article 8 of the Convention

150. Except for one case (no. CH/98/1131, Ms. Demo), all of the applicants claimed to be victims of a violation of Article 8 of the Convention which reads, insofar as relevant, as follows:

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

151. The respondent Party did not submit any observations under this provision. The Chamber will consider all of the applications under this provision.

152. The Chamber notes that all of the applicants had lived in the houses situated on their properties and used them as their homes until such times as they were forced to leave. The Chamber has previously held that the links that persons in similar situations as the applicants in the present cases retained to their dwellings were sufficient for them to be considered to be their "homes" within the meaning of Article 8 of the Convention (see, e.g., *Pletilić and others*, sup. cit., paragraph 165). In addition, the respondent Party did not contest that the properties were to be considered the applicants' homes.

153. It is therefore clear that the properties are to be considered as the applicants' "homes" for the purposes of Article 8 of the Convention.

154. The Chamber notes that all of the applicants were forced to leave their homes, either because they were evicted by private persons or because of fearing for their safety as a result of the hostilities. All of the properties were then occupied by refugees or displaced persons of Serb origin. In all except two of the present cases, these refugees or displaced persons occupied the properties concerned in accordance with decisions of the Commission issued in accordance with the old law. The applicants in all of the cases where they have been unable to regain possession of their properties or parts thereof have been unable to do so due to the failure of the authorities of the Republika Srpska to deal effectively with their various applications in this regard. Therefore, the respondent Party is responsible for the interference with the rights of the applicants to respect for their homes in these cases. Only the applicants in cases nos. CH/98/1132, Mr. Ćirkić, and CH/98/1134, Ms. Rizvanović, have succeeded in fully regaining possession of their properties. Accordingly, the interference in the other nineteen cases is ongoing. This applies also in case no.

CH/98/1124 where the applicants, Mr. and Ms. Dizdarević (see paragraph 17 above), have regained possession of part of the property.

155. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was "in accordance with the law", served a legitimate aim and was "necessary in a democratic society" (see *Pletilić and others*, sup. cit., paragraph 168). There will be a violation of Article 8 if any one of these conditions is not satisfied.

156. The majority of the properties were considered to be abandoned in accordance with the old law (see paragraphs 97-105 above). All of the properties either are or were occupied by refugees or displaced persons of Serb origin. Moreover, all of the applicants tried to regain possession of their properties in accordance with Articles 39 and 42 of the old law. This law sought to provide for a regime for the administration of abandoned property in the Republika Srpska. In accordance with the provisions of this law, the properties were occupied by refugees and displaced persons of Serb origin. The Chamber notes that neither the Ministry, during the domestic proceedings initiated by the applicants, nor the respondent Party, during the proceedings before the Chamber, have sought to claim that the Ministry did not allocate the properties concerned in these applications. In addition, all of except two of the applicants have positively stated that the occupants of their property lived there in accordance with decisions of the Commission. The Chamber accordingly finds that they were allocated to the current occupants by the Ministry.

157. The Chamber must decide whether the old law can be considered to be a "law" in the context of Article 8 paragraph 2 of the Convention. As the Chamber has found in a number of cases, the old law cannot be considered as a "law" under paragraph 2 of Article 8 (see, e.g., *Pletilić and others,* sup. cit., paragraphs 170-174).

158. There is therefore no requirement for the Chamber to examine whether the acts complained of pursued a "legitimate aim" or were "necessary in a democratic society".

159. In conclusion, the Chamber finds that there has been a violation by the respondent Party of the rights of all of the applicants to respect for their homes as guaranteed by Article 8 of the Convention. This violation is ongoing in nineteen of the cases (i.e. in all those except cases nos. CH/98/1132, Mr. Ćirkić, and CH/98/1134, Ms. Rizvanović), where the applicants have not yet regained possession of all of their property.

160. The Chamber notes that the new law has been adopted in order to remedy the violations caused by the old law. The rights of all of the applicants under Article 8 of the Convention were violated by the old law, as it did not meet the standards of a "law" as required by the second paragraph of that provision. The Chamber considers that the new law does meet the requirements of paragraph 2 of Article 8, as it grants the applicants a right to regain possession of their properties. However, the realisation of this right has been delayed in nineteen of the cases presently before the Chamber. Accordingly the conduct of the respondent Party to date in relation to the applicants in these nineteen cases has not been "in accordance with the law" as required by paragraph 2 of Article 8. There is therefore a continuing violation of the rights of the applicants in those nineteen cases to respect for their homes and this violation will continue until such time as they actually regain possession of their homes.

(b) Article 1 of Protocol No. 1 to the Convention

161. Except for one case (no. CH/98/1131, Ms. Demo), all of the applicants complain that their rights to peaceful enjoyment of their possessions have been violated as a result of their inability to regain possession of their properties. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

162. The respondent Party did not submit any observations under this provision. The Chamber will consider all of the applications under this provision.

163. The Chamber finds that the properties concerned constitute the applicants' "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention. All applicants are in fact exclusive or joint owners of the properties.

164. The Chamber considers that the treatment of the applicants' properties in the majority of the cases as abandoned by the authorities of the Republika Srpska and their allocation to third parties for use constitutes or constituted an "interference" with the applicants' rights to peaceful enjoyment of their possessions. The failure of the Republika Srpska to take the necessary steps to enable the applicants to regain possession of their properties also constitutes such an interference.

165. In all of the cases except for the two where the applicants have regained full possession of their properties (see paragraphs 32 and 39 above), the interference is still ongoing. This applies also in case no. CH/98/1124, where the applicants, Mr. and Ms. Dizdarević (see paragraph 17 above), have only regained possession of part of their property.

166. The Chamber must therefore examine whether the above interferences can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law. This means that the deprivation must have a basis in national law and that the law concerned must be both accessible and sufficiently certain.

167. The Chamber has further noted (in its examination of the applications under Article 8 of the Convention; see paragraph 157 above) that the old law does not meet the standards of a "law" in a democratic society, as is provided for in Article 1 of Protocol No. 1. This is in itself sufficient to warrant a finding that there has also been a violation of that provision.

168. In conclusion, the Chamber finds that there has been a violation of the rights of all of the applicants to peaceful enjoyment of their properties as guaranteed by Article 1 of Protocol No. 1 to the Convention. Again, this violation is ongoing in nineteen of the cases where the applicants have not yet regained possession of all of their property, despite their efforts to do so, including under the new Law.

169. The Chamber again notes that the new law has been adopted in order to remedy the violations caused by the old law. The Chamber reiterates, however, that although the new law may provide an effective remedy, it has not, so far, been applied in a manner consistent with Article 1 of Protocol No. 1 in respect of the majority of the cases before it.

(c) Article 6 of the Convention

170. The applicants did not specifically claim that their rights as protected by Article 6 of the Convention had been violated. However, in view of the fact that a number of the applicants complained of the conduct of the proceedings they had initiated at national level, the Chamber raised this issue *proprio motu* when it transmitted the applications to the respondent Party for its observations on their admissibility and merits.

171. Article 6 of the Convention reads as follows:

> "In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …."

172. The respondent Party did not submit any observations under this provision. The Chamber will consider all of the applications under this provision.

173. The Chamber recalls that it has held that the right to enjoyment of one's property is a civil right within the meaning of Article 6 of the Convention (see e.g. *Pletilić and others,* sup. cit., paragraph 191).

174. The Chamber notes that the applicants in three of the cases initiated proceedings before the Municipal Court in Gradiška (the situation in respect of each applicant is set out in Section III above). In those cases where a decision has in fact been issued by the Court, this decision has been to reject consideration of the requests for lack of competence. The Court has stated that matters concerning abandoned property are within the sole competence of the Ministry.

175. The Chamber notes that Article 121 of the RS Constitution states that the establishment of legal rights and interests is the role of the courts. It also states that the courts shall decide upon the basis of, *inter alia*, the laws of the Republika Srpska (see paragraph 96 above). Accordingly, for any subject matter to be removed from their jurisdiction, this would have to be done by a law or other valid legal instrument. Such a removal would require a specific statement to this effect. The Chamber has previously found that in the absence of a specific statement to that effect, the old law did not remove jurisdiction over property that was considered to be abandoned form the Courts (see *Pletilić and others,* sup. cit., paragraph 194).

176. Nevertheless, the practical effect of the standpoints of the courts of the Republika Srpska is that it has been or would, for the time being at least, be impossible for the applicants to have the merits of their civil actions against the current occupants of their properties determined by a tribunal within the meaning of Article 6 paragraph 1. Accordingly, there has been a violation of the applicants' right to effective access to court as guaranteed by Article 6 paragraph 1 of the Convention.

(d) Article 13 of the Convention

177. Except for one case (no. CH/98/1131, Ms. Demo) all applicants allege that their right to an effective remedy has been violated. This may be understood as referring to Article 13 of the Convention, which provides as follows:

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

178. In view of its finding that there has been a violation of Article 6 of the Convention (see paragraph 176 above) the Chamber does not deem it necessary to examine the complaints under Article 13 of the Convention.

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

179. All of the applicants, except in case no. CH/98/1131 Ms. Demo, complained that they had been a victim of discrimination on the ground of their national origin in the enjoyment of the rights guaranteed to them by the Convention. The Chamber will consider this allegation in the context of Article II(2)(b) of the Agreement, which states that the Chamber shall consider:

> "alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Agreement ...."

180. The respondent Party did not submit any observations on this issue. The Chamber will consider all of the applications in the light of the requirements of this part of the Agreement.

181. The Chamber notes that it has already found violations of all of the applicants' rights as protected by Articles 6 and 8 of the Convention and by Article 1 of Protocol No. 1 to the Convention. It must now consider whether the applicants have suffered discrimination in the enjoyment of those rights.

182. In examining whether there has been discrimination contrary to the Agreement the Chamber recalls its jurisprudence. As the Chamber noted in the *Đ.M.* case (case no. CH/98/756, decision on admissibility and merits delivered on 14 May 1999, paragraph 73, Decisions January-July 1999), it is necessary first to determine whether an applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in the relevant provisions, including religion or national origin.

183. The Chamber recalls that the obligation on the Parties to the Annex 6 Agreement to "secure" the rights and freedoms mentioned in the agreement to all persons within their jurisdiction not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to protect those rights (see *Đ.M.,* sup. cit., paragraph 75). Analogous obligations are also contained in the Constitutions of Bosnia and Herzegovina and of the Republika Srpska (see paragraphs 85, 87 and 91 above).

184. The Chamber notes that all of the applicants are of Bosniak origin.

185. The Chamber recalls that the applicants' ownership of the properties in question has never been in dispute. Nevertheless, with the exception of the applicants in cases nos. CH/98/1132, Mr. Ćirkić, and CH/98/1134, Ms. Rizvanović (see paragraphs 32 and 39 above) and partly in case no. CH/98/1124, (where the applicants are Mr. and Mrs. Dizdarević), their attempts to seek assistance from the authorities in order to regain possession of their properties have been unsuccessful, both at the judicial and administrative level.

186. The Chamber notes that all of the applicants sought to regain possession of their properties under the old law. The Chamber has previously concluded that this law was drafted in such a way as to deny to refugees and internally displaced persons any real prospect of regaining possession of their properties, therefore reinforcing the ethnic cleansing which occurred during the war by protecting the refugees and displaced persons of Serb origin who currently occupy the properties concerned in the applications and by seeking to frustrate the efforts of persons who were forced to leave their homes in the Republika Srpska from regaining possession of them (see *Pletilić and others,* sup. cit., paragraphs 203-205). The experience of the present applicants in their attempts to regain possession of their properties under this law only serves to reinforce this view.

187. In addition, the Chamber has found that the standpoint of the courts in the Republika Srpska (see paragraph 176 above) was such as to deny the applicants their right of access to court. This denial was a consequence of the application by the courts in the Republika Srpska of the old law.

188. In conclusion, the Chamber finds that the passage and application of the old law constitutes discrimination against the applicants in relation to their right to respect for their homes, to peaceful enjoyment of their possessions and of access to court. This discrimination has been based on the ground of national origin in respect of all of the applicants. So far, the new law has largely failed to remedy this situation.

189. The Chamber concludes that the applicants have been discriminated against in the enjoyment of their rights under Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

190. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures. The Chamber is not necessarily bound by the claims of an applicant.

191. The Chamber considers it appropriate to order the respondent Party to take all necessary steps to enable the applicants, who have not already done so, to regain possession of their properties without further delay, and in any event not later than one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

192. With regard to possible compensatory awards, the Chamber first recalls that in accordance with its order for proceedings in the respective cases, all applicants were afforded the possibility of claiming compensation or other relief within the time-limit fixed by the Chamber. Sixteen of the applicants requested compensation for mental suffering and for the cost of renting another property and/or for general expenses. Five of the applicants did not make any claim for compensation. The specific situation in respect of each applicant is set out below.

193. Mr. and Ms. Dizdarević (CH/98/1124) claimed compensation for mental suffering experienced by them and their family due to their inability to return to their home in the sum of 7,500 Convertible Marks (*Konvertibilnih Maraka,* "KM"). They also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 9 months, totalling KM 1,350. In addition, they claimed KM 1,000 for the costs of redecorating their home. The total amount of compensation they claimed was therefore KM 9,850.

194. Mr. Raković (CH/98/1126) claimed compensation for mental suffering experienced by him due to his inability to return to his home in the sum of KM 2,500. He also claimed compensation of KM 4,000 for other expenses, including rental costs for other property and redecoration costs. The total amount of compensation he claimed was therefore KM 6,500.

195. Mr. Hatić (CH/98/1127) and Mr. Pivač (CH/98/1130) did not make any claim for compensation.

196. Ms. Demo (CH/98/1131) claimed compensation for mental suffering experienced by her and her family due to their inability to return to their home in the sum of KM 12,500. She also claimed compensation for the cost of renting another property in the sum of KM 200 per month for 8 months, totalling KM 1,600. In addition, she claimed KM 700 for other unspecified costs. The total amount of compensation she claimed was therefore KM 14,800.

197. Mr. Ćirkić (CH/98/1132) did not make any claim for compensation.

198. Mr. Hatić (CH/98/1133) claimed compensation for mental suffering experienced by him and his wife due to their inability to return to their home in the sum of KM 5,000. He also claimed compensation for the cost of renting another property in the sum of KM 200 per month for 9 months, totalling KM 1,800. In addition, he claimed KM 900 for redecoration costs. The total amount of compensation he claimed was therefore KM 7,700.

199. Ms. Rizvanović (CH/98/1134) claimed compensation for mental suffering experienced by her due to her inability to return to her home in the sum of KM 2,500. She also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 10 months, totalling KM 1,500. In addition, she claimed KM 800 for other unspecified costs. The total amount of compensation she claimed was therefore KM 4,800.

200. Mr. Kadir Lojić (CH/98/1135) claimed compensation for mental suffering experienced by him due to his inability to return to his home in the sum of KM 2,500. He also claimed compensation for the cost of renting another property, in the sum of KM 100 per month for 8 months, totalling KM 800. In addition, he claimed KM 1,000 for redecoration costs. The total amount of compensation he claimed was therefore KM 4,300.

201. Mr. Ismet Lojić (CH/98/1136) claimed compensation for mental suffering experienced by him and his family due to their inability to return to their home in the sum of KM 10,000. He also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 8 months, totalling KM 1,200. He also claimed compensation in the sum of KM 1,000 for redecoration costs. The total amount of compensation he claimed was therefore KM 12,200.

202. Mr. Neškić (CH/98/1139) did not make any claim for compensation.

203. Mr. Anadolac (CH/98/1141) claimed compensation for mental suffering experienced by him and his wife due to their inability to return to their home in the sum of KM 5,000. He also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 10 months, totalling KM 1,500. In addition, he claimed KM 900 for redecoration costs. The total amount of compensation he claimed was therefore KM 7,400.

204. Mr. Drndić (CH/98/1144) claimed compensation for mental suffering experienced by him and his wife due to their inability to return to their home in the sum of KM 5,000. He also claimed compensation for the cost of renting another property, in the sum of KM 200 per month for 9 months, totalling KM 1,800. In addition, he claimed KM 700 for other unspecified costs. The total amount of compensation he claimed was therefore KM 7,500.

205. Mr. Crnkić (CH/98/1145) claimed compensation for mental suffering experienced by him and his wife due to their inability to return to their home in the sum of KM 5,000. He also claimed compensation for the cost of renting another property, in the sum of KM 200 per month for 9 months, totalling KM 1,800. In addition, he claimed KM 900 for other unspecified costs. The total amount of compensation he claimed was therefore KM 7,700.

206. Mr. Halilović (CH/98/1146) claimed compensation for mental suffering experienced by him and his family due to their inability to return to their home in the sum of KM 20,000. He also claimed compensation for the cost of renting another property, in the sum of KM 200 per month for 9 months, totalling KM 1,800. In addition, he claimed KM 1,000 for redecoration costs. The total amount of compensation he claimed was therefore KM 22,800.

207. Mr. Hadžihafizović (CH/98/1147) did not make any claim for compensation.

208. Mr. Mesić (CH/98/1148) claimed compensation for mental suffering experienced by him due to his inability to return to his home in the sum of KM 2,500. He also claimed compensation for the cost of renting another property, in the sum of KM 100 per month for 12 months, totalling KM 1,200. In addition, he claimed KM 800 for other unspecified costs. The total amount of compensation he claimed was therefore KM 4,500.

209. Mr. Samardžić (CH/98/1149) claimed compensation for mental suffering experienced by him and his family due to their inability to return to their home in the sum of KM 7,500. He also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 12 months, totalling KM 1,800. In addition, he claimed KM 800 for redecoration costs. The total amount of compensation he claimed was therefore KM 10,100.

210. Mr. Šarac (CH/98/1150) claimed compensation for mental suffering experienced by him and his wife due to their inability to return to their home in the sum of KM 5,000. He also claimed compensation for the cost of renting another property, in the sum of KM 200 per month for 9 months, totalling KM 1,800. In addition, he claimed KM 1,000 for redecoration costs. The total amount of compensation he claimed was therefore KM 7,800.

211. Mr. Neškić (CH/98/1151) claimed compensation for mental suffering experienced by him and his family due to their inability to return to their home in the sum of KM 10,000. He also claimed compensation for the cost of renting another property, in the sum of KM 150 per month for 12 months, totalling KM 1,800. In addition, he claimed KM 900 for redecoration costs. The total amount of compensation he claimed was therefore KM 12,700.

212. Mr. Porić (CH/98/1153) claimed compensation for mental suffering experienced by him and his family due to their inability to return to their home in the sum of KM 12,500. He also claimed compensation for the cost of renting another property, in the sum of KM 100 per month for 9 months, totalling KM 900. In addition, he claimed KM 900 for redecoration costs. The total amount of compensation he claimed was therefore KM 14,300.

213. The respondent Party, in its observations on the claims for compensation, states that the applicants left the territory of the Republika Srpska before the entry into force of the Agreement on 14 December 1995. It claims that it is entitled, under Annex 7 to the General Framework Agreement to house refugees and internally displaced persons in abandoned property subject to final determination of ownership of such property by the Annex 7 Commission. The respondent Party points out that it has objected to the admissibility of the applications on the same grounds. It claims that neither it nor any body, the actions of which it is responsible for, are responsible for any damage that may have occurred to the applicants. It states that the applicants are responsible for the difficulties they are experiencing as they decided to leave the places where they were accommodated after leaving Gradiška. In conclusion, the respondent Party states that the claims for compensation are ill-founded and inadmissible.

214. Article XIII of Annex 7 (see paragraph 83 above) of the General Framework Agreement allows the Parties, after notification to the Annex 7 Commission and in coordination with, *inter alia*, the United Nations High Commission for Refugees, to house refugees and internally displaced persons in vacant property. It is obvious, however, that this provision could not have been applied prior to the entry into force of the General Framework Agreement and the establishment of the Annex 7 Commission. Accordingly, the Chamber cannot accept the argument of the respondent Party in this regard.

215. The Chamber likewise does not accept the argument of the respondent Party that the applicants themselves are responsible for the difficulties in which they find themselves by leaving the places in which they were temporarily accommodated and returning to the Gradiška area. As clearly stated by Article XIII of Annex 7, all refugees and displaced persons have the right to return freely to their homes. As the Chamber has found in its decision, the right to return to one's prewar home also raises various issues under the Agreement. It is the responsibility of all of the Parties to the Agreement to ensure that this right is guaranteed to all refugees and displaced persons. A refugee or displaced person who chooses to return to his or her place of origin cannot be held responsible for any difficulties he or she may suffer as a result of the failure of a Party to the Agreement to comply with its obligations, under national law and the General Framework Agreement, to allow him or her to return to his property.

216. Accordingly, the Chamber does not accept the arguments of the respondent Party in relation to the claims for compensation by the applicants.

217. The Chamber notes that 16 of the applicants have claimed sums for mental suffering allegedly caused to them, and in most cases also to members of their families, as a result of their inability to regain possession of their properties. These sums vary from KM 2,500 to KM 20,000 and are based on a figure of KM 2,500 per person in every household allegedly affected. The Chamber considers that such sums are excessive. The Chamber does however, consider it appropriate to award a sum to all of the applicants in recognition of the sense of injustice they have no doubt suffered as a result of their inability to regain possession of their properties, especially in view of the fact that they have all taken various steps to do so. The Chamber does not consider it appropriate to award sums under this head to members of the applicants' families; it can only award such sums to the applicants themselves.

218. Accordingly, the Chamber will order the respondent Party to pay to the applicant or applicants in each of the 21 cases the sum of KM 1,200 in recognition of their suffering as a result of their inability to regain possession of their properties. In the particular circumstances at hand the Chamber will also award the applicants in cases nos. CH/98/1127, Mr. Hatić, CH/98/1130, Mr. Pivač, CH/98/1132, Mr. Ćirkić, CH/98/1139, Mr. Neškić, and CH/98/1147, Mr. Hadžihafizović, the same sum, even though they did not claim compensation. As the Chamber held in *Pletilić and others,* (sup. cit., paragraph 236), Article XI(1)(b) of the Agreement does not preclude the Chamber from ordering a remedy which has not been requested by an applicant.

219. In 16 cases, the applicants also claimed compensation for the rent they have been forced to pay for their accommodation pending their return to their properties. These sums range from KM 100 to KM 200 per month for each month that they have been required to pay such rent.

220. In accordance with its decision in *Pletilić and others* (sup. cit., paragraph 238), the Chamber considers that the sum of KM 100 per month is appropriate to award for each month that the applicants were forced to pay for alternative accommodation, payable from two months after the end of the month in which they lodged their first application to the Ministry to regain possession of their properties under the old law. For the purposes of compensation for rental costs in cases nos. CH/98/1124, Mr. and Mrs. Dizdarević, and CH/98/1134, Ms. Rizvanović, this period is to be calculated to the end of the month in which they were able to move into their homes, i.e. the end of March and October 1999 respectively. For the remaining cases, where claims of compensation for rental costs have been made, this sum should continue to be paid at the same rate until the applicants regain possession of their properties. For practical purposes, the Chamber will award the applicants a set sum until the end of May 2000 and a further monthly sum payable from the beginning of June 2000 until the end of the month in which they actually regain possession of their properties.

221. The remaining claims for compensation (relating to redecoration and other unspecified costs) are unsubstantiated and must be rejected.

222. Additionally, the Chamber awards 4 % (four per cent) interest as of the date of expiry of the three-month period set for the implementation of the present decision, on the sums awarded in paragraphs 218 and 220 above.

VIII. CONCLUSIONS

223. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. unanimously, that there has been a violation of the rights of the applicants to respect for their homes within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that there has been a violation of the rights of the applicants to peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, that the impossibility for the applicants to have the merits of their civil actions against the current occupants of their property determined by a tribunal constitutes a violation of their right to effective access to court within the meaning of Article 6 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, that the enactment of, and application by the authorities of the Republika Srpska of the Law on Use of Abandoned Property in the applicants' cases constituted discrimination against them on the ground of national origin in the enjoyment of their rights as protected by Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention;

6. unanimously, that it is not necessary to rule on the complaints under Article 13 of the Convention;

7. unanimously, to order the Republika Srpska to enable the applicants who have not already done so to regain possessions of their properties (as described more particularly in respect of each applicant in Section III of this decision) without further delay, and in any event not later than one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure;

8. by 6 votes to 1, to order the Republika Srpska:

(a) to pay to the applicants 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 Procedure, the following sums:

to Ms. Fehreta and Mr. Refik Dizdarević, the applicants in case no. CH/98/1124: KM 2,300 (two thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Munib Raković, the applicant in case no. CH/98/1126: KM 3,300 (three thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Hatić, the applicant in case no. CH/98/1127: KM 1,200 (one thousand two hundred), by way of compensation for mental suffering;

to Mr. Pivač, the applicant in case no. CH/98/1130: KM 1,200 (one thousand two hundred), by way of compensation for mental suffering;

to Ms. Demo, the applicant in case no. CH/98/1131: KM 2,700 (two thousand seven hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,500 for rental payments in respect of paying for alternative accommodation;

to Mr. Ćirkić, the applicant in case no. CH/98/1132: KM 1,200 (one thousand two hundred), by way of compensation for mental suffering;

to Mr. Hatić, the applicant in case no. CH/98/1133: KM 2,600 (two thousand six hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,400 for rental payments in respect of paying for alternative accommodation;

to Ms. Rizvanović, the applicant in case no. CH/98/1134: KM 2,600 (two thousand six hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,400 for rental payments in respect of paying for alternative accommodation;

to Mr. Kadir Lojić, the applicant in case no. CH/98/1135: KM 3,300 (three thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Ismet Lojić, the applicant in case no. CH/98/1136: KM 3,300 (three thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Neškić, the applicant in case no. CH/98/1139: KM 1,200 (one thousand two hundred), by way of compensation for mental suffering;

to Mr. Anadolac, the applicant in case no. CH/98/1141: KM 4,400 (four thousand four hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 3,200 for rental payments in respect of paying for alternative accommodation;

to Mr. Drndić, the applicant in case no. CH/98/1144: KM 3,100 (three thousand one hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,900 for rental payments in respect of paying for alternative accommodation;

to Mr. Crnkić, the applicant in case no. CH/98/1145: KM 3,300 (three thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Halilović, the applicant in case no. CH/98/1146: KM 3,400 (three thousand four hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,200 for rental payments in respect of paying for alternative accommodation;

to Mr. Hadžihafizović, the applicant in case no. CH/98/1147: KM 1,200 (one thousand two hundred), by way of compensation for mental suffering;

to Mr. Mesić, the applicant in case no. CH/98/1148: KM 3,500 (three thousand five hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,300 for rental payments in respect of paying for alternative accommodation;

to Mr. Samardžić, the applicant in case no. CH/98/1149: KM 3,400 (three thousand four hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,200 for rental payments in respect of paying for alternative accommodation;

to Mr. Šarac, the applicant in case no. CH/98/1150, KM 3,100 (three thousand one hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 1,900 for rental payments in respect of paying for alternative accommodation;

to Mr. Neškić, the applicant in case no. CH/98/1151: KM 3,300 (three thousand three hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,100 for rental payments in respect of paying for alternative accommodation;

to Mr. Porić, the applicant in case no. CH/98/1153: KM 3,200 (three thousand two hundred), composed of KM 1,200 by way of compensation for mental suffering and KM 2,000 for rental payments in respect of paying for alternative accommodation;

(b) to pay to those applicants who have not yet regained possession of their properties by 31 May 2000 (excluding the applicants in case no. CH/98/1124, Mr. and Mrs. Dizdarević), within three months from the dates when they regain possession of their properties, the sum of KM 100 (one hundred) per month from 1 June 2000 until the end of the month in which they regain possession of the properties;

(c) to pay to the applicant or applicants in each case simple interest at the rate of 4 (four) per cent per annum over the above sums or any unpaid portion thereof from the date of expiry of the above three-month periods until the date of settlement of all sums due to the applicant or applicants in each case in accordance with this decision; and

9. 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 Procedure on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/98/1162

Slavica PROLE

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 7 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. The application concerns the applicant's attempts to enter into possession of her pre-war apartment located at Dajanli Ibrahimbega no. 6/III in Sarajevo, which her husband purchased from the former Yugoslav National Army ("the JNA") Housing Fund (*Vojna Ustanova za upravljanje stambenih fondom JNA---Beograd, Odeljenje Sarajevo*), according to a purchase contract dated 23 December 1991. The applicant also seeks to be registered as the owner of the apartment in question. The applicant timely submitted her repossession claim for the apartment on 11 March 1998 to the Commission for Real Property Claims of Displaced Persons and Refugees ("the CRPC"). Nevertheless, the domestic housing organs assert that the applicant did not timely file her repossession claim and for this reason they have denied her the right to return to the apartment. The respondent Party, in the proceedings before the Commission, has conceded that the applicant timely filed her repossession claim.

2. The application appears to raise issues in connection with Article 8 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 1 to the Convention, in connection with discrimination.

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced to the Chamber on 14 September 1998 and registered on the same day.

4. On 22 January 1999 the application was transmitted to the Federation of Bosnia and Herzegovina ("the Federation of BiH") in connection with Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. Although directed against Bosnia and Herzegovina, the application was not transmitted to Bosnia and Herzegovina. Therefore, throughout this decision, "respondent Party" refers only to the Federation of BiH.

5. On 19 April 1999 the Chamber received the respondent Party's observations on the admissibility and merits of the application. On 6 June 2003, the respondent Party submitted additional observations

6. The applicant submitted her comments on the respondent Party's initial observations on 19 May 1999; these were subsequently forwarded to the respondent Party. The applicant submitted additional information on 6 April 2000, 2 April 2001, 11 October 2001, 27 February 2002, 30 December 2002, 28 March 2003, and 2 July 2003.

7. On 4 December 2003 the Chamber considered the application, at which time it decided to re-transmit the application to the respondent Party in connection with Article 8 of the Convention and in relation to discrimination in connection with Article 8 and Article 1 of Protocol No. 1 to the Convention. The application was re-transmitted to the respondent Party on 11 December 2003.

8. On 13 January 2004 the Commission received further observations on the admissibility and merits of the application from the respondent Party, which were forwarded to the applicant. On 9 February 2004, the applicant submitted her response. On 15 April 2004 and 28 April 2004, additional information and observations were received from the respondent Party, which were also forwarded to the applicant.

9. On 10 March, 3 May 2004, and 7 May 2004, the Commission deliberated on the admissibility and merits of the application, and on the latter date it adopted the present decision.

III. FACTS

10. The applicant's husband, Radomir Prole, was a citizen of Bosnia and Herzegovina of Serb national origin, as is the applicant.

11. The applicant's husband was the the pre-war occupancy right holder over an apartment located at Dajanli Ibrahimbega 6/III in Sarajevo. The applicant was the co-occupancy right holder, and since the death of her husband in September 1997, she has been the sole pre-war occupancy right holder. The applicant and her husband moved into the apartment in April 1989.

12. On 23 December 1991 the applicant's husband concluded a purchase contract with the former JNA. The purchase price amounted to 576,602.00 Yugoslav Dinars, to be paid in installments. On 25 December 1991, the taxes on the transfer of real estate were paid, and on 27 December 1991 the signatures on the contract were verified before the Basic Court II in Sarajevo (*Osnovni Sud II*).

13. According to the payment slip dated 14 February 1992, the applicant's husband paid 466,255.20 Yugoslav Dinars for the purchase of the apartment.

14. On 15 February 1992 the applicant's husband signed an annex to the contract, changing the terms of the contract such that the total price amounted to 466,255.29 Yugoslav Dinars, to be paid in a lump sum. The signatures on the annex were also verified before the Basic Court II in Sarajevo on 6 March 1992.

15. On 27 April 1992 the JNA Housing Fund, Sarajevo Branch, issued a confirmation that Radomir Prole had paid the entire purchase price for the apartment at Dajanli Ibrahimbega 6/III on 14 February 1992.

16. The applicant's husband was an officer in the former JNA until 19 May 1992, at which time, as the applicant states, he became an officer in the Army of the Republika Srpska (*Vojska Republika Srspka*), where he served until 1 July 1996. As evidence, the applicant submitted the following documentation: an order dated 23 May 1992 whereby the Ministry of Defence of the Republika Srpska transferred Radomir Prole to the rank of Colonel and the position of Head of Liaison Unit in the Headquarters of the Serb Army of Bosnia and Herzegovina (*načelnika roda veze u glavnom štabu vojska Srpske Republike Bosne i Herecegovine*), effective 16 May 1992; a confirmation (*uvjerenje*) issued on 19 December 2002 by the Secretariat of the Ministry of Defence of the Republika Srspka, Department in Banja Luka, (*Ministarstvo odbrane Sekretariat Banja Luka, Odsjek Banja Luka*) stating that Radomir Prole served in the armed forces of the Republika Srspka as of 16 May 1992 until 30 June 1996; and finally, a confirmation dated 4 October 2001 issued by the Military Post Banja Luka Army of the Republika Srpska (*Vojna Pošta 7572-4 Banja Luka)* stating that Radomir Prole was a member of the Army of the Republika Srpska as of 19 May 1992.

17. The applicant states that she lived in Sarajevo until 6 June 1993, when she was displaced to Banja Luka, where she continues to live to this day. The applicant states that she was forced to flee Sarajevo because she was afraid for her life.

18. The apartment was declared permanently abandoned on 24 May 1996.

19. On 3 March 1997 E.J. signed a contract on use for the apartment.

20. The applicant filed a reposession claim for the apartment on 11 March 1998 to the CRPC Office in Banja Luka.

21. On 3 March 2000 the applicant filed a request to the Federation Ministry of Defence Municipality Centar Section (*Federalno Ministarstvo Odbrane—Odjel za odbranu Centar Sarajevo*)

("Ministry of Defence") to be registered as owner of the apartment. On 22 March 2000 the applicant received a written response from the Ministry of Defence stating that because her apartment was declared abandoned, she must first repossess her apartment in accordance with the Law on Cessation of the Application of the Law on Abandoned Apartments of the Federation of Bosnia and Herzegovina ("Law on Cessation"). On 13 May 2000 the applicant, in response to the letter of 22 March 2000, submitted another letter urging the Ministry of Defence to register her as owner over the apartment. Because she received no response, on 15 November 2000 and 15 February 2001, the applicant sent urgent appeals (*urgencija*) to the Ministry of Defence.

22. On 16 May 2000 the applicant filed a repossession request to Department for the Administration of Property and Geodetic Affairs and Cadaster Real Estate of the Municipality Centar (*Sluzba za upravu za imovinsko-pravne poslove, geodetske poslove i katastar nekretnina*) ("Department for Private Property") for her apartment, which she identified in the request as her private property.

23. On 15 November 2000 and 15 February 2001 the applicant filed urgent appeals to the Department for Private Property regarding the repossession request for her apartment.

24. By its letter of 8 March 2001, the Department for Private Property forwarded the applicant's repossession request to the Canton Sarajevo Administration for Housing Affairs (*Kanton Sarajevo Uprava za stambena pitanje*) ("the Administration"), as the body competent for such claims. The applicant also received a copy of this letter.

25. On 23 March 2001 the applicant submitted a repossession request for her pre-war apartment to the Administration. In this request the applicant states that she had first applied to the CRPC on 11 March 1998 and that she also submitted a repossession request to the Department for Private Property on 16 May 2000. She also states that on 7 March 2001 she received a telephone call from an employee of the Department for Private Property, informing her to submit her repossession request to the Administration, because the Department for Private Property was not competent in regard to former JNA apartments. The applicant concluded by stating that, in accordance with these verbal instructions, she was again submitting her request, but that the Department for Private Property should have immediately forwarded her request to the competent body and not telephoned her a year later to inform her that she should file yet another request to the competent body.

26. On 23 March 2001 the applicant submitted another request to the Ministry of Defence requesting that she be registered as the owner over the apartment.

27. On 29 March 2001 the Ministry of Defence sent a letter in response to the applicant's request, stating that, because the applicant had not presented any new information, the Ministry of Defence maintained its position as stated in its letter of 22 March 2000 (see paragraph 21 above.)

28. On 4 April 2001 the Administration issued a procedural decision (*zaključak*) rejecting the applicant's repossession claim as out of time, with the explanation that the applicant had filed her claim on 16 May 2000, while the deadline for submitting her claim had expired on 4 July 1999.

29. On 29 May 2001 the applicant submitted an appeal to the Canton Sarajevo Ministry for Housing Affairs (*Kanton Sarajevo Ministarstvo stambenih poslova*) ("the Ministry") against the procedural decision of 4 April 2001, arguing that the Law on Cessation was incorrectly applied because her private property was in question, which means that the Law on Cessation of the Application of the Law on Temporarily Abandonded Real Property Owned by Citizens ("Law on Cessation--Real Property") should have been applied in her case.

30. On 29 May 2001 the applicant sent a letter to the CRPC urging that a decision in her case be issued.

31. On 14 September 2001 the CRPC sent a letter to the applicant explaining that it had suspended consideration of repossession requests submitted for former JNA apartments pending the decision of the Human Rights Chamber regarding Article 3a of the Law on Cessation.

32. On 11 October 2001 the applicant submitted a request to the CRPC that they resolve her claim with urgency, and explaining that because her husband had served in the Army of the Republika Srspka, and that both she and her husband were citizens of Bosnia and Herzegovina, Article 3a of the Law on Cessation could not be applied in her case.

33. On 12 December 2001 the Minstry issued a procedural decision (*rješenje*) rejecting the applicant's appeal of 29 May 2001. The decision states that the applicant filed a repossession claim for the apartment on 16 May 2000 and, according to the Law on Cessation, she should have filed a claim prior to 4 July 1999. As to the ownership, the Ministry states that the applicant must first repossess her apartment in accordance with the Law on Cessation before being able to register her ownership over the apartment in accordance with Articles 39a, 39b, and 39c of the Law on Sale of Apartments with an Occupancy Right ("Law on Sale of Apartments").

34. On 25 February 2002 the applicant submitted a second request for the repossession of her apartment to the Administration. On 13 June 2002, this request was rejected as out of time. On 8 July 2003, the applicant submitted an appeal to the Ministry against the decision of 13 June 2002.

35. On 22 April 2003 the CRPC issued a decision (*odluka*) rejecting the applicant's claim and declaring itself not competent to decide in the case because the pre-war occupancy right holder, Radomir Prole, served in foreign armed forces after the relevant date of 14 December 1995. The decision does not state on what grounds, nor on what evidentiary basis, this conclusion was drawn.

36. On 2 July 2003 the applicant filed a request for review of the CRPC decision, arguing that her husband did not serve in any foreign army after 14 December 1995, but rather that her husband served in the armed forces of the Republika Srspka from 19 May 1992 until his retirement on 30 June 1996, and that on 30 April 1991 he served in the armed forces of the JNA and had citizenship of Bosnia and Herzegovina.

37. It appears that the CRPC ended its mandate without issuing a decision on the applicant's request for review.

38. On 7 July 2003 the applicant submitted a request to the Ministry to renew the proceedings (*obnoviti postupak*) upon its decision of 12 December 2001 (see paragraph 33 above). The applicant requested that the proceedings be renewed on the grounds that her private property is in question and not only her occupancy right.

39. On 24 December 2003 the Ministry issued a procedural decision (*zaključak*) rejecting the applicant's request to renew the proceedings as out of time.

40. On 25 December 2003 the Ministry issued a procedural decision (*rješenje*) rejecting the applicant's appeal against the decision of 13 June 2002 (see paragraph 34 above). In the explanation, it states that the applicant appealed against the decision on the grounds that the first instance organ incorrectly determined the facts and misapplied the law. Namely, the applicant states in her appeal that her deceased husband was the owner of the apartment on the basis of the purchase contract concluded on 23 December 1991; and for this reason the first instance organ should have applied the Law on Cessation--Real Property, and not the Law on Cessation. The Ministry notes that the applicant filed her request to repossess the apartment on 25 February 2002, and in accordance with Article 5, paragraph 1 of the Law on Cessation, her request was out of time. As to the applicant's assertion that the Law on Cessation—Private Property applies, the Ministry asserts that this is not applicable because it is apparent from Article

39c and 39e of the Law on Sale of Apartments that the applicant must first be in possession of the apartment in accordance with the Law on Cessation. The Ministry concludes that the first instance organ correctly rejected the applicant's repossession request as out of time.

41. The applicant initiated an administrative dispute before the Cantonal Court in Sarajevo against the Ministry's decision of 25 December 2003. In her appeal, the applicant emphasizes that the competent organs should have applied the Law on Cessation--Real Property. These proceedings are still pending.

IV. RELEVANT DOMESTIC LEGISLATION

A. Relevant legislation of the Socialist Federal Republic of Yugoslavia

1. Law on Securing Housing for the Yugoslav National Army

42. The applicant's husband purchased the apartment under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia ("OG SFRJ") no. 84/90). This Law was passed in 1990 and came into force on 6 January 1991. It essentially regulated the housing needs for military and civilian members of the JNA.

43. Article 21 set forth the general manner in which the purchase price of the apartment was to be determined, which included reductions for the revaluated construction value, the depreciation value, and the revaluated amount of procurement and communal facilities costs of the construction land, and the revaluated amount of the housing construction contribution which was paid to the JNA Housing Fund. The Federal Secretary was also authorized to prescribe the exact methodology to determine the purchase price.

B. Relevant legislation of the Republic of Bosnia and Herzegovina

1. Law on Abandoned Apartments

44. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina ("OG RBiH") nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95). The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 17 June 1994 and renamed the Decree the "Law on Abandoned Apartments". The Law governed the declaration of abandonment of certain categories of socially-owned apartments and their re-allocation.

45. Article 2 set forth that apartments were to be considered abandoned if the pre-war occupancy right holder and his family members left the apartment, even if temporarily. If the pre-war occupancy right holder failed to resume using the apartment within the applicable time limit laid down in Article 3 (*i.e.* before 6 January 1996), he or she was regarded as having abandoned the apartment permanently.

46. According to Article 10, as amended, the failure to resume using the apartment within the time limit was to result in the deprivation of the occupancy right. The resulting loss of the occupancy right was to be recorded in a decision by the competent authority.

2. Law on the Transfer of Real Estate

47. Article 9 of the Law on the Transfer of Real Estate (Official Gazette of the Socialist Republic of Bosnia and Herzegovina ("OG SRBiH") nos. 38/78, 4/89, 29/90 and 22/91; OG RBiH nos. 21/92, 3/93, 17/93, 13/94, 18/94 and 33/94) provided that a contract on the transfer of real estate must be made in written form and the signatures of the parties must be verified by the competent court.

C. Relevant legislation of the Federation of Bosnia and Herzegovina

1. Law on Cessation of the Application of the Law on Abandoned Apartments

48. The Law on Cessation entered into force on 4 April 1998 and has been amended on several occasions thereafter (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02 and 29/03). The Law on Cessation repealed the former Law on Abandoned Apartments.

49. According to the Law on Cessation, the competent authorities may make no further decisions declaring apartments abandoned (Article 1, paragraph 2). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the Law on Abandoned Apartments are null and void (Article 2, paragraph 1).

50. All occupancy rights or contracts on use made between 1 April 1992 and 7 February 1998 were cancelled (Article 2, paragraph 3). A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered a temporary user (Article 2, paragraph 3).

51. The occupancy right holder of an apartment declared abandoned, or a member of his/her household, has a right to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Article 3, paragraphs 1 and 2).

52. According to Article 4, paragraph 1, the pre-war occupancy right holder over an apartment or a member of his or her household shall be entitled to claim repossession of the apartment.

53. Article 5, paragraphs 1-3, as amended, provides as follows:

> "A claim for repossession of the apartment must be filed within fifteen months from the date of entry into force of this Law[1].
>
> "Exceptionally, the deadline for submission of claims for repossession of apartments under Article 2, paragraph 5 and Article 18b paragraph 1 of this Law, and Article 83a para. 4 of the Law on Amendments to the Law on Taking Over of the Law on Housing Relations (Official Gazette of FBiH no. 19/99) shall be October 4, 1999.
>
> "If the occupancy right holder does not file a claim to the competent administrative authority, to a competent court, or to the Commission for Real Property Claims of Displaced Persons and Refugees (hereinafter "CRPC"), within the appropriate time limit, or a request for enforcement of a decision of the CRPC within the deadline specified in the Law on Implementation of the Decisions of the CRPC (FBiH OG 43/99, 5/00) the occupancy right is cancelled."

2. Instruction on Application of the Law on Cessation of the Application of the Law on Abandoned Apartments ("Instruction on the Law on Cessation")

[1] That is to say before 4 July 1999.

54. Point 14, sub-point iii, of the Instruction on the Law on Cessation (OG FBiH nos. 11/98, 38/98, 12/99, 27/99, 43/99 and 56/01) clarifies that under Article 5 of the Law on Cessation an occupancy right holder is considered to have made a claim for repossession of the apartment in accordance with the applicable deadline if the occupancy right holder has

> "...submitted a claim to the Commission for Real Property Claims of Displaced Persons and Refugees in accordance with its rules and regulations, namely, by 2 September 1999; or exceptionally, for claims referred to in Article 5, paragraph 2 of the Law, by 3 December 1999;"

3. Law on Sale of Apartments with an Occupancy Right ("Law on Sale of Apartments")

55. Article 27of the Law on Sale of Apartments (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01 and 15/02) provides that the ownership right to an apartment shall be acquired upon registration of that right in the Land Registry books of the competent court.

56. Article 39 provides, in relevant part:

> "The occupancy right holders who previously concluded a contract on purchase of an apartment in accordance with the Law on Securing Housing for JNA … shall have the amount they paid, expressed in German Marks ("DEM") according to the applicable exchange rate on the day of purchase, recognised when the new contract on purchase of the apartment is concluded in accordance with this Law."

57. Articles 39a, 39b, 39c, 39d, and 39e came into force on 5 July 1999, the date of their publication in the Official Gazette of the Federation of Bosnia and Herzegovina, as a result of their imposition by the High Representative of Bosnia and Herzegovina.

58. Article 39a provides:

> "If the occupancy right holder of an apartment at the disposal of the Federation Ministry of Defence uses the apartment legally and s/he entered into a legally binding contract on purchase of the apartment with the Federal Secretariat for National Defence before 6 April 1992 in accordance with the Law referred to in Article 39 of this Law, the Federation Ministry of Defence shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court."

59. Article 39b provides that if the occupancy right holder did not pay the total purchase price as specified in the purchase contract, then he or she shall pay the remaining amount specified in the contract to the Ministry of Defence.

60. Article 39c provides:

> "The provisions of Articles 39a and 39b shall also be applicable to an occupancy right holder who has exercised the right to repossess the apartment pursuant to the provisions of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98 and 18/99)."

61. Article 39d states that if an individual fails to realise his or her rights in connection with the apartment with the Federation Ministry of Defence, as provided for in the Law on Sale of Apartments, he or she may initiate proceedings before the competent court.

4. Instruction for Implementation of Articles 39a, 39b and 39c of the Law on Sale of Apartments

62. The Instruction for the Implementation of Articles 39a, 39b, and 39c of the Law on Sale of Apartments with an Occupancy Right (OG FBiH no. 6/00) states that the Ministry of Defence shall issue an order for registration of the ownership right over the apartment on the request of the occupancy right holder, or a member of his or her family household, who realised the right to repossess the apartment in accordance with the Law on Cessation, and who had previously concluded a legally binding contract on purchase of the apartment from the JNA (Federal Secretariat for National Defence) Housing Fund before 6 April 1992.

5. Law on Civil Procedure

63. Article 54 of the Law on Civil Procedure (OG FBiH nos. 42/98, 3/99 and 53/03) provides as follows:

> "A plaintiff may initiate a lawsuit and request that the court establish the existence or non-existence of some right or legal relationship, and the authenticity or non-authenticity of some document, respectively.
>
> "Such a lawsuit may be initiated when a special regulation provides so, when the plaintiff has a legal interest that the court establish the existence or non-existence of some right or legal relationship and the authenticity or non-authenticity of some document before the maturity date of the claim for enforcement from the same relationship.
>
> "If the decision in the dispute depends on whether some legal interest, which during the lawsuit became disputable, exists or not, the plaintiff may file, in addition to the existing claim, a complaint requesting that the court establish the existence or non-existence of such relationship, if the court before which the lawsuit is pending is competent for such a complaint.
>
> "Filing a complaint under the provision in paragraph 3 of this Article shall not be deemed modification of the lawsuit."

V. COMPLAINTS

64. The applicant alleges a violation of her right to the peaceful enjoyment of her possessions (Article 1 of Protocol No. 1 to the Convention) and requests that the domestic organs recognise her as the owner of the apartment based on the purchase contract concluded in December 1991.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

65. The respondent Party submitted its observations on the admissibility and merits of the application on 19 April 1999, in a joint submission also addressing three other applications. The submission makes no comments on the facts of the case. As to the admissibility, the respondent Party asserts that the six-month rule should be applied to declare the cases inadmissible. As to the merits, the respondent Party only generally states that Article 6 has not been violated, and therefore Article 13 has also not been violated. As to Article 1 of Protocol No. 1 to the Convention, the respondent Party argues that the applicants (*i.e.* the husband of the present applicant Slavica Prole and the three others) had not concluded purchase contracts; therefore, they have no protected possession. Even if the applicants had purchase contracts that were retroactively invalidated by certain legislation, there is still no violation of Article 1 of Protocol No. 1 to the Convention, according to the respondent Party.

66. In its submission received on 6 June 2003, the respondent Party requests the Chamber to declare the application inadmissible for non-exhaustion of domestic remedies because the applicant only filed a repossession request for the apartment on 16 May 2000.

67. In its observations on the admissibility and merits received on 13 January 2004, the respondent Party submits that the applicant submitted her repossession request to the CRPC on 11 March 1998, and that this request was rejected by the CRPC on 24 April 2003. The applicant submitted a request for review of the decision, but no response was ever obtained from the CRPC.

68. As to the admissibility of the application, the respondent Party states that the applicant filed a repossession request on 11 March 1998 and that the competent organ rejected the applicant's request. However, the applicant still has the possibility to initiate an administrative dispute before the Cantonal Court. Moreover, the applicant can initiate a civil lawsuit to determine the validity of the purchase contract in accordance with the Law on Civil Procedure. The respondent Party, therefore, requests that the application be declared inadmissible as pre-mature.

69. With regard to the merits of the application, the respondent Party states that Article 8 of the Convention has not been violated because the competent organ rejected the applicant's repossession claim as out of time and the CRPC rejected her repossession request. As to the alleged discrimination, the respondent Party states that the applicant did not state on what grounds she has been discriminated against, nor has she shown that she has been the victim of any discrimination; therefore, this claim is unsupported.

70. On 28 April 2004, the respondent Party submitted additional written observations contesting the validity of the purchase contract of 23 December 1991. The respondent Party asserts that the seal indicates that the contract was concluded in Belgrade, although the Military Construction Department in Sarajevo was responsible for concluding contracts for the purchase of JNA apartments located in Sarajevo. Also, the practice was to place the stamp of the Basic Court on each page of the contract, which this contract does not have; moreover, the competent court for the verification of such purchase contracts was the Basic Court I in Sarajevo, and not the Basic Court II in Sarajevo. The respondent Party also disputes the confirmation issued on 27 April 1992 showing that the applicant paid the full purchase price as it obtained information from the Ministry of Defence that the individual who signed the confirmation worked at the Ministry of Defence only as of 22 April 1992.

B. The applicant

71. The applicant considers herself the owner of the apartment,and she believes that the Law on Cessation--Real Property should be the applicable law in her case. The applicant asserts that she has taken all steps possible to gain repossession of her apartment and to obtain the registration of her ownership in the Land Registry books. The applicant also claims that she has been discriminated against in this regard.

72. In a submission dated 8 October 2003, the applicant states that she has not received any response from the CRPC regarding her request for review, nor from the Ministry regarding her request to renew the proceedings. The applicant explains that she did not initiate an administrative dispute against the 12 December 2001 decision of the Ministry because she assumed she would realise her rights to the apartment through the CRPC.

73. On 9 February 2004 the applicant responded to the additional observations of the respondent Party. The applicant states that her husband was in the JNA until 19 May 1992, at which time, upon the formal exit of the JNA from Bosnia and Herzegovina, he became a part of the Army of the Republika Srpska, where he served until 1 July 1996 (he received the decision regarding his retirement pension on 30 June 1996). The applicant lodged a request for review of the CRPC decision because it was based on incorrect facts, and she also initiated an administrative dispute before the Cantonal Court regarding the repossession request. She

believes that the respondent Party's insistence on her initiating an administrative dispute is simply a delay tactic. The applicant reiterates that she submitted her repossession claim to the CRPC on 11 March 1998.

74. The applicant objects to the respondent Party's assertion that the contract on purchase concluded by her husband in 1991 is in any way not valid. The applicant states that the Law on Sale of Apartments explicitly recognises the validity of purchase contracts concluded before 6 April 1992. Article 39a of said Law provides that a possessor of such a contract may be registered as the owner of the apartment, on the condition that the contract holder has legally entered into possession of the apartment. Thus, the applicant considers it unnecessary to initiate civil proceedings to determine the validity of the purchase contract because the Law on Sale of Apartments does not in any way question the validity of the contract. The 22 March 2000 letter from the Ministry of Defence is also evidence that the Ministry of Defence does not dispute the validity of the contract because it only requests that she repossess her apartment in order to realise her rights to register ownership over the apartment.

75. As to the objections of the respondent Party on the merits of the case, the applicant quotes from a decision of the Federation Supreme Court, in case no. UŽ-216/02, where the Court held that a repossession request must be considered in light of Article 8 of the Convention and Annex 7, and that the Convention has priority over all other domestic laws. The applicant concludes that other organs of the respondent Party have already found, in repossession cases similar to hers, violations of Article 8 of the Convention, such that the respondent Party's rejection of her repossession claim is ill-founded.

VII. OPINION OF THE COMMISSION

A. Admissibility

76. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided 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. Admissibility as against Bosnia and Herzegovina

77. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.… In so doing, the [Commission] shall take into account the following criteria: … (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."

78. The Commission notes that the applicant directs her application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

79. In the previous cases decided by the Chamber on the subject of JNA apartments, the Chamber held Bosnia and Herzegovina responsible for passing the legislation that retroactively annulled the contracts on purchase of JNA apartments (*see, e.g.,* case no. CH/96/3, CH/96/8 and CH/96/9, *Medan, Baštijanović, and Marković,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996 – December 1997; case no. CH/96/22, *Bulatović,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996 – December 1997; case no. CH/96/2 *et al., Podvorac and others,* decision on admissibility and merits of 14 May 1998, Decisions and Reports 1998; case nos. CH/97/82 *et al., Ostojić and others,* decision on admissibility and merits of 13 January 1999, Decisions January – July 1999; case no. CH/97/60

et al., Miholić and others, decision on admissibility and merits of 9 November 2001, Decisions July – December 2001).

80. In the present case, however, it is not shown that the retroactive annulment of purchase contracts with the former JNA has affected the applicant. Rather, the Commission notes that the conduct of the bodies responsible for the proceedings complained of by the applicant, such as the Administration, the Ministry, and the Ministry of Defence, engages the responsibility of the Federation of BiH, not of Bosnia and Herzegovina, for the purposes of Article II(2) of the Agreement. Accordingly, as directed against Bosnia and Herzegovina, the application is incompatible *ratione personae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c).

81. The Commission therefore decides to declare the application inadmissible against Bosnia and Herzegovina.

2. Admissibility as against the Federation of Bosnia and Herzegovina

a. Manifestly ill-founded

82. 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."

83. The Chamber transmitted the application in connection with discrimination and the right to the enjoyment of one's possessions and the right to one's home. However, in the course of the proceedings before the domestic organs, it is not apparent that the applicant has been discriminated against. The applicant states that Article 3a of the Law on Cessation is discriminatory. However, the Commission notes that Article 3a of the Law on Cessation has not been applied in the applicant's case. Therefore, the Commission decides to declare the application inadmissible as manifestly ill-founded in relation to the applicant's discrimination claim.

b. Non-exhaustion of domestic remedies

84. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …."

(1) Repossession claim

85. The respondent Party asserts that the applicant has not exhausted domestic remedies related to the repossession of the apartment because she still has the possibility of initiating an administrative dispute before the Cantonal Court in Sarajevo. The Commission notes that the applicant initiated such a dispute on 25 December 2003, and that these proceedings are still pending. However, given the fact that the applicant first lodged her repossession request on 11 March 1998, more than six years ago, the Commission concludes that the domestic remedies have not proven effective. For this reason, the application is admissible despite the pending administrative dispute.

(2) Ownership claim

86. As to the respondent Party's assertion that the applicant must initiate a civil lawsuit to determine the validity of the purchase contract concluded in 1991, the Commission acknowledges that the Law on Civil Procedure provides a remedy to determine whether some right exists or not or to determine the authenticity of a document.

87. The Commission recalls that previously the Chamber has found Article 54 of the Law on Civil Procedure (or Article 172, under the former Law on Civil Procedure) an effective domestic remedy that must be exhausted in cases where the applicants did not have a purchase contract in their possession, but rather asserted that they were the owners based on the steps taken toward the purchase of an apartment in 1991 and 1992 (see, *e.g.* case nos. CH/98/1160, CH/98/1177, CH/98/1264 *Pajagić, Kurozović and M.P.*, decision on admissibility of 9 May 2003). In such cases, the Commission considers it reasonable to expect that the applicant must bear the burden of initiating a lawsuit to determine the existence of a contractual relationship or of any contractual rights.

88. In the case at hand, the applicant has a purchase contract that appears, in all aspects, to be a valid contract. It has been signed by all parties, includes the purchase price and terms of payment, the signatures on the contract were verified by the Basic Court II in Sarajevo, and the taxes on the transfer of real estate were paid. The applicant asserts that the validity of the contract is not in dispute because the Law on Sale of Apartments explicitly recognises purchase contracts concluded with the JNA prior to 6 April 1992, but only sets the additional condition that the contract holder first repossess the apartment in accordance with the Law on Cessation before the contractual rights can be realised. The Commission takes note that the respondent Party has disputed the validity of the purchase contract five years after the application and purchase contract were transmitted to it, by its submission of 28 April 2004 (see paragraph 70 above). The Commission also takes note that no organ of the respondent Party has disputed the validity of the purchase contract. The Commission considers that the burden of initiating proceedings to determine the validity of the contract should fall on the party who wishes to dispute the contract, and not on the contract holder who otherwise has no reason to doubt the validity of the contract he or she possesses.

89. The Commission concludes that, because the applicant possesses a purchase contract which appears on its face to be valid, initiating a lawsuit in accordance with Article 54 of the Law on Civil Procedure is not a domestic remedy that the applicant must exhaust, within the meaning of Article VIII(2)(a) of the Agreement.

3. Conclusion as to admissibility

90. Because the respondent Party has asserted no other grounds for declaring the application inadmissible, and there are no other apparent grounds, the Commission declares the application inadmissible *ratione personae* as directed against Bosnia and Herzegovina, inadmissible as to the alleged discrimination, and admissible in all other respects as directed against the Federation of BiH.

B. MERITS

91. 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. Alleged violation in connection with Article 1 of Protocol No. 1 to the Convention

92. The applicant alleges a violation of the peaceful enjoyment of her possessions with regard to the use and enjoyment of the apartment over which she and her husband were the pre-war occupancy right holders and which her husband purchased in 1991.

93. Article 1 of Protocol No. 1 to the Convention provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

94. Article 1 of Protocol No. 1 to the Convention thus contains three rules. The first rule enunciates the general principle that one has the protected right to the peaceful enjoyment of one's property. The second rule covers deprivation of property and subjects it to the requirements of the public interest and conditions laid out in law. The third rule recognises that States are entitled to control the use of property and subjects such control to the general interest and domestic law. It must then be determined in respect of these conditions whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's rights, bearing in mind that the last two rules should be construed in light of the general principle (*see*, *e.g.,* case no. CH/96/17 *Blentić,* decision on admissibility and merits of 5 November 1997, paragraphs 31-32, Decisions on Admissibility and Merits March 1996-December 1997). Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

95. The Commission must first consider whether the applicant has any rights under the contract that constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. In this regard, the Commission refers to the Chamber's decisions in case no. CH/96/3 *et al. Medan and others*, decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996 – December 1997; and case no. CH/97/60 *et al. Miholić and others*, decision on admissibility and merits of 9 November 2001, Decisions July – December 2001. In the aforementioned cases, the Chamber consistently found that the rights under a contract to purchase an apartment concluded with the JNA, pursuant to the Law on Securing Housing for the JNA, constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. The Commission notes that in the present case the applicant's husband concluded a contract under factual circumstances similar to those in the cases cited, and therefore, the Commission sees no reason to diverge from the previous jurisprudence of the Chamber in this regard.

a. Interference with the applicant's rights

96. The Commission must next determine the nature of the interference with the applicant's rights flowing from the purchase contract. On 3 March 2000 the applicant first requested the Ministry of Defence to issue an order that would allow her to be registered as the owner of the apartment in the Land Registry books. Her request has been denied on several occasions, with the explanation that she must first repossess the apartment in accordance with the Law on Cessation as provided for in Article 39c of the Law on Sale of Apartments before the Ministry of Defence will issue such an order. Thus, the applicant is essentially prevented from exercising her ownership rights to the apartment for two reasons: First, because she cannot enter into possession of the apartment due to the domestic organs' insistence that she did not timely file the repossession request; and second, because Article 39c of the Law on Sale of Apartments requires her to be in possession of the apartment before the order to be registered as owner can be issued. It appears that the Ministry of Defence lawfully denied the applicant's request to be registered as

the owner because Article 39c explicitly sets forth that an order authorising the registration of ownership cannot be issued until the contract holder is in possession of the apartment. The Commission is aware, although it is not specifically raised in the proceedings in this case, that Article 39d of the Law on Sale of Apartments further provides that a person who does not realise his or her rights to the apartment in accordance with the Law on Sale of Apartments may initiate court proceedings in order to do so. The Commission therefore concludes that the interference in question stems from the Law on Sale of Apartments. It is accordingly necessary for the Commission to examine whether this interference by the Federation of BiH is justified under Article 1 of Protocol No. 1 to the Convention as being "subject to conditions provided for by law" and "in the public interest".

b. Principle of lawfulness

97. Regardless of which of the three rules set forth in Article 1 of Protocol No. 1 of the Convention is applied in a given case (*i.e.*, interference with possessions, deprivation of possessions, or control of use of property), the challenged action by the respondent Party must have been lawful in order to comply with the requirements of Article 1 of Protocol No. 1 to the Convention. As mentioned above, the refusal to issue the order for the applicant to be registered as owner over the apartment was in accordance with Article 39c of the Law on Sale of Apartments. Therefore, the denial of the applicant's rights flowing from the purchase contract is in accordance with the law.

c. Public interest

98 The central issue of this case, and what the Commission must now examine, is whether the continuing interference with the applicant's property rights resulting from the application of Article 39c of the Law of Sale of Apartments can be justified as "in the public interest". Additionally, although not specifically asserted during the proceedings by the Ministry of Defence as a legal possibility for the applicant, the Commission will also address whether Article 39d of the said Law is "in the public interest."

99. When considering whether the taking of property is "in the public interest", it must be determined whether a "fair balance" has been struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. Thus, there must be a reasonable relationship of proportionality between the means employed and the aim to be achieved. The requisite balance will not be found if the persons concerned had to bear "an excessive burden" (see *e.g.*, Eur. Court HR, *Sporrong and Lönnroth v. Sweden,* decision of 23 September 1982, Series A no. 52, pp. 26-28, paragraphs 70-73).

100. The European Court has acknowledged that in taking decisions involving the deprivation of property rights of individuals, national authorities enjoy a wide margin of appreciation because of their direct knowledge of their society and its needs. Further, the decision to expropriate property will often involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ. Therefore, the judgement of the national authorities will be respected unless it was "manifestly without reasonable foundation" (Eur. Court HR, *James and Others v. United Kingdom*, decision of 21 February 1986, Series A no. 98, p. 40, paragraph 46).

101. Nevertheless, respondent Parties have not been granted *carte blanche* when deciding upon appropriate measures of their social and economic policies. Those measures are still subject to the scrutiny of the European Court: (a) They must pursue a legitimate aim; and (b) there must be a "reasonable relation of proportionality between the means employed and the aim sought to be realised" (see the above-mentioned *James and others* decision, p. 34, paragraph 50). The latter requirement was expressed also by the notion of the "fair balance" that must be struck between the demands of the communal interest and the requirements of the protection of the individual's fundamental rights. There is no "fair balance" if the person concerned has had to bear "an

individual and excessive burden" (see the above-mentioned *Sporrong and Lönnroth* decision, p. 26, paragraphs 69 and 73).

102. In the case at hand, the respondent Party has asserted no legitimate aim for Article 39c of the Law on Sale of Apartments. In its submission received on 23 March 1999, the respondent Party states that Article 39 of the Law on Sale of Apartments allows those persons who concluded legally binding contracts to be reimbursed for the funds they previously paid, which therefore brings all citizens to an equal footing. This reasoning, however, does not provide an aim for the provision of Article 39c of the Law on Sale of Apartments. By its own examination, the Commission can see no legitimate aim in requiring a contract holder to first enter into possession of the apartment in question before being able to exercise his or her contractual rights. Lacking any legitimate aim, the Commission therefore, must find that this provision is not "in the public interest". This determination is sufficient for the Commission to find that the provision is not compatible with Article 1 of Protocol No. 1 to the Convention.

103. The Commission will next turn to address whether Article 39d of the Law on Sale of Apartments has a legitimate aim and is proportional to the aim sought. The Commission notes that in other submissions related to contracts on purchase of JNA apartments concluded before 6 April 1992, the respondent Party has pointed out that Article 39d of the Law on Sale of Apartments provides a remedy for persons who do not realise their rights to the apartment with the Ministry of Defence, in that they may initiate a lawsuit regarding their ownership to the apartment. Although the respondent Party has submitted no legitimate aim for the provision in question, the Commission, *proprio motu*, could accept that such provision is appropriate in cases where the purchase contract is in some form incomplete, in dispute, lost, *etc*. When, however, as in the present case, there are no apparent flaws in the purchase contract and its validity has not been disputed by the domestic organs, the Commission considers that requiring the applicant to initiate court proceedings places an excessive burden on the contract holder and that this burden is not proportional to any legitimate aim. Therefore, the Commission finds that this provision, in the case at hand, is not "in the public interest" and as such, it is incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

d. Conclusion

104. Having regard to the above, the Commission finds that the denial of the applicant's rights flowing from the purchase contract due to the application of Article 39c of the Law on Sale of Apartments was not in the public interest, and thereforecannot be justified. The Commission also finds that Article 39d of the Law on Cessation places an excessive burden on contract holders, and that it is also not "in the public interest", and therefore not compatible with Article 1 of Protocol No. 1 to the Convention. The Commission therefore, finds a violation of the right to the peaceful enjoyment of the applicant's possessions under Article 1 of Protocol No. 1 to the Convention, the Federation of BiH being responsible for this violation.

2. Alleged violation in connection with Article 8 of the Convention

105. Article 8 of the Convention provides as follows,

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

106. In light of its finding above of a violation of Article 1 of Protocol No. 1 to the Convention, related to the ownership claim, the Commission considers it unnecessary to also examine the application in connection with Article 8 of the Convention.

VIII. REMEDIES

107. The Commission has established that the Federation of BiH violated the right of the applicant to the peaceful enjoyment of her rights flowing from the purchase contract that her husband concluded with the JNA in 1991 in connection with Article 1 of Protocol No. 1 to the Convention. 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 regard the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

108. The Commission recalls that the applicant, on 30 December 2002, submitted a claim for pecuniary and non-pecuniary monetary compensation related to the non-recognition of her ownership to the apartment. Additionally, the applicant added a compensation request for her alleged unlawful detention by the Military Police in Sarajevo for a three-day period in April 1992. This second compensation claim is not otherwise supported or explained in the course of the proceedings before the Chamber or Commission.

109. In view of the finding of a violation, the Commission considers it appropriate to order the respondent Party to ensure that the applicant is allowed to repossess the apartment located at Dajanli Ibrahimbega 6/III within three months from the date of receipt of this decision, and to ensure that the Federation Ministry of Defence issues an order for the applicant to be registered as the owner over the apartment in question within three months from the date of receipt of this decision. The Commission considers that this is sufficient satisfaction for the violations found.

110. The Commission will order the Federation of BiH to submit to the Commission a full report on the steps taken by it to comply with these orders by 29 October 2004.

IX. CONCLUSIONS

111. For the above reasons, the Commission decides,

1. unanimously, to declare the application inadmissible as directed against Bosnia and Herzegovina;

2. unanimously, to declare the application inadmissible in relation to the applicant's claim of discrimination;

3. unanimously, to declare the remainder of the application admissible as against the Federation of Bosnia and Herzegovina;

4. unanimously, that the right of the applicant to the peaceful enjoyment of her possessions flowing from the purchase contract, within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, that it is not necessary to examine the application in connection with Article 8 of the European Convention on Human Rights;

6. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is permitted to repossess the apartment and ensure that the Federation of Bosnia and Herzegovina Ministry of Defence issues the order for the applicant to be registered as the owner over the apartment at Dajanli Ibrahimbega 6/III in the Land Registry books of the competent court within three months from the date of receipt of this decision; and,

7. unanimously, to order the Federation of Bosnia and Herzegovina to submit to the Commission a full report on the steps taken by it to comply with these orders by 29 October 2004.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 June 2003)

Case no. CH/98/1169

R.M.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 2 June 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Mato TADIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Miodrag PAJIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

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 Agreement on Human Rights ("Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

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

I. INTRODUCTION

1. The case concerns the applicant's attempts to register his ownership over a former Yugoslav National Army ("JNA") apartment located at Ulica Skenderija 24 in Sarajevo, the Federation of Bosnia and Herzegovina. At issue is whether the applicant should be recognised as the owner of the apartment, based on the fact that he initiated the proceedings to purchase his apartment, was assessed the purchase price, which turned out to be 0.00 Yugoslav Dinars ("YUD"), and paid a small fee related to the purchase, but never concluded the written purchase contract. The applicant has always been in possession of his apartment.

2. The case raises issues under Articles 6 and 13 of the European Convention on Human Rights (the "Convention") and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced and registered on 18 September 1998.

4. On 23 April 1999, the Chamber transmitted the case to the Federation of BiH for its observations on the admissibility and merits under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

5. On 23 June 1999, the Federation of BiH submitted its observations on the admissibility and merits, which were forwarded to the applicant. On 12 July 1999, the applicant submitted his comments on the observations on the admissibility and merits.

6. On 25 December 2001, 23 January 2003, 6 February 2003, 26 March 2003 and 28 April 2003, the applicant submitted additional comments.

7. On 11 April 2003, 29 April 2003 and 21 May 2003, the respondent Party submitted additional observations.

8. The Chamber deliberated on the admissibility and merits of the application on 31 March 2003, 1 April 2003, 6 May 2003, and 2 June 2003 and adopted the present decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

9. The applicant served in the former JNA between 1954 and 1987.

10. The applicant has been the occupancy right holder over the apartment in question since 1971.

11. On 30 January 1992, the applicant requested the JNA to sell to him the apartment in question in accordance with the Law on Securing Housing for the Yugoslav National Army (see paragraphs 26-27 below).

12. On 31 January 1992, a "draft" contract on purchase of the apartment was prepared and signed by the applicant, contract no. 25/3-3-5008. The applicant states that he was expecting the other contracting party, the JNA, to sign it; however, this never happened.

13. On 4 February 1992, the applicant paid the costs of assessment of the value of his apartment and other procedural costs.

14. On 27 February 1992, the competent commission of the JNA Housing Fund valued the applicant's apartment at 669,426 YUD.

15. On 12 March 1992, the JNA Social Welfare Fund issued a certificate stating that the applicant's contributions for the housing needs of JNA service members amounted to 816,867 YUD.

16. Since the applicant's contributions were larger than the value of his apartment, the purchase price was 0.00 YUD. Nevertheless, the applicant decided to pay an additional 5,600 YUD on 12 April 1992, suspecting that the purchase price might rise due to inflation.

17. On 12 January 1995, the applicant requested the Municipal Court I in Sarajevo ("Municipal Court") to establish his ownership over the apartment in question regardless of the fact that he had not concluded a purchase contract. The applicant submitted the draft purchase contract together with his lawsuit.

18. On 16 October 2000, the Municipal Court issued a judgment establishing the applicant's ownership over the claimed apartment. The Municipal Court concluded that the applicant obtained the ownership over the apartment based on the purchase contract of 31 January 1992, which was only signed by the applicant, and on the basis of the additional 5,600 YUD which he paid. The Federation Ministry of Defence appealed this decision on 25 December 2000.

19. On 7 August 2001, the Cantonal Court in Sarajevo quashed the judgment of 16 October 2000 and returned the case to the Municipal Court.

20. The applicant alleges that, upon his insistence, the Municipal Court judge scheduled hearings on 18 June 2002, 2 August 2002, 26 August 2002, 24 September 2002, and 21 October 2002. All of these hearings were postponed, apparently because one of the parties to the proceedings, the Federation Ministry of Defence, did not appear. Finally, on 6 November 2002 the hearing was held, even though the above-mentioned party was still not present. The respondent Party did not dispute these statements.

21. On 6 November 2002, the Municipal Court issued a procedural decision declaring its lack of jurisdiction. In its reasoning, the Municipal Court noted that the applicant is the occupancy right holder over the apartment in question, and that therefore, in accordance with the Law on Sale of Apartments with an Occupancy Right, he is obliged to initiate proceedings with the Federation Ministry of Defence to privatise his apartment.

22. On 24 January 2003, the applicant appealed against the procedural decision of 6 November 2002 to the Cantonal Court in Sarajevo. The case is still pending.

23. The applicant furthermore alleges that he visited the Federation Ministry of Defence in 2000 and 2002 and orally requested it to issue to him a contract on purchase of the apartment in question on the basis of his contributions to the JNA Housing Fund. The officials of the Federation Ministry of Defence allegedly refused the applicant's requests. However, there are no written records of those conversations.

24. On 29 April 2003 and 21 May 2003, the respondent Party informed the Chamber that the applicant had signed a new purchase contract for the apartment in question and that the signatures of the parties have already been verified by the competent court. The applicant should be registered as the owner over the apartment in question within a short time.

25. On 12 May 2003, the Chamber requested the applicant to inform the Chamber whether he had signed a new purchase contract with the Federation Ministry of Defence to purchase the apartment in question. The applicant was requested to respond within two weeks, but failed to do so.

IV. RELEVANT LEGAL FRAMEWORK

A. Law on Securing Housing for the Yugoslav National Army

26. The applicant initiated the proceedings to purchase his apartment under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia –hereinafter- "OG SFRJ", no. 84/90). This Law was passed in 1990 and came into force on 6 January 1991. It essentially regulated the housing needs for military and civilian members of the JNA.

27. Article 20 of the Law provided that the holder of an occupancy right residing in an apartment of the JNA Housing Fund could purchase the apartment on the basis of a contract made with the former JNA.

B. Law on the Transfer of Real Estate

28. Article 9 of the Law on the Transfer of Real Estate (Official Gazette of the Socialist Republic of Bosnia and Herzegovina – hereinafter – "OG SRBiH" nos. 38/78, 4/89, 29/90 and 22/91; Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter – "OG RBiH" nos. 21/92, 3/93, 17/93, 13/94, 18/94 and 33/94) states that a contract on the transfer of real estate must be made in written form and the signatures must be verified by the competent court.

C. Law on Sale of Apartments with an Occupancy Right

29. Article 39a of the Law on Sale of Apartments with an Occupancy Right (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter –"OG FBiH" nos. 27/97, 11/98, 22/99, 27/99, 7/00, 25/01, 32/01, 61/01 and 15/02) states that a person who entered into a contract to purchase a JNA apartment, who holds the occupancy right over said apartment and is legally using the apartment, shall be registered as that apartment's owner with the competent court by an order of the relevant housing authority within the Federation Ministry of Defence."

30. Article 39d states that if an individual fails to realise his or her rights in connection with the apartment with the Federation Ministry of Defence, as provided for in this Law, the individual may initiate proceedings before the competent court.

D. Instruction on Application of Articles 39a, 39b and 39c of the Law on Sale of Apartments with an Occupancy Right

31. According to Article 6 of the Instruction for Implementation of Articles 39a, 39b and 39c of the Law on Sale of Apartments with an Occupancy Right (OG FBiH no. 6/00), the Federation Ministry of Defence shall sell a former JNA apartment to the occupancy right holder over such apartment, who is not in possession of a contract on purchase concluded with the former JNA, in accordance with the Law on Sale of Apartments. The Federation Ministry of Defence shall assess the new purchase price of the apartment and it shall subtract from such purchase price any sum that was paid in accordance with the Law on Securing Housing for the JNA.

V. COMPLAINTS

32. The applicant complains that the authorities of the Federation of BiH have not recognised him as the owner, but only as the occupancy right holder, of the apartment in question. Therefore, the application raises issues under Article 1 of Protocol No. 1 to the Convention. Given that the applicant initiated proceedings before the courts in 1995 to establish his ownership over the apartment, and has still not obtained a final decision, the application also raises issues under Articles 6 and 13 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

33. The Federation of BiH submitted its observations on the admissibility and merits of the application on 23 June 1999. As to the admissibility, the Federation of BiH submits that the applicant has not exhausted domestic remedies, and also raises objections concerning the six-month rule. As to the merits, the Federation of BiH submits that as the applicant has not exhausted any domestic remedies, a violation of Article 6 of the Convention can not be in question. As to Article 1 of Protocol No. 1 to the Convention, the Federation of BiH asserts that ownership over property must be evidenced by a written contract. In this case, the applicant does not have a written contract, which means that Article 1 of Protocol No. 1 to the Convention has not been called into question. The Federation of BiH also points out that all evidence that the applicant submitted related to the purchase of the apartment is inadequate to prove his ownership. The courts are the only body that can establish whether a contract existed or not.

34. On 29 April 2003, the respondent Party submitted additional information, namely, that the Prosecutor's Office of the Federation Ministry of Defence determined that the applicant's contract on purchase of the apartment, number 17-1-102/01, was valid on 2 September 2002, and that the order for the applicant to be registered as the owner over the apartment should be issued shortly. On 21 May 2003, the respondent Party confirmed that such contract is a new contract on purchase, issued under the Law on Sale of Apartments with an Occupancy Right.

B. The applicant

35. The applicant maintains that he obtained ownership over his apartment in 1992 because he fulfilled all the conditions set out in the Law on Securing Housing for the JNA. The fact that he did not conclude the purchase contract is not relevant, in the applicant's opinion, as he took all other necessary steps. The applicant requests the Chamber to issue a decision finding a violation of his rights in that the organs of the Federation of BiH have not recognised his ownership based on the steps he took in 1992 and due to the length of proceedings before the domestic organs.

VII. OPINION OF THE CHAMBER

A. Admissibility

36. Before considering the merits of the application the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and, if so, whether they have been exhausted, and whether the application has been filed within six months from the date of the final decision in the case.

37. The Federation of BiH objects to the admissibility of the application on the ground that the applicant has failed to exhaust domestic remedies. The Chamber has found that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *e.g*, case no. CH/96/17, *Blentić,* decision on admissibility and merits of 5 November 1997, paragraph 19, Decisions on Admissibility and Merits March 1996 – December 1997).

38. The Chamber is aware that proceedings are still pending in the present case, as the applicant has appealed the most recent decision of the Municipal Court I in Sarajevo to the Cantonal Court. However, given the fact that the applicant initiated proceedings in this matter in 1995, and that the proceedings are thus pending for more than eight years, the Chamber concludes that the domestic remedies have not proven effective. For these reasons, the application is admissible despite the pending court proceedings.

39. As to the Federation of BiH's objections to the admissibility of the application due to the six-month rule, that is that the applicant must file his application to the Chamber within six months of receiving a final decision in the matter, the Chamber does not consider this objection well-founded as the applicant has still not received a final decision in his case from the domestic authorities. Consequently, the six-month time limit for filing an application to the Chamber has not started running.

40. As to the Federation of BiH's objection that the lack of a written contract on purchase of the apartment means that the applicant has no protected possession for the purposes of Article 1 of Protocol No. 1 to the Convention, the Chamber will consider this question on the merits of Article 1 of Protocol No. 1 to the Convention.

41. The Chamber finds that none of the other grounds for declaring the application inadmissible have been established. Accordingly, the application is admissible in its entirety.

B. Merits

42. Under Article XI of the Agreement, the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Article I of the Agreement provides that the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Article 6 of the Convention

43. Article 6 paragraph 1 of the Convention, so far as relevant, provides as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

44. The applicant primarily complains of the length of proceedings before the domestic bodies. The reasonableness of the length of proceedings is to be assessed based on criteria laid down by the European Court of Human Rights, namely the complexity of the case, the conduct of the applicant, the conduct of the authorities and the matter at stake for the applicant (see, e.g., case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998).

a. Period to be taken into account

45. It is an uncontested fact that the applicant initiated proceedings before the competent court to determine the ownership over the apartment in question on 12 January 1995. However, the period which falls under the Chamber's jurisdiction did not begin on that date, but rather on 14 December 1995, the date the Agreement came into force. Thus, although the proceedings are pending for over eight years and five months, the Chamber has jurisdiction to consider the period starting from 14 December 1995 to the present, a period of seven years and six months.

b. Applicable criteria

i. The complexity of the case

46. The applicant seeks the domestic organs to confirm his ownership right over the apartment given the steps he took in 1992 to purchase the apartment. The Chamber considers that this determination is not particularly complex.

ii. The conduct of the applicant

47. The Chamber has no information that the conduct of the applicant has in any way contributed to the length of the proceedings. On the contrary, from the statements of the applicant, it appears that he has urged the court on several occasions to issue a decision in his case.

iii. The conduct of the national authorities

48. The Chamber recalls that the applicant received the decision from the first instance body in his favour on 16 October 2000, five years after he first initiated the proceedings in January 1995. However, as the Federation Ministry of Defence appealed the decision, the Cantonal Court quashed that decision and returned the case to the Municipal Court on 7 August 2001. Nearly a year later, the Municipal Court declared its lack of jurisdiction on 6 November 2002. In declaring its lack of jurisdiction, the Municipal Court simply disregarded the claim brought before it by the applicant, which is that he validly concluded a contract on purchase of the apartment and seeks to be registered as the owner over the apartment on the basis of that contract, and not of a new contract to be concluded under the Law on Sale of Apartments with an Occupancy Right. The applicant appealed this decision to the Cantonal Court. In the event that the Cantonal Court rules that the Municipal Court in fact has jurisdiction, then the procedural decision issued by the Municipal Court only served to further delay the proceedings.

c. Conclusion

49. The Chamber holds that the excessive length of proceedings in a relatively simple matter violates the applicant's right to a fair trial within a reasonable time under Article 6, paragraph 1 of the Convention, for which the Federation of BiH is responsible.

2. Article 13 of the Convention

50. Article 13 of the Convention provides as follows:

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

51. In view of its finding under Article 6 of the Convention, the Chamber considers it unnecessary also to examine the application under Article 13 of the Convention. The requirements of Article 13 of the Convention are less strict than those of Article 6 of the Convention and are absorbed by the latter (see, *e.g.*, Eur. Court HR, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296, paragraph 65).

3. Article 1 of Protocol No. 1 to the Convention

52. The applicant alleges a violation of his right to the peaceful enjoyment of possessions. Article 1 of Protocol No. 1 to the Convention reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

53. The Chamber observes that the applicant appears to have concluded a new contract on purchase under the Law on Sale of Apartments with an Occupancy Right. However, this does not resolve the question of whether the Federation's refusal to recognise him as the owner over the

apartment on question based on the steps he took under the Law on Securing Housing for the JNA constitutes a violation of the applicant's right to the peaceful enjoyment of his possessions.

54. In previous JNA apartment cases, the Chamber has held that the contractual rights obtained on the basis of contracts concluded with the former JNA constitute "possessions", within the meaning of Article 1 of Protocol No. 1 to the Convention (see, *e.g.*, case no. CH/96/3, 8 and 9 *Medan, Bastijanović and Marković*, decision on the merits of 3 November 1997, paragraphs 32-34, Decision on Admissibility and Merits March 1996-December 1997; case no. CH/96/2 *et al.*, *Podvorac and Others,* decision on admissibility and merits of 14 May 1998, paragraphs 59-61, Decisions and Reports 1998). These contractual rights (although the contracts may in some cases be challengeable in court), were based on a written contract concluded between the applicants and the former JNA.

55. In the present case, the Chamber must determine whether the steps the applicant took in 1992 towards the purchase of the apartment can be considered to have conferred on him a protected possession within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber recalls that the applicant was assessed the purchase price of his apartment (which happened to be 0.00 YUD) and paid a small fee related to the purchase, and even signed a draft contract, but never concluded the written purchase contract.

a. Does the applicant have a protected possession on the grounds of having concluded a contract?

56. While true that the Municipal Court in its decision issued on 16 October 2000 found that the steps taken by the applicant in 1992 were sufficient to conclude that the applicant had obtained the ownership over the apartment in question, the Cantonal Court quashed this decision and ordered that the first instance organ remove the deficiencies from the judgment and again carefully consider the submitted evidence. It appears to the Chamber that the most probable interpretation of domestic law is that the applicant's position is not that he concluded a contract which may be challengeable in court (as the applicants Messrs. Medan, Marković and D.Đ. and Ms. Fetahagić in the above-mentioned cases), but that he has a claim which is *prima facie* not recognised by domestic law. Although the Chamber does not exclude the possibility that the domestic courts might find that the applicant is the owner over the apartment in question, the Chamber considers that the applicant's claim at the present moment is too tenuous to find that he has a protected possession on the grounds of having concluded a purchase contract.

b. Does the applicant have a present legitimate expectation to have the contract concluded under the Law on Securing Housing for the Yugoslav National Army?

57. The Chamber recalls that, according to the jurisprudence of the European Court of Human Rights, a protected possession can only be an "existing possession" (Eur. Court HR, *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, paragraph 48), or, at least, an asset which the applicant has a "legitimate expectation" to obtain. Furthermore, that "legitimate expectation" must be based upon a valid administrative act or upon legislation in force (see, e.g. case no. CH/98/1040 *Živojnović,* decision on admissibility of 9 October 1999, paragraph 20, Decisions August— December 1999).

58. In the present case, the applicant, at the time of taking the steps towards the purchase of the apartment, had a legitimate expectation to purchase the apartment under the Law on Securing Housing for the Yugoslav National Army. However, that Law is no longer in force. The Chamber considers that while the applicant may have had a legitimate expectation in 1992 to conclude a purchase contract with the JNA and be registered as the owner over the apartment, the applicant presently does not have a valid legitimate expectation to be recognised as the owner over such apartment. Consequently, he does not have a protected possession in the sense of having a valid legitimate expectation to be recognised as the owner over the apartment based on the steps he took in 1992 under the Law on Securing Housing for the JNA.

c. Conclusion

59. In conclusion, the Chamber holds that the applicant's claim under Article 1 of Protocol No. 1 to the Convention is too tenuous to amount to a protected possession, and therefore, there has been no violation of Article 1 of Protocol No. 1 to the Convention.

VIII. REMEDIES

60. The Chamber has established that the Federation of BiH violated the right of the applicant to a fair trial within a reasonable time. According to Article XI(1)(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the Federation of BiH to remedy the established breach. In this connection the Chamber shall consider, *inter alia,* issuing orders to cease and desist and monetary relief (including pecuniary and non-pecuniary damages).

61. With regard to the court proceedings, the Chamber considers it appropriate to order the respondent Party to take all necessary steps to secure the speedy resolution of the applicant's claim.

62. The applicant did not request any monetary compensation for pecuniary damage, and the Chamber finds no reason to award any.

63. However, the Chamber *proprio motu* considers it appropriate to award a sum of 1,000 KM to the applicant in recognition of the sense of injustice he suffered due to the unjustified delays in the resolution of his claim before the domestic organs, such sum to be paid not later than 6 August 2003.

64. The Chamber will further award simple interest at an annual rate of 10% as of 6 August 2003 on the sum awarded in the preceding paragraph or any unpaid portion thereof until the date of settlement in full.

65. The Chamber will order the respondent Party to report to it no later than 6 August 2003 on the steps taken to comply with the above orders.

IX. CONCLUSIONS

66. For the above reasons, the Chamber decides,

1. by 11 votes to 3, to declare the application admissible against the Federation of Bosnia and Herzegovina in respect of Article 1 of Protocol No. 1 to the European Convention on Human Rights;

2. by 13 votes to 1, to declare the application admissible against the Federation of Bosnia and Herzegovina in respect of Articles 6 and 13 of the European Convention on Human Rights;

3. by 12 votes to 2, that the right of the applicant to a fair trial within a reasonable time under Article 6 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that it is not necessary to examine the application under Article 13 of the European Convention on Human Rights;

5. unanimously, that the right of the applicant to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights has not been violated;

6. by 13 votes to 1, to order the Federation of Bosnia and Herzegovina to take all necessary steps to secure the speedy resolution of the applicant's claim;

7. by 10 votes to 4, to order the Federation of Bosnia and Herzegovina to pay to the applicant, not later than 6 August 2003, the sum of 1,000 (one thousand) Convertible Marks (Konvertibilnih Maraka) by way of compensation for non-pecuniary damage;

8. by 10 votes to 4, to order the Federation of Bosnia and Herzegovina to pay simple interest at an annual rate of 10% (ten percent) on the sum specified in conclusion no. 7 above or any unpaid portion thereof as from 6 August 2003 until the date of settlement in full; and

9. unanimously, to order the Federation of Bosnia and Herzegovina to report to it on the steps taken to comply with the above orders no later than 6 August 2003.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ODLUKA O PRIHVATLJIVOSTI I MERITUMU

Predmeti br. CH/98/874, CH/98/893, CH/98/994, CH/99/1413, CH/99/1426, CH/99/1569, CH/99/1754, CH/99/1761, CH/99/2161, CH/99/2271, CH/99/2357, CH/99/2845 i CH/99/3119

Kosta PEMAC, Slobodan VUJIČIĆ, S.C, Vukojica NIKOLENDŽIĆ, Milorad IVANOVIĆ, R.V, Velimir NOGO, J.O, Milovan MIŠIĆ, Petar MEMETAJ, Slavko VULIN, Bogdan ŽIVAK i Zdravko ŠOŠIĆ

protiv

BOSNE I HERCEGOVINE

i

FEDERACIJE BOSNE I HERCEGOVINE

Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine, na zasjedanju Velikog vijeća od 9. februara 2005. godine, sa sljedećim prisutnim članovima:

Gosp. Miodrag PAJIĆ, predsjednik
Gosp. Mehmed DEKOVIĆ, potpredsjednik
Gosp. Želimir JUKA, član
Gosp. Ćazim SADIKOVIĆ, član
Gosp. Mato TADIĆ, član

Gosp. Nedim ADEMOVIĆ, arhivar

Razmotrivši gore spomenute prijave podnesene Domu za ljudska prava za Bosnu i Hercegovinu (u daljnjem tekstu: Dom) u skladu sa članom VIII(1) Sporazuma o ljudskim pravima (u daljnjem tekstu: Sporazum) sadržanom u Aneksu 6 uz Opći okvirni sporazum za mir u Bosni i Hercegovini;

Konstatujući da je Dom (u daljnjem tekstu: Dom) prestao postojati 31. decembra 2003. godine i da je Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine (u daljnjem tekstu: Komisija) dobila mandat prema sporazumima u skladu sa članom XIV Aneksa 6 uz Opći okvirni sporazum za mir u Bosni i Hercegovini koji su zaključeni u septembru 2003. i januaru 2005. godine (u daljnjem tekstu: Sporazum iz 2005. godine) da odlučuje o predmetima podnesenim Domu do 31. decembra 2003. godine;

Usvaja sljedeću odluku u skladu sa članom VIII(2)(d) Sporazuma, čl. 3. i 8. Sporazuma iz 2005. godine, kao i pravilom 21. stavom 1(a) u vezi sa pravilom 51. stavom 1(a) Pravila procedure Komisije:

I. UVOD

1. Predmeti se odnose na pokušaje podnosilaca prijava pripadnika bivše Jugoslovenske narodne armije (u daljnjem tekstu: JNA), odnosno u slučaju broj CH/98/994 supruge pripadnika JNA i u slučaju broj CH/99/3119 supruga pripadnice JNA, da vrate u posjed stanove u Bosni i Hercegovini i da budu priznati kao njihovi vlasnici.

2. Prijave pokreću pitanja u vezi s čl. 6. i 8. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (u daljnjem tekstu: Evropska konvencija) i članom 1. Protokola broj 1 uz Evropsku konvenciju, te članom II(2)(b) Sporazuma.

3. S obzirom na sličnost između činjenica u predmetima i žalbenih navoda podnosilaca prijava, Komisija je odlučila da ove prijave spoji u skladu s pravilom 33. Pravila procedure Komisije.

II. POSTUPAK PRED DOMOM/KOMISIJOM

4. Prijave su podnesene i registrovane između avgusta 1998. i novembra 1999. godine.

5. Dom, odnosno Komisija, su prijave proslijedili tuženim stranama prema čl. 6. i 8. Evropske konvencije i članu 1. Protokola broj 1 uz Evropsku konvenciju, te članu II(2)(b) Sporazuma u periodu između 28. novembra 2002. i 4. maja 2004. godine. Do dana donošenja ove odluke, tužene strane dostavile su pismena zapažanja u svim prijavama.

6. Pismena zapažanja proslijeđena su podnosiocima prijava u periodu između 3. februara 2003. i 18. juna 2004. godine.

7. Malo vijeće Komisije je 8. februara 2005. godine, u skladu sa pravilom 51. stavom 2. Pravila procedure Komisije, usvojilo prijedlog o meritumu prijave.

III. UTVRĐIVANJE ČINJENICA

a. Činjenice koje su zajedničke svim predmetima

8. Svi predmetni stanovi su bili u društvenom vlasništvu. Imaoci društvene svojine u Socijalističkoj Federativnoj Republici Jugoslaviji su bili državni organi ili pravna lica. JNA je bila jedan takav državni organ koji je kontrolisao određeni dio imovine u društvenom vlasništvu. Svi podnosioci prijava su bili u službi JNA kao vojna ili civilna lica. Svi stanovi se nalaze u Sarajevu. Svaki podnosilac prijave je uživao stanarsko pravo na stanu koji mu je dodijelila JNA, izuzev u predmetu Zdravka Šošića, u kojem je nosilac stanarskog prava na stanu bila njegova supruga i u predmetu S.C, gdje je nosilac stanarskog prava na stanu bio njen suprug.

9. Svi podnosioci prijava su, osim u slučaju CH/99/1569, gdje je potpisnik bio Vazduhoplovni zavod «Orao» Rajlovac, sa JNA, u periodu između 11. novembra 1991. i 2. aprila 1992. godine zaključili ugovor o kupoprodaji stanova na kojima su imali stanarsko pravo. Ugovori su zaključeni u skladu sa Zakonom o stambenom obezbjeđenju u JNA (vidi tačke 91. i 92) sa državom SFRJ – SSNO – Vojnom ustanovom za upravljanje stambenim fondom Jugoslovenske narodne armije (u daljnjem tekstu: Stambeni fond bivše JNA). Ovim zakonom, koji je donesen 1990. godine i koji je stupio na snagu 6. januara 1991. godine, su, u osnovi, regulisane stambene potrebe vojnih i civilnih pripadnika JNA.

10. Svi podnosioci prijava su stanove napustili početkom ratnih dejstava u Bosni i Hercegovini (u daljnjem tekstu: BiH). Podnosilac prijave, Bogdan Živak je stan napustio 8. marta 1996. godine.

11. Svi podnosioci prijava su pokrenuli upravne postupke pred nadležnim organima za povrat posjeda svojih stanova. U svim predmetima, nadležni organi su osporili njihove zahtjeve za povrat.

Podnosioci prijava nisu bili u mogućnosti da povrate u posjed svoje stanove u BiH zbog primjene člana 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima u vezi sa članom 39e. Zakona o prodaji stanova na kojima postoji stanarsko pravo (vidi tačke 104. do 117. ove odluke). Član 3a. je stupio na snagu 1. jula 1999. godine.

12. Svi podnosioci prijava su odbijeni sa zahtjevima za povrat stanova, jer je utvrđeno da su ostali u Vojsci Jugoslavije nakon 14. decembra 1995. godine.

13. Svi ugovori su potpisani od strane oba ugovarača, potvrđena im je pravovaljanost ugovora od strane vojnog pravobranioca. Ugovori sadrže popunjen ili bjanko pečat nadležne poreske službe. Svi podnosioci prijava dostavili su dokaze u vidu kopija uplatnica ili potvrda banaka o potpunoj ili većinskoj uplati kupoprodajne cijene stana. Potpisi na nekim ugovorima nisu ovjereni kod nadležnog suda. Neki od podnosilaca prijava to nisu uspjeli učiniti nakon zaključivanja ugovora, zbog obustave procesa otkupa stanova iz Stambenog fonda bivše JNA od strane izvršne vlasti Socijalističke Republike Bosne i Hercegovine 1992. godine. Međutim, prema članu 9. stavu 4. Zakona o prometu nepokretnosti, oni to nisu ni bili u obavezi učiniti (vidi tačku 100. dole).

14. Neki od stanova su na korištenje dodijeljeni trećim licima, uglavnom pripadnicima Vojske Federacije Bosne i Hercegovine ili članovima njihovih porodica, koji ih još uvijek koriste.

b. Činjenice u pojedinačnim predmetima

1) Predmet broj CH/98/874, Kosta PEMAC protiv Federacije Bosne i Hercegovine

15. Podnosilac prijave je 16. marta 1992. godine zaključio ugovor o kupoprodaji stana u ulici Trg heroja (bivši Trg Pere Kosorića) broj 27/2, u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca, a potpisi ovjereni pred nadležnim sudom. Ugovor sadrži pečat nadležne poreske službe. U ugovoru je navedeno da kupoprodajna cijena iznosi 352.519 dinara. Prema uplatnici Vojnog servisa, evidentno je da je podnosilac prijave izvršio uplatu u iznosu od 322.000 jugoslovenskih dinara.

16. Podnosilac prijave je podnio zahtjev za vraćanje stana u posjed Upravi. Uprava je donijela rješenje, broj: 23/6-372-P-2829/99 od 25. marta 2000. godine, kojim se odbija zahtjev podnosioca prijave “za povrat stanarskog prava”, kao neosnovan, jer je na dan 30. aprila 1991. godine bio aktivno vojno lice u JNA, tj. do 19. novembra 1996. godine, kada mu je prestala profesionalna vojna služba. Također, utvrđeno je da podnosilac prijave nije bio državljanin Socijalističke Republike Bosne i Hercegovine na dan 30. aprila 1991. godine.

17. Podnosilac prijave je protiv rješenja od 25. marta 2000. godine podnio žalbu Ministarstvu. Ministarstvo je donijelo rješenje, broj: 27/02-23-1914/00 od 22. decembra 2000. godine, kojim se žalba podnosioca prijave odbija kao neosnovana. Podnosilac prijave nije pokretao upravni spor protiv ovog rješenja.

18. Podnosilac prijave je podnio zahtjev za vraćanje stana u posjed i CRPC-u. CRPC je odbacila zahtjev podnosica prijave zaključkom, broj: 511-104876-1/1 od 9. jula 2002. godine, iz razloga što je podnosilac prijave ostao poslije 14. decembra 1995. godine u aktivnoj službi u oružanim snagama van teritorije BiH.

19. Podnosilac prijave nije podnosio zahtjev za izdavanje naloga za uknjižbu Federalnom ministarstvu odbrane niti je podnio tužbu radi utvrđenja pravne valjanosti ugovora i upisa prava vlasništva.

2) Predmet broj CH/98/893, Slobodan VUJIČIĆ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

20. Podnosilac prijave je 2. aprila 1992. godine zaključio ugovor o kupoprodaji stana u ulici Envera Šehovića broj 46/7 (raniji naziv Omera Maslića broj 20/7), u Sarajevu. Ugovor je potpisan od strane oba ugovarača. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je uplatio kupoprodajnu cijenu u cjelokupnom iznosu.

21. Podnosilac prijave je 12. juna 1998. godine podnio Upravi zahtjev za vraćanje stana u posjed. Uprava je donijela rješenje, broj: 23/6-372-P-2165/98 od 13. septembra 2000. godine, kojim se odbija zahtjev za "povrat stanarskog prava" podnosioca prijave, kao neosnovan, jer je utvrđeno da je i nakon 14. decembra 1995. godine ostao aktivno vojno lice u Vojsci Jugoslavije, tj. do 19. novembra 1996. godine, kada mu je prestala profesionalna vojna služba.

22. Podnosilac prijave je protiv rješenja od 23. februara 2001. godine podnio žalbu Ministarstvu za stambene poslove Kantona Sarajevo. U žalbi je naveo da je Uprava pogrešno utvrdila činjenicu da je on bio pripadnik Vojske Jugoslavije. Naveo je da je bio pripadnik Vojske Republike Srpske, a ne Vojske Jugoslavije, te je predložio da Ministarstvo zatraži potvrdu od Ministarstva odbrane Republike Srpske u pogledu njegovog statusa.

23. Ministarstvo je donijelo rješenje, broj: 27/02-23-2691/03 od 21. maja 2003. godine, kojim se mijenja rješenje Uprave, broj: 23/6-372-P-2165/98 od 13. septembra 2000. godine, tako da se u dispozitivu navodi da se odbija zahtjev podnosioca prijave “za povrat u posjed stana” kao neosnovan.

24. Protiv rješenja Ministarstva podnosilac prijave je pokrenuo upravni spor pred Kantonalnim sudom. Kantonalni sud je donio presudu, broj U-299/03 od 18. februara 2004. godine, kojom se tužba podnosioca prijave uvažava, osporeno i prvostepeno rješenje poništavaju i predmet vraća prvostepenom organu na ponovni postupak. Postupak pred Upravom je još uvijek u toku.

3) Predmet broj CH/98/994, S.C. protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

25. Podnositeljica prijave je 30. septembra 1998. godine dostavila Domu punomoć supruga za zastupanje u pravnoj stvari vraćanja stana u posjed.

26. Suprug podnositeljice prijave je 13. februara 1992. godine zaključio Ugovor o kupoprodaji stana u ulici Ismeta Mujezinovića broj 32/III u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca, a potpisi ovjereni pred nadležnim sudom. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je dostavio kopiju uplatnica o plaćenoj kupoprodajnoj cijeni u cjelokupnom iznosu.

27. Podnositeljica prijave je 18. juna 1998. godine podnijela zahtjev za vraćanje predmetnog stana u posjed Upravi. Uprava je donijela rješenje, broj: 23/1-372-1099/98 od 27. septembra 2000. godine, kojim se odbija zahtjev podnositeljice prijave zbog toga što je utvrđeno da je njen suprug, nosilac stanarskog prava na stanu, ostao u aktivnoj službi JNA nakon 14. decembra 1995. godine. Ta činjenica je utvrđena iz Naredbe načelnika Generalštaba Vojske Jugoslavije, broj 4-200 od 2. decembra 1998. godine ("Službeni vojni list", broj 26/98).

28. Podnositeljica prijave je protiv ovog rješenja podnijela žalbu Ministarstvu. Ministarstvo je donijelo rješenje, broj: 27/02-23-674/01 od 22. marta 2001. godine, kojim se žalba podnositeljice prijave odbija. Podositeljica prijave je protiv ovog rješenja pokrenula upravni spor pred Kantonalnim sudom. Kantonalni sud je uvažio tužbu podnositeljice prijave poništio osporeno i prvostepeno rješenje i predmet vratio na ponovni postupak. Komisija nema dodatnih podataka o ovoj sudskoj odluci.

29. Uprava je donijela rješenje, broj: 23/1-372-1099/98 16. juna 2003. godine, kojim se zahtjev podnositeljice prijave odbija kao neosnovan. Podnositeljica prijave je protiv ovog rješenja podnijela žalbu Ministarstvu. Ministarstvo je donijelo rješenje, broj: 27/02-23-3854/03 od 10. februara 2004. godine, kojim se žalba podnositeljice prijave odbija. Iz dodatnih informacija tužene strane, Federacije Bosne i Hercegovine, proizilazi da podnositeljica prijave protiv ovog rješenja Ministarstva nije pokretala upravni spor.

4) Predmet broj CH/99/1413, Vukojica NIKOLENDŽIĆ protiv Federacije Bosne i Hercegovine

30. Podnosilac prijave je 10. februara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Hasana Brkića broj 50/IV u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca, a potpisi ovjereni pred nadležnim sudom. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je dostavio kopiju uplatnica o plaćenoj kupoprodajnoj cijeni u cjelokupnom iznosu.

31. Podnosilac prijave je podnio Upravi zahtjev za vraćanje predmetnog stana u posjed. Uprava je donijela rješenje, broj: 23/1-372-1759/99 od 23. avgusta 2002. godine, kojim se odbija zahtjev podnosioca prijave zbog toga što je utvrđeno da je ostao u aktivnoj službi oružanih snaga JNA poslije 14. decembra 1995. godine i to na osnovu izjave supruge podnosioca prijave, date lično na zapisnik usmene rasprave, te uvjerenja Saveznog ministarstva za odbranu Beograd, broj 1572-1 od 21. avgusta 2002. godine.

32. Podnosilac prijave je protiv ovog rješenja podnio žalbu Ministarstvu. Ministarstvo je donijelo rješenje, broj: 27/02-23-4672/02 od 15. aprila 2003. godine, kojim se poništava rješenje Uprave i predmet vraća prvostepenom organu na ponovni postupak.

33. Prema informaciji podnosioca prijave, dostavljenoj Komisiji 1. juna 2004. godine, podnosilac prijave se nije vratio u posjed stana.

5) Predmet broj CH/99/1426, Milorad IVANOVIĆ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

34. Podnosilac prijave je 7. januara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Hasana Brkića broj 38/1, u Sarajevu. Ugovor je potpisan od strane oba ugovarača. Potpisi su ovjereni pred nadležnim sudom. Takođe, ugovor sadrži popunjen pečat nadležne poreske službe. Podnosilac prijave je priložio uplatnicu iz koje se vidi da je podnosilac prijave 17. januara 1992. godine izvršio uplatu kupoprodajne cijene u cjelokupnom iznosu.

35. Podnosilac prijave je podnio CRPC-u zahtjev za vraćanje stana u posjed. CRPC je odlukom, broj: 514-147-1/1 od 9. jula 1999. godine, odbacio zahtjev podnosioca prijave, jer je podnosilac prijave ostao u službi u Vojsci Jugoslavije i poslije 14. decembra 1995. godine. Podnosilac prijave je podnio zahtjev za ponovno razmatranje ove odluke. CRPC je donio odluku, broj: R-514-147-1/1-90-1100 od 4. marta 2003. godine, kojom je odbio zahtjev za ponovno razmatranje odluke od 9. jula 1999. godine.

36. Podnosilac prijave je 1. jula 1999. godine podnio zahtjev za vraćanje stana u posjed Upravi. Komisija nema informacija o načinu odlučenja Uprave. Međutim, prema stanju spisa, čini se da je Uprava dozvolila vraćanje stana u posjed podnosiocu prijave. U žalbenom postupku, a rješenjem Ministarstava broj: 33-05/02 od 27. novembra 2002. godine, preinačeno je prvostepeno rješenje Uprave, broj: 23-1-372-2459/9 od 26. aprila 2002, i zahtjev podnosioca prijave odbijen.

37. Podnosilac prijave je protiv ovog rješenja pokrenuo upravni spor pred Vrhovnim sudom Federacije Bosne i Hercegovine. Postupak pred Vrhovnim sudom Federacije Bosne i Hercegovine je još uvijek u toku.

38. Prema informaciji koju je tužena strana Federacija Bosne i Hercegovine dostavila Komisiji 26. aprila 2004. godine, predmetni stan trenutno privremeno bespravno koristi K.I.

6) Predmet broj CH/99/1569, R.V protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

39. Podnosilac prijave je 11. novembra 1991. godine zaključio Ugovor o kupoprodaji stana u ulici Tešanjska 9/1 u Sarajevu (bivši objekat A4 i 5 na Marin dvoru) sa Vazduhoplovnim zavodom "Orao" Rajlovac. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca, a potpisi ovjereni pred nadležnim sudom. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je dostavio kopiju uplatnica od 6. i 13 februara 1992. godine o plaćenoj kupoprodajnoj cijeni u cjelokupnom iznosu.

40. Podnosilac prijave je 6. oktobra 1998. godine podnio Upravi zahtjev za povrat stana u posjed. Uprava je rješenjem, broj: 23/1-372-3608/98 od 30. oktobra 2001. godine, odbila njegov zahtjev, jer je utvrđeno da je podnosilac prijave ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine.

41. Protiv ovog rješenja, podnosilac prijave je podnio žalbu Ministarstvu. Ministarstvo je žalbu odbilo rješenjem broj: 27/02-23-4109/01 od 10. maja 2002. godine.

42. Komisija nema informacija da li je podnosilac prijave preduzimao daljnje pravne radnje u vezi sa ovim postupkom.

7) Predmet broj CH/99/1754, Velimir NOGO protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

43. Podnosilac prijave je 10. februara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Trg heroja broj 19/III u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je dostavio potvrdu YU Garant banke iz koje proizilazi da je podnosilac prijave na ime kupoprodajne cijene 12. februara 1992. godine uplatio cjelokupni iznos kupoprodajne cijene.

44. Podnosilac prijave je 3. jula 1998. godine podnio Upravi zahtjev za povrat stana u posjed. Rješenjem, broj: 23-04/II-23-P-2154/98 od 1. aprila 2000. godine, zahtjev podnosioca prijave je odbijen. Protiv ovog rješenja podnosilac prijave je podnio žalbu Ministarstvu. Ministarstvo je rješenjem, broj: 27/02-23-1792/00 od 20. decembra 2000. godine, poništilo prvostepeno rješenje i predmet vratilo Upravi na ponovni postupak. Uprava je u ponovnom postupku donijela rješenje, broj: 23-04/II-23-P-2154/98 od 29. maja 2001. godine kojim je odbijen zahtjev za povrat stana.

45. Protiv ovog rješenja, podnosilac prijave je podnio žalbu Ministarstvu. Ministarstvo je rješenjem, broj 23-04/II-23-P-2154/98 od 15. marta 2002. godine, žalbu odbilo. Podnosilac prijave je kod Kantonalnog suda pokrenuo upravni spor. Kantonalni sud je presudom, broj: U:341/02 od 30. januara 2003. godine, tužbu podnosioca prijave uvažio, osporeno i prvostepeno rješenje poništio i predmet vratio na ponovni postupak.

46. U ponovnom postupku, Uprava je ponovno odbila zahtjev podnosioca prijave, rješenjem broj: 23-04/II-23-P-2154/98 od14. jula 2003. godine, jer je utvrđeno da je ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine. Protiv ovog rješenja, podnosilac prijave je ponovno podnio žalbu Ministarstvu. Ministarstvo je žalbu odbilo rješenjem broj: 27/02-23-5328/03 od 19. januara 2004. godine.

47. Protiv ovog rješenja podnosilac prijave je pokrenuo upravni spor kod Kantonalnog suda. Kantonalni sud je rješenjem, broj: U-123/04 od 22. juna 2004. godine, postupak prekinuo uz obrazloženje da je odlukom Predstavničkog doma Parlamenta Federacije Bosne i Hercegovine ("Službene novine Federacije Bosne i Hercegovine“, broj 28/04) određeno da se prekinu svi

upravni i sudski postupci za povrat vojnih stanova do donošenja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo.

48. Podnosilac prijave je, takođe, podnio zahtjev za povrat stana u posjed CRPC-u. Odlukom CRPC-a, broj: 303-2319-1/1 od 16. aprila 2002. godine, odbačen je zahtjev podnosioca prijave zbog nenadležnosti jer se, zbog aktivne službe u oružanim snagama van BiH, nakon 14. decembra 1995. godine, ne može smatrati izbjeglicom.

49. Iz dostavljene kopije Službenog vojnog lista, broj 37/99 od 22. novembra 1999. godine, evidentno je da je podnosilac prijave, Naredbom broj 5-203 načelnika Generalštaba Vojske Jugoslavije, od 28. oktobra 1999. godine, unaprijeđen u čin "pešadijskog potpukovnika" sa danom 29. septembar 1999. godine.

8) Predmet broj CH/99/1761, J.O protiv Federacije Bosne i Hercegovine

50. U ime svoga supruga, prijavu je podnijela S.O. Dana 11. avgusta 2004. godine dostavila je punomoć prema kojoj je njen suprug J.O. ovlašćuje da je zastupa u postupku pred Komisijom povodom ove prijave.

51. Podnosilac prijave je 10. februara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Kemala Kapetanovića broj 8, u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca, a potpisi ovjereni pred nadležnim sudom. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave dostavio je kopije uplatnica od 6. februara 1992. godine o uplaćenoj cijelokupnoj kupoprodajnoj cijeni.

52. Podnosilac prijave je 8. juna 1998. godine podnio zahtjev Upravi za povrat stana u posjed. Uprava je rješenjem, broj: 23/6 –372-P-2273 /98 od 26. decembra 2000. godine, odbila zahtjev. Protiv ovog rješenja podnosilac prijave je podnio žalbu Ministarstvu. Ministarstvo je žalbu odbilo rješenjem, 27/02-23-1077/01 od 14. avgusta 2001. godine.

53. Protiv ovog rješenja, podnosilac prijave je pokrenuo upravni spor kod Kantonalnog suda. Kantonalni sud je presudom, broj: U-387/02 od 6. februara 2003. godine, tužbu uvažio, osporeno i prvostepeno rješenje poništio i predmet vratio na ponovni postupak.

54. Odlučujući u ponovnom postupku, Uprava je odbila zahtjev za povrat stana rješenjem broj: 23/6–372-P-2273 /98 od 23. januara 2004. godine, jer je utvrđeno da je podnosilac prijave ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine. Komisija nema informacija da li je podnosilac prijave preduzimao daljnje pravne radnje u vezi sa ovim postupkom.

55. Podnosilac prijave je 30. aprila 1999. godine podnio zahtjev za povrat stana u posjed CRPC-u. Dopisom od 9. jula 2004. godine, podnosilac prijave je obavijestio Komisiju da postupak pred CRPC još uvijek nije okončan. Komisija nije dobila daljnje informacije povodom ovoga postupka.

9) Predmet broj CH/99/2161, Milovan MIŠIĆ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

56. Podnosilac prijave je 10. februara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Senada Mandića Dende broj 4, u Sarajevu. Ugovor je potpisan od strane oba ugovarača, ovjeren od strane vojnog pravobranioca. Ugovor sadrži pečat nadležne poreske službe. Podnosilac prijave je dostavio potvrdu YU Garant banke iz koje proizilazi da je podnosilac prijave na ime kupoprodajne cijene 14. februara 1992. godine uplatio cjelokupni iznos kupoprodajne cijene.

57. Podnosilac prijave je 12. avgusta 1998. godine podnio zahtjev Upravi za povrat stana u posjed. Uprava je rješenjem, broj: 23/5-372-3233/98 od 29. septembra 2000. godine, odbila

zahtjev podnosioca prijave za vraćanje stana u posjed kao neosnovan, jer je utvrđeno da je podnosilac prijave ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine.

58. Ministarstvo je rješenjem, broj: 27/02-23-2495/01 od 20. decembra 2001. godine, odbilo žalbu podnosioca prijave protiv prvostepene odluke od 29. septembra 2000. godine.

59. Kantonalni sud u Sarajevu je presudom, broj: U-204/02 od 6. juna 2003. godine, uvažio tužbu podnosioca prijave i poništio osporeno rješenje od 20. decembra 2001. godine, kao i prvostepeno rješenje i vratio predmet prvostepenom organu na ponovno rješavanje.

60. Uprava je, u ponovnom postupku, rješenjem, broj: 23/5-372-3233/98 od 7. aprila 2004. godine, odbila zahtjev podnosioca prijave za vraćanje stana u posjed kao neosnovan.

61. Ministarstvo je rješenjem, broj: 27/02-23-2103/04 od 4. avgusta 2004. godine, odbilo žalbu podnosioca prijave protiv prvostepene odluke od 7. aprila 2004. godine.

62. Podnosilac prijave je u međuvremenu pokrenuo postupak utvrđivanja valjanosti ugovora pred Općinskim sudom II u Sarajevu. Općinski sud je presudom, broj P: 654/02 od 23. juna 2003. godine, utvrdio da je kupoprodajni ugovor koji je podnosilac prijave zaključio 10. februara 1992. godine pravovaljan i da je tuženo Federalno ministarstvo odbrane dužno trpiti da se podnosilac prijave uknjiži kao vlasnik predmetnog stana kod Zemljišno-knjižnog ureda kod Općinskog suda I u Sarajevu.

63. Kantonalni sud u Sarajevu je presudom, broj GŽ: 1474/03 od 9. aprila 2004. godine, odbio žalbu Federalnog ministarstva odbrane protiv gore navedene presude i potvrdio prvostepenu presudu.

64. Podnosilac prijave je podnio zahtjev za upis prava vlasništva, pod brojem Dn 6666/04. Podnosilac prijave nije naveo kojem organu je podnio zahtjev, ali čini se da je zahtjev podnesen Zemljišno-knjižnom uredu Općinskog suda u Sarajevu. Komisija nema dodatnih informacija o ovom postupku.

10) Predmet broj CH/99/2271, Petar MEMETAJ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

65. Podnosilac prijave je 14. februara 1992. godine zaključio ugovor o kupoprodaji stana, u ulici Kemala Kaptanovića broj 18 (bivša ul. Slobodana Principa broj 10), u Sarajevu. Ugovor sadrži potpise oba ugovarača, ovjeren je od strane vojnog pravobranioca i sadrži pečat nadležne poreske službe. Podnosilac prijave je uplatio cjelokupnu kupoprodajnu cijenu u februaru 1992. godine. Dan uplate nije vidljiv na kopiji uplatnice koju je podnosilac prijave dostavio u spis.

66. Podnosilac prijave je napustio stan i mjesto stanovanja početkom ratnih dejstava. Zahtjev za povrat stana u posjed podnio je 11. juna 1998. godine. Uprava je rješenjem, broj: 23-/1-372-973/98 od 30. maja 2000. godine, odbila zahtjev kao neosnovan, jer je utvrđeno da je podnosilac prijave ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine i jer se ne može smatrati izbjeglicom.

67. Protiv ovog rješenja, podnosilac prijave je podnio žalbu Ministarstvu. Ministarstvo ju je rješenjem, broj: 27/02-23-2282/00 od 25. avgusta 2000. godine, odbilo kao neosnovanu.

68. Podnosilac prijave je protiv ovog rješenja pokrenuo upravni spor pred Kantonalnim sudom. Kantonalni sud je, presudom broj U-635/00 od 5. aprila 2002. godine, uvažio tužbu podnosioca prijave i osporeno rješenje poništio.

69. Ministarstvo je, u ponovnom postupku razmatranja žalbe podnosioca prijave, rješenjem broj: 27/02-23-2282/00 od 6. avgusta 2002. godine, poništilo tačku I dispozitiva osporenog rješenja od 30. maja 2000. godine i odbilo zahtjev podnosioca prijave za vraćanje stana u posjed.

70. Protiv ovog rješenja, podnosilac prijave je pokrenuo upravni spor pred Kantonalnim sudom. Kantonalni sud je, presudom broj U-605/02 od 30. januara 2003. godine, uvažio tužbu i poništio osporeno, kao i prvostepeno rješenje i predmet vratio na ponovni postupak.

71. Uprava je, u ponovnom postupku, rješenjem broj: 23/1-372-973/98 od 3. februara 2004. godine odbila zahtjev podnosioca prijave za vraćanje stana u posjed.

72. Podnosilac prijave je 17. februara 2004. godine podnio tužbu Općinskom sudu u Sarajevu sa zahtjevom da utvrdi valjanost ugovora o kupoprodaji stana od 14. februara 1992. godine, iseli privremenog korisnika iz stana i preda mu isti u posjed. Ovaj postupak je u toku.

73. Uprava je, zaključkom broj: 23/1-372-973-I/98 od 17. avgusta 2004. godine, prekinula postupak u predmetu vraćanja stana podnosioca prijave u posjed, uz obrazloženje da je Odlukom Predstavničkog doma Parlamenta Federacije Bosne i Hercegovine ("Službene novine Federacije Bosne i Hercegovine“, broj 28/04) određeno da se prekinu svi upravni i sudski postupci za povrat vojnih stanova do donošenja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo.

11) Predmet broj CH/99/2357, Slavko VULIN protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

74. Podnosilac prijave je 26. februara 1992. godine zaključio ugovor o kupoprodaji stana u ulici Aleja lipa broj 47/VI (bivša ul. Obala 27. jula, broj 55/IV), u Sarajevu. Ugovor sadrži potpise oba ugovarača, ugovor je ovjeren od strane vojnog pravobranioca i sadrži pečat nadležne poreske službe. Podnosilac prijave je uplatio cjelokupan iznos kupoprodajne cijene 9. marta 1992. godine.

75. Podnosilac prijave je podnio zahtjev za povrat stana u posjed Upravi. Uprava je rješenjem, broj: 23/6-372-P-5382/98 od 25. marta 2000. godine, odbila zahtjev kao neosnovan, jer je utvrđeno da je podnosilac prijave ostao u aktivnoj službi Vojske Jugoslavije nakon 14. decembra 1995. godine, tj. do 31. decembra 1997. godine kada je penzionisan.

76. Podnosilac prijave je protiv ovog rješenja podnio žalbu Ministarstvu. Ministarstvo je rješenjem, broj: 27/02-23-2662/00 od 7. decembra 2000. godine, odbilo kao neosnovanu.

77. Podnosilac prijave je protiv ovog rješenja pokrenuo upravni spor pred Kantonalnim sudom. Kantonalni sud u Sarajevu je presudom, broj U-324/01 od 15. avgusta 2002. godine, uvažio tužbu podnosioca prijave, poništio oba rješenja i predmet vratio na ponovni postupak.

78. Uprava je, u ponovnom postupku, donijela rješenje, broj: 23/6-372-P5382/98 od 29. novembra 2002. godine, kojim je odbila zahtjev podnosioca prijave za povrat stana u posjed kao neosnovan. Podnosilac prijave je protiv ovog rješenja podnio žalbu, koju je Ministarstvo rješenjem, broj: 27/02-23-1031/03 od 25. septembra 2003. godine, odbilo kao neosnovanu.

79. Podnosilac prijave je pred Kantonalnim sudom pokrenuo upravni spor protiv ovog rješenja. Kantonalni sud je rješenjem, broj: U-594/03 od 18. juna 2004. godine, prekinuo postupak uz obrazloženje da je Odlukom Predstavničkog doma Parlamenta Federacije Bosne i Hercegovine ("Službene novine Federacije Bosne i Hercegovine“, broj 28/04) određeno da se prekinu svi upravni i sudski postupci za povrat vojnih stanova do donošenja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo.

12) Predmet broj CH/99/2845, Bogdan ŽIVAK protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

80. Podnosilac prijave je 23. marta 1992. godine zaključio ugovor o kupoprodaji stana u ulici Grbavička broj 43, u Sarajevu. Ugovor je potpisan od strane oba ugovarača. Ugovor sadrži bjanko pečat nadležne poreske službe. Podnosilac prijave je dostavio kopije uplatnica o plaćenoj kupoprodajnoj cijeni u cijelosti od 13. i 19. februara 1992. godine.

81. Podnosilac prijave je 25. maja 1998. godine podnio Upravi zahtjev za vraćanje stana u posjed. Uprava je donijela rješenje, broj: 23/6-372-887/98 od 23. februara 2001. godine, kojim se odbija zahtjev podnosioca prijave kao neosnovan, jer je utvrđeno da je podnosilac prijave ostao aktivno vojno lice u Vojsci Jugoslavije nakon 14. decembra 1995. godine, tj. do 1. jula 1997. godine, kada mu je rješenjem o penzionisanju Zavoda za socijalno osiguranje vojnih osiguranika Beograd priznato pravo na invalidsku penziju.

82. Podnosilac prijave je protiv rješenja od 23. februara 2001. godine podnio žalbu Ministarstvu. U žalbi je naveo da je Uprava pogrešno utvrdila činjenicu da je on bio pripadnik Vojske Jugoslavije. Navodi da je od 4. aprila 1992. godine do 30. juna 1996. godine bio pripadnik Vojske Republike Srpske, a ne Vojske Jugoslavije. Vrijeme od 30. juna 1996. godine do 1. jula 1997. godine, kada je ostvario pravo na invalidsku penziju, proveo je na liječenju u bolnici. Kao dokaz, uz žalbu je priložio uvjerenje Ministarstva odbrane Republike Srpske od 7. decembra 2000. godine, Izvještaj Zavoda za socijalno osiguranje vojnih osiguranika Republike Srpske i otpusnicu iz bolnice Koran-Pale. Ove dokaze podnosilac prijave nije predočio prvostepenom organu, jer, prema njegovim navodima, nije data takva mogućnost, pošto je odluka donijeta bez održavanja rasprave.

83. Ministarstvo je odbilo žalbu podnosioca prijave rješenjem, broj: 27/02-23-1822/01 od 12. decembra 2001. godine. Čini se da podnosilac prijave nije pokrenuo upravni spor protiv ovog rješenja.

84. CRPC je donijela odluku, broj: 301-2204-1/1 od 6. februara 2001. godine, kojom se potvrđuje da je podnosilac prijave bio nosilac stanarskog prava 1. aprila 1992. godine na predmetnom stanu. Ministarstvo je podnijelo zahtjev za ponovno razmatranje ove odluke. CRPC je donio odluku, broj: R-301-2204-1/1-90-1101 od 4. marta 2003. godine, kojom je usvojio zahtjev Ministarstva, stavio van snage svoju odluku od 6. februara 2001. godine, te odbacio zahtjev podnosioca prijave za vraćanje stana u posjed.

85. Podnosilac prijave nije pokretao postupak pred nadležnim sudom radi utvrđivanja pravne valjanosti ugovora o kupoprodaji stana.

13) Predmet broj CH/99/3119, Zdravko ŠOŠIĆ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine

86. Supruga podnosioca prijave je u februaru 1992. godine zaključila ugovor o kupoprodaji stana u ulici Avde Smajlovića (bivša Petrovačka) broj 5, u Sarajevu (tačan dan zaključenja ugovora nije vidljiv, ali je evidentno da je ugovor zaključen u februaru 1992. godine). Ugovor je potpisan od strane oba ugovarača. Ugovor sadrži bjanko pečat nadležne poreske službe. Ugovorom je predviđeno da podnosilac prijave plati otkupnu cijenu u iznosu 603.597 jugoslovenskih dinara. Podnosilac prijave je dostavio kopiju uplatnice o plaćenoj kupoprodajnoj cijeni od 10. februara 1992. godine na iznos 185.535,50 i drugu kopiju na iznos od 439.500 jugoslovenskih dinara (datum na drugoj uplatnici nije vidljiv). Podnosilac prijave nije dostavio punomoć supruge.

87. Podnosilac prijave je 22. oktobra 1998. godine podnio zahtjev za vraćanje stana u posjed Upravi. Uprava je donijela rješenje, broj: 23/6-372- 6217/98 od 26. aprila 2001. godine, kojim se odbija zahtjev supruge podnosioca prijave kao neosnovan, jer je utvrđeno da je supruga podnosioca prijave ostala u aktivnoj vojnoj službi u Vojsci Jugoslavije do 15. januara 1999. godine.

Uprava je ovu činjenicu utvrdila na osnovu naredbe saveznog Ministra za odbranu, broj 5-4 od 15. januara 1999. godine ("Službeni vojni list Savezne Republike Jugoslavije" broj 1/99).

88. Podnosilac prijave i njegova supruga su protiv rješenja od 26. aprila 2001. godine podnijeli žalbu Ministarstvu. U žalbi su naveli da je Uprava pogrešno utvrdila činjenicu da je podnosiocu prijave prestalo svojstvo aktivnog vojnog lica bivše JNA 15. januara 1999. Uz žalbu su priložili naredbu komandanta VP 2082 Beograd, broj: 103-81 od 14. novembra 1994. godine, iz koje se isto tako vidi da supruzi podnosioca prijave prestaje profesionalna vojna služba 14. novembra 1994. godine.

89. Ministarstvo je donijelo rješenje, broj: 27/02-23-2199/01 od 7. decembra 2001. godine, kojim se žalba podnosioca prijave i njegove supruge usvaja i predmet vraća prvostepenom organu na ponovni postupak.

90. U ponovnom postupku, Uprava je donijela rješenje, broj: 23/6-372-6217/98 od 15. jula 2003. godine, kojim je odbila zahtjev za vraćanje stana u posjed, obzirom da je ponovo utvrdila da je supruzi podnosioca prijave prestala profesionalna vojna služba 15. januara 1999. godine. Protiv ovog rješenja, podnosilac prijave je 11. septembra 2003. godine podnio žalbu Ministarstvu. Odluka po žalbi još uvijek nije donesena.

91. Prema navodima tužene strane, podnosilac prijave je podnio zahtjev za vraćanje stana u posjed i CRPC-u, ali je CRPC njegov zahtjev odbacila. Podnosilac prijave nije osporio ove navode.

92. U svom pismu Komisiji, od 22. marta 2004. godine, podnosilac prijave je dostavio dokumentaciju koja se odnosi na garažu koja je njegovoj supruzi dodijeljena na korištenje rješenjem Komande garnizona od 20. januara 1984. godine. Podnosilac prijave nije isticao žalbene navode niti dostavljao dokumentaciju u vezi sa garažom u dosadašnjem postupku pred Domom i Komisijom.

IV. RELEVANTNE ZAKONSKE ODREDBE

A. Relevantno zakonodavstvo Socijalističke Federativne Republike Jugoslavije i Socijalističke Republike Bosne i Hercegovine

1. Zakon o stambenom obezbjeđenju u JNA

93. Podnosioci prijave su otkupili stan prema Zakonu o stambenom obezbjeđenju u JNA ("Službeni list Socijalističke Federativne Republike Jugoslavije", broj 84/90). Ovaj zakon je usvojen 1990. godine, a na snagu je stupio 6. januara 1991. godine. Zakon je, u osnovi, regulisao stambene potrebe vojnih i građanskih lica na službi u JNA.

94. Član 21. navodi opšti način na koji se trebala odrediti otkupna cijena stana. Cijena se trebala odrediti uzimajući u obzir revalorizovanu građevinsku vrijednost, a biće umanjena za vrijednost amortizacije stana i dalje smanjena revalorizovanim iznosom troškova nabavnih i komunalnih objekata građevinskog zemljišta, te revalorizovanim iznosom doprinosa za stambenu izgradnju koji se uplaćivao Stambenom fondu bivše JNA. Savezni sekretar je takođe bio ovlašten da propiše tačnu metodologiju za određivanje cijene otkupa.

2. Uputstvo o metodologiji za utvrđivanje otkupne cene stanova stambenog fonda Jugoslovenske narodne armije (u daljnjem tekstu: Uputstvo)

95. Ovo Uputstvo je objavljeno u aprilu 1991. godine u Vojnom službenom listu i predviđalo je način izračunavanja otkupne cijene stanova koji su se trebali otkupiti iz Stambenog fonda bivše JNA.

3. Pravilnik o otkupu stanova iz stambenog fonda Jugoslovenske narodne armije (u daljnjem tekstu: Pravilnik)

96. Ovaj pravilnik objavljen je u aprilu 1991. godine u Vojnom službenom listu i utvrdio je proceduru koja će se slijediti u otkupu stana od Stambenog fonda bivše JNA.

4. Zakon o porezu na promet nepokretnosti i prava

97. Zakon o porezu na promet nepokretnosti i prava ("Službeni list Socijalističke Republike Bosne i Hercegovine"– br. 37/71, 8/72, 37/73, 23/76, 21/77, 6/78, 13/82 i 29/91) bio je na snazi u vrijeme kada su podnosici prijava zaključili kupoprodajni ugovor sa JNA. Član 3, stav 1, tačka 18. predviđao je da se ne plaća porez na promet nepokretnosti u slučaju otkupa stana od Stambenog fonda bivše JNA.

B. Relevantno zakonodavstvo Republike Bosne i Hercegovine

1. Zakon o napuštenim stanovima

98. Predsjedništvo tadašnje Republike Bosne i Hercegovine je 15. juna 1992. godine donijelo Uredbu sa zakonskom snagom o napuštenim stanovima ("Službeni list Republike Bosne i Hercegovine", br. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 i 33/95). Skupština Republike Bosne i Hercegovine usvojila je ovu Uredbu 17. juna 1994. godine kao "Zakon o napuštenim stanovima". Zakonom su regulisani uslovi pod kojima se određene kategorije stanova u društvenom vlasništvu proglašavaju napuštenim i pod kojima se ponovo dodjeljuju.

99. Članom 2. određuje se da se napuštenim stanom smatra stan kojeg su prijeratni nosilac stanarskog prava i članovi njegovog porodičnog domaćinstva napustili, čak i privremeno. Ukoliko prijeratni nosilac stanarskog prava nije ponovo otpočeo koristiti stan u roku određenom članom 3. ovoga zakona (tj. do 6. januara 1996. godine), smatraće se da je stan trajno napustio.

100. U skladu sa izmijenjenim i dopunjenim članom 10, ako nosilac stanarskog prava ne otpočne koristiti stan u propisanom roku smatra se da je stan trajno napustio. Prestanak stanarskog prava se utvrđuje rješenjem nadležnog organa.

2. Zakon o prometu nepokretnosti

101. Član 9. stav 2. Zakona o prometu nepokretnosti ("Službeni list Socijalističke Republike Bosne i Hercegovine", br. 38/78, 4/89, 29/90 i 22/91; "Službeni list Republike Bosne i Hercegovine" br. 21/92, 3/93, 17/93, 13/94, 18/94 i 33/94) predviđa da ugovor o prenosu nepokretnosti mora biti sačinjen u pismenom obliku, a potpisi ugovarača ovjereni u nadležnom sudu. Stavom 4. se, između ostalog, predviđa da je pismeni ugovor o prenosu nepokretnosti koji je u potpunosti ili značajnom dijelu izvršen valjan čak iako potpisi ugovornih strana nisu ovjereni kod nadležnog suda.

C. Relevantno zakonodavstvo Federacije Bosne i Hercegovine

1. Zakon o prestanku primjene Zakona o napuštenim stanovima

102. Zakon o prestanku primjene Zakona o napuštenim stanovima (u daljnjem tekstu: Zakon o prestanku primjene) stupio je na snagu 4. aprila 1998. godine i potom je u više navrata dopunjavan i mijenjan ("Službene novine Federacije Bosne i Hercegovine", br. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02 i 29/03). Zakonom o prestanku primjene je ukinut raniji Zakon o napuštenim stanovima.

103. Prema Zakonu o prestanku primjene, nadležni organi vlasti ne mogu dalje donositi odluke kojima se stanovi proglašavaju napuštenima (član 1, stav 2). Svi upravni, sudski i drugi akti kojima

je nosiocu stanarskog prava prestalo stanarsko pravo oglašavaju se ništavim (član 2, stav 1). Ipak, akti kojima je dodijeljen stan na privremeno korištenje ostaju na snazi dok se ne ponište u skladu sa Zakonom o prestanku primjene (član 2, stav 2).

104. Sva stanarska prava ili ugovori o korištenju koji su zaključeni od 1. aprila 1992. do 7. februara 1998. godine prestaju da važe (član 2, stav 3). Osoba koja koristi stan po osnovu poništenog stanarskog prava ili odluke o privremenom korištenju smatraće se privremenim korisnikom (član 2, stav 3).

105. Nosilac stanarskog prava na stanu koji je proglašen napuštenim, ili član njegovog porodičnog domaćinstva, ima pravo na povrat stana u skladu sa Aneksom 7 uz Opći okvirni sporazum za mir u Bosni i Hercegovini (član 3, stav 1. i 2).

106. Raniji član 3a, st. 1. i 2, koji su bili na snazi između 4. jula 1999. godine i 1. jula 2003. godine, određivao je slijedeće:

> *Izuzetno od odredbe člana 3. stav 1. i 2. ovog zakona, u vezi sa stanovima koji su proglašeni napuštenim na teritoriji Federacije Bosne i Hercegovine, a koji su na raspolaganju Federalnog ministarstva odbrane, nosilac stanarskog prava ne smatra se izbjeglicom ako je 30. aprila 1991. godine bio u aktivnoj službi u SSNO – u JNA (tj. nije bio penzionisan) i nije bio državljanin SR Bosne i Hercegovine prema evidenciji državljana, izuzev ako mu je odobren boravak u statusu izbjeglice ili drugi vid zaštite koji odgovara ovom statusu u nekoj od zemalja van bivše SFRJ prije 14. decembra 1995. godine.*
>
> *Nosilac stanarskog prava na stan iz stava 1. ovog člana ne smatra se izbjeglicom ukoliko je poslije 14. decembra 1995. godine ostao u aktivnoj službi u bilo kojim oružanim snagama van teritorije Bosne i Hercegovine, ili ako je stekao novo stanarsko pravo van teritorije Bosne i Hercegovine.*

107. Član 3a, koji je stupio na snagu 1. jula 2003. godine, određuje slijedeće:

> *Izuzetno od odredbe člana 3. st. 1. i 2. Zakona, stanovi koji su proglašeni napuštenim na teritoriju Federacije Bosne i Hercegovine, a kojima raspolaže Federalno ministarstvo odbrane čiji je nosilac stanarskog prava nakon 19. maja 1992. godine ostao u službi vojnog ili civilnog lica u bilo kojim oružanim snagama izvan teritorija Bosne i Hercegovine, ne smatra se izbjeglicom niti ima pravo na povrat stana u Federaciji Bosne i Hercegovine, izuzev ako mu je odobren boravak u statusu izbjeglice ili drugi oblik zaštite koji odgovara tom statusu u nekoj od zemalja izvan bivše SFRJ prije 14. decembra 1995. godine.*
>
> *Izbjeglicom se ne smatra niti ima pravo na povrat stana u Federaciji Bosne i Hercegovine ni nosilac stanarskog prava na stanove iz stava 1. ovog člana, koji je iz istoga stambenog fonda bivše JNA ili utemeljenih fondova oružanih snaga država nastalih na prostorima bivše SFRJ stekao novo stanarsko pravo koje odgovara tom pravu.*

2. Odluka Zastupničkog doma Federacije Bosne i Hercegovine

108. Odluka Zastupničkog doma Federacije Bosne i Hercegovine je objavljena u „Službenim novinama Federacije Bosne i Hercegovine“, broj 28/04 i stupila je na snagu 26. maja 2004. godine, a, u relevantnom dijelu, ova odluka glasi:

> *[...]…i obustavi sve upravne i sudske postupke za vraćanje u posjed vojnih stanova do usvajanja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo, a koje su trenutno u parlamentarnoj proceduri.*

3. Zakon o prodaji stanova na kojima postoji stanarsko pravo

109. Član 27. Zakona o prodaji stanova na kojima postoji stanarsko pravo („Službene novine Federacije Bosne i Hercegovine “, br. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/0, 15/02 i 54/04) prvi put je stupio na snagu 1997. godine. Članovi 39a, 39b, 39c, 39d. i 39e. su stupili na snagu 5. jula 1999. godine, kada su objavljeni u „Službenim novinama Federacije Bosne i Hercegovine“, nakon što ih je nametnuo Visoki predstavnik za Bosnu i Hercegovinu. Odredbe, koje se odnose na otkup vojnih stanova, su značajno izmijenjene i dopunjene 16. oktobra 2004. godine, a posebno članovi 39, 39a. i 39e. Prvobitna i izmijenjena verzija su dole citirane.

110. Član 18.

> *Vrijednost stana čini građevinska vrijednost stana korigirana koeficijentom položajne pogodnosti stana. Građevinska vrijednost stana je 600 DEM po m^2. Koeficijent položajne pogodnosti stana utvrđuje nadležna vlada kantona-županije u rasponu od 0,80 do 1,20 ovisno o zoni naselja u kojem se stan nalazi, opremljenosti naselja, katnosti i drugih bitnih elemenata.*

111. Član 27. predviđa da se pravo vlasništva na stanu stiče uknjižbom tog prava u zemljišne knjige nadležnog suda.

112. Član 39. je, u relevantnom dijelu, predviđao:

> *Nositeljima stanarskog prava koji su zaključili ugovor o otkupu stana na osnovu Zakona o obezbjeđenju u JNA [...], prilikom zaključenja ugovora o prodaji stana u skladu sa odredbama ovog zakona priznat će se uplaćeni iznos iskazan u DEM po kursu na dan uplate.*

113. Izmijenjeni član 39, koji je na snazi od 16. oktobra 2004. godine, predviđa:

> *Nositelj prava iz kupoprodajnog ugovora zaključenog s bivšim SSNO-om, na temelju Zakona o stambenom obezbjeđenju u JNA ("Službeni list SFRJ", broj 84/90) i podzakonskih akata za njegovu provedbu, za stan koji je na raspolaganju Federalnom ministarstvu obrane, zaključio je pravno obvezujući ugovor ako je zaključio pisani ugovor o otkupu stana do 06. travnja 1992. godine i ugovor dostavio na ovjeru nadležnoj poreznoj službi, te ukoliko je kupoprodajna cijena utvrđena sukladno tada vrijedećem Zakonu i iznos cijene izmirio u ugovorenom roku.*

114. Član 39a. predviđa sljedeće:

> *Ako nosilac stanarskog prava na stanu koji je na raspolaganju Ministarstva odbrane Federacije taj stan koristi legalno, i ako je prije 6. aprila 1992. zaključio pravno obavezujući ugovor o otkupu stana sa Saveznim sekretarijatom za narodnu odbranu (SSNO) u skladu sa zakonima navedenim u članu 39. ovog zakona, Ministarstvo odbrane Federacije izdaje nalog da se nosilac stanarskog prava uknjiži kao vlasnik stana u nadležnom sudu.*

115. Član 39b., u relevantnom dijelu, određuje:

> *U slučaju kada nosilac stanarskog prava iz člana 39a. ovog zakona nije izvršio uplatu cijelog iznosa prodajne cijene stana u skladu sa kupoprodajnim ugovorom, onda će platiti ostatak prodajne cijene navedene u tom ugovoru Ministarstvu odbrane Federacije.*
>
> *[...]*

Odredbe člana 39a. ovog zakona i st. 1. i 2. ovog člana primjenjuju se i na ugovore o otkupu stana koji su zaključeni prije 6. aprila 1992. godine u slučajevima kada nije izvršena ovjera potpisa kod nadležnog suda.

116. Član 39c. određuje:

Odredbe člana 39a. i 39b. primjenjuju se i na nosioca stanarskog prava koji je ostvario pravo na povrat stana prema odredbama Zakona o prestanku primjene Zakona o napuštenim stanovima ("Službene novine Federacije Bosne i Hercegovine", br. 11/98 i 18/99).

117. Član 39d. Određuje da ako neko lice ne ostvari svoje pravo u vezi sa stanom, kako je određeno Zakonom o prodaji stanova, ili ako ne pokrene zahtjev za vraćanje stana u posjed, on ili ona može pokrenuti postupak kod nadležnog suda.

118. Član 39e. je predviđao:

Nosilac stanarskog prava koji nema pravo na povrat stana ili ne podnese zahtjev za povrat stana u skladu sa odredbama iz čl. 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima, a koji je prije 6. aprila 1992. godine zaključio pravno obavezujući ugovor o kupovini stana sa bivšim Saveznim sekretarijatom za narodnu odbranu (SSNO), ima pravo da podnese zahtjev Ministarstvu odbrane Federacije za nadoknadu sredstava plaćenih po ovom osnovu, izuzev ako se dokaže da su mu ta sredstva priznata za otkup stana van teritorije Bosne i Hercegovine.

119. Izmijenjeni član 39e. predviđa sljedeće:

Nositelju prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, a koji je napustio stan u Federaciji Bosne i Hercegovine i nakon toga iz istoga stambenog fonda ili novoutemeljenih stambenih fondova oružanih snaga država nastalih iz bivše SFRJ stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, stjecanjem novoga stana raskinut je ugovor o otkupu stana u Federaciji Bosne i Hercegovine, te nema pravo na upis prava vlasništva nad tim stanom.

Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, koji je nakon 14. prosinca 1995. godine ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine, a nije stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, umjesto upisa prava vlasništva po zaključenom ugovoru ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu sukladno članku 18. Zakona, umanjenu za amortizaciju.

Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona za čiji stan je sadašnji korisnik, sukladno vrijedećim zakonima, zaključio ugovor o korištenju stana ili ugovor o otkupu stana, umjesto upisa prava vlasništva na stanu, ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu na način iz stavka 2. ovoga članka, izuzev nositelja prava kupoprodajnog ugovora iz stavka 1. ovoga članka.

4. Zakon o parničnom postupku

120. Član 54. Zakona o parničnom postupku („Službene novine Federacije Bosne i Hercegovine", br. 42/98, 3/99 i 53/03) određuje sljedeće:

Tužitelj može u tužbi tražiti da sud samo utvrdi postojanje odnosno nepostojanje kakva prava ili pravnog odnosa, ili istinitost odnosno neistinitost kakve isprave.

Takva se tužba može podići kad je to posebnim propisima predviđeno, kad tužitelj ima pravni interes da sud utvrdi postojanje odnosno nepostojanje kakva prava ili pravnog odnosa ili istinitost odnosno neistinitost kakve isprave prije dospjelosti zahtjeva za činidbu iz istog odnosa ili kad tužitelj ima kakav drugi pravni interes za podizanje takve tužbe.

Ako odluka o sporu ovisi o tome postoji li ili ne postoji kakav pravni odnos koji je tokom parnice postao sporan, tužitelj može, pored postojećeg zahtjeva, istaknuti i tužbeni zahtjev da sud utvrdi da takav odnos postoji odnosno da ne postoji, ako je sud pred kojim parnica teče nadležan za takav zahtjev.

Isticanje zahtjeva prema odredbi stava 3. ovog članka neće se smatrati preinakom tužbe.

V. ŽALBENI NAVODI

121. Podnosioci prijava se žale na činjenicu da nisu vraćeni u posjed svojih stanova i da nisu priznati njihovi ugovori o otkupu stanova. Oni smatraju da su vlasnici stanova i da im se mora omogućiti raspolaganje njima. Također, podnosioci prijava se žale na trajanje postupka u vezi sa njihovim zahtjevima za povrat stana, čime im je onemogućen efektivan pristup sudu.

VI. ODGOVOR TUŽENIH STRANA

a) Odgovor tužene strane Bosne i Hercegovine

122. U vezi sa činjenicama, tužena strana, Bosna i Hercegovina, ne spori postojanje kupoprodajnih ugovora podnosilaca prijava. Međutim, objašnjava da je Uredbom Vlade Bosne i Hercegovine nametnuta privremena zabrana prodaje stanova u društvenoj svojini. Također naglašava da su istom Uredbom ugovori proglašeni ništavim.

123. Po pitanju prihvatljivosti, tužena strana, Bosna i Hercegovina, predlaže da prijave budu proglašene neprihvatljivim zbog toga što podnosioci prijava nisu iskoristili pravna sredstva u sudskom postupku, naročito postupak radi utvrđenja prava koji im je stajao na raspolaganju u skladu sa Zakonom o parničnom postupku (vidi tačku 119. gore).

124. U pogledu merituma prijave, tužena strana, Bosna i Hercegovina, predlaže da prijave budu odbijene i u meritumu, jer je procedura otkupa stanova regulisana Zakonom o prodaji stanova, što uključuje i raniji otkup stanova izvršen prema Zakonu o stambenom obezbjeđenju JNA. Drugim riječima, Zakonom o prodaji stanova predviđeno je da će se prilikom zaključenja ugovora o prodaji stana, priznati uplaćeni iznos iskazan u DEM po kursu na dan uplate.

b) Odgovor tužene strane Federacije Bosne i Hercegovine

125. Federacija Bosne i Hercegovine je osporavala prihvatljivost prijava zbog toga što ih je smatrala preuranjenim, uglavnom, jer su u vrijeme dostavljanja zapažanja, upravni postupci pred prvostepenim ili drugostepenim upravnim organima bili u toku. Federacija Bosne i Hercegovine je, također, isticala prigovor neiscrpljivanja djelotvornih pravnih lijekova, jer je smatrala da su podnosioci prijava, koji to nisu učinili, trebali pokrenuti postupke radi utvrđivanja pravne valjanosti ugovora koje su zaključili krajem 1991. godine ili početkom 1992. godine, ili tražiti izdavanje naloga za uknjiženje prava vlasništva od Federalnog ministarstva odbrane, što su neki od podnosioca prijave propustili učiniti.

126. U pogledu merituma prijave, tužena strana navodi da nije došlo do povrede članova Evropske konvencije. U vezi sa članom 6. Evropske konvencije, Federacija Bosne i Hercegovine navodi da domaći organi nisu prekršili navedni član, jer je postupak pred njima još u toku. Što se tiče člana 8. Evropske konvencije, Federacija Bosne i Hercegovine navodi da nije prekršila njihovo

pravo na poštivanje doma, jer je utvrdila da im u skladu sa Zakonom o prestanku primjene Zakona o napuštenim stanovima, ne pripada pravo na povrat stana, jer nisu bili državljani Bosne i Hercegovine na dan 30. aprila 1991. godine i jer su i nakon 14. decembra 1995. godine bili pripadnici oružanih snaga druge države, zbog čega se nisu mogli smatrati izbjeglicama. Federacija Bosne i Hercegovine se, takođe, u nekim slučajevima pozvala na odluke Komisije za imovinske zahtjeve izbjeglica i raseljenih lica, koja je zahtjeve za povrat stanova u posjed podnosioca prijava odbacila zbog nenadležnosti, odnosno, jer se nisu mogli smatrati izbjeglicama. U odnosu na navodnu povredu člana II(2)(b) Sporazuma, Federacija Bosne i Hercegovine smatra da podnosioci prijava nisu diskriminisani u uživanju prava i sloboda ni po jednom osnovu, jer je Federacija Bosne i Hercegovine donijela niz zakona kojima se svim izbjeglim i raseljenim licima omogućava povratak njihovim domovima bez obzira na nacionalnu, vjersku ili drugu pripadnost, ili političko uvjerenje.

127. U vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Federacija Bosne i Hercegovine smatra da podnosioci prijava moraju ispuniti uslove predviđene u Zakonu o prodaji stanova, prema kojem podnosioci prijava ne mogu izvršiti upis prava vlasništva na stanu ako nisu ostvarili pravo na vraćanje stana u posjed u skladu sa Zakonom o prestanku primjene. U vezi s tim treba uzeti u obzir i uspostavljanje ravnoteže između interesa zajednice i osnovnih prava pojedinaca, tako da podnosioci prijava koji su ostali u oružanim snagama drugih država, nakon 1995. godine, moraju biti ograničeni u pravu na povrat u posjed stanova. Tužena strana zaključuje da u ovom predmetu nije prekršila član 1. Protokola broj 1 uz Evropsku konvenciju.

VII. MIŠLJENJE KOMISIJE

A. Prihvatljivost

128. Komisija podsjeća da su prijave podnesene Domu u skladu sa Sporazumom. S obzirom da Dom o njima nije odlučio do 31. decembra 2003. godine, Komisija je, u skladu sa članom 3. Sporazuma iz 2005. godine, sada nadležna da odlučuje o ovim prijavama. Pri tome, Komisija će uzimati u obzir kriterije za prihvatljivost prijave sadržane u članu VIII(2) i (3) Sporazuma. Komisija, takođe, zapaža da se Pravila procedure kojima se uređuje njeno postupanje ne razlikuju, u dijelu koji je relevantan za predmete podnosilaca prijava, od Pravila procedure Doma, izuzev u pogledu sastava Komisije.

129. Komisija zapaža da podnosioci prijava upućuju svoju prijavu protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine.

1. Prihvatljivost prijava u dijelu upućenom protiv Bosne i Hercegovine

130. U skladu sa članom VIII(2) Sporazuma, "[Komisija] će odlučiti koje prijave će prihvatiti [...] Pri tome će [Komisija] uzeti u obzir sljedeće kriterije: [...] (c) [Komisija] će takođe odbiti svaku žalbu koju bude smatrala nespojivom sa ovim Sporazumom, ili koja je očigledno neosnovana, ili predstavlja zloupotrebu prava žalbe."

131. U ranijim predmetima, u kojima je Dom odlučio o pitanju u vezi sa JNA stanovima, Dom je smatrao da je Bosna i Hercegovina odgovorna za donošenje zakona kojima su ugovori o otkupu JNA stanova retroaktivno poništeni (vidi, na primjer, odluke o meritumu, CH/96/3, CH/96/8 i CH/96/9, *Medan, Baštijanović i Marković*, od 3. novembra 1997. godine, Odluke o prihvatljivosti i meritumu mart 1996. - decembar 1997; CH/96/22, *Bulatović*, od 3. novembra 1997. godine, Odluke o prihvatljivosti i meritumu mart 1996. - decembar 1997; Odluku o prihvatljivosti i meritumu CH/96/2 i dr, *Podvorac i dr*, od 14. maja 1998. godine, Odluke i izvještaji 1998).

132. Međutim, Komisija zapaža da u ovim predmetima postupanje organa, koji su odgovorni za postupke na koje se podnosioci prijave žale, kao što su Uprava za stambene poslove Kantona Sarajevo, Ministarstvo za stambene poslove Kantona Sarajevo i Ministarstvo odbrane uključuje odgovornost Federacije Bosne i Hercegovine, a ne Bosne i Hercegovine, u smislu člana II(2)

Sporazuma. Prema tome, u dijelu u kome je upućena protiv Bosne i Hercegovine prijava je nespojiva *ratione personae* sa odredbama Sporazuma u smislu člana VIII(2)(c).

133. Komisija zbog toga odlučuje da prijavu proglasi neprihvatljivom protiv Bosne i Hercegovine.

2. Prihvatljivost prijave u dijelu upućenom protiv Federacije Bosne i Hercegovine

134. U skladu sa članom VIII(2) Sporazuma, Komisija će odlučiti koje prijave će prihvatiti. Pri tome će Komisija uzeti u obzir sljedeće kriterije: (a) postoje li djelotvorni pravni lijekovi i da li je podnosilac prijave dokazao da ih je iscrpio, da li je prijava u biti ista kao i stvar koju je Dom/Komisija već ispitao, ili je već podnesena u nekom drugom postupku, ili je već predmet međunarodne istrage ili rješenja. Komisija će, također, odbiti svaku žalbu koju bude smatrala nespojivom sa ovim Sporazumom, ili koja je očigledno neosnovana, ili predstavlja zloupotrebu prava žalbe.

135. U skladu sa članom VIII(3) Sporazuma "[Komisija] u bilo kojem trenutku svog postupka može obustaviti razmatranje neke žalbe, odbaciti je ili brisati iz razloga (a) što podnosilac prijave namjerava odustati od žalbe; (b) što je stvar već riješena; ili (c) što iz bilo kojeg drugog razloga, koji utvrdi [Komisija], više nije opravdano nastaviti s razmatranjem žalbe; pod uslovom da je takav rezultat u skladu s ciljem poštivanja ljudskih prava."

a. Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za povrat stana u posjed

136. Podnosioci prijava tvrde da nemaju mogućnost da dođu do konačnog meritornog odlučenja povodom povrata njihovih stanova, da postupci traju van razumnog roka, te da im nije omogućen djelotvoran pravni lijek, uzimajući u obzir cjelokupnu situaciju.

137. Federacija navodi da podnosioci prijava nisu iscrpili djelotvorne pravne lijekove u postupcima vraćanja u posjed predmetnih stanova i uknjiženja vlasništva na stanu.

138. Komisija zapaža da su podnosioci prijava pokrenuli svoje postupke 1998. ili 1999. godine. Od tada je prošlo 6, tj. 7 godina, a postupci vraćanja nisu meritorno okončani. Komisija naglašava da upravni postupak funkcioniše po načelu efikasnosti (član 6. Zakona o upravnom postupku Federacije Bosne i Hercegovine, br. 2/98 i 48/99). Prvostepeni postupak, prema članu 216. stavu 1. navedenog Zakona, traje 60 dana, dok drugostepeni postupak, prema članu 244, traje najduže 60 dana. Uzimajući u obzir čak i mogućnost vođenja upravnog spora, navedeni rokovi i stvarne dužine postupaka nisu u razumnom odnosu.

139. Pravilo iscrpljivanja pravnih lijekova se mora fleksibilno primjenjivati i podnosiocima prijava se moraju uzeti posebne okolnosti u obzir, ako one postoje (vidi odluku Ustavnog suda Bosne i Hercegovine, *U 22/00*, od 22. i 23. juna 2001. godine, tačka 20, "Službeni glasnik Bosne i Hercegovine", broj 25/01). Komisija naglašava da Aneks 7 uz Opći okvirni sporazum za mir u Bosni i Hercegovini, s obzirom na svoje ciljeve i zadatke, podrazumijeva obavezu nadležnih državnih organa uspostavljanja sistema i procedure, koji bi zadovoljili hitnost rješavanja svih predmeta koji se tiču povrata imovine i ljudi. Prema tome, hitno postupanje kod povrata, bez obzira što sami postupci, pozitivno-pravnim propisima, nisu definisani kao takvi, mogu se posmatrati kao takve posebne okolnosti, na koje je ukazivao Ustavni sud Bosne i Hercegovine.

140. Komisija, nadalje, zapaža da se u nekim slučajevima, o predmetima odlučivalo i više puta nakon što su vraćeni na ponovno odlučivanje od strane Kantonalnog suda, ali i nakon ponovnog postupka o zahtjevu je odlučeno na isti način – podnosiocima prijava nije priznato pravo na povrat stana (vidi, na primjer, predmet broj CH/99/1754, *Velimir NOGO protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine*). Štaviše, u mnogim predmetima je prekinuto odlučivanje o meritumu do donošenja novih zakonskih odredbi (vidi, na primjer, predmet broj CH/99/2271, *Petar MEMETAJ protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine*). Konačno, za vrijeme

postupaka, pravna osnova se mijenjala više puta, što je dodatno otežavalo situaciju podnosiocima prijava.

141. Dovodeći u vezu dvije prethodne tačke ove Odluke sa činjenicom da podnosioci prijava smatraju da im je povrijeđeno pravo pristupa sudu, zbog nemogućnosti da dođu do konačne odluke, Komisija zaključuje da podnosioci prijava nemaju izgleda za okončanje postupaka u nastavku postupka povrata stana u posjed. Ovakav stav je, također, opravdan činjenicom da u BiH, u konkretnom slučaju u Federaciji Bosne i Hercegovine, ne postoji djelotvorno pravno sredstvo koje bi omogućilo aplikantima da se žale zbog predugog trajanja postupka ili pristupa sudu (vidi, odluku Ustavnog suda Bosne i Hercegovine, *AP 769/04*, od 30. novembra 2004. godine, tačka 31, sa uputom na daljnju praksu Evropskog suda za ljudska prava).

b. Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za priznavanje vlasništva

142. Federacija Bosne i Hercegovine, *inter alia,* tvrdi da podnosioci prijava nisu iscrpili domaće pravne lijekove koji su im dostupni u vezi s uknjižbom vlasništva na stanu, jer podnosioci prijava nisu pokrenuli sudski postupak za utvrđivanje valjanosti svog kupoprodajnog ugovora (vidi tačku 124. gore).

143. Komisija potvrđuje da Zakon o parničnom postupku predviđa pravni lijek kojim se utvrđuje postojanje ili nepostojanje nekog prava, ili autentičnost nekog dokumenta. Komisija podsjeća da je ranije Dom utvrdio da je član 54. Zakona o parničnom postupku (ili član 172., prema bivšem Zakonu o parničnom postupku) djelotvoran domaći pravni lijek koji se mora iscrpiti u slučaju kada podnosilac prijave nema u posjedu kupoprodajni ugovor, nego se mora utvrditi da je vlasnik na osnovu koraka koje je preduzeo u otkupu stana tokom 1991. i 1992. godine (vidi, na primjer, Odluku o prihvatljivosti, CH/98/1160, CH/98/1177, CH/98/1264, *Pajagić, Kuruzović i M.P*, od 9. maja 2003. godine). Komisija je nastavila sa istim pristupom ovom pravnom lijeku (vidi, naprimjer, Odluku o prihvatljivosti, CH/99/1921, *Blagojević*, od 16. januara 2004. godine). U takvim predmetima Komisija smatra razumnim da očekuje da podnosioci prijave moraju podnijeti teret pokretanja sudskog spora radi utvrđivanja postojanja ugovornog odnosa ili bilo kog ugovornog prava.

144. U svim prijavama, podnosioci prijava posjeduju kuporodajni ugovor, koji je u svim aspektima, pravovaljan ugovor. Potpisale su ga sve strane, ugovor uključuje otkupnu cijenu i uslove plaćanja, a ima i pečat nadležne poreske službe. Komisija smatra da teret pokretanja postupka radi utvrđivanja valjanosti ugovora treba pasti na stranu koja ga želi osporiti, a ne na nosioca ugovora, koji uopće nema razloga da sumnja u pravovaljanost ugovora koji posjeduje.

145. Pošto podnosioci prijave posjeduju kupoprodajni ugovor koji je pravovaljan, Komisija zaključuje da pokretanje sudskog spora prema članu 54. Zakona o parničnom postupku nije domaći pravni lijek koji podnosioci prijava moraju iscrpiti u smislu člana VIII(2)(a) Sporazuma.

A.1. Zaključak u pogledu prihvatiljivosti

146. Komisija proglašava prijave neprihvatljivim *ratione personae* u dijelu u kojem su upućene protiv Bosne i Hercegovine i prihvatljivim u dijelu u kojem su upućene protiv Federacije Bosne i Hercegovine.

B. Meritum

147. Prema članu XI Sporazuma, Komisija mora obraditi pitanje da li utvrđene činjenice otkrivaju da je tužena strana prekršila svoje obaveze iz Sporazuma. Kao što je već naglašeno, prema članu I Sporazuma, strane su obavezne “osigurati svim licima pod svojom nadležnošću najviši stepen međunarodno priznatih ljudskih prava i osnovnih sloboda”, uključujući prava i slobode predviđene Evropskom konvencijom i drugim sporazumima nabrojanim u Dodatku Sporazuma.

148. Komisija zaključuje da bi predmetne prijave trebale biti ispitane u pogledu člana 1. Protokola broj 1 uz Evropsku konvenciju, člana 8. Evropske konvencije, člana 6. Evropske konvencije i člana II(2)(b) Sporazuma. Komisija neke predmete nije proslijedila prema članu 6. Evropske konvencije, ali obzirom da se predmeti tiču istog pravnog i činjeničnog problema, Komisija će prihavatiti odgovore tužene strane po ovom članu za sve predmete. Komisija će prvo ispitati navode u pogledu povrede člana 6. Evropske konvencije.

B.1. Član 6. Evropske konvencije

149. Član 6. stav 1. Evropske konvencije, u relevantnom dijelu, glasi:

> *Prilikom utvrđivanja građanskih prava i obaveza ili osnovanosti bilo kakve krivične optužbe protiv njega, svako ima pravo na pravično suđenje i javnu raspravu u razumnom roku pred nezavisnim i nepristrasnim, zakonom ustanovljenim sudom.*

150. Podnosioci prijava žalili su se na pravo efektivnog pristupa sudu, jer dužina trajanja postupaka vraćanja njihovih stanova u posjed nije razumna i onemogućava ih da dođu do konačne odluke povodom njihovih zahtjeva.

151. Nema sumnje, što je potvrđeno dugogodišnjom praksom sudskih organa u BiH, da je pravo pristupa sudu elemenat inherentan pravu iskazanom u članu 6. stavu 1. Evropske konvencije (vidi odluku Ustavnog suda Bosne i Hercegovine, *U 3/99*, od 17. marta 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 21/00). Pravo na pristup sudu iz člana 6. stava 1. Evropske konvencije podrazumijeva, prije svega, široke proceduralne garancije i zahtjev za hitni i javni postupak (neobjavljena odluka Ustavnog suda Bosne i Hercegovine, *U 107/03*, od 19. novembra 2004. godine, tač. 7. i 21). Pravo pristupa sudu ne znači samo formalni pristup sudu, već efikasan pristup sudu. Da bi nadležni organ bio efikasan, on mora obavljati svoju funkciju na zakonit i djelotvoran način. Obaveza obezbjeđivanja efikasnog prava na pristup nadležnim organima spada u kategoriju dužnosti, tj. pozitivne obaveze države (vidi presudu Evropskog suda za ljudska prava, *Airey protiv Irske,* od 9. oktobra 1979. godine, Serija A, broj 32, stav 25).

152. Komisija napominje da ima zadatak, u skladu sa članom I Sporazuma, da osigura najviši stepen zaštite ljudskih prava i sloboda. S druge strane, pravo povratka imovine i lica, u smislu Aneksa 7. uz Opći okvirni sporazum za mir u Bosni i Hercegovini, mora da bude jedan od prioriteta u Bosni i Hercegovini. U vezi s tim, Aneks 7 zahtijeva da se član 6. Evropske konvencije i član 1. Protokola broj 1 uz Evropsku konvenciju tumače na širi način, tj. da se tuženim stranama nametne viši standard pozitivne obaveze zaštite u vezi sa povratkom. To znači da su strane potpisnice Sporazuma dužne obezbijediti brz i djelotvoran način povratka imovine i ljudi i djelotvornu zaštitu istih. Drugim riječima, Aneksi 7 i 6 Sporazuma, a u vezi sa članom 6. Evropske konvencije, garantuju pravo na pravično suđenje, koje obuhvata kako efikasan pristup sudu tako i odlučivanje o predmetu spora u "razumnom roku" u vezi povratka.

153. Komisija, najprije, zapaža da su zahtjevi za povrat stanova u posjed podneseni uglavnom 1998. i 1999. godine. Evidentno je da su se postupci vodili od tada sve do današnjeg dana. *In conclusio*, postupci, koji su još u toku, traju već 6-7 godina. Takav zaključak, sam po sebi, je protivan navodima iz prethodne tačke ove odluke.

154. Za razliku od "klasičnih“ slučajeva pristupa sudu, konkretni predmeti vode ka zaključku da je pristup sudu bio formalno omogućen, ali da nije bio djelotvoran. U svim postupcima, predmeti su po žalbi ili nakon okončanog upravnog spora vraćani na ponovno odlučivanje, mada je rezultat postupaka bio isti. Ovim se može zaključiti da su organi bili aktivni, ali da podnosioci prijava nisu mogli doći do konačnog mišljenja nadležnih organa, znači ne i efikasni. Postavlja se pitanje da li tužena strana ima opravdanje za ovakvo postupanje.

155. Ukidanje odlučenja nižih organa pred višim organima i vraćanje na ponovni postupak, što je bio najčešći slučaj u predmetima, u principu, ne čini pravne lijekove nedjelotvornim (vidi *mutatis mutandis* odluku Ustavnog suda Bosne i Hercegovine, *U 14/99,* od 29. septembra 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 36/00). Međutim, stalno vraćanje na ponovni postupak može učiniti pravne lijekove iluzornim, a postupak beskonačnim i bespredmetnim. Pravni put, od niže ka višoj instanci, treba da bude pravilo, jer omogućava aplikantu da brzo i djelotvorno dobije odlučenje od najvišeg organa, kao najdemokratičnijeg u vertikalnoj skali lijekova. Samo u izuzetnim slučajevima, ukidanje i poništavanje odluke, vraćanje nižestepenim organima i ponavljanje postupka može biti opravdano, pogotovo ako se radi o hitnim postupcima.

156. Konačno, u predmetu broj CH/99/1754, Kantonalni sud je prekinuo postupak po pokrenutom upravnom sporu da bi sačekao izmjene i dopune Zakona o prodaji stanova. Komisija, međutim, smatra da je ovakvo postupanje jednog suda u suprotnosti sa članom 6, koji zahtjeva da sud donese odluku u skladu sa zakonom. Naime, pravo pristupa sudu zahtijeva odlučivanje po pozitivno-pravnim propisima (vidi Odluku Ustavnog suda Bosne i Hercegovine, *U 107/03*, od 19. novembra 2004. godine, tač. 7. i 21). Konačno, to zahtijeva princip zakonitosti iz člana I/2 Ustava Bosne i Hercegovine. Prema tome, Sud je imao obavezu odlučiti u skladu sa svojom nadležnošću o pravnoj stvari koja se pred njim nalazila u skladu sa važećim propisima, ne čekajući propise koji bi eventualno tek trebali stupiti na snagu. Također, nužno je istaći da je postupak, koji je prekinut 2004. godine, započeo zahtjevom za povrat stana u posjed podnesenim 1998. godine. Dakle, podnosilac prijave nema mogućnost da se o njegovom zahtjevu odluči ni nakon punih 6 godina. Na ovaj način, direktno je povrijeđeno pravo podnosioca prijave na pristup sudu prema članu 6. Evropske konvencije.

157. Komisija zbog svega navedenog zaključuje da je Federacija Bosne i Hercegovine prekršila pravo podnosilaca prijava prema članu 6. Evropske konvencije, zbog toga što im nije omogućila djelotvoran pristup sudu.

B.2. Član 1. Protokola broj 1 uz Evropsku konvenciju

158. Član 1. Protokola broj 1 uz Evropsku konvenciju glasi**:**

> *Svako fizičko i pravno lice ima pravo uživati u svojoj imovini. Niko ne može biti lišen imovine, osim u javnom interesu i pod uvjetima predviđenim zakonom i općim načelima međunarodnog prava.*
>
> *Prethodne odredbe, međutim, ne utiču ni na koji način na pravo države da primjenjuje zakone koje smatra potrebnim da bi se regulisalo korištenje imovine u skladu sa općim interesima ili da bi se obezbijedila napalata poreza ili drugih dadžbina i kazni.*

159. Prema jurisprudenciji Evropskog suda za ljudska prava, član 1. Protokola broj 1 uz Evropsku konvenciju obuhvata tri različita pravila. Prvo, koje je izraženo u prvoj rečenici prvog stava i koje je opće prirode, izražava princip mirnog uživanja u imovini. Drugo pravilo, u drugoj rečenici istog stava, bavi se lišavanjem imovine i podvrgava ga izvjesnim uvjetima. Treće, sadržano u drugom stavu, dozvoljava da države potpisnice imaju pravo, između ostalog, da kontrolišu korištenje imovine u skladu sa općim interesom, sprovođenjem onih zakona koje smatraju potrebnim za tu svrhu (vidi Odluku Ustavnog suda Bosne i Hercegovine, *U 3/99*, od 17. marta 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 21/00).

160. Komisija, prije svega, primjećuje da se u konkretnim slučajevima ne radi o lišenju imovine u korist države, nego u korist drugih fizičkih lica. Ipak, član 1. Protokola broj 1 uz Evropsku konvenciju ne podrazumijeva neophodno lišenje imovine u korist države, već uključuje i slučajeve lišenja u korist privatnih lica, ako se ovakvo lišenje, tj. transfer imovine, smatra "javnim interesom“.

Naime, pojam javnog interesa treba tumačiti kao "generalni interes“ i ne znači da on ne postoji ako isključivo privatna lica imaju korist od ovih mjera. Ipak, i ovakvi slučajevi podrazumijevaju poštovanje standarda koji su nametnuti stavom 2. člana 1. Protokola broj 1 uz Evropsku konvenciju (vidi presudu Evropskog suda za ljudska prava, *James i dr. protiv Velike Britanije,* od 21. februara 1986. godine, Serija A, broj 98, stav 41-45). Iz ovoga sijedi da je transfer imovine od jednih privatnih lica ka drugim zaštićen članom 1. Protokola broj 1 uz Evropsku konvenciju samo ako postoji takav "javni interes“. U protivnom, član 1. Protokola broj 1 uz Evropsku konvenciju se ne bi primjenjivao, jer bi se radilo o regulisanju odnosa koji nemaju veze sa državom i javnim interesom. Drugim riječima, imovinski odnosi između privatnih fizičkih ili pravnih lica su van domašaja navedenog člana – teorija direktnog trećeg dejstva ili tzv. direktni *Drittwirkung* (vidi i odluke o dopustivosti bivše Evropske komisije za ljudska prava, aplikacije broj E 8588/79 i 8589/79, *Bramelid i Malmström protiv Švedske*, Odluke i izvještaji (OI), broj 29, str. 64). Komisija nema sumnje da ovi slučajevi povlače pitanje javnog interesa.

161. Uzimajući u obzir gornju tačku ove Odluke, slijedi da Komisija mora odgovoriti na tri pitanja. Prvo, da li se pravo u vezi sa stanovima JNA mogu smatrati "imovinom" u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju? Drugo, ako se smatraju imovinom, da li se zakonskom regulativom miješa u ta prava tako da uključuje zaštitu člana 1. Protokola broj 1 uz Evropsku konvenciju? Treće, ako je član 1. Protokola broj 1 uz Evropsku konvenciju uključen, da li je miješanje opravdano prema tom članu?

B.2.a. Da li se radi o imovini?

162. Dom, odnosno Komisija, je u svojoj dosadašnjoj praksi naglasila da su podnosioci prijava dužni imati valjan ugovor o kupoprodaji stana (vidi, na primjer, Odluku o prihvatljivosti Komisije, CH/98/514, *Putnik*, od 7. jula 2004. godine, tač. 60-62, Odluke juli – decembar 2004). U principu, pitanje valjanosti ugovora je pitanje koje traba da riješi nadležni organ. Dom, odnosno Komisija, je u nekoliko navrata naveo da nema opću nadležnost da zamijeni svojom vlastitom ocjenu činjenica i primjenu prava od strane domaćih organa (vidi, na primjer, Odluku o prihvatljivosti Doma, CH//99/2565, *Banović*, od 8. decembra 1999. godine, tačka 11, Odluke avgust – decembar 1999). Obzirom da je tužena strana u određenim slučajevima (vidi, na primjer, Odluku o prihvatljivosti Komisije, CH//98/514, *Putnik*, od 7. jula 2004. godine, tačka 75, Odluke juli – decembar 2004) zlupotrebljavala svoje zakonske ovlasti u vezi nametanja kriterija za ispitivanje valjanosti predmetnih ugovora, Dom je bio prisiljen da utvrdi koji su stvarni kriteriji koje određeni ugovor mora ispuniti. Tako je Komisija utvrdila da podnosilac prijave mora imati valjan ugovor, koji u smislu člana 39. Zakona o prodaji stanova na kojima postoji stanarsko pravo podrazumijeva da je ugovor zaključen do 6. aprila 1992. godine, da je dostavljen nadležnoj poreznoj službi na ovjeru, kod kojeg je kupoprodajna cijena utvrđena u skladu sa tada važećim zakonom i kod kojeg je iznos cijene u cijelosti izmiren u ugovorenom roku.

163. Dom je u svojoj Odluci o prihvatljivosti i meritumu CH/96/3 (*Medan i drugi*, od 3. novembra 1997. godine, tačka 31. ff) jasno naglasio da retroaktivno poništavanje ugovora nije u skladu sa članom 1. Protokola broj 1 uz Evropsku konvenciju i da Federacija Bosne i Hercegovine, stoga, krši svoje obaveze po članu I. Aneksa 6 uz Opći okvirni sporazum za mir u Bosni i Hercegovini. Osim toga, Dom je dosljedno utvrdio da prava prema ugovoru o kupovini stana zaključenom sa JNA, u skladu sa Zakonom o stambenom obezbjeđenju u JNA, predstavljaju ”imovinu” u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju.

164. Obzirom da su podnosioci prijava zadovoljili navedene kriterije, nema sumnje da stan za njih predstavlja imovinu u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju. Za Komisiju ostaje još pitanje da riješi da li je došlo do miješanja, ako jeste, kakva je njegova priroda i da li je ono opravdano u smislu stava 2. člana 1. Protokola broj 1 uz Evropsku konvenciju.

B.2.b. Da li se radi o miješanju tužene strane u pravo na imovinu?

165. Komisija primjećuje da je u dosadašnjem postupku po zahtjevu za vraćanje u posjed stanova utvrđeno da podnosioci prijava ne ispunjavaju uslove za povrat, jer su ostali služiti u JNA i nakon 14. decembra 1995. godine, kada je Opći okvirni sporazum za mir u Bosni i Hercegovini stupio na snagu.

166. U međuvremenu, 17. oktobra 2004. godine, stupio je na snagu izmijenjeni član 39.e Zakona o prodaji stanova na kojima postoji stanarsko pravo. Ovaj Zakon predviđa:

> *Nositelju prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, a koji je napustio stan u Federaciji Bosne i Hercegovine i nakon toga iz istoga stambenog fonda ili novoutemeljenih stambenih fondova oružanih snaga država nastalih iz bivše SFRJ stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, stjecanjem novoga stana raskinut je ugovor o otkupu stana u Federaciji Bosne i Hercegovine, te nema pravo na upis prava vlasništva nad tim stanom.*
>
> *Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, koji je nakon 14. prosinca 1995. godine ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine, a nije stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, umjesto upisa prava vlasništva po zaključenom ugovoru ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu sukladno članku 18. Zakona, umanjenu za amortizaciju.*
>
> *Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona za čiji stan je sadašnji korisnik, sukladno vrijedećim zakonima, zaključio ugovor o korištenju stana ili ugovor o otkupu stana, umjesto upisa prava vlasništva na stanu, ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu na način iz stavka 2. ovoga članka, izuzev nositelja prava kupoprodajnog ugovora iz stavka 1. ovoga članka.*

167. Tumačeći ovaj Zakon, a u vezi sa predmetnim slučajevima, proizilazi da podnosioci prijava, kao vlasnici stanova, nemaju pravo na povrat stana, jer su "nakon 14. prosinca 1995. godine osta[li] u službi u oružanim snagama izvan teritorija Bosne i Hercegovine“, što je dokazano u dosadašnjim postupcima.

168. Shodno tome, nema sumnje da se postojeći Zakon miješa u pravo na imovinu podnosilaca prijava. Zakon onemogućava vlasnicima stanova, koji ne ispunjavaju uvjete date ovim članom, vraćanje u prijeratne stanove. Stav 2. ovoga člana, stoga, kontinuirano uskraćuje imovinsko podnosilaca prijava, koji su pogođeni primjenom ovog Zakona da uživaju svoju imovinu.

169. Svako miješanje u pravo prema drugom ili trećem pravilu iz člana 1. Protokola broj 1 uz Evropsku konvenciju mora biti predviđeno zakonom, mora služiti legitimnom cilju, mora uspostavljati pravičnu ravnotežu između prava nosioca prava i javnog i općeg interesa. Drugim riječima, opravdano miješanje se ne može nametnuti samo zakonskom odredbom koja ispunjava uvjete vladavine prava i služi legitimnom cilju u javnom interesu, nego mora, također, održati razuman odnos proporcionalnosti između upotrijebljenih sredstava i cilja koji se želi ostvariti. Miješanje u pravo ne smije ići dalje od potrebnog da bi se postigao legitiman cilj, a nosioci stanarskih prava se ne smiju podvrgavati proizvoljnom tretmanu i od njih se ne smije tražiti da snose prevelik teret u ostvarivanju legitimnog cilja.

B.2.c. Da li je miješanje predviđeno zakonom?

170. Miješanje je zakonito samo ako je zakon koji je osnova miješanja (a) dostupan građanima, (b) toliko precizan da omogućava građanima da odrede svoje postupke, (c) u skladu sa principom pravne države, što znači da sloboda odlučivanja koja je zakonom data izvršnoj vlasti ne smije biti neograničena, tj. zakon mora obezbijediti građanima adekvatnu zaštitu protiv proizvoljnog miješanja (vidi presudu Evropskog suda za ljudska prava, *Sunday Times protiv Velike Britanije,* od 26. aprila 1979. godine, Serija A, broj 30, stav 49; vidi, takođe, presudu Evropskog suda za ljudska prava, *Malone,* od 2. avgusta 1984. godine, Serija A, broj 82, st. 67. i 68).

171. Komisija zaključuje da Zakon o prodaji stanova na kojima postoji stanarsko pravo ispunjava standarde u smislu Evropske konvencije, jer je objavljen u Službenim novinama Federacije Bosne i Hercegovine, tj. dostupan, i na zadovoljavajući način određuje pitanje povrata stanova u situacijama, kao što su one podnosilaca prijava.

B.2.d. Da li je miješanje u skladu sa javnim interesom?

172. Evropski sud za ljudska prava je ustanovio da domaće vlasti uživaju široko polje procjene prilikom donošenja odluka koje su vezane za lišavanje imovinskih prava pojedinaca zbog neposrednog poznavanja društva i njegovih potreba. Odluka da se oduzme imovina često uključuje razmatranje političkih, ekonomskih i socijalnih pitanja po kojima će se mišljenja u okviru demokratskog društva bitno razlikovati. Stoga će se presuda domaćih vlasti poštivati, osim ako je očigledno bez opravdanog osnova (vidi presudu Evropskog suda za ljudska prava, *James i drugi*, od 21. februara 1986. godine, Serija A, broj 98, stav 46).

173. Tužena strana, Federacija Bosne i Hercegovine, smatra da podnosiocima prijava ne pripada pravo na povrat stana, jer su na određen datum bili pripadnici JNA, zbog čega se nisu mogli smatrati izbjeglicama. Federacija Bosne i Hercegovine se, takođe, u nekim slučajevima pozvala na odluke Komisije za imovinske zahtjeve izbjeglica i raseljenih lica, koja je zahtjeve za povrat stanova u posjed podnosilaca prijava odbacila zbog nenadležnosti, odnosno, jer se nisu mogli smatrati izbjeglicama. Federacija Bosne i Hercegovine smatra da podnosioci prijava koji su ostali u oružanim snagama drugih država, nakon 1995. godine, moraju biti ograničeni u pravu na povrat u posjed stanova. Osim toga, iz predmeta i javne rasprave pred Ustavnim sudom Bosne i Hercegevoine *U 83/03*, a koji se ticao, takođe, povrata JNA-stanova (od 22. septembra 2004. godine, tačka 34) tužena strana je navela da želi da sačuva stambeni fond i da pripadnicima vlastite armije, ratnim veteranima i ostalim osobama kojima je potreban stan, dā prioritet u dodjeli stana. Slični navodi su izrečeni i u predmetu Doma, CH/96/3 (*Medan i ostali*, od 3. novembra 1997. godine, tačka 36).

174. Komisija zaključuje da navedni član 39.e, bez sumnje, slijedi ova dva interesa, tj. omogućava njihovo zadovoljenje.

B.2.e. Uspostavljanje pravične ravnoteže između prava nosioca prava i javnog interesa (proporcionalnost)

175. U odlučivanju da li član 39e. Zakona uspostavlja pravičnu ravnotežu ili razuman odnos proporcionalnosti između prava nosioca prava i javnog interesa, Komisija mora, prije svega, razmotriti dva pitanja. Prvo, da li miješanje u prava ide dalje od potrebnog da bi se postigao legitiman cilj? Drugo, da li član 39e. Zakona podvrgava vlasnike stanova proizvoljno-nepovoljnom tretmanu u poređenju sa drugima, tako da se od njih traži da nose prevelik teret u ostvarivanju legitimnog cilja?

B.2.f. Obim miješanja

176. Da bi odgovorila na ovo pitanje, Komisija se poziva na zaključke Ustavnog suda Bosne i Hercegovine. U citiranom predmetu *U 83/03*, Ustavni sud Bosne i Hercegovine je naveo:

> 58. Uzimajući u obzir ozbiljnost problema stambenog deficita i ekonomskih problema u Bosni i Hercegovini, kao i poteškoća u odlučivanju kako dodijeliti stambene resurse velikom broju ljudi koji imaju potrebu za njima, uključujući i one koji trenutno žive u stanovima u skladu sa osporenim Zakonom, Ustavnom sudu su potrebni veoma jaki dokazi da bi se uvjerio da je stanovište zakonodavca prekoračilo granice slobodne procjene u odlučivanju što je potrebno da bi se pristupilo rješavanju ovog veoma ozbiljnog društvenog problema. Ustavni sud je veoma oprezan u pogledu donošenja stava da je neka institucija prekoračila dozvoljeno područje procjene u pogledu nužnosti određene mjere (što je na neki način analogno u domaćem pravu "institutu slobodnog polja procjene", što je državama ponekad dozvoljeno u međunarodnom pravu prema jurisprudenciji Evropskog suda za ljudska prava), kada se radi o pitanju prava sa značajnim ekonomskim posljedicama, kao što je to ovdje slučaj trenutnih nosilaca stanarskih prava, kao i bivših nosilaca stanarskih prava, a rješenje je postignuto donošenjem demokratskog zakona, nakon pune rasprave, uključujući ispitivanje zakona od Zakonodavno-pravne komisije Parlamenta.

177. Komisija primjećuje da se opisana situacija u predmetu *U 83/03* nije znatno promjenila. Problem stambenog deficita i ekonomski problemi u BiH su i dalje akutni. Prema tome, Komisija zaključuje da nije ustanovljeno da se zakonodavac miješao u prava više nego što se smatra potrebnim da bi se postigao legitiman cilj.

B.2.g. Proizvoljan tretman i nametanje prevelikog tereta

178. Da bi dala odgovor na ovo pitanje, Komisija mora, prije svega, analizirati određene aspekte razvoja prakse i zakonodavstva po pitanju vraćanja vojnih stanova.

179. Naime, bivši člana 39.e Zakona o prodaji stanova na kojima postoji stanarsko pravo je predviđao:

> *Nosilac stanarskog prava koji nema pravo na povrat stana ili ne podnese zahtjev za povrat stana u skladu sa odredbama iz čl. 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima, a koji je prije 6. aprila 1992. godine zaključio pravno obavezujući ugovor o kupovini stana sa bivšim Saveznim sekretarijatom za narodnu odbranu (SSNO), ima pravo da podnese zahtjev Ministarstvu odbrane Federacije za nadoknadu sredstava plaćenih po ovom osnovu, izuzev ako se dokaže da su mu ta sredstva priznata za otkup stana van teritorije Bosne i Hercegovine.*

180. Član 39.e zahtijevao je da lice, koje je "prije 6. aprila 1992. godine zaključi[l]o pravno obavezujući ugovor o kupovini stana“, mora ispuniti uslove iz člana 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima. Član 3, st. 1. i 2. predviđali su opću mogućnost da nosilac stanarskog prava na stanu koji je proglašen napuštenim, ili član njegovog ili njenog porodičnog domaćinstva, ima pravo na povrat stana u skladu sa Aneksom 7 uz Opći okvirni sporazum za mir u Bosni i Hercegovini. Izuzetak je napravljen članom 3a, koji je, u svojoj verziji od 4. jula 1999. godine do 1. jula 2003. godine, predviđao da lice koje je 30. aprila 1991. godine bilo u aktivnoj službi u SSNO – u JNA (tj. nije bio penzionisan) i nije bio državljanin Bosne i Hercegovine prema evidenciji državljana ne može se smatrati izbjeglicom, izuzev "ako mu je odobren boravak u statusu izbjeglice ili drugi vid zaštite koji odgovara ovom statusu u nekoj od zemalja van bivše SFRJ prije 14. decembra 1995. godine“.

181. Kada je Dom odlučio da izvorna forma člana 3a. Zakona krši (između ostalog) pravo nosioca stanarskog prava na mirno uživanje imovine, on je došao do tog zaključka prije svega na osnovu toga da je taj član proizvoljan i da nameće prevelik teret određenim grupama ljudi bez objektivnog i razumnog opravdanja. Prvi stav člana 3a. navedenog Zakona je diskriminirao ljude koji su bili članovi JNA u vrijeme (od 30. aprila 1991. godine) kada je BiH još uvijek bila dio jedinstvene države Socijalističke Federativne Republike Jugoslavije. Diskriminacija je, takođe, bila zasnovana po osnovu državljanstva. Dom je odlučio da nije opravdano “nepovoljno” tretirati ljude

na ovim osnovama. Dom je, takođe, smatrao da u pojedinim slučajevima nije bilo opravdano dodijeliti stanove ljudima koji nisu spadali u pogođene kategorije ljudi (vidi odluke o meritumu Doma, CH/02/8202, CH/02/9880 i CH/02/11011, *M.P. i ostali protiv Federacije Bosne i Hercegovine,* od 4. aprila 2003. godine, st. 154-158, 176 i 191-192).

182. Nakon odluka Doma, član 3a. dobio je novu formu i stupio je na snagu 1. jula 2003. godine. Ovaj član predvidio je stare uslove povrata u novom modalitetu, tako da je vremenska granica sa 30. aprila 1991. godine pomaknuta na 19. maj 1992. godine, znači datum kada se JNA povukla sa teritorije BiH (Rezolucija Vijeća sigurnosti Ujedinjenih nacija, UN dokument, S/RES/752 (1992) od 15. maja 1992. godine), a Vlada Republike Bosne i Hercegovine je preuzela kontrolu nad teritorijom Republike Bosne i Hercegovine. Izuzetak su činile osobe kojima je odobren boravak u statusu izbjeglice ili drugi oblik zaštite koji odgovara tom statusu u nekoj od zemalja izvan bivše države prije 14. decembra 1995. godine.

183. Ova odredba je bila predmet ispitivanja u postupku apstraktne kontrole ustavnosti pred Ustavnim sudom Bosne i Hercegovine u citiranom predmetu *U 83/03*. Tom prilikom, Ustavni sud Bosne i Hercegovine je zaključio da je odredba u saglasnosti sa članom 1. Protokola broj 1 uz Evropsku konvenciju. Ustavni sud Bosne i Hercegovine je zaključio:

> Od tog datuma, osoba koja je bila u oružanim snagama druge zemlje se mogla smatrati osobom koja više nema dužnost lojalnosti prema Republici Bosni i Hercegovini. Ako su oružane snage pripadale zemlji na teritoriji unutar područja bivše SFRJ, a ta zemlja i Republika Bosna i Hercegovina su bile u ratnim odnosima, može se zaključiti da Republika Bosna i Hercegovina nije više dugovala bilo kakvu zaštitu toj osobi. Premda FBiH nije objasnila zašto bi takva vojna služba rezultirala gubitkom stanarskog prava osobe, Ustavni sud smatra da okončanje obaveza lojalnosti nekog stanovnika državi u kojoj prebiva i obaveza države da zaštiti i obezbijedi blagostanje svojim stanovnicima, mogu omogućiti racionalno i objektivno opravdanje za usvajanje neke mjere koja ljude tretira različito po toj osnovi.

184. Novim članom 39.e Zakona o prodaji stanova na kojima postoji stanarsko pravo isključeno je pozivanje na član 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima. Ipak, pitanje povratka ponovo je uslovljeno ispunjenjem određenih uslova, a to je, za predmetne slučajeve, da povratnik nije "ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine“ nakon 14. decembra 1995. godine. S druge strane, navedeni Zakon predvidio je za one koji ne ispune ovaj uslov naknadu u skladu sa članom 18. Zakona o prodaji stanova na kojima postoji stanarsko pravo. Članom 18. predviđena je nadoknada u iznosu od 600 KM/m^2, umanjena za amortizaciju.

185. Iz prethodne tačke proizilazi da Komisija mora odgovoriti da li je ovakvo zakonsko rješenje proporcionalno u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju. Komisija podržava stav Ustavnog suda Bosne i Hercegovine u pogledu pitanja nelojalnosti svojoj državi zbog služenja u vojsci van vlastite države poslije 14. decembra 1995. godine. Ovakav zaključak je, štaviše, neophodan u uslovima kada se dvije zemlje nalaze u "ratnim odnosima“, kako je to zaključio taj Sud. Prema tome, Komisija zaključuje da takva lica ne mogu očekivati jednaku zaštitu kao i druga lica, koja nisu pokazala nelojalnost Bosni i Hercegovini.

186. Na ovakav zaključak ne utiču ni relevantne odredbe Aneksa 7 i Ustava Bosne i Hercegovine. Naime, Aneks 7 uz Opći okvirni sporazum za mir u Bosni i Hercegovini daje pravo na povratak domovima svim izbjeglicama i raseljenim licima. Prema članu I stavu 1. Aneksa 7, “*sve izbjeglice i raseljena lica imaju pravo slobodno se vratiti u svoje domove. Imaju pravo na vraćanje imovine koje su lišeni u toku neprijateljstava od 1991. godine i na naknadu imovine koja se ne može vratiti.* Prema članu II/5. Ustava Bosne i Hercegovine a u vezi sa članom VI Aneksa 7 *“sve izbjeglice i raseljena lica koja su se vratila a optužena su za kazneno djelo, osim za ozbiljna kršenja međunarodnog humanitarnog prava koja su definirana u Statutu Međunarodnog suda za ratne zločine na prostoru bivše Jugoslavije nakon 1. januara 1991. godine ili za kazneno djelo koje*

nije povezano s ratnim sukobom, nakon povratka bit će amnestirana. Ni u kojem slučaju optužbe za kaznena djela ne mogu biti podignute zbog političkih ili drugih neodgovarajućih razloga ili radi sprječavanja primjene amnestije". Iz citiranih odredbi bi se dalo zaključiti da bi vlasnici stanova, kao povratnici, trebali biti amnestirani zbog služenja u vojsci van BiH. Ipak, Dom je, u svojoj jurisprudenciji iz Odluke o meritumu u predmetu *M.P. i drugi* (CH/02/8202, od, 31. marta 2003. godine, tačka 162), napravio izuzetak u pogledu prijeratnih nosilaca stanarskog prava na stanovima JNA. Dom je naveo:

> [...] Dom zapaža da su stanarska prava imala važnu društvenu ulogu u predratnoj Bosni i Hercegovini, kao i drugdje u bivšoj SFRJ. Pripadnicima tadašnje JNA su dakle dodjeljivani stanovi u Bosni i Hercegovini jer ih je bivša JNA poslala tu na službu i morala im je obezbijediti smještaj. Davalac takvih stanova na korištenje je bila bivša JNA. Nakon raspada bivše SFRJ, davalac takvih stanova na korištenje u Federaciji BiH je postalo Ministarstvo odbrane Federacije BiH. Svrha tih stanova je ostala ista da se obezbijedi smještaj pripadnicima oružanih snaga. Federacija BiH je u skladu sa tim principom oduzela gosp. Štrpcu, pripadniku bivše JNA koji je napustio Bosnu i Hercegovinu i nastavio da služi u stranoj vojsci, njegov stan u Bosni i Hercegovini. Dom zato smatra da je lišavanje gosp. Štrpca i podnosioca prijave njihovog predratnog stana proporcionalno cilju obezbjeđenja smještaja ratnim veteranima i njihovim porodicama. S obzirom na sve okolnosti, teret koji je podnosilac prijave Štrbac primoran da snosi nije pretjeran.

187. Ustavni sud Bosne i Hercegovine, pozivajući se na ovu praksu, naglasio je u predmetu *U 83/03* (*loc. cit*, stav 65) da prihvata ovakav zaključak Doma. Nadalje, Ustavni sud Bosne i Hercegovine je objasnio "da je JNA smještala vojno osoblje tamo gdje je ono bilo stacionirano. Stoga, premještanje stanarskog prava bi trebalo shvatiti kao novo stalno mjesto boravka. Osobe koje se nalaze u ovakvim situacijama ne bi se trebale smatrati izbjeglicama ili raseljenim licima u smislu člana 1. Aneksa 7. uz Opći okvirni sporazum za mir u Bosni i Hercegovini." Na ovakav zaključak ne utiče ni činjenica da se ne radi o nosiocima stanarskog prava, već vlasnicima stanova.

188. Ipak, činjenica da se radi o vlasnicima stanova treba da ima značaja kod pitanja da li je oduzimanje mogućnosti vraćanja stanova vlasnicima, koji su bili nelojalni svojoj državi u smislu prethodnih tačaka ove Odluke, proporcionalna mjera u datim okolnostima. Pri tome, Komisija naglašava da lišavanje imovine nije jedina mjera predviđena navedenim Zakonom, nego je popraćena nadoknadom u iznosu od 600 KM/m^2, pomnoženom sa koeficijentom od 0,8 do 1,2 i umanjenom za amortizaciju.

189. Evropski sud za ljudska prava, u svojoj odluci *Lithgow i dr. protiv Velike Britanije* (od 8. jula 1986. godine, Serija A, broj 102, st. 121. f) naglasio je da oduzimanje imovine uz naknadu, koja ne predstavlja tržišnu vrijednost, u principu, predstavlja neproporcionalno miješanje u pravo na imovinu nosioca prava. Međutim, pravo na imovinu iz člana 1. Protokola broj 1 uz Evropsku konvenciju ne garantuje pravo na punu kompenzaciju u svim okolnostima, s obzirom da legitimni ciljevi javnog interesa mogu da budu usmjereni ka ostvarivanju veće socijalne pravde.

190. Uzimajući u obzir da je Federacija Bosne i Hercegovine naglasila da se radi o „nelojalnim" građanima, a da, s druge strane, želi da sačuva stambeni fond i da pripadnicima vlastite armije, ratnim veteranima i ostalim osobama kojima je potreban stan, dā prioritet u dodjeli stana, te da je predviđena naknada za lišenje imovine u skladu sa ekonomskom moći države, kao i da je određena procedura za isplatu te naknade, Komisija ne vidi da je podnosiocima prijava povrijeđeno pravo na imovinu iz člana 1. Protokola broj 1 uz Evropsku konvenciju. Komisija je svjesna da naknada ne predstavlja punu tržišnu vrijednost, međutim, ona nije proizvoljna uzimajući u obzir sve okolnosti predmetnih slučajeva.

191. Obzirom na zaključak u vezi sa stavom 2. člana 39.e Zakona o prodaji stanova na kojima postoji stanarsko pravo, Komisija ne vidi potrebu da u predmetnim slučajevima, u kojima je sporni

stan dat na korištenje trećim licima, razmatra pitanje usaglašenosti stava 3. citiranog člana sa članom 1. Protokola broj 1 uz Evropsku konvenciju.

B.2.h. Zaključak o meritumu

192. Komisija zaključuje da je došlo povrede prava podnosilaca prijava na pristup sudu koje štiti član 6. Evropske konvencije.

193. Komisija zaključuje da nije došlo do povrede prava podnosilaca prijava na imovinu koje štiti član 1. Protokola broj 1 uz Evropsku konvenciju.

194. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Komisija ne smatra potrebnim da ispita prijave u vezi sa članom 8. Evropske konvencije i članom II(2)(b) Sporazuma.

195. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Komisija smatra potrebnim da tužena strana omogući podnosiocima prijave hitan postupak naknade i garantovanje procesualnih standarda iz člana 6. i člana 1. Protokola broj 1 uz Evropsku konvenciju u vezi sa istom.

VIII. PRAVNI LIJEKOVI

196. Prema članu XI(1)(b) Sporazuma, a u vezi sa pravilom 58. stavom 1(b) Pravila procedure Komisije, Komisija mora razmotriti pitanje o koracima koje Federacija Bosne i Hercegovine mora preduzeti da ispravi kršenja Sporazuma koja je Komisija utvrdila, uključujući naredbe da sa kršenjima prestane i od njih odustane, te novčanu nadoknadu.

197. Komisija nalaže, uzevši u obzir dugotrajnost nastojanja podnosilaca prijava da ostvare svoja prava pred upravnim, odnosno sudskim organima, da tužena strana Federacija Bosne i Hercegovine svakom od podnosilaca prijava isplati iznos od po 1000 KM (hiljadu konvertibilnih maraka) na ime materijalne i nematerijalne štete u roku od mjesec dana od dana prijema ove odluke, te da svakom od podnosilaca prijava isplati zateznu kamatu od 10 % (deset posto) na ovaj dosuđeni iznos ili na svaki njegov neisplaćeni dio po isteku jednomjesečnog roka predviđenog za tu isplatu do datuma pune isplate ovog naređenog iznosa;

198. Komisija, takođe, nalaže da tužena strana Federacija Bosne i Hercegovine obezbijedi djelotvoran i hitan postupak isplate naknade podnosiocima prijava prema članu 39e. stav 2. Zakona o prodaji stanova na kojima postoji stanarsko pravo.

IX. ZAKLJUČAK

199. Iz ovih razloga, Komisija odlučuje,

1. jednoglasno, da prijave proglasi neprihvatljivim u dijelu koji se odnosi na navodne povrede ljudskih prava počinjene od strane Bosne i Hercegovine;

2. jednoglasno, da prijave proglasi prihvatljivim u dijelu koji se odnosi na navodne povrede ljudskih prava počinjene od strane Federacije Bosne i Hercegovine;

3. jednoglasno, da je prekršeno pravo podnosilaca prijava na pravično suđenje prema članu 6. Evropske konvencije, čime je Federacija Bosne i Hercegovine prekršila član I Sporazuma;

4. jednoglasno, da nije prekršeno pravo podnosilaca prijava na mirno uživanje imovine prema članu 1. Protokola broj 1 uz Evropsku konvenciju, čime Federacija Bosne i Hercegovine nije prekršila član I Sporazuma;

5. jednoglasno, da nije potrebno ispitivati prijave prema članu 8. Evropske konvencije;

6. jednoglasno,da nije potrebno ispitivati prijave prema članu II(2)(b) Sporazuma;

7. jednoglasno, da naredi Federaciji Bosne i Hercegovine da svakom od podnosilaca prijava isplati iznos od po 1000 KM (hiljadu konvertibilnih maraka) na ime materijalne i nematarijalne štete u roku od mjesec dana od dana prijema ove odluke;

8. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocima prijava isplati zateznu kamatu od 10 % (deset posto) na iznos dosuđen u prethodnom zaključku ili na svaki njegov neisplaćeni dio po isteku jednomjesečnog roka predviđenog za tu isplatu do datuma pune isplate iznosa naređenog u ovoj odluci;

9. jednoglasno, da naredi Federaciji Bosne i Hercegovine da preduzme neophodne korake i osigura hitnu isplatu naknade podnosiocima prijava prema članu 39e. stavu 2. Zakona o prodaji stanova bez daljnjeg odlaganja;

10. jednoglasno,da naredi Federaciji Bosne i Hercegovine da Komisiji u roku od tri mjeseca od dana uručenja ove odluke dostavi informaciju o preduzetim mjerama po pravnim lijekovima.

(potpisao)
Nedim Ademović
Arhivar Komisije

(potpisao)
Miodrag Pajić
Predsjednik Komisije

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 May 2000)

Cases nos. CH/98/875, CH/98/939 and CH/98/951

Radovan ŽIVKOVIĆ, Ilija SARIĆ and Dobrivoje JOVANOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 4 April 2000 with the following members present:

Mr. Andrew GROTRIAN, Acting President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned applications 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 Article XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina living in the territory of the Federation of Bosnia and Herzegovina. They are former members of the Yugoslav National Army ("JNA") who retired before 1992. Until the outbreak of the war in Bosnia and Herzegovina they received their pensions from the Institute for Social Insurance of Army Insurees in Belgrade (the "JNA Pension Fund"), to which they had paid contributions during their life as active soldiers. Between February and April 1992 the applicants ceased to receive payments from the JNA Pension Fund. In September 1992 the Republic of Bosnia and Herzegovina issued a decree to the effect that pensioners of the JNA would be paid a pension amounting to 50 percent of their previous pension. This decision was confirmed by a law of the Republic of Bosnia and Herzegovina passed in June 1994 and by Article 139 of the Law on Pensions and Disability Insurance of the Federation of Bosnia and Herzegovina, which entered into force on 31 July 1998.

2. The applications raise issues primarily under Article 1 of Protocol No. 1 to the European Convention on Human Rights, and of discrimination in the enjoyment of the right guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

3. On 9 March 2000 the plenary Chamber has adopted a first decision on the admissibility and merits of three applications concerning the issue of the pensions paid by the Pension and Disability Insurance Fund of Bosnia and Herzegovina (the "PIO BiH") to JNA pensioners (cases nos. CH/98/706, 740 and 776, *Šećerbegović, Biočić and Oroz,* decision delivered on 7 April 2000). In deciding the present cases the Chamber has relied on its findings in that decision.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The applications were introduced between 17 August and 15 September 1998 and registered on the date of their submission. Mr. Jovanović is represented by Mr. Ismet Mehić, a lawyer practising in Sarajevo, while the other two applicants are not represented by lawyers.

5. The applications were transmitted to the respondent Party for its observations on the admissibility and merits of the cases on 15 July 1999.
6. Observations from the respondent Party were received on 15 September 1999 and transmitted to the applicants on 12 October 1999. Only Mr. Jovanović replied to the respondent Party's observations.
7. The Chamber deliberated on the cases on 4 April 2000, decided to formally join the applications and adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the individual cases

1. Case no. CH/98/875 Radovan Živković

8. The applicant, born in 1938, is a citizen of Bosnia and Herzegovina living in Sarajevo. He is a retired JNA officer. Since April 1992, due to the hostilities in Bosnia and Herzegovina, the applicant has not received any payments on account of his pension from the JNA Pension Fund. Since an unspecified date, probably between April 1992 and January 1993, he has been receiving an amount equivalent to 50 percent of his original pension from the PIO BiH in Sarajevo, as subsequently adjusted in accordance with the applicable Federation legislation. The applicant has not indicated the current amount of his pension. He has submitted a letter by the PIO BIH, by which the addressee (a JNA pensioner) is informed that the PIO BiH cannot issue a procedural decision determining the amount of the addressee's pension until "that problem is solved by law". The copy of the letter submitted to the Chamber does not contain the name of the addressee, nor any other data identifying him.

2. Case no. CH/98/939 Ilija Sarić

9. The applicant, born in 1927, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1981 the applicant retired from active service in the JNA with the rank of an ensign of first class. In February 1992 he ceased receiving payments on account of his pension from the JNA Pension Fund. Since an unspecified date (probably between June 1992 and January 1993) he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted in accordance with the applicable Federation legislation. The applicant did not receive any decision concerning this payment. As of June 1998 the applicant received a monthly pension of KM 245,50. Mr. Sarić has submitted to the Chamber a copy of the same letter submitted by Mr. Živković (see paragraph 8 above).

3. Case no. CH/98/951 Dobrivoje Jovanović

10. The applicant, born in 1935, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1986 he retired as a JNA officer. In March 1992 he ceased receiving payments on account of his pension from the JNA Pension Fund. Since September 1992 he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, although during the war the amount paid was sometimes lower and sometimes the cash payment was substituted by payment in kind, such as flour or a food parcel. The pay cheque generally bore a note saying "50 percent of the Army pension". On 25 September 1997 the applicant addressed the PIO BiH and asked for explanations concerning the reduction in the payments he received. By letter of 2 October 1997 the PIO BiH replied, informing him that he was receiving 50 percent of his original JNA pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted, in accordance with the applicable legislation enacted since 1992 (see paragraphs 17-24 below). After that, the cheque no longer indicated "50 percent of the Army pension". In September 1998 the applicant was receiving a monthly pension of KM 230.

B. Relevant domestic legislation

1. Legislation concerning the pension system, in particular JNA pensions

(a) Legislation of the Socialist Federal Republic of Yugoslavia and the Socialist Republic of Bosnia and Herzegovina

(i) *Civilian pensions*

11. According to Article 281 paragraph 3 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY"), the SFRY established the fundamental rights of the workers with regard to pensions and social security. This constitutional provision was implemented through the Law on Fundamental Rights of Pension and Disability Insurance (Official Gazette of the SFRY – hereinafter "OG SFRY" – nos. 23/82, 77/82, 75/85, 8/87, 65/87, 44/90 and 84/90).

12. The regulation of the pension system beyond the principles established in the SFRY law was within the competence of the republics of the SFRY, so that each Republic had its own pension legislation and its own (public) pension fund. In the Socialist Republic of Bosnia and Herzegovina ("SRBiH") pensions were governed by the SRBiH Law on Pension and Disability Insurance (Official Gazette of the SRBiH nos. 38/90 and 22/91).

13. All employees, except for the military personnel of the JNA, paid into the pension fund of their republic of residence. This applied also to the employees of the ministries and agencies of the Federal Government. The pension funds in the republics worked together closely. If an individual worked and contributed into a pension fund in one republic, he or she could choose to retire to a second republic and still receive his or her pension from the first republic's pension fund through the distribution system of the second republic. If an individual lived and worked and therefore paid his contributions in more than one republic throughout his working life, upon retirement he would be entitled to receive his pension from the fund to which he had contributed most.

ii. *Military pensions*

14. According to Article 281 paragraph 6 of the 1974 Constitution of the SFRY, the SFRY regulated and secured through the federal authorities the pension rights of the military staff of the JNA and of the members of their families.

15. The specific aspects of military pensions were regulated by the Law on Pensions and Disability Insurance of Insured Military Personnel (OG SFRY nos. 7/85, 74/87 and 20/89). This law provided for several mechanisms which rendered the pension treatment of former JNA military personnel more favourable than that of other categories. For the purpose of their pension treatment JNA pensioners were generally credited 15 months of service for every year of actual service. Moreover, the determination of the salary relevant to the calculation of the amount of the pension was more favourable than for the other categories of pensioners (in the case of the JNA pension the basis for calculation was the salary of the last December in active service, while for the other categories the basis was the average of the ten consecutive years with the highest income, raised to the consecutive fifteen years with the highest income by the 1998 Federation Law on Pension and Disability Insurance).

16. The JNA military employees paid their contributions to and received their pensions from the JNA Pension Fund. This was the only pension fund existing at the Federal level.

(b) Legislation of the Republic of Bosnia and Herzegovina

17. The SFRY Law on Pensions and Disability Insurance of Insured Military Personnel was taken over on 11 April 1992 as a law of the Republic of Bosnia and Herzegovina by the Decree with force of law on the Adoption and the Application of Federal Laws applicable in Bosnia and Herzegovina as Republic Laws (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – no. 2/92).

18. Article 5 of the Decree with Force of Law on Pension and Disability Insurance During the State of War or Immediate Threat of War (OG RBiH nos. 16/92, 8/93) of 18 September 1992, however, provided that:

> "(1) The Fund decides on the right to pension and disability insurance of the military insurees who are citizens of the Republic of Bosnia and Herzegovina and who reside within the territory of the Republic of Bosnia and Herzegovina.
>
> (2) The pensions of military insurees are paid in the amount of 50 percent of the pension as determined in accordance with the Law on Pensions and Disability Insurance of Insured Military Personnel and are adjusted to the amount and in the way established by the Law on Fundamental Rights of Pension and Disability Insurance and the Law on Pension and Disability Insurance.
>
> (3) The pensions of military insurees are paid in the amount and in the way determined in paragraph 2 of this Article, starting with April 1992."

19. This provision was amended by the Law on Amendments and Changes to the Decree with Force of Law on Pensions and Disability Insurance During the State of War or Immediate Threat of War (OG RBiH no. 13/94) which entered into force on 9 June 1994. Article 2 of this Law reads:

> "Article 5 is amended as follows:
>
> 'Pensions of Insured Military Personnel of the former JNA who are citizens of the Republic and who reside within the territory of the Republic (hereinafter "Insured Military Personnel") will be paid 50 percent of the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel.
>
> Where the pension of Insured Military Personnel established under the Law on Pensions and Disability Insurance of Insured Military Personnel is lower than the guaranteed pension established under the Law on Pensions and Disability Insurance (hereinafter "guaranteed pension"), pensions will be paid in the amount established under the Law on Pensions and Disability Insurance of Insured Military Personnel.

> Where the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel is higher then the guaranteed pension, and by the application of paragraph 1 of this Article is an amount lower then the guaranteed pension, the amount of the guaranteed pension will be paid.'"

(c) Legislation of the Federation of Bosnia and Herzegovina

20. Article III(1) of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement) establishes the matters that are the responsibility of the institutions of (the State of) Bosnia and Herzegovina. Article III(3)(a) provides that all governmental functions and powers not expressly assigned in the Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities, i.e. the Federation of Bosnia and Herzegovina and the Republika Srpska. The pension system is not among the matters listed in Article III(1).

21. On 31 July 1998 the Law on Pensions and Disability Insurance of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina - hereinafter "OG FBiH" - no. 29/98) came into force. Article 4 establishes that:

> "Pension and disability insurance shall be funded, in accordance with this law, from contributions and other resources."

22. Article 139 is the provision concerning JNA pensioners. It reads:

> "To the military insured members of the former JNA, who are citizens of Bosnia and Herzegovina residing within the territory of the Federation, the pension will be paid in the amount of 50 percent of the amount of the pension determined in accordance with the rules on pension and disability insurance of the military insured in force until the day of coming into force of this law."

23. Article 140 provides for the cases in which the pension as determined under the preceding Article is below the guaranteed minimum pension. It reads:

> "If the pension of the military insured of former JNA, determined in accordance with the military insured rules, is below the minimum guaranteed pension determined in the Article 72 of this law, the pension will be paid in the amount defined in accordance with the military insured rules.
>
> If the pension determined in accordance to the military insured rules amounts to more than the minimum pension guaranteed by this law, but is below the guaranteed minimum pension after application of paragraph 1 of Article 139 of this law, the pension will be paid in the amount of guaranteed minimum pension determined by this law."

24. Article 141 provides:

> "If the holder of the insurance, e.g. the insured, does not have at his disposal the records on his salary in order to determine the pension basis of the military insured of the former JNA, the pension will be determined on the basis of the average pension of the pensioners holding the same rank as the insured pension being determined."

25. As to the pension treatment of those members of the JNA who subsequently served in the Army of the Republic of Bosnia and Herzegovina or in the Army of the Federation, and who have retired or will retire after 30 July 1998, the Federation submits that their pension is determined in full accordance with the Federation Law on Pension and Disability Insurance. For these pensioners, the length of the service in the JNA before 6 April 1992 is taken into account in order to determine whether they fulfil the conditions to be entitled to a pension, but not for the purposes of calculating the amount to which they are entitled.

26. Those former JNA members who subsequently served in the Army of the Republic of Bosnia and Herzegovina or in the Army of the Federation, and who retired before 30 July 1998, receive credit for the time served in the JNA also for the purposes of calculating the amount to which they are entitled.

2. The Law on Administrative Proceedings

27. According to Article 68 of the SRBiH Law on Pension and Invalidity Insurance (see paragraph 12 above), rights from the pension and invalidity insurance are to be exercised, unless otherwise provided, in accordance with the Law on Administrative Proceedings. This provision was taken over into Article 7 of the Federation Law on Pension and Invalidity Insurance.

28. Under Article 221 paragraph 1 of the Law on Administrative Proceedings (OG FBiH no. 2/98), parties enjoy a right to appeal against decisions of first-instance administrative organs, unless otherwise provided.

3. The Law on Administrative Disputes

29. Article 1 of the Law on Administrative Disputes (OG FBiH no. 2/98) provides that the courts shall decide in administrative disputes on the lawfulness of administrative acts concerning rights and obligations of citizens and legal persons.

C. General factual background concerning the Bosnian pension system

30. The following information is based on the submissions of the respondent Party and of Mr. Jovanović, on the report "Falling Through the Cracks: the Bosnian Pension System and its Current problems" issued by the Organization for Security and Co-operation in Europe (OSCE) – Mission to Bosnia and Herzegovina, and on statistical data contained in the economic *Newsletter* of the Office of the High Representative (OHR) of February 2000.

31. During the war, the Pension and Disability Insurance Fund of the Republic of Bosnia and Herzegovina split into three separate funds, headquartered in Sarajevo, West Mostar and Pale, each fund becoming exclusively competent for the pensioners living within its region. The 1998 Federation Law on Pension and Disability Insurance provides for the continued existence of two pension funds within the Federation on a transitional basis (Article 6 of the Law). Unless otherwise specified, the Chamber has in the following disregarded the separate existence of two funds within the Federation, as it is not relevant to its decision and as it was ignored by the Parties in their submissions. All three applicants receive payments from the fund headquartered in Sarajevo, and the Chamber shall refer to it as the Pension and Disability Insurance Fund of Bosnia and Herzegovina ("PIO BiH").

32. The assets and obligations of the JNA Pension Fund in Belgrade are among the subjects of the succession negotiations between the former Republics of the SFRY. The Chamber has not received any information as to when the negotiations on this issue are expected to be concluded, or whether they actually have at all begun.

33. According to the respondent Party, the JNA Pension Fund continues to pay pensions to the JNA pensioners living in the Republika Srpska. These pensions are allegedly lower than the pensions the JNA pensioners living in the Federation receive from the PIO BiH. According to the Federation, as of February 1999, 1,466 JNA pensioners were receiving pension payments from the PIO BiH. The average monthly pension of the JNA pensioners, i.e. the average benefit paid to JNA pensioners in accordance with Article 139 of the Federation Law on Pension and Disability Insurance, amounts to about KM 298. This is about 80 percent higher than the average of the pensions paid to all other categories of pensioners, which amounts to KM 164. The maximum monthly pension paid by the PIO BiH amounts to KM 613.

34. The Federation finally submits that the PIO BiH is in great financial difficulties, as the ratio between active workers contributing to it and beneficiaries of pensions is only of 1.3 to 1.

35. The economic *Newsletter* published by the OHR in February 2000 contains the following data concerning the income distribution structure of the beneficiaries of the Sarajevo-based PIO BiH:

Monthly amount of pension in KM	No. of pensioners
less than 117	57,829
117-170	67,347
170-190	18,871
190-250	41,867
250-400	30,386
400-550	4,008
550-613	800
Total	221,108

36. According to information provided by Mr. Jovanović, which was not disputed by the Federation, pensioners of the Army of the Federation who retired with a military rank comparable to his, receive a pension amounting to at least KM 510. The Chamber notes that this figure is compatible with information provided by the Federation in the *Šećeregović, Biočić and Oroz* case, according to which the average pension of the pensioners of the Army of the Federation was, in February 2000, KM 573.

IV. COMPLAINTS

37. The applicants allege a violation of their right to receive the full pension in accordance with the procedural decisions on their retirement. Messrs. Sarić and Jovanović also complain that they are being discriminated against in the enjoyment of that right, in comparison to all other pensioners in the Federation according to Mr. Sarić, in comparison to the retired officers of the Army of the Federation according to Mr. Jovanović. The latter applicant furthermore complains that his right to a fair hearing before a court for the determination of his right to receive the full pension is being violated, and that, as a consequence, he has no remedy against this violation.

V. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

1. As to admissibility

38. The Federation asks the Chamber to declare the applications inadmissible on the ground that the applicants have not exhausted the available domestic remedies. It argues that the applicants should have appealed against the letter by the PIO BiH refusing to issue a procedural decision determining the amount of their pension. If no favourable decision had been obtained in the administrative appeals proceedings, they could have initiated court proceedings under the Law on Administrative Disputes.

39. The Federation also argues that the applications are inadmissible on the ground that they are outside the Chamber's competence *ratione temporis*. It submits that Article 139 of the Federation Law on Pension and Disability Insurance of 31 July 1998 is only a confirmation and continuation of the regulation adopted by the Republic of Bosnia and Herzegovina with the 1992 Decree and the 1994 Law. Therefore, it is argued that the relevant action by the authorities was taken with the 1992 Decree and the 1994 Law. Consequently, as the Agreement cannot be applied retroactively, the Chamber has no competence to examine the matter.

40. It is further argued that the Decree of 18 September 1992 has to be considered the "final decision" in the applicants' cases for the purpose of Article VIII(2)(a) of the Agreement. Accordingly, the applicants failed to submit their cases within six months of such final decision and the applications are inadmissible on that ground, too.

41. Finally, the Federation submits that, since Article 139 of the 1998 Law on Pension and Disability Insurance merely constitutes a continuation of the provisions adopted by the Republic of

Bosnia and Herzegovina, the State of Bosnia and Herzegovina, who is the legal successor of the Republic, should be called to act as a respondent Party in the present cases as well.

2. As to the merits

42. With regard to the merits of the complaints, the Federation submits that the applicants never paid contributions to the PIO BiH. Therefore, they are not entitled to receive a pension from the PIO BiH on the basis of the contributions made as active members of the JNA and do not have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

43. The Federation argues that the provision contained in Article 5 of the 1992 Decree was adopted in order to provide the JNA pensioners living within the territory then controlled by the Army of the Republic of Bosnia and Herzegovina, who had ceased to receive pension payments from Belgrade, with some kind of pension. It is also submitted that the Federation government decided to give continuity to this solution in order to strike a balance between, on the one hand, the need to ensure the social security of the JNA pensioners who live on its territory and are citizens of Bosnia and Herzegovina, and, on the other hand, the need not to overburden the PIO BiH, which already faces great difficulties to ensure the pensions of its insurees (see paragraph 34 above). The Federation states that this is the only possible solution until the succession negotiations, including succession to the assets of the JNA Pension Fund, are concluded.

44. As to the complaint of discrimination, the Federation argues that as the applicants do not have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention, there can be no discrimination in the enjoyment of that provision. It also submits that the payment to the JNA pensioners who reside in the Federation of only 50 percent of their original pension is fully justified in the light of the above considerations. Namely, that these pensioners contributed to the JNA Pension Fund, and not to the PIO BiH, that the PIO BiH is in serious financial difficulties and can hardly pay the full pensions to its insurees, and, finally, that notwithstanding the 50 percent reduction the average pension of a JNA pensioner is still 80 percent higher than the average pension paid by the PIO BiH. The Federation concludes that there is no discrimination against the applicants.

B. The applicants

45. Messrs. Živković and Sarić have not made any submissions, except for the above stated complaints. The following are the submissions by Mr. Jovanović.

1. As to admissibility

46. As to the issue of domestic remedies, the applicant recalls that the violation of his rights is provided for by the 1992 Decree and the 1998 Federation Law on Pension and Disability Insurance. He therefore concludes that it would be "illusory and an unnecessary waste of time" to initiate court proceedings with a view to being recognised his full pension as established by the SFRY Law on Pensions and Disability Insurance of the Insured Military Personnel. He submits that the same applies to the protection of his rights in administrative proceedings.

47. Regarding the six-months time-limit, the applicant submits that there is a continuity between the 1992 Decree, the 1994 Law and the 1998 Federation Law. He states that the application of these three laws constitutes a continuous and ongoing violation of his rights which renders inapplicable the time-limit in Article VIII(2)(a) referred to by the Federation.

2. As to the merits

48. The applicant confirms his complaints. He rejects the Federation's argument that as a JNA pensioner, who paid his contributions to the JNA Pension Fund in Belgrade, he does not enjoy a right to a pension paid by the PIO BiH. The applicant submits that this argument is contradicted by the fact that he is a citizen of Bosnia and Herzegovina, that the Federation assertedly admits in its observations that it is "withholding" the JNA pensions until the succession to the assets of the JNA

Pension Fund is solved, and that from 1992 to 1997 his pension cheque bore a note saying "50 percent of the Army pension" (see paragraph 10 above).

49. The applicant finally states that the letter received from the PIO BiH (see paragraph 10) above meant that he "had no right to any court proceedings to prove the violations of [his] rights, as the respondent Party sealed the whole thing up by the above-mentioned discriminatory law".

VI. OPINION OF THE CHAMBER

A. Admissibility

50. Before considering the cases on their merits the Chamber must decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(c) the Chamber shall dismiss any application which it considers incompatible with the Agreement. Under Article VIII(2)(a) the Chamber shall consider whether effective remedies exist and the applicants have demonstrated that they have been exhausted, and whether the application was submitted within six months of the final decision in the applicants' cases.

1. Competence *ratione personae*

51. The Federation submits, on the basis of the argument outlined above (paragraph 41), that the State of Bosnia and Herzegovina should be joined to the proceedings as respondent Party. The Chamber notes that in the *Šećerbegović, Biočić and Oroz* case, in which the State was a respondent Party, it found that it had no competence *ratione personae* to continue consideration of the applications insofar as they were directed against Bosnia and Herzegovina (paragraphs 68-71 of the *Šećerbegović, Biočić and Oroz* decision). It reached this conclusion on the grounds that pensions are not among the matters falling into the State's competence under the Constitution of Bosnia and Herzegovina, that "the State of Bosnia and Herzegovina has not taken any legislative or administrative action affecting the applicants, nor have institutions of the Republic of Bosnia and Herzegovina done so since the entry into force of the Agreement" and that therefore "no responsibility for the matters complained of can attach to Bosnia and Herzegovina" (paragraph 71).

52. As the cases presently before the Chamber do not reveal any difference in this respect to the *Šećerbegović, Biočić and Oroz* case, the Chamber concludes that it would not have any competence *ratione personae* with regard to the State of Bosnia and Herzegovina. The Federation's request stands therefore rejected.

2. Competence *ratione temporis*

53. The Chamber will next address the question to what extent it is competent *ratione temporis* to consider the present cases, bearing in mind that according to generally accepted principles of international law and to its own case-law, it is outside its competence to decide whether events occurring before the coming into force of the Agreement on 14 December 1995 involve violations of human rights (see e.g. case no. CH/96/1, *Matanović*, decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997).

54. The Chamber recalls that the respondent Party is under an obligation to ensure that its legal system is in conformity with the obligations arising from the Convention (see Eur. Court H.R., *De Becker v. Belgium* judgment of 27 March 1962, Series A no. 4, pp. 24-26). The Chamber is therefore competent to examine whether the application of legislation enacted before 14 December 1995 has given rise after 14 December 1995 to a violation of the applicants' rights guaranteed by the Agreement. Moreover, the situation complained of by the applicants has been confirmed by Article 139 of the Federation Law on Pension and Disability Insurance, which entered into force on 31 July 1998. The objection to the Chamber's competence *ratione temporis* to examine the application is therefore rejected.

3. Exhaustion of domestic remedies and compliance with the six months rule

55. The respondent Party asks the Chamber to declare the application inadmissible under Article VIII(2)(a) of the Agreement. It argues that the applicants should have appealed in accordance with the Law on Administrative Proceedings against the refusal of the PIO BiH to issue a procedural decision determining the amount of their pension. If no favourable decision had been obtained in the administrative appeals proceedings, they could have initiated court proceedings under the Law on Administrative Disputes.

56. The question arises whether the administrative and court proceedings invoked by the Federation constitute a remedy which the applicants could be reasonably expected to pursue. The Chamber notes that there is no dispute as to the full amounts of the applicants' JNA pensions, and, therefore, no issue left to be determined under the Law on Administrative Proceedings. Assuming that the applicants had initiated proceedings before the courts seeking payment of their JNA pensions in the full original amount, it can be reasonably expected that the court would have applied Article 139 of the Law on Pension and Disability Insurance. Furthermore, the Chamber notes that the respondent Party has not submitted a single case among the 1,466 affected by Article 139 of the 1998 Law of a JNA pensioner who would have availed himself successfully of the remedies indicated by it. The Chamber therefore concludes that there was no domestic remedy the applicants could be required to pursue for the purposes of Article VIII(2)(a) of the Agreement.

57. The respondent Party finally submits that the applications are inadmissible because the applicants did not lodge them within six months of the entry into force of the Decree of 18 September 1992, which, according to the Federation, was the relevant final decision in the cases.

58. The Chamber notes that the complaints in the present cases concern a situation that has lasted for nearly eight years and is still continuing. In such a case the six-month period starts to run from the moment when the situation complained of ceases to exist (see the European Commission of Human Right's decision of 19 January 1989 in application no. 11660/85, *Macedo v. Portugal*, D.R. 59, p. 85). This has not yet occurred and the six-month time-limit is therefore inapplicable in the applicants' cases and the objection is rejected.

4. Conclusion as to admissibility

59. The Chamber concludes that the applications are admissible.

B. Merits

60. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above indicate a breach by the Federation of its obligations under the Agreement. In terms of 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 instruments listed in the Appendix to the Agreement.

61. Under Article II of the Agreement, the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix (including the Convention).

62. The Chamber shall first consider the complaints raised under Article II(2)(a) of the Agreement and Article 1 of Protocol No. 1 to the Convention, as well as Articles 6 and 13 of the Convention. It shall secondly consider the complaints of discrimination under Article II(2)(b) of the Agreement and Article 9 of the ICESCR, protecting the right to social security.

1. Article 1 of Protocol No. 1 to the Convention

63. The applicants complain that the fact that they receive only 50 percent of their original JNA pension constitutes a violation of Article 1 of Protocol No. 1 to the Convention, which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

64. The Chamber notes that the European Commission of Human Rights has held that where a person has contributed to an old age pension fund, this may give rise to a property right in a portion of such a fund, and a modification of the pension rights under such a system could in principle raise an issue under Article 1 of Protocol No. 1 to the Convention. The Commission has, however, also held that the Convention does not guarantee a right to a specific social welfare benefit (see, e.g., application no. 5849/72, *Müller v. Austria*, decision of 1 October 1975, D.R. 3, p. 31; and application no. 39914/98, *Tricković v. Slovenia*, decision of 27 May 1998). In particular, the Commission has stressed that there is no right to receive social welfare benefits in a specific amount. The European Court of Human Rights has stated that the right to a certain social security benefit – in so far as it is provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (Eur. Court H.R., *Gaygusuz v. Austria* judgment of 31 August 1996, Reports of Judgments and Decisions 1996-IV, paragraph 41).

65. The applicants argue that they are entitled to receive from the PIO BiH the full amount of their JNA pension.

66. The Chamber notes that the language both of Article 5 of the 1992 Decree, as amended by Article 2 of the 1994 Law, and of Article 139 of the 1998 Law might be interpreted in the sense that the Republic of Bosnia and Herzegovina first, and then the Federation, took over the obligation of the JNA Pension Fund to pay the applicants' JNA pensions and then decided to pay only 50 percent of the amount due. The amended Article 5 of the 1992 Decree (see paragraph 18 above) provided:

> "Pensions of Insured Military Personnel of the former JNA who are citizens of the Republic and who reside within the territory of the Republic (...) will be paid 50 percent of the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel."

Article 139 of the 1998 Law (see paragraph 22 above) reads:

> "To the military insured members of the former JNA, who are citizens of Bosnia and Herzegovina residing within the territory of the Federation, the pension will be paid in the amount of 50 percent of the amount of the pension in accordance to the rules on pension and disability insurance of the military insured being in force until the day of coming into force of this Law."

67. The Chamber notes, however, that the applicants have not paid any contributions to the PIO BiH in Sarajevo, nor to any other pension fund in the Republic of Bosnia and Herzegovina or in the Federation. They had no legal relation to the PIO BiH before the issuing of the 1992 Decree with Force of Law on Pension and Disability Insurance During the State of War or Immediate Threat of War.

68. The Chamber recalls that the Federation submits that the decision to pay JNA pensioners a pension in the amount of 50 percent of the pension they were entitled to under the Law on Pensions and Disability Insurance of Insured Military Personnel was taken in order to ensure that these persons living in the territory controlled by the Army of the Republic of Bosnia and Herzegovina, who at the outbreak of the war had ceased to receive their pension payments, had the means to survive. The Federation further submits that the same *ratio* underlies Article 139 of the 1998 Law in relation to the citizens of Bosnia and Herzegovina living in the territory of the Federation. It also stresses that the assets of the Belgrade JNA Pension Fund are among the subjects of the succession negotiations.

69. The Chamber concludes that the applicants have no claims against the PIO BiH or against the Federation beyond those attributed to them by the 1992 Decree and 1998 Law, which could be regarded as a possession under Article 1 of Protocol No. 1 to the Convention. The applicants' claim towards the JNA Pension Fund, which is not at issue before the Chamber, appears to remain

untouched by the mentioned legislation. Accordingly, the Chamber concludes that the applications do not reveal any interference with the applicants' possessions by the Federation and, accordingly, no violation of Article 1 of Protocol No. 1 to the Convention.

2. Article 6 of the Convention

70. Mr. Jovanović complains that, because the payment of only 50 percent of his full JNA pension is provided by law, he does not have access to a court for the determination of his right to receive the full pension in a fair hearing. On this ground he claims a violation of Article 6 paragraph 1 of the Convention, which – insofar as relevant – reads:

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

71. The Chamber recalls that for Article 6 of the Convention to apply, the right at issue must be a "civil right" within the meaning of Article 6 paragraph 1. In the present case, however, for the reason set forth below, the Chamber need not determine whether the claim to receive from the PIO BiH or the Federation the full JNA pension concerns a "civil right".

72. The Chamber notes that Mr. Jovanović has not taken any steps in order to initiate court proceedings. Also, he has not claimed that he was barred, in fact or in law, from initiating such proceedings in order to complain of the alleged curtailment of his pension payments, once he had completed the proceedings before the competent administrative authorities. He rather complains that such court proceedings would not have offered any reasonable prospect of success, as the court would have applied exactly the legislation allegedly violating his rights.

73. In examining the admissibility of the applications under Article VIII(2)(a) of the Agreement, the Chamber has substantially agreed with this evaluation (see paragraph 56 above). With regard to the merits of the applicant's complaint, however, the Chamber does not find that this situation reveals a violation of the applicants' right to access to a court and to a fair trial before such court protected by Article 6. Indeed, while Mr. Jovanović's grievance is that his right to a full pension is not recognised by the Federation legislation, Article 6 extends only to disputes over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see Eur. Court H. R., *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p.46, paragraph 81). Moreover, Article 6 does not require that there be a domestic court with competence to invalidate or override domestic law (see *James and Others*, paragraph 81).

74. To sum up, the fact that the applicants did not have a reasonable prospect to be recognised the right to receive the full JNA pension by a domestic court, because this right is not recognised by domestic law, does not disclose a violation of Article 6 of the Convention. There has accordingly been no violation of that provision.

3. Article 13 of the Convention

75. Mr. Jovanović states that he does not have any remedy before national authorities against the violation of his right to receive his full pension, which he considers a violation of his right to his possessions protected by Article 1 of Protocol No. 1 to the Convention. Although the applicant has made this complaint with reference only to Article 6 of the Convention, the Chamber has considered it also under Article 13, which provides:

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

76. The Chamber notes that in the present cases the source of the grievance is the legislation itself. Requiring an effective remedy would be tantamount to requesting judicial or other review of legislation. In the *James and Others* judgment referred to above the European Court of Human Rights has held that "Article 13 does not go as far as to guarantee a remedy allowing a Contracting State's

laws as such to be challenged before a national authority on the ground of being contrary to the Convention" (paragraph 85). Accordingly, the applications do not reveal a violation of Article 13 of the Convention.

4. Discrimination in the enjoyment of the right to social security guaranteed by Article 9 of the ICESCR

77. Mr. Sarić complains that the JNA pensioners are the only category of pensioners who suffers a 50 percent reduction of the pension payments. Mr. Jovanović complains that his pension has been reduced while those of the pensioners of the Army of the Federation are being paid in the full amount.

78. The Chamber has considered the applicants' complaints as allegations of discrimination in the enjoyment of the right guaranteed by Article 9 of the ICESCR, which reads:

> "The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance."

79. In order to determine whether the applicants have been discriminated against, the Chamber must first determine whether the applicants were treated differently from others in the same or a relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions January-July 1999).

80. In accordance with the approach outlined above, the Chamber has considered whether the other categories of pensioners mentioned by the applicants constitute "others in the same or relevantly similar situations". As to the civilian pensioners, the Chamber is of the opinion that they are not in a relevantly similar position. Firstly, the civilian pensioners paid their contributions into the PIO BiH and thereby acquired a right to a pension from that fund in accordance with the provisions of the SRBiH Law on Pension and Disability Insurance, as subsequently taken over and amended by the Republic of Bosnia and Herzegovina and the Federation. Secondly, the JNA pension scheme contained mechanisms that rendered it unique and very favourable. The Chamber recalls that JNA pensioners were generally credited 15 months of service for every year of actual service for the purposes of the calculation of the years of service attained. Moreover, the determination of the salary relevant as the basis for the calculation of the amount of the pension was significantly more favourable than for the other categories of pensioners (see paragraph 15 above). In the light of these considerations, the Chamber concludes that no issue of differential treatment of the applicants, and therefore no issue of discrimination in the enjoyment of the right to social security, arises in relation to the civilian pensioners, as these do not constitute a relevantly comparable group.

81. The situation is different in relation to the former JNA members who retired after having served in the Army of the Republic of Bosnia and Herzegovina or the Army of the Federation, in particular those who retired before 30 July 1998 (see paragraphs 25 and 26 above). The latter category apparently receives the full pension as established under the Federation Law on Pension and Disability Insurance and full credit is given for the time served in the JNA, both for the purpose of the determination of the entitlement and of the amount of the pension to which they are entitled. The Chamber notes that the mechanism by which this category's entitlement to pension is calculated is not completely clear. The fact, however, that the average pension of the pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation amounts to KM 573.50 (as of February 2000), whereas the average pension of the JNA pensioners is KM 298 (as of February 1999), the maximum pension obtainable being KM 613, leaves no doubt as to the favourable treatment of these pensioners.

82. These statistical data show that the veterans of the war in Bosnia and Herzegovina are put in a position of considerable economic advantage in comparison to the entire remaining population of the Federation, and not only as compared to members of the JNA who retired before 1992 and did not join the Army of the Republic of Bosnia and Herzegovina, the HVO or the Army of the Federation.

Furthermore, the former JNA members who joined these armed forces served either the government of the Republic of Bosnia and Herzegovina or of the Federation and thereby established a legal relationship to one or both of these governments. The Chamber notes that the privileged treatment of veterans is a feature that is not peculiar to the society of the post-war Federation of Bosnia and Herzegovina.

83. In the light of these considerations, the Chamber concludes that the difference in treatment between the JNA pensioners on the one hand and the pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation on the other hand, including the former JNA members who served in these armed forces, has an objective justification in the fact that the members of the second group are former soldiers of the armed forces of the country or government whose pension fund is paying their pensions. As the applicants still receive a pension that is higher than the average pension paid by the PIO BiH, the Chamber does not find that the Federation government exceeded its margin of appreciation in not extending the favourable treatment granted to its own pensioners to the JNA pensioners. Therefore, the Chamber concludes that there is no discrimination against the applicants in the enjoyment of the right to social security in comparison to the military pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation either.

84. To sum up, the Chamber finds that the position of the applicants, and of the JNA pensioners in general, within the pension and social security system of the Federation of Bosnia and Herzegovina is characterised by elements which exclude any comparison to the civilian pensioners as a group in the same or a relevantly similar position. As to the difference in treatment with regard to the pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation, the Chamber finds that the difference in treatment is justifiable in the light of the above considerations. The Chamber concludes that the cases before it do not disclose discrimination against the applicants.

VIII. CONCLUSIONS

85. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. unanimously, that there has been no violation of the applicants' right to peacefully enjoy their possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights;

3. unanimously, that there has been no violation of the applicants' right to have their civil rights determined in a fair hearing before an independent and impartial tribunal under Article 6 of the European Convention on Human Rights;

4. unanimously, that there has been no violation of the applicants' right to an effective remedy before a national authority against violations of their rights protected by the Convention under Article 13 of the European Convention on Human Rights;

5. unanimously, that the applicants have not been discriminated against in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Andrew GROTRIAN
Acting President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 8 October 1999)

Case no. CH/98/892

Dževad MAHMUTOVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 7 September 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Miodrag PAJIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. This case concerns an order to the applicant by the Prnjavor municipal authorities to exhume his wife from her grave at the Islamic cemetery in Prnjavor, and to re-bury her in a non-existing cemetery.

2. The application raises primarily issues of discrimination in the enjoyment of the rights to manifest one's religious beliefs in practice and to private and family life, guaranteed by Articles 9 and 8 of the European Convention on Human Rights respectively.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 20 August 1998 and registered the following day. The applicant requested, as a provisional measure, that the execution of the Procedural Decision of the Prnjavor Municipality of 30 July 1998 and delivered to the applicant on 5 August 1998, be prevented. The decision ordered the exhumation of the remains of the applicant's late wife, Mrs. Bedrija Mahmutović, from the Muslim Town Cemetery in the centre of Prnjavor, and their re-burial at the new town cemetery in the eastern part of Prnjavor. According to the applicant, the new cemetery did not exist.

4. On 24 August 1998 the President of the Chamber issued an order for provisional measures, ordering the respondent Party to desist from implementing the decision of 30 July 1998.

5. At its session on 9 September 1998 the Chamber approved the order for provisional measures issued by the President. It further decided to request additional information from the applicant and to transmit the application to the respondent Party for observations on the admissibility and merits of the case. No response was received from the respondent Party within the period allotted by the Chamber.

6. On 1 December 1998 the Chamber requested the assistance of the Organisation for Security and Co-operation in Europe ("OSCE") in order to obtain information on whether the new cemetery in Prnjavor exists. On 7 December 1998 the OSCE Field Office in Doboj replied that the new cemetery had not been established yet (see paragraphs 30 and 31 below). The letter by OSCE was transmitted to the applicant and to the respondent Party on 22 December 1998 for possible observations.

7. The applicant submitted written observations on 18 December 1998, which were transmitted to the respondent Party on 22 December 1998.

8. The Chamber deliberated on the case on 14 December 1998 and decided to hold a public hearing on 14 January 1999. This hearing was then postponed to 12 February 1999 at the request of the Agent of the respondent Party.

9. By a letter of 13 January 1999 the applicant restated his factual and legal allegations and put forward a detailed claim for pecuniary compensation. This letter was transmitted to the respondent Party on 27 January 1999.

10. At the public hearing there appeared the applicant and his counsel, Mr. Halid Kulenović, and the Agent of the respondent Party, Mr. Stevan Savić. The Chamber took testimony from witness Sakib Ćuran, while witnesses Nedeljko Karanović and Dušan Ljubojević failed to appear (see paragraphs 32 to 36 below).

11. In the course of the hearing, the Agent for the respondent Party stated that he would explore the possibility of an amicable settlement of the case. By a letter dated 2 March 1999 he informed the Chamber of the terms of a friendly settlement proposed by the Municipal Assembly of Prnjavor. By a letter dated 5 April 1999 the applicant's counsel rejected the proposed friendly settlement.

12. On 13 April 1999 the Chamber instructed the Registrar to offer the Chamber's good offices to the Parties in order to reach a friendly settlement of the case. In a memorandum dated 20 April

1999, the Registrar set forth to the Parties the terms of the proposed friendly settlement adopted by the Chamber on 16 April 1999. On 27 April 1999 the Chamber received the acceptance of the proposed friendly settlement by the respondent Party and its refusal by the applicant.

13. On 28 May 1999 the Chamber received a letter from the applicant stating that the new cemetery had not been opened yet. This letter was transmitted to the respondent Party on 1 June 1999 for possible observations. A letter by the respondent Party confirming that the new cemetery had not been opened yet was received on 4 June 1999.

14. The Chamber deliberated on the admissibility and the merits of the case on 14 May, 9 and 10 June, 5 July and 6 and 7 September 1999. On the last-mentioned date the Chamber adopted the decision on the admissibility and merits of the case.

III. ESTABLISHMENT OF THE FACTS

A. Facts as presented by the applicant

1. Death and burial of Mrs. Bedrija Mahmutović

15. The applicant, Mr. Dževad Mahmutović, is of Bosniak origin, residing in Prnjavor, Republika Srpska.

16. On 17 May 1998 the applicant's wife, Mrs Bedrija Mahmutović, died. On 19 May 1998 she was buried in the Muslim Town Cemetery in accordance with Muslim religious regulations and practice.

17. The Muslim Town Cemetery in Prnjavor is located at cadaster lot 741/1, Cadaster Municipality Prnjavor, and is managed and maintained by the Islamic Community of Prnjavor. The Mahmutović family owns a parcel at that cemetery where its members have been buried for decades.

18. On 21 May 1998 the applicant paid to the Board of the Islamic Community of Prnjavor the amount of 600 Dinars for burial expenses.

2. Decision of 21 October 1994 putting out of use the Muslim Town Cemetery

19. On 21 October 1994 the Municipality of Prnjavor had issued decision No. 01-012-77/94, providing that the cemetery ("*harem*") at cadaster lot 741/1 in Prnjavor (the Muslim Town Cemetery) no longer be used. The same decision provided that the burial of deceased Muslims would be performed at the new town cemetery in the eastern part of the town. The decision did not indicate the cadastral land mark of the new town cemetery. The applicant states that the new town cemetery in the eastern part of the town does not exist.

20. The decision of the Municipality provides only for the putting out of use of the Muslim Cemetery, while it does not affect the nearby Orthodox and Catholic cemeteries.

21. Notwithstanding the decision, the Muslim Town Cemetery was used for three burials before the end of May 1995 and again on 26 March 1999. On the latter occasion, Mr. Sakib Ćuran, the President of the Islamic Community Board in Prnjavor, was summoned to the police station after the funeral and was informed that burials in that cemetery were forbidden. On 30 March 1999, a further deceased Muslim citizen of Prnjavor should have been buried in the Town Cemetery, but the funeral could not take place there, because the municipal officials explicitly prohibited it.

3. Order to exhume the remains of Mrs. Mahmutović and the ensuing proceedings

22. On 29 July 1998, the Communal Inspector of the Prnjavor Municipality made an on-site investigation at the Cemetery.

23. On 30 July 1998 the Prnjavor Municipality Communal Inspection issued Procedural Decision

No. 07-371-48/98, ordering the applicant to conduct, at his own expense, the exhumation of his late wife from the Town Cemetery, and to move her remains to the new town cemetery located in the eastern part of town, within 15 days from the day of the receipt of the Procedural Decision. By the same procedural decision, the applicant was obliged to request the Municipal Sanitary Inspection for permission to exhume his late wife. The applicant received the procedural decision on 5 August 1998. The decision provided for the right of appeal within 15 days of receipt but such appeal would not have suspensive effect.

24. On 12 August 1998 the applicant submitted a letter to the OSCE Regional Office in Banja Luka. He wrote that "on the basis of discrimination and over dead bodies, ethnic cleansing of the non-Serb nationality has been performed" because the Muslim Town Cemetery had been put out of use by the Decision of the Prnjavor Municipality from 1994.

25. On 14 August 1998 the applicant filed an appeal against the Procedural Decision of 30 July 1998 to the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology. He received no reply.

26. On 20 August 1998 the applicant filed an application for provisional measures with the Chamber. On 25 August 1998 the applicant submitted to the Chamber a certificate from the Prnjavor Islamic Community which states that Mrs. Mahmutović and other deceased members of the family are buried at the cemetery on cadastral lot 741/1, Cadaster Municipality Prnjavor, and that the Mahmutović family has a parcel in that cemetery.

B. Facts as presented by the respondent Party

27. The respondent Party did not dispute the substance of the facts as described by the applicant.

28. The respondent Party stated that the cemetery at lot 741/1 of the Prnjavor Municipal Cadaster was put out of use by a decision of the Municipal Assembly and that the Islamic Community was duly informed of that decision. The Agent of the respondent Party was not able to indicate the reasons for the closing of the Muslim Town Cemetery. He noted, however, that in fact the Islamic Community had complied with the decision until the funeral of Mrs. Mahmutović, by burying its deceased in the cemeteries of the villages of Konjuhovci, Lišnja, Mravica and Babanovci.

29. At the Chamber hearing on 12 February 1999 the Agent of the respondent Party produced the decision of the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology, the second instance organ to which the applicant had appealed against the procedural decision of 30 July 1998. In its decision dated 2 February 1999 the Ministry annulled the first instance decision on the grounds that it did not indicate the exact location of the cemetery in which Mrs. Mahmutović was to be re-buried, and, secondly, that the photocopies of the Municipality decisions in the case file were only photocopies instead of officially verified copies. The Ministry accordingly remitted the case to the Communal Inspector for a renewed decision. It instructed that the new decision should precisely establish where the remains of Bedrija Mahmutović are to be buried. It appears that the Communal Inspector has not rendered the renewed decision up to date.

C. Information provided by the OSCE

30. In reply to a request for assistance by the Chamber, the OSCE Field Office in Doboj stated on 7 December 1998 that the new cemetery did not exist yet. It added, however, that negotiations about the purchase of a piece of land to use as a municipal graveyard were ongoing.

31. The OSCE Field Office in Doboj also stated that the Islamic Community of Prnjavor was currently burying its dead at an Islamic cemetery in Konjuhovci, a suburb of Prnjavor.

D. Oral testimony by witness Mr. Sakib Ćuran

32. Of the three witnesses summoned to the oral hearings on 2 February 1999 only one appeared, Mr. Sakib Ćuran, President of the Islamic Community in Prnjavor. The other two witnesses,

Mr. Nedeljko Karanović, Municipal Inspector of Prnjavor, and Mr. Dušan Ljubojević, Director of JKP "Park" Prnjavor, did not appear at the public hearing.

33. Mr. Ćuran stated that until June 1995 the Islamic Community of Prnjavor had buried its dead at the Muslim Town Cemetery. This cemetery is located within not more than 500 meters from the Orthodox and the Catholic cemeteries in the center of Prnjavor. Before the armed conflict, the Islamic Community was selling parcels of the cemetery to Muslim families. The data available to the Islamic Community showed that the empty space in the cemetery was sufficient for the next fifty years. Mr. Mahmutović had not purchased a land parcel in the Town Cemetery for his wife, but there was space for her in the parcel where all the deceased members of the Mahmutović family had been buried.

34. Mr. Ćuran further stated that he had not been consulted before the adoption of the Municipality Assembly decision putting the graveyard out of use, and that he had not received any communication about the reasons for that decision. Concerning the new cemetery in the Eastern part of town, Mr. Ćuran said that he was not aware of the existence of the new cemetery, and that certainly no right to use that cemetery had been registered in favor of the Islamic Community.

35. From June 1995 until the funeral of Mrs. Mahmutović on 19 May 1998, the Islamic Community did not dare to bury any of its deceased members in the Town Cemetery because of the hostile atmosphere. During that period most of the deceased Moslems were buried in a meadow adjacent to the cemetery of Konjuhovci, a small village at about 2.5 to 3 kilometers from the border of Prnjavor town.

36. In relation to the funeral of Mrs. Mahmutović, Mr Ćuran stated that the Prnjavor police had been notified about the burial and that it had not interfered with it.

E. Relevant domestic law

1. Continuation of laws enacted prior to the General Framework Agreement

37. Under Article 2 of Annex II to Annex 4 to the General Framework Agreement, all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution of Bosnia and Herzegovina enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

38. According to Article 12 of the Constitutional Law on the Implementation of the Constitution of the Republika Srpska (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 21/92), laws and other regulations of the Socialist Federal Republic of Yugoslavia ("SFRY") and the Socialist Republic of Bosnia and Herzegovina ("SRBiH") which are consistent with the Constitution of the Republic and not inconsistent with laws and regulations enacted by the Assembly of the Serb People in Bosnia and Herzegovina, i.e. the People's Assembly, will be applied until the issuance of relevant laws and regulations of the Republika Srpska.

2. The Law on General Administrative Procedure

39. According to Article 218 of the Law on General Administrative Procedure (Official Gazette of the SFRY no. 47/86) any request submitted to an administrative organ is to be considered refused, if no decision has been made within one or two months (depending on the subject matter).

40. If the competent body does not deliver a decision within the above time-limit, the applicant has a right to appeal against this tacit refusal, "silence of administration", to the higher administrative body, if an appeal against the decision initially sought is allowed (Article 218).

41. The rules applicable to appeals against decisions by first instance administrative bodies are set forth in Articles 239 to 245 of the Law on Administrative Procedure.

42. Pursuant to Article 242, paragraph 1, if the second instance body finds, on the basis of the

facts as they have been assessed in the first instance proceedings, that the matter before the first-instance body should have been solved differently, it shall annul the impugned decision and render a new decision directly solving the matter.

43. However, if the second instance body finds that the first instance body is in a better position to remove the flaws of the impugned decision expeditiously and efficiently, it shall remit the case to the first instance body. The first instance body must render a new decision at latest within 30 days from receipt of the case on remittal and shall be bound by the instructions of the second instance body on how to solve the matter. The party has the right to appeal against the new decision by the first instance body (Article 242, paragraph 2).

3. The Republika Srpska Law on Administrative Disputes

44. According to Article 2 of the Law on Administrative Disputes (OG RS no. 12/94), a physical and legal person has a right to initiate an administrative dispute if he considers that his right or personal interest based on law has been violated. According to Article 3, county courts, the Supreme Court of the RS and the RS Military Supreme Court are competent to resolve administrative disputes.

45. According to Articles 7 and 25 of the law, an administrative dispute may be initiated against an administrative decision of a second instance body. An administrative dispute may also be initiated against an administrative decision of a first instance body, if an ordinary appeal against the decision is not allowed.

46. According to Article 9(1) of the law, an administrative dispute cannot be initiated against administrative decisions in matters which a judicial body is competent to adjudicate.

47. According to Articles 23 and 25, an administrative dispute may be initiated within 30 days from the day of delivery of the administrative decision. An administrative dispute may also be initiated if the first or second instance body did not issue a decision on the applicant's request or appeal within sixty days, or within seven days after the request for a decision has been repeated.

4. The Republika Srpska Law on Communal Activities

48. According to Article 2(1)(6) of the Law on Communal Activities of Republika Srbska (OG RS no. 11/95), funerals are an activity of special public interest.

49. According to Article 19 of the law, a cemetery is a communal object which the Municipality Assembly shall allocate for management and maintenance to a public utility company, or other company or local community.

50. According to Article 20, the Municipality Assembly shall prescribe, in particular the modalities of and conditions for the arrangement and maintenance of cemeteries, terms for ceding and reimbursement for use of parcels in a cemetery, terms for erection of family vaults, conditions for erection of tombstones and entry of certain data on these monuments, transfer of mortal remains to the cemetery, and terms under which burials may be performed outside of cemeteries in use.

51. According to Article 21, the company, or religious or local community managing the cemetery shall grant permissions for the erection, removal or replacement of tombstones and tombstone signs in accordance with regulations of the Municipality Assembly.

52. According to Article 24, objects for religious ceremonies on existing cemeteries shall be managed by the religious communities to which they belong.

53. Article 32, finally, provides that by the day of entry into force of this law the validity of the (old) Law on Communal Activities (Official Gazette of the SRBiH no. 20/90) shall cease.

5. The Ordinance on Graveyards of the Prnjavor Municipality

54. On 30 April 1998 the Prnjavor Municipality Assembly passed the Ordinance on Graveyards of

the Prnjavor Municipality, which was published on 4 May 1998 and entered into force eight days later. The ordinance is based on the powers attributed to the Municipality by Articles 19 and 20 of the above-mentioned Law on Communal Activities of Republika Srpska (OG RS no. 11/95). The ordinance provides for the conditions and forms of burials, exhumation of the remains of deceased persons, the transfer of such remains from one graveyard to another and for the conditions for the closing and levelling of graveyards.

55. According to Article 2 of the ordinance, a graveyard out of use, also defined as an "abandoned graveyard", is a graveyard at which, pursuant to a decision of the Municipality Assembly, no further burials shall take place.

56. According to Article 4 of the ordinance, burials may be performed only in cemeteries or parts of cemeteries in use.

57. Article 6 of the ordinance provides that the establishment of new graveyards and the extension of existing ones can only take place in locations destined for that purpose in the urban planning documentation.

58. According to Article 16 of the ordinance, graveyards in use in the Prnjavor urban area are managed by the communal company "Park", while graveyards outside the urban area are managed by the respective local community. The same applies to graveyards out of use, until the area is destined to a different use.

59. According to Article 50 of the ordinance, deceased persons can exceptionally be buried at special places, outside of a graveyard in use, provided that special reasons exist and special conditions are met and that the burial does not contravene the public interest, urban planning, sanitary and other regulations.

60. According to Article 52(1) of the ordinance, the remains of persons buried outside graveyards in use can be transferred to graveyards in use, unless the family of the deceased or the person taking care of the grave objects. Paragraph 2 of the same Article provides that the municipal organ for sanitary inspection is competent for the procedural decision on exhumation and subsequent burial. The expenses of the exhumation and the subsequent transfer of the mortal remains are to be borne by the person requesting the exhumation and approving the transfer, or by the Municipality if the exhumation is in the public interest.

61. According to Article 53(1) of the ordinance, the remains of deceased persons may be exhumed and transferred to another place upon request of the family of the deceased and in accordance with the applicable regulations. Paragraph 5 of the same Article provides that the municipal organ for sanitary inspection is competent for the procedural decision on exhumation and subsequent burial. According to Paragraph 6, the expenses of the exhumation and the subsequent transfer of the mortal remains are to be borne by the person requesting the exhumation and approving the transfer, or by the Municipality if the exhumation is in the public interest.

62. Article 54 of the ordinance provides that a graveyard or part of a graveyard shall be put out of use when it is established that there is no more place for further burials, or if the closing is necessary for sanitary or urban planning reasons. According to Article 54(2), the decision to put the graveyard or part of it out of use is taken by the Municipality Assembly. Such decision shall also provide the conditions for the transfer of the remains of persons buried in the closed graveyard.

IV. COMPLAINTS

63. The applicant complains that the order to exhume his wife constitutes discrimination against him on the grounds of religion and national origin in the enjoyment of his right of freedom of religion. In this respect, he asserts that "the act of burial is a highly religious act in any religion". The applicant also complains that the closing of the Muslim Town Cemetery deprived the Mahmutović family of its parcel in that cemetery. In the course of the public hearing, the applicant further complained that he was prevented from participating in the proceedings leading to the exhumation

order of 30 July 1998.

64. The applicant specifically invokes Articles 6, 9 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

V. FINAL SUBMISSIONS BY THE PARTIES

A. The respondent Party

65. The respondent Party maintains that the application is inadmissible, as the applicant has not exhausted the available domestic remedies. It does not specify which effective remedies were available to the applicant.

66. Should the Chamber examine the merits of the case, the respondent Party contends that Mrs. Mahmutović was unlawfully buried in the closed Muslim Town Cemetery without the knowledge of the competent municipal organ. This violation of the applicable laws and regulations by Mr. Mahmutović could not be justified by his right to freedom of religion. The maintenance of cemeteries is a matter falling within the competence of the municipal authorities, to be exercised in accordance with the regulations concerning urban planning and the protection of natural, historical and other values within the municipality area. Moreover, the respondent Party points out that the applicant could have applied for an exceptional permission to bury his wife in the closed graveyard under Article 50 of the Decision on Graveyards.

67. In relation to the alleged violation of the applicant's property rights, the respondent Party asserts that pursuant to Articles 19 to 24 of the Republika Srpska Law on Communal Activities (OG RS no. 11/95), land intended for burials of deceased persons could not be the object of a property right. Therefore, no such right of the applicant could have been violated by the Prnjavor authorities (see paragraph 49 above).

68. As far as respect for the applicant's rights in the course of the administrative procedure is concerned, the respondent Party points out that the applicant was heard on the occasion of the inspection of the cemetery on 29 July 1998. It can therefore not be said that his right to due process has been violated in that respect.

B. The applicant

69. The applicant maintains his complaints.

70. At the oral hearing the applicant explained that, considering the inefficiency shown by the authorities in dealing with his complaints in the course of the administrative proceedings, he felt it was useless to take other legal steps against the "silence of the administration" that followed his appeal. The applicant has not made any submissions on the issue of available remedies after learning about the decision of the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology dated 2 February 1999, annulling the decision of 30 July 1998 (see paragraph 29 above).

71. The applicant insists on the discriminatory character of the 1994 Municipality Assembly Decision closing the Muslim Town Cemetery. He suspects that the purpose of the order to exhume his wife is to speed up the levelling of the cemetery and the designation of the area for a different use.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Requirement to exhaust effective domestic remedies

72. According to Article VIII(2)(a) of the Agreement, the Chamber shall take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

73. The Chamber has already found that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, e.g., case no. CH/96/17, *Blentić*, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21, with further reference, Decisions on Admissibility and Merits 1996-1997). It is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (*ibid.*).

74. In the present case, the respondent Party argues that the application should be declared inadmissible, because the applicant did not indicate that there were no domestic remedies available, nor did he show that he had exhausted the available remedies. The applicant, for his part, asserts that due to the inefficiency of the competent organs, all remedies available would prove to be ineffective.

75. The burden of proof is on a respondent Party arguing non-exhaustion of domestic remedies to satisfy the Chamber that there was an effective remedy available to the applicant both in theory and in practice (see, e.g., case no. CH/96/21, *Čegar*, decision on admissibility of 11 April 1997, paragraph 12, Decisions on Admissibility and Merits 1996-1997).

76. In the present case, the respondent Party has not indicated which remedies were or would be available to the applicant. The procedural decision ordering the exhumation provides that an appeal against it does not have any suspensive effect. The Chamber notes that where the execution of an order by the administrative authority causes irreparable harm to the person concerned by it, the provision that an appeal shall not suspend the execution means that there is in fact no effective remedy against the order.

77. On the information available to it the Chamber determines that no effective remedy was available to the applicant which could have afforded redress in respect of the breaches alleged. The Chamber therefore concludes that the admissibility requirement in Article VIII(2)(a) of the Agreement has been met.

B. Merits

78. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by Republika Srpska of its obligations under the Agreement.

1. Discrimination in the enjoyment of the right to private and family life and freedom of religion

79. The applicant complains primarily that he has been the victim of discrimination on the grounds of his religion, as a Muslim, since only the Muslims are prevented from burying their dead in the city. He also submits that he has been discriminated against on the ground of his nationality, as a person of Bosniak descent, and suggests that the case involves “an attempt to eradicate all traces of the existence of that nationality by cleansing even cemeteries and not allocating new burial grounds where burials can be conducted”. He submits that the conduct of the authorities severely upset numerous members of his family, who owned a plot at the cemetery in question and whose family members had always been buried there. The Chamber has considered these complaints in the light of Article II(2)(b) of the Agreement in relation to Articles 8 and 9 of the Convention.

80. Under Article II (2) (b) of the Agreement the Chamber has jurisdiction to consider:

> "alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex ...".

81. Article 8 of the Convention (which is among the international agreements listed in the Appendix to the Agreement) provides as follows:

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

82. Article 9 of the Convention reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

83. In order to determine whether the applicant has been discriminated against, on the ground of his religion, national origin or association with a national minority, in the enjoyment of his rights to freedom of religion and respect for his private and family life, the Chamber must first determine whether the impugned acts of the municipal authorities of Prnjavor fall within the ambit of these rights.

84. As to Article 8 of the Convention, the European Commission of Human Rights held in the case of *X. v. the Federal Republic of Germany* (Decisions and Reports 24, p. 137) that the refusal of the German authorities to allow the applicant in that case to have his ashes scattered on his garden was so closely related to private life that it came within the sphere of Article 8 (ibid. at p. 139). In the present case, the applicant asserts that his family originates from Prnjavor and that for many years family members have been buried at the family plot at the Muslim Cemetery where his late wife is buried. He also claims that numerous members of the family were severely upset by the authorities' action in ordering her exhumation. The applicant's statements have not been disputed and the Chamber accepts them as correct. In the circumstances of the case the Chamber considers that the authorities' action in ordering the exhumation of the applicant's wife from the family plot was so closely related to the private and family life of the applicant that it came within the ambit of Article 8 in so far as it relates to respect for private and family life.

85. As to Article 9, the Chamber notes that the applicant's wife was buried in the Muslim Cemetery in accordance with Muslim religious regulations and practice. The Chamber finds that such a burial clearly falls within the ambit of Article 9 in so far as it relates to freedom of religion, including in particular freedom to manifest one's religion in practice and observance. Equally any interference with the grave by exhumation or an order for exhumation of the deceased after such a burial has taken place, must be considered to fall within the ambit of Article 9.

86. The Chamber therefore finds that the facts of the case fall within the ambit of Articles 8 and 9 of the Convention and that it therefore has jurisdiction under Article II (2) (b) of the Agreement to

consider whether the applicant has been the victim of discrimination in relation to the enjoyment of his rights under those provisions.

87. In examining whether there has been discrimination contrary to the Agreement, the Chamber, applying case-law of the European Court of Human Rights and of other international human rights monitoring bodies, has consistently found it necessary to determine whether the applicant was treated differently from others in the same or a relevantly similar situation (see, e.g., case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraphs 87ff., Decisions and Reports 1998). The Chamber has held that any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in Article I (14) of the Agreement, including religion or national origin (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 121, Decisions January-July 1999).

88. The procedural decision of 30 July 1998, ordering the exhumation, was based on the Municipality's decision of 21 October 1994 which provided for the closure of the Muslim Town Cemetery. The latter decision was taken before 14 December 1995, when the Agreement came into force. Since the Agreement does not have retroactive effect, the Chamber has no competence *ratione temporis* to consider whether any violation of the human rights provisions referred to in the Agreement occurred before that date (see, e.g., case no. CH/96/1, *Matanović*, decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997). In the present case, however, the decision of October 1994 remains in force and forms the legal basis for the decision affecting the applicant. It gives rise to a continuing prohibition on the Muslims of Prnjavor from burying their dead in the Muslim Cemetery, which has been applied in the applicant's case since the Agreement came into force. In considering whether the decision affecting the applicant was discriminatory it is therefore relevant also to consider the decision of October 1994.

89. With reference to the decision of October 1994, the Chamber first notes that it affected only the Muslim Cemetery and not the Orthodox or Catholic cemeteries situated nearby. According to the undisputed testimony of the President of the Islamic Community in Prnjavor, which the Chamber accepts, there is no shortage of space for burials in the Muslim Cemetery, the space available being sufficient for the next fifty years. The decision itself does not state any reason for the closure of the Cemetery. No reason for the decision was communicated to the Islamic Community either at the time of the decision or since. The respondent Party was unable to specify any reason for the decision in the proceedings before the Chamber. In the circumstances the Chamber finds the applicant's suggestion, that the purpose of the 1994 decision was to contribute to the elimination of all traces of the Muslim population from the town centre of Prnjavor, has not been seriously challenged and is the only plausible explanation of that decision.

90. As to the procedural decision of 30 July 1998, the Chamber first notes that no reason has been given by the respondent Party as to why the applicant should have been required to exhume his wife beyond the fact that the Cemetery had been closed by the 1994 decision. The Chamber finds, however, that the continued closure of the Cemetery, under a decision taken in pursuance of a policy of ethnic cleansing, involves differential treatment of Muslims such as the applicant, and cannot be regarded as pursuing any legitimate aim. The decision on exhumation therefore involved discrimination against the applicant for these reasons alone.

91. A number of other factors also support the view that the decision was arbitrary, unreasonable and lacking any legitimate aim. In particular the decision orders that the remains of Mrs. Mahmutović should be transferred to a cemetery that does not exist. The respondent Party has not claimed, nor could it reasonably be claimed, that the Communal Inspector who took the decision was unaware of the non-existence of the "new cemetery in the eastern part of the town". On the evidence before it the Chamber can therefore only conclude that the Inspector knowingly issued an order that the applicant could not possibly comply with. The decision also orders the applicant to proceed with the exhumation of his wife and at the same time orders him to apply to the Municipal Sanitary Inspection

for permission to do so. Additionally, it provides for a very short time limit, of fifteen days, to carry out all the duties imposed. Furthermore, the decision was not accompanied by adequate procedural safeguards, which must be regarded as essential in such a sensitive area. The applicant was not given any opportunity to make representations to the authorities before the decision was taken and the only right of appeal had no suspensive effect and was therefore, as the Chamber has already found, not an effective remedy (see paragraph 76 above).

92. The fact that on 2 February 1999 the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology annulled the decision on exhumation, does not alter the Chamber's view that the applicant has been the victim of discrimination. The appeal decision merely orders that a new decision to be issued by the Communal Inspector should establish precisely where the remains of Mrs. Mahmutović are to be transferred. It does not deal with the fundamental question of discrimination which is involved in the exhumation decision, regardless of where the applicant's wife might be reinterred, and appears to leave it open to the Communal Inspector to proceed with the exhumation process.

93. The Chamber therefore concludes that the order for the exhumation of the applicant's wife constituted an act of discrimination against the applicant in the enjoyment of his rights to respect for his private and family life under Article 8 of the Convention, and his freedom of religion under Article 9.

2. Other Issues

94. In view of the conclusion which it has reached in relation to the primary issue of discrimination, the Chamber finds it unnecessary to consider whether there has been any breach of Article 8 or 9 of the Convention considered alone. It is also unnecessary to consider whether there has been any violation of the applicant's procedural rights under Article 6 of the Convention or of his property rights under Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

95. Under Article XI(1)(b) of the Agreement the Chamber must next address the question what steps shall be taken by the respondent Party to remedy 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.

96. The Chamber notes that the remedy sought by the applicant at the time of the filing of the application is an order permanently prohibiting the execution of the procedural decision to exhume his wife. From the correspondence relating to the attempts to reach a friendly settlement, it appears that the applicant is now seeking a more general prohibition of any interference by the authorities with burials at the Muslim Town Cemetery.

97. The Chamber has found that the order to exhume Mrs. Mahmutović constitutes a violation of the applicant's right not to be subject to discrimination in the enjoyment of his rights to private and family life and to freely practice his religious beliefs. The Chamber therefore deems it appropriate to order the respondent Party to desist from any steps to remove the remains of the applicant's wife from their present place of burial.

98. As to the request for a more general remedy, ordering the respondent Party not to interfere with burials of members of the Muslim community of Prnjavor at the Muslim Town Cemetery, the Chamber notes that the present case has been lodged by only one applicant, Mr. Mahmutović. Consequently the Chamber will not order a remedy which would go beyond the facts directly affecting that applicant.

99. On 13 January 1999 the applicant filed a claim for compensation of non-pecuniary damages and legal costs. He claimed non-pecuniary damages in the amount of 10,000 German Marks (DEM) for the serious suffering inflicted on him by the order to exhume his wife, and 191.80 Convertible Marks (*Konvertibilnih Maraka*, KM) for legal fees calculated in accordance with the Tariff of the

Republika Srpska Bar.

100. In the particular circumstances of this case, the Chamber will exercise its discretion to consider the claim for compensation, although filed out of time.

101. The Chamber considers that its finding that the order to exhume Mrs. Mahmutović amounts to discrimination against the applicant in the enjoyment of the rights guaranteed by the Agreement and the remedy set out in paragraph 97 constitute already some satisfaction for the suffering inflicted on the applicant. In view thereof the Chamber considers the claim for DEM 10,000 of non-pecuniary damages to be too high. It therefore orders the respondent Party to pay the applicant KM 1,000 as monetary compensation for non-pecuniary damages, within three months from the date of this decision.

102. As for legal fees, the Chamber orders the respondent Party to compensate the applicant, within three months from the date of this decision, for the legal fees incurred in the present proceedings, which he has quantified as KM 191.80, a sum not questioned by the respondent Party.

103. Additionally, the Chamber awards interest at an annual rate of 4%, as of the date of expiry of the three-month time period set in paragraphs 101 and 102, for the payment of the sums awarded in the same paragraphs.

VIII. CONCLUSIONS

104. For the reasons given above, the Chamber decides,

1. by 12 votes to 2, to declare the application admissible;

2. by 12 votes to 2, that the applicant has been discriminated against in the enjoyment of his right to private and family life as guaranteed by Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in violation of Article I of the Human Rights Agreement;

3. by 12 votes to 2, that the applicant has been discriminated against in the enjoyment of his right to freedom of religion as guaranteed by Article 9 of the Convention, the Republika Srpska thereby being in violation of Article I of the Agreement;

4. unanimously, not to consider the complaints relating to the alleged violation of the applicant's rights under Article 6 of the Convention, Articles 8 and 9 of the Convention in isolation and Article 1 of Protocol No. 1 to the Convention;

5. unanimously, to order the Republika Srpska to refrain from any steps to remove the remains of Mrs. Bedrija Mahmutović from their present place of burial;

6. by 8 votes to 6, to order the Republika Srpska to pay the applicant, within three months from this decision, KM 1,000 in compensation for non-pecuniary damages;

7. by 13 votes to 1, to order the Republika Srpska to pay the applicant, within three months from this decision, KM 191.80 in compensation for legal fees;

8. by 12 votes to 2, that simple interest at an annual rate of 4 % will be payable over the sum awarded in conclusions nos. 6 and 7 or any unpaid portion thereof, from the day of expiry of the three-month period referred to in conclusions nos. 6 and 7, until the date of the settlement; and

9. unanimously, to order the Republika Srpska to report to it by 7 January 2000 on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mr. Manfred Nowak.

CONCURRING OPINION OF MR. MANFRED NOWAK

I fully agree that the order for the exhumation of the applicant's wife constituted an act of discrimination against the applicant in the enjoyment of his rights to freedom of religion and respect for his private and family life. I am, however, of the opinion that the steps ordered by the Chamber are not sufficient to remedy that breach.

First of all, I would like to point out that this case reveals a particularly serious form of discrimination practiced by the authorities of Prnjavor against the Muslim community. The order to exhume the mortal remains of the applicant's wife from the old Muslim town cemetery and to re-bury them within 15 days at a non-existing new cemetery, together with the order to obtain permission for such exhumation from another department of the Prnjavor Municipality, and the decision that his right to appeal has no suspensive effect, is of a particularly arbitrary nature and seems to aim at humiliating the applicant and at continuing the policy of "ethnic cleansing" even by desecrating the mortal remains of the deceased. The compensation of KM 1,000 for non-pecuniary damages ordered by the Chamber is, therefore, not adequate for providing a remedy for the serious suffering and humiliation inflicted upon the applicant.

Secondly, I disagree with the reasoning of the Chamber in paragraph 98 of the decision. The real issue in this case was not the exhumation order against the applicant but the fact that the authorities of Prnjavor in 1994 had issued a discriminatory decision to put the old Muslim town cemetery out of use and that this discriminatory decision has not been rectified more than three years after the entry into force of the Dayton Peace Agreement. Until the present day, Muslims remaining in this town have no legal possibility, as opposed to members of other religious communities, to bury their deceased family members within Prnjavor. The aim of this policy is to put further pressure on Muslims to leave that town as well as to prevent Muslims from returning, in blatant violation of many provisions of the Dayton Peace Agreement. It would, therefore, have been appropriate for the Chamber to order the Respondent Party to ensure, without any further delay, that Muslims can be buried in Prnjavor and that the municipal authorities refrain from any further interference with burials of members of the Muslim cemetery in Prnjavor. In addition, the authorities of the Republika Srpska should be ordered to take the necessary disciplinary and/or penal measures against individuals responsible for the continuation of such a policy of "ethnic cleansing against the deceased".

(signed)
Manfred Nowak

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

Case no. CH/98/894

Dragan TOPIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 October 1999 with the following members present:

Mr. Viktor MASENKO-MAVI, Acting President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Mato TADIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. He is the holder of an occupancy right over an apartment in Prijedor, Republika Srpska. On 25 August 1994 the applicant was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 9 April 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Prijedor ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry"), declared the applicant to be an illegal occupant of the apartment and ordered him to vacate it within three days under threat of forcible eviction. On 19 August 1998 this decision was delivered to him. On 21 August 1998 the applicant appealed against the decision. There has been no decision on this appeal to date. The applicant still occupies the apartment.

2. The case raises issues principally under Article 8 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant introduced his application to the Chamber on 21 August 1998. It was registered the same day.

4. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary steps to prevent his eviction from the apartment.

5. On 24 August 1998 the Vice-President of the Chamber ordered, pursuant to Rule 36(2) of the Rules of Procedure, the respondent Party to refrain from evicting the applicant from the apartment. The order stated that it would remain in force until the Chamber had given its final decision in the case, unless withdrawn by the Chamber before then.

6. On 18 September 1998, pursuant to Rule 49(3)(b) of the Rules of Procedure, the application was transmitted to the respondent Party for observations on its admissibility and merits. Under the Chamber's Order concerning the organisation of the proceedings in the case, such observations were due by 18 October 1998. However, no observations were received from the respondent Party.

7. On 8 December 1998 the applicant was requested to submit a written statement and any claim for compensation or other relief which he wished to make. This statement, which did not contain a claim for compensation, was received by the Chamber on 2 February 1999, outside the time-limit set by the Chamber. The applicant informed the Chamber that he had only received its letter of 8 December 1998 on 27 January 1999. The Chamber decided to accept his written statement and transmitted it to the Agent of the respondent Party for information.

8. The Second Panel deliberated upon the admissibility and merits of the application on 8 October 1999 and on the same date adopted this decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

9. The facts of the case as they appear from the applicant's submissions and the documents in the case file have not been contested by the respondent Party and may be summarised as follows.

10. The applicant occupies an apartment located at Pećani H-1/48, Prijedor, Republika Srpska ("the apartment"). On 25 August 1994 he was granted the occupancy right over the apartment by the holder of the allocation right, the Institute for the Protection of Male Children and Youths ("the Institute"), a public body in Prijedor. The previous holder of the occupancy right over the apartment, who had worked at the Institute, had left the Republika Srpska. The applicant entered into a contract with the relevant housing company.

11. On 9 April 1998 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 16 below) declaring the applicant to be an illegal occupant of the apartment (on the ground that he had entered it illegally) and ordering him to vacate it within three days under threat of forcible eviction. The applicant was not served with this decision until 19 August 1998. On this date the applicant was served with an announcement ("*Saopštenje*") issued by the Commission. This standard-issue announcement stated that it had not been possible to serve the applicant with the decision of 9 April 1998 and that he could obtain a copy of it by calling personally to the offices of the Commission. The delivery of such a document constitutes delivery under the law of the Republika Srpska (see paragraphs 24-26 below). The announcement also contained hand-written text informing him that he should be present in the apartment from 9am on 25 August 1998 so that he could be evicted peacefully (i.e. without the need for police) in order to allow the family of a fallen soldier to enter into possession of the apartment.

12. On 21 August 1998 the applicant appealed against the Commission's decision. He has not received any decision on this appeal to date. On the same day the Institute wrote to the Commission, stating that the applicant had been allocated the apartment in accordance with the law. The applicant still occupies the apartment.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

13. The Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 3/96; "the old law") was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It was published in the OG RS on 26 February 1996 and entered into force the following day. It establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present case, are summarised below.

14. Articles 2 and 11 define "abandoned property" as real and personal property which has been abandoned by its owners or users and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

15. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

16. Article 10 states that if a person enters into possession of abandoned property without a decision of the appropriate commission, that commission shall issue a decision ordering the person to leave the property concerned. An appeal may be lodged to the Ministry by the recipient within three days of its receipt. The lodging of an appeal to the Ministry does not suspend the execution of the decision.

17. Article 15 reads as follows:

> "Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:
>
> 1. to the families of killed soldiers
> 2. war invalids with injuries in categories I-V
> 3. war invalids with injuries in categories V-X
> 4. qualified workers of whom there is a lack in the Republika Srpska."

18. Article 15A (which was inserted into the old law by an amendment of 12 September 1996) adds a further category of persons to this list. This category is bearers of state honours, deputies of the National Assembly of the Republika Srpska and other officials of the Republika Srpska who have the status of refugees or displaced persons.

2. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property

19. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98; "the new law") establishes a detailed framework for persons to regain possession of property considered to be abandoned under the old law. It entered into force on 19 December 1998 and puts the old law out of force.

20. Article 2 of the new law was amended by the Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, which was contained in a decision of the High Representative of 13 April 1999. The amended text reads as follows:

> "All administrative, judicial, and other decisions enacted on the basis of the regulations referred to in Article 1 of this law in which rights of temporary occupancy have been created shall remain effective until cancelled in accordance with this law.
>
> Any occupancy right or contract on use made between 1 April 1992 and 19 December 1998 is cancelled. A person who occupies an apartment on the basis of an occupancy right which is cancelled under this Article shall be considered a temporary user for the purposes of this law.
>
> A temporary user referred to in the previous paragraph who does not have other accommodation available to him/her has a right to a new contract for use of the apartment, if the occupancy right of the former occupant terminates under Article 16 of this law or if a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this law.
>
> An occupancy right holder to an apartment as of 1 April 1992, who agreed to the cancellation of his or her occupancy right in exchange for another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his or her former apartment in accordance with this Law."

3. The Law on General Administrative Procedures

21. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

22. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedures.

23. Article 8 reads as follows:

> "(1) Before making a decision a party has to be given the opportunity to express his or her opinion on all the facts and circumstances that are of importance in making an administrative decision.
>
> (2) A decision may be made without hearing the opinion of a party only if provided by law."

24. Articles 81 - 98 regulate delivery of decisions. Delivery is to be carried out personally to the

person named in the decision. Exceptions are provided for in certain circumstances, for example where the person named in the decision cannot be located. Article 83(1) reads as follows:

> "As a rule, delivery shall be to the home or workplace of the person named in the decision ...."

25. Article 84 states that if the person concerned is not present in his or her home or workplace, a member of his or her household or a person employed in the same office may receive the decision. Article 85 states that if delivery is not possible in accordance with the provisions of Article 84, the decision is to be returned to the deciding organ. It also provides for the appointment of a representative to receive a decision on behalf of a person who cannot be located. Article 86 allows for an exceptional delivery procedure to be used after unsuccessful attempts to deliver the decision in accordance with the above procedure. It allows a decision to be sent to the relevant local municipal organ. An announcement may be placed on the door of the home of the person named in the decision, stating where the decision may be collected. The date of the delivery is deemed to be the date of the placing of the notice on the door of the home of the person named in the decision.

26. Under Article 247 a decision on an appeal must be made within two months of the lodging of such appeal.

4. The Law on Administrative Disputes

27. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25(1), if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued within 7 days of the lodging of such a reminder, the applicant may initiate an administrative dispute.

5. The Decree on Court Taxation

28. Tariff 23 of the Decree on Court Taxation (OG RS no. 7/97), issued on 2 April 1997, prescribes a fee of 1,000 Yugoslav Dinars ("YUD") (approximately 60 Convertible Marks – *Konvertibilnih Maraka*, "KM" – at current rates) for the lodging of an administrative dispute before the Supreme Court of the Republika Srpska.

IV. COMPLAINTS

29. The applicant complains of violations of his right to respect for family life and of his right to property. He also complains of the fact that the lodging of an appeal against the decision of the Commission does not have any suspensive effect.

V. SUBMISSIONS OF THE PARTIES

30. The respondent Party has not made any submissions regarding the application.

31. The applicant maintains his complaint. He states that there have not been any further attempts to evict him since the issuing of the provisional order by the Vice-President of the Chamber.

VI. OPINION OF THE CHAMBER

A. Admissibility

32. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

33. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist

and whether the applicant has demonstrated that they have been exhausted. The Chamber notes that the respondent Party has not suggested that there is any "effective remedy" available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

34. The applicant lodged an appeal to the Ministry against the decision of the Commission of 9 April 1998. However, the lodging of such an appeal does not have any suspensive effect.

35. The Chamber notes that there has been no decision on this appeal to date. It would have been open to the applicant to commence administrative proceedings before the Supreme Court of the Republika Srpska in respect of the failure of the Ministry to issue a decision on his appeal. Before doing so, he would have had to lodge a reminder with the Ministry, which he has not done. The Ministry would then have a seven day period in which to issue a decision. Following the expiry of that period, the applicant could then have initiated an administrative dispute before the Supreme Court. However, the fee required for the initiation of such a dispute is YUD 1,000.

36. As the Chamber noted in the case of *Onić* (case no. CH/97/58, decision on admissibility and merits delivered on 12 February 1999, paragraph 38, Decisions January-July 1999) referring to the approach taken by the European Court of Human Rights in relation to the corresponding requirement in Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11) the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion, it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.

37. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 9 April 1998 raises the question whether there is an effective remedy available to the applicant. Also the size of the fee he would have had to pay to initiate an administrative dispute before the Supreme Court must be taken into account in this regard. These factors, together with the fact that the respondent Party did not seek to argue that there was any effective remedy available to the applicant, leads the Chamber to conclude that no such remedy was in fact available to him.

38. The Chamber does not consider that any other ground for declaring the case inadmissible has been established. Accordingly, the case is declared admissible in respect of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

B. Merits

39. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

1. Article 8 of the Convention

40. The applicant alleges a violation of his right to respect for family life. The Chamber has interpreted this as referring to his right to respect for his home, as guaranteed by Article 8 of the Convention. This provision reads as follows:

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

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

41. The Chamber notes that the applicant has lived in the apartment since August 1994, when he was allocated the occupancy right over it by the Institute, the holder of the allocation right. It is therefore clear that the apartment is to be considered as his "home" for the purposes of Article 8 of the Convention.

42. The Chamber has already held that the threatened eviction of a person from his home constitutes an "interference by a public authority" with the exercise of the right to respect for his home (see case no. CH/96/31, *Turčinović*, decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decision of the Commission declaring the applicant an illegal occupant of the apartment and ordering him to vacate it within three days under threat of forcible eviction therefore constitutes an "interference by a public authority" with that right.

43. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was "in accordance with the law", served a legitimate aim and "was necessary in a democratic society" (see the aforementioned decision in *Onić*, paragraph 38). There will be a violation of Article 8 if any one of these conditions is not satisfied.

44. The Chamber notes that Article 2 of the old law requires a property to be entered into the records of abandoned property before it can be allocated to a person within the categories set out in Article 15. The respondent Party has not provided any evidence that any such entry was made in respect of the apartment in the present case. Nor is there any other indication available to the Chamber that such an entry was made.

45. Therefore, it has not been established that the requirements of the old law were adhered to in the present case. Accordingly, the attempts of the Commission to get the applicant to vacate the apartment cannot be considered to have been "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention. In these circumstances, it is not necessary to examine whether the other requirements under that provision have been met.

46. Accordingly, the Chamber considers that there has been a violation of the applicant's rights as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

47. The applicant alleges a violation of his right to property. This complaint falls to be considered under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48. The Chamber must first consider whether the applicant's occupancy right over the apartment constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber notes that the applicant was granted a permanent occupancy right over the apartment by the Institute, the holder of the allocation right, on 25 August 1994. However, Article 2 of the new law, as amended (see paragraph 20 above), cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

49. The Chamber has previously considered whether the rights of a person in substantively similar circumstances as the present applicant's constitute "possessions" within the meaning of Article 1 of Protocol No. 1 (see case no. CH/98/1495, *Rosić*, decision on admissibility and merits

delivered on 10 September 1999, paragraphs 55-61). The Chamber held that a temporary occupancy right constitutes a "possession" as there is a possibility for the occupant to be eligible for a permanent right if he satisfies the conditions set out in Article 2 of the new law, as amended.

50. Having established that the applicant's right to occupy the apartment constitutes a possession, the Chamber next finds that the decision of the Commission declaring the applicant to be an illegal occupant of the apartment and ordering him to vacate it interfered with his right to peaceful enjoyment of that possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

51. The Chamber must therefore examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law.

52. The Chamber notes that the decision ordering the applicant's eviction from the apartment was not in accordance with the old law (see paragraphs 43-45 above). Accordingly, the requirements of national law have not been adhered to and therefore the interference was not "subject to conditions provided for by law" as required by Article 1 of Protocol No. 1.

53. Accordingly, there has been a violation of the applicant's rights as protected by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

54. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

55. The Chamber notes that in accordance with its order for the proceedings in the case the applicant was afforded the possibility of claiming compensation or other relief. He did not do so, but requests that the eviction procedure against him be terminated.

56. The Chamber notes that the old law has been put out of force by the adoption of the new law. However, this does not of itself remove the threat to the applicant that he would be evicted, as the new law does not put out of force decisions ordering evictions under the old law.

57. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 9 April 1998 ordering the eviction of the applicant from the apartment in question and to allow the applicant to remain in possession of the apartment, subject to the terms of the new law.

VIII. CONCLUSION

58. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies constitutes a violation of his right to respect for his home within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies,

constitutes a violation of his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Republika Srpska to take all necessary steps to revoke the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment in accordance with the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and

5. unanimously, to order the Republika Srpska to report to it by 5 February 2000 on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Viktor MASENKO-MAVI
Acting President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 9 June 2000)

Case no. CH/98/896

Mirko ČVOKIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 10 May 2000 with the following members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb descent, resident in Banja Luka. On 1 June 1996 he was detained by Bosnian Croat police officers in Glamoč in the Federation of Bosnia and Herzegovina, together with Mr. Krstan Čegar, who was the applicant to the Chamber in case no. CH/96/21 (decision on admissibility and merits delivered on 6 April 1998, Decisions and Reports 1998).

2. The case raises issues principally under Articles 3, 4 and 5 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention, and under the provisions of the Agreement guaranteeing the right not to be discriminated against in the enjoyment of the rights enumerated in the Appendix thereto.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant is represented by Ms. Vesna Rujević, a lawyer practising in Banja Luka.

4. On 5 March 1997 the applicant submitted an application to the Human Rights Ombudsperson for Bosnia and Herzegovina. On 26 January 1998, through his representative, he lodged a written submission to the Chamber. On 24 August 1998, pursuant to a request by the Chamber, the applicant's representative submitted a completed application form, which was registered on the same date.

5. On 19 April 1999 the applicant's representative informed the Chamber that he wished to pursue his application to the Chamber and withdraw his application to the Ombudsperson. Confirmation of this withdrawal was submitted on 27 June 1999.

6. On 22 September 1999 the application was transmitted to the Federation for its observations on admissibility and merits, which were duly received on 19 November 1999 and transmitted to the applicant's representative on 3 December 1999. A further statement from the applicant's representative was received on 30 December 1999 and transmitted to the Federation on 27 January 2000 for information.

7. The Chamber deliberated upon the admissibility and merits of the application on 6 April and 10 May 2000 and on the latter date adopted its decision.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the case

8. The facts of the case are substantively the same as those in case no. CH/96/21 *Čegar* (sup. cit.). As they appear from the application and the submissions of the parties in the present case, they may be summarised as follows.

9. Before the war, the applicant, who was born in 1945, lived in Glamoč, which is now in the Federation. He currently lives in Banja Luka. On 1 June 1996, together with some other persons, he drove to Glamoč to view his pre-war home. Finding it destroyed, he left. Just outside Glamoč, he was stopped and arrested by Bosnian Croat police officers.

10. Until 3 June 1996 he was detained in a prison in Glamoč, when he was transferred to a prison in Livno. On 11 June 1996 he was again transferred, now to the Rodoč military prison near Mostar. On 12 June 1996 the applicant was visited in Rodoč by representatives of the International Committee of the Red Cross ("ICRC") and registered as a detainee with that organisation. On the same date and also on 13 June 1996 he was visited by monitors of the United Nations International Police Task Force. The applicant claims that certain items of personal property were taken from him upon his arrest and never returned to him.

11. While in detention he was told that he was being detained for the purposes of exchange for prisoners of Croat origin held by the authorities of the Republika Srpska. He was also subjected to verbal abuse, including being called a "Četnik" and being told that he should be killed because of his Serb origin. He was also forced to perform hard labour, including unloading and moving heavy materials, and the rations he was given were rare and of poor quality. For the entire duration of his detention - 46 days - he was not allowed access to clean underwear.

12. On 16 July 1996, following the intervention of the ICRC, the applicant was released.

13. The applicant was never given any information concerning the reasons for his arrest and detention, other than that he was being held for the purposes of exchange. He was not brought before a judge or other officer exercising judicial power at any time during his detention.

B. Relevant legislation

14. The Law on Criminal Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – nos. 26/86, 74/87, 57/89 and 3/90, and Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 9/92, 16/92 and 13/94) governed criminal procedure in the Federation at the time of the applicant's detention. This law has been replaced by the new Law on Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98) which entered into force on 28 November 1998. The following provisions, quoted from the old law, were taken over without substantive changes.

15. Article 542(2):

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

16. Article 543(1):

> "If a claim for compensation for damages is not accepted or no decision by the relevant organ has been made within three months since the date of making it, the person concerned may submit a complaint to the competent court for compensation for damages suffered. If an agreement has been reached concerning part of the claim, the damaged person may submit a complaint regarding the remainder of the claim."

17. Article 545(3):

> "The right to compensation for damage belongs ... to a person who is, as a result of a mistake or an illegal act of an organ, deprived of his or her freedom or kept for a longer period of time in custody than is provided for by law."

18. The above provisions were suspended from 2 June 1992 until 23 December 1996 by the Law on Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95). Since 23 December 1996 they have been in force once more.

IV. COMPLAINTS

19. In his application to the Chamber the applicant complains of violations of his rights as guaranteed by Articles 3 and 4, Article 5 paragraphs 1(c), 2, 3, 4 and 5, and Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. The full text of these Articles is set out in the relevant sections of Chapter VI of the present decision. He also complains of discrimination in the enjoyment of these rights.

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Facts

20. The Federation disputes certain of the facts as presented by the applicant. It claims that the Federation, due to the complex legal and constitutional arrangements in Canton 10, where Glamoč is situated, did not have control over the actions of the authorities there. In addition, the applicant should have been aware of the fact that unknown persons were at great risk if they visited Glamoč, due to the attitude of the authorities there as a result of the war.

21. The Federation also claims that it has no knowledge of the applicant's arrest and claims that no evidence has been provided to the Chamber showing that any authorities for whose actions it is responsible detained the applicant. It claims that all military prisons on the territory of the former "Croatian Republic of Herzeg Bosna" were closed on 30 July 1995, in pursuance of legislation passed by that body. The Federation further disputes the applicant's claim that he was mistreated during his detention and contests the medical evidence he submitted, on the ground that it does not comply with the formal requirements for medical evidence and also as the applicant was treated some five months after his release from detention.

2. Admissibility

22. The Agent of the Federation of BiH first claims that the application to the Chamber has not been fully and properly completed and that the Chamber should refuse to accept it on this ground.

23. The Agent of the Federation contested the admissibility of the application, in light of Article VIII(2)(a) of the Agreement. This provision requires the Chamber to consider, in deciding which applications to accept, whether effective remedies exist in the domestic system, whether the applicant has demonstrated that he has exhausted them and whether the application was lodged to the Human Rights Commission (composed of the Ombudsperson and Chamber) within six months of the date of the final decision at domestic level concerning the matter.

24. The Federation further states that the applicant did not seek to avail himself of the domestic remedies available to him, although the Law on Criminal Procedure (see paragraphs 14-18 above) sets out a procedure whereby persons can seek compensation for allegedly illegal arrest. It claims that this remedy is an effective one in practice and that as a result the application is inadmissible under Article VIII(2)(a) of the Agreement

25. The Federation claims that as the applicant has not sought to avail himself of this remedy, there is no final decision in his case within the meaning of Article VIII(2)(a), so therefore the six-month period provided for by that provision has not commenced.

3. Merits

26. The Federation claims that the applicant was not physically mistreated during his detention and therefore there has been no violation of his rights as protected by Article 3 of the Convention.

27. Concerning Article 4 of the Convention, the Federation claims that the work he was forced to perform during his detention did not constitute a violation of this provision.

28. The Federation states that it does not have any information concerning the circumstances of the arrest of the applicant. It goes on to claim that the applicant was detained for his own safety, in view of the tense situation in Glamoč at the time. In conclusion, as it does not have any details concerning the arrest of the applicant, and in view of the prevailing circumstances at the time, the arrest and detention should be considered to be in accordance with the applicant's right to liberty and security of person as guaranteed by Article 5 of the Convention.

29. Concerning the applicant's right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention, the Federation states that as the applicant has not proved his ownership of the goods he claims were taken from him upon his arrest, it cannot be considered to be responsible for any such goods that may have been taken from him.

30. Finally, the Federation claims that the applicant has not provided any evidence that he was discriminated against in the enjoyment of any of the rights as guaranteed by the Agreement, and that a claim of discrimination by itself is insufficient to establish that a person actually has been discriminated against.

B. The applicant

31. The applicant maintains his complaints. In his further observations, he claims that the remedies available to him were insufficiently certain both in theory and practice and that therefore he was justified in applying to the Chamber. Concerning the standpoint of the Federation on the facts of the case, the applicant states that it merely contests the facts as presented by him, without presenting contrary evidence.

VI. OPINION OF THE CHAMBER

A. Admissibility

32. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. Exhaustion of domestic remedies

33. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

34. The Federation claims that the applicant had not sought to avail himself of the domestic remedies available to him. It claims that he could have sought compensation for alleged damages under the Law on Criminal Procedure (see paragraphs 14-18 above).

35. The Chamber firstly recalls the general principle, which it has applied on numerous previous occasions (see, e.g., case no. CH/98/764, *Kalik*, decision on admissibility and merits delivered on 10 September 1999, paragraph 27, Decisions August-December 1999):

> "the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants."

36. The Chamber first notes that the provisions referred to by the Federation were not in force at the time of the applicants release, as they had been suspended by the Law on Application of the Law on Criminal Procedure (see paragraph 18 above). It was not until 23 December 1996 that these provisions were again applicable, some five months after the release of the applicant. Accordingly, he had no remedy at all available to him until that time.

37. The Chamber considered a similar argument in case no. CH/98/1374, *Pržulj* (decision on admissibility and merits delivered on 13 January 2000, paragraphs 120-124). In that case, at paragraph 124, the Chamber found in its examination of the remedy apparently provided for by the Law on Criminal Procedure as a remedy for a violation of Article 5 of the Convention that it was, *inter alia*, insufficient in theory to redress the harm complained of.

38. In addition, the Federation itself has claimed that due to the specific situation in Canton 10, where Glamoč is situated, it had limited, if any, control over the authorities there. As the Chamber has itself found, the courts in Canton 10 are subject to political interference and discriminate against applicants on the grounds of their ethnic origin (see case no. CH/98/756, *Đ.M.,* decision on admissibility and merits delivered on 14 May 1999, paragraphs 76-80, Decisions January-July 1999).

39. The Chamber therefore finds that the treatment of the applicant in the present case and the general situation in Canton 10 are such that the applicant had no prospect in practice of success were he to seek to pursue such a remedy.

40. In conclusion, the Chamber finds that there was no effective remedy available to the applicant which could remedy the matters he complains of and therefore the case is not inadmissible under this provision.

2. The six-month rule

41. Article VIII(2)(a) of the Agreement requires the Chamber, when deciding upon the admissibility of an application, to take into account, *inter alia*, whether the application was filed with the Human Rights Commission within six months from the date of the final decision was taken in the matter at national level. The Federation claims that as the applicant has not sought to avail himself of any remedies at the domestic level, there is no final decision in his case and therefore the six-month period has not commenced.

42. The Chamber has previously held that in a situation where there is no decision concerning the matter at national level, the six-month period commences on the day when the alleged violations of the applicant's rights ended (case no. CH/98/1021, *Agić,* decision on admissibility of 5 October 1999, paragraph 12, Decisions August-December 1999).

43. The alleged violations of the applicant's rights ended on 16 July 1996, the date of his release from detention. The applicant submitted an application to the Ombudsperson on 5 March 1997, that is, one month and twenty days after the six-month time limit expired on 16 January 1997.

44. The Chamber has, however, a certain discretionary power to take into account special circumstances which might prevent an applicant from submitting an application within this period of six months (see case no. CH/99/1433, *Smajić,* decision on admissibility of 4 November 1999, paragraph 16, Decisions August-December 1999). In the present case, the applicant has provided evidence that he had been hospitalised between 19 December 1996 and 28 January 1997 and again between 6 February and 3 March 1997. In these circumstances the Chamber accepts the reasons for the delay provided by the applicant as justified and considers his application admissible under the six-month rule as set out in Article VIII(2)(a) of the Agreement.

45. The Chamber does not consider that any of the other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber decides to accept the case.

B. Merits

46. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

47. Under Article II(2) of the Agreement the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement (including the Convention), where such a violation is alleged to or appears to have been committed by the Parties, including by any

organ or official of the Parties, Cantons or Municipalities or any individual acting under the authority of such an official or organ.

1. Article II(2)(a) of the Agreement

(a) Article 3 of the Convention

48. Article 3 of the Convention provides as follows:

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

49. The applicant claims that he had been a victim of a violation of his rights as guaranteed under this provision.

50. The Federation claims that the applicant's rights as guaranteed by this provision were not violated. It denies that the applicant was mistreated during his arrest and detention. At the same time, it states that it has no knowledge of the applicant's arrest and adds that it did not have control over the actions of the authorities in Canton 10 (see paragraphs 20-21 above). In these circumstances, a refutation in general terms by the respondent Party of the applicant's allegations cannot be relied on. Due weight must therefore be given to the applicant's description of what took place from the time of his arrest until his release.

51. The Chamber finds it established that the applicant was in a state of total uncertainty regarding his fate during the entire period of his detention and was subjected to verbal abuse, including being called a "Četnik", which is an extremely abusive term used to describe persons of Serb origin, as well as being told that he should be killed because of his Serb origin. In addition, the rations he was given were small and of poor quality and for the entire duration of his detention he was not allowed access to clean underwear.

52. The Chamber considers that the conditions of the applicant's detention, including being subjected to such threats as described above on the basis of his origin, would give rise to serious concern as to his safety. Being held in such poor conditions for a total period of 46 days, without proper food and access to clean clothes, undoubtedly had a serious effect on the applicant. The Chamber must now consider whether the circumstances of the applicant's detention were so serious as to amount to a breach of Article 3 of the Convention. The Chamber will consider this aspect of the case in the context of the guarantee of freedom from inhuman and degrading treatment contained in that provision.

53. The Chamber has previously found (*Hermas,* sup. cit., paragraph 28):

> "Article 3 enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment and punishment … Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation."

54. The Federation asserts that the applicant is himself at least partially to blame for having gone to Glamoč without having registered with the local police or international organisations. The Chamber rejects this argument as unacceptable. Although the situation throughout Bosnia and Herzegovina was extremely tense at the time of the applicant's detention, which was approximately nine months after the war, such a situation can in no circumstances constitute a justification for the treatment he suffered. The Chamber notes that the applicant was never charged with any criminal offence, nor informed that he was suspected of having committed any such offence. He was told that he was arrested merely for the purposes of exchange for prisoners held by the authorities of the Republika Srpska.

55. The Chamber considers that to be subjected to threats of the nature as the applicant was subjected to, to be kept in a period of prolonged uncertainty concerning his fate and to be deprived of

proper food and access to clean clothes constituted inhuman and degrading treatment in violation of the guarantees provided by Article 3. The Federation is responsible for this treatment.

56. In conclusion there has been a violation of the applicant's right not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the Convention.

(b) Article 4 of the Convention

57. Article 4 of the Convention provides as follows:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
>
> - any work required to be done in the course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention;
>
> - any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> - any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> - any work or service which forms part of normal civic obligations."

58. The applicant complains that the work he was forced to perform during his detention, being physically very demanding, was such as to constitute a violation of Article 4 of the Convention. The Federation states that the work he was forced to perform during his detention was not such as to violate this provision.

59. The Chamber accepts that the applicant was forced to work during his detention and that this work was of a heavy nature, involving unloading and moving heavy materials.

60. In *Hermas,* the Chamber adopted the definition of forced or compulsory labour as used by the International Labour Organisation, which defines such labour as "... all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (sup. cit., paragraph 35).

61. It is clear that the applicant did not offer himself for work voluntarily, as he was detained illegally. The Chamber finds that the circumstances of his detention were such that he would have feared serious consequences were he to refuse to perform such work. Accordingly, the work exacted from the applicant constituted "forced or compulsory labour". This will constitute a violation of Article 4 of the Convention, unless it is covered by one of the exceptions provided for in paragraph 3 of Article 4 of the Convention. The Chamber finds that the exception provided for in paragraph 3(a) is inapplicable as the applicant was arbitrarily detained in contravention of Article 5 of the Convention. The other exceptions are obviously inapplicable in the present case.

62. In conclusion, the Chamber finds that the work exacted from the applicant during his detention constituted a violation of the right not to be subjected to forced or compulsory labour contained in Article 4 of the Convention.

(c) Article 5 of the Convention

63. Article 5 of the Convention provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligations prescribed by law;
>
> (c) the lawful arrest of any detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purposes of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious disease, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

64. The applicant claims to have been a victim of a violation of all paragraphs of this Article.

65. The Federation states that it does not have any information concerning the reasons for the arrest and detention of the applicant, and that it has no evidence that the applicant's detention was in accordance with the requirements of Article 5. It states, however, that it is "convinced" that his arrest and detention were justified, because of the prevailing situation in Glamoč at the time. It claims that at the time it was insecure for unknown persons to go there and that the applicant put himself in a position of danger by so doing without registering with the police or international organisations. It also claims that there is no evidence that the applicant was not informed of the reasons for his arrest and that he was detained for his own safety. It concludes that there has been no violation of Article 5 of the Convention, bearing in mind the prevailing circumstances at the time, the fact that the applicant was given the opportunity to have the legality of his detention established and the fact that he was released after a visit of the ICRC.

66. The Chamber notes at the outset that it is not open to doubt that the applicant was deprived of his liberty.

(i) *Article 5 paragraph 1 - lawfulness of the applicant's detention*

67. The Chamber considers that the arguments of the Federation concerning the lawfulness of the applicant's detention are totally devoid of merit. Whatever the circumstances prevailing in an area at a particular time, the detention of a person can only take place if it complies with Article 5 paragraph 1.

68. The Chamber found in *Čegar* that the applicant in that case, who was detained together with the present applicant, was detained by agents of the respondent Party for the sole purpose of exchanging him for prisoners held by others, and that this finding was sufficient for it to find that the detention was contrary to Article 5 paragraph 1 of the Convention (see paragraphs 35-36 of the *Čegar* decision). As there is no substantive difference between the two cases in this respect, the Chamber makes the same finding in respect of the present applicant, who was arbitrarily arrested and detained. Accordingly the arrest and detention of the applicant was in violation of Article 5 paragraph 1 of the Convention.

(ii) *Article 5 paragraph 2 – right to be informed of reasons for arrest*

69. As the Chamber pointed out in its decision in *Čegar* (at paragraph 39), Article 5 paragraph 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty.

70. The applicant was kept in detention for 46 days. On the second day of his detention he was told that he was being held for the purpose of exchanging him for prisoners held by the authorities of the Republika Srpska. Furthermore, no legal grounds for his detention were given to him at any stage during his detention. Such behaviour by an authority cannot in any circumstances be considered compatible with Article 5 paragraph 2 of the Convention and accordingly there has been a violation of that paragraph.

(iii) *Article 5 paragraph 3 – right to be brought promptly before a judge*

71. As the Chamber pointed out in its decision in *Čegar* (at paragraph 44), Article 5 paragraph 3 applies only to persons arrested or detained in accordance with Article 5 paragraph 1(c) of the Convention. As the applicant was not arrested in accordance with that provision, Article 5 paragraph 3 is not applicable in the present case.

(iv) *Article 5 paragraph 4 – right to review of detention*

72. The Federation claims that the applicant had available to him a right of review of his detention. It however did not seek to show that the applicant was given any opportunity to avail of any such right at any time during his detention and the Chamber finds it established that he was never in fact given any such opportunity.

73. In *Čegar*, the Chamber held that Article 5 paragraph 4 of the Convention constitutes a separate guarantee from the guarantee contained in Article 5 paragraph 1 and a finding of a violation of that provision does mean that there is no requirement to examine the case under Article 5 paragraph 4 (see paragraph 47 of the *Čegar* decision).

74. The Chamber also pointed out in *Čegar* (at paragraph 49):

> "the notion of lawfulness under Article 5 paragraph 4 has the same meaning as in Article 5 paragraph 1; and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1. By virtue of Article 5 paragraph 4 arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty…."

75. The effect of this is that the applicant is entitled to have available to him a remedy allowing the competent court to examine not only the compliance of his detention with the requirements of national law, but also the reasonableness of any suspicion as a basis for the arrest and also the legitimacy of the purpose pursued by the arrest and the ensuing detention. In addition the remedy must allow the review of the lawfulness of the detention to be decided "speedily" by a body possessing the attributes of a "court". (*ibid.*, paragraph 50).

76. The Chamber finds it established that no remedy at all was available to the applicant during the 46 days of his detention and that therefore his rights under Article 5 paragraph 4 of the Convention have been violated.

(v) *Article 5 paragraph 5 – right to compensation for illegal detention*

77. The respondent Party, in its observations on the merits of the case, did not submit any observations on this provision. However, in the context of the admissibility of the case, the Federation states that the applicant could have sought compensation under the procedure provided for by the Law on Criminal Procedure. Such a remedy could have the effect that there had been no violation of Article 5 paragraph 5 of the Convention.

78. The Chamber will therefore examine whether the provisions of the Law on Criminal Procedure meet the requirements of Article 5 paragraph 5 of the Convention.

79. Firstly, the Chamber notes that the relevant provisions were not in force until 23 December 1996 (see paragraph 18 above). After that date the law of the Federation provided for a right to compensation for illegal detention.

80. In its decision in *Pržulj* (case no. CH/98/1374, decision on admissibility and merits delivered on 14 January 2000), the Chamber noted that "in order to meet the standards of the Convention, the legal system must provide for the right to claim compensation for both pecuniary and non-pecuniary damages" (at paragraph 122). Notwithstanding that this was in the context of the admissibility of the *Pržulj* case, the Chamber considers that the same applies to the present case in the context of Article 5 paragraph 5 of the Convention. As the Chamber also noted, the Law on Criminal Procedure has been interpreted as providing for pecuniary damages arising from unlawful detention and only for non-pecuniary damages in extremely limited circumstances and there is no indication that a person has ever received an award in respect of non-pecuniary damages (*ibid.*, paragraph 123).

81. In addition, as the Chamber held in *H.R. and Momani* (case no. CH/98/946, decision on admissibility and merits delivered on 5 November 1999, paragraph 105, Decisions August-December 1999), it must have regard to the general and legal and political context in which such remedies operate. The Agent of the Federation has not provided evidence to the Chamber that any person has ever received compensation for the type of damages suffered by the applicant.

82. The Chamber considers that the reasoning of the Chamber in the *H.R. and Momani* case on this issue is particularly relevant to the present case. At paragraph 106 of its decision, the Chamber found that in that case, which also involved the detention of persons for the sole reason of exchange for prisoners held by other authorities, the general situation in the country was uncertain and "the central authority was apparently not in a position to ensure observance of the rule of law by its subordinate executive authorities".

83. The Chamber does not consider it established that the formal right to compensation provided for by the Law on Criminal Procedure was in fact enforceable, in view of the fact that the Federation has not sought to provide any evidence of such enforceability and that no other such evidence is available to the Chamber. Furthermore, the Chamber has decided a number of cases involving illegal arrest and detention by authorities on the territory of the Federation (e.g. *H.R. and Momani*, sup. cit., *Hermas*, sup. cit., *Čegar*, sup. cit., *Pržulj*, sup. cit. and *Marčeta*, case no. CH/97/41, decision on admissibility and merits delivered on 6 April 1998, Decisions and Reports 1998). In none of these cases has the applicant received compensation on the basis of the Law on Criminal Procedure.

84. In conclusion, there has been a violation of Article 5 paragraph 5 of the Convention.

(d) Articles 8 and 13 of the Convention

85. Article 8 of the Convention provides as follows:

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

86. Article 13 of the Convention provides as follows:

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

87. The applicant alleges violations of his rights as guaranteed by these provisions. The Federation states that there has been no violation of these Articles in the applicant's case.

88. The Chamber, having regard to the other violations of the applicant's rights it has found, does not consider it necessary to examine the case under these provisions.

(e) Article 1 of Protocol No. 1 to the Convention

89. Article 1 of Protocol No. 1 to the Convention provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

90. The applicant claims that a number of items of his property were taken from him when he was arrested and that they were never returned to him. These items are an agricultural plough (valued at 1,000 German marks (DEM)), four balloons made of glass with a capacity of 20 litres (valued at DEM 120), approximately 100 kilogrammes of soap (valued at approximately DEM 120), and cash totalling DEM 70. The Federation claims that the applicant has not proved that he was the owner of the items in question nor that they were taken from him by any authority of the Federation.

91. The applicant specifies the items concerned in detail, and the Chamber sees no indication that the applicant has been other than truthful in listing them. The items he mentions are not of particularly high value and he only claims to have had a relatively small amount of cash on him. The Federation merely refutes the claim, without providing any evidence to the contrary, e.g. any official records of the items the applicant was carrying upon his arrest. The Chamber considers it established that the items mentioned by the applicant were taken from him upon his arrest and that they were his property.

92. Accordingly, the Chamber must consider whether the interference with the applicants right to peaceful enjoyment of his possessions can be justified under Article 1 of Protocol No. 1. For this to be the case, the interference must have been "in the public interest" and "subject to the conditions provided for by law and by the general provisions of international law".

93. In the present case there is no apparent justification, either from the Federation or from the circumstances of the case, that the interference complied with these requirements. The Chamber can

find no justification for what amounts to the theft of the applicant's property by agents of the Federation and therefore there has been a violation of Article 1 of Protocol No. 1.

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

94. The Chamber has previously held on a number of occasions that the prohibition of discrimination is a central objective of the General Framework Agreement for Peace in Bosnia and Herzegovina to which the Chamber must attach particular importance (see, *inter alia*, case no. CH/98/1786, *Odobašić,* decision on admissibility and merits delivered on 5 November 1999, paragraph 127, Decisions August-December 1999). Article II(2)(b) affords to it the jurisdiction to consider alleged or apparent discrimination on any ground in the enjoyment of any of the rights contained in the 16 treaties in the Appendix to the Agreement.

95. The Chamber notes that it has already found violations of the rights of the applicant as protected by Articles 3, 4 and 5 of, and Article 1 of Protocol No. 1 to, the Convention. It will now consider whether he has suffered discrimination in the enjoyment of those rights.

96. In examining whether there has been discrimination contrary to the Agreement the Chamber has consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations (see, *inter alia*, *Đ.M.* sup. cit., paragraph 73), Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

97. The Chamber must first consider whether the applicant was treated differently from others in the same or relevantly similar situations. The Chamber has found (at paragraph 68 above) that the applicant was arrested and detained solely for the purpose of exchanging him for prisoners held by the authorities of the Republika Srpska. Accordingly, the reason the applicant was detained was because he is of Serb origin. In addition, the applicant was verbally abused on the basis of his origin. The applicant therefore underwent differential treatment solely on the basis of his national origin.

98. The Chamber considers that this differential treatment extended also to the inhuman and degrading treatment as well as the forcing of the applicant to perform labour and to the taking of his personal belongings, which the Chamber has found to be violations of his rights as protected by Articles 3 and 4 of the Convention and Article 1 of Protocol No. 1 to the Convention respectively.

99. It is clear that the differential treatment to which the applicant was subjected had no reasonable or objective justification.

100. The applicant has therefore been discriminated against in the enjoyment of his rights as guaranteed by Articles 3, 4 and 5 of the Convention and by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

101. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

102. The Chamber notes that it has found that the applicant has suffered violations of his rights not to be subjected to inhuman and degrading treatment, not to be subjected to forced or compulsory labour, to liberty and security of person as well as to peaceful enjoyment of his possessions. It has also found that he was discriminated against in the enjoyment of those rights.

103. The applicant claimed compensation for the following matters:

- for items taken from him upon his arrest and not returned to him, consisting of an agricultural plough (valued at DEM 1,000), four balloons made of glass with a capacity of 20 litres (valued at DEM 120), approximately 100 kilogrammes of soap (valued at approximately DEM 120), and cash totalling DEM 70:

- for illegal deprivation of freedom: DEM 100 per day, for a total of 46 days, totalling DEM 4,600;

- for lost income due to his inability to work as a truck driver during his detention: DEM 150 per day for a total of 46 days, totalling DEM 6,900;

- for severe mental suffering, damage to his reputation, deprivation of freedom and serious fear: DEM 20,000.

104. The Federation contests the claim for compensation made by the applicant. Firstly, it states that the Chamber should declare the case inadmissible and therefore there is no need to consider the claim at all. Concerning the applicant's claim for the fear he suffered, the Federation claims that as the applicant was registered by the ICRC, he had no reason to fear for his safety and therefore the claim should be rejected. Concerning the claim for pecuniary damages for the items taken from the applicant, the Federation states that he has not provided any evidence that these belongings were taken from him. Accordingly, it claims, the applicant did not have these items with him and therefore the Federation cannot be held responsible for them. Regarding the claims of the applicant for lost income, it states that the applicant should be required to provide certificates showing such lost income.

105. The Chamber notes that it has found that the items the applicant claimed to have had taken from him were actually taken and that the Federation is responsible for this. Accordingly, having established this fact, and considering that the applicant's claim is not unreasonable or excessive, the Chamber will accept those claims. It therefore awards the applicant the sum claimed in respect of items taken from him upon his arrest, the value of which totals DEM 1,310. The Chamber will order this sum to be paid in Convertible marks (*Konvertibilnih Maraka,* "KM").

106. Concerning the claim of the applicant for lost incomes during the period, the Chamber first finds that the sum claimed, DEM 150 per day for a total of 46 days, is excessive. The Chamber considers that in 1996, in view of the prevailing situation in the country at the time, it is highly unlikely that a truck driver would have been able to obtain 46 days uninterrupted work, and that even if he did, the salary would have been far less than DEM 150 per day, especially in view of the fact that the current average monthly wage in the Republika Srpska, where the applicant lives, is approximately KM 210. In addition, the claim is totally unsubstantiated. Accordingly, it must be rejected.

107. Regarding the applicant's claims for damages for illegal deprivation of freedom, the Chamber does not consider it established that the applicant has suffered any specific pecuniary damage solely as a result of his being detained. The Chamber will consider this as a claim for non-pecuniary damage.

108. In addition, the applicant claimed the sum of DEM 20,000 for non-pecuniary damages caused by mental suffering, damage to his reputation, deprivation of freedom and serious fear. Therefore the total amount of non-pecuniary damages the applicant claims is DEM 24,600. The Chamber considers that although the fear the applicant suffered may well have reduced after he was registered by the ICRC, he would have suffered great fear prior to that especially in view of the verbal abuse he was subjected to, including being told that he should be killed. In addition, this head does not only cover the fear the applicant may have suffered; it also covers the moral suffering he underwent in general as a result of his arrest and detention.

109. In *Čegar* (sup. cit.), the applicant in that case claimed the same amount under this head. The Chamber found in that case that this sum was too high. It did find it appropriate, however, to award

the applicant a sum under this head, in view of the fact that he was "kept in illegal detention for six weeks, [and that this] was apparently motivated solely by the desire to exchange him against prisoners held by another authority" (see paragraph 66). As in that case, the Chamber takes a very serious view of the treatment of the applicant by agents of the Federation. The Chamber considers it appropriate to award the applicant the same sum as in the Ćegar case, in view of the great similarities between the two cases. Accordingly, as in that case, it will award the applicant the sum of KM 5,000 under this head.

110. Additionally the Chamber awards 4 % (four per cent) interest as of the date of expiry of the three month period set for the implementation of the present decision on the sums awarded in paragraphs 105 and 109 above.

IX. CONCLUSION

111. For the above reasons, the Chamber decides,

1. by 5 votes to 2, to declare the application admissible;

2. by 6 votes to 1, that the arrest and detention of the applicant by the police in Glamoč between 1 June and 16 July 1996 constituted a violation of the right of the applicant not to be subjected to inhuman and degrading treatment as guaranteed by Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

3. by 6 votes to 1, that the forcing of the applicant to carry out hard labour during his detention constituted a violation of his right not to be subjected to forced or compulsory labour as guaranteed by Article 4 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. by 6 votes to 1, that the arrest and detention of the applicant by the police in Glamoč between 1 June and 16 July 1996 constituted a violation of the right of the applicant to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. by 4 votes to 3, that the failure to inform the applicant promptly of the reason for his arrest constituted a violation of his right as guaranteed by Article 5 paragraph 2 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that Article 5 paragraph 3 of the Convention is inapplicable in the present case;

7. by 6 votes to 1, that the inability of the applicant to take proceedings to challenge the lawfulness of his detention constituted a violation of his right as guaranteed by Article 5 paragraph 4 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

8. by 6 votes to 1, that the non-availability to the applicant of an enforceable right to compensation in respect of the illegal arrest and detention he suffered constituted a violation of the right of the applicant as guaranteed by Article 5 paragraph 5 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

9. unanimously, that it is not necessary to examine the application under Articles 8 and 13 of the Convention;

10. by 6 votes to 1, that the taking from the applicant of his personal property upon his arrest and the failure to return it to him constituted a violation of the right of the applicant to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

11. by 6 votes to 1, that the applicant has been discriminated against in the enjoyment of his rights as guaranteed by Articles 3, 4 and 5 of the Convention and by Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

12. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chambers Rules of Procedure, the sum of KM 5,000 (five thousand *Konvertibilnih Maraka*) by way of compensation for moral damage suffered;

13. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Rules, the sum of KM 1,310 (one thousand three hundred and ten *Konvertibilnih Maraka*) by way of compensation for pecuniary damage suffered;

14. unanimously, to reject the remainder of the applicant's claim for compensation;

15. by 6 votes to 1, that simple interest at an annual rate of 4 % (four per cent) will be payable on the sum awarded in conclusions number 12 and 13 above from the expiry of the period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

16. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within three months from the date on which this decision becomes final and binding in accordance with Rule 66 on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex Dissenting opinion of Mr. Mehmed Deković

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Mehmed Deković.

DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

I voted against conclusion no. 1, in which the Chamber decided to declare the application admissible. Having in mind circumstances as presented in paragraphs 41-44 of its decision, the Chamber concluded that it "accepts the reasons for the delay provided by the applicant as justified and considers his application admissible under the six-month rule as set out in Article VIII(2)(a) of the Agreement". With due respect, I cannot accept the position of the majority for the following reasons:

First of all, I wish to state that the Dayton Agreement is a *sui generis* legal act in its nature. It is not necessary to point out particularly that it governs extremely important issues, among others the respect for human rights as one of the fundamental guidelines for the successful implementation of the Agreement. In that context, it is necessary to bring in line both the work and jurisdiction of the Chamber with the provision of Article VIII(2)(a). Under this provision, when deciding which application to accept, the Chamber must consider two criteria. The first one is whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted and the second one is whether the application *was submitted within six months after the issuance of the final decision in the case*. In considering whether the second criterion has been met, which is very important in the present case, the Chamber should first determine what kind of time-limit this is. More concretely, it should determine whether it is a legal, strict and preclusive time-limit which has to be complied with or a judicial one which can be extended subject to certain conditions. Considering the manner in which the provision of Article VIII(2)(a) has been stipulated, I am of the opinion that this time-limit is a legal and preclusive one which the applicant is obliged to comply with in order to have his application accepted by the Chamber. Otherwise, any failure to comply with this time-limit would result in his application being rejected as ill-founded.

In the *Agić* case, the Chamber took the position that if no final decision has been taken in the domestic proceedings, the six-month period starts to run on the day when the alleged violations of the applicant's rights ended. In the present case the violation ended on 16 July 1996. The applicant submitted an application to the Human Rights Ombudsperson for Bosnia and Herzegovina on 5 March 1997, thus one month and twenty days after the six-month period expired on 16 January 1997. However, having noted that the applicant was hospitalised between 19 December 1996 and 28 January 1997 and again between 6 February and 3 March 1997 and having found that it has "a certain discretionary power to take into account special circumstances which might prevent an applicant from submitting an application within this period of six months", the Chamber accepted the reasons for the delay in the present case, as presented by the applicant, and found that his application was admissible on this particular ground. It may be concluded on the basis of the above stated that the Chamber has interpreted the six-month time-limit in a very extensive manner which is unacceptable in my opinion. There are several reasons on which my opinion is based. First of all, the above time-limit constitutes a preclusive and strict time-limit. Furthermore, this is not a short time-limit of, for instance, 8, 15 or 30 days, but a time-limit of six months. The circumstance that the applicant was hospitalised at the end of this six-month period is not of importance and cannot extend the time-limit for the applicant to submit his application. In addition, the applicant could have submitted his application through a representative. The position of the Chamber that it has "a certain discretionary power" in assessing whether the time-limit has been complied with does not have support in the provision of Article VIII(2)(a) or in the intention of this time-limit, and the Chamber does not have the authority to amend it under the Agreement. The present case confirms this. If the hospitalisation of the applicant constitutes a ground for extending the six-month time-limit, it loses its purpose and the Chamber not only has "a certain discretionary power" but can extend it for an indefinite period of time. This is not acceptable. Finally, the Chamber uses in its decision the term "six-month rule". Under domestic legislation, "rule" and "time-limit" cannot be considered equal neither as terms nor in their content. I consider that the Chamber could interpret a "rule" in a broader sense, but for a fixed "time-limit" there is no such possibility. It is true that the domestic legislation affords a possibility for a party who fails to take certain action within a fixed time-limit to request that

the proceedings be restored to their previous stage. This does not mean, however, that the party must be successful with such a request, especially in a case like the present one.

On the basis of the above stated, I consider that the present application is inadmissible and that it should have been rejected as ill-founded.

(signed)
Mehmed Đeković

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 11 January 2002)

Case no. CH/98/916

Nebojša TOMIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 January 2002 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant lived until May 1992 in an apartment in Tuzla, Bosnia and Herzegovina, over which he held an occupancy right. In May 1992 he left his apartment for an anticipated one-day trip to Belgrade from which he did not immediately return due to the outbreak of the hostilities in Tuzla. Pursuant to the Law on Abandoned Apartments the apartment was thereafter temporarily allocated to other persons. In August 1998 the applicant initiated proceedings before the competent administrative authorities to regain possession of his apartment. After more than three years of proceedings the applicant's occupancy right was eventually confirmed on 2 August 2001 by a decision under the 1998 Law on the Cessation of the Application of the Law on Abandoned Apartments. However, this decision has not been enforced up to date.

2. This case involves issues under Articles 6 and 8 of the European Convention on Human Rights, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 1 September 1998 and was registered on the same day.

4. Upon request of the Chamber, the applicant submitted further information and documents on 6 November 1998.

5. On 18 January 1999 the Chamber invited the Federation of Bosnia and Herzegovina to submit observations in writing on the admissibility and merits of the case. The Federation submitted its observations on 18 March 1999.

6. In accordance with the Chamber's order for the proceedings, the applicant was afforded the possibility of replying to the respondent Party's observations and, in that connection, to claim compensation. On 8 May 1999 the Chamber received the applicant's reply, which did not contain any claim for compensation. Further observations were received from the applicant 8 October 2001, and were transmitted to the respondent Party on 14 November 2001.

7. On 6 December 2001, 7 January and 8 January 2002 the Chamber deliberated on the admissibility and merits of the case and adopted the present decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

8. The facts of the case, as they appear from the application, the respondent Party's submissions and the documents in the case-file may be summarised as follows.

9. The applicant holds the occupancy right over an apartment located at Ismeta Mujezinovića 17 (Sjenjak D-3/8) in Tuzla. On 14 May 1992 he left Tuzla for a trip to Belgrade with his family. Due to the outbreak of the hostilities, the applicant was not able to return to Tuzla.

10. On 4 March 1993 the Public Health Institute in Tuzla allocated the apartment to other persons, who, on 11 March 1993 concluded a contract with the Department for Housing and Public Affairs of Local Communities of the Municipality Tuzla ("the Department for Housing") for use of the apartment on the ground that the apartment had been declared abandoned pursuant to the Law on Abandoned Apartments (see paragraphs 15 - 19 below).

11. On 26 August 1998 the applicant submitted a request to the Department for Housing for confirmation of his occupancy right and to regain possession of the apartment.

12. On 27 August 1999 the applicant filed an appeal to the Ministry for Physical Planning and Environment in Tuzla, because he had not yet received a decision from the Department for Housing.

13. On 2 August 2001 the Department for Housing eventually confirmed the applicant's occupancy right by a decision under the Law on the Cessation of the Application of the Law on Abandoned Apartments (see paragraphs 20-26 below), which had entered into force on 4 April 1998. The applicant initiated proceedings for the enforcement of the decision on 22 August 2001.

14. According to the correspondence from the applicant received 8 October 2001, there have not been any developments in the enforcement proceedings.

IV. Relevant legislation

A. The Law on Abandoned Apartments

15. The Law on Abandoned Apartments ("the old law"), originally issued on 15 June 1992 as a decree with force of law, was adopted as law on 1 June 1994. It was amended on several occasions (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95). It governed the re-allocation of occupancy rights over socially-owned apartments that had been abandoned.

16. According to the old law, an occupancy right expired if the holder of the right and the members of his or her household had abandoned the apartment after 30 April 1991 (Article 1). An apartment was considered abandoned if, even temporarily, it was not used by the occupancy right holder or members of the household (Article 2).

17. Proceedings aimed at having an apartment declared abandoned could be initiated by a state authority, a holder of an allocation right (i.e. a juridical person authorised to grant permission to use an apartment), a political or a social organisation, an association of citizens or a housing board. Except for certain exceptions not relevant to the present application, the competent municipal housing authority was to decide on a request to this end within seven days and could also *ex officio* declare an apartment abandoned (Article 4). Failing a decision within this time-limit, it was to be made by the Ministry for Urban Planning, Housing and Environment. Interested parties could challenge a decision by the municipal organ before the same ministry but an appeal had no suspensive effect (Article 5).

18. An apartment declared abandoned could be allocated for temporary use to "an active participant in the fight against the aggressor of the Republic of Bosnia and Herzegovina" or to a person who had lost his or her apartment due to hostilities (Article 7). Such temporary use could last up to one year after the date of the cessation of the imminent threat of war. A temporary user was obliged to vacate the apartment at the end of that period and to place it at the disposal of the authority that had allocated it (Article 8).

19. The occupancy right holder was to be regarded as having abandoned the apartment permanently if he or she failed to resume using it either within seven days (if he or she had been staying within the territory of the Republic of Bosnia and Herzegovina) or within fifteen days (if he or she had been staying outside that territory) from the publication of the Decision on the Cessation of the State of War (OG RBiH no. 50/95, published on 22 December 1995). The resultant loss of the occupancy right was to be recorded in a decision by the competent authority (Article 10 compared to Article 3 paragraph 3).

B. The Law on the Cessation of the Application of the Law on Abandoned Apartments

20. The old law was repealed by the Law on the Cessation of the Application of the Law on Abandoned Apartments ("the new law") which entered into force on 4 April 1998 and has been amended on several occasions thereafter (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – nos. 11/98, 38/98, 12/99, 18/99, 27/99 and 43/99).

21. According to the new law, no further decisions declaring apartments abandoned are to be taken (Article 1). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the old law are invalid. Nevertheless, decisions establishing a right of temporary occupancy shall remain effective until revoked in accordance with the new law. Until 14 April 1999, also all decisions which had created a new occupancy right pursuant to regulations issued under the old law were valid unless revoked. However, on that date, the High Representative decided that any occupancy right or contract on use made between 1 April 1992 and 7 February 1998 is cancelled. A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered as a temporary user (Article 2). Also contracts and decisions made after 7 February 1998 on the use of apartments declared abandoned are invalid. Any person using an apartment on the basis of such a contract or decision is considered to be occupying the apartment without any legal basis (Article 16).

22. The occupancy right holder of an apartment declared abandoned has a right to return to the apartment in accordance with Annex 7 of the General Framework Agreement (Article 3 paragraphs 1 and 2). Persons using the apartment without any legal basis shall be evicted immediately or at the latest within 15 days (Article 3 paragraph 3). A temporary user who has alternative accommodation is to vacate the apartment within 15 days of the date of delivery (before 1 July 1999 within 90 days of the date of issuance) of the decision on repossession (Article 3 paragraph 4). A temporary user without alternative accommodation is given a longer period of time (at least 90 days) within which to vacate the apartment. In exceptional circumstances, this deadline may be extended for up to one year if the municipality or the allocation right holder responsible for providing alternative accommodation submits detailed documentation regarding its efforts to secure such accommodation to the cantonal administrative authority for housing affairs and that authority finds that there is a documented absence of available housing, as agreed upon with the Office of the High Representative. In such a case, the occupancy right holder must be notified of the decision to extend the deadline and the basis therefor 30 days before the original deadline expires (Article 3 paragraph 5 compared with Article 7 paragraphs 2 and 3).

23. With a few exceptions not relevant to the present application, the time-limit for an occupancy right holder to file a claim for repossession expired 15 months after the entry into force of the new law, i.e. on 4 July 1999 (Article 5 paragraph 1). If no claim was submitted within that time-limit, the occupancy right is cancelled (Article 5 paragraph 3).

24. Upon receipt of a claim for repossession, the competent authority, normally the municipal administrative authority for housing affairs, had 30 days to issue a decision (Article 6) containing the following parts (Article 7 paragraph 1):

1. a confirmation that the claimant is the occupancy right holder;
2. a permit for the occupancy right holder to repossess the apartment, if there was a temporary user in the apartment or if it was vacant or occupied without a legal basis;
3. a termination of the right of temporary use, if there was a temporary user in the apartment;
4. a time-limit during which a temporary user or another person occupying the apartment should vacate it; and
5. a finding as to whether the temporary user was entitled to accommodation in accordance with the Law on Taking Over the Law on Housing Relations.

25. Following a decision on repossession, the occupancy right holder is to be reinstated into his apartment not earlier than 90 days, unless a shorter deadline applies, and no later than one year from the submission of the claim (Article 7 paragraphs 2 and 3). Appeals against such a decision could be lodged by the occupancy right holder, the person occupying the apartment and the allocation right holder and should be submitted to the cantonal ministry for housing affairs within 15 days from the date of receipt of the decision. However, an appeal has no suspensive effect (Article 8).

26. If the person occupying the apartment refuses to comply with an order to vacate it, the competent administrative body shall forcibly evict him or her at the request of the occupancy right holder (Article 11). If the occupancy right holder, without good cause, fails to reoccupy the apartment within certain time-limits, his or her occupancy right may be terminated in accordance with the procedures established under the new law and its amendments (Article 12).

C. The Law on Administrative Proceedings

27. Under Article 275 of the Law on Administrative Proceedings (OG FBiH no. 2/98) the competent administrative organ has to issue a decision to execute an administrative decision within 30 days upon receipt of a request to this effect. Article 216 paragraph 3 provides for an appeal to the administrative appellate body if a decision is not issued within this time limit (appeal against "silence of the administration").

D. The Law on Administrative Disputes

28. Article 1 of the Law on Administrative Disputes (OG FBiH no. 2/98) provides that the courts shall decide in administrative disputes on the lawfulness of second instance administrative acts concerning rights and obligations of citizens and legal persons.

29. Article 22 paragraph 3 provides that an administrative dispute may be instituted also if the administrative second instance organ fails to render a decision within the prescribed time limit, whether the appeal to it was against a decision or against the first instance organ's silence.

V. COMPLAINT

30. The applicant complains that his rights guaranteed by Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention have been violated, and that he has been discriminated against in violation of Article II(2)(b) of the Agreement.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

31. As to the admissibility of the case, the Federation states that the applicant has not yet exhausted the available domestic remedies. It points out that under the Law on Administrative Proceedings and Article 22 paragraph 3 of the Law on Administrative Disputes (see above paragraphs 27 and 29), the applicant could have initiated court proceedings against the inactivity of the administration upon his request for execution.

32. The Federation also argues that the application should be declared inadmissible on the ground that it was not submitted within six months of the final decision in the applicant's case, as provided by Article VIII(2)(a) of the Agreement.

33. As for the merits under Article 6, the respondent Party states that an unreasonable length of time has not passed in the administrative proceeding, and that the applicant has not commenced any court proceedings. Therefore it finds that there can be no violation of Article 6.

34. With regard to Article 8, the Federation argues that it is not responsible for the applicant having left his apartment, and that the respondent Party is committed to take all necessary steps to enable him to return, and to the return of refugees and internally displaced persons in general.

35. With regard to Article 1 of Protocol No. 1 to the Convention, the respondent Party submits that the applicant abandoned his possessions on his own motion. Therefore, it is argued that the interference with the applicant's possessions was justified, given the need to provide alternative accommodation to a temporary occupant, who could no longer inhabit his dwelling due to the hostilities.

36. The respondent Party did not submit observation with regard to Article II(2)(b) of the Agreement.

B. The applicant

37. The applicant maintains his complaint, pointing out that the proceedings to reinstate him into his apartment have been pending since August, 1998, and that the respondent Party has failed to enforce the decision confirming his occupancy right.

VII. OPINION OF THE CHAMBER

A. Admissibility

38. Before considering the merits of this case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. Exhaustion of Effective Domestic Remedies

39. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In the *Blentić* case (case no. CH/96/17, *Blentić*, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21, Decisions on Admissibility and Merits 1996–1997, with further references) the Chamber considered this admissibility criterion in the light of the corresponding requirement to exhaust domestic remedies in Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11 to the Convention). The European Court of Human Rights has found that such remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The Court has, moreover, considered that in applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants.

40. In the present case the Federation objects to the admissibility of the application on the ground that the domestic remedies provided by the Law on Administrative Proceedings and by the Law on Administrative Disputes have not been exhausted. Whilst these laws afford remedies which might in principle qualify as effective ones within the meaning of Article VIII(2)(a) of the Agreement in so far as the applicant is seeking to return to his apartment and faced with the authorities' inaction, the Chamber must ascertain whether, in the case now before it, these remedies can also be considered effective in practice.

41. The Chamber first notes that the applicant indeed initiated proceedings in August 1998 under the new law with a view to being reinstated into his apartment. The domestic authorities remained silent in the face of his application for three years. Further, the resultant decision of 2 August 2001 confirming his occupancy right and ordering the temporary occupant to vacate the apartment within 15 days has not been executed despite the applicant's enforcement request which has also been pending since August 2001. Nor has the respondent Party shown the documented existence of any exceptional circumstances within the meaning of Article 7 paragraph 3 of the new law which have warranted an extension of the temporary occupant's deadline for vacating the apartment. At any rate, it has not been shown that the applicant was notified within the time-limit stipulated in Article 7 paragraph 3 of any decision to that end.

42. In these particular circumstances the Chamber is satisfied that the applicant could not be required to exhaust, for the purposes of Article VIII(2)(a) of the Agreement, any further remedy provided by domestic law.

2. The Six-Month Rule

43. The Federation also objects to the admissibility on the ground that the application was not filed within six months from the date of the final decision in the applicant's case. However, in this instance there has not yet been any final decision infringing upon the applicant's rights. Rather, the

applicant complains of the failure of the authorities to respond to his attempts to regain possession of his apartment and the more than three years of inaction on the part of the respondent Party in this regard. Accordingly the time for the running of the six-month period has not yet begun, and this objection to the admissibility of the application is therefore ill-founded.

3. Whether the Application is Manifestly Ill-Founded

44. As previously noted, the applicant complains that he has been discriminated against in the enjoyment of his rights as protected by Article II(2)(b) of the Agreement.

45. While the respondent Party did not provide any arguments in response to this claim, the applicant also has not provided any evidence which would tend to indicate that he has been discriminated against in the enjoyment of any of his rights. Nor can the Chamber of its own motion find any such evidence. The allegation has not been substantiated by the applicant, and the Chamber therefore finds that this claim is manifestly ill-founded and inadmissible.

46. As no other ground for declaring the case inadmissible has been established, the Chamber declares the application admissible with respect to the allegations concerning Articles 6 and 8 of the Convention, and inadmissible regarding the claim of discrimination (see paragraph 45).

B. Merits

47. Under Article XI of the Agreement the Chamber must next address the question 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.

1. Article 8 of the Convention

48. Article 8 of the Convention reads, as far as relevant, as follows:

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

49. It is the Federation's assertion that it was necessary in the public interest to declare the apartment abandoned and to allocate it temporarily to other persons in need of housing.

50. The Chamber notes that at the end of the hostilities the applicant was prevented from returning to his pre-war apartment as it had been temporarily allocated to other persons. In March 1993 the apartment was also declared abandoned. As from 1998 the applicant has attempted to regain possession of the apartment. However, even after the issuance of the decision of 2 August 2001 by the Department of Housing confirming his occupancy right, the Federation has still failed to reinstate the applicant into possession of his home.

51. The Chamber has already found that the links which an applicant facing similar difficulties retained to his dwelling sufficed for this to be considered his "home" for the purposes of Article 8 paragraph 1 of the Convention (see, *inter alia*, the decisions in case no. CH/97/46, *Kevešević*, decision on the merits delivered on 10 September 1998, paragraphs 39-42, Decisions and Reports 1998, and case no. CH/97/58, *Onić*, decision on admissibility and merits delivered on 12 February 1999, paragraph 48, Decisions January-July 1999, with ample reference to the jurisprudence of the European Court of Human Rights). The Chamber furthermore considers that there has been an ongoing interference with the present applicant's right to respect for his home.

52. In order to determine whether this interference has been justified under the terms of paragraph 2 of Article 8, the Chamber must examine whether it was "in accordance with the law", served a legitimate aim and was "necessary in a democratic society" (see the aforementioned *Kevešević* decision, paragraphs 47-58). There will be a violation of Article 8 if any one of these conditions is not satisfied.

53. In so far as the present case relates to the application of the new law, the Chamber recalls its above findings relating to the admissibility of the case (see paragraph 41). It is true that the applicant received a decision pursuant to the new law, confirming his occupancy right. The current occupants of his apartment were ordered to vacate the apartment within 15 days. In spite of the applicant's enforcement request pursuant to Article 11 of the new law the decision in the applicant's favor has not been executed. As the Chamber has already noted, it has not been shown that the applicant was notified, at least 30 days before the end of the current occupants' 15-day period for vacating the apartment, of any documented exceptional circumstances warranting an extension of the latter time-limit. Therefore, there is an ongoing violation of Article 8 of the Convention as the procedure followed by the respondent Party under the new law has not been "in accordance with the law" based both upon the three-year silence of the authorities in the face of the proceedings initiated by the applicant, and due to the subsequent failure to enforce his occupancy right once recognized (see case no. CH/97/42, *Eraković*, decision on admissibility and merits delivered on 15 January 1999, paragraph 51, Decisions January-July 1999). The Chamber would add that under Article 3 paragraph 9 of the new law it is explicitly stipulated that a failure of, for example, the cantonal authorities to meet their obligations under Article 3 shall not hamper the possibility of an occupancy right holder (such as the applicant) to reclaim an apartment.

54. Accordingly, the Chamber concludes that Article 8 of the Convention has been violated, given the failure of the authorities to respond to the applicant's proceedings for three years and the failure to execute the decision of 2 August 2001 effectively entitling the applicant to return to his dwelling.

2. Article 1 of Protocol No. 1 to the Convention

55. The applicant complains that his right to peaceful enjoyment of his possessions has been and continues to be violated as a result of the decision declaring his apartment abandoned and, following the procedural decision of 2 August 2001, of the effective prevention of his return into the apartment. Article 1 of Protocol No. 1 to the Convention provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

56. The Federation argues that there has been no violation of Article 1 of Protocol No. 1, as the temporary allocation of the applicant's apartment to the other persons was necessary in the public interest so as to solve an urgent housing problem.

57. In previous cases, the Chamber has already found that an occupancy right can indeed be regarded as a "possession", it being a valuable asset giving the holder the right, subject to the conditions prescribed by the law, to occupy an apartment indefinitely (see case no. CH/96/28, *M.J.*, decision on admissibility and merits delivered on 3 December 1997, paragraph 32, Decisions on Admissibility and Merits 1996–1997, and the aforementioned *Kevešević* decision, paragraph 73). In those cases the Chamber recalled, *inter alia*, that the European Court of Human Rights has given a wide interpretation to the concept of "possessions", holding that this notion covers a wide variety of rights and interests with an economic value (see, e.g., Eur.Court HR, *Van Marle v. the Netherlands* judgment of 26 June 1986, Series A no. 101, page 13, paragraph 41; and *Pressos Compania Naviera S.A. v. Belgium* judgment of 20 November 1995, Series A no. 332, page 21, paragraph 31).

58. The Chamber has further found that a decision declaring abandoned an apartment over which someone enjoyed an occupancy right and the allocation thereof to another person amounted to a *de facto* expropriation. The Chamber has also established that the rule contained in the second sentence of the first paragraph of Article 1 of Protocol No. 1, subjecting the deprivation of possessions to certain conditions, applies to such a *de facto* expropriation (see the above-mentioned *Kevešević* decision, paragraphs 73 to 78).

59. The applicant's grievance under this provision includes the three-year silence of the authorities in the face of his attempts to regain possession of his apartment, and extends to the failure of the authorities to enforce the decision entitling him to return to his apartment. The Chamber has already noted (in paragraphs 51 and 53 above) that this non-enforcement is not in compliance with the new law. In addition to the violation stemming from the refusal to allow the applicant to return to his apartment for want of recognition of his occupancy right, there has thus been a continuing violation of his right to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 in so far as the procedure under the new law has not been "subject to the conditions provided for by law" either (cf. the aforementioned *Eraković* decision, paragraph 60).

60. Accordingly, the Chamber concludes that Article 1 of Protocol 1 to the Convention has been violated, given the failure of the authorities to respond to the applicant's proceedings for three years and the failure to execute the decision of 2 August 2001 effectively entitling the applicant to return to his dwelling.

3. Article 6 of the Convention

61. Article 6 of the Convention, insofar as relevant, provides as follows:

> "In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

62. Noting that the proceedings which are still pending concern the applicant's occupancy right over the apartment in question, the Chamber finds that these proceedings relate to his "civil rights" within the meaning of Article 6 paragraph 1 and that the provision is accordingly applicable to the present case (see paragraph 57 above).

63. The Chamber considers that the case raises the question of whether the proceedings have been expedited with reasonable speed. A determination of the reasonableness of the length of proceedings is based on the complexity of the case, the conduct of the applicant and the authorities, and the matter at stake for the applicant (see, e.g. case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998).

64. The issue underlying the proceedings over the last three years is whether the applicant is entitled to regain the occupancy right and possession of the apartment in question. The Chamber cannot find this issue to be so complex as to require more than three years to decide. Further, there is no evidence that any conduct of the applicant has served to prolong the proceedings. On the contrary, the applicant has made at least two attempts to speed up the proceedings and have action taken by the relevant bodies.

65. Instead, the authorities have failed to act upon the requests of the applicant within reasonable time frames. First, there was a failure to act upon the applicant's initial request for three years. Second, the authorities have further failed to act upon the decision of 2 August 2001 to reinstate the applicant into his apartment within the time frame established by law.

66. Finally, the Chamber notes that a speedy outcome of this matter would have been of particular importance to the applicant, given that the question concerned his home and property.

67. In view of the above, the Chamber finds a violation of Article 6 paragraph 1 of the Convention in that the proceedings in the applicant's case have not been determined within a reasonable time.

VIII. REMEDIES

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

69. The Chamber recalls that in accordance with its order for the proceedings in this case the applicant was afforded the possibility of claiming compensation within the time limit fixed for any reply to observations submitted by a respondent Party. The applicant has not lodged any such claim, but has only requested that he be reinstated into his apartment.

70. The Chamber therefore considers it appropriate to order the Federation to take all necessary steps to enable the applicant, whose occupancy right has already been confirmed, to regain possession of his apartment.

71. Article XI(3) of the Agreement provides: "subject to review as provided in paragraph 2 of Article X, the decisions of the Chamber shall be final and binding". Thus, a decision of the Chamber does not become final and binding until the provision in Article XI(3) of the Agreement has been met, that is, in particular, until after the Chamber decides upon any motions for requests for review filed in accordance with the Chamber's Rules of Procedure.

72. However, Article XI(1) of the Agreement states that "the Chamber shall promptly issue a decision, which shall address: ... (b) what steps shall be taken by the Party to remedy such breach, including ... provisional measures". The Chamber interprets this provision in the sense that it is authorised to order the respondent Party to take certain steps without further delay, that is, before the decision becomes final and binding pursuant to Article XI(3) of the Agreement, in order to remedy breaches of the Agreement.

73. Since the applicant in the present case has, for a long time, been unable to regain possession of his apartment due to the failure of the respondent Party to reinstate him in a timely manner, the Chamber finds it appropriate to exercise the powers granted under Article XI(1)(b) of the Agreement to order the respondent Party to reinstate the applicant without further delay, and at the latest within one month after the date on which the present decision is delivered, regardless of whether either party files a motion to review the decision under Article X(2) of the Agreement.

74. In addition the applicant is awarded the sum of 3000 Convertible Marks (*Konvertibilnih Maraka*, "KM") on account of non-pecuniary damages in recognition of his suffering as a result of his inability to regain possession of his apartment, to be paid no later than one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure. As the Chamber has held in *Pletilić and others* (cases nos. 98/659 et al., decision on admissibility and merits of 9 July 1999, paragraph 236, Decisions August-December 1999), Article XI(1)(b) of the Agreement does not preclude the Chamber from ordering a remedy which has not been requested by an applicant.

75. The Chamber further awards simple interest at an annual rate of 10% as of the date of expiry of the one-month period following the date on which this decision becomes final and binding within the meaning of Rule 66 of the Chamber's Rules of Procedure, and on any unpaid portion of the sum awarded in paragraph 74 until the date of settlement in full.

IX. CONCLUSIONS

76. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible with regard to the claims brought under Articles 6 and 8 and Article 1 of Protocol No. 1 to the Convention;

2. unanimously, to declare the application inadmissible with regard to the complaint of discrimination;

3. unanimously, that the refusal to allow the applicant to return to his apartment due to the prolonged failure to respond to the applicant's request for reinstatement and the failure to enforce the decision of 2 August 2001 confirming his occupancy right constitute a violation by the Federation of Bosnia and Herzegovina of his right to respect for his home within the meaning of Article 8 of the European Convention on Human Rights, the Federation thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that the refusal to allow the applicant to return to his apartment due to the prolonged failure to respond to the applicant's request for reinstatement and the failure to enforce the decision of 2 August 2001 confirming his occupancy right also constitute a violation by the Federation of Bosnia and Herzegovina of his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Federation thereby being in breach of Article I of the Agreement;

5. unanimously, that the failure to respond to the applicant's request for reinstatement into his apartment for three years constitute a violation by the Federation of Bosnia and Herzegovina of his right to a hearing within a reasonable time within the meaning of Article 6 of the European Convention on Human Rights, the Federation thereby being in breach of Article I of the Human Rights Agreement;

6. unanimously, to order the Federation of Bosnia and Herzegovina to reinstate the applicant into his apartment without further delay, and at the latest on 11 February 2002;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, no later than one month after 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 3000 KM on account of non-pecuniary damages for the loss of the use of his apartment;

8. unanimously, to order the Federation of Bosnia and Herzegovina to pay simple interest at the rate of 10 (ten) percent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full; and

9. unanimously, to order the Federation of Bosnia and Herzegovina to report to it, within three months from the date on which the present decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken by it to comply with the above order.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

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ODLUKA O PRIHVATLJIVOSTI I MERITUMU

Predmet broj CH/98/922

Marijana PILIPOVIĆ

protiv

FEDERACIJE BOSNE I HERCEGOVINE

Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine, na zasjedanju Velikog vijeća od 12. maja 2005. godine, sa sljedećim prisutnim članovima:

Gosp. Miodrag PAJIĆ, predsjednik
Gosp. Mehmed DEKOVIĆ, potpredsjednik
Gosp. Želimir JUKA, član
Gđa Valerija GALIĆ, član
Gosp. Miodrag SIMOVIĆ, član

Gosp. Nedim ADEMOVIĆ, arhivar

Razmotrivši gore spomenutu prijavu podnesenu Domu za ljudska prava za Bosnu i Hercegovinu (u daljnjem tekstu: Dom) u skladu sa članom VIII(1) Sporazuma o ljudskim pravima (u daljnjem tekstu: Sporazum) sadržanom u Aneksu 6 uz Opći okvirni sporazum za mir u Bosni i Hercegovini;

Konstatujući da je Dom prestao postojati 31. decembra 2003. godine i da je Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine (u daljnjem tekstu: Komisija) dobila mandat prema sporazumima u skladu sa članom XIV Aneksa 6 uz Opći okvirni sporazum za mir u Bosni i Hercegovini koji su zaključeni u septembru 2003. i januaru 2005. godine (u daljnjem tekstu: Sporazum iz 2005. godine) da odlučuje o predmetima podnesenim Domu do 31. decembra 2003. godine;

Usvaja sljedeću odluku u skladu sa članom VIII(2)(d) Sporazuma, čl. 3. i 8. Sporazuma iz 2005. godine, kao i pravilom 21. stavom 1(a) u vezi sa pravilom 53. Pravila procedure Komisije:

I. UVOD

1. Predmet se odnosi na pokušaje podnosioca prijave da se vrati u posjed i da se prizna kao vlasnik stana u ulici Trg zlatnih ljiljana 10, u Sarajevu, na osnovu ugovora o kupoprodaji – otkupu stana koji je zaključio njen bivši suprug sa Stambenim fondom Jugoslovenske narodne armije (u daljnjem tekstu: JNA).

2. Prijava pokreće pitanja u vezi sa čl. 6. i 8. Evropske konvencije za zaštitu ljudskih prava i temeljnih sloboda (u daljnjem tekstu: Evropska konvencija) i članom 1. Protokola broj 1 uz Evropsku konvenciju, te članom II(2)(b) Sporazuma.

II. POSTUPAK PRED DOMOM/KOMISIJOM

3. Prijava je podnesena 4. septembra 1998. godine i registrovana istog dana.

4. Podnosilac prijave je 17. jula 2003. godine i 19. marta 2004. godine dostavila obavještenja o daljim događanjima u vezi sa prijavom.

5. Komisija je 24. marta 2004. proslijedila tuženoj strani prijavu podnosioca radi dostavljanja pismenih zapažanja.

6. Komisija je 26. aprila, 1. juna, 5. jula, 10. novembra 2004. i 7. aprila 2005. godine zaprimila pismena zapažanja tužene strane.

7. Komisija je 11. maja, 11. juna, 12. jula i 1. novembra 2004. godine proslijedila zapažanja o prihvatljivosti i meritumu tužene strane podnosiocu prijave na njene navode.

8. Podnosilac prijave je 20. maja 2004. godine poslala svoj odgovor na pismena zapažanja tužene strane.

III. ČINJENICE U PREDMETU

9. Činjenice koje su dole sažete zasnivaju se na obrascu prijave i priloženim dokumentima.

10. Bivši suprug podnosioca prijave je, na osnovu ugovora o korištenju stana zaključenog 15. juna 1983. godine, bio nosilac stanarskog prava na stanu koji se nalazi u ulici Trg zlatnih ljiljana broj 22/3, u Sarajevu. Stan mu je dodijeljen kao aktivnom vojnom licu.

11. Brak između podnosioca prijave i njenog supruga je razveden pravosnažnom presudom Osnovnog suda II u Sarajevu, broj P-3676/91 od 27. decembra 1991. godine.

12. Bivši suprug podnosioca prijave je 13. februara 1992. godine zaključio ugovor o kupoprodaji – otkupu stana sa Stambenim fondom JNA u skladu sa Zakonom o stambenom obezbjeđenju u JNA. U ugovoru je navedeno da kupoprodajna cijena iznosi 357.812 dinara. Potpisi nisu ovjereni pred nadležnim sudom, ali ugovor sadrži pečat poreske uprave od 19. februara 1992. godine na kojem piše da se na otkup stana, koji je vlasništvo države SFRJ-SSNO ne plaća porez na promet. Podnosilac prijave je dostavila potvrdu koju je izdala ”YU GARANT BANKA”, a koja je pravni sljedbenik Narodne banke Jugoslavije – Vojnog servisa, iz koje se vidi da je suprug podnosioca prijave izvršio uplatu u iznosu od 357.812 tadašnjih YU dinara.

13. Po otpočinjanju oružanog sukoba u Bosni i Hercegovini, podnosilac prijave je napustila stan sa kćerkom i otišla u Beograd.

14. Podnosilac prijave je 22. jula 1998. godine podnijela zahtjev za vraćanje stana u posjed Upravi za stambena pitanja Kantona Sarajevo (u daljnjem tekstu: Uprava).

15. Podnosilac prijave je 13. marta 2000. godine podnijela prijedlog Općinskom sudu II u Sarajevu za utvrđivanje stanarskog prava razvedenih bračnih drugova. Taj Sud je 2. oktobra 2000. godine donio rješenje, broj: RS-50/00, kojim se podnosilac prijave određuje za isključivog nosioca stanarskog prava na predmetnom stanu. U obrazloženju rješenja je navedeno da je nesporno utvrđeno da je Z.P. napustio predmetni stan nakon razvoda braka. Takođe, Z.P. je izjavio da se odriče stanarskog prava u korist podnosioca prijave i njihove zajedničke kćerke.

16. Uprava je 15. marta 2001. godine donijela rješenje, broj: 23/5-372- 2221/98, kojim se odbija zahtjev podnosioca prijave za vraćanje stana u posjed kao neosnovan, prema članu 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima (u daljnjem tekstu: Zakon o prestanku primjene). U rješenju se navodi da se suprug podnosioca prijave ne može smatrati izbjeglim ili raseljenim licem u smislu Zakona o prestanku primjene, jer je bio u profesionalnoj vojnoj službi u Vojsci Jugoslavije i nakon 14. decembra 1995. godine, tačnije do 1. jula 1996. godine. U obrazloženju rješenja se navodi da rješenje Općinskog suda II u Sarajevu, broj: RS-50/00 od 2. oktobra 2000. godine, kojim se podnosilac prijave određuje za isključivog nosioca stanarskog prava, nije od uticaja na rješavanje zahtjeva podnosioca prijave za vraćanje stana u posjed, obzirom da je Sud utvrdio činjenično stanje na osnovu ugovora o korištenju stana zaključenog 15. juna 1983. godine.

17. Protiv rješenja Uprave podnosilac prijave je ponijela žalbu Ministarstvu za stambene poslove Kantona Sarajevo (u daljnjem tekstu: Ministarstvo). Ministarstvo je 10. decembra 2000. godine donijelo rješenje, broj: 27/02-23-1895/01, kojim se žalba podnosioca prijave odbija kao neosnovana.

18. Podnosilac prijave je protiv rješenja Ministarstva pokrenula upravni spor pred Kantonalnim sudom u Sarajevu. Kantonalni sud je 16. januara 2003. godine donio presudu U-191/02, kojom se tužba podnosioca prijave uvažava, a oba rješenja poništavaju. U obrazloženju presude sud je naveo da je prilikom rješavanja zahtjeva podnosioca prijave trebalo uzeti u obzir da je brak razveden 1991. godine, te da je podnosilac prijave određena za isključivog nosioca stanarskog prava. Takođe, trebalo je uzeti u obzir vrijeme podnošenja tužbe za razvod braka, te eventualno cijeniti zahtjev podnosioca prijave nezavisno od od statusa tadašnjeg nosioca stanarskog prava.

19. U ponovnom postupku, Uprava je 22. januara 2003. godine donijela rješenje, broj 2375-372-2221, kojim se zahtjev podnosioca prijave odbija. U obrazloženju rješenja, Uprava izričito navodi da nije mogla prihvatiti preporuke date u presudi Kantonalnog suda, broj U-191/02 od 16. januara 2003. godine, ističući da tužba za razvod braka iz 1989. godine, te presuda o razvodu braka iz 1991. godine nisu imale bitnog uticaja na odluku iz razloga što je suprug podnosioca prijave bio legitimni nosilac stanarskog prava na predmetnom stanu do donošenja rješenja Općinskog suda II u Sarajevu, broj: RS-50/00 od 2. oktobra 2000. godine, kojim se podnosilac prijave određuje za isključivog nosioca stanarskog prava.

20. Podnosilac prijave je protiv rješenja Uprave od 22. januara 2003. godine podnijela žalbu Ministarstvu. Ministarstvo je 25. juna 2004. godine donijelo rješenje, broj: 27/02-231338/04, kojim se poništava rješenje Uprave od 22. januara 2003. godine, a predmet vraća Upravi na ponovni postupak. U obrazloženju rješenja je navedeno da Uprava nije utvrdila kao odlučnu činjenicu, da li je Z.P., bivši suprug podnosioca prijave i nosilac stanarskog prava na predmetnom stanu, na dan 30. aprila 1991. godine živio u stanu ili ne, posebno što je podnosilac prijave tvrdila da je tužbu za razvod braka podnijela 1989. godine, kada je, prema njenim navodima, njen bivši suprug i napustio predmetni stan.

21. Uprava je 10. marta 2005. godine donijela rješenje, broj: 23/5-372-2221/98, kojim se odbija zahtjev podnosioca prijave. U obrazloženju rješenja je navedeno da Z.P., na dan 30. aprila 1991. godine, nije samo formalno bio nosilac stanarskog prava na predmetnom stanu, već je i živio u tom stanu, tj. nije ga napustio 1989. godine, kako je tvrdila podnosilac prijave. Uprava je ovu činjenicu utvrdila na osnovu izvoda iz baze podataka Federalnog zavoda za statistiku, broj: 04-329-1620-3/04 od 29. decembra 2004. godine. U izvodu je navedeno da su prilikom popisa stanovništva od

1. aprila 1991. godine do 15. aprila 1991. godine, na adresi predmetnog stana popisani podnosilac prijave, njen bivši suprug i njihova kćerka. Takođe, Uprava je, uvidom u presudu o razvodu braka, utvrdila da je podnosilac prijave bio na adresi predmetnog stana, a da je podnosilac prijave privremeno bila na drugoj adresi.

22. U vrijeme dostavljanja rješenja Uprave od 10. marta 2005. godine, rok za ponošenje žalbe je još bio u toku. Komisiji nije poznato da li je podnosilac prijave podnijela žalbu protiv rješenja Uprave.

23. Predmetni stan je privremeno dodijeljeljen K.B.

24. Podnositeljica prijave je uz prijavu dostavila Domu punomoć bivšeg supruga, od 6. februara 1998. godine, da u njegovo ime može regulisati stanarsko pravo na predmetnom stanu, kao i sve u vezi sa otkupom stana, a zatim prenijeti stanarsko pravo na njihovu zajedničku kćerku, kao i sva prava koja joj po tom osnovu pripadaju u vezi sa tim stanom. Podnositeljica prijave ne posjeduje posebnu punomoć svog bivšeg supruga za zastupanje pred Domom i Komisijom, a u svojim naknadnim podnescima Domu i Komisiji navodi samo povrede svojih prava. Takođe, sve postupke pred domaćim organima je pokretala podnositeljica prijave.

IV. RELEVANTNE ZAKONSKE ODREDBE

A. Relevantno zakonodavstvo Socijalističke Federativne Republike Jugoslavije i Socijalističke Republike Bosne i Hercegovine

1. Zakon o stambenom obezbjeđenju u JNA

25. Podnosilac prijave je otkupio stan prema Zakonu o stambenom obezbjeđenju u JNA (”Službeni list Socijalističke Federativne Republike Jugoslavije“, broj 84/90). Ovaj zakon je usvojen 1990. godine, a na snagu je stupio 6. januara 1991. godine. Zakon je, u osnovi, regulisao stambene potrebe vojnih i građanskih lica na službi u JNA.

26. Član 21. Zakona navodi opći način na koji se trebala odrediti otkupna cijena stana. Cijena se trebala odrediti uzimajući u obzir revalorizovanu građevinsku vrijednost, a biće umanjena za vrijednost amortizacije stana i dalje smanjena revalorizovanim iznosom troškova nabavnih i komunalnih objekata građevinskog zemljišta, te revalorizovanim iznosom doprinosa za stambenu izgradnju koji se uplaćivao Stambenom fondu JNA. Savezni sekretar je, takođe, bio ovlašten da propiše tačnu metodologiju za određivanje cijene otkupa.

2. Uputstvo o metodologiji za utvrđivanje otkupne cene stanova stambenog fonda Jugoslovenske narodne armije (u daljnjem tekstu: Uputstvo)

27. Ovo Uputstvo je objavljeno u aprilu 1991. godine u Vojnom službenom listu i predviđalo je način izračunavanja otkupne cijene stanova koji su se trebali otkupiti iz Stambenog fonda JNA.

3. Pravilnik o otkupu stanova iz stambenog fonda Jugoslovenske narodne armije (u daljnjem tekstu: Pravilnik)

28. Ovaj Pravilnik objavljen je u aprilu 1991. godine u Vojnom službenom listu i utvrdio je proceduru koja će se slijediti u otkupu stana od Stambenog fonda JNA.

4. Zakon o porezu na promet nepokretnosti i prava

29. Zakon o porezu na promet nepokretnosti i prava (“Službeni list Socijalističke Republike Bosne i Hercegovine”, br. 37/71, 8/72, 37/73, 23/76, 21/77, 6/78, 13/82 i 29/91) bio je na snazi u vrijeme kada je suprug podnosioca prijava zaključio kupoprodajni ugovor sa JNA. Član 3, stav 1,

tačka 18. predviđao je da se ne plaća porez na promet nepokretnosti u slučaju otkupa stana od Stambenog fonda JNA.

B. Relevantno zakonodavstvo Republike Bosne i Hercegovine

1. Zakon o napuštenim stanovima

30. Predsjedništvo tadašnje Republike Bosne i Hercegovine je 15. juna 1992. godine donijelo Uredbu sa zakonskom snagom o napuštenim stanovima (”Službeni list Republike Bosne i Hercegovine”, br. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 i 33/95). Skupština Republike Bosne i Hercegovine usvojila je ovu Uredbu 17. juna 1994. godine kao “Zakon o napuštenim stanovima”. Zakonom su regulisani uslovi pod kojima se određene kategorije stanova u društvenom vlasništvu proglašavaju napuštenim i pod kojima se ponovo dodjeljuju.

31. Članom 2. određuje se da se napuštenim stanom smatra stan kojeg su prijeratni nosilac stanarskog prava i članovi njegovog porodičnog domaćinstva napustili, čak i privremeno. Ukoliko prijeratni nosilac stanarskog prava nije ponovo otpočeo koristiti stan u roku određenom članom 3. ovoga zakona (tj. do 6. januara 1996. godine), smatraće se da je stan trajno napustio.

32. U skladu sa izmijenjenim i dopunjenim članom 10, ako nosilac stanarskog prava ne otpočne koristiti stan u propisanom roku smatra se da je stan trajno napustio. Prestanak stanarskog prava se utvrđuje rješenjem nadležnog organa.

2. Zakon o prometu nepokretnosti

33. Član 9. stav 2. Zakona o prometu nepokretnosti (“Službeni list Socijalističke Republike Bosne i Hercegovine”, br. 38/78, 4/89, 29/90 i 22/91; ”Službeni list Republike Bosne i Hercegovine”, br. 21/92, 3/93, 17/93, 13/94, 18/94 i 33/94) predviđa da ugovor o prenosu nepokretnosti mora biti sačinjen u pismenom obliku, a potpisi ugovarača ovjereni u nadležnom sudu. Stavom 4. se, između ostalog, predviđa da je pismeni ugovor o prenosu nepokretnosti koji je u potpunosti ili značajnom dijelu izvršen valjan čak i ako potpisi ugovornih strana nisu ovjereni kod nadležnog suda.

C. Relevantno zakonodavstvo Federacije Bosne i Hercegovine

1. Zakon o prestanku primjene Zakona o napuštenim stanovima

34. Zakon o prestanku primjene Zakona o napuštenim stanovima (u daljnjem tekstu: Zakon o prestanku primjene) stupio je na snagu 4. aprila 1998. godine i potom je u više navrata dopunjavan i mijenjan (“Službene novine Federacije Bosne i Hercegovine“, br. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02 i 29/03). Zakonom o prestanku primjene je ukinut raniji Zakon o napuštenim stanovima.

35. Prema Zakonu o prestanku primjene, nadležni organi vlasti ne mogu dalje donositi odluke kojima se stanovi proglašavaju napuštenima (član 1, stav 2). Svi upravni, sudski i drugi akti kojima je nosiocu stanarskog prava prestalo stanarsko pravo oglašavaju se ništavim (član 2, stav 1). Ipak, akti kojima je dodijeljen stan na privremeno korištenje ostaju na snazi dok se ne poništе u skladu sa Zakonom o prestanku primjene (član 2, stav 2).

36. Sva stanarska prava ili ugovori o korištenju koji su zaključeni od 1. aprila 1992. do 7. februara 1998. godine prestaju da važe (član 2, stav 3). Osoba koja koristi stan po osnovu poništenog stanarskog prava ili odluke o privremenom korištenju smatraće se privremenim korisnikom (član 2, stav 3).

37. Nositelj stanarskog prava na stanu koji je proglašen napuštenim, ili član njegovog ili njenog porodičnog domaćinstva, ima pravo na povrat stana u skladu sa Aneksom 7 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini (član 3, stav 1. i 2).

38. Raniji član 3a, st. 1. i 2, koji su bili na snazi između 4. jula 1999. godine i 1. jula 2003. godine, određivao je slijedeće:

> Izuzetno od odredbe člana 3. stav 1. i 2. ovog zakona, u vezi sa stanovima koji su proglašeni napuštenim na teritoriji Federacije Bosne i Hercegovine, a koji su na raspolaganju Federalnog ministarstva odbrane, nosilac stanarskog prava ne smatra se izbjeglicom ako je 30. aprila 1991. godine bio u aktivnoj službi u SSNO – u JNA (tj. nije bio penzionisan) i nije bio državljanin Socijalističke Republike Bosne i Hercegovine prema evidenciji državljana, izuzev ako mu je odobren boravak u statusu izbjeglice ili drugi vid zaštite koji odgovara ovom statusu u nekoj od zemalja van bivše SFRJ prije 14. decembra 1995. godine.
>
> Nosilac stanarskog prava na stan iz stava 1. ovog člana ne smatra se izbjeglicom ukoliko je poslije 14. decembra 1995. godine ostao u aktivnoj službi u bilo kojim oružanim snagama van teritorije Bosne i Hercegovine, ili ako je stekao novo stanarsko pravo van teritorije Bosne i Hercegovine.

39. Član 3a, koji je stupio na snagu 1. jula 2003. godine, određuje slijedeće:

> Izuzetno od odredbe člana 3. st. 1. i 2. Zakona, stanovi koji su proglašeni napuštenim na teritoriju Federacije Bosne i Hercegovine, a kojima raspolaže Federalno ministarstvo odbrane čiji je nosilac stanarskog prava nakon 19. maja 1992. godine ostao u službi vojnog ili civilnog lica u bilo kojim oružanim snagama izvan teritorija Bosne i Hercegovine, ne smatra se izbjeglicom niti ima pravo na povrat stana u Federaciji Bosne i Hercegovine, izuzev ako mu je odobren boravak u statusu izbjeglice ili drugi oblik zaštite koji odgovara tom statusu u nekoj od zemalja izvan bivše SFRJ prije 14. decembra 1995. godine.
>
> Izbjeglicom se ne smatra niti ima pravo na povrat stana u Federaciji Bosne i Hercegovine ni nosilac stanarskog prava na stanove iz stava 1. ovog člana, koji je iz istoga stambenog fonda bivše JNA ili utemeljenih fondova oružanih snaga država nastalih na prostorima bivše SFRJ stekao novo stanarsko pravo koje odgovara tom pravu.

2. Odluka Zastupničkog doma Federacije Bosne i Hercegovine

40. Odluka Zastupničkog doma Federacije Bosne i Hercegovine je objavljena u “Službenim novinama Federacije Bosne i Hercegovine“ broj 28/04 i stupila je na snagu 26. maja 2004. godine, a, u relevantnom dijelu, ova odluka glasi:

> [...]…i obustavi sve upravne i sudske postupke za vraćanje u posjed vojnih stanova do usvajanja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo, a koje su trenutno u parlamentarnoj proceduri.

3. Zakon o prodaji stanova na kojima postoji stanarsko pravo

41. Član 27. Zakona o prodaji stanova na kojima postoji stanarsko pravo (“Službene novine Federacije Bosne i Hercegovine“, br. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/0, 15/02 i 54/04) prvi put je stupio na snagu 1997. godine. Članovi 39a, 39b, 39c, 39d. i 39e. su stupili na snagu 5. jula 1999. godine, kada su objavljeni u “Službenim novinama Federacije Bosne i Hercegovine“, nakon što ih je nametnuo Visoki predstavnik za Bosnu i Hercegovinu. Odredbe, koje se odnose na

otkup vojnih stanova, su značajno izmijenjene i dopunjene 16. oktobra 2004. godine, a posebno članovi 39, 39a. i 39e. Prvobitna i izmijenjena verzija su dole citirane.

42. Član 18.

> Vrijednost stana čini gradjevinska vrijednost stana korigirana koeficijentom polozajne pogodnosti stana. Gradjevinska vrijednost stana je 600 DEM po m2. Koeficijent polozajne pogodnosti stana utvrdjuje nadlezna vlada kantona-županije u rasponu od 0,80 do 1,20 ovisno o zoni naselja u kojem se stan nalazi, opremljenosti naselja, katnosti i drugih bitnih elemenata.

43. Član 27. predviđa da se pravo vlasništva na stanu stiče uknjižbom tog prava u zemljišne knjige nadležnog suda.

44. Član 39. je, u relevantnom dijelu, predviđao:

> Nositeljima stanarskog prava koji su zakljucili ugovor o otkupu stana na osnovu Zakona o obezbjeđenju u JNA [...], prilikom zaključenja ugovora o prodaji stana u skladu sa odredbama ovog zakona priznat će se uplaćeni iznos iskazan u DEM po kursu na dan uplate.

45. Izmijenjeni član 39, koji je na snazi od 16. oktobra 2004. godine, predviđa:

> Nositelj prava iz kupoprodajnog ugovora zaključenog s bivšim SSNO-om, na temelju Zakona o stambenom obezbjeđenju u JNA (”SLSFRJ”, broj 84/90) i podzakonskih akata za njegovu provedbu, za stan koji je na raspolaganju Federalnom ministarstvu obrane, zaključio je pravno obvezujući ugovor ako je zaključio pisani ugovor o otkupu stana do 06. travnja 1992. godine i ugovor dostavio na ovjeru nadležnoj poreznoj službi, te ukoliko je kupoprodajna cijena utvrđena sukladno tada vrijedećem Zakonu i iznos cijene izmirio u ugovorenom roku.

46. Član 39a. predviđa sljedeće:

> Ako nosilac stanarskog prava na stanu koji je na raspolaganju Ministarstva odbrane Federacije taj stan koristi legalno, i ako je prije 6. aprila 1992. zaključio pravno obavezujući ugovor o otkupu stana sa Saveznim sekretarijatom za narodnu odbranu (SSNO) u skladu sa zakonima navedenim u članu 39. ovog zakona, Ministarstvo odbrane Federacije izdaje nalog da se nosilac stanarskog prava uknjiži kao vlasnik stana u nadležnom sudu.

47. Član 39b, u relevantnom dijelu, određuje:

> U slučaju kada nosilac stanarskog prava iz člana 39a. ovog zakona nije izvršio uplatu cijelog iznosa prodajne cijene stana u skladu sa kupoprodajnim ugovorom, onda će platiti ostatak prodajne cijene navedene u tom ugovoru Ministarstvu odbrane Federacije.
>
> [...]
>
> Odredbe člana 39a. ovog zakona i st. 1. i 2. ovog člana primjenjuju se i na ugovore o otkupu stana koji su zaključeni prije 6. aprila 1992. godine u slučajevima kada nije izvršena ovjera potpisa kod nadležnog suda.

48. Član 39c. određuje:

> Odredbe člana 39a. i 39b. primjenjuju se i na nosioca stanarskog prava koji je ostvario pravo na povrat stana prema odredbama Zakona o prestanku primjene Zakona o napuštenim stanovima (”SNFBIH”, br. 11/98 i 18/99).

49. Član 39d. određuje da ako neko lice ne ostvari svoje pravo u vezi sa stanom, kako je određeno Zakonom o prodaji stanova, ili ako ne pokrene zahtjev za vraćanje stana u posjed, može pokrenuti postupak kod nadležnog suda.

50. Član 39e. je predviđao:

> Nosilac stanarskog prava koji nema pravo na povrat stana ili ne podnese zahtjev za povrat stana u skladu sa odredbama iz čl. 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima, a koji je prije 6. aprila 1992. godine zaključio pravno obavezujući ugovor o kupovini stana sa bivšim Saveznim sekretarijatom za narodnu odbranu (SSNO), ima pravo da podnese zahtjev Ministarstvu odbrane Federacije za nadoknadu sredstava plaćenih po ovom osnovu, izuzev ako se dokaže da su mu ta sredstva priznata za otkup stana van teritorije Bosne i Hercegovine.

51. Izmijenjeni član 39e. predviđa sljedeće:

> Nositelju prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, a koji je napustio stan u Federaciji Bosne i Hercegovine i nakon toga iz istoga stambenog fonda ili novoutemeljenih stambenih fondova oružanih snaga država nastalih iz bivše SFRJ stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, stjecanjem novoga stana raskinut je ugovor o otkupu stana u Federaciji Bosne i Hercegovine, te nema pravo na upis prava vlasništva nad tim stanom.
>
> Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, koji je nakon 14. prosinca 1995. godine ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine, a nije stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, umjesto upisa prava vlasništva po zaključenom ugovoru ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu sukladno članku 18. Zakona, umanjenu za amortizaciju.
>
> Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona za čiji stan je sadašnji korisnik, sukladno vrijedećim zakonima, zaključio ugovor o korištenju stana ili ugovor o otkupu stana, umjesto upisa prava vlasništva na stanu, ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu na način iz stavka 2. ovoga članka, izuzev nositelja prava kupoprodajnog ugovora iz stavka 1. ovoga članka.

3. Zakon o parničnom postupku

52. Član 54. Zakona o parničnom postupku (“Službene novine Federacije Bosne i Hercegovine“, br. 42/98, 3/99 i 53/03) određuje sljedeće:

> Tužitelj može u tužbi tražiti da sud samo utvrdi postojanje odnosno nepostojanje kakva prava ili pravnog odnosa, ili istinitost odnosno neistinitost kakve isprave.
>
> Takva se tužba može podići kad je to posebnim propisima predviđeno, kad tužitelj ima pravni interes da sud utvrdi postojanje odnosno nepostojanje kakva prava ili pravnog odnosa ili istinitost odnosno neistinitost kakve isprave prije dospjelosti

zahtjeva za činidbu iz istog odnosa ili kad tužitelj ima kakav drugi pravni interes za podizanje takve tužbe.

Ako odluka o sporu ovisi o tome postoji li ili ne postoji kakav pravni odnos koji je tokom parnice postao sporan, tužitelj može, pored postojećeg zahtjeva, istaknuti i tužbeni zahtjev da sud utvrdi da takav odnos postoji odnosno da ne postoji, ako je sud pred kojim parnica teče nadležan za takav zahtjev.

Isticanje zahtjeva prema odredbi stava 3. ovog članka neće se smatrati preinakom tužbe.

V. ŽALBENI NAVODI

53. Podnosilac prijave se žali na činjenicu da nije vraćena u posjed svog stana. Smatra da joj se mora omogućiti pravo raspolaganja na stanu koji je otkupio njen bivši suprug. Također, žali se na trajanje postupka odlučivanja o njenom zahtjevu za povrat stana, čime joj je onemogućen efektivan pristup sudu.

VI. ODGOVOR TUŽENE STRANE

54. Komisija predmet nije proslijedila prema članu 6. Evropske konvencije, ali s obzirom da se predmet tiče istog pravnog i činjeničnog problema, kao i predmeti u kojima je tužena strana ranije dostavila svoja pismena zapažanja u vezi i sa ovim članom Evropske konvencije (vidi, na primjer, Odluku o prihvatljivosti i meritumu Komisije, CH/98/874, *Pemac i drugi*, od 9. februara 2004. godine, tačka 126.), Komisija će prihvatiti odgovore tužene strane po ovom članu i za ovaj predmet.

55. Federacija Bosne i Hercegovine je osporavala prihvatljivost prijave zbog toga što je smatrala prijavu preuranjenom, jer je upravni postupak radi vraćanja stana u posjed bio u toku. Federacija Bosne i Hercegovine je, također, isticala prigovor neiscrpljivanja djelotvornih pravnih lijekova, jer je smatrala da je podnosilac prijave trebala pokrenuti postupak radi utvrđivanja pravne valjanosti kupoprodajnog ugovora.

56. U pogledu merituma prijave, tužena strana navodi da nije došlo do povrede članova Evropske konvencije. U vezi sa članom 6. Evropske konvencije, Federacija Bosne i Hercegovine navodi da domaći organi nisu prekršili navedni član, jer je postupak pred njima još u toku. Što se tiče člana 8. Evropske konvencije, Federacija Bosne i Hercegovine navodi da, zbog toga što je utvrđeno da je podnosilac prijave bio pripadnik strane vojske nakon 14. decembra 1995. godine, negiranje prava podnosiocu prijave da bude vraćen u posjed stana nije u suprotnosti sa ranijim odlukama Doma u sličnim predmetima. Tužena strana zaključuje da nije prekršila pravo na dom podnosioca prijave. U vezi sa članom 1. Protokola br. 1 uz Evropsku konvenciju, tužena strana zapaža da podnosilac prijave koristi izraz “vlasništvo” za stan na kome je bio nosilac stanarskog prava njen suprug. Ukoliko se suprug podnosioca prijave smatra vlasnikom, tada bi u njegovom slučaju važio Zakon o prestanku primjene zakona o napuštenim nekretninama u svojini građana Federacije Bosne i Hercegovine. Tužena strana zaključuje da nije prekršila član 1. Protokola br. 1 uz Evropsku konvenciju. Tužena strana zaključuje da je prijava u cijelosti neosnovana. U odnosu na navodnu povredu člana II(2)(b) Sporazuma, Federacija Bosne i Hercegovine smatra da podnosioci prijava nisu diskriminisani u uživanju prava i sloboda ni po jednom osnovu, jer je Federacija Bosne i Hercegovine donijela niz zakona kojima se svim izbjeglim i raseljenim licima omogućava povratak njihovim domovima bez obzira na nacionalnu, vjersku ili drugu pripadnost, ili političko uvjerenje.

VII. MIŠLJENJE KOMISIJE

A. Prihvatljivost

57. Komisija podsjeća da je prijava podnesena Domu u skladu sa Sporazumom. S obzirom da Dom o njoj nije odlučio do 31. decembra 2003. godine, Komisija je, u skladu sa članom 2. Sporazuma iz septembra 2003. godine i članom 3. Sporazuma iz 2005. godine, nadležna da odlučuje o ovoj prijavi. Pri tome, Komisija će uzimati kriterije za prihvatljivost prijave sadržane u članu VIII/2) Sporazuma. Komisija, također, zapaža da se Pravila procedure kojima se uređuje njeno postupanje ne razlikuju, u dijelu koji je relevantan za predmet podnosioca prijave, od Pravila procedure Doma, izuzev u pogledu sastava Komisije.

58. U skladu sa članom VIII(2) Sporazuma, Komisija će odlučiti koje prijave će prihvatiti. Pri tome će Komisija uzeti u obzir sljedeće kriterije: (a) postoje li djelotvorni pravni lijekovi i da li je podnosilac prijave dokazao da ih je iscrpio, (b) da li je prijava u biti ista kao i stvar koju je Dom/Komisija već ispitao, ili je već podnesena u nekom drugom postupku, ili je već predmet međunarodne istrage ili rješenja. Komisija će, također, odbiti svaku žalbu koju bude smatrala nespojivom sa ovim Sporazumom, ili koja je očigledno neosnovana, ili predstavlja zloupotrebu prava žalbe (c). U skladu sa članom VIII(3) Sporazuma "[Komisija] u bilo kojem trenutku svog postupka može obustaviti razmatranje neke žalbe, odbaciti je ili brisati iz razloga (a) što podnosilac prijave namjerava odustati od žalbe; (b) što je stvar već riješena; ili (c) što iz bilo kojeg drugog razloga, koji utvrdi [Komisija], više nije opravdano nastaviti s razmatranjem žalbe; pod uvjetom da je takav rezultat u skladu s ciljem poštivanja ljudskih prava."

59. S obzirom da se radi o institucionalnom okviru, za koji je isključivo odgovorna Federacija Bosne i Hercegovine, Komisija neće razmatrati prijavu protiv Bosne i Hercegovine.

60. Komisija, osim toga, napominje da se podnosilac prijave može posmatrati kao član domaćinstva na stanu, koji je predmet zahtjeva za povrat i uknjižbu. S druge strane, podnosilac prijave ima i generalnu punomoć od bivšeg supruga u pogledu svih postupaka i radnji u vezi sa spornim stanom. Prema tome, Komisija zaključuje da podnosilac prijave ima aktivnu legitimaciju i, stoga, nije neophodno utvrđivati da li je ona u jednom ili u drugom svojstvu u ovom slučaju. Konačno, prava bivšeg supruga podnosioca prijave su u znatnoj mjeri povezana sa pravima podnosioca prijave, kako u materijalno-pravnom smislu, tako i u procesnom smislu. Zbog svega toga, u pogledu člana 1. Protokola broj 1 uz Evropsku konvenciju, Komisija, pod uslovom ispunjavanja kriterija prihvatljivosti ove prijave, mora ispitati da li suprug podnosioca prijave ima pravo na povrat stana. Nakon toga, Komisija će uzeti u obzir činjenice vezane za razvod braka, te ispitati da li one utiču na zaključak Komisije u vezi sa povratom stana i upisom prava vlasništva nad istim, ako je potrebno.

a) Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za povrat stana u posjed

61. Podnosilac prijave tvrdi da nema mogućnost da dođe do konačnog meritornog odlučenja povodom povrata stana, da postupci traju van razumnog roka, te da joj nije omogućen djelotvoran pravni lijek, uzimajući kompletnu situaciju u obzir.

62. Pravilo iscrpljivanja pravnih lijekova se mora fleksibilno primjenjivati i podnosiocu prijave se moraju uzeti u obzir posebne okolnosti, ako one postoje (vidi odluku Ustavnog suda Bosne i Hercegovine, *U 22/00*, od 22. i 23. juna 2001. godine, tačka 20, "Službeni glasnik Bosne i Hercegovine", broj 25/01). Komisija naglašava da Aneks 7 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini, s obzirom na svoje ciljeve i zadatke, podrazumijeva obavezu nadležnih državnih organa da uspostave sistem i procedure, koji bi zadovoljili hitnost rješavanja svih predmeta koji se tiču povrata imovine i ljudi. Prema tome, hitno postupanje kod povrata imovine, bez obzira što sami postupci, pozitivno-pravnim propisima, nisu definisani kao takvi, može se posmatrati kao takva posebna okolnost.

63. Federacija navodi da u predmetu nisu iscrpljeni djelotvorni pravni lijekovi u postupcima vraćanja u posjed stana i uknjiženja vlasništva na stanu.

64. Komisija naglašava da je pitanje povrata stanova zakonski veoma komplikovano riješeno. S jedne strane, Aneks 7 je predvidio jednu proceduru povrata imovine, koja je vezana za postupke pred CRPC-om. S druge strane, analizirajući jurisprudenciju Komisije u vezi sa ovakvim i sličnim predmetima, Komisija zaključuje da je postupak povrata tzv. JNA-stanova, pred nadležnim upravnim organima, često spor, komplikovan i nedjelotvoran. Ova dva postupka nisu harmonizirana, niti je uređen odnos između njih u potpunosti, pogotovo u vezi sa pitanjima izvršenja odluka CRPC-a. Federacija Bosne i Hercegovine, štaviše, često je tražila pokretanje parničnog postupka utvrđivanja valjanosti kupoprodajnih ugovora, što je dodatno otežavalo situaciju oko povrata. Naime, Komisija potvrđuje da Zakon o parničnom postupku predviđa pravni lijek kojim se utvrđuje postojanje ili nepostojanje nekog prava, ili autentičnost nekog dokumenta. Komisija podsjeća da je ranije Dom utvrdio da je član 54. Zakona o parničnom postupku (ili član 172, prema bivšem Zakonu o parničnom postupku) djelotvoran domaći pravni lijek koji se mora iscrpiti u slučaju kada podnosilac prijave nema u posjedu kupoprodajni ugovor, nego se mora utvrditi da je vlasnik na osnovu koraka koje je preduzeo u otkupu stana tokom 1991. i 1992. godine (vidi npr. Odluku o prihvatljivosti, CH/98/1160, CH/98/1177 i CH/98/1264, *Pajagić, Kuruzović i M.P,* od 9. maja 2003. godine). Komisija je nastavila sa istim pristupom ovom pravnom lijeku (vidi, naprimjer, Odluku o prihvatljivosti, CH/99/1921, *Blagojević*, od 16. januara 2004. godine). U takvim predmetima Komisija smatra razumnim da očekuje da podnosioci prijave moraju podnijeti teret pokretanja sudskog spora radi utvrđivanja postojanja ugovornog odnosa ili bilo kog ugovornog prava. Međutim, u mnogim slučajevima tužena strana je insistirala na pokretanju ovog postupka, zloupotrebljavajući svoj položaj, jer su podnosioci prijave posjedovali kuporodajne ugovore, koji su u svim aspektima, bili pravovaljani ugovori. Potpisale su ga sve strane, ugovor uključuje otkupnu cijenu i uslove plaćanja, a ima i pečat nadležne poreske službe. Komisija smatra da teret pokretanja postupka radi utvrđivanja valjanosti ugovora treba pasti na stranu koja ga želi osporiti, a ne na nosioca ugovora, koji uopšte nema razloga da sumnja u pravovaljanost ugovora koji posjeduje.

65. U konkretnom slučaju, Komisija zapaža da se o predmetu odlučivalo u dva upravna postupka i jednom upravnom sporu pred sudskim organima. Presudom Kantonalnog suda, broj: U-191/02, od 16. januara 2003. godine, Kantonalni sud je tužbu podnosioca prijave uvažio i stvar riješio tako da se tužba tužiteljice uvažava, a prvostepeno, kao i drugostepeno rješenje poništava, i predmet vraća na ponovni postupak. Konačno rješenje u ponovnom postupku još uvijek nije doneseno. Prema tome, postupak traje godinama, bez konačnog meritornog riješenja. Komisija naglašava da upravni postupak funkcioniše po načelu efikasnosti (član 6. Zakona o upravnom postupku Federacije Bosne i Hercegovine, "Službene novine Federacije Bosne i Hercegovine", br. 2/98 i 48/99). Prvostepeni postupak, prema članu 216. stavu 1. navedenog Zakona, traje 60 dana, dok drugostepeni postupak, prema članu 244, traje 30 dana. Uzimajući u obzir vođenje upravnog spora, navedeni rokovi i stvarne dužine postupaka nisu u razumnom odnosu.

66. Zastupnički dom Federacije Bosne i Hercegovine je, pored činjenice da je stvorio, generalno, izuzetno komplikovan sistem povrata, donio Odluku, od 26. maja 2004. godine, koja je obustavila sve upravne i sudske postupke za vraćanje u posjed vojnih stanova do usvajanja izmjena i dopuna Zakona o prodaji stanova na kojima postoji stanarsko pravo, što je izravno predstavljalo zabranu prava pristupa sudu u konkretnom slučaju. Štaviše, za vrijeme postupaka pravna osnova se mijenjala više puta, što je dodatno otežavalo situaciju u postupku, a za što krivicu ne snosi podnosilac prijave. Naime, na ovaj način se stvarao osjećaj pravne nesigurnosti.

67. Tužena strana, zlouptrebljavajući svoj položaj, zahtijevala je od bivšeg supruga podnosioca prijave da sam pokreće postupke utvrđivanja pravne valjanosti kupoprodajnog ugovora, mada on ima valjan ugovor.

68. Komisija zaključuje da predmetni slučaj predstavlja klasični primjer nefunkcionisanja principa pravne države u Bosni i Hercegovini, koji je predviđen članom I/2. Ustava Bosne i Hercegovine, ali koji predstavlja i inherentni element Evropske konvencije.

69. Ovakav stav je opravdan, štaviše, činjenicom da u Bosni i Hercegovini, u konkretnom slučaju u Federaciji Bosne i Hercegovine, ne postoji djelotvorno pravno sredstvo koje bi omogućilo podnosiocima prijava da se žale zbog predugog trajanja postupka ili povrede prava pristupa sudu (vidi, odluku Ustavnog suda Bosne i Hercegovine, *AP 769/04*, od 30. novembra 2004. godine, tačka 31, sa uputom na daljnju praksu Evropskog suda za ljudska prava).

b) Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za priznavanje vlasništva

70. Federacija Bosne i Hercegovine, *inter alia*, tvrdi da nisu iscrpljeni domaći pravni lijekovi koji su dostupni u vezi s uknjižbom vlasništva na stanu, jer bivši suprug podnosioca prijave nije pokrenuo sudski postupak za utvrđivanje valjanosti svog kupoprodajnog ugovora.

71. Komisija ukazuje na zaključke iz tačke 64. ove Odluke. Konkretno, bivši suprug podnosioca prijave posjeduje kuporodajni ugovor, koji je u svim aspektima, pravovaljan ugovor. Potpisale su ga sve strane, ugovor uključuje otkupnu cijenu i uslove plaćanja, a ima i pečat nadležne poreske službe. Komisija smatra da teret pokretanja postupka radi utvrđivanja valjanosti ugovora treba pasti na stranu koja ga želi osporiti, a ne na nosioca ugovora, koji uopće nema razloga da sumnja u pravovaljanost ugovora koji posjeduje.

72. Pošto bivši suprug podnosioca prijave posjeduje kupoprodajni ugovor koji je pravovaljan, Komisija zaključuje da pokretanje sudskog spora prema članu 54. Zakona o parničnom postupku nije domaći pravni lijek koji podnosilac prijave mora iscrpiti u smislu člana VIII(2)(a) Sporazuma.

A.1. Zaključak u pogledu prihvatiljivosti

73. Iz ovih razloga Komisija proglašava prijavu neprihvatljivom *ratione personae* u dijelu u kojem je upućena protiv Bosne i Hercegovine i prihvatljivom u dijelu u kojem je upućena protiv Federacije Bosne i Hercegovine.

B. Meritum

74. Prema članu XI Sporazuma, Komisija mora obraditi pitanje da li utvrđene činjenice otkrivaju da je tužena strana prekršila svoje obaveze iz Sporazuma. Kao što je već naglašeno, prema članu I Sporazuma, strane su obavezne “osigurati svim licima pod svojom nadležnošću najviši stepen međunarodno priznatih ljudskih prava i osnovnih sloboda”, uključujući prava i slobode predviđene Evropskom konvencijom i drugim sporazumima nabrojanim u Dodatku Sporazuma.

75. Komisija zaključuje da bi predmetna prijava trebala biti ispitana u pogledu člana 1. Protokola broj 1 uz Evropsku konvenciju, člana 8. Evropske konvencije, člana 6. Evropske konvencije i člana II(2)(b) Sporazuma.

B.1. Član 6. Evropske konvencije

76. Član 6. stav 1. Evropske konvencije, u relevantnom dijelu, glasi:

> Prilikom utvrđivanja građanskih prava i obaveza ili osnovanosti bilo kakve krivične optužbe protiv njega, svako ima pravo na pravično suđenje i javnu raspravu u razumnom roku pred nezavisnim i nepristrasnim, zakonom ustanovljenim sudom.

77. Podnosilac prijave se žalila na pravo efektivnog pristupa sudu, jer dužina trajanja postupka vraćanja njenog stana u posjed nije razumna i onemogućava je da dođe do konačne odluke povodom njenog zahtjeva.

78. Nema sumnje, što je potvrđeno dugogodišnjom praksom sudskih organa u Bosni i Hercegovini, da je pravo pristupa sudu elemenat inherentan pravu iskazanom u članu 6. stavu 1. Evropske konvencije (vidi odluku Ustavnog suda Bosne i Hercegovine, *U 3/99*, od 17. marta 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 21/00). Pravo na pristup sudu iz člana 6. stava 1. Evropske konvencije podrazumijeva, prije svega, široke proceduralne garancije i zahtjev za hitni i javni postupak (odluka Ustavnog suda Bosne i Hercegovine, *U 107/03*, od 19. novembra 2004. godine, tač. 7. i 21). Pravo pristupa sudu ne znači samo formalni pristup sudu, već efikasan pristup sudu. Da bi nadležni organ bio efikasan, on mora obavljati svoju funkciju na zakonit i djelotvoran način. Obaveza obezbjeđivanja efikasnog prava na pristup nadležnim organima spada u kategoriju dužnosti, tj. pozitivne obaveze države (vidi presudu Evropskog suda za ljudska prava, *Airey protiv Irske*, od 9. oktobra 1979. godine, Serija A, broj 32, stav 25).

79. Komisija napominje da ima zadatak, u skladu sa članom I Sporazuma, da osigura najviši stepen zaštite ljudskih prava i sloboda. S druge strane, pravo povratka imovine i lica, u smislu Aneksa 7 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini, mora da bude jedan od prioriteta u Bosni i Hercegovini. U vezi s tim, Aneks 7 zahtijeva da se član 6. Evropske konvencije i član 1. Protokola broj 1 uz Evropsku konvenciju tumače na širi način, tj. da se tuženim stranama nametne viši standard pozitivne obaveze zaštite u vezi sa povratkom. To znači da su strane potpisnice Sporazuma dužne obezbijediti jedan brz i djelotvoran način povratka imovine i ljudi i djelotvornu zaštitu istih. Drugim riječima, Aneksi 7 i 6 Sporazuma, u vezi sa članom 6. Evropske konvencije, garantuju pravo na pravično suđenje, koje obuhvata kako efikasan pristup sudu tako i odlučivanje o predmetu spora u vezi povrata stanova u "razumnom roku".

80. Komisija, najprije, zapaža da je zahtjev za povrat stana u posjed podnesen 1998. godine. Evidentno je da se postupak vodio od tada sve do današnjeg dana. *In conclusio*, postupak, koji je još u toku, traje već nepunih 7 godina. Takav zaključak, sam po sebi, protivan je navodima iz prethodne tačke ove Odluke.

81. Za razliku od "klasičnih“ slučajeva pristupa sudu, konkretni predmeti vode ka zaključku da je pristup sudu bio formalno omogućen, ali da nije bio djelotvoran. Ovim se može zaključiti da su organi bili aktivni, ali da podnosilac prijave nije mogao doći do konačnog mišljenja nadležnog organa, znači ne i efikasni. Postavlja se pitanje da li tužena strana ima opravdanje za ovakvo postupanje.

82. Ukidanje odlučenja nižih organa pred višim organima i vraćanje na ponovni postupak, u principu, ne čini pravne lijekove nedjelotvornim (vidi *mutatis mutandis* odluku Ustavnog suda Bosne i Hercegovine, *U 14/99,* od 29. septembra 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 36/00). Međutim, stalno vraćanje na ponovni postupak može učiniti pravne lijekove iluzornim, a postupak beskonačnim i bespredmetnim. Pravni put, od niže ka višoj instanci, treba da bude pravilo, jer omogućava podnosiocu prijave da brzo i djelotvorno dobije odlučenje od najvišeg organa, kao najdemokratičnijeg u vertikalnoj skali lijekova. Samo u izuzetnim slučajevima, ukidanje i poništavanje odlučenja, vraćanje nižestepenim organima i ponavljanje postupka može biti opravdano, pogotovo ako se radi o hitnim postupcima.

83. Komisija, zbog svega navedenog, zaključuje da je Federacija Bosne i Hercegovine prekršila pravo podnosioca prijave prema članu 6. Evropske konvencije, zbog toga što joj nije omogućila djelotvoran pristup sudu.

B.2. Član 1. Protokola broj 1 uz Evropsku konvenciju

84. Član 1. Protokola broj 1 uz Evropsku konvenciju glasi:

> Svako fizičko i pravno lice ima pravo uživati u svojoj imovini. Niko ne može biti lišen imovine, osim u javnom interesu i pod uvjetima predviđenim zakonom i općim načelima međunarodnog prava.
>
> Prethodne odredbe, međutim, ne utiču ni na koji način na pravo države da primjenjuje zakone koje smatra potrebnim da bi se regulisalo korištenje imovine u skladu sa općim interesima ili da bi se obezbijedila napalata poreza ili drugih dadžbina i kazni.

85. Prema jurisprudenciji Evropskog suda za ljudska prava, član 1. Protokola broj 1 uz Evropsku konvenciju obuhvata tri različita pravila. Prvo, koje je izraženo u prvoj rečenici prvog stava i koje je opće prirode, izražava princip mirnog uživanja u imovini. Drugo pravilo, u drugoj rečenici istog stava, pokriva lišavanje imovine i podvrgava ga izvjesnim uvjetima. Treće, sadržano u drugom stavu, dozvoljava da države potpisnice imaju pravo, između ostalog, da kontrolišu korištenje imovine u skladu sa općim interesom, sprovođenjem onih zakona koje smatraju potrebnim za tu svrhu (vidi Odluku Ustavnog suda Bosne i Hercegovine, *U 3/99*, od 17. marta 2000. godine, "Službeni glasnik Bosne i Hercegovine", broj 21/00).

86. Uzimajući u obzir gornju tačku ove Odluke, slijedi da Komisija mora odgovoriti na tri pitanja. Prvo, da li se prava u vezi sa stanovima JNA mogu smatrati "imovinom" u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju? Drugo, ako se smatraju imovinom, da li se zakonskom regulativom miješa u ta prava tako da uključuje zaštitu člana 1. Protokola broj 1 uz Evropsku konvenciju? Treće, ako je član 1. Protokola broj 1 uz Evropsku konvenciju uključen, da li je miješanje opravdano prema tom članu?

B.2.a. Da li se radi o imovini?

87. Dom, odnosno Komisija, je u svojoj dosadašnjoj praksi naglasila da su podnosioci prijava dužni imati valjan ugovor o kupoprodaji stana (vidi, na primjer, Odluku o prihvatljivosti Komisije, CH/98/514, *Putnik*, od 7. jula 2004. godine, tač. 60-62, Odluke juli – decembar 2004). U principu, pitanje valjanosti ugovora je pitanje koje traba da riješi nadležni organ. Dom, odnosno Komisija, je u nekoliko navrata naveo da nema opću nadležnost da zamijeni svojom vlastitom ocjenu činjenica i primjenu prava od strane domaćih organa (vidi, na primjer, Odluku o prihvatljivosti Doma, CH/99/2565, *Banović*, od 8. decembra 1999. godine, tačka 11, Odluke august – decembar 1999). Obzirom da je tužena strana u određenim slučajevima (vidi, na primjer, Odluku o prihvatljivosti Komisije, CH/98/514, *Putnik*, od 7. jula 2004. godine, tačka 75, Odluke juli – decembar 2004) zloupotrebljavala svoje zakonske ovlasti u vezi nametanja kriterija za ispitivanje valjanosti predmetnih ugovora, Dom je bio prisiljen da utvrdi koji su stvarni kriteriji koje određeni ugovor mora ispuniti. Tako je Komisija utvrdila da podnosilac prijave mora imati valjan ugovor, koji, u smislu člana 39. Zakona o prodaji stanova na kojima postoji stanarsko pravo, podrazumijeva da je ugovor zaključen do 6. aprila 1992. godine, da je dostavljen nadležnoj poreznoj službi na ovjeru, kod kojeg je kupoprodajna cijena utvrđena u skladu sa tada važećim zakonom i kod kojeg je iznos cijene u cijelosti izmiren u ugovorenom roku.

88. Dom je u svojoj Odluci o prihvatljivosti i meritumu CH/96/3 (*Medan i ostali*, od 3. novembra 1997. godine, tačka 31. et sequ.) jasno naglasio da retroaktivno poništavanje ugovora nije u skladu po članu 1. Protokola broj 1 uz Evropsku konvenciju i da Federacija Bosne i Hercegovine, stoga, krši svoje obaveze po članu 1. Aneksa 6 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini.

Osim toga, Dom je dosljedno utvrdio da prava prema ugovoru o kupovini stana zaključenom sa JNA, u skladu sa Zakonom o stambenom obezbjeđenju u JNA, predstavljaju ”imovinu” u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju.

89. S obzirom da su podnosilac prijave i njen bivši suprug zadovoljili navedene kriterije, nema sumnje da stan za njih predstavlja imovinu u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju. Za Komisiju ostaje još pitanje da riješi da li je došlo do miješanja, ako jeste, kakva je njegova priroda i da li je opravdana u smislu stava 2. člana 1. Protokola broj 1 uz Evropsku konvenciju.

B.2.b. Da li se radi o miješanju tužene strane u pravo na imovinu?

90. U rješenju se navodi da se suprug podnosioca prijave ne može smatrati izbjeglim ili raseljenim licem u smislu Zakona o prestanku primjene, jer je bio u profesionalnoj vojnoj službi u Vojsci Jugoslavije i nakon 14. decembra 1995. godine, tačnije do 1. jula 1996. godine. Osim toga, upravni organi su utvrdili da razvod braka iz 1989. godine ne utiče na ovu činjenicu, jer suprug podnosioca prijave nije bio samo formalno nosilac stanarskog prava na predmetnom stanu, već je i živio u tom stanu, tj. nije ga napustio 1989. godine, kako je tvrdila podnosilac prijave.

91. U međuvremenu, 17. oktobra 2004. godine, stupio je na snagu izmijenjeni član 39.e Zakona o prodaji stanova. Ranija odredba Zakona je stavljena van snage, bez prelaznih odredbi. Nova odredba predviđa:

> Nositelju prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, a koji je napustio stan u Federaciji Bosne i Hercegovine i nakon toga iz istoga stambenog fonda ili novoutemeljenih stambenih fondova oružanih snaga država nastalih iz bivše SFRJ stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, stjecanjem novoga stana raskinut je ugovor o otkupu stana u Federaciji Bosne i Hercegovine, te nema pravo na upis prava vlasništva nad tim stanom.
>
> Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona, koji je nakon 14. prosinca 1995. godine ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine, a nije stekao novo stanarsko pravo ili pravo koje odgovara tome pravu, umjesto upisa prava vlasništva po zaključenom ugovoru ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu sukladno članku 18. Zakona, umanjenu za amortizaciju.
>
> Nositelj prava iz kupoprodajnog ugovora koji je zaključio pravno obvezujući ugovor iz članka 39. stavak 1. Zakona za čiji stan je sadašnji korisnik, sukladno vrijedećim zakonima, zaključio ugovor o korištenju stana ili ugovor o otkupu stana, umjesto upisa prava vlasništva na stanu, ima pravo na naknadu od Federacije Bosne i Hercegovine, utvrđenu na način iz stavka 2. ovoga članka, izuzev nositelja prava kupoprodajnog ugovora iz stavka 1. ovoga članka.

92. Tumačeći ovaj Zakon, a u vezi sa predmetnim slučajem, proizilazi da podnosilac prijave, kao razvedeni bračni drug vlasnika stana, nema pravo na povrat i upis prava vlasništva po punomoći, jer je vlasnik stana bio u profesionalnoj vojnoj službi u Vojsci Jugoslavije i nakon 14. decembra 1995. godine, tačnije do 1. jula 1996. godine. Njemu, zbog toga, pripada naknada umjesto upisa prava vlasništva, prema članu 39.e, stavu 2. Zakona o prodaji stanova.

93. Shodno tome, nema sumnje da se postojeći Zakon miješa u pravo na imovinu podnosioca prijave. Zakon onemogućava vlasnicima stanova, koji ne ispunjavaju uvjete date ovim članom, vraćanje u prijeratne stanove. Stav 2. ovoga člana, stoga, kontinuirano uskraćuje imovinsko pravo podnosiocima prijave, koji su pogođeni primjenom ovog Zakona da uživaju svoju imovinu.

94. Svako miješanje u pravo prema drugom ili trećem pravilu iz člana 1. Protokola broj 1 uz Evropsku konvenciju mora biti predviđeno zakonom, mora služiti legitimnom cilju, mora uspostavljati pravičnu ravnotežu između prava nosioca prava i javnog i općeg interesa. Drugim riječima, opravdano miješanje se ne može nametnuti samo zakonskom odredbom koja ispunjava uvjete vladavine prava i služi legitimnom cilju u javnom interesu, nego mora, također, održati razuman odnos proporcionalnosti između upotrijebljenih sredstava i cilja koji se želi ostvariti. Miješanje u pravo ne smije ići dalje od potrebnog da bi se postigao legitiman cilj, a nosioci imovinskih prava se ne smiju podvrgavati proizvoljnom tretmanu i od njih se ne smije tražiti da snose prevelik teret u ostvarivanju legitimnog cilja.

B.2.c. Da li je miješanje predviđeno zakonom?

95. Miješanje je zakonito samo ako je zakon koji je osnova miješanja (a) dostupan građanima, (b) toliko precizan da omogućava građanima da odrede svoje postupke, (c) u skladu sa principom pravne države, što znači da sloboda odlučivanja koja je zakonom data izvršnoj vlasti ne smije biti neograničena, tj. zakon mora obezbijediti građanima adekvatnu zaštitu protiv proizvoljnog miješanja (vidi presudu Evropskog suda za ljudska prava, *Sunday Times protiv Velike Britanije,* od 26. aprila 1979. godine, Serija A, broj 30, stav 49; vidi, također, presudu Evropskog suda za ljudska prava, *Malone,* od 2. augusta 1984. godine, Serija A, broj 82, st. 67. i 68).

96. Komisija zaključuje da Zakon o prodaji stanova ispunjava standarde u smislu Evropske konvencije, jer je objavljen u "Službenim novinama Federacije Bosne i Hercegovine", tj. dostupan, i na zadovoljavajući način određuje pitanje povrata stanova u situacijama, kao što je situacija podnosioca prijave.

B.2.d. Da li je miješanje u skladu sa javnim interesom?

97. Evropski sud za ljudska prava je ustanovio da domaće vlasti uživaju široko polje procjene prilikom donošenja odluka koje su vezane za lišavanje imovinskih prava pojedinaca zbog neposrednog poznavanja društva i njegovih potreba. Odluka da se oduzme imovina često uključuje razmatranje političkih, ekonomskih i socijalnih pitanja po kojima će se mišljenja u okviru demokratskog društva bitno razlikovati. Stoga će se presuda domaćih vlasti poštivati, osim ako je očigledno bez opravdanog osnova (vidi presudu Evropskog suda za ljudska prava, *James i drugi*, od 21. februara 1986. godine, Serija A, broj 98, stav 46).

98. Tužena strana, Federacija Bosne i Hercegovine, smatra da podnosiocu prijave ne pripada pravo na povrat stana, jer je njen bivši suprug na određeni datum bio pripadnik JNA, zbog čega se nije mogao smatrati izbjeglicom. Federacija Bosne i Hercegovine smatra da podnosilac prijave, koji je ostao u oružanim snagama druge države, nakon 1995. godine, mora biti ograničen u pravu na povrat u posjed stana. Osim toga, iz predmeta i javne rasprave pred Ustavnim sudom Bosne i Hercegevine *U 83/03*, a koji se ticao, također, povrata JNA-stanova (od 22. septembra 2004. godine, tačka 34) tužena strana je navela da želi da sačuva stambeni fond i da pripadnicima vlastite armije, ratnim veteranima i ostalim osobama kojima je potreban stan, dā prioritet u dodjeli stana. Slični navodi su izrečeni i u predmetu Doma, CH/96/3 (*Medan i ostali*, od 3. novembra 1997. godine, tačka 36).

99. Komisija zaključuje da navedni član 39.e, bez sumnje, slijedi ova dva interesa, tj. omogućava njihovo zadovoljenje.

B.2.e. Uspostavljanje pravične ravnoteže između prava nosioca prava i javnog interesa (proporcionalnost)

100. U odlučivanju da li član 39e. Zakona o prodaji stanova uspostavlja pravičnu ravnotežu ili razuman odnos proporcionalnosti između prava nosioca prava i javnog interesa, Komisija mora, prije svega, razmotriti dva pitanja. Prvo, da li miješenje u prava ide dalje od potrebnog da bi se postigao legitiman cilj? Drugo, da li član 39e. Zakona podvrgava vlasnike stanova proizvoljno-

nepovoljnom tretmanu u poređenju sa drugima, tako da se od njih traži da nose prevelik teret u ostvarivanju legitimnog cilja?

B.2.f. Obim miješanja

101. Da bi odgovorila na ovo pitanje, Komisija se poziva na zaključke Ustavnog suda Bosne i Hercegovine. U citiranom predmetu *U 83/03*, Ustavni sud Bosne i Hercegovine je naveo:

> 58. Uzimajući u obzir ozbiljnost problema stambenog deficita i ekonomskih problema u Bosni i Hercegovini, kao i poteškoća u odlučivanju kako dodijeliti stambene resurse velikom broju ljudi koji imaju potrebu za njim, uključujući i one koji trenutno žive u stanovima u skladu sa osporenim Zakonom, Ustavnom sudu su potrebni veoma jaki dokazi da bi se uvjerio da je stanovište zakonodavca prekoračilo granice slobodne procjene u odlučivanju što je potrebno da bi se pristupilo rješavanju ovog veoma ozbiljnog društvenog problema. Ustavni sud je veoma oprezan u pogledu donošenja stava da je neka institucija prekoračila dozvoljeno područje procjene u pogledu nužnosti određene mjere (što je na neki način analogno u domaćem pravu «institutu slobodnog polja procjene», što je državama ponekad dozvoljeno u međunarodnom pravu prema jurisprudenciji Evropskog suda za ljudska prava), kada se radi o pitanju prava sa značajnim ekonomskim posljedicama, kao što je to ovdje slučaj trenutnih nosilaca stanarskih prava, kao i bivših nosilaca stanarskih prava, a rješenje je postignuto donošenjem demokratskog zakona, nakon pune rasprave, uključujući ispitivanje zakona od Zakonodavno-pravne komisije Parlamenta.

102. Komisija primjećuje da se situacija opisana u predmetu *U 83/03* nije znatno promijenila. Problem stambenog deficita i ekonomski problemi u Bosni i Hercegovini su i dalje akutni. Prema tome, Komisija zaključuje da nije ustanovljeno da se zakonodavac miješao u prava više nego što se smatra potrebnim da bi se postigao legitiman cilj.

B.2.g. Proizvoljan tretman i nametanje prevelikog tereta

103. Da bi dala odgovor na ovo pitanje, Komisija mora, prije svega, analizirati određene aspekte razvoja prakse i zakonodavstva po pitanju vraćanja vojnih stanova.

104. Naime, bivši člana 39.e Zakona o prodaji stanova je predviđao:

> Nosilac stanarskog prava koji nema pravo na povrat stana ili ne podnese zahtjev za povrat stana u skladu sa odredbama iz čl. 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima, a koji je prije 6. aprila 1992. godine zaključio pravno obavezujući ugovor o kupovini stana sa bivšim Saveznim sekretarijatom za narodnu odbranu (SSNO), ima pravo da podnese zahtjev Ministarstvu odbrane Federacije za nadoknadu sredstava plaćenih po ovom osnovu, izuzev ako se dokaže da su mu ta sredstva priznata za otkup stana van teritorije Bosne i Hercegovine.

105. Član 39.e zahtijevao je da lice, koje je “prije 6. aprila 1992. godine zaključi[l]o pravno obavezujući ugovor o kupovini stana“, mora ispuniti uslove iz člana 3. i 3a. Zakona o prestanku primjene Zakona o napuštenim stanovima. Član 3, st. 1. i 2. predviđali su opću mogućnost da nositelj stanarskog prava na stanu koji je proglašen napuštenim, ili član njegovog ili njenog porodičnog domaćinstva, ima pravo na povrat stana u skladu sa Aneksom 7 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini. Izuzetak je napravljen članom 3a, koji je, u svojoj verziji od 4. jula 1999. godine do 1. jula 2003. godine, predviđao da se lice koje je 30. aprila 1991. godine bilo u aktivnoj službi u SSNO – u JNA (tj. nije bilo penzionisano) i nije bilo državljanin Bosne i Hercegovine prema evidenciji državljana ne može smatrati izbjeglicom, izuzev “ako mu je odobren

boravak u statusu izbjeglice ili drugi vid zaštite koji odgovara ovom statusu u nekoj od zemalja van bivše SFRJ prije 14. decembra 1995. godine.

106. Kada je Dom odlučio da izvorna forma člana 3a. Zakona krši (između ostalog) pravo nosioca stanarskog prava na mirno uživanje imovine, on je došao do tog zaključka prije svega na osnovu toga da je taj član proizvoljan i da nameće prevelik teret određenim grupama ljudi bez objektivnog i razumnog opravdanja. Prvi stav člana 3a. navedenog Zakona je diskriminirao ljude koji su bili članovi JNA u vrijeme (od 30. aprila 1991. godine) kada je BiH još uvijek bila dio jedinstvene države Socijalističke Federativne Republike Jugoslavije. Diskriminacija je, također, bila zasnovana po osnovu državljanstva. Dom je odlučio da nije opravdano "nepovoljno" tretirati ljude na ovim osnovama. Dom je, također, smatrao da u pojedinim slučajevima nije bilo opravdano dodijeliti stanove ljudima koji nisu spadali u pogođene kategorije ljudi (vidi odluke o meritumu Doma, CH/02/8202, CH/02/9880 i CH/02/11011, *M.P. i ostali protiv Federacije Bosne i Hercegovine,* od 4. aprila 2003. godine, st. 154-158, 176 i 191-192).

107. Nakon odluka Doma, član 3a. dobio je novu formu i stupio je na snagu 1. jula 2003. godine. Ovaj član predvidio je stare uslove povrata u novom modalitetu, tako da je vremenska granica sa 30. aprila 1991. godine pomaknuta na 19. maj 1992. godine, znači datum kada se JNA povukla sa teritorije Bosne i Hercegovine (Rezolucija Vijeća sigurnosti Ujedinjenih nacija, UN dokument, S/RES/752 (1992) od 15. maja 1992. godine), a Vlada Republike Bosne i Hercegovine je preuzela kontrolu nad teritorijom Republike Bosne i Hercegovine. Izuzetak su činile osobe kojima je odobren boravak u statusu izbjeglice ili drugi oblik zaštite koji odgovara tom statusu u nekoj od zemalja izvan bivše države prije 14. decembra 1995. godine.

108. Ova odredba je bila predmet ispitivanja u postupku apstraktne kontrole ustavnosti pred Ustavnim sudom Bosne i Hercegovine u citiranom predmetu *U 83/03*. Tom prilikom, Ustavni sud Bosne i Hercegovine je zaključio da je odredba u saglasnosti sa članom 1. Protokola broj 1 uz Evropsku konvenciju. Ustavni sud Bosne i Hercegovine je zaključio:

> Od tog datuma, osoba koja je bila u oružanim snagama druge zemlje se mogla smatrati osobom koja više nema dužnost lojalnosti prema Republici Bosni i Hercegovini. Ako su oružane snage pripadale zemlji na teritoriji unutar područja bivše SFRJ, a ta zemlja i Republika Bosne i Hercegovina su bile u ratnim odnosima, može se zaključiti da Republika Bosna i Hercegovina nije više dugovala bilo kakvu zaštitu toj osobi. Premda FBiH nije objasnila zašto bi takva vojna služba rezultirala gubitkom stanarskog prava osobe, Ustavni sud smatra da okončanje obaveza lojalnosti nekog stanovnika državi u kojoj prebiva i obaveza države da zaštiti i obezbijedi blagostanje svojim stanovnicima, mogu omogućiti racionalno i objektivno opravdanje za usvajanje neke mjere koja ljude tretira različito po toj osnovi.

109. Novim članom 39.e Zakona o prodaji stanova isključeno je pozivanje na član 3. i 3a. Zakona o prestanku primjene. Ipak, pitanje povratka ponovo je uslovljeno ispunjenjem određenih uslova, a to je, za predmetni slučaj, da povratnik nije "ostao u službi u oružanim snagama izvan teritorija Bosne i Hercegovine" nakon 14. decembra 1995. godine. S druge strane, navedeni Zakon predvidio je za one koji ne ispune ovaj uslov naknadu u skladu sa članom 18. Zakona o prodaji stanova na kojima postoji stanarsko pravo. Članom 18. predviđena je naknada u iznosu od 600 KM/m^2, pomnožena sa položajnim koeficijentom 0,8-1,2 i umanjena za amortizaciju.

110. Iz prethodne tačke proizilazi da Komisija mora odgovoriti da li je ovakvo zakonsko rješenje proporcionalno u smislu člana 1. Protokola broj 1 uz Evropsku konvenciju. Komisija podržava stav Ustavnog suda Bosne i Hercegovine u pogledu pitanja nelojalnosti svojoj državi zbog služenja u vojsci van vlastite države poslije 14. decembra 1995. godine. Ovakav zaključak je, štaviše, neophodan u uslovima kada se dvije zemlje nalaze u "ratnim odnosima", kako je to zaključio taj Sud. Prema tome, Komisija zaključuje da takva lica ne mogu očekivati jednaku zaštitu kao i druga lica, koja nisu pokazala nelojalnost Bosni i Hercegovini.

111. Na ovakav zaključak ne utiču ni relevantne odredbe Aneksa 7 i Ustava Bosne i Hercegovine. Naime, Aneks 7 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini daje pravo na povratak domovima svim izbjeglicama i raseljenim licima. Prema članu I stavu 1. Aneksa 7, "sve izbjeglice i raseljena lica imaju pravo slobodno se vratiti u svoje domove. Imaju pravo na vraćanje imovine koje su lišeni u toku neprijateljstava od 1991. godine i na naknadu imovine koja se ne može vratiti". Prema članu II/5. Ustava Bosne i Hercegovine a u vezi sa članom VI Aneksa 7 "sve izbjeglice i raseljena lica koji su se vratili a optuženi su za kazneno djelo, osim za ozbiljna kršenja međunarodnog humanitarnog prava koja su definirana u Statutu Međunarodnog suda za ratne zločine na prostoru bivše Jugoslavije nakon 01. januara 1991. godine ili za kazneno djelo koje nije povezano s ratnim sukobom, nakon povratka bit će amnestirani. Ni u kojem slučaju optužbe za kaznena djela ne mogu biti podignute zbog političkih ili drugih neodgovarajućih razloga ili radi sprečavanja primjene amnestije". Iz citiranih odredbi bi se dalo zaključiti da bi vlasnici stanova, kao povratnici, trebali biti amnestirani zbog služenja u vojsci van Bosne i Hercegovine. Ipak, Dom je, u svojoj jurisprudenciji iz Odluke o meritumu u predmetu *M.P. i ostali* (CH/02/8202, od, 31. marta 2003. godine, stav 162), napravio izuzetak u pogledu prijeratnih nosilaca stanarskog prava na stanovima JNA. Dom je naveo:

> [...] Dom zapaža da su stanarska prava imala važnu društvenu ulogu u predratnoj Bosni i Hercegovini, kao i drugdje u bivšoj SFRJ. Pripadnicima tadašnje JNA su dakle dodjeljivani stanovi u Bosni i Hercegovini jer ih je bivša JNA poslala tu na službu i morala im je obezbijediti smještaj. Davalac takvih stanova na korištenje je bila bivša JNA. Nakon raspada bivše SFRJ, davalac takvih stanova na korištenje u Federaciji BiH je postalo Ministarstvo odbrane Federacije BiH. Svrha tih stanova je ostala ista da se obezbijedi smještaj pripadnicima oružanih snaga. Federacija BiH je u skladu sa tim principom oduzela gosp. Štrpcu, pripadniku bivše JNA koji je napustio Bosnu i Hercegovinu i nastavio da služi u stranoj vojsci, njegov stan u Bosni i Hercegovini. Dom zato smatra da je lišavanje gosp. Štrpca i podnosioca prijave njihovog predratnog stana proporcionalno cilju obezbjeđenja smještaja ratnim veteranima i njihovim porodicama. S obzirom na sve okolnosti, teret koji je podnosilac prijave Štrbac primoran da snosi nije pretjeran.

112. Ustavni sud Bosne i Hercegovine, pozivajući se na ovu praksu, naglasio je u predmetu *U 83/03* (*loc. cit*, stav 65) da prihvata ovakav zaključak Doma. Nadalje, Ustavni sud Bosne i Hercegovine je objasnio "da je JNA smještala vojno osoblje tamo gdje je ono bilo stacionirano. Stoga, premještanje stanarskog prava bi trebalo shvatiti kao novo stalno mjesto boravka. Osobe koje se nalaze u ovakvim situacijama ne bi se trebale smatrati izbjeglicama ili raseljenim licima u smislu člana 1. Aneksa 7. Općeg okvirnog sporazuma za mir u Bosni i Hercegovini." Na ovakav zaključak ne utiče ni činjenica da se ne radi o nosiocima stanarskog prava, već vlasnicima stanova.

113. Ipak, činjenica da se radi o vlasniku stana treba da ima značaja kod pitanja da li je oduzimanje mogućnosti vraćanja stanova vlasnicima, koji su bili nelojalni svojoj državi u smislu prethodnih tačaka ove Odluke, proporcionalna mjera u datim okolnostima. Pri tome, Komisija naglašava da lišavanje imovine nije jedina mjera predviđena navedenim Zakonom, nego je popraćena naknadom u iznosu od 600 KM/m^2, pomnoženom sa koeficijentom od 0,8 do 1,2 i umanjenom za amortizaciju.

114. Evropski sud za ljudska prava, u svojoj odluci *Lithgow i drugi protiv Velike Britanije* (od 8. jula 1986. godine, Serija A, broj 102, st. 121. f) naglasio je da oduzimanje imovine uz naknadu, koja ne predstavlja tržišnu vrijednost, u principu, predstavlja neproporcionalno miješanje u pravo na imovinu nosioca prava. Međutim, pravo na imovinu iz člana 1. Protokola broj 1 uz Evropsku konvenciju ne garantuje pravo na punu kompenzaciju u svim okolnostima, s obzirom da legitimni ciljevi javnog interesa mogu da budu usmjereni ka ostvarivanju veće socijalne pravde.

115. Uzimajući u obzir da je Federacija Bosne i Hercegovine naglasila da se radi o "nelojalnim" građanima, a da, s druge strane, želi da sačuva stambeni fond i da pripadnicima vlastite armije,

ratnim veteranima i ostalim osobama kojima je potreban stan dā prioritet u dodjeli stana, te da je predviđena naknada za lišenje imovine u skladu sa ekonomskom moći države, kao i da je određena procedura za isplatu te naknade, Komisija ne vidi da je podnosiocu prijave povrijeđeno pravo na imovinu iz člana 1. Protokola broj 1 uz Evropsku konvenciju. Komisija je svjesna da naknada ne predstavlja punu tržišnu vrijednost, međutim, ona nije proizvoljna uzimajući u obzir sve okolnosti predmetnih slučajeva.

116. Obzirom na zaključak u vezi sa stavom 2. člana 39.e Zakona o prodaji stanova na kojima postoji stanarsko pravo, Komisija ne vidi potrebu da u predmetnom slučaju, u kojem je sporni stan dat na korištenje trećim licima, razmatra pitanje usaglašenosti stava 3. citiranog člana sa članom 1. Protokola broj 1 uz Evropsku konvenciju.

117. Na osnovu svega izloženog, Komisija zaključuje da vlasnik stana nema pravo na povrat, već na naknadu predviđenu relevantnim zakonskim odredbama. Ipak, postavlja se pitanje da li razvod braka između podnosioca prijave i vlasnika stana može imati uticaja na ovaj zaključak. Komisija je utvrdila da je razvod braka uslijedio 1989. godine. Razvod braka nije uticao na prenos stanarskog prava, sve do 2000. godine, kada je Općinski sud II u Sarajevu, 2. oktobra 2000. godine donio rješenje, broj: RS-50/00, kojim se podnosilac prijave određuje za isključivog nosioca stanarskog prava na predmetnom stanu. Međutim, do donošenja ove presude, a Komisija napominje da je ovaj postupak pokrenut 2000. godine, današnji vlasnik stana je, u svojstvu tadašnjeg nosioca stanarskog prava, otkupio ovaj stan. Komisija je u tač. 63, 70. i 88. ove Odluke jasno utvrdila zašto je kupoprodajni ugovor današnjeg vlasnika valjan ugovor. Shodno tome, svaki naknadni prenos stanarskog prava, koje formalno-pravno ne postoji od trenutka zaključenja valjanog ugovora o kupoprodaji stana, ne može biti zakonito. Zbog toga, Komisija ga neće ni uzeti u obzir. U protivnom, zaključak Komisije ne bi bio u skladu sa dosadašnjom praksom Doma i Komisije. Naime, u prijavama, u kojima su vlasnici JNA-stanova tvrdili da su vlasnici na osnovu sličnih kupoprodajnih ugovora, a tužena strana, Federacija Bosne i Hercegovine, to negirala, Dom i Komisija su prihvatili tvrdnju podnosilaca prijava u pogledu vlasništva (vidi, osim već citirane prakse, na primjer, objašnjenje u Odluci o prihvatljivosti i meritumu, CH/99/1828, *Slavko Stojnić protiv Federacije Bosne i Hercegovine*, od 9. marta 2005. godine). U ovom predmetu, Komisija ne može biti nedosljedna navedenom zaključku iz svoje već ustaljene prakse, pa priznati stanarsko pravo podnosioca prijave, a negirati vlasništvo njenog bivšeg supruga. Sasvim bi druga stvar bila da je podnosilac prijave, nakon razvoda braka, a prije napuštanja spornog stana i otkupa istog, prenijela na sebe stanarsko pravo. Međutim, to se u ovom slučaju nije desilo.

118. Naravno, obrazloženje iz prethodne tačke ne zabranjuje podnosiocu prijave, kao licu koje ima punomoć vlasnika stana u postupku pred nadležnim organima, ali i kao članu domaćinstva (nije dokazano da podnosilac prijave nije bila član domaćinstva do napuštanja stana) da traži povrat stana. Upravo iz razloga njene aktivne legitimacije, Komisija je našla povredu prava na pravično suđenje u smislu razumne dužine postupka. Međutim, Komisija smatra da ona, u postupku povrata stana, dijeli zakonsku sudbinu njenog bivšeg supruga, koji, kao što je objašnjeno u ovoj Odluci, nema pravo na povrat stana i upis prava vlasništva. Ona, po punomoći, ima pravo na naknadu koja je propisana zakonom.

B.2.h. Zaključak o meritumu

119. Komisija zaključuje da je došlo do povrede prava podnosioca prijave na pristup sudu koje štiti član 6. Evropske konvencije.

120. Komisija zaključuje da nije došlo do povrede prava podnosioca prijave i njenog bivšeg supruga na imovinu koje štiti član 1. Protokola broj 1 uz Evropsku konvenciju.

121. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Komisija ne smatra potrebnim da ispita prijavu u vezi sa članom 8. Evropske konvencije i članom II(2)(b) Sporazuma.

122. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Komisija smatra potrebnim da tužena strana omogući podnosiocu prijave, imajući u vidu da posjeduje punomoć bivšeg supruga koja nikada nije opozvana, hitan postupak naknade i garantovanje procesualnih standarda iz člana 6. i člana 1. Protokola broj 1 uz Evropsku konvenciju u vezi sa istom.

VIII. PRAVNI LIJEKOVI

123. Prema članu XI(1)(b) Sporazuma, a u vezi sa pravilom 58. stavom 1(b) Pravila procedure Komisije, Komisija mora razmotriti pitanje o koracima koje Federacija Bosne i Hercegovine mora preduzeti da ispravi kršenja Sporazuma koja je Komisija utvrdila, uključujući naredbe da sa kršenjima prestane i od njih odustane, te novčanu naknadu.

124. Komisija nalaže, uzevši u obzir dugotrajnost nastojanja podnosioca prijave da ostvari svoja prava pred upravnim, odnosno sudskim organima, da tužena strana, Federacija Bosne i Hercegovine, podnosiocu prijave isplati iznos od 1000 KM (hiljadu konvertibilnih maraka), kao paušalan iznos na ime nematerijalne štete, u roku od tri mjeseca od dana prijema ove Odluke.

125. Komisija, također, nalaže da tužena strana, Federacija Bosne i Hercegovine, obezbijedi djelotvoran i hitan postupak isplate naknade podnosiocu prijave prema članu 39e. stav 2. Zakona o prodaji stanova, te da okonča isti najkasnije u roku od tri mjeseca od dana prijema ove Odluke.

126. Komisija nalaže da tužena strana, Federacija Bosne i Hercegovine, podnosiocu prijave isplati zateznu kamatu od 10 % (deset posto) na iznose dosuđene u tač. 124. i 125. ove Odluke ili na svaki njihov neisplaćeni dio po isteku rokova predviđenih za tu isplatu do datuma pune isplate naređenih iznosa;

IX. ZAKLJUČAK

127. Iz ovih razloga, Komisija odlučuje,

1. jednoglasno, da prijavu proglasi neprihvatljivom *ratione personae* u dijelu koji se odnosi na navodne povrede ljudskih prava počinjene od strane Bosne i Hercegovine;

2. jednoglasno, da prijavu proglasi prihvatljivom u dijelu koji se odnosi na navodne povrede ljudskih prava počinjene od strane Federacije Bosne i Hercegovine;

3. jednoglasno, da je prekršeno pravo podnosioca prijave na pravično suđenje prema članu 6. Evropske konvencije, čime je Federacija Bosne i Hercegovine prekršila član I Sporazuma;

4. jednoglasno, da nije prekršeno pravo podnosioca prijave na mirno uživanje imovine prema članu 1. Protokola 1 uz Evropsku konvenciju, čime Federacija Bosne i Hercegovine nije prekršila član I Sporazuma;

5. jednoglasno, da nije potrebno ispitivati prijavu prema članu 8. Evropske konvencije;

6. jednoglasno, da nije potrebno ispitivati prijave prema članu II(2)(b) Sporazuma;

7. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave isplati iznos od 1000 KM (hiljadu konvertibilnih maraka), kao iznos na ime naknade nematerijalne štete, u roku od tri mjeseca od dana prijema ove Odluke;

8. jednoglasno, da naredi Federaciji Bosne i Hercegovine da poduzme neophodne korake i osigura hitnu isplatu naknade podnosiocu prijave prema članu 39e. stavu 2. Zakona o prodaji stanova bez daljnjeg odlaganja, a najkasnije u roku od tri mjeseca od dana prijema ove Odluke;

9. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave isplati zateznu kamatu od 10 % (deset posto) na iznose dosuđene u zaključcima br. 7. i 8. ove Odluke ili na svaki njihov neisplaćeni dio po isteku rokova predviđenih za tu isplatu do datuma pune isplate iznosa naređenih u ovoj Odluci; i

10. jednoglasno, da naredi Federaciji Bosne i Hercegovine da Komisiji u roku od mjesec dana od dana proteka rokova iz zaključaka br. 7. i 9. ove Odluke dostavi informaciju o preduzetim mjerama po pravnim lijekovima.

(potpisao)	(potpisao)
Nedim Ademović	Miodrag Pajić
Arhivar Komisije	Predsjednik Komisije

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 July 2000)

Case no. CH/98/934

Edin GARAPLIJA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 July 2000 with the following members present:

Mr. Giovanni GRASSO, Acting President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to Article VIII(2) and Article 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 Bosniak origin. Since June 1992 he has been working as a police officer for a Bosnian State Security Service, the "Agency for Investigation and Documentation" (*Agencija za Istraživanje i Dokumentaciju*, hereinafter "AID"). On 13 June 1997 the Cantonal Court Sarajevo convicted him of abduction and attempted murder and sentenced him to 13 years of imprisonment. The judgment was confirmed by the Supreme Court of the Federation of Bosnia and Herzegovina on 26 May 1998. The applicant is currently serving his prison sentence at the Zenica Correctional Facility.

2. The applicant essentially alleges that his trial was unfair, in particular that he was prevented from defending himself appropriately during his trial and that he is a "political prisoner". The application thus raises issues under Article 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 10 September 1998 and registered on the same day. The applicant is represented by Mr. Faruk Balijagić, a lawyer practising in Brčko and Tuzla.

4. In his application, the applicant requested the Chamber to order the respondent Party as a provisional measure to take all necessary action to protect him from being killed while serving his prison sentence. The Chamber rejected the applicant's request on 11 September 1998. At the same time, he was asked to substantiate the allegation that his life was endangered.

5. On 21 September 1998 the applicant's representative submitted further information and repeated the request for provisional measures. He stated that he had visited his client in prison, where he had learned from him that his name was on a secret list concerning "liquidation". On 13 October 1998 the Chamber rejected the request once again. On the same day, it decided to communicate the application to the respondent Party pursuant to Rule 49(3)(b) of the Rules of Procedure and to grant it precedence under Rule 35(2). The Chamber further decided to inform the Organisation for Security and Co-operation in Europe, the Office of the High Representative, and the United Nations Mission in Bosnia and Herzegovina of the application pursuant to Rule 33(1).

6. On 6 November 1998 the applicant's representative informed the Chamber that his client had been transferred to the Cantonal Clinic in Zenica to undergo an appendix surgery and that neither he nor the applicant's mother had been notified about the incidence. He also expressed doubts whether the diagnosis was correct and reiterated the request for provisional measures. On 9 November 1998 the Chamber requested the respondent Party to provide the applicant's medical records no later than 12 November 1998.

7. As no such evidence was submitted within the prescribed time-limit, on 13 November 1998 the Chamber ordered the respondent Party as a provisional measure to ensure that the applicant could be examined by a team of international doctors and that they have access to all medical documents kept in hospital or in prison. On 23 November 1998 the Chamber received written observations of the respondent Party. On 2 December 1998 the Federation permitted that the applicant be examined by international doctors.

8. On 10 December 1998 three members of the Stabilisation Force's Theatre Surgeon Group carried out the examination of the applicant and of the medical records. The medical team ascertained that the applicant's state of health was good and that the operation of the applicant was in fact medically indicated and even necessary to save his life. It also found that there were no medical circumstances indicating that further detainment would be detrimental to the applicant's health.

9. On 18 December 1998 the Chamber decided to withdraw the provisional order it had issued on 13 November 1998.

10. On 4 August 1999 the applicant's representative reported to the Chamber that his involvement in the case had turned into a "nightmare" and brought him into "great trouble". He said that he and his family were subject to harassment and that he had to give up membership in the Advocate's Bar Association in Sarajevo and become a member of the Mostar Bar Association. Furthermore, he alleged that the AID kept a secret file on him and that his assassination was planned.

11. The respondent Party commented on these allegations on 14 December 1999, stating that Mr. Balijagić's membership in the Sarajevo Bar Association had in fact been suspended. It also stated that he could not be a member of two Bar Associations at the same time. The Federation also contested the existence of a secret file on Mr. Balijagić with any of its authorities. It held that the applicant's representative had lost any credibility since none of his allegations had turned out to be true and proposed that his authorisation to represent the applicant be revoked.

12. Further submissions of the applicant and of his representative were received on 3 December 1998, on 22 February, 23 April, 24 May and 22 December 1999, and on 5 and 26 January, 2 and 22 February, 3 and 7 March and 3 April 2000. The respondent Party sent further observations on 10 June and 30 December 1999, and on 2 February and 30 March 2000. On 17 May 2000 the applicant provided the Chamber with a confidential document issued by the AID ordering him to detain Mr. Nedžad Herenda. This document was transmitted to the Federation on 8 June 2000.

13. The Chamber deliberated on the case on 11 September, 13 October, 13 November and 18 December 1998 and on 13 January, 11 February, 10 March, 11 May, 6 and 8 June and 3 July 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

1. Facts underlying the applicant's conviction (as presented in the first instance judgment)

14. On 25 June 1996 the applicant, together with a Mr. H.P., stopped Mr. Nedžad Herenda in a street in Sarajevo, dragged him into a car and abducted him to a house located somewhere in town. Mr. Herenda was apparently a member of the paramilitary group "Ševa". Inside the house the applicant and H.P. made their victim surrender all his personal belongings. It seemed that the purpose of the abduction was to get hold of certain information in the possession of Mr. Herenda.

15. Mr. Herenda remained in the hands of the accused until 29 June 1996 and was subject to serious ill-treatment. At one point, the applicant fired two pistol bullets into the head of Mr. Herenda, wrapped him into a blanket and threw him out of his car at a place outside Sarajevo. Being still alive, Mr. Herenda was found there and admitted to hospital, where he received intensive medical treatment. Mr. Herenda survived the assault and testified against the accused.

2. Criminal proceedings

16. The applicant was arrested on 2 July 1996 on the grounds of reasonable suspicion that he had committed the crime. During the investigation phase the applicant used his right to remain silent. On 25 December 1996 the competent prosecutor indicted the applicant for the criminal charges of abduction and attempted murder. On 20 January 1997 the main hearing commenced before the Cantonal Court Sarajevo. The applicant was defended by Mr. Fahrija Karkin, a lawyer practising in Sarajevo.

17. At the hearing, the applicant denied that he had committed the crime he was indicted for, stating that on the date in question he was on an official trip in Tuzla from which he only had returned on 30 June 1996.

18. The Cantonal Court rendered a judgment on 13 June 1997. After having heard numerous witnesses, the court found it established that the applicant had abducted and attempted to kill Mr. Nedžad Herenda and sentenced him to 13 years of imprisonment. The public was excluded from a part of the hearings in the case.

19. On 17 July 1997 the applicant appealed against the judgment to the Supreme Court of the Federation of Bosnia and Herzegovina. The appeal alleged erroneous factual and judicial assessment by the Cantonal Court, therefore proposing that the first instance judgment be revoked or the applicant's sentence be reduced. The Supreme Court was also requested to allow the presence of the applicant during the deliberations in order to further explain the appeal reasons.

20. During the proceedings before the Supreme Court, the applicant was represented by his defence counsel, but he was not present in person although he requested to be so. Pursuant to Article 371 paragraph 1 of the Law on Criminal Proceedings (see paragraph 26 below) he was only informed that a session would be held on 26 May 1998. On the same day the Supreme Court rejected the appeal as manifestly ill-founded and confirmed the first instance judgment which became thereby legally binding.

21. On 7 September 1998 the applicant withdrew the authorisation of Mr. Fahrija Karkin as his defence counsel and appointed Mr. Faruk Balijagić as his new representative.

22. The applicant's new lawyer demanded protection of legality against his client's conviction, but on 8 October 1998, the Federal Prosecutor rejected the request. Thereafter, a request for renewal of criminal proceedings was rejected by the Cantonal Court on 13 November 1998 as ill-founded. Finally, the appeal against that decision was rejected by the Supreme Court on 9 December 1999.

23. On 23 December 1997 the President of the Federation of Bosnia and Herzegovina issued a decision to pardon 108 convicts (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 32/97) in exercise of his powers according to Article 17 of the Law on Pardon (OG FBiH no. 9/96). The applicant was not included in the list.

3. The confidential order

24. On 10 June 1996 the Director of the AID, Mr. Kemal Ademović, issued a confidential order by which an operation called "Orao" (Eagle) was to be carried out (reference no. 17-18/96). The operation consisted of two stages: firstly, Mr. Nedžad Herenda was to be surveilled and secondly, his arrest and detention for "further operative processing" was ordered. The confidential order also stated that Mr. Herenda was under suspicion of having committed serious criminal acts in the field of terrorism punishable under international law.

B. Relevant domestic law and practice

25. At the relevant time, the following material and procedural criminal laws were in force:

1) The Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY – hereinafter "OG SFRY" – nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90); taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94);

2) The Criminal Code of the Socialist Republic of Bosnia and Herzegovina as applicable in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement) (Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 16/77, 19/77, 32/84, 19/86, 40/87, 41/87, 33/89, 2/90 and 24/91; OG RBiH nos. 16/92, 21/92, 13/94, 28/94 and 33/94);

3) The Law on Criminal Procedure of the SFRY (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90); taken over as the law of the Republic of Bosnia and Herzegovina (OG RBiH nos. 2/92, 9/92 and 13/94).

26. The relevant Articles of the Law on Criminal Procedure provide as follows:

Article 363:

"A verdict may be challenged on the following grounds:

1. because of an essential violation of the provisions of criminal procedure;
2. because of a violation of the Criminal Code;
3. because of erroneously or incompletely established facts;
4. because of the decision as to the criminal sanctions

..."

Article 366:

"1. A verdict may be challenged on the basis of erroneously or incompletely established facts or if the court has erroneously established decisive facts or failed to establish them at all.
..."

Article 371:

"1. Notice of the session of the panel shall be given to the accused and his defense counsel ..., who within the period allowed for an appeal ... are requested to be notified of the session or can propose that a hearing be held before the court of second instance. The presiding judge of the panel or the panel itself may decide to give notice of the session of the panel to the parties even if they have not requested so, or to give notice of the session to a party who did not request so if their presence would be helpful to clarify the matter."

"2. If the accused is in custody and has a defence counsel, the presence of the accused shall be provided for only if the presiding judge of the panel finds this to be expedient."
...
"4. The failure of a party to appear, although duly notified, shall not prevent the session of the panel from being held."

Article 372:

"1. The second instance court shall render a decision in a session of a panel or on the basis of a hearing."

"2. The second instance court shall decide in a session of a panel whether to hold a hearing."

Article 373:

"1. A hearing shall be held before the second instance court only if it is necessary for presentation of new evidence or repetition of evidence already presented because the state of the facts was erroneously or incompletely established and if there are legitimate reasons for not returning the case for retrial to the court of first instance.
..."

Article 378:

"If an appeal has been filed in favour of the accused, the judgment may not be modified to his detriment. In this case the court may not convict the accused of a more severe criminal charge nor impose a more severe sentence than the first instance court."

Article 381:

"... The second instance court may, on the basis of a panel session or of a hearing, reject an appeal as being submitted out of time or as being inadmissible, or it may refuse the appeal as ill-founded and confirm the judgment of the first instance court, or it may revoke the judgment of the first instance court and return the case to the court for reconsideration, or it may modify the verdict of the first instance court."

Article 385:

"1. The second instance court shall ... render a decision revoking the first instance judgment and return the case for retrial if it finds that there has been an essential violation of the provisions of criminal procedure or if it considers that erroneously or incompletely established facts justify a new trial before the original court.
..."

27. The relevant Articles of the Law on the Agency for Investigation and Documentation (OG RBiH 17/96) provide as follows:

Article 3:

"1. The tasks of investigation and documentation within the meaning of this law are as follows:

1) Investigation, documention and prevention of criminal acts with elements of international and inter-entity crimes, especially terrorism, illegal drug trafficking, organised crime and other criminal offences punishable under international law.
..."

Article 14:

"1. Certain employees of the Agency, when conducting their tasks and carrying out assignments, have special duties and rights determined by this law (hereinafter: "the empowered official").

2. The empowered official may be an employee engaged directly in the performance of operative tasks and assignments provided in Article 3 of this law as well as any other employee whose tasks, assignments and responsibilities are directly related to performing these tasks and assignments.
..."

Article 16:

"Empowered officials are under an obligation to carry out orders issued by the director or their immediate superior in order to carry out official tasks and assignments within the competence of the Agency with the exception of those whose execution would be contrary to the Constitution and the law."

Article 22:

"1. Besides in those cases regulated by the Law on Criminal Procedure, an empowered official is entitled to take in or to bring in also:

1) a person extradited by foreign organs when it is necessary in order to hand them over to a competent organ in Bosnia and Herzegovina;

2) a person whose conduct shows that it might put in danger a person whose security is being provided for or if some other circumstances and information point at it;

3) a person whose identity cannot be established on the spot.

2. Persons referred to in sub-paragraphs 1 and 2 of paragraph 1 of this Article may be detained up to 48 hours, and persons mentioned in sub-paragraph 3 may be detained for 24 hours at the longest, respectively until the person has been handed over to the competent police organ.

3. Detention is ordered by a procedural decision of the director or by any person authorised by him.
..."

Article 31:

"1. If criminal or civil proceedings are initiated against an empowered official because of the use of fire arms, coercion or other measures while performing or in relation to the performance of tasks and assignments, the Agency shall provide a defence counsel and other legal assistance required for the conduct of the proceedings.
..."

Article 44:

"1. An employee of the Agency is under an obligation to keep state, military and official secrets. The obligation to keep state, military and official secrets continues even after the termination of the employment.
..."

IV. COMPLAINTS

28. The applicant asserts that he was "unlawfully" not pardoned by virtue of a decision of the President of the Federation of Bosnia and Herzegovina of 23 December 1997.

29. The applicant essentially alleges that he did not enjoy a fair trial, including the right to an adequate defence. The applicant states that he was ordered to arrest and detain Mr. Nedžad Herenda. He claims to have been under an obligation not to reveal "professional secrets" relating to his work and the commanding structure within the AID. Moreover, he alleges that he was convicted for "political reasons" and in order to "hide criminal activities" on the highest political level of the country. Furthermore, the applicant claims that he was provided with a defence counsel by the AID who had failed to act in his favour and had carried out his duty only formally.

30. Finally, the applicant complains that he did not have an opportunity to be present in person during the appellate proceedings before the Supreme Court. The applicant asks the Chamber to order the respondent Party that the proceedings in his case be reopened.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

31. The Federation claims that the applicant's allegations concerning the facts of the case are contradictory and untrue. It proposes that the application be declared inadmissible as manifestly ill-founded.

32. As to the presence of the applicant in the proceedings before the Supreme Court, the Federation states that the President of the deciding Panel had a discretionary power to decide if the presence of the accused was necessary or not pursuant to Article 371 paragraph 2 of the Law on Criminal Procedure (see paragraph 26 above). It asserts that the applicant could have attended if he had made a request in that respect. However, the applicant would have had to pay the expenses for his transport to the court. It is concluded that he preferred to be absent of his own choice.

B. The applicant

33. The applicant maintains all his allegations concerning the unfairness of his trial both before the Cantonal and the Supreme Court. He furthermore alleges that before his arrest and during the investigation phase he was instructed by agents of the AID to keep confidential the background of the act he was to be brought to trial for and that failure to do so would cost his life. He asserts that an agent of the AID told him that "he would lose his head" if he did not stay silent and that he was told to defend himself with a fake alibi during the hearing before the Cantonal Court.

VI. OPINION OF THE CHAMBER

A. Admissibility

34. Before considering the case on the merits the Chamber must 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)(c), the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded, or an abuse of the right of petition.

35. The applicant has alleged that he was "unlawfully" denied the "right to be pardoned". In support of this complaint he quotes a decision issued by the President of the Federation of Bosnia and Herzegovina on 23 December 1997 (see paragraph 23 above), which contains a list with the names of 108 convicts that the pardon applies to. The applicant claims that he should have been included in that list because he was "innocent".

36. According to the Agreement, the Chamber can find violations of the human rights protected therein and to order the appropriate remedies for the respondent Party's breach of its obligations under the Agreement. The Chamber notes that there is no general right to pardon guaranteed in the Agreement or in any of the treaties listed in the Appendix to the Agreement. The Chamber therefore has no competence to examine whether the fact that the applicant's name was not included in the pardon list constitutes a breach of the Agreement.

37. It follows that the Chamber cannot accept this part of the application, it being incompatible with the Agreement *ratione materiae*.

38. The Federation has proposed to declare the application inadmissible as manifestly ill-founded in its entirety. The Chamber notes that the substance of the applicant's remaining complaints contains serious allegations relating to the principle of fair trial. The Chamber cannot dismiss these allegations as manifestly ill-founded without having considered them on the merits.

39. As no other ground for inadmissibility of the application has been established, the remainder of the application is declared admissible.

B. Merits

40. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation 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 by the Convention and the other international agreements listed in the Appendix to the Agreement.

41. The Chamber will now consider the applicant's allegations that there have been violations of Article 6 of the Convention in that he was limited in his right to defend himself or through the assistance of a defence counsel and in that he was absent during the appellate proceedings.

42. The relevant parts of Article 6 provide as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (c) to defend himself in person or through legal assistance of his own choosing
> ..."

1. The right to defend oneself in person or through legal assistance

43. The Chamber recalls the applicant's allegations that he was ordered to arrest and to detain Mr. Nedžad Herenda and that he was prevented from defending himself appropriately during his trial due to his obligation not to reveal "professional secrets". He has furthermore asserted that he was told by an agent of the AID that "he would lose his head" if he did not stay silent during the investigative stage and that he was apparently provided with a fake alibi for the trial hearing.

44. The Chamber notes that, according to the documents before it, an order to detain Mr. Herenda existed and that the applicant was under a legal obligation to keep secret professional information of the AID (see paragraph 27 above). Even though it may be open to speculation what the applicant was instructed to do in detaining Mr. Herenda "for further operative processing" as stated in the order, the Chamber also notes that the applicant thereby cannot be released from his individual criminal responsibility for the acts committed by him.

45. Furthermore, the Chamber recalls that the applicant stated in person at the hearing before the Cantonal Court on 20 January 1997 that, at the relevant period of time, he was in Tuzla, and could therefore not have committed the crime. However, the witnesses heard by the court testified to the contrary and the court in its judgment followed their evidence. The Chamber finds that it was at the applicant's disposal either to remain silent and to leave his defence to his attorney, or to present to the court a different version of the events that occurred. It may be that the applicant's above-mentioned statement before the court was given in order not to violate his legal duty to keep the professional secrets of the AID. Neither was the issue that an order to detain Mr. Herenda existed raised in the applicant's appeal letter. It was only in an advanced stage of the proceedings before the Chamber that the applicant has presented evidence that such an order existed.

46. It derives from its mandate under the Agreement that, in the instant case, the Chamber can only examine the complaints moved by the applicant with a view to determining whether they amount to a violation of the procedural safeguards set forth in Article 6 of the Convention by the respondent Party. Since the applicant has not raised the issue of the existence of a confidential order during his proceedings before the Cantonal Court and the Supreme Court, the Chamber, in the light of the information before it, does not consider it to amount to an interference by the courts with the applicant's right to defend himself as guaranteed by Article 6 paragraph 3(c) of the Convention. The Chamber therefore cannot find that this right was violated in the course of the domestic court proceedings.

47. The applicant has further claimed that his defence counsel had carried out his duty only formally on account of his assignment by the AID. The applicant can thus be understood to complain that he did not enjoy "legal assistance of his own choosing" for the purposes of Article 6 paragraph 3(c) of the Convention. The European Court of Human Rights has previously held that the right

referred to in this provision is to "effective" legal assistance (*Artico v. Italy* judgment of 13 May 1980, Series A no. 37, paragraph 34).

48. The Chamber notes that the applicant's defence counsel was authorised to represent him during the trial. It has not been demonstrated by the applicant that, in the case of disagreement or loss of confidence, it would not have been possible to revoke the authorisation conferred on the defence counsel.

49. The Chamber also notes that, to be "effective" within the meaning of Article 6 paragraph 3(c) of the Convention, a lawyer appointed to defend an accused must be qualified to represent him at the particular stage of proceedings for which his assistance is sought. In applying this requirement to the case before it, the Chamber cannot find that the applicant's defence counsel did not meet this standard. Accordingly, the applicant's allegations in this respect are rejected.

50. To sum up, the Chamber considers the applicant's complaints in that he was prevented from defending himself in person or through legal assistance of his own choosing are ill-founded and must therefore be dismissed.

2. The right to be present at the appellate proceedings

51. Lastly, the applicant complained that the Supreme Court had decided his case without allowing him to appear before the court.

52. When examining the question whether the applicant was deprived of a "fair hearing" and of the right to defend himself in person, as provided for in paragraphs 1 and 3(c) of Article 6 of the Convention, the Chamber recalls that the European Court of Human Rights has previously held that this provision requires that a person charged with a criminal offence be entitled to take part at the trial hearing (*Colozza v. Italy* judgment of 12 February 1985, Series A no. 89, paragraph 27).

53. With regard to the first instance proceedings, the Chamber notes that this requirement was satisfied since the Cantonal Court determined the charges brought against the applicant on the basis of a hearing at which the applicant was present, gave evidence and argued in his case. However, the same did not apply to the proceedings before the Supreme Court.

54. Addressing the question whether the guarantees under Article 6 of the Convention can also be applied to the proceedings before an appellate court, the European Court of Human Rights has already found that "persons shall enjoy before these courts the fundamental guarantees contained in Article 6 of the Convention". However, account must be taken of the entirety of the proceedings and the role of the appellate court therein (see the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, paragraphs 54 and 56). Provided that there has been a public hearing before the court of first instance, the absence of such a hearing before the appellate court may be justified if these proceedings involve only questions of law, as opposed to questions of fact (*Monnell and Morris*, paragraph 58).

55. The Chamber will now, in deciding this question, have regard to the domestic appeal system, the ambit of the Supreme Court's powers and the manner in which the applicant's interests were actually protected.

56. According to the applicable laws at the relevant time, a judgment of a court of first instance could be appealed, *inter alia*, for the reason of erroneously or incompletely established facts (Article 366 of the Law on Criminal Procedure, see paragraph 26 above). The second instance court in a criminal case was called upon to decide on questions of law and on those of fact (Article 385). It was within the scope of the appellate court's jurisdiction either to confirm or to annul a first instance judgment and to return the case to that court, or to change the qualification of the criminal charge and to modify a sentence, but without increasing it, provided that no appeal was submitted by the prosecutor (Articles 378 and 381).

57. In his appeal letter, the applicant's representative challenged the Cantonal Court's factual and legal findings. In particular, the appeal was directed against the qualification of the criminal charges underlying the applicant's conviction and the length of the sentence pronounced. Also reference to the applicant's personality was made. Accordingly, the Supreme Court was called upon to examine the instant case as to the facts and the law. It should also be noted that, in the same document, there was a request that the applicant be enabled to be present in person before the Supreme Court to give further explanation of the appeal reasons.

58. The Chamber notes that Articles 372 and 373 of the Law on Criminal Procedure provided for a session of a panel of the Supreme Court or a hearing. In deciding whether the accused should be present or not during the proceedings, it can be seen from the provision of Article 371 paragraph 2 that the court enjoyed a certain margin of appreciation. Against this decision there was no legal remedy allowed.

59. The respondent Party has submitted a statement of the Supreme Court indicating that the applicant's defence counsel in his appeal had only repeated the arguments already brought forward against the indictment of the accused during the first instance hearing and that therefore the court did not deem it expedient to hear the applicant once more.

60. However, taking into account the formal request to be present in the appeal letter and bearing in mind that the applicant could have presented new facts to the court which could have had an impact on his conviction and sentence, the Chamber takes the view that the procedural guarantees provided in Article 6 paragraphs 1 and 3(c) of the Convention required that the applicant be allowed to attend the proceedings before the Supreme Court in person.

61. It is not in dispute that the applicant was notified in prison that the Supreme Court would hold a session in his case. The Federation has argued that the applicant could have attended the proceedings if he had expressed his wish and made a request in that respect. However, he would have had to bear the expenses of his journey. The applicant has made a statement to the contrary, saying that he was not allowed to attend.

62. As the applicant already in his appeal letter had asked to be present, the Chamber cannot find that another request was necessary. The Federation's assertion that the applicant had waived his right to be present must accordingly be dismissed. As to the travel expenses, the Chamber is of the opinion that it is inconsistent with the respondent Party's positive obligation to secure the enjoyment of the fundamental rights and freedoms set forth in the Convention to attribute such costs to the applicant.

63. With a view to the proceedings before the domestic courts regarded as a whole, the role of the Supreme Court and the issue subject to the appeal procedure, the Chamber concludes that the applicant was denied the right to be present in person at the appellate proceedings without reasonable justification. Accordingly, there has been a violation of paragraphs 1 and 3(c) of Article 6 of the Convention.

VII. REMEDIES

64. Under Article XI(b) of the Agreement the Chamber must next address the question what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found.

65. In the circumstances, the Chamber finds that the repetition of the appellate proceedings would be an appropriate measure to remedy the violation that occurred. It will make an order to the respondent Party to that effect.

VIII. CONCLUSIONS

66. For these reasons, the Chamber decides,

1. by 8 votes to 4, to declare the application admissible insofar as it relates to the alleged violation of the applicant's right to a fair hearing as guaranteed by Article 6 of the European Convention on Human Rights;

2. unanimously, to declare the application inadmissible insofar as it concerns the applicant's complaint relating to the granting of a pardon;

3. by 7 votes to 5, that the applicant's right to a fair hearing as guaranteed by Article 6 paragraph 1 in conjunction with paragraph 3(c) of the Convention has been violated in that he was not present during the proceedings before the appellate court, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. by 11 votes to 1, that there has been no other violation of the applicant's rights as guaranteed by Article 6 of the Convention;

5. by 6 votes to 6, with the Acting President's casting vote, to order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant renewed appellate proceedings, should the applicant lodge a petition to this effect; and

6. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 7 October 2000 on the steps taken by it to give effect to this decision.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
Acting President of the Chamber

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 September 1999)

Case no. CH/98/935

Mirko GLIGIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 7 July 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. He is the holder of an occupancy right over an apartment in Prijedor, Republika Srpska ("the apartment"). On 25 August 1995, the applicant was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 8 May 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry"), declared the applicant to be an illegal occupant of the apartment and ordered him to vacate it within three days under threat of forcible eviction. On 15 May 1998 the applicant appealed against this decision. There has been no decision on this appeal to date. The applicant still occupies the apartment.

2. The case raises issues principally under Article 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant introduced his application to the Chamber on 10 September 1998. It was registered under the above case number on 11 September 1998.

4. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary steps to prevent him being evicted from the apartment.

5. On 11 September 1998 the President of the Chamber ordered, pursuant to Rule 36(2) of the Rules of Procedure, the respondent Party to refrain from evicting the applicant from the apartment. The order stated that it would remain in force until the Chamber has given its final decision in the case, unless it was withdrawn by the Chamber before then.

6. On 27 November 1998, pursuant to Rule 49(3)(b) of the Rules of Procedure, the application was transmitted to the respondent Party for observations on its admissibility and merits. Under the Chamber's Order concerning the organisation of the proceedings in the case, such observations were due by 27 December 1998.

7. No observations were received from the respondent Party.

8. On 18 January 1999 the applicant was requested to submit a written statement and any claim for compensation or other relief which he wished to make. This statement, which did not contain a claim for compensation, was received by the Chamber on 15 February 1999, within the time-limit laid down by the Chamber's Order concerning the organisation of the proceedings in the case.

9. On 26 February 1999 the applicant's written statement was transmitted to the Agent of the respondent Party for information.

10. The First Panel deliberated upon the admissibility and merits of the application on 8 June 1999. On 7 July 1999 the First Panel adopted its decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

11. The facts of the case as they appear from the applicant's submissions and the documents in the case file have not been contested by the respondent Party and may be summarised as follows.

12. The applicant is the occupier of an apartment located at Vožda Karađorđa 13, Prijedor, Republika Srpska. On 25 August 1995 he was granted the occupancy right by the holder of the

allocation right, Prijedorska Banka A.D. ("the Bank"). He was allocated this apartment as his previous apartment was unsuitable for the needs of his family. The previous holder of the occupancy right had left Bosnia and Herzegovina. The applicant entered into a contract with the relevant housing company on the same day.

13. On 8 May 1998 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 17 below) declaring the applicant to be an illegal occupant of the apartment and ordering him to vacate it within three days under threat of forcible eviction. On 15 May 1998 the applicant appealed against this decision. The applicant has not received any decision on this appeal to date. On 19 May 1998 the Bank wrote to the Commission in support of the applicant's occupancy of the apartment. The applicant still occupies the apartment. He states that he and his family have no alternative accommodation available to them.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

14. The Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 3/96; "the old law") was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It was published in the Official Herald on 26 February 1996 and entered into force the following day. It establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present case, are summarised below.

15. Articles 2 and 11 of the old law define "abandoned property" as real and personal property which has been abandoned by its owners and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

16. Article 3 of the old law states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

17. Article 10 of the old law states that if a person enters into possession of abandoned property without a decision of the appropriate commission, that commission shall issue a decision ordering the person to leave the property concerned. An appeal may be lodged to the Ministry by the recipient within three days of its receipt. The lodging of an appeal to the Ministry does not suspend the execution of the decision.

18. Article 15 of the old law reads as follows:

> "Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:
>
> 1. to the families of killed soldiers
> 2. war invalids with injuries in categories I-V
> 3. war invalids with injuries in categories V-X
> 4. qualified workers of whom there is a lack in the Republika Srpska."

19. Article 15A of the old law (which was inserted by an amendment of 12 September 1996) adds a further category of persons to this list. This category is bearers of state honours, deputies of the National Assembly of the Republika Srpska and other officials of the Republika Srpska who have the status of refugees or displaced persons.

2. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property

20. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98; "the new law") establishes a detailed framework for persons to regain possession of property considered to be abandoned under the law. It entered into force on 19 December 1998 and puts the old law out of force.

21. Article 2 was amended by the Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, which was contained in a decision of the High Representative of 13 April 1999. The amended text reads as follows:

> "All administrative, judicial, and other decisions enacted on the basis of the regulations referred to in Article 1 of this law in which rights of temporary occupancy have been created shall remain effective until cancelled in accordance with this law.
>
> Any occupancy right or contract on use made between 1 April 1992 and 19 December 1998 is cancelled. A person who occupies an apartment on the basis of an occupancy right which is cancelled under this Article shall be considered a temporary user for the purposes of this law.
>
> A temporary user referred to in the previous paragraph who does not have other accommodation available to him or her has a right to a new contract for use of the apartment, if the occupancy right of the former occupant terminates under Article 16 of this law or if a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this law.
>
> An occupancy right holder to an apartment as of 1 April 1992, who agreed to the cancellation of his or her occupancy right in exchange for another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his or her former apartment in accordance with this law."

22. Article 16 of the new law reads as follows:

> "A claim for repossession of an apartment may be filed within six months from the date of entry into force of this law.
>
> If the occupancy right holder does not file a claim within the time-limit referred to in the previous paragraph, his or her occupancy right shall be cancelled."

3. The Law on General Administrative Procedures

23. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

24. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedures.

25. Article 8 reads as follows:

> "(1) Before making a decision a party has to be given the opportunity to express his or her opinion on all the facts and circumstances that are of importance in making an administrative decision.

(2) A decision may be made without hearing the opinion of a party only if provided by law."

26. Article 135(1) requires all relevant facts to be ascertained prior to the making of a decision. Under Article 247, a decision on an appeal must be made within two months of the lodging of such appeal.

4. The Law on Administrative Disputes

27. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25(1), if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued within 7 days of the lodging of such a reminder, the applicant may initiate an administrative dispute.

5. The Decree on Court Taxation

28. Tariff 23 of the Decree on Court Taxation (OG RS no. 7/97), issued on 2 April 1997, prescribes a fee of YUD 1,000 for the lodging of an administrative dispute.

IV. COMPLAINTS

29. The applicant does not make any specific complaints of any violations of his human rights as protected by the Agreement. He complains that his right to occupy his apartment has been violated.

V. SUBMISSIONS OF THE PARTIES

30. The respondent Party has not made any submissions regarding the application.

31. The applicant maintains his complaint.

VI. OPINION OF THE CHAMBER

A. Admissibility

32. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

33. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. The Chamber notes that the respondent Party has not suggested that there is any "effective remedy" available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

34. The applicant lodged an appeal to the Ministry against the decision of the Commission of 8 May 1998. However, the lodging of such an appeal does not have any suspensive effect.

35. The Chamber notes that there has been no decision on this appeal to date. It would have been open to the applicant to commence administrative proceedings before the Supreme Court of the Republika Srpska in respect of the failure of the Ministry to issue a decision on his appeal. Before doing so, he would have had to have lodged a reminder with the Ministry, which he has not done. The Ministry would then have a seven day period in which to issue its decision. The applicant could then have initiated an administrative dispute before the Supreme Court. However, the fee required for the initiation of an administrative dispute is YUD 1,000, which is approximately KM 90 at current rates.

36. As the Chamber noted in the case of *Onić* (case no. CH/97/58, decision on admissibility and

merits delivered on 12 February 1999, paragraph 38, Decisions January-July 1999), referring to the approach taken by the European Court of Human Rights in relation to the corresponding requirement in Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11) the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants.

37. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 8 May 1998 raises a question of whether there is an effective remedy available to the applicant. In addition, the size of the fee he would have had to pay to initiate an administrative dispute before the Supreme Court raises an issue in this regard. These factors, together with the fact that the respondent Party did not seek to argue that there was any effective remedy available to the applicant, leads the Chamber to conclude that no such remedy is in fact available to him.

38. The Chamber does not consider that any of the other grounds for declaring the case inadmissible have been established. Accordingly, the case is to be declared admissible.

B. Merits

39. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

1. Article 8 of the Convention

40. The applicant did not specifically allege a violation of his rights as protected by Article 8 of the Convention. The Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case. Article 8 reads as follows:

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

41. The Chamber notes that the applicant has lived in the apartment since August 1995, when he was allocated the occupancy right over it by the Bank, the holder of the allocation right. It is therefore clear that the apartment is to be considered as his "home" for the purposes of Article 8 of the Convention.

42. The Chamber has already held that the threatened eviction of a person from his home constitutes an "interference by a public authority" with the exercise of the right to respect for his home (see case no. CH/96/31, *Turčinović*, decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decision of the Commission declaring the applicant an illegal occupant of the apartment and ordering him to vacate it within three days under threat of forcible eviction therefore constitutes an "interference by a public authority" with that right.

43. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was "in accordance with the law", served a legitimate aim and "was necessary in a democratic society" (see the aforementioned

decision in *Onić*, paragraph 48). There will be a violation of Article 8 if any one of these conditions is not satisfied.

44. The Chamber notes that Article 2 of the old law requires a property to be entered into the minutes of abandoned property before it can be allocated to a person within the categories set out in Article 15. The respondent Party has not provided any evidence that any such entry was made in respect of the apartment in the present case. Nor is there any other indication available to the Chamber that such an entry was made.

45. Therefore, it has not been established that the requirements of the old law were adhered to in the present case. Accordingly, the attempts of the Commission to get the applicant to vacate the apartment cannot be considered to have been "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention.

46. Accordingly, the Chamber considers that there has been a violation of the applicant's rights as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

47. The applicant did not specifically allege a violation of his rights as protected by Article 1 of Protocol No. 1 to the Convention. The Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48. The Chamber must first consider whether the applicant's occupancy right over the apartment constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber notes that the applicant was granted a permanent occupancy right over the apartment by the Bank, the holder of the allocation right, on 25 August 1995. However, Article 2 of the new law, as amended, (see paragraph 21 above) cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

49. If certain conditions as set out in the fourth paragraph of Article 2 are fulfilled, the applicant is entitled to a new contract for the use of the apartment (e.g. if the previous holder of the occupancy right does not seek to regain possession of the apartment and his or her occupancy right is accordingly terminated by Article 16 of the new law). The new Law does not expressly state that the applicant is entitled to a new occupancy right, although as a person is not entitled to a contract for the use of an apartment unless he or she holds an occupancy right over it, it may be assumed that this is the intended meaning of the provision.

50. Therefore, under domestic law, the applicant possesses a temporary occupancy right over the apartment. The applicant has, however, the possibility to be granted a new contract for the use of the apartment. However, this will only be the case if he does not have alternative accommodation available to him. The applicant has stated that he does not have such accommodation available to him. The respondent Party has not contested this statement and therefore the Chamber has no reason to doubt that this is indeed the case. Accordingly, if the previous holder of the occupancy right over the apartment does not seek to regain possession of the apartment within the time-limit set under the new law, the applicant will be in a position to obtain a permanent occupancy right.

51. The Chamber considers therefore that the applicant possesses a temporary occupancy right and is entitled to obtain a permanent occupancy right over the apartment, in accordance with the terms of Articles 2(3) and 16 of the new law.

52. The Chamber has previously held that a permanent occupancy right constitutes a "possession" (see, *inter alia,* the above-mentioned decision in *Onić*, paragraph 55). The Chamber has also noted that the concept of "possessions" is to be understood in a broader sense and includes various assets. It also noted that the European Court of Human Rights has given a wide interpretation to the concept of possessions, holding that the notion covers a wide variety of interests with an economic value (see case no. CH/97/93, *Matić*, decision on admissibility and merits delivered on 11 June 1999, paragraphs 73-74, Decisions January-July 1999).

53. Accordingly, the Chamber considers that the applicant's temporary occupancy right constitutes a possession, in view of the fact that there is a possibility that he may be eligible to receive a permanent one, if he satisfies the conditions set out in Article 2 of the new law.

54. Having established that the applicant's right to occupy the apartment constitutes his possession, the Chamber next finds that the decision of the Commission declaring the applicant to be an illegal occupant of the apartment and ordering him to vacate it interfered with his right to peaceful enjoyment of that possession within the meaning of the first sentence of Article 1 of Protocol No. 1 to the Convention.

55. The Chamber must therefore examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law.

56. The Chamber notes that the decision ordering the applicant's eviction from the apartment was not in accordance with the old law (see paragraphs 44 and 45 above). Accordingly, the requirements of national law have not been adhered to and therefore the interference was not "subject to conditions provided for by law" as required by Article 1 of Protocol No. 1 to the Convention.

57. Accordingly, there has been a violation of the applicant's rights as protected by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

58. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

59. The Chamber notes that in accordance with its order for proceedings in the case the applicant was afforded the possibility of claiming compensation or other relief. He did not do so, but requests that the eviction procedure against him be terminated, at least until the return of the previous occupancy right holder.

60. The Chamber notes that the old Law has been put out of force by the adoption of the new law. However, this does not of itself remove the threat to the applicant that he would be evicted, as the new law does not put out of force decisions ordering evictions under the old law.

61. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 8 May 1998 ordering the eviction of the applicant from the apartment in question and to allow the applicant to remain in possession of the apartment, subject to the terms of the new law.

VIII. CONCLUSION

62. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 8 May 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies constitutes a violation of his right to respect for his home within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 8 May 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies, constitutes a violation of his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Republika Srpska to take all necessary steps to revoke the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 8 May 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment in accordance with the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and

5. unanimously, to order the Republika Srpska to report to it by 10 December 1999 on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

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

Case no. CH/98/946

H.R. and Mohamed MOMANI

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 6 October 1999 with the following members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The two applicants were arrested by Bosnian Croat police on 10 February 1996 and detained together with Samy Hermas, who was the applicant in case no. CH/97/45 in which the Chamber delivered its decision on admissibility and merits on 18 February 1998 (Decisions and Reports 1998).

II. PROCEEDINGS BEFORE THE CHAMBER

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

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

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

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

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Relevant legislation

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

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

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

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

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

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

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

Article 157:

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

Article 158:

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

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

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

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

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

Article 159:

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

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

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

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

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

Article 190:

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

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

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

Article 191:

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

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

Article 192:

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

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

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

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

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

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

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

Article 193:

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

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

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

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

Article 195:

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

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

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

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

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

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

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

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

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

Article 197:

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

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

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

Article 198:

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

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

Article 35:

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

Article 36:

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

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

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

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

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

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

Article 542 paragraph 2:

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

Article 543 paragraph 1:

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

Article 545 paragraph 3:

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

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

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

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

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

IV. COMPLAINTS

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

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

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

V. FINAL SUBMISSIONS OF THE PARTIES

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

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

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

VI. OPINION OF THE CHAMBER

A. Admissibility

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

B. Merits

1. Article 3 of the Convention

49. Article 3 of the Convention reads as follows:

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

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

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

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

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

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

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

52. The Chamber recalls that Article 3 enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see the *Hermas* decision, paragraph 28, citing, *inter alia*, the judgment of the European Court of Human Rights in the case of *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI, paragraph 62).

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

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

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

2. Article 4 of the Convention

56. Article 4 of the Convention reads as follows:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention;

(b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

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

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

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

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

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

60. As did the European Court of Human Rights in the case of *Van der Mussele v. Belgium* (judgment of 23 November 1983, Series A no. 70), the Chamber will take as its starting point the definition of "forced or compulsory labour" given in Article 2 paragraph 2 of Convention No. 29 of the International Labour Organisation concerning Forced or Compulsory Labour, namely "... all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

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

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

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

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

3. Article 5 of the Convention

65. Article 5 of the Convention reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a

court or in order to secure the fulfilment of any obligation prescribed by law;

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

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Article 5 paragraph 2 of the Convention

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

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

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

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

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

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

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

(d) Article 5 paragraph 3 of the Convention

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

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

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

(e) Article 5 paragraph 4 of the Convention

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

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

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

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

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

93. As was held by the European Court of Human Rights in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series A no. 145-B), the notion of "lawfulness" under Article 5 paragraph 4 has the same meaning as in Article 5 paragraph 1; and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1. By virtue of Article 5 paragraph 4, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty.

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

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

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

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

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

(f) Article 5 paragraph 5 of the Convention

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 13 of the Convention

111. Article 13 of the Convention reads as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. REMEDIES

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

132. The applicants' claims are as follows:

Mohamed Momani:

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

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

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

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

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

H.R.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

148. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

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

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

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

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

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

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

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

9. unanimously,

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

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

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

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

11. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber, by 5 February 2000, on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 December 1999)

Case no. CH/98/958

Mara BERIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 4 November 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. She is the holder of an occupancy right over an apartment in Prijedor, Republika Srpska. On 28 September 1992, she was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 30 April 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Prijedor ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry"), declared the applicant to be an illegal occupant of the apartment and ordered her to vacate it within three days under threat of forcible eviction. On 12 September 1998 the applicant received this decision and on 14 September 1998 she appealed against it. There has been no decision on this appeal to date. The applicant still occupies the apartment.

2. The case raises issues principally under Article 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 16 September 1998. It was registered on 17 September 1998. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary steps to prevent her being evicted from the apartment.

4. On 18 September 1998 the President of the Chamber ordered, pursuant to Rule 36(2) of the Rules of Procedure, the respondent Party to refrain from evicting the applicant from the apartment.

5. On 29 October 1998, pursuant to Rule 49(3)(b) of the Rules of Procedure, the application was transmitted to the respondent Party for observations on its admissibility and merits. These observations were due by 29 December 1998. However, no observations were received from the respondent Party.

6. On 20 January 1999 the applicant was requested to submit a written statement and any claim for compensation or other relief which she wished to make. This statement, which did not contain a claim for compensation, was received by the Chamber on 9 February 1999. On 22 April 1999, the statement was transmitted to the respondent Party for information.

7. The Chamber deliberated upon the admissibility and merits of the application on 4 November 1999 and on the same date adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

8. The facts of the case as they appear from the applicant's submissions and the documents in the case-file have not been contested by the respondent Party and may be summarised as follows.

9. The applicant is the occupant of an apartment located at Miloša Obilića GS-2/IV, Prijedor, Republika Srpska. On 28 September 1992 she was granted the occupancy right by the holder of the allocation right over it, Prijedorska Banka A.D. ("the Bank"), where she is employed. The previous holder of the occupancy right had left Bosnia and Herzegovina. On 16 July 1993 the Bank issued a further decision, again granting the applicant the occupancy right over the apartment. On 5 August 1993 she entered into a contract for the use of the apartment with the housing company.

10. On 30 April 1998 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 14 below) declaring the applicant to be an illegal occupant of the apartment and ordering her to vacate it within three days under threat of forcible eviction. The reason for this decision was that, under the Law on the Use of Abandoned Property, the applicant was not entitled to be allocated abandoned property for use. On 12 September 1998 the applicant

received this decision and on 14 September 1998 she appealed against it. She has not received any decision on this appeal to date. On 16 July 1998 the Bank had written to the Commission in support of the applicant's occupancy of the apartment. She still occupies the apartment.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

11. The Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 3/96; "the old law") establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present case, are summarised below.

12. Articles 2 and 11 define "abandoned property" as real and personal property which has been abandoned by its owners and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

13. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

14. Article 10 states that if a person enters into possession of abandoned property without a decision of the appropriate commission, that commission shall issue a decision ordering the person to vacate the property concerned. An appeal may be lodged to the Ministry by the recipient within three days of its receipt. Such an appeal to the Ministry does not suspend the execution of the decision.

15. Article 15 reads as follows:

> "Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:
>
> 1. to the families of killed soldiers
> 2. war invalids with injuries in categories I-V
> 3. war invalids with injuries in categories V-X
> 4. qualified workers of whom there is a lack in the Republika Srpska."

2. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property

16. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98; "the new law") establishes a detailed framework for persons to regain possession of property considered to be abandoned under the law. It entered into force on 19 December 1998 and puts the old law out of force.

17. Article 2 was amended by the Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, which was contained in a decision of the High Representative of 13 April 1999. The amended text reads as follows:

> "All administrative, judicial, and other decisions enacted on the basis of the regulations referred to in Article 1 of this Law in which rights of temporary occupancy have been created shall remain effective until cancelled in accordance with this Law.

Any occupancy right or contract on use made between 1 April 1992 and 19 December 1998 is cancelled. A person who occupies an apartment on the basis of an occupancy right which is cancelled under this Article shall be considered a temporary user for the purposes of this Law.

A temporary user referred to in the previous paragraph who does not have other accommodation available to him or her has a right to a new contract for use of the apartment, if the occupancy right of the former occupant terminates under Article 16 of this Law or if a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this Law.

An occupancy right holder to an apartment as of 1 April 1992, who agreed to the cancellation of his or her occupancy right in exchange for another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his or her former apartment in accordance with this Law."

18. Article 16 of the new law reads as follows:

"A claim for repossession of an apartment may be filed within six months from the date of entry into force of this Law.

If the occupancy right holder does not file a claim within the time-limit referred to in the previous paragraph, his or her occupancy right shall be cancelled."

3. The Law on General Administrative Procedures

19. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

20. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedures.

21. Article 8 reads as follows:

"(1) Before making a decision a party has to be given the opportunity to express his or her opinion on all the facts and circumstances that are of importance in making an administrative decision.

(2) A decision may be made without hearing the opinion of a party only if provided by law."

22. Article 135 paragraph 1 requires all relevant facts to be ascertained prior to the making of a decision. Under Article 247, a decision on an appeal must be made within two months of the lodging of such appeal.

4. The Law on Administrative Disputes

23. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25 paragraph 1, if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued within 7 days of the lodging of such a reminder, the applicant may initiate an administrative dispute.

IV. COMPLAINTS

24. The applicant does not make any specific complaints of any violations of her human rights as protected by the Agreement. She complains that the decision of the Commission declaring her an illegal occupant of the apartment was made on an incorrect legal and factual basis.

V. SUBMISSIONS OF THE PARTIES

25. The respondent Party has not made any submissions regarding the application.

26. The applicant maintains her complaint.

VI. OPINION OF THE CHAMBER

A. Admissibility

27. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

28. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. The Chamber notes that the respondent Party has not suggested that there is any "effective remedy" available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

29. The applicant lodged an appeal to the Ministry against the decision of the Commission of 30 April 1998. However, the lodging of such an appeal does not have any suspensive effect.

30. The Chamber notes that there has been no decision on this appeal to date. It would have been open to the applicant to commence administrative proceedings before the Supreme Court of the Republika Srpska in respect of the failure of the Ministry to issue a decision on her appeal. Before doing so, she would have had to have lodged a reminder with the Ministry, which she has not done. The Ministry would then have a seven day period in which to issue its decision. The applicant could then have initiated an administrative dispute before the Supreme Court.

31. As the Chamber noted in the *Onić* case (no. CH/97/58, decision on admissibility and merits delivered on 12 February 1999, paragraph 38, Decisions January-July 1999), the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants.

32. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 30 April 1998 raises a question of whether there is an effective remedy available to her. This fact, together with the fact that the respondent Party did not seek to argue that there was any effective remedy available to the applicant, leads the Chamber to conclude that no such remedy is in fact available to her.

33. The Chamber does not consider that any of the other grounds for declaring the case inadmissible have been established. Accordingly, the case is to be declared admissible.

B. Merits

34. Under Article XI of the Agreement the Chamber must next address the question 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 treaties listed in the Appendix to the Agreement.

1. Article 8 of the Convention

35. The applicant did not specifically allege a violation of her rights as protected by Article 8 of the Convention. The Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case. Article 8 reads as follows:

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

36. The Chamber notes that the applicant has lived in the apartment since September 1992, when she was allocated the occupancy right over it. It is therefore clear that the apartment is to be considered as her "home" for the purposes of Article 8 of the Convention.

37. The Chamber has already held that the threatened eviction of a person from his home constitutes an "interference by a public authority" with the exercise of the right to respect for his home (case no. CH/96/31, *Turčinović,* decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decision of the Commission declaring the applicant to be an illegal occupant of the apartment and ordering her to vacate it within three days under threat of forcible eviction therefore constitutes an "interference by a public authority" with that right.

38. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was "in accordance with the law", served a legitimate aim and "was necessary in a democratic society" (see the aforementioned decision in *Onić*, paragraph 48). There will be a violation of Article 8 if any one of these conditions is not satisfied.

39. The Chamber notes that Article 2 of the old law requires a property to be entered into the register of abandoned property before it can be allocated to a person within the categories set out in Article 15. The respondent Party has not provided any evidence that any such entry was made in respect of the apartment in the present case. Nor is there any other indication available to the Chamber that such an entry was made.

40. Therefore, it has not been established that the requirements of the old law were adhered to in the present case. Accordingly, the attempts of the Commission to get the applicant to vacate the apartment cannot be considered to have been "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention.

41. Accordingly, the Chamber considers that there has been a violation of the applicant's rights as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

42. The applicant did not specifically allege a violation of her rights as protected by Article 1 of Protocol No. 1 to the Convention. The Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

43. The Chamber must first consider whether the applicant's occupancy right over the apartment constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber notes that the applicant was granted a permanent occupancy right over the apartment by the Bank, the holder of the allocation right, on 28 September 1992. However, Article 2 of the new law, as amended, (see paragraph 17 above) cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

44. If certain conditions as set out in the fourth paragraph of Article 2 are fulfilled, the applicant is entitled to a new contract for the use of the apartment (e.g. if the previous holder of the occupancy right does not seek to regain possession of the apartment and his or her occupancy right is accordingly terminated by Article 16 of the new law). The new law does not expressly state that the applicant is entitled to a new occupancy right although, as a person is not entitled to a contract for the use of an apartment unless he or she holds an occupancy right over it, it may be assumed that this is the intended meaning of the provision.

45. Therefore, under domestic law, the applicant possesses a temporary occupancy right over the apartment. She has, however, the possibility to be granted a new contract for the use of the apartment. However, this will only be the case if she does not have alternative accommodation available to her. The Chamber has not received any information as to whether the applicant has any alternative accommodation available to her. However, it does not consider it necessary to decide upon this issue for the purposes of the present case. It considers that at present the applicant has a right to apply for her current temporary occupancy right over the apartment to be converted into a permanent one, in accordance with Article 2 of the new law. The question of whether she has alternative accommodation available to her is a factual question for the appropriate national authorities to determine in the event that the applicant applies for her occupancy right to effectively be converted into a permanent one.

46. The Chamber considers therefore that the applicant has a conditional right to obtain a permanent occupancy right over the apartment, in accordance with the terms of Article 2 paragraph 3 and Article 16 of the new law.

47. The Chamber has previously held that an occupancy right such as that held by the present applicant constitutes a "possession" (case no. CH/98/1495, *Rosić,* decision on admissibility and merits delivered on 10 September 1999, paragraphs 60-61).

48. Accordingly, the Chamber considers that the applicant's temporary occupancy right constitutes a possession in view of the fact that she will be eligible to receive a permanent one, if she satisfies the conditions set out in Article 2 of the new law.

49. Having established that the applicant's right to occupy the apartment constitutes her possession, the Chamber next finds that the decision of the Commission declaring her to be an illegal occupant of the apartment and ordering her to vacate it interfered with her right to peaceful enjoyment of that possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

50. The Chamber must therefore examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law.

51. The Chamber notes that the decision ordering the applicant's eviction from the apartment was not in accordance with the old law (see paragraphs 39 and 40 above). Accordingly, the requirements of national law have not been adhered to and therefore the interference was not "subject to conditions provided for by law".

52. Accordingly, there has been a violation of the applicant's rights as protected by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

53. 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 established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

54. The Chamber notes that in accordance with its order for the proceedings in the case the applicant was afforded the possibility of claiming compensation or other relief. She did not do so, but requests that she be entitled to remain in the apartment.

55. The Chamber notes that the old law has been put out of force by the adoption of the new law. However, this does not of itself remove the threat to the applicant that she would be evicted, as the new law does not put out of force decisions ordering evictions under the old law.

56. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 30 April 1998 ordering the eviction of the applicant from the apartment in question and to allow her to remain in possession of the apartment, subject to the terms of the new law.

VIII. CONCLUSION

57. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 declaring the applicant an illegal occupant and ordering her, under threat of eviction, to vacate the apartment she currently occupies constitutes a violation of her right to respect for her home within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 declaring the applicant an illegal occupant and ordering her, under threat of eviction, to vacate the apartment she currently occupies constitutes a violation of her right to peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Republika Srpska to take all necessary steps to revoke the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment in accordance with the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and

5. unanimously, to order the Republika Srpska to report to it, within three months of the date of the present decision becoming final in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/98/959

Ljiljana RADOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 7 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. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. She was employed by the Joint Services Unit of the Republic's Organs ("Služba za zajedničke poslove republičkih organa") of the Republic of Bosnia and Herzegovina in Sarajevo before the outbreak of the armed conflict. During the armed conflict, she was unable to report to work because she had lived in Nedžarići, seven kilometres from her working place, which was on the first front line. After the end of the armed conflict she attempted to return to work. The applicant sought legal redress to regain her position before the court, but court proceedings were suspended and her case was referred to the Cantonal Commission for Implementation of Article 143 of the Labour Law ("the Cantonal Commission").

2. The case raises issues under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced on 16 September 1998 and registered on 17 September 1998.

4. On 24 June 1999 the applicant's attorney informed the Chamber about the course of civil proceedings before the Municipal Court I Sarajevo in the applicant's case.

5. On 25 October 1999 the Chamber transmit the application to the respondent Party for its observations on the admissibility and merits under Article 6 of the Convention.

6. The respondent Party submitted its written observations on the admissibility and merits to the Chamber on 23 December 1999.

7. The Chamber transmitted the respondent Party's observations to the applicant for her reply on 30 December 1999.

8. The applicant did not reply, and on 13 December 2000, the Chamber again requested the applicant to submit responsive observations. The applicant replied on 18 December 2000.

9. The respondent Party submitted additional written observations on 19 April 2001.

10. The Chamber transmitted the respondent Party's additional observations to the applicant for her comments on 2 May 2001.

11. The respondent Party submitted additional written observations on 28 November 2001, and these were transmitted to the applicant for her comments on 12 December 2001.

12. The Chamber requested additional written information from the applicant on 15 December 2003. The applicant submitted additional written observations on 18 December 2003, and these were transmitted to the respondent Party on 19 December 2003.

13. The Commission deliberated on the admissibility and merits of the case on 8 March 2004 and 7 May 2004. On the latter date it adopted the present decision.

III. FACTS

14. The applicant is of Serb origin.

15. The application relates to the termination of the applicant's employment at the "Joint Services Unit of the Republic's Organs" ("Služba za zajedničke poslove republičkih organa") of the Republic of Bosnia and Herzegovina as a cleaning lady. The applicant was unable to report for work after the outbreak of hostilities because she lives in Nedžarići, seven kilometres from her working place, which was on the first front line. On 22 May 1992, the applicant left Sarajevo for health reasons. She lived abroad in Germany, where she had an operation. She returned to Sarajevo on 12 June 1996.

16. The applicant states that she reported for work when she returned to Sarajevo, but was informed that her employment had been terminated because, without good reason, she had not reported for work during the hostilities. On 24 June 1996 the applicant received a decision on termination of her employment as of 20 May 1992. The decision was issued on 30 April 1993 by the Director of the Joint Services Units of the Parliament of the Republic of Bosnia and Herzegovina. The applicant appealed against the decision to the Director. The Director refused the applicant's appeal as ill-founded by a decision of 8 July 1996.

17. The applicant commenced proceedings before the Court of First Instance I Sarajevo on 4 September 1996. The Court issued a default judgement on 18 November 1996 because the defendant (Federal Government-Joint Services Unit) did not appear at the hearing, without good reason. A judgement was issued in the applicant's favour. The Court annulled the 20 May 1992 decision on employment termination and ordered the defendant to reinstate the applicant.

18. The defendant appealed against this judgement on 13 December 1996. The Court of First Instance I Sarajevo considered the appeal as a request for *restitutio in integrum* and allowed the defendant's request without issuing any procedural decision.

19. On 21 December 1999 the applicant submitted a request to her employer for her labour relationship to be reinstated in accordance with Article 143 of the Labour Law of the Federation of Bosnia and Herzegovina. Because she did not receive a reply, she lodged an appeal to the Cantonal Commission for the Implementation of Article 143 on 27 November 2000, but the Commission did not decide upon her appeal until 6 August 2001 (see paragraph 21 below).

20. On 21 December 2000 the Municipal Court I Sarajevo issued a procedural decision by which the procedure in the case was suspended on the grounds that the file would be transferred to the Cantonal Commission for further proceedings.

21. The Cantonal Commission, by its procedural decision of 6 August 2001, determined that the applicant's appeal to the Commission was well founded and ordered the employer (the Government of the Federation of Bosnia and Herzegovina, Joint Services Unit Sarajevo) to act in accordance with Article 143, paragraphs 2 through 4 of the Law on Labour, i.e. to establish the applicant's labour and working status as an employee on the waiting list from the date she submitted her request through 5 May 2000 and to determine the termination of the employee's labour relationship in accordance with the law. The Commission also ordered the employer to determine the amount of severance pay to be paid to the applicant and to enter into an agreement on severance pay with the applicant.

22. The employer did not act in accordance with the Commission's decision. It neither established the labour and working status of the applicant nor paid her severance pay. Instead, the employer appealed to the Federal Commission for Implementation of Article 143 of the Labour Law ("the Federal Commission").

23. On 20 May 2003 the applicant submitted a claim before the Ombudsman of the Federation of Bosnia and Herzegovina, requesting protection of her right to work.

24. On 10 June 2003 the Federation Ombudsman requested the Federal Commission to provide information about the measures it had taken in the applicant's case. The Federation Ombudsman emphasised that two years had passed since the Cantonal Commission issued its procedural decision in the applicant's case and that the applicant had intervened before the Federal Commission on several occasions in order to speed up the proceedings. On each occasion the applicant received the same answer, i.e. that the Federal Commission had not yet decided on the appeal of the applicant's employer.

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Fundamental Rights in Labour Relations

25. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of SFRY, nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" - no. 2/92). Article 23, paragraph 2 of the Law provides that:

> "A written decision on the realisation of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily."

Article 75 of the Law provides for the termination of a working relationship. Paragraph 2(3) of that Article reads as follows:

> "The working relationship ends without the consent of the employee, … if he or she stayed away from work for five consecutive days without good cause."

B. The Law on Labour Relations

26. The Decree with Force of Law on Labour Relations during the State of War or Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992) entered into force on the day of its publication. It was later confirmed by the Assembly of the Republic (OG RBiH no. 13/94 of 9 June 1994) and applied as the Law on Labour Relations. It remained in force until 5 November 1999. The Law contained the following relevant provisions:

> Article 10
>
> "An employee can be sent on unpaid leave due to his or her inability to come to work in the following cases:
>
> "If he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.
>
> …
>
> "Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended.
>
> Article 15
>
> "The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

C. The Law on Labour

27. The Law on Labour (OG FBiH 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labour (OG FBiH 32/00), with the particular effect that certain new provisions, including Articles 143a, 143b, and 143c, were added and entered into force on 7 September 2000.

28. Article 5 of the Law on Labour provides that:

> "(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labour contract or other issues arising out of labour relations.
>
> "(2) Paragraph 1 of this Article shall not exclude the following differences:
>
> 1. which are made in good faith based upon requirements of particular a job;
>
> 2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;
>
> 3. activities that have as an objective the improvement of the position of persons who are in unfavourable economic, social, educational or physical position.
>
> "(3) In the case of breach of paragraphs 1 and 2 of this Article:
>
> 1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;
>
> 2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on discriminatory grounds;
>
> 3. If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, or the provision or restoration of any right arising from the contract of employment."

29. Article 143 of the Law on Labour provides that:

> "(1) An employee who is on the waiting list on the effective date of this law shall retain that status no longer than six months from the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline.
>
> "(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law (5 February 2000), addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had not accepted employment from another employer during this period, shall also be considered an employee on the waiting list.
>
> "(3) While on the waiting list, the employee shall be entitled to compensation in the amount specified by the employer.

"(4) If a waiting list employee referred to in paragraphs 1 and 2 of this Article is not requested to return to work within the deadline referred to in paragraph 1 of this Article, his or her employment shall be terminated with a right to severance pay which shall be established according to the average monthly salary paid at the level of the Federation on the date of entry of this Law into force, as published by the Federal Statistics Institute.

"(5) The severance pay referred to in paragraph 4 of this Article shall be paid to the employee for the total length of service (experience) and shall be established on the basis of average salary referred to in paragraph 4 of this Article multiplied with the following coefficients:

Experience	Coefficient
- up to 5 years	1.33
- 5 to 10 years	2.00
- 10 to 20 years	2.66
- more than 20 years	3.00.

…

"(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed."

30. Article 145 of the Law on Labour provides that:

"Proceedings to exercise and protect the rights of employees, which were instituted before this law has come into effect, shall be completed according to the regulations applicable on the territory of the Federation before the effective date of this law, if this is more favourable for the employees."

D. The Law on Amendments to the Law on Labour

31. In the Law on Amendments to the Law on Labour, a new Article 143a was added to the Law on Labour as follows:

"(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labour Affairs (hereinafter the "Cantonal Minister").

"(2) The Federal Commission for Implementation of Article 143 (hereinafter the "Federal Commission"), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.

"(3) In the case when the Cantonal Commission is not performing tasks for which it is established, the Federal Commission shall overtake the jurisdiction of the Cantonal Commission.

"(4) If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of procedure."

32. In the Law on Amendments to the Law on Labour, a new Article 143b was added to the Law on Labour as follows:

"(1) Members of the Federal/Cantonal Commission shall be appointed by the Federal/ Cantonal Minister on the basis of their professional experience and demonstrated ability for performance of their function.

"(2) Members of the Commission have to be independent and objective and may not be elected officials or have any political mandate.

"(3) The Federal Ministry or competent organ of the Canton shall bear the expenses of the Federal/Cantonal Commission."

33. In the Law on Amendments to the Law on Labour, a new Article 143c was added to the Law on Labour as follows:

"The Federal/Cantonal Commission may:

1. hear the employee, employer, and their representatives;

2. summon witnesses and experts;

3. request appropriate authority organs and employers to submit all relevant information.

"Decisions of the Federal/Cantonal Commission shall be:

1. final and subject to the court's review in accordance with the law;

2. legally based;

3. transmitted to the applicant within 7 days."

34. The Law on Amendments to the Labour Law further added the following Articles 52, 53, and 54:

"Article 52

"This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labour prior to the date of entry into force of this Law (i.e. 7 September 2000).

"Article 53

"This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law (7 September 2000) in the application of Article 143 of the Law on Labour.

"Article 54

"Procedures of realisation and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law (7 September 2000), if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

35. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01, delivered on 12 December 2001, held that the decisions of the Cantonal Commission and Federal Commission do not have the legal nature of administrative acts. In its opinion, the Supreme Court stated that the Commissions are not organs that conduct proceedings under the laws regarding administrative proceedings, but they are *sui generis* bodies unique to the field of labour relations. Therefore, their final decisions are not subject to judicial review under regular administrative dispute procedures, which are limited to review of administrative acts. Extra-judicial remedies cannot be filed against the Commissions' decisions because they can only be filed

against effective judicial decisions. Commission decisions should, however, be subject to review by competent regular courts subject to the laws on civil procedure.

E. The Law on Civil Procedure

36. Article 420 of the Law on Civil Procedure (OG FBiH no. 53/03) stipulates that, in proceedings concerning labour relations, the court shall generally have regard to the urgency of such matters, especially in scheduling hearings and setting time limits.

V. COMPLAINTS

37. The applicant alleges a violation of her rights to work, income, and social insurance. She states that she lives in a very difficult financial situation because she is 60 years old and cannot easily find another job. She has 19 years of work experience and cannot yet retire. Her husband is a pensioner with a very low pension. Accordingly, she alleges that her right to life, i.e. her right to survive, is imperilled.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to admissibility

38. The respondent Party suggests that the Commission issue a decision in accordance with Paragraph 4 of Rule 46 of the former Chamber's Rules of Procedure, by which the Chamber refused to accept and examine an application if it did not meet the form and content requirements. With respect to admissibility, the respondent Party, in its observations dated 24 December 1999, emphasised that there was no standing to be sued because the Federation of Bosnia and Herzegovina Joint Services Unit is not the legal successor to the Joint Services Unit of the Republic of Bosnia and Herzegovina. The respondent Party further asserts that the Commission lacks competence *ratione temporis* because the applicant's labour relationship was terminated on 20 May 1992, before the entry into force of the Agreement. The respondent Party also suggests that the application be declared inadmissible under Article VIII(2)(a) of the Agreement for non-exhaustion of domestic remedies.

2. As to the merits

39. With respect to the merits, the Federation asserts that

> "the undisputed fact is, following the case file, that the applicant did not report for work after 1 May 1992, and there is no evidence that she was temporarily prevented from work, *i.e.* on sick leave, and she did not provide any other explanation. The respondent Party believes that there is no country in the world where such a behaviour would be tolerated by the employer. Therefore, the first and only reason why the labour relation of the applicant was terminated was her continuous absence from work longer than five days without justification. Having in mind the fact that the applicant did not apply within the time limit of fifteen days after the reintegration of the occupied part of Sarajevo, but applied only on 24 June 1996, it is indisputable that the conditions prescribed by law were met and the possibility to terminate the applicant's labour relation existed, even quite some time after the war stopped."

The Federation concludes that the applicant's employment was terminated under lawful conditions.

40. With respect to Article 6, the Federation asserts that “the applicant has not yet exhausted all domestic legal remedies, so there could not have been a violation of the right guaranteed by the quoted Article of the Convention”.

B. The applicant

41. The applicant states that her right to work and other rights arising from the right to work have been violated. Further, the applicant complains that, on 18 November 1996, the Court of First Instance I Sarajevo issued a judgement in her favour, but two months later the defendant lodged an appeal against the judgement although the time limit provided for appeals had expired. In her last observations of 18 December 2003, the applicant informed the Chamber that her case was still pending before the Federal Commission and that she had not yet received any severance pay.

VII. OPINION OF THE COMMISSION

A. Admissibility

42. Before considering the merits of the case the Commission must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. In accordance with Article VIII(2) of the Agreement, “the Commission shall decide which applications to accept […]. In so doing, the Commission shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted […] (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.”

1. Regarding the claim related to the termination of the applicant's employment

43. The Commission notes that the applicant complains of violations of her rights to work, income, and social insurance. These rights, however, are not included among the rights and freedoms guaranteed under the European Convention and its Protocols (case no. CH/02/9500, *Šabić*, decision on admissibility of 5 September 2002; case no. CH/98/1171, *Čuturić*, decision on admissibility and merits delivered on 8 October 1999, paragraph 38, Decisions August-December 1999). Such rights could be protected under the International Covenant on Economic, Social and Cultural Rights ("the ICESCR”). In accordance with Article II(2)(b) of the Agreement, however, the Commission only has jurisdiction to consider rights protected under the ICESCR in connection with alleged or apparent discrimination. The applicant has not alleged discrimination, nor did she state before the Municipal Court that she was the victim of discrimination on any of the grounds set forth in Article II(2)(b) of the Agreement.

44. Therefore, pursuant to Article VIII(2)(c) of the Agreement, the Commission declares inadmissible as incompatible *ratione materiae* with the Agreement those parts of the application related to the termination of the applicant’s employment and related rights.

2. Regarding the claim of a violation of Article 6 of the Convention

45. The Commission notes that the applicant initiated court proceedings on 4 September 1996 in order to be reinstated into her pre-war position. To date she has not obtained final and binding decisions from the Court or the Federal Commission for Implementation of Article 143 of the Labour Law.

46. As to the length of the proceedings before the Court and the Federal Commission, the Commission observes the lack of activity by these organs in the case, which raises issues in

relation to the right to a fair hearing within a reasonable time. The Commission therefore declares this part of the application admissible.

B. Merits

47. 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.

48. Article 6 paragraph 1 of the Convention provides, as far as relevant, as follows:

> "In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."

1. Length of proceedings

49. The Commission notes that the applicant initiated court proceedings on 4 September 1996. The court of First Instance I Sarajevo issued a default judgement on 18 November 1996 because the employer failed to appear at the hearing without good reason. A judgement was issued in the applicant's favour. The Court annulled the decision on employment termination and ordered the defendant employer to reinstate the applicant. The defendant appealed against this judgement on 13 December 1996. The Court of First Instance I Sarajevo considered the appeal as a request for *restitutio in integrum* and allowed the defendant's request. On 21 December 2000 the Municipal Court I Sarajevo suspended the proceedings and referred the case to the Cantonal Commission for proceedings in accordance with Article 143 of the Law on Labour. The Cantonal Commission issued a procedural decision on 6 August 2001. The case is currently pending before the Federal Commission upon the employer's appeal, and no further action has been taken in the proceedings.

50. When assessing the length of proceedings for the purposes of Article 6, paragraph 1 of the Convention, the Commission must take into account, *inter alia*, the conduct of the applicant and the authorities and the matter at stake for the applicant (*see, e.g.,* case no. CH/99/1714, *Vanovac*, decision on admissibility and merits of 8 November 2002, paragraph 53, Decisions July-December 2002; Eur. Court HR, *Rajcevic v. Croatia*, judgment of 23 July 2002, paragraph 36). The issue in the applicant's case is whether her working relationship was terminated in accordance with law. The issues presented are not of a particularly complex nature. There is no indication that the length of the proceedings can be imputed to the applicant. Nor has the respondent Party provided any explanation from which it would appear that the delays should not be imputed to its authorities.

51. The failure to bring the proceedings to a conclusion within a reasonable time is further compounded by the fact that an employee who considers that her working relationship was wrongly terminated has an important personal interest in a speedy outcome of the dispute and in securing a final and binding decision, considering that her very livelihood depends on it. Domestic law requires that matters concerning employment are to be resolved as a matter of urgency.

52. Under the circumstances, the fact that the applicant's case was pending before the Municipal Court I in Sarajevo for more than four years (from 13 December 1996 until it was suspended on 21 December 2000) without any decision establishes a violation of the applicant's right to a fair hearing within a reasonable time under Article 6, paragraph 1 of the Convention.

53. The violation is compounded by the suspension of the applicant's case by the Court. Under the decision on suspension the case was referred to the Cantonal Commission, which issued its procedural decision on 6 August 2001. The case has since been pending before the Federal Commission in the appeal proceedings for more than two years. In the proceedings before the Cantonal and Federal Commissions, however, the applicant can only expect, at best,

the termination of her labour relation as of 5 May 2000 and payment of some compensation. Moreover, there is no telling how long the Federal Commission appeal proceedings might take. Under these circumstances, the Commission considers that the procedural decision of 21 December 2000 has caused further delay in the applicant's case.

54. The Commission therefore concludes, based on the length of proceedings, that the Federation of Bosnia and Herzegovina has violated the applicant's right to a hearing within a reasonable time under Article 6, paragraph 1 of the Convention.

2. Access to court

55. The Commission considers that the decision of the Municipal Court I of 21 December 2000 leaves the applicant with no access to court. The Cantonal and Federal Commission proceedings are, as the Supreme Court of the Federation of Bosnia and Herzegovina has held, *sui generis* extra-judicial proceedings (see paragraph 35 above). While her case is pending before the Federal Commission, the applicant has no expectation that her main complaint will be solved by the courts, but only that this case will be decided by the Cantonal i.e. Federal Commission employing a straightforward application of Article 143.

56. The Cantonal Commission can apparently only order a statutorily prescribed level of compensation, and it is not competent to order the applicant's reinstatement. The same is true of the Federal Commission, the venue for direct appeal of the Cantonal Commission's decision.

57. Further, it is not clear what judicial review of the Cantonal or Federal Commission's decision, if any, will be available. The Supreme Court of the Federation of Bosnia and Herzegovina has made it clear that the Commission's decision is not subject to judicial review under regular administrative dispute procedures. While the Supreme Court stated that the Commission's decisions should be subject to review by competent courts under the laws on civil procedure, it is not apparent that such review would be of any value to the present applicant. At best, the applicant could bring her proposal for continuance of the suspended civil proceedings in Municipal Court. It appears, however, that the courts, following the law, could only uphold the decision of the Cantonal or Federal Commission or repeat the referral of her case to the Cantonal Commission, and the applicant would again have no prospect of reinstatement. The existing system appears to place the applicant in an endless procedural loop, with no prospect of having her substantive claims heard by a court.

58. Under the circumstances, the Commission concludes that the respondent Party has violated the applicant's right to access to court guaranteed by Article 6, paragraph 1 of the Convention.

3. Conclusion

59. For the foregoing reasons, the Commission concludes that there has been a violation of the applicant's rights under Article 6, paragraph 1 of the Convention, for which the Federation of Bosnia and Herzegovina is responsible.

VIII. REMEDIES

60. 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 as well as provisional measures. The Commission is not necessarily bound by the claims of an applicant.

61. The applicant requests reinstatement into her employment and benefits arising from her

employment.

62. The Commission has found violations of the applicant's right to a fair hearing within a reasonable time and her right to access to court as guaranteed by Article 6, paragraph 1 of the Convention. Therefore, the Commission considers it appropriate to order the respondent Party to take all necessary steps to issue a final and binding decision in the applicant's case within a reasonable time.

63. The Commission further finds it appropriate to award a sum to the applicant in recognition of the sense of injustice she has suffered as a result of her inability to have her case decided before the ordinary courts and as a result of the delays before the Federal Commission for Implementation of Article 143 of the Labour Law.

64. Accordingly, the Commission will order the respondent Party to pay to the applicant, within one month of the date of receipt of this decision, the sum of 1000 Convertible Marks (*Konvertibilnih Maraka*) in recognition of her suffering as a result of her inability to have her case decided within a reasonable time by the courts and the Commission for Implementation of Article 143 of the Labour Law.

65. Additionally, the Commission further awards simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in the preceding paragraph. The interest shall be paid from the due date on the sum awarded or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

66. For the above reasons, the Commission decides,

1. unanimously, to declare admissible under Article 6, paragraph 1 of the European Convention on Human Rights the part of the application relating to the length of the domestic proceedings in the applicant's case before the Municipal Court I in Sarajevo and the Federal Commission for Implementation of Article 143 of the Labour Law;

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

3. unanimously, that there has been a violation of the applicant's right to a fair hearing within a reasonable time under Article 6, paragraph 1 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that there has been a violation of the applicant's right to access to court under Article 6, paragraph 1 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary steps, through its organs, to ensure that a final and binding decision is issued in the applicant's case within a reasonable time;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, the total sum of 1000 Convertible Marks ("*Konvertibilnih Maraka*"), within one month of the date of receipt of this decision, as compensation for non-pecuniary damages;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay simple interest at an annual rate of 10 (ten) per cent on the sum awarded to be paid to the applicant, such interest to

be paid from the due date on the sum awarded in conclusion no. 6 above or any unpaid portion thereof until the date of settlement in full; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to submit to the Commission a report on the steps taken by it to comply with the above orders by 31 December 2004.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission

DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/98/986

Dušanka BEŠTA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 1 November 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 Articles 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. The application concerns the applicant's request to regain his pre-war working position in the Public Utility Company "Vodovod i kanalizacija" Sarajevo ("the Company").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

2. The application was introduced on 28 September 1998 and registered on the same day. On 13 June 2001 the Chamber transmitted the application to the respondent Party under Article 6 of the European Convention and Protocol 12 to the Convention as well as Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and Article 26 of the International Covenant on Civil and Political Rights ("ICCPR"), in conjunction with Article II(2)(b) of the Human Rights Agreement.

3. On 13 August 2001 the respondent Party submitted its written observations to the Chamber. On 27 August 2001 the Chamber received additional observations of the respondent Party, containing information that the Cantonal Commission for Implementation of Article 143 of the Labour Law had resolved the applicant's request in her favour.

4. On 14 September 2001 the Chamber forwarded the respondent Party's observations to the applicant for her comments. On 17 October 2001 the applicant sent her reply.

5. Further submissions were received from the Respondent Party on 12 November 2001, 16 May 2003, 19 June 2003, 10 February 2004, and 9 August 2004.

6. Further submissions were received from the applicant on 24 April 2003, 4 June 2003, 30 June 2003, 26 January 2004, and 15 March 2004.

7. The Chamber considered the case on 9 May 2001. The Commission considered the case on 6 May 2004, 5 July 2004, 7 September 2004, and 1 November 2004. On the latter date the Commission adopted the present decision.

III. FACTS

8. Due to outbreak of hostilities, the applicant, who is of Serb origin, left Sarajevo in April 1992 and moved in with her parents in Vojvodina. She alleged that she had lived in the area "Špicasta stijena", on the front line of the armed conflict. When the minimum conditions were met, she immediately returned to Sarajevo.

9. The applicant reported to work after she returned to Sarajevo on 10 June 1996. At that time she was informed that her labour relation had been terminated because she had been absent from work without leave for more than five consecutive days. The applicant, at that time, received the decision on termination of her labour relation effective as of 1 May 1992. This decision was passed on 3 August 1994 and it was issued by the Director General of the company. The applicant appealed against the decision to the Director. By his decision of 13 June 1996, the Director confirmed the first decision on termination of labour relation.

10. On 20 June 1996 the applicant initiated proceedings before the Municipal Court II in Sarajevo. On 7 October 1997 the Court issued a judgment in the applicant's favour, quashing the decision on termination of her labour relation and ordering the company to reinstate the applicant into her work.

11. On 25 February 1998 the company appealed against the judgment to the Cantonal Court in Sarajevo. On 22 June 1998 the Cantonal Court modified the judgment of the Municipal Court II in Sarajevo and rejected the applicant's request in its entirety. The Cantonal Court found the reasons for the termination of the applicant's labour relations well founded, that she did not have any

written approval to be absent from work, and that she failed to report to work within 15 days after the cessation of the state of war, which was an obligation under the then-valid regulations.

12. On 13 December 1999 the applicant submitted a request to the Commission for Implementation of Article 143 of the Law on Labour of the Canton Sarajevo ("the Cantonal Commission"). By its procedural decision of 17 July 2001, the Cantonal Commission accepted the applicant's appeal ordering the Company to act in accordance with Article 143 paragraphs from 2 to 4 of the Law on Labour, i.e. to reinstate the applicant's labour status of laid off employee starting with the date when she submitted her request until 5 May 2000 and to decide on the termination of applicant's labour relations in accordance with the law. The Cantonal Commission also ordered the Company to determine the amount of severance pay and to reach an agreement with the applicant on the payment thereof.

13. Unsatisfied with the procedural decision issued by the Cantonal Commission, because it did not provide for her reinstatement to work, the applicant submitted an appeal to the Federal Commission for Implementation of Article 143 of the Law on Labour ("the Federal Commission"). By its procedural decision of 15 November 2002, the Federal Commission rejected the applicant's appeal as ill founded.

14. The Company acted pursuant to the 17 July 2001 procedural decision of the Cantonal Commission, and, by its procedural decision of 7 November 2001, it established the applicant's legal status as an employee on the waiting list, determined the termination of her employment, and offered the applicant a contract on payment of severance pay which she did not accept. The applicant is not satisfied with this solution because she still wants to resume her job.

15. Between August 1994 and May 2001, the company employed 415 employees. Of these, it appears to the Commission that nine were of non-Bosniak origin.

IV. COMPLAINTS

16. The applicant alleges that she has been discriminated against in the enjoyment of the right to work on the basis of her national origin. She also alleges a violation of her right to a fair hearing under Article 6 of the European Convention.

17. The Commission considers that the case may raise issues under Article 6 of the European Convention and Protocol 12 to the Convention as well as Articles 6 and 7 of the ICESCR and Article 26 of the ICCPR in conjunction with Article II(2)(b) of the Human Rights Agreement.

V. RELEVANT LEGAL PROVISIONS

A. The Law on Fundamental Rights in Labour Relations

18. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of SFRY, nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" - no. 2/92). Article 23, paragraph 2 of the Law provides that:

> "A written decision on the realization of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily." [1]

[1] The Labour law does not contain regulations determining the moment when decisions become effective if the whereabouts of the employee are unknown. But according to the Article 96, paragraph 1 of the Law on General Administrative Proceedings (OG SFRJ no. 47/86), which was taken over as Republic Law (OG SRBiH no. 2/92), and which a public Company could apply: "In cases in which the person or his/her legal representative changes his/her place of residence during the proceedings, they must report such change to the administrative body." Paragraph 2 prescribes that "[i]f they fail to do so, ... the administrative body shall determine that all further deliveries shall be performed by placing decisions on the advertising board of the

Article 75 of the Law provides for the termination of a working relationship. Paragraph 2(3) of that Article reads as follows:

> "The working relationship ends without the consent of the employee, … if he or she stayed away from work for five consecutive days without good cause."

B. The Law on Labour Relations

19. The Decree with Force of Law on Labour Relations during the State of War or Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992) entered into force on the day of its publication. It was later confirmed by the Assembly of the Republic (OG RBiH no. 13/94 of 9 June 1994) and applied as the Law on Labour Relations. It remained in force until 5 November 1999. The Law contained the following relevant provisions:

> Article 10
>
> "An employee can be sent on unpaid leave due to his or her inability to come to work in the following cases:
>
> "If he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.
>
> "…
>
> "Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she was not able to come to work earlier.
>
> "During the unpaid leave all rights and obligations of the employee under the employment are suspended."
>
> Article 15
>
> "The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

C. The Law on Labour

20. The Law on Labour (OG FBiH 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labour (OG FBiH 32/00) with the particular effect that certain new provisions, including Articles 143a, 143b, and 143c, were added and entered into force on 7 September 2000.

21. Article 5 of the Law on Labour provides that:

> "(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labour contract or other issues arising out of labour relations.
>
> "(2) Paragraph 1 of this Article shall not exclude the following differences:
>
> 1. which are made in good faith based upon requirements of particular a job;

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institution." Under paragraph 3, "[t]he delivery is considered as accomplished upon expiration of 8 days after the decision is placed on the advertising board."

2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;

3. activities that have as an objective the improvement of the position of persons who are in unfavourable economic, social, educational or physical position.

"(3) In the case of breach of paragraphs 1 and 2 of this Article:

1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;

2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on discriminatory grounds;

3. If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, or the provision or restoration of any right arising from the contract of employment."

22. Article 143 of the Law on Labour provides that:

"(1) An employee who is on the waiting list on the effective date of this law shall retain that status no longer than six months from the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline.

"(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law (5 February 2000), addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had not accepted employment from another employer during this period, shall also be considered an employee on the waiting list.

"(3) While on the waiting list, the employee shall be entitled to compensation in the amount specified by the employer.

"(4) If a waiting list employee referred to in paragraphs 1 and 2 of this Article is not requested to return to work within the deadline referred to in paragraph 1 of this Article, his or her employment shall be terminated with a right to severance pay which shall be established according to the average monthly salary paid at the level of the Federation on the date of entry of this Law into force, as published by the Federal Statistics Institute.

"(5) The severance pay referred to in paragraph 4 of this Article shall be paid to the employee for the total length of service (experience) and shall be established on the basis of average salary referred to in paragraph 4 of this Article multiplied with the following coefficients:

Experience	Coefficient
- up to 5 years	1.33
- 5 to 10 years	2.00
- 10 to 20 years	2.66
- more than 20 years	3.00."

...

"(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed."

23. Article 145 of the Law on Labour provides that:

> "Proceedings to exercise and protect the rights of employees, which were instituted before this law has come into effect, shall be completed according to the regulations applicable on the territory of the Federation before the effective date of this law, if this is more favourable for the employees."

D. The Law on Amendments to the Law on Labour

24. In the Law on Amendments to the Law on Labour, a new Article 143a was added to the Law on Labour as follows:

> "(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labour Affairs (hereinafter the "Cantonal Minister").
>
> "(2) The Federal Commission for Implementation of Article 143 (hereinafter the "Federal Commission"), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.
>
> "(3) In the case when the Cantonal Commission is not performing tasks for which it is established, the Federal Commission shall overtake the jurisdiction of the Cantonal Commission.
>
> "(4) If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of procedure."

25. In the Law on Amendments to the Law on Labour, a new Article 143b was added to the Law on Labour as follows:

> "(1) Members of the Federal/Cantonal Commission shall be appointed by the Federal/ Cantonal Minister on the basis of their professional experience and demonstrated ability for performance of their function.
>
> "(2) Members of the Commission have to be independent and objective and may not be elected officials or have any political mandate.
>
> "(3) The Federal Ministry or competent organ of the Canton shall bear the expenses of the Federal/Cantonal Commission."

26. In the Law on Amendments to the Law on Labour, a new Article 143c was added to the Law on Labour as follows:

> "The Federal/Cantonal Commission may:
>
> 1. hear the employee, employer, and their representatives;
> 2. summon witnesses and experts;
> 3. request appropriate authority organs and employers to submit all relevant information.
>
> "Decisions of the Federal/Cantonal Commission shall be:
>
> 1. final and subject to the court's review in accordance with the law;
> 2. legally based;
> 3. transmitted to the applicant within 7 days."

27. The Law on Amendments to the Labour Law further added the following Articles 52, 53, and 54:

> Article 52
>
> "This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labour prior to the date of entry into force of this Law (i.e. 7 September 2000).
>
> Article 53
>
> "This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law (7 September 2000) in the application of Article 143 of the Law on Labour.
>
> Article 54
>
> "Procedures of realization and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law (7 September 2000), if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

28. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01, delivered on 12 December 2001, held that the decisions of the Cantonal Commission and Federal Commission do not have the legal nature of administrative acts. In its opinion, the Supreme Court stated that the Commissions are not organs that conduct proceedings under the laws regarding administrative proceedings, but they are *sui generis* bodies unique to the field of labour relations. Therefore, their final decisions are not subject to judicial review under regular administrative dispute procedures, which are limited to review of administrative acts. Extra-judicial remedies cannot be filed against the Commissions' decisions because they can only be filed against effective judicial decisions. Commission decisions should, however, be subject to review by competent regular courts subject to the Law on civil procedure.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

29. The respondent Party considers the application inadmissible *ratione temporis,* because the General Framework Agreement for Peace in Bosnia and Herzegovina was signed on 14 December 1995 and the Commission is only competent to consider events that occurred after that date or events that occurred before if a violation continued after that date. Because the applicant's employment was terminated on 1 May 1992 by the decision of the Company's general manager of 3 August 1994, the respondent Party proposes that the application should be declared inadmissible.

30. The respondent Party also contested the admissibility of the application, on the ground of non-exhaustion of domestic remedies because, at the time of the respondent Party's submission of these observations, the proceedings before the Cantonal Commission were still pending.

2. As to the merits

31. As to a possible violation of Article 6 of the Convention, the respondent Party considers the application ill founded because the criteria provided for in Article 6 have been complied with in this case.

32. As to the allegations on a violation of Protocol 12 to the Convention, Articles 6 and 7 of the ICESCR, and Article 26 of the ICCPR, the respondent Party asserts that the applicant lost her right to work exclusively by her own behaviour.

33. In its additional observations, the respondent Party also stated that the applicant's allegations that she was discriminated against on the ground of her national origin were arbitrary and unsubstantiated, and the applicant had not proved any such discrimination.

34. The respondent Party has submitted a list of employees who established their labour relations with the Company between August 1994 and May 2001. From the list it appears that a total of 415 persons were employed during this time period. The respondent Party did not indicate how many of these 415 persons are of Serb origin.

B. The applicant

35. The applicant alleges that she has been discriminated against on the basis of her national origin, that the national composition of the employees of the company is now 98% Bosniak, and that the persons who have been employed after the war are of Bosniak origin. As an example, she quotes three names: L.S., K.M. and M.H, whom she alleges to have the same qualifications as she does.

VII. OPINION OF THE COMMISSION

A. Admissibility

36. 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.

37. Before considering the merits of the application, the Commission must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement.

1. Competence *ratione temporis*

38. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.… In so doing, the [Commission] shall take into account the following criteria: … (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."

39. The respondent Party contends that the Commission lacks competence *ratione temporis* to consider the application because the applicant's employment was terminated before the entry into force of the Agreement. The procedural decision terminating the applicant's labour relations was only delivered to her in writing, as required by Article 78 of the Law on Fundamental Rights in Labour Relations, on 10 June 1996. And it appears that the situation the applicant complains of is her employer's failure to hire her back, which is of an ongoing nature. Further, the applicant's request for reinstatement was refused on 3 July 1998. The applicant's grievances relate to a situation that took place after the Agreement entered into force, and the Commission concludes that it is competent *ratione temporis* to consider the application insofar as it relates to events after 14 December 1995.

40. On 20 June 1996 the applicant initiated court proceedings for the protection of her rights with regard to the termination of her labour relations. Also, beginning 13 December 1999, proceedings were conducted before the bodies of the Federation under Article 143 of the Law on

Labour. Consequently, the application falls within the competence of the Commission *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

41. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …."

42. The Federation argues that the applicant has not exhausted effective domestic remedies because, at the time the applicant addressed the Chamber, the proceedings before the Cantonal Commission for Implementation of Article 143 of the Law on Labour were pending. The Commission notes, however, that these proceedings have now been concluded.

43. The Commission further observes that the applicant has exhausted legal remedies before the Cantonal and the Federal Commission for Implementation of Article 143 of the Law on Labour, obtaining a final procedural decision on her legal and working status. Although the decisions of the Federal Commission are subject to review by initiating a labour dispute before the competent court, which was a possibility after the issuance of the decision of the Federal Commission, it does not appear that this legal remedy would be effective. The applicant, before the proceedings before the Cantonal and the Federal Commission, obtained court decisions by which this issue had already been considered. Thus the applicant would likely have her claim rejected as *res judicata*.

3. Conclusion on admissibility

44. The Commission further finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Commission declares the application admissible.

B. Merits

45. 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 recognized human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention and other international agreements listed in the Appendix to the Agreement.

1. Discrimination in the enjoyment of the right to work

46. Under Article II of the Agreement, the Commission has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the sixteen international agreements listed in the Appendix to the Agreement on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

47. The Chamber repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber (and now the Commission) must attach particular importance. Article II(2)(b) of the Agreement affords the Commission jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, including the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (see case no. CH/01/7351, *Kraljević*, decision on admissibility and merits, delivered on 12 April 2002, para. 62).

48. The Commission further notes that the basis of discrimination in Bosnia and Herzegovina often rests upon the perceived ethnic or national differences expressed in terms such as Bosniak,

Croat and Serb. Therefore, the Commission uses this terminology in discrimination cases without endorsing it. By Bosniak, the Commission refers to persons who can be considered to have a Bosnian Muslim cultural heritage (*see Brkić*, case no. CH/99/2696, decision on the admissibility and merits, delivered on 12 October 2001, paragraph 64). The Commission will consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR which, in relevant part, read as follows:

49. Article 6(1) of the ICESCR, in relevant part, provides as follows:

> "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

50. Article 7 of the ICESCR, in relevant part, provides as follows:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> "(a) Remuneration which provides all workers, as a minimum, with:
>
> "(i) fair wages and equal remuneration for work of equal value without distinction of any kind, …
>
> "(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant, …."

a. Impugned acts and omissions

51. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to re-employ the applicant after the end of the armed conflict and the hiring of others to the company. These acts affect the applicant's enjoyment of the rights guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Commission will therefore examine whether the Federation has secured protection of these rights without discrimination.

b. Differential treatment and possible justification

52. The Commission must first determine whether the applicant was treated differently from others in the same or similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship or proportionality between the means employed and the aim sought to be realized. The burden is on the respondent Party to justify otherwise prohibited differential treatment based on grounds explicitly enumerated in Article II(2)(b) of the Agreement (see, e.g., case no. CH/99/2696, *Brkić*, decision on admissibility and merits of 8 October 2001, paragraph 71, Decisions July-December 2001).

53. The applicant asserts that she was subjected to continued discrimination in the enjoyment of the right to work due to her national origin. She alleges that the national composition of the company's employees is 98% Bosniak and that the company, while she was struggling to resume her job, hired a number of new employees whom she states are Bosniaks, out of which she mentioned three persons of Bosniak origin with the same qualifications as she has.

54. The respondent Party claims that the applicant's employment was terminated on the basis of the Law on Fundamental Rights in Labour Relations because of her unjustified absence from work for five consecutive days and because she did not have any written approval to leave the country. The respondent party considers that the applicant's arguments relating to the alleged discrimination are arbitrary and unsubstantiated, and that the applicant has not proved any such discrimination.

55. The respondent Party submitted a list of persons employed during the relevant time period when the applicant had been trying to return to work. The Commission notes from this list of newly

employed workers that the applicant's company hired a large number of new employees in the period after the war. The company indeed hired the three persons the applicant indicated in her allegations. The three newly hired employees have the same qualifications as the applicant and are of Bosniak origin. There is no data on the positions held by these persons, but they were employed in 1997 and 1998, during the time period when the applicant was trying to resume her job.

56. As to the question of whether the applicant was treated differently from other employees on the ground of her national origin, the Commission notes that, except for a general refutation, the respondent Party failed to contest the applicant's arguments or to offer evidence proving that the applicant was not subject to differential treatment. The Commission concludes taking into account the applicant's efforts to return to her pre-war position as well as the fact, admitted by the Federation, that there was a need to hire new employees, that there was no justification for not reinstating the applicant into her work. Furthermore, the respondent Party has not refuted the applicant's allegations with regard to the new employees. In light of all these considerations, the Commission finds that the applicant has been subjected to differential treatment in comparison with persons of different ethnic origin.[2]

57. Having found that the applicant was treated differently in comparison with her colleagues of Bosniak origin, the Commission will consider whether there is any possible justification for such treatment. In this regard, the Commission notes that the company continued to operate after the war and obviously had the need and the means to employ many new employees. At the same time it chose to employ new persons, the company failed to reinstate the applicant, an experienced employee, to her work. The respondent Party stresses that her labour relations were terminated lawfully, but it provides no substantive argument as to why the applicant could not have been reinstated into her pre-war position or why the company hired new persons without considering the possibility of rehiring the applicant.

58. Having regard to the totality of these circumstances, the Commission is unable to find any reasonable or objective justification in law for this treatment. Nor can the Commission discern any legitimate aim served by the company's failure to reinstate the applicant into her work.

59. The Commission concludes, therefore, that the respondent Party, through the Public Utility Company "Vodovod i kanalizacija" Sarajevo, discriminated against the applicant in the enjoyment of her right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation of Bosnia and Herzegovina thereby being in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the ICESCR.

2. Article 6 of the Convention

60. Article 6, paragraph 1 of the Convention provides, in relevant part, as follows:

> "In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."

a. As to the length of the court proceedings and the proceedings before the Commissions for Implementation of Article 143 of the Law on Labour

61. When assessing the length of proceedings for the purposes of Article 6, paragraph 1 of the Convention, the Commission must take into account, *inter alia*, the conduct of the applicant and the authorities and the matter at stake for the applicant (see the aforementioned *Brkić* decision, paragraph 85).

[2] This unbalanced situation was temporarily corrected by the Municipal Court II in Sarajevo, which ordered the company to reinstate the applicant into her pre-war job, but this decision was modified by the Cantonal Court in Sarajevo, which rejected the applicant's claim, thereby perpetuating her situation.

62. The Commission notes that the applicant initiated court proceedings before the Municipal Court II in Sarajevo on 20 June 1996 and that the Court issued a judgment on 7 October 1997. The Cantonal Court in Sarajevo issued a decision in the appeal on 22 June 1998.

63. The proceedings initiated by the applicant lasted a total of two years. The Commission considers this a reasonable length of time and concludes that the respondent Party has not interfered with the applicant's rights under Article 6(1) of the Convention in relation to the court proceedings.

64. As to the proceedings before the Commission for Implementation of Article 143 of the Law on Labour, the applicant filed her request to the Commission for Implementation of Article 143 of the Law on Labour of Canton Sarajevo on 13 December 1999. On 17 July 2001 the Cantonal Commission issued a decision, and the proceedings on appeal were concluded on 15 November 2002 by the decision of the Federal Commission. Taking into account a huge number of the requests before the Cantonal and the Federal Commission during the period when the applicant's request was subject to consideration, more expedient action on the applicants' request could not be expected. In the circumstances, the Commission considers this a reasonable length of time and concludes that the respondent Party has not interfered with the applicant's rights under Article 6(1) of the Convention in relation to the Commission proceedings.

b. As to the fairness of the proceedings

65. The proceedings in the first instance were completed in the applicant's favour. In the second instance, the judgment was altered and her statement of claim rejected, because the Cantonal Court found that the applicant did not meet the legal conditions for reinstatement to work and that the first instance judgment was based on wrongly established facts and incorrect conclusions. It appears from the judgments of the Municipal Court and the Cantonal Court that the applicant took part in the first instance proceedings on an equal basis and that she was afforded an opportunity to present her statement and the relevant facts.

66. The applicant has not offered any argument proving that the proceedings on appeal were not fair. Nor can the Commission, on its own motion, find any evidence that the Cantonal Court conducted the applicant's proceedings on appeal in an unfair manner in comparison to any other proceedings, under the procedures provided for by the law.

67. In the proceedings before the Commissions for implementation of Article 143 of the Law on Labour, the Commission has not found any evidence of unfairness. The Commissions appear to have decided this case in accordance with the applicable legal provisions, resolving the applicant's case in manner favourable to her.

68. Accordingly, the Commission does not find any special circumstances justifying a conclusion that the respondent Party has violated the applicant's rights under Article 6 of the Convention with regard to the proceedings conducted in the applicant's case.

3. Conclusion

69. The Commission concludes that the applicant has been discriminated against in the enjoyment of her rights under Articles 6 and 7 of the ICESCR in conjunction with Article II(2)(b) of the Agreement and that the applicant's rights as guaranteed under Article 6 of the Convention have not been violated.

4. Other provisions of the Agreement

70. Considering the above conclusion on discrimination, the Commission considers that it is not necessary to examine whether there has also been a violation of the provisions of Protocol 12 to the Convention or discrimination against the applicant in relation to Article 26 of the ICCPR.

VIII. REMEDIES

71. 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.

72. The applicant requests that the Federation be ordered to reinstate her to work. The applicant has not submitted a compensation claim.

73. The Commission considers it is appropriate to order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in her right to work and to just and favourable conditions of work, and that she be offered the possibility of resuming her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position.

74. The Commission has found the Federation to be in breach of its obligations under the Agreement. In the circumstances, the Commission finds it appropriate to award the applicant, by way of compensation, within one month of the date of delivery of this decision, a lump sum of 15,000 KM covering pecuniary and non-pecuniary damages suffered during the period from 10 June 1996 through 31 December 2004.

75. The applicant shall also receive, on the first day of each month, 300 KM, from the date of its receipt of this decision, until she is offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position.

76. Additionally, the Commission will award 10% (ten percent) interest per annum on the sums referred to in the preceding paragraphs. The interest shall be paid from the due date of each payment until the date of settlement in full.

IX. CONCLUSIONS

77. For the above reasons, the Commission decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the applicant has been discriminated against in the enjoyment of her right to work as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, in conjunction with Article II(2)(b) of the Human Rights Agreement, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

3. unanimously, that there has been no violation of the applicant's right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights;

4. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the applicant is immediately offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position;

5. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, not later than one month after receipt of this decision, the amount of 15,000 KM by way of compensation for pecuniary and non-pecuniary damages suffered during the period from 10 June 1996 through 31 December 2004;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay 300 KM to the applicant on the first day of each month, from the date of its receipt of this decision, until she is

offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10% (ten percent) per annum over the sums stated in conclusion nos. 5 and 6 or any unpaid portion thereof from the due date of each payment until the date of settlement in full; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission, or its successor institution, 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