DECISION ON ADMISSIBILITY AND MERITS

(delivered on 8 October 1999)

Case no. CH/98/1171

Ševala ČUTURIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 8 September 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 of Bosniak origin. Until 1993 she worked at the Institute for Health Protection ("the Institute") in Banja Luka, Republika Srpska. On 28 January 1993 the Institute terminated the applicant's employment. The applicant's complaint concerns the proceedings before the Court of First Instance ("the Court") in Banja Luka which she initiated in 1993 against this decision. These proceedings are still pending before the Court.

2. The case raises issues primarily under Article 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 21 September 1998 and registered on the same day under the above case number. The applicant is represented by Mr. Drago Malešević, a lawyer practising in Banja Luka.

4. At its session in November 1998 the First Panel of the Chamber decided, pursuant to Rule 49(3)(b) of the Rules of Procedure, to transmit the application 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 8 January 1999.

5. No observations were received from the respondent Party.

6. On 18 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, containing a claim for compensation, was received by the Chamber on 4 February 1999.

7. On 16 February 1999, the applicant's written statement was transmitted to the Agent of the respondent Party for observations on the claim for compensation. No observations were received from the respondent Party.

8. On 22 April 1999 the Chamber received certain information from the Organisation for Security and Cooperation in Europe ("OSCE") relating to the case. This information was sent to the parties on 15 July 1999.

9. The First Panel deliberated upon the admissibility and merits of the application and adopted its decision on 8 September 1999.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

10. 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.

11. On 28 January 1993 the applicant's employment at the Institute was terminated by the Director of the Institute. The reason given for this termination was that a member of her family had failed to comply with a mobilisation order to join the Army of the Republika Srpska ("VRS"). On 11 February 1993 the applicant initiated proceedings before the Court against this decision. In these proceedings she claimed that the grounds for her dismissal were incorrect. She stated that she lived alone and provided a certificate of the Ministry of Defence of the Republika Srpska showing that her brother, the only family she has, had complied with his working obligations.

12. On 10 July 1995 the Court held a hearing in the case, which did not decide it. The Court has requested certain information from the Institute relating to the case, which it has not received to

date. The applicant's proceedings are still pending before the Court.

13. On 22 April 1999 the Chamber received certain information relating to the case from the Banja Luka office of the OSCE (see paragraph 8 above). This information is to the effect that the dismissal of the applicant was not in accordance with the laws of the Republika Srpska and that the applicant's complaint to the Institute against her dismissal was rejected. On 10 July 1995 a hearing was held in the case. The Court has repeatedly requested the Institute to submit all relevant documentation relating to the applicant to it, which has not been done to date. The reason given for this is that the Institute's building is being renovated and the Institute does not have access to the information at present.

B. Relevant legislation

14. Article 434 of the 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.

IV. COMPLAINTS

15. The applicant complains that her right to work has been violated.

V. SUBMISSIONS OF THE PARTIES

16. The respondent Party has not made any submissions regarding the application.

17. The applicant maintains her complaint. She states that the Court has remained completely passive in relation to her proceedings.

VI. OPINION OF THE CHAMBER

A. Admissibility

18. 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. Competence *ratione temporis*

19. The Chamber must consider to what extent it is competent *ratione temporis* to consider the case, bearing in mind that the dismissal of the applicant occurred in 1993, prior to the entry into force of the Agreement. The Chamber has previously held that it can only consider events that occurred after the entry into force of the Agreement (see e.g. case no. CH/97/67, *Zahirović,* decision on admissibility and merits delivered on 8 July 1999, paragraph 104, Decisions January-July 1999). Accordingly, the dismissal of the applicant cannot be considered by the Chamber as it occurred prior to the entry into force of the Agreement and is therefore outside the Chamber's competence *ratione temporis*.

20. The applicant's proceedings before the Court have been pending since 11 February 1993. The time that the Chamber can take into account commences on 14 December 1995, the date of entry into force of the Agreement.

21. Accordingly, the Chamber is competent to examine the case insofar as it relates to the conduct of the applicant's proceedings insofar as they have continued after 14 December 1995.

2. Requirement to exhaust effective domestic remedies

22. 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.

23. As noted above, the applicant initiated proceedings against her dismissal before the Court on 11 February 1993. These proceedings are still pending. There is no ordinary remedy available to the applicant in the legal system of the Republika Srpska against the failure of the Court to decide on her proceedings. Accordingly, the Chamber does not consider that there is any effective remedy available to the applicant which she should be required to exhaust. In addition, the Chamber notes that the respondent Party has not sought to claim that there is any effective remedy available to the applicant.

24. 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 insofar as it relates to the continuation of the applicant's domestic proceedings after 14 December 1995.

B. Merits

25. 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

26. Although the applicant did not specifically allege a violation of her rights as guaranteed by this provision, she complained in a general manner of the length of the proceedings she initiated before the Court. Accordingly, 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.

27. Article 6 of the Convention, insofar as relevant to the present case, reads 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...."

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

29. The Chamber must examine whether the dismissal of the applicant from her employment concerns a "civil right" within the meaning of Article 6 of the Convention. The Chamber notes that it has already held that matters concerning employment relate to "civil rights" (see *Zahirović, sup. cit.*, paragraph 135). Article 6 is therefore applicable to the proceedings in question.

30. The Chamber has already noted that the applicant initiated proceedings before the Court on 11 February 1993. However, for the reasons set out at paragraph 19 above, the period of time that may be taken into account by the Chamber in its consideration of the case commences on 14 December 1995, the date of entry into force of the Agreement. The Chamber must therefore consider whether this period of time has been reasonable within the meaning of the first paragraph of Article 6 of the Convention.

31. Accordingly, the period of time that may be taken into account by the Chamber is three years and nine months (as of September 1999). The Chamber must also take into account the state of proceedings as at the date of entry into force of the Agreement. At that time, they had already been pending for two years and approximately ten months, one hearing having been held.

32. The Chamber has held that the factors to be taken into account in determining whether the length of civil proceedings has been reasonable are as follows: the complexity of the case, the conduct of the applicant and the conduct of the national authorities (case no. CH/97/54, *Mitrović,* decision on admissibility of 10 June 1998, paragraph 12, Decisions and Reports 1998).

(a) The complexity of the case

33. According to the information contained in the Chamber's file, the case does not appear to be a complex one. It concerns a dispute over the termination of the applicant's employment by her employer. The core of the dispute appears to be whether the reason given by the Director of the Institute for the termination of the applicant's employment was a valid one under the law of the Republika Srpska or not.

(b) The conduct of the applicant

34. On the basis of the information provided to the Chamber, there does not appear to be any conduct on the part of the applicant which could be considered to be responsible for the delay in the proceedings.

(c) The conduct of the national authorities

35. The Chamber notes that there has been one hearing held in the case to date, on 10 July 1995. The apparent reason (see paragraphs 12-13 above) for the failure to decide on the case is the failure of the Institute to supply certain information to the Court. The Chamber cannot accept that this is a valid reason for the proceedings to have lasted as long as they have. The reason given by the Institute for the failure to supply the requested information is not only dubious in itself, but even if it were true could not have lasted for such a long period as in the present case. The response of the Court, however, has been merely to repeat the request. The Chamber considers that the conduct of the Court has therefore been unreasonable. Faced with such apparent non-cooperation by one of the parties to proceedings before it, the Court could have considered the use of coercive powers to force the Institute to comply with the request, or decided the case in the absence of such information. In addition, national law requires employment disputes to be dealt with as a matter of urgency.

36. Accordingly the Chamber considers that the conduct of the Court has been unreasonable as it has remained passive as regards the failure of the Institute to supply the information requested by it.

37. The Chamber therefore finds that the length of time that the applicant's proceedings have been pending before the Court is unreasonable and that the applicant's right to a fair trial within a reasonable time guaranteed by Article 6 paragraph 1 of the Convention has been violated as a result.

2. The right to work

38. The applicant claimed that her right to work had been violated. This right is not guaranteed by the Agreement. Accordingly the Chamber cannot consider whether the applicant's right to work has been violated, except in the context of possible discrimination.

3. Article I(14) of the Agreement

39. The applicant did not claim that she had been a victim of a violation of Article I(14) of the Agreement which prohibits discrimination in the enjoyment of the rights as referred to in Annex 6. 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.

40. Under Article II(2)(b), the Chamber has jurisdiction to consider complaints of alleged or apparent discrimination on a wide range of grounds in the enjoyment of the rights guaranteed in the instruments appended to Annex 6. After its examination of the case, the Chamber does not consider it established that the applicant has been discriminated against in the enjoyment of any of the rights guaranteed by Article I(14) of the Agreement.

VII. REMEDIES

41. 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.

42. The Chamber notes that the applicant claimed KM 15,500 for lost salaries and social insurance for the period since she was dismissed.

43. The Chamber has already found that the applicant's dismissal is outside its competence *ratione temporis* (see paragraphs 19-21 above). Accordingly, the Chamber cannot award the applicant compensation for lost salaries or other pecuniary matters relating to her dismissal. In addition, the Chamber cannot award the applicant any sums relating to the period after the entry into force of the Agreement, as the applicant's domestic proceedings have not yet been decided and therefore the Chamber is not in a position to decide whether the applicant should have been reemployed by the Institute.

44. The Chamber notes that it has found a violation of the applicant's right to a fair hearing within a reasonable time as guaranteed by Article 6(1) of the Convention. It considers it appropriate to order the respondent Party to take all necessary steps to ensure that the applicant's proceedings are decided upon in a reasonable time by the Court and that the continued proceedings are conducted entirely in accordance with the applicant's rights as guaranteed by the Agreement.

VIII. CONCLUSION

45. For the above reasons, the Chamber decides,

1. by 6 votes to 1, to declare the application admissible insofar as it relates to the continuation of the applicant's proceedings after 14 December 1995;

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

3. by 6 votes to 1, that the failure of the Court of First Instance to decide upon the applicant's court proceedings against her dismissal constitutes a violation of her right to a fair trial within a reasonable time in the determination of her civil rights and obligations within the meaning of Article 6 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that there has been no violation of the applicant's rights as guaranteed by Article I(14) of the Agreement;

5. unanimously, to order the Republika Srpska to take all necessary steps to ensure that the applicant's proceedings before the Court of First Instance are decided upon in a reasonable time and in accordance with the applicant's rights as guaranteed by the Agreement; and

6. unanimously, to order the Republika Srpska to report to it by 8 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 First Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 May 2000)

Case no. CH/98/1195

Rahima LISAC

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 8 May 2000 with the following members present:

Ms. Michèle PICARD, President
Mr. Andrew GROTRIAN, Vice-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 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 case concerns the attempts of the applicant, a citizen of Bosnia and Herzegovina of Bosniak descent, to regain possession of an apartment in Banja Luka of which she is the owner. She lived in the apartment until September 1995, when she vacated it and entered into a contract for the rental of the apartment with a private individual. She claims that she was forced by that individual to enter into the contract. The applicant has initiated administrative and judicial proceedings to regain possession of the apartment, so far without success.

2. The case raises issues under Articles 6 and 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 submitted on 28 September 1998 and registered on the same day.

4. On 18 January 1999 the Chamber requested certain factual information from the applicant. Her reply was received on 5 February 1999.

5. On 26 July 1999 the application was transmitted to the respondent Party for its observations on its admissibility and merits, which were received on 28 September 1999.

6. The applicant's further observations, including a claim for compensation, were received on 13 October and 8 November 1999 and transmitted to the respondent Party on 14 October and 12 November 1999. The respondent Party was requested to submit observations on the claim for compensation submitted by the applicant but did not do so.

7. On 18 February 2000 the Chamber requested certain further factual information from the applicant, which was received on 10 March 2000 and sent to the respondent Party for information on 15 March 2000.

8. The Chamber deliberated on the admissibility and merits of the application on 4 April and 8 May 2000.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

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

10. The applicant is a citizen of Bosnia and Herzegovina of Bosniak descent. She resided in an apartment located at Jevrejska 24/II in Banja Luka. After the death of her husband in 1991, his occupancy right over the apartment was transferred to the applicant by the holder of the allocation right over the apartment, the Yugoslav National Army ("JNA"). She subsequently entered into a contract for the purchase of the apartment. On 8 December 1997 this contract, which is not dated, was approved by the Court of First Instance in Banja Luka and the applicant was duly registered in the land registry as the owner of the apartment.

11. In the course of 1995 a private individual, V.Đ., exerted pressure on the applicant to vacate the apartment, as he wished to reside there. This pressure consisted of repeated visits by armed men and threats of violence against the applicant if she did not vacate the apartment. On 9 September 1995 the applicant vacated the apartment, having been forced to enter into a contract with V.Đ., under which he was entitled to occupy the apartment. This contract, signed by the applicant and V.Đ., was for a period of two years. On 15 October 1995 the High Commission for

Accommodation of the Bosnian Serb Army declared the apartment abandoned. V.Đ. now refuses to vacate the apartment. The applicant has since lived at various temporary addresses in Banja Luka.

12. On 4 June 1996 the applicant initiated proceedings before the Court of First Instance in Banja Luka against V.Đ., requesting the termination of the rental contract of 9 September 1995 and requesting that she be entitled to regain possession of the apartment.

13. The applicant made various additional submissions to the court regarding her proceedings. On a number of occasions she requested the court to expedite its proceedings in the case. On 18 February 1998 she amended her proceedings in view of the fact that the contract for rental of the apartment of 9 September 1995 had expired. The amendment of the proceedings was thus to reflect the fact that she no longer requested the termination of the contract, but solely requested to be allowed to regain possession of the apartment. At a hearing held before the court on 21 January 1999, V.Đ. presented a copy of a decision of the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Banja Luka, a department of the Ministry for Refugees and Displaced Persons, dated 11 April 1997. This decision allocated the apartment to V.Đ. and stated that the apartment was considered to be abandoned. The applicant had not been delivered a copy of this decision and this was the first time she became aware of its existence.

14. On 4 February 1999 the Court of First Instance issued its decision in the applicant's proceedings. It declared itself incompetent to deal with the matter as it concerned abandoned property. The court stated that matters concerning abandoned property are to be dealt with by the Ministry in administrative proceedings. On 12 March 1999 the applicant appealed to the Regional Court in Banja Luka against this decision. According to the latest information available to the Chamber, there has been no decision upon her appeal to date.

15. On 24 January 1999 the applicant appealed to the Ministry for Refugees and Displaced Persons against the decision of 11 April 1997 allocating the apartment to V.Đ. The grounds of her appeal were that she had never left Banja Luka and that she only vacate the apartment due to the pressure of V.Đ. No decision has been issued on this appeal to date.

16. On 26 March 1999 the applicant applied under the Law on the Cessation of the Application of the Law on the Use of Abandoned Property to be allowed to regain possession of the apartment. On 1 July 1999 the Commission ordered that the apartment be returned into her possession within 90 days of the date of the decision. It also stated that the right of V.Đ. to occupy the apartment would cease upon the expiry of that period. The decision also stated that V.Đ. was to be granted alternative accommodation by the Ministry before the expiry of the 90-day period referred to above for the return of the apartment into the applicant's possession. On 14 July 1999 the applicant appealed against this decision, on the ground that V.Đ. was not entitled to be allocated alternative accommodation. There has, according to the information available to the Chamber, been no decision on this appeal to date. The applicant claims that she will, in fact, be unable to regain possession of the apartment as long as V.Đ. has the right to be granted alternative accommodation, as there is at present a chronic shortage of such accommodation.

17. On 23 November 1996 the applicant appealed to the relevant authorities of the Army of the Republika Srpska against the decision of the High Commission for Accommodation of 15 October 1995 declaring the apartment to be abandoned. On 29 November 1996 this commission wrote to the applicant, stating that her complaint would not be considered as it was not lodged within the relevant time and in any event that organ no longer had competence to deal with the apartment (as it was abandoned and therefore to be administered by the Ministry). On 5 December 1996 the applicant appealed against this decision. There has been no decision on this appeal to date.

18. The applicant has not yet regained possession of the apartment and her administrative and court proceedings are still pending before the relevant organs of the Republika Srpska. She currently lives in Banja Luka with friends.

B. Relevant legislation

1. Constitution of the Republika Srpska

19. Article 121 of the Constitution of the Republika Srpska 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."

2. The Law on Use of Abandoned Property

20. 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 was published in the OG RS on 26 February 1996 and entered into force the following day. It established a legal framework for the administration of abandoned property. Accordingly, it defined what forms of property were to be considered as abandoned and set out the categories of persons to whom abandoned property could be allocated. The provisions of that law, insofar as they are relevant to the present case, are summarised below.

21. 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 records of abandoned property. Types of property which could be declared abandoned include apartments (both privately and socially owned) and houses.

22. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, under 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

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

23. 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. It puts the old law out of force.

24. 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.

25. 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.

26. Upon receipt of an application, 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.

27. 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.

28. Article 8 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. 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.

29. 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.

30. Article 10 states that proceedings concerning return of property shall, unless otherwise specified, be carried out in accordance with the Law on Administrative Proceedings and treated as an expedited procedure.

31. 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.

32. 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.

4. The Law on General Administrative Proceedings

33. The Law on General Administrative Proceedings (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.

34. 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 Proceedings. Under Article 3, all issues that are not regulated by a special law are to be regulated by the Law on Administrative Proceedings.

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

36. 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.

37. 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.

38. 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.

39. Under Article 277(1), administrative execution shall be carried out by the administrative body which issued the first instance decision, unless a different procedure is provided for by law.

40. Article 286 states that if the person against whom execution is ordered does not comply with the decision, the administrative body which made the decision shall ensure the execution of the decision. The administrative body shall warn the person against whom execution is ordered that if he or she does not comply with the decision within a specified period that forceful means shall be employed to ensure execution of the decision. If he or she fails to comply with the decision within this specified period, the threatened means shall be applied and further stronger, means shall be threatened.

41. Article 287 provides for the use of direct force to ensure the execution of a decision which cannot be executed using the procedure provided for under Article 286 above.

IV. COMPLAINTS

42. The applicant complains of violations of her rights as guaranteed by Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

V. SUBMISSIONS OF THE PARTIES

43. The respondent Party, in its observations on the admissibility and merits of the application, refers to the administrative and court proceedings initiated by the applicant. It states that these proceedings are still pending before the competent organs of the Republika Srpska.

44. The respondent Party claims that the matter essentially involves a private dispute between the applicant and V.Đ. In addition, it claims that the proceedings before the Court of First Instance have not lasted an excessively long period of time, especially in view of the fact that the applicant amended her proceedings and thereby is herself responsible for the length of time they have lasted.

45. Concerning the administrative proceedings initiated by the applicant, the respondent Party points out that the Commission issued a decision on 1 July 1999 (see paragraph 16 above) entitling the applicant to regain possession of the apartment.

46. In conclusion, the respondent Party states that the application should be declared inadmissible as manifestly ill-founded.

47. The applicant maintains her complaint. She claims that her court proceedings have lasted an unreasonably long time, due to the actions of the court. She denies that she has contributed to the delay in the proceedings. She claims that the conduct of the authorities of the respondent Party in the administrative proceedings has been such as to deny her the right to regain possession of the apartment, of which she is the registered owner.

VI. OPINION OF THE CHAMBER

A. Admissibility

48. 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. 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.

49. In the *Onić* case (case no. CH/97/58, decision on admissibility and merits delivered on 12 February 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."

50. The Chamber notes that in June 1996, the applicant initiated proceedings before the Court of First Instance in Banja Luka, seeking to regain possession of the first apartment. However, these proceedings were rejected by the court and the applicant's appeal is currently pending before the Regional Court (see paragraph 14 above).

51. 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, finding that 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 does not appear to be an effective remedy.

52. The Chamber notes that the applicant has applied under the new law to regain possession of the apartment. On 1 July 1999 the Commission issued a decision entitling her to regain possession of it and granting the current occupant the right to alternative accommodation. The applicant's appeal against the latter part of the decision is still pending. The reason for her appeal was that she claims that the current occupant will not be evicted unless and until he is provided with alternative accommodation, which has not yet happened.

53. As the Chamber noted in its decision in *Eraković* (case no. CH/97/42, decision on admissibility and merits delivered on 15 January 1999, paragraph 40, Decisions January-July 1999) a remedy such as that provided for by the law applicable in the Federation of Bosnia and Herzegovina, analogous to the new law in the Republika Srpska, could in principle qualify as an effective one. The Chamber finds that its analysis in that case applies equally to the new law, i.e. the Republika Srpska law, relevant to the present case.

54. In the *Eraković* case, the Chamber considered the factual background to the case in the context of its admissibility. It held that the circumstances of that case, including the failure to adhere to the relevant time-limits, meant that the applicant could not be required to exhaust any further remedy provided for by national law. The Chamber finds that the same applies in the present case, especially in view of the fact that, despite the clear statement in the new law (see paragraph 27 above) that any failure by the relevant organ to provide a temporary occupant with alternative accommodation cannot delay the return of the pre-war owner, no steps have been taken to restore possession of the apartment to the applicant. In addition, the Commission in Banja Luka has not complied with the part of the decision ordering it to provide the current occupant with alternative accommodation.

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

56. The respondent Party claims that the application is manifestly ill-founded. The reasons it gives in support of this claim (see paragraphs 43-45 above) essentially relate to the question of exhaustion of domestic remedies, which the Chamber has considered above. The Chamber does not consider that there are any grounds for considering the application to be inadmissible as manifestly ill-founded and accordingly there is no reason to declare the application inadmissible on this ground.

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

B. Merits

58. 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. 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

59. The applicant claimed that her right to a fair trial as protected by Article 6 of the Convention had been violated. 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 ...."

60. The respondent Party claimed that the applicant's proceedings before the Court of First Instance in Banja Luka had not lasted an unreasonably long time and that in any event the applicant had contributed to the length of those proceedings by amending her complaint.

61. 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. case no. CH/98/659 *et al., Pletilić and others,* decision on admissibility and merits delivered on 10 September 1999, paragraph 191, Decisions August-December 1999).

62. The Chamber notes with concern the length of the proceedings before the court, especially in view of the fact that the applicant is seeking to regain possession of an apartment of which she is the undisputed owner. In addition, even if the contract for rental of the apartment signed by the applicant with V.Đ. on 9 September 1995 could be considered to have been valid, it expired in September 1997. In addition, the decision of the Commission of 11 April 1997 purporting to allocate the apartment to him was clearly not in accordance with the law in force at the time, as the apartment could not be considered to be abandoned as the applicant had already initiated court proceedings to regain possession of it. Accordingly, since September 1997, there has been absolutely no doubt that V.Đ. is an illegal occupant. However, the Chamber does not consider it necessary to decide upon the reasonableness of the length of the applicant's proceedings for the following reasons.

63. As the Chamber has already noted, the applicant initiated proceedings before the Court of First Instance in Banja Luka on 4 June 1996, requesting that she be entitled to regain possession of the apartment. On 4 February 1999 the court declared itself incompetent to deal with the matter, as proceedings concerning return of property should be dealt with by the Ministry, in administrative proceedings. The applicant's appeal against this decision is still pending before the Regional Court in Banja Luka. As the Chamber has noted above (see paragraph 51), the courts of the Republika Srpska have a practice of suspending consideration of claims for repossession of abandoned and other property, holding that such questions are to be determined by administrative proceedings before the Ministry.

64. The Chamber notes that Article 121 of the Republika Srpska 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 19 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 court jurisdiction over property that was considered to be abandoned (see *Pletilić and others,* sup. cit., paragraph 194).

65. Nevertheless, the practical effect of the decision of the court of 4 February 1999 is that it is impossible for the applicant to have the merits of her civil action for the return into her possession of the apartment, which she owns, determined by a tribunal within the meaning of Article 6 paragraph 1 of the Convention. Accordingly, there has been a violation of her right to effective access to court as guaranteed by Article 6 paragraph 1 of the Convention.

2. Article 8 of the Convention

66. The applicant alleged a violation of her right to respect for her home as protected by Article 8 of the Convention. Article 8 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."

67. The Chamber notes that the applicant lived in the apartment until September 1995, when she left and V.Đ. entered into possession of it in pursuance of a contract he concluded with the applicant. The Chamber has previously held that persons seeking to regain possession of properties they lost possession of during the war retain sufficient links with those properties for them to be considered their "home" within the meaning of Article 8 of the Convention (see, e.g., case no. CH/98/777, *Pletilić,* decision on admissibility and merits delivered on 8 October 1999, paragraph 74, Decisions August-December 1999). The Chamber therefore considers that the apartment is the applicant's "home" for this purpose.

68. The applicant has not claimed that the respondent Party or any body for whose actions it is responsible were responsible for her leaving the apartment. In any event she vacated the apartment before the entry into force of the Agreement, so the Chamber has no competence *ratione temporis* to consider the circumstances in which the applicant vacated the apartment.

69. V.Đ. received a decision of the Commission on 11 April 1997 entitling him to reside in the apartment. This decision was issued despite the fact that the applicant never abandoned the apartment, but rather entered into a contract for the rental of it with V.Đ. The Chamber does not consider it necessary for the purposes of the present case to determine whether she did so as a result of undue pressure. It is sufficient to note that as of the date of the decision of 11 April 1997 the applicant's court proceedings to regain possession of the apartment had been pending for over ten months. Accordingly, the apartment cannot be considered to have been abandoned. As a result, the decision of the Commission of 11 April 1997 was clearly not in accordance with the old law (see paragraph 21 above).

70. As noted above (see paragraphs 12-18), the applicant has initiated court and administrative proceedings seeking to regain possession of the apartment. However, these proceedings have been unsuccessful to date and she has not yet regained possession of that apartment. The decision of the Commission of 1 July 1999 grants the applicant the right to regain possession of her apartment and grants the current occupant the right to alternative accommodation (see paragraph 16 above). The respondent Party has not shown that the relevant authorities have taken any steps to provide V.Đ. with such accommodation and the Chamber has no evidence that this has occurred. The practical consequence of this failure appears to be that the prospects of the applicant regaining possession of her apartment are remote while V.Đ. is not provided with alternative accommodation and the respondent Party is responsible for this.

71. Therefore, the applicant has been unable to regain possession of the first apartment due to the failure of the authorities of the Republika Srpska to deal effectively with her various applications in this regard, which she commenced in June 1996. In addition, during these proceedings the Commission issued a decision granting V.Đ. the right to occupy the apartment. As a result, the

respondent Party is responsible for the interference with the right of the applicant to respect for her home as of 11 April 1997, the date of the decision of the Commission. This interference is ongoing as the applicant has not yet regained possession of the apartment.

72. The Chamber must therefore examine whether this interference has been in accordance with paragraph 2 of Article 8 of the Convention.

73. For an interference to be justified under the terms of paragraph 2 of Article 8 of the Convention, it must be "in accordance with the law", serve a legitimate aim and be "necessary in a democratic society". There will be a violation of Article 8 if any one of these conditions is not satisfied.

74. As the Chamber has pointed out at paragraph 69 above, the decision of the Commission of 11 April 1997 allocating the apartment to V.Đ. for his use was not in accordance with the old law. Therefore it cannot be considered to have been in accordance with the law as required by paragraph 2 of Article 8 of the Convention.

75. In addition, as the Chamber has noted in the context of its examination of the case under Article 6 of the Convention (see paragraph 63 above), the Court of First Instance in Banja Luka rejected the applicant's application to regain possession of her home, as it considered itself incompetent in such matters. The Chamber has found that this is not in accordance with the Constitution of the Republika Srpska. Accordingly, the failure of the court to decide upon the applicant's proceedings is not "in accordance with the law" as required by paragraph 2 of Article 8.

76. 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".

77. 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 and this violation is ongoing.

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

78. The applicant claimed that her right to peaceful enjoyment of her possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention has been violated. This provision 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."

79. The Chamber notes that the applicant is the registered owner of the apartment. Accordingly, the apartment constitutes her "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention.

80. The Chamber considers that the failure of the authorities of the Republika Srpska to allow the applicant to regain possession of the apartment constitutes an interference with her right to peaceful enjoyment of her possession. This interference is ongoing as the applicant still does not enjoy possession of the apartment.

81. 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. This means that the deprivation must have a basis in national law and that the law concerned must be both accessible and sufficiently precise.

82. The Chamber has found, in the context of its examination of the case under Article 8 of the Convention, that the allocation of the apartment to V.Đ by the Commission on 11 April 1997 and the

failure of the authorities to enable the applicant to regain possession of the apartment was not in accordance with 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 right of the applicant under this provision has been violated and this violation is ongoing.

VII. 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 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.

84. The Chamber considers it appropriate to order the respondent Party to take all necessary steps to enable the applicant to regain possession of the apartment without further delay.

85. The applicant has submitted a claim for compensation. The respondent Party did not submit any observations on this claim.

86. The applicant requests compensation for material damages in the sum of 300 German marks per month from 1 June 1996, totaling 11,700 German Marks as of the date of lodging her claim for compensation. She does not substantiate this claim in any way.

87. The Chamber does, however, consider it appropriate to award the applicant monetary compensation, as she has undoubtedly suffered stress as a result of the fact that, despite initiating various administrative and court proceedings, she has been unable to regain possession of her apartment. As the Chamber has found, this is due to the actions of the authorities of the Republika Srpska. The Chamber considers that the Republika Srpska can only be considered to be responsible for this stress as and from the passing of a reasonable time after the applicant's first steps to regain possession of the apartment, i.e. when she initiated court proceedings in June 1996. The Chamber therefore considers that a reasonable sum to award the applicant in respect of the loss of use of her apartment and moral suffering is 2,500 Convertible marks (*Konvertibilnih Maraka*, "KM"). It will accordingly award the applicant this sum. Additionally, the Chamber awards 4% (four per cent) interest as of the date of expiry of the period set for the implementation of the present decision, on the above sum.

VIII. CONCLUSION

88. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the impossibility for the applicant to have the merits of her civil action determined by a tribunal constitutes a violation of her right to effective access to court within the meaning of Article 6 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 and continues to be a violation of the right of the applicant to respect for her home within the meaning of Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, that there has been and continues to be 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 Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, to order the Republika Srpska, as soon as possible and in any event 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, to take all necessary steps to ensure that the applicant regains possession of her apartment, located at Jevrejska 24/II in Banja Luka, Republika Srpska;

6. by 5 votes to 1, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 2,500 (two thousand five hundred) Convertible marks as compensation for the loss of use of her apartment and for moral suffering;

7. unanimously, to reject the remainder of the applicant's claim for compensation as unsubstantiated;

8. by 5 votes to 1, to order that simple interest at an annual rate of four per cent will be payable on the sum awarded in conclusion 6 above after the expiry of the period set in that conclusion for the payment of that sum; and

9. unanimously, to order the Republika Srpska to report to it, within two weeks of the expiry of the time-limit referred to in conclusion 5 above, 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 8 October 1999)

Case no. CH/98/1198

Božidar GLIGIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 9 September 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 occupies a house located at Zmijanjska Street No. 38, Banja Luka ("the house"). On 16 August 1995 the applicant entered into a rental agreement with the owners of the house. The contract was made for an indefinite period of time and validated by the Municipality of Banja Luka. On 14 September 1998 the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Banja Luka ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry") issued a decision concerning the house. This decision declared the applicant to be an illegal occupant of the house and ordered him to vacate it within three days under threat of forcible eviction.

2. The case raises issues principally under Articles 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 30 September 1998 and registered on the same day. The applicant requested that the Chamber order a provisional measure to take all necessary action to prevent his eviction.

4. On 30 September 1998 the President of the Chamber ordered, pursuant to Rule 36(2), the respondent Party to refrain from evicting the applicant from the house. 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.

5. On 28 October 1998 the Chamber decided, pursuant to Rule 49(3)(b) of the Rules of Procedure to transmit the application 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 28 November 1998.

6. No observations were received from the respondent Party.

7. 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 18 February 1999.

8. On 7 June 1999 the First Panel decided to ask the applicant whether the decision of the Commission of 14 September 1998 was still in force and whether there still was any threat of his being evicted from the house. On 18 June 1999 the Registry wrote to the applicant requesting this information. On 5 July 1999 his reply was received.

9. The First Panel deliberated upon the admissibility and merits of the application on 9 September 1999, and adopted its decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

10. 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.

11. The applicant occupies a house located at Zmijanjska Street No. 38, Banja Luka, Republika Srpska. On 16 August 1995, he entered into a contract with the owners of the house, Mr. and Mrs. O, who were leaving Banja Luka. The main terms of the contract are that it is valid for an indefinite period or until the owners return to Banja Luka. The applicant is entitled to use one floor of the

house. No rent is payable. The applicant is obliged to pay regular expenses for power, water etc. The contract was verified by the Municipality of Banja Luka.

12. On 14 September 1998 the Commission issued a decision declaring the applicant to be an illegal occupant of the house under Article 10 of the Law on the Use of Abandoned Property (see paragraph 19 below). This decision ordered the applicant to vacate the house within three days of the date of delivery, under threat of forcible eviction. The applicant received this decision on an unspecified date in September 1998. He appealed to the Ministry on 17 September 1998, on the basis that he could not be considered to be an illegal occupant of the house as he had entered into a contract with the owner which entitled him to use it. The applicant has not received any response to this appeal to date.

13. On 29 September 1998 there was an attempt to evict the applicant. The applicant managed to postpone the eviction. He still occupies the house.

B. Relevant legislation

1. Constitution of the Republika Srpska

14. Article 56 of the Constitution of the Republika Srpska ("the Constitution") reads as follows:

> "In accordance with the law, rights of ownership may be limited or expropriated against payment of equal compensation."

15. 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."

2. The Law on the Use of Abandoned Property

16. The Law on the Use of Abandoned Property (Official Gazette of Republika Srpska – hereinafter "OG RS" – no. 3/96) ("the Law") was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It was published 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 Law, insofar as they are relevant to the present case, are summarised below.

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

18. Article 3 of the 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.

19. Article 10 of the 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.

20. Article 15 of the 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."

21. Article 15A of the 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.

22. The Law also provides, in Article 17, for the accommodation of refugees and displaced persons in properties still occupied, if there is insufficient abandoned property available to accommodate them. This may be done in cases where the current occupiers of a property have over 15 square metres of space per household member.

23. Articles 39 and 40 of the Law set out the terms upon which the owner of a property which has been declared abandoned may seek to regain possession of it.

24. Article 49 of the Law reads as follows:

> "Lease agreements as well as agreements relating to the use and protection of abandoned apartments and other property entered into after 6 April 1992 between an owner or user who has left the territory of the Republika Srpska and other persons are null and void."

25. Article 53 of the Law reads as follows:

> "The owners or users of real and other property situated in the Republika Srpska who left the territory of the Republika Srpska after 6 April 1992 cannot deal with their property through an authorised person."
>
> Contracts or agreements referred to in the above paragraph relating to the disposal of real and other property concluded after the entry into force of this Law are invalid. In such situations, certification of the signatures of parties to such a contract may not be carried out by the responsible authorities.
>
> (…)"

26. Article 56 of the Law states that the procedure of allocation of abandoned property is to be carried out in accordance with the provisions of the Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – no. 47/86), if not otherwise specified in the Law.

27. Under Article 62, the Law is to enter into force on the day after its publication in the Official Herald of the Republika Srpska.

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

28. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98) establishes a detailed framework for persons to regain possession of property considered to be abandoned under the Law. It puts the Law on the Use of Abandoned Property out of force.

4. The Law on General Administrative Procedures

29. The Law on General Administrative Procedures (OG SFRY 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.

30. 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.

31. 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."

32. 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.

5. The Law on Administrative Disputes

33. 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.

6. The Decision on Cessation of State of War and Immediate Threat of War

34. The Decision on Cessation of State of War and Immediate Threat of War (OG RS no. 15/96) was adopted on 19 June 1996 and entered into force on 8 July 1996.

7. The Decree on Court Taxation

35. 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

36. The applicant complains of violation of his rights from the contract he entered into with the owners of the house.

V. SUBMISSIONS OF THE PARTIES

37. The respondent Party has not made any submissions regarding the application.

38. The applicant maintains his complaint and also states that the decision ordering his eviction is still in force, and that therefore there is still a threat of his being evicted from the house.

VI. OPINION OF THE CHAMBER

A. Admissibility

39. 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.

40. 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.

41. The applicant lodged an appeal to the Ministry against the decision of the Commission of 14 September 1998. However, the lodging of such an appeal does not have any suspensive effect.

42. 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 80 at current rates.

43. 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.

44. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 14 September 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 (see, e.g., case no. CH/98/645, *Blagojević*, decision on admissibility and merits delivered on 11 June 1999, Decisions January – July 1999).

45. 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

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.

1. Article 8 of the Convention

47. 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:

> "Everyone has the right to respect for ..., his home ...
>
> 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."

48. The Chamber notes that the applicant has lived in the house since August 1995. It is therefore clear that the house is to be considered as his "home" for the purposes of Article 8 of the Convention. The Chamber has already held that the threatened eviction of a person from their home constitutes an "interference by a public authority" with the exercise of the right to respect for 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 of 14 September 1998 ordering the applicant's eviction from the house therefore constitutes an "interference by a public authority" with his right to respect for his home. This decision has not been revoked to date and accordingly the interference is ongoing.

49. 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 *Blagojević,* paragraph 51). There will be a violation of Article 8 if any one of these conditions is not satisfied.

50. The Chamber notes that Article 2 of the 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 house in the present case. Nor is there any other indication available to the Chamber that such an entry was made. Therefore, the requirements of the Law were not adhered to in the present case. Accordingly, the decision of the Commission of 14 September 1998 cannot be considered to have been "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention.

51. Even if the decision of the Commission of 14 September 1998 could be considered to be "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention, it must also have pursued a legitimate aim and be "necessary in a democratic society". Even if the aim of the law can be considered to be a legitimate one, the means adopted to achieve those aims are not proportional. The aim of the Law is the provision of accommodation for refugees and displaced persons on the territory of the Republika Srpska. This may be considered to be a legitimate aim, given the large number of such persons whom the Republika Srpska is required to accommodate. However, the retrospective nullification by Article 49 of the Law (see paragraph 24 above) of the applicant's contract (see paragraph 11 above), which he had entered into in good faith, and in accordance with the terms of which he has occupied the house since August 1995, cannot be considered to be proportional to that aim.

52. Accordingly, the Chamber considers that there has been a violation of the applicant's rights as guaranteed by Article 8 of the Convention.

2. Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention

53. In view of its findings under Article 8 of the Convention, the Chamber does not consider it necessary to examine the case under Articles 6 and 13 of the Convention and 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 proceedings in the case the applicant was afforded the possibility of claiming compensation. He did not do so.

56. The Chamber notes that the Law has been put out of force by the adoption of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property. 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 Law.

57. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission ordering the eviction of the applicant from the house in question and to take no further steps to disturb the applicant's occupancy of the house in accordance with the terms of his contract with the owner.

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 Resettlement of Refugees and the Administration of Abandoned Property in Banja Luka of 14 September 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the house he currently occupies, constitutes a violation of his right to respect for his home within the meaning of Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

3. unanimously, that it is not necessary to rule on the application under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention;

4. unanimously, to order the respondent Party to revoke the decision of the Commission for the Resettlement of Refugees and the Administration of Abandoned Property in Banja Luka of 14 September 1998 and to allow the applicant to enjoy undisturbed occupancy of the house in accordance with the terms of his contract with the owners of 16 August 1995; and

5. unanimously, to order the respondent Party to report to it by 8 January 2000 on the steps taken by it to comply with the above order.

(signed)	(signed)
Anders MÅNSSON	Michèle PICARD
Registrar of the Chamber	President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 8 September 2000)

Case no. CH/98/1221

Ljiljana OKULIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 6 July 2000 with the following members present:

Mr. Viktor MASENKO-MAVI, Acting 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 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The case concerns the attempts of the applicant, a citizen of Bosnia and Herzegovina, to regain possession of an apartment located at Aleja Svetog Save no. 34 in Banja Luka, over which she holds the occupancy right. She lived in the apartment until 1996, when she vacated it in accordance with a decision of the municipality of Banja Luka. She was allocated another smaller apartment, located at Zmaj Jovine 14 in Banja Luka, which she occupied until April 2000. The applicant initiated various administrative and judicial proceedings to regain possession of the apartment located at Aleja Svetog Save, and on 4 April 2000 succeeded in doing so.

2. The case raises issues under Articles 6 and 8 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted on 13 October 1998 and registered on the same day.

4. The applicant requested that the Chamber order the Republika Srpska as a provisional measure to take all necessary steps to prevent her eviction from the apartment she occupied at the time, located at Zmaj Jovine 14. On 27 October 1998 this request was refused by the President of the Chamber.

5. On 7 June 1999 the applicant's renewed request that the Chamber order a provisional measure preventing her eviction was refused by the Second Panel of the Chamber.

6. On 16 June 1999 the application was transmitted to the respondent Party for its observations on its admissibility and merits, which were received on 29 July 1999.

7. The applicant's further observations, including a claim for compensation, were received on 28 October 1999 and transmitted to the respondent Party on 12 November 1999, whose observations in reply were received on 28 December 1999.

8. On 21 March 2000 the applicant again requested the Chamber to order the respondent Party as a provisional measure to take all necessary steps to prevent her eviction from the apartment she occupied at the time. This request was refused by the Chamber on 6 April 2000. On 30 May 2000 the applicant submitted a further claim for compensation.

9. On 7 March, 12 May and 7 June 2000 the Chamber considered the admissibility and merits of the application. On 6 July 2000 it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

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

11. On 15 December 1982 the relevant organ of the Municipality of Banja Luka decided that the applicant was entitled to succeed into the occupancy right over an apartment located at Aleja Svetog Save 34 ("apartment 1"). On 15 February 1983 she entered into a contract for the use of the apartment and thereby became the holder of the occupancy right over it.

12. On 25 December 1995 the Secretariat for Economy of the Municipality of Banja Luka granted the applicant the occupancy right over an apartment located at Zmaj Jovine 14 ("apartment 2"). At the same time, her occupancy right over apartment 1 was terminated and this apartment was allocated to another person. The decision was stated to be taken in pursuance of the need for rationalisation of housing space in Banja Luka. The legal basis for this decision was stated to be

Articles 23 and 24 of the Law on Housing Relations, as amended (see paragraphs 28-30 below). The decision gave the applicant the right to lodge a complaint against it within eight days to the Executive Board of the Municipality of Banja Luka. She did not do so, claiming that the person who was allocated apartment 1 was the brother of the then Prime Minister of the Republika Srpska, and in the prevailing circumstances she had no prospect of success in seeking to avail herself of any remedies available to her.

13. Following the decision purportedly terminating her occupancy right, the applicant left apartment 1 in February 1996 and entered into possession of apartment 2, which she occupied until she regained possession of apartment 1 on 4 April 2000.

14. The pre-war occupant of apartment 2, which was never declared to be abandoned property, initiated court proceedings to seek to regain possession of it. On 3 February 1998 the Court of First Instance in Banja Luka issued a decision determining that that person was the holder of the occupancy right over it and annulled the contract for the use of it which the applicant had entered into. It also ordered the applicant to vacate the apartment within 15 days under threat of forcible execution. On 28 August 1998 the applicant's appeal against this decision was refused by the Regional Court in Banja Luka. On 12 October 1998 the applicant lodged a request for review of this decision to the Supreme Court of the Republika Srpska. According to the latest information available to the Chamber, there has been no decision on this request to date. The Court of First Instance in Banja Luka issued a number of conclusions authorising the eviction of the applicant from apartment 2. The last of these scheduled her eviction for 7 April 2000.

15. The applicant applied to the Commission for Real Property Claims of Refugees and Displaced Persons ("the Annex 7 Commission"), requesting that it issue a decision confirming her occupancy right over apartment 1. On 17 December 1998 it issued a decision in these terms. The applicant applied to the Court of First Instance, requesting that it order the enforcement of this decision. On 2 April 1999 the court issued its decision and refused to accept her request. The reason it gave for this decision was that the decision of the Annex 7 Commission was not enforceable under the law of the Republika Srpska. On 20 April 1999 the applicant appealed to the Regional Court in Banja Luka against this decision, where her appeal is still pending.

16. On 15 May 1998 the applicant initiated proceedings before the Court of First Instance in Banja Luka against the Municipality of Banja Luka, the Republika Srpska, the relevant housing company and the then occupant of apartment 1. In these proceedings she requested that the decision of the municipality of 25 December 1995 (see paragraph 12 above) be annulled, as well as the contract for use of the apartment between the person who occupied it and the housing company. She also requested that she be entitled to regain possession of it, on the basis that she was the legal holder of the occupancy right over it. On 6 May 1999 the court issued a decision confirming that the applicant was the holder of the occupancy right over apartment 1, declared the contract for use of the apartment between the occupant and the housing company to be void *ab initio* and ordered that person to vacate it within fifteen days. The Republika Srpska appealed to the Regional Court in Banja Luka against the part of the decision declaring the then occupant's contract for the use of the apartment to be void *ab initio*. It did not appeal against the substance of the decision. This appeal is still pending.

17. On 25 April 1999 the applicant applied to the Commission for the Accommodation of Refugees and Displaced Persons and Administration of Abandoned Property in Banja Luka, a department of the Ministry for Refugees and Displaced Persons, to regain possession of apartment 1. On 6 August 1999 it issued a decision in these terms, ordering the then occupant of the apartment to vacate it. On 4 April 2000 the Commission executed this decision and the applicant regained possession of apartment 1. At the same time, she vacated apartment 2.

B. Relevant legislation

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

18. The Law on Cessation of Application of the Law on Use of Abandoned Property of 11 December 1998 (Official Gazette of the Republika Srpska – hereinafter "OG RS" - no. 38/98; "the 1998 law"), as amended, establishes a detailed framework for persons to regain possession of property considered to be abandoned. It puts the Law on the Use of Abandoned Property (OG RS no. 3/96), out of force.

19. Article 3 gives the owner, possessor or user of real property who left 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.

20. 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.

21. Upon receipt of an application, 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 1998 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.

22. 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.

23. Article 8 provides 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. 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.

24. 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.

25. Article 10 states that proceedings concerning return of property shall, unless otherwise specified, be carried out in accordance with the Law on Administrative Proceedings and treated as an expedited procedure.

26. 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 the 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.

27. 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.

2. The Law on Housing Relations

28. The Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 14/84, as amended) establishes a legal regime governing the allocation of socially owned property.

29. Article 23 reads as follows:

"An apartment may be allocated for the use of only one occupancy right holder."

30. Article 24 states, *inter alia*, that socially owned apartments are allocated for use by a decision of the holder of the allocation right over the apartment. Factors to be taken into account by the holder of the allocation right in allocating apartments include the housing situation of the worker concerned and the number of members of his or her family household.

IV. COMPLAINTS

31. The applicant complains of violations of her rights as guaranteed by Articles 6, 8 and 13 of the Convention and also that she has been discriminated against in the enjoyment of those rights.

V. SUBMISSIONS OF THE PARTIES

32. The Republika Srpska refers to the fact that the applicant has initiated judicial and administrative proceedings before the relevant organs of the Republika Srpska, which are still pending. It therefore claims that the applicant has not exhausted the domestic remedies available to her and that the application is therefore inadmissible on this ground.

33. The applicant maintains her complaint. She complains of the length of time it took her to regain possession of apartment 1 and that she had to initiate various judicial and administrative proceedings to this end.

VI. OPINION OF THE CHAMBER

A. Admissibility

34. 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.

35. 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.

36. The Chamber first notes that on 25 December 1995 the applicant's occupancy right over apartment 1 was purportedly terminated (see paragraph 12 above). The applicant did not appeal against this decision, even though she had the right to do so. The applicant claims that the reason for this was that she had no prospect of success. She has not, however, substantiated her claim in this regard. A claim that the remedies available to a person would be ineffective, without any substantiation, cannot support a finding that a person should be relieved of the obligation under the Agreement to exhaust them. This is borne out by the fact that the applicant has now regained possession of apartment 1 in pursuance of a decision of the Ministry. Accordingly, the part of the application concerning the decision of 25 December 1995 is to be declared inadmissible as the applicant did not seek to exhaust the domestic remedies available to her against that decision, nor has she shown that they would have been ineffective in her case.

37. According to Article VIII(3) of the Agreement, the Chamber may at any stage decide, *inter alia*, to strike out an application on a number of grounds, including if the matter has been resolved, provided that this is consistent with the objective of respect for human rights.

38. The applicant complained of the refusal of the Court of First Instance in Banja Luka to order the enforcement of the decision of the Annex 7 Commission of 17 December 1998 (see paragraph 15 above). However, despite this refusal, she has now regained possession of the apartment concerned and therefore the part of the application concerning her regaining possession of apartment 1 has been resolved.

39. Therefore the Chamber considers it appropriate to strike out the part of the application relating to the applicant's reinstatement into apartment 1.

40. Accordingly, the remaining issue in the case is the conduct of the proceedings initiated by the applicant on 15 May 1998 before the Court of First Instance in Banja Luka (see paragraph 16 above). These proceedings (i.e. the appeal from the decision of the Court of First Instance of 6 May 1999) have been pending for a total of over two years. They therefore raise an issue under Article 6 of the Convention as regards the length of the proceedings. The Chamber therefore considers that this part of the application should be declared admissible under Article 6 of the Convention.

41. Accordingly, the application is to be declared admissible insofar as it relates to the conduct of the proceedings initiated by the applicant on 15 May 1998.

B. Merits

42. 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.

43. The applicant complains of the length of the proceedings leading to her regaining possession of apartment 1. This complaint is to be considered under Article 6 paragraph 1 of the Convention which, 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 ...."

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

45. The Chamber recalls that it has previously held that a dispute concerning an apartment over which a person holds an occupancy right falls within the ambit of Article 6 paragraph 1 of the Convention (see, e.g., case no. CH/97/93*, Matić,* decision on admissibility and merits delivered on 11 June 1999, paragraph 80, Decisions January-July 1999).

46. The Chamber notes that the applicant initiated proceedings before the Court of First Instance in Banja Luka on 15 May 1998, requesting that she be entitled to regain possession of apartment 1.

47. The court issued a decision in her favour on 6 May 1999, which the Republika Srpska, one of the defendants, partly appealed against (see paragraph 16 above). This appeal is still pending. These proceedings have therefore been pending for over two years. The issue may now, however, be moot, as the applicant has regained possession of apartment 1.

48. The Chamber must consider whether these proceedings have lasted a reasonable time, as required by Article 6 of the Convention. In the *Čuturić* case (no. CH/98/1171, decision on admissibility and merits delivered on 8 September 1999, paragraph 32, Decisions August-December

1999), the Chamber held that the factors to be taken into account in deciding whether the length of proceedings has been reasonable are as follows: the complexity of the case, the conduct of the applicant and the conduct of the national authorities.

(i) *The complexity of the case*

49. According to the information available to the Chamber, the dispute was not a complicated one. Under the appropriate law in force in the Republika Srpska, the applicant is the holder of the occupancy right over apartment 1 and entitled to regain possession of it.

(ii) *The conduct of the applicant*

50. There is no information available to the Chamber which would tend to indicate that the applicant is responsible for the delay.

(iii) *The conduct of the national authorities*

51. The Chamber notes that the Court of First Instance issued its decision on the applicant's proceedings on 6 May 1999, just under one year after she initiated them. The Republika Srpska then lodged an appeal against this decision, claiming that part of the decision was incorrect (see paragraph 16 above). This appeal is still pending.

52. The Chamber considers that, although the proceedings have been pending for over two years, this period, while of concern, is not so unreasonably long as to constitute a violation of the rights of the applicant under Article 6 of the Convention.

53. Therefore, the facts of the case do not disclose a violation by the Republika Srpska of any of the rights of the applicant as guaranteed by the Agreement.

VIII. CONCLUSION

54. For the above reasons, the Chamber decides,

1. unanimously, to declare the part of the application relating to Article 6 of the European Convention on Human Rights admissible;

2. unanimously, to strike out the part of the application relating to the reinstatement of the applicant into the apartment located at Aleja Svetog Save 34 in Banja Luka;

3. unanimously, to declare the remaining part of the application inadmissible; and

4. unanimously, that there has been no violation of the rights of the applicant as guaranteed by Article 6 of the Convention.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Viktor MASENKO-MAVI
Acting President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 December 1999)

Case no. CH/98/1232

Nedeljko STARČEVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 6 December 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 applicant is a citizen of Bosnia and Herzegovina of Serb origin. He is the holder of an occupancy right over an apartment in Doboj, Republika Srpska. On 18 June 1997 the applicant was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 12 October 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Doboj ("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 14 October 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 primarily under Article 8 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 19 October 1998 and registered the same day. 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.

4. On 21 October 1998 the Vice-President of the Second Panel 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. The observations were due by 29 December 1998. However, no observations were received from the respondent Party within that time-limit.

6. 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. On 26 February 1999 the statement was transmitted to the respondent Party for information.

7. On 15 April 1999 the respondent Party submitted observations on the admissibility and merits of the application. The Chamber decided to accept these observations, notwithstanding the fact that they were received outside the time-limit set by the Chamber. On 6 May 1999 the applicant's observations in reply were received. On 25 May 1999 these observations were transmitted to the respondent Party for information.

8. The Chamber deliberated upon the admissibility and merits of the application on 3 November 1999. It decided to request the respondent Party to inform it whether the apartment was registered as abandoned property. A deadline expiring on 26 November 1999 was set for the receipt of this information. No reply was received from the respondent Party. On 6 December 1999 the Chamber adopted the present 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 Jug Bogdana 55/37, Doboj, Republika Srpska. On 18 June 1997 he was granted the occupancy right over the apartment by the holder of

the allocation right, ODP "Bosanka" Doboj, a publicly owned company where he is employed. The previous holder of the occupancy right, a Bosniak who had worked at Bosanka, had left the Republika Srpska. On 25 December 1997 the applicant entered into a contract with the relevant housing company.

11. On 12 October 1998 the Commission issued a decision under the Law on the Use of Abandoned Property and the Instructions on the Allocation of Abandoned Immovable and Other Property, ordering the applicant to vacate the apartment within three days under threat of forcible eviction on the basis that he had alternative accommodation available to him.

12. On 14 August 1998 the applicant appealed against this decision. He has not received any decision on this appeal to date. On 19 October 1998 the Commission issued a conclusion scheduling the applicant's eviction for 23 October 1998. 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") 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."

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

18. 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 put the old law out of force.

19. 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 and by the Decision on the Law on Amendments to the Law on Cessation of the Application of the Law on the Use of Abandoned Property, made by the High Representative on 27 October 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 and who subsequently received 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

20. 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.

21. 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.

22. 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.

5. The Instructions on the Allocation of Abandoned Immovable and Other Property

24. Article 20 of the Instructions on the Allocation of Abandoned Immovable and Other Property (OG RS no. 9/96) grants commissions the power to invalidate decision of other organs allocating property considered to be abandoned under the old law.

IV. COMPLAINTS

25. The applicant does not make any specific complaint of a violation of any of his rights as guaranteed by the Agreement. He complains in a general manner of the attempts to evict him from the apartment. The Chamber interprets this as an allegation that his rights as protected by Article 8 of the Convention have been violated.

V. FINAL SUBMISSIONS OF THE PARTIES

26. The respondent Party claims that the applicant has not sought to avail himself of the domestic remedies available to him and that therefore the application should be declared inadmissible under Article VIII(2)(a) of the Agreement. It further states that the apartment is abandoned property and, in accordance with Article 15 of the old law, could only be allocated to refugees or displaced persons. In addition, the applicant is the owner of a house in Mali Prnjavor, near Doboj, and lived there with his parents before the war.

27. The applicant states that the house referred to by the respondent Party is owned by his brother and that therefore he has no right to live there. He denies that he lived there before the war. He asks that he be allowed to remain in the apartment and that if the prewar occupant of it returns to Doboj, he will seek to come to an amicable solution with that person regarding the apartment.

VI. OPINION OF THE CHAMBER

A. Admissibility

28. 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.

29. 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 specified any "effective remedy" that it considers to be available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

30. The applicant lodged an appeal to the Ministry against the decision of the Commission of 12 October 1998. However, the lodging of such an appeal does not have any suspensive effect.

31. 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 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.

32. As the Chamber noted in the *Onić* case (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 the personal circumstances of the applicants.

33. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 12 October 1998 raises the question whether there is an effective remedy available to the applicant. This factor, together with the fact that the respondent Party did not specify what effective remedy it considered to be available to the applicant, leads the Chamber to conclude that no such remedy was in fact available to him.

34. The Chamber does not consider that any other ground for declaring the case inadmissible has been established. Accordingly, the case is declared admissible.

B. Merits

35. 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.

36. The applicant did not specifically allege a violation of his rights as guaranteed 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. 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."

37. The respondent Party claimed that the apartment had clearly been abandoned property and could therefore be allocated only to persons within the categories set out in Article 15 of the old law.

38. The Chamber has noted that the applicant has lived in the apartment since June 1997, when he was allocated the occupancy right over it. It is therefore clear that the apartment is to be considered as his "home" for the purposes of Article 8 of the Convention.

39. 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 ordering the applicant to vacate it within three days under threat of forcible eviction therefore constitutes an "interference by a public authority" with that right.

40. 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.

41. The Chamber notes that Article 2 of the old law requires a property to be entered into the register of abandoned property in order to be registered as abandoned property and allocated to a person within the categories set out in Article 15. Although specifically requested to do so, the respondent Party has not provided any evidence that such an 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.

42. 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 and in particular whether the old law can, in the context of the present case, be considered to be a "law" within the meaning of Article 8 paragraph 2.

43. Accordingly, the Chamber considers that there has been a violation of the applicant's rights as guaranteed by Article 8 of the Convention.

VII. REMEDIES

44. 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.

45. 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 he be allowed to remain in the apartment.

46. 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.

47. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 12 October 1998 ordering the eviction of the applicant from the apartment in question and to allow the applicant to enjoy undisturbed occupancy of the apartment, subject to the terms of the new law, in particular with reference to the right of the pre-war occupancy right holder to regain possession of the apartment.

VIII. CONCLUSION

48. 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 Doboj of 12 October 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, 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 Doboj of 12 October 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment subject to the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and

4. 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) Giovanni GRASSO President of the Second Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 8 October 1999)

Case no. CH/98/1237

F. G.

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 9 September 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
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 VIII(2) and VIII(3) 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, resident in Janja, Republika Srpska. In August 1994 he and his father were forcibly evicted from their home. When the applicant returned to it in October 1994, it had been occupied by Bosnian Serbs, displaced from the Federation of Bosnia and Herzegovina. The applicant initiated court proceedings, and the court issued a decision ordering the current occupants of the house to vacate it and return it into the applicant's possession. On 13 January 1999 the applicant got back into the house.

2. The case raises issues principally under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and under Article 1 of Protocol No.1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was referred to the Chamber by the Human Rights Ombudsperson for Bosnia and Herzegovina ("the Ombudsperson") on 1 October 1998 and registered on 20 October 1998.

4. On 18 December 1998 the Chamber decided, pursuant to Rule 49(3)(b) of the Rules of Procedure to transmit the application 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 12 March 1999.

5. The respondent Party's observations were received on 29 March 1999.

6. On 7 April 1999 the observations were transmitted to the applicant and he was requested to submit any further observations and any compensation claim he wished to make. The applicant's written statement was received on 30 April 1999, within the time-limit laid down by the Chamber's Order concerning the organisation of the proceedings in the case.

7. On 5 May 1999 the applicant's written statement was transmitted to the Agent of the respondent Party. It was also sent to the Ombudsperson, who was invited to submit any written observations which she wished to make on the case. The Ombudsperson submitted her statement on 4 June 1999. The respondent Party submitted its observations on the applicant's compensation claim on 8 June 1999.

8. The First Panel deliberated upon the admissibility and merits of the application on 8 July and 9 September 1999, and adopted its decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

9. The facts of the case as they appear from the Report of the Ombudsperson of 20 May 1998, 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 is a citizen of Bosnia and Herzegovina, resident in Janja, Republika Srpska.

11. Until 1994 the applicant and his father lived in a house located at Omladinska Street No. 2 in Janja. The house was owned by the applicant's father. On 14 November 1996 the father donated the house to the applicant.

12. On 27 August 1994 the applicant and his father were forcibly evicted from the house and taken to the mountain of Majevica. The applicant returned to Janja in October 1994, and then found out that the house had been occupied by a displaced Bosnian Serb ("the occupant") and his family.

On 12 October 1994, the applicant requested the municipal organ competent to administer abandoned property in Bijeljina to enable him to regain possession of his house. He has never received any direct reply to this request, but on 19 October 1994 the Municipal Administration for Geodetic Affairs and Cadaster of Real Properties of the Municipality of Bijeljina ("the Municipality") issued a decision refusing the request of the occupant for temporary allocation of the applicant's house.

13. On 30 January 1996 the applicant filed a request similar to the one of 12 October 1994 to the Municipal Commission for Accommodation of Refugees and Administration of Abandoned Property ("the Commission"). There have been no developments in the proceedings.

14. On 25 November 1996 the applicant filed a lawsuit to the Municipal Court in Bijeljina ("the court") requesting the court to reinstate him into his house.

15. On 13 February 1998 the President of the court issued a report stating that the court had serious lack of personnel in the course of 1996 and 1997 (the court had five to six judges, although the internal regulations request eighteen judges to be appointed in this court). The president stated that the court has been mainly dealing with the cases which were urgent upon the law, and the applicant's case is not of that kind. The case was allocated to a judge on 18 December 1997 who then scheduled a hearing for 29 January 1998.

16. On 9 April 1998, after having held three hearings in the case, the court issued a decision ordering the occupant to vacate the house and return it into the applicant's possession.

17. The occupant appealed against the decision and on 28 August 1998 the Regional Court in Bijeljina granted the appeal, invalidated the first instance decision and sent the case back to the Municipal Court for reconsideration. The reasons for such a decision were that the Municipal Court had not established the facts of the case and that the law had not been applied properly.

18. On 17 November 1998 the Municipal Court issued a decision of the same substance as the decision of 9 April 1998, following the instructions of the Regional Court regarding establishment of the facts and application of the law. The occupant appealed against the decision. There have been no developments in the proceedings before the Regional Court, as the second instance court, to date.

19. On 26 November 1998 the applicant repeated the request to the Commission in order to be reinstated into the house.

20. On 13 January 1999 the applicant entered into possession of his house, with the assistance of the local police and the officials of the Ministry.

B. Relevant legislation

1. Constitution of the Republika Srpska

21. Article 56 of the Constitution of the Republika Srpska ("the Constitution") reads as follows:

> "In accordance with the law, rights of ownership may be limited or expropriated against payment of equal compensation."

22. 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."

2. The Law on the Use of Abandoned Property

23. The Law on the Use of Abandoned Property (Official Gazette of Republika Srpska – hereinafter "OG RS" – no. 3/96) ("the Law") was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It was published 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 Law, insofar as they are relevant to the present case, are summarised below.

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

25. Article 3 of the 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.

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

26. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98) establishes a detailed framework for persons to regain possession of property considered to be abandoned under the Law. It puts the Law on the Use of Abandoned Property out of force.

4. The Law on Basic Property Relations

27. Article 37 of the Law reads as follows:

> “The owner can file a lawsuit and request the return of an individually specified property from the current holder.
> The owner needs to prove his ownership over the property he requests to be returned, as well as that the property is in actual possession of the respondent.
> The right from paragraph 1 of this Article does not expire.”

IV. COMPLAINTS

28. The applicant has not alleged any specific violation of his human rights protected by the Agreement.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

29. The respondent Party submits that the application should be rejected as the case is about a private dispute of the applicant and the occupant of his house. The respondent Party has not legalised the occupancy of the house by allocating the house to the occupant.

30. The respondent Party further submits that the applicant filed the application to the Ombudsperson on 31 July 1996, i.e. before he became the owner of the house in question and before he sought to avail himself of the domestic remedies.

31. Regarding the issue of Article 6 of the Convention the respondent Party submits that although it took thirteen months for the first hearing to be held before the Municipal Court in Bijeljina the proceedings before this court lasted for fifteen months, and therefore it could not be considered that the proceedings were unreasonably long. Therefore the applicant had an access to court in determination of his civil rights, and the complaint concerning the access to court should be regarded

as ill-founded.

B. The applicant

32. The applicant maintains that he was evicted by the soldiers of the "Panteri" Squad, which have been acting on behalf of the respondent Party. He argues that it is true that the respondent Party has not legalised the occupants' occupancy of the house, but also has not taken any action to enable him be reinstated into the house. As far as the ownership over the house is concerned the applicant claims that he has participated in the construction of the house, and that his father has made a testament by which he would inherit the house after his father's death.

33. Regarding the submission of the respondent Party that the application to the Human Rights Ombudsperson was filed before the applicant sought to avail himself of domestic remedies, the applicant argues that it took almost two years for the case before the Ombudsperson to be decided upon. Therefore, since the proceedings he initiated are still pending he still would not be entitled to file an application to the Ombudsperson or the Chamber. The applicant further argues that the Ombudsperson in her Report of 20 May 1998 found a violation of Article 6 paragraph 1 to the Convention.

34. The applicant requests the Chamber to order the respondent Party to pay him compensation of KM 10,400 as he has not been able to use his house for more than four years, KM 5,000 as the length of proceedings exceeded a "reasonable time" and KM 40,000 for his belongings.

C. The Ombudsperson

35. In her observations dated 4 June 1999 (see paragraph 7 above) the Ombudsperson notes that in the applicant's case she has only examined the applicant's right to a hearing within a reasonable time, and therefore the respondent Party's arguments set out in paragraph 27 are irrelevant.

36. As to the respondent Party's suggestion that the applicant has not sought to avail himself of domestic remedies before he filed the application to her, the Ombudsperson argues that the time of introduction of the application is relevant only for the consideration of whether the case was introduced within six months from the date of the final decision in the case.

37. The Ombudsperson further argues that it took fourteen months for the Municipal Court to schedule the first hearing in the applicant's case. Then in three months the court held three hearings and decided the case in the applicant's favour. This proves that the delay could not be convincingly justified by the Government, although the President of the court confirmed that the court had a serious lack of personnel until February 1998. The Ombudsperson maintains that there has been a violation of Article 6 paragraph 1 of the Convention as the civil proceedings in the applicant's case exceeded the requirement of "a reasonable time".

VI. OPINION OF THE CHAMBER

A. Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention

1. Criteria set out in Article VIII(3) of the Agreement

38. According to Article VIII(3) of the Agreement, the Chamber may at any point decide to strike out an application on the ground that (a) the applicant does not intend to pursue his application; (b) the matter has been resolved; or (c) for any other reason established by the Chamber, it is no longer justified to continue the examination of the case. In all these situations, however, a decision to strike out an application must be consistent with the objective of respect for human rights.

39. In the present case the Chamber notes that the applicant was reinstated into his house on 13 January 1999, with the assistance of the local police and the officials of the Ministry. Therefore any violation of the applicant's right to respect for his home and his right to peaceful enjoyment of

property that may have occured was remedied.

40. Accordingly, the Chamber concludes that this part of the application has been resolved. In these circumstances it is no longer justified to continue the examination of this part of the case and such an outcome would not be inconsistent with the objective of respect for human rights.

2. Admissibility *ratione personae* and *ratione temporis*

41. In the light of the circumstances described in paragraph 36 above the Chamber finds it unnecessary to examine the arguments of the respondent Party, the applicant and the Ombudsperson on whether the respondent Party can be held responsible for possible violations of the applicant's right to respect for his home and his right to property.

B. Article 6 paragraph 1 of the Convention

42. The respondent Party did not make any objection to the admissibility of the application. The Chamber sees no grounds for rejecting the application under any of the admissibility criteria set out in the Agreement. Accordingly, this part of the application is admissible.

43. The applicant did not specifically allege any violation of his rights as protected by Article 6 paragraph 1 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 6 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 [a] ... tribunal ..."

44. The respondent Party suggests that the proceedings should be regarded as a whole. Nevertheless, in her Report of 20 May 1998, the Ombudsperson found a violation of Article 6 paragraph 1 of the Convention, and maintains the same arguments in her submission of 4 June 1999, i.e. that it is up to the respondent Party to organise its legal system so as to enable the courts to comply with the requirements of Article 6 paragraph 1 of the Convention (see *F.Gr. v. Republika Srpska*, Ombudsperson's Report of 20 May 1998, para. 35). Therefore the delay in the applicant's case cannot be justified by a certain lack of personnel. The applicant maintains the arguments brought up in the above - mentioned Report.

45. The Chamber notes that the applicant initiated proceedings before the Municipal Court in Bijeljina on 25 November 1996. On 9 April 1998 the court issued a decision granting his request and ordering the occupant to return the house into the applicant's possession. On 28 August 1998 the Regional Court invalidated the decision of 9 April and returned the case to the Municipal Court for reconsideration, instructing the Municipal Court to remedy certain procedural defects. On 17 November 1998 the Municipal Court issued a decision, again granting the applicant's request, but following the instructions given by the Regional Court. The occupant appealed against the decision of 17 November 1998.

46. Accordingly, the period of time the Chamber can take into account is two years and nine months (as of September 1999), in which period the Municipal Court issued a first instance decision, the Regional Court invalidated it, the Municipal Court issued another decision, and the case is pending before the Regional Court, again following the occupant's appeal.

47. The Chamber has held that the factors to be taken into account in determining whether the length of civil proceedings has been reasonable are as follows: the complexity of the case, the conduct of the applicant and the conduct of the national authorities (see e.g. *Mitrović*, case no. CH/97/54, decision on admissibility of 10 June 1998, paragraph 12, Decisions and Reports 1998).

1. The complexity of the case

48. According to the Ombudsperson's Report, and documents in the case file, the case does not

appear to be a complex one. It is about the owner requesting the courts to evict the illegal occupant and to enable him to enter into possession of his house. Such a conclusion is supported by the fact that once the applicant's case had been taken into consideration it took three months to the Municipal Court to decide upon it.

2. The conduct of the applicant

49. The respondent Party does not suggest that the applicant could be held responsible for the initial backlog of the case. There is no information in the case file that there has been any conduct on the part of the applicant which could be considered as causing a delay in the proceedings.

3. The conduct of the national authorities

50. The Chamber notes that the initial backlog of the applicant's case was due to a serious lack of personnel in the Municipal Court in Bijeljina in the course of 1996 and 1997. The President of the Municipal Court stated that as soon as a new judge was appointed to this court a hearing was scheduled in the applicant's case, and it was consequently decided upon, within three months.

51. The Chamber recalls that the European Court of Human Rights has held that a temporary backlog of court business does not engage the responsibility of the state concerned, provided that the state takes effective remedial action with the requisite promptness (see, e.g, the *Guincho v. Portugal* judgment of 10 July 1984, Series A no. 81, p. 17, para. 40). In the present case the Chamber notes that the courts had to face a serious lack of personnel, which resulted in initial delay in the applicant's case. In addition, once the additional judges were appointed to the Municipal Court the case was allocated to a judge and a decision was passed within three months. However, the Chamber considers that the length of time the respondent Party took to remedy this delay was not, in the circumstances prevailing at the time, unreasonable.

52. The respondent Party cannot be held responsible for the length of proceedings conducted after the decision of 9 April 1998 was adopted, since the occupant was exercising his right to an effective remedy. It took seven months for the Regional Court to decide upon his appeal, and the Municipal Court to comply with the instructions of the Regional Court. The Chamber notes, that although the case is still pending before the Regional Court, following the occupant's appeal the decision of 9 April 1998 was complied with as the applicant entered into possession of his house on 13 January 1999.

53. Accordingly the Chamber finds that the applicant's right to a hearing within a reasonable time, as provided for in Article 6 paragraph 1 of the Convention has not been violated, as the respondent Party remedied the reason for initial delay in the applicant's case.

C. The applicant's compensation claim

54. In the light of the above findings the Chamber finds that it is not necessary to examine the applicant's compensation claim.

VII. CONCLUSIONS

55. For these reasons, the Chamber decides,

1. unanimously, to strike out the part of the application relating to the violations of Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to the Convention;

2. unanimously, to declare the remainder of the application admissible;
3. unanimously, that there has been no violation of the applicant's rights as guaranteed by Article 6 paragraph 1 of the Convention; and

4. unanimously, that there is no need to examine the applicant's claim for monetary relief.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

HUMAN RIGHTS COMMISSION
WITHIN THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA

KOMISIJA ZA LJUDSKA PRAVA
PRI USTAVNOM SUDU
BOSNE I HERCEGOVINE

ODLUKA O PRIHVATLJIVOSTI I MERITUMU

Predmet broj CH/98/1240

Milorad DRAGIĆ

protiv

BOSNE I HERCEGOVINE

i

FEDERACIJE BOSNE I HERCEGOVINE

Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine, na zasjedanju Velikog vijeća od 10. maja 2005. godine, sa sljedećim prisutnim članovima:

Gosp. Miodrag PAJIĆ, predsjednik
Gosp. Mehmed DEKOVIĆ, potpredsjednik
Gosp. Želimir JUKA, član
Gosp. Miodrag SIMOVIĆ, član
Gđa. Valerija GALIĆ, 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. stav 1(a) u vezi sa pravilom 53, pravilom 50 stav 1(b) i 1(h) Pravila procedure Komisije:

I. UVOD

1. Milorad Dragić (u daljnjem tekstu: podnosioc prijave), zastupan po advokatima Goranu i Zoranu Bubiću iz Banja Luke (u daljem tekstu: zastupnik podnosioca prijave), podnio je 20. oktobra 1998. godine prijavu Domu.

2. Zastupnik podnosioca prijave u svom pismu Komisiji od 24. maja 1999. godine navodi da je podnosilac prijave žrtva povrede člana 6. Evropske konvencija za zaštitu ljudskih prava i temeljnih sloboda (u daljnjem tekstu: Evropska konvencija), jer je lišen prava na pristup sudu.

3. Predmet postavlja pitanja u vezi čl. 6. i 13. Evropske konvencije, te člana 1. Protokola broj 1 uz Evropsku konvenciju.

II. POSTUPAK PRED DOMOM/KOMISIJOM

4. Prijava je podnesena 19. oktobra 1998. godine.

5. Dom je 22. januara 1999. godine proslijedio predmet tuženim stranama na zapažanja o prihvatljivosti i meritumu.

6. Federacija Bosne i Hercegovine je 23. marta 1999. godine dostavila svoja zapažanja o prihvatljivosti i meritumu, koja je Dom 20. aprila 1999. godine proslijedio zastupnicima podnosioca prijave.

7. Zastupnik podnosioca prijave je 24. marta 1999. godine dostavio Domu odgovor na pismena zapažanja o prihvatljivost i meritumu tužene strane, Federacije Bosne i Hercegovine.

8. Bosna i Hercegovina nije dostavila svoja zapažanja o prihvatljivosti i meritumu, međutim 2. jula 1999. godine je dostavila Domu svoja zapažanja u vezi zahtjeva za kompenzaciju podnosioca prijave.

9. Komisija je 9. jula 2004. godine pozvala Organizaciju za sigurnost i saradnju u Evropi (u daljnjem tekstu: OSCE) da učestvuje u postupku kao *amicus curiae* i navela dva posebna područja za koja je Komisija izrazila poseban interes da dobije podatke: (1) uzajamna veza između Vojske tadašnje Savezne Republike Jugoslavije i Vojske Republike Srpske, koja je uspostavljena preko 30. kadrovskog centra vojske tadašnje Savezne Republike Jugoslavije, (2) te da sazna da li je pitanje ove uzajamne veze uzeto u obzir pri izradi člana 3.a Zakona o prestanku primjene Zakona o napuštenim stanovima ("Službene novine Federacije Bosne i Hercegovine", br. 11/98, 38/98, 12/99, 18/99, 27/99, 31/01 i 56/01).

10. OSCE je 11. augusta 2004. godine dostavio svoj podnesak *amicus curiae*, u kome su odgovorili na poziv Komisije. Međutim u podnesku se, također, navodi da Komisija nije tražila mišljenje OSCE-a u vezi sa vlasničkim potraživanjem, pošto se *prima facie* čini da se član 3.a ne može primijeniti u predmetu podnosioca prijave, jer postoji ugovor o kupoprodaji i uplata kupoprodajne cijene.

III. ČINJENICE U PREDMETU

11. Činjenice koje su dole sažete zasnivaju se na obrascu prijave i priloženim dokumentima.

12. Podnosilac prijave je 10. februara 1992. godine zaključio ugovor o kupoprodaji stana, broj: 75-2/1, sa bivšim Saveznim sekretarijatom za narodnu odbranu Jugoslovenske narodne armije (u daljnjem tekstu: SSNO JNA), za stan koji se nalazi u ulici Harmani H-15, ulaz broj 10, u Bihaću, Federacija Bosne i Hercegovine. Ugovor je potpisan od strane obje ugovorne strane i ovjeren od

strane vojnog pravobranioca. Ugovor ne sadrži pečat nadležne poreske uprave. Podnosilac prijave je Domu dostavio uplatnice kao dokaz o plaćenoj kupoprodajnoj cijeni.

13. Podnosilac prijave je napustio svoj stan prije početka ratnih neprijateljstava u Bihaću. Prema dokumentima koje je podnosilac prijave dostavio Domu, podnosilac prijave je bio u službi oružanih snaga Republike Srpske do odlaska u penziju 1996. godine. Prema navodima Federacije Bosne i Hercegovine, podnosilac prijave je u istom periodu bio u službi oružanih snaga Savezne Republike Jugoslavije, što je dokazano odlukom objavljenom u Službenom listu broj 20 Savezne Republike Jugoslavije.

14. Podnosilac prijave je 7. aprila 1998. godine tražio od Komisije za imovinske zahtjeve raseljenih lica i izbjeglica (u daljnjem tekstu: CRPC) da potvrdi njegovo stanarsko pravo na predmetnom stanu.

15. Podnosilac prijave je 22. maja 1998. godine podnio zahtjev za vraćanje u posjed predmetnog stana Službi obnove i stambeno-komunalnih poslova Općine Bihać (u daljnjem tekstu: Služba). Služba je donijela rješenje, broj: 3/36-372-715 od 21. augusta 2000. godine, kojim se odbija zahtjev podnosioca prijave. U obrazloženju navedenog rješenja se ističe da je zahtjev odbijen na osnovu člana 3a. stav 2. Zakona o prestanku primjene Zakona o napuštenim stanovima. Ovom odredbom se osporava pravo na vraćanje predratnog stana osobi koja je poslije 14. decembra 1995. godine ostala u aktivnoj vojnoj službi u bilo kojim oružanim snagama van teritorije Bosne i Hercegovine. Međutim, po žalbi podnosioca prijave, Ministarstvo za građenje, prostorno uređenje i zaštitu okoline Unsko-sanskog kantona (u daljnjem tekstu: Ministarstvo) je donijelo rješenje, kojim se poništava rješenje Službe, broj 3/36-372-715 od 21. augusta 2000. godine i predmet vraća Službi na ponovni postupak.

16. Služba je donijela novo rješenje, broj: 3/36-372-715/2 od 22. januara 2001. godine, kojim se odbija zahtjev podnosioca prijave na osnovu člana 3a, stava 2. Zakona o prestanku primjene Zakona o napuštenim stanovima. Podnosilac prijave je izjavio žalbu protiv navedenog rješenja Ministarstvu. Ministarstvo je donijelo rješenje, broj: 11/2-23-240-UP-2/01 od 22. februara 2001. godine, kojim je odbilo žalbu podnosioca prijave kao neosnovanu i potvrdilo rješenje Službe od 22. januara 2001. godine.

17. Podnosilac prijave je 4. aprila 2001. godine pokrenuo upravni spor pred Kantonalnim sudom u Bihaću (u daljnjem tekstu: Kantonalni sud).

18. CRPC je podneskom, broj: 004 22846/01 od 14. septembra 2001. godine, obavijestila podnosioca prijave da je donošenje odluka, koje se odnose na zahtjeve za potvrđivanje prava na vojnim stanovima, obustavljeno dok se ne usklade zakoni Federacije Bosne i Hercegovine i Republike Srpske u vezi sa stanovima Jugoslovenske narodne armije (u daljnjem tekstu: JNA stanovi) i dok Dom ne donese odluku po pitanju bivših JNA stanova.

19. Kantonalni sud je donio rješenje, broj: U-85/01 od 14. januara 2002. godine, kojim se prekida postupak u predmetu podnosioca prijave do donošenja konačne odluke CRPC-a, kako je propisano članom 14. Zakona o prestanku primjene Zakona o napuštenim stanovima. Podnosilac prijave je 14. januara 2002. godine izjavio žalbu protiv ove odluke Kantonalnog suda Vrhovnom sudu Federacije Bosne i Hercegovine.

20. Vrhovni sud Federacije Bosne i Hercegovine je donio rješenje, broj: UŽ-131/02 od 23. januara 2003. godine, kojim se uvažava žalba podnosioca prijave, poništava se rješenje Kantonalnog suda broj: U-85/01 od 14. januara 2002. godine i predmet vraća Kantonalnom sudu na ponovni postupak. U odluci se navodi da je Kantonalni sud trebao razmotriti sve činjenice u predmetu, a posebno kupoprodajni ugovor zaključen 10. februara 1992. godine i prava zaštićena članom 1. Protokola broj 1 uz Evropsku konvenciju.

21. Kantonalni sud je donio presudu, broj: U: 85/01 od 19. februara 2003. godine, kojom se uvažava tužba podnosioca prijave i poništava rješenje Ministarstva, broj: 11/2-23-240-UP-2/01 od 22. februara 2001. godine.

22. Ministarstvo je 16. aprila 2003. godine donijelo rješenje, broj: 11/2-23-240-UP-2/01, kojim sa uvažava žalba podnosioca prijave protiv rješenja Službe, broj: 3/36-372-715/2, i poništava ožalbeno rješenje, a postupak u ovoj pravnoj stvari prekida. U rješenju se navodi da se postupak prekida dok CRPC ne donese odluku. U rješenju se, također, navodi da podnosilac prijave tvrdi da je vlasnik stana, te da prvostepeni organ mora donijeti odluku uzimajući u obzir ugovor o otkupu i prava podnosioca prijave u vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju.

23. CRPC je 4. juna 2003. godine donijela odluku broj: 703-562-1/1, kojom se odbacuje zahtjev podnosioca prijave za povrat stana. U pomenutoj odluci se navodi da CRPC nije nadležna da odlučuje o stvari, jer je podnosilac prijave bio u službi strane vojske nakon 14. decembra 1995. godine.

24. Podnosilac prijave je 18. septembra 2003. godine podnio zahtjev za vraćanje u posjed svog stana Službi prostornog uređenja, katastra i imovinsko-pravnih poslova Općine Bihać (u daljnjem tekstu: Služba za imovinske poslove).

25. Služba je u ponovljenom postupku 29. septembra 2003. godine donijela rješenje, broj: 3/36-372-715/2, kojim se odbija zahtjev podnosioca prijave za vraćanje stana u posjed (postupak koji je bio prekinut ponovo je aktiviran). U obrazloženju je navedeno da je zahtjev podnosioca prijave odbijen kao neosnovan, jer je CRPC donijela odluku kojom je sebe oglasila nenadležnom da odlučuje u toj stvari. U odluci se navodi da se podnosilac prijave obratio i Službi za imovinska pitanja Općine Bihać u vezi sa vraćanjem u posjed svoje privatne imovine. Podnosilac prijave je 22. oktobra 2003. godine uložio Ministarstvu žalbu protiv ove odluke.

26. Nezadovoljan gore navedenim rješenjem Službe, podnosilac prijave je 22. oktobra 2003. godine izjavio žalbu Ministarstvu. Ministarstvo je odlučujući po ovoj žalbi donijelo rješenje, broj: 11/2-23-1539-UP-2/03 od 23. februara 2004. godine, kojim se žalba odbija kao nosnovana.

27. Služba prostornog uređenja, katastra i imovinsko pravnih poslova je 12. februara 2004. godine donijela zaključak, broj: 03/3-31-4414, kojim se prekida postupak koji je podnosilac prijave pokrenuo 18. septembra 2003. godine u vezi s vraćanjem u posjed stana za koji posjeduje kupoprodajni ugovor od 10. februara 1992. godine i kojim se naređuje podnosiocu prijave da pred sudom pokrene postupak za utvrđivanje valjanosti navedenog kupoprodajnog ugovora. Služba za imovinske poslove je navela da je, pošto nije bilo moguće utvrditi da li je podnosilac prijave vlasnik stana i pošto je Ministarstvo odbrane osporilo njegova vlasnička prava na stanu, bilo odlučeno da se postupak prekine dok se ne riješi pitanje vlasništva. Podnosilac prijave je 16. marta 2004. godine Ministarstvu izjavio žalbu protiv ove odluke. Na osnovu uvida u dokumentaciju, podnosilac prijave nije pokrenuo postupak pred nadležnim sudom radi utvrđivanja valjanosti ugovora o otkupu.

28. Podnosilac prijave je 24. marta 2004. godine pokrenuo upravni spor pred Kantonalnim sudom protiv rješenja, broj: 11/2-23-1539-UP-2/03 od 23. februara 2004. godine.

29. Ministarstvo je 14. juna 2004. godine donijelo rješenje kojim se odbija žalba podnosioca prijave protiv zaključka od 12. februara 2004. godine. Ministarstvo je zaključilo da je prvostepeni organ pravilno obustavio postupak koji se odnosi na vraćanje stana podnosioca prijave u posjed, dok se pred sudom ne utvrdi njegovo vlasničko pravo, zato što postoje ozbiljne sumnje u valjanost ugovora o otkupu. Podnosilac prijave je protiv rješenja Ministarstva pokrenuo upravni spor pred Kantonalnim sudom. Kantonalni sud je donio presudu, broj: U-136/04 od 19. novembra 2004. godine, kojom se odbija tužba podnosioca prijave.

30. Podnosilac prijave je 21. augusta 2004. godine pokrenuo upravni spor protiv ovog rješenja pred Kantonalnim sudom u Bihaću. Kantonalni sud je donio presudu, broj: U-56/04 od 20.

septembra 2004. godine kojom se tužba podnosioca prijave uvažava, a osporeni akti; rješenje Ministarstva broj: 11/2-23-1539-UP-2/03 od 23. februara 2004. godine i rješenje Službe broj: 3/36-372-715/2 od 29. septembra 2004. godine poništavaju i predmet vraća prvostepenom organu na ponovno razmatranje. U obrazloženju navedene presude se navodi da su prvostepeni i drugostepeni organ pogrešno i nepotpuno utvrdili činjenično stanje, te pogrešno primijenili materijalno pravo. Podnosilac prijave, u svom pismu Komisiji od 23. novembra 2004. godine, a tužena strana u zapažanjima od 7. februara 2005. godine navode da postupak pred prvostepenim organom još nije okončan.

IV. RELEVANTNE ZAKONSKE ODREDBE

A. Relevantno zakonodavstvo Socijalističke Federativne Republike Jugoslavije i Socijalističke Republike Bosne i Hercegovine

1. Zakon o stambenom obezbjeđenju u JNA

31. 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.

32. 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)

33. 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)

34. 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

35. 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

36. 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.

37. 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.

38. 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

39. 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

40. Zakon o prestanku primjene Zakona o napuštenim stanovima 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 Zakona o napuštenim stanovima je ukinut raniji Zakon o napuštenim stanovima.

41. Prema Zakonu o prestanku primjene Zakona o napuštenim stanovima, 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 Zakona o napuštenim stanovima (član 2, stav 2).

42. 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).

43. 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).

44. 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.

45. 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

46. 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

47. 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.

48. 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.

49. Član 27. predviđa da se pravo vlasništva na stanu stiče uknjižbom tog prava u zemljišne knjige nadležnog suda.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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).

55. 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.

56. 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.

57. 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

58. 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

59. Podnosilac prijave se žali na činjenicu da nije vraćen u posjed svog stana i da nije priznat njegov ugovor o otkupu stana. On smatra da je vlasnik stana i da mu se mora omogućiti raspolaganje sa njim. Također, se žali na trajanje postupka odlučivanja o njegovom zahtjevu za povrat stana.

60. Prema mišljenju Komisije, prijava pokreće pitanja u vezi s čl. 6. i 13. Evropske konvencije, te članom 1. Protokola broj 1 uz Evropsku konvenciju.

VI. ODGOVOR TUŽENE STRANE

A. Odgovor tužene strane Bosne i Hercegovine

61. Tužena strana, Bosna i Hercegovina nije dostavila svoja zapažanja o prihvatljivosti i meritumu. Bosna i Hercegovina je 2. jula 1999. godine dala svoj komentar samo na zahtjev podnosioca prijave za kompenzaciju. U navedenom pismu Bosna i Hercegovina predlaže da se odbije zahtjev za kompenzaciju podnosioca prijave, jer nije tražio kompenzaciju u konkretnom iznosu.

B. Odgovor tužene strane Federacije Bosne i Hercegovine

62. U vezi sa činjenicama, tužena strana, Federacija Bosne i Hercegovine navodi da je podnosilac prijave propustio da u "obrazac arhivara“ upiše relevantne podatke kao što su: koja su ljudska prava prekršena, pravne argumente koje želi da Dom razmotri, te da tužena strana nije u prilici prepozati u čemu se ona ogledaju, odnosno kojim aktima tužene strana ili osoba koje djeluju pod njenom ogovornošću su, eventualno, učinjene povrede članova 6. i 13. Evropske konvencije i člana 1. Protokola broj 1 uz Evropsku konvenciju. S obzirom da je tuženoj strani teško da se izjasni o podnesenoj prijavi, tužena strana predlaže Domu da, u skladu sa tačkom 4. pravila 46. Pravila procedure, donese odluku o odbijanju prijema i ispitivanja prijave od strane Doma.

63. Po pitanju prihvatljivosti, tužena strana u svojim zapažanjima navodi da je prijava preuranjena, jer je u vrijeme dostavljanja zapažanja, upravni postupak pred upravnim organom bio u toku. Tužena strana tvrdi da podnosilac prijave nije iscrpio sve domaće pravne lijekove prije nego se obratio Domu.

64. U pogledu merituma prijave, tužena strana, Federacija Bosne i Hercegovine, ističe u svojim pismenim zapažanjima da je prijava u meritumu neosnovana i da nije povrijeđen član 6. Evropske konvencije. Ističe da podnosilac prijave nije iscrpio sve pravne lijekove, niti pred organima uprave, a naročito ne takve pravne lijekove u kojima bi svoje učešće imao sud. S obzirom na to, organi uprave, a ni nadležni sudovi, nisu bili u prilici niti su povrijedili član 6. Evropske konvencije. Samim tim, nema ni povrede člana 6. Evropske konvencije od strane tužene strane, Federacije Bosne i Hercegovine. Kako nije povrijeđen član 6. Evropske konvencije nema ni povrede člana 13. Evropske konvencije. U vezi sa članom 1. Protokola broj 1 uz Evropsku konvenciju, Federacija Bosne i Hercegovine smatra da podnosilac prijave mora ispuniti uslove predviđene u Zakonu o prodaji stanova, prema kojem lice ne može izvršiti upis prava vlasništva na stanu ako nije ostvarilo pravo na vraćanje stana u posjed u skladu sa Zakonom o prestanku primjene Zakona o napuštenim stanovima.

VII. MIŠLJENJE KOMISIJE

A. Prihvatljivost

65. 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.

A1. Prihvatljivost prijave u dijelu upućenom protiv Bosne i Hercegovine

66. 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 također odbiti svaku žalbu koju bude smatrala nespojivom sa ovim Sporazumom, ili koja je očigledno neosnovana, ili predstavlja zloupotrebu prava žalbe."

67. Komisija zapaža da podnosilac prijave upućuje svoju prijavu protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine.

68. U ranijim predmetima, u kojima je Dom odlučio o pitanju u vezi sa stanovima JNA, Dom je smatrao da je Država odgovorna za donošenje zakona kojima su ugovori o otkupu JNA stanova retroaktivno poništeni (vidi, na primjer, odluke o prihvatljivosti i 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., Odluke i izvještaji 1998).

69. Komisija, međutim, zapaža da u ovom predmetu postupanje organa, koji su odgovorni za postupke na koje se podnosilac prijave žali, 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).

70. Komisija, zbog toga, odlučuje da prijavu proglasi neprihvatljivom protiv Bosne i Hercegovine.

A2. Prihvatljivost prijave u dijelu upućenom protiv Federacije Bosne i Hercegovine

71. 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], nije više opravdano nastaviti s razmatranjem žalbe; pod uvjetom da je takav rezultat u skladu s ciljem poštivanja ljudskih prava."

72. Komisija će posebno ispitati prihvatljivost po pitanju prava na povrat stana i prava na vlasništvo nad istim. Naime, podosilac prijave je tražio povrat stana, tvrdeći ujedno, da je i vlasnik spornog stana. Nadležni organi smatraju da podnosilac prijave nema valjan kupoprodajni ugovor za predmetni stan. Međutim, u tom slučaju, podnosilac prijave se smatra predratnim nosiocem stanarskog prava, te se, kao takav mora tretirati u postupku povrata. Pitanje vlasništva, kao posebno pravno pitanje, ne može biti prepreka postupku vraćanja stana podnosiocu prijave u svojstvu nosioca stanarskog prava, pod uslovim, da ispunjava zakonom propisane uslove. Drugim riječima, od ocjene nadležnih organa, da li je podnosilac prijave vlasnik ili ne, zavisi koji će se zakonski osnov primijeniti u konkretnom slučaju povrata stana. Stoga, Komisija će separatno posmatrati ova dva pitanja.

a. Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za povrat stana u posjed

73. Podnosilac prijave tvrdi da nema mogućnost da dođe do konačnog meritornog odlučenja povodom povrata njegovog stana, da postupak traje van razumnog roka, te da mu nije omogućen djelotvoran pravni lijek, uzimajući u obzir cjelokupnu situaciju.

74. Federacija navodi da podnosilac prijave nije iscrpio djelotvorne pravne lijekove u postupku vraćanja u posjed predmetnog stana i uknjiženja vlasništva na stanu.

75. Komisija, nadalje, zapaža da je podnosilac prijave pokrenuo svoj postupak za povrat predmetnog stana 1998. godine. Od tada je prošlo 7 godina, a postupak po zahtjevu za povrat predmetnog stana nije okončan.

76. 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 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.

77. Komisija, nadalje, zapaža da se o predmetu podnosioca prijave odlučivalo i više puta nakon što je vraćen na ponovno odlučivanje od strane Kantonalnog suda, ali i nakon ponovnih postupaka po zahtjevu je odlučeno na isti način – podnosiocu prijave nije priznato pravo na povrat stana niti je postupak pravomoćno okončan. Konačno, za vrijeme postupaka, pravna osnova se mijenjala više puta, što je dodatno otežavalo situaciju podnosioca prijave.

78. Dovodeći u vezu dvije prethodne tačke ove Odluke sa činjenicom da podnosilac prijave smatra da mu je povrijeđeno pravo pristupa sudu, zbog nemogućnosti da dođe do konačne odluke, Komisija zaključuje da podnosilac prijave nema izgleda za okončanje postupaka u nastavku postupka povrata stana u posjed. Komisija smatra da je prijava prihvatljiva po ovom pitanju, te da je potrebno da riješi ovo pitanje meritorno. Naime, postupak je trajao od 1998. godine i još uvijek nije okončan. S obzirom da se radi o upravnom postupku u vezi sa povratom stanova, ova činjenica govori da prijava, po ovom pitanju, nije *prima facie* neosnovana.

79. 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 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

80. Federacija Bosne i Hercegovine, *inter alia,* tvrdi da podnosilac prijave nije iscrpio domaće pravne lijekove koji su mu dostupni u vezi s uknjižbom vlasništva na stanu, jer podnosilac prijave nije pokrenuo sudski postupak za utvrđivanje valjanosti svog kupoprodajnog ugovora.

81. 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 Komsija, 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). S 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 ugovori moraju ispuniti. Tako je Komisija utvrdila da podnosioci prijava moraju imati valjan ugovor, koji u smislu člana 39. 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, 15/02 i 54/04) 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.

82. Slijedeći tu praksu, Komisija primjećuje da ugovor koji je predmet ovog slučaja, ne ispunjava te kriterije. Ugovor, koji podnosilac prijave posjeduje je potpisan i ovjeren od strane vojnog pravobranioca. Međutim, ugovoru nedostaju pečat nadležne poreske uprave.

83. Komisija, konačno, podsjeća da Zakon o parničnom postupku, u članu 54. ("Službene novine Federacije Bosne i Hercegovine", broj 53/03) predviđa mogućost podnošenja tužbe kojom se utvrđuje postojanje ili nepostojanje nekog prava, pravnog odnosa ili istinitost odnosno neistinitost neke isprave. Komisija podsjeća da je Dom, u ranijoj praksi, utvrdio da je član 54. Zakona o parničnom postupku (ili član 172. bivšeg Zakona o parničnom postupku, "Službene novine Federacije Bosne i Hercegovine" br. 42/98 i 3/99) djelotvoran domaći pravni lijek koji se mora iscrpiti u slučaju kada podnosilac prijave nema u posjedu valjan kupoprodajni ugovor, nego se mora utvrditi da li je on vlasnik, i to na osnovu koraka koje su preduzeli u procesu otkupa stana tokom 1991. i 1992. godine (vidi, na primjer, odluke o prihvatljivosti, CH/98/1160, CH/98/1177, CH/98/1264, *Pajagić, Kuruzović i M.P. protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine* od 9. maja 2003. godine). Komisija je nastavila sa primjenom navedenog pristupa ovom problemu (vidi, na primjer, Odluku o prihvatljivosti i brisanju, CH/99/1921, *Blagojević protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine*, od 16. januara 2004. godine). Komisija smatra da je navedeni pristup, također, primjenljiv i u slučaju kada treba utvrditi da li predmetni ugovor sadrži sve potrebne elemente propisane zakonom, a što je slučaj sa ugovorom u konkretnom predmetu. U ovakvim situacijama, Komisija smatra razumnim da očekuje da podnosilac prijave mora snositi teret pokretanja sudskog spora radi utvrđivanja postojanja ugovornog odnosa ili bilo kog ugovornog prava. Tek po okončanju postupka dokazivanja postojanja i valjanosti ugovora pred nadležnim sudom, on će imati mogućnost daljnjeg postupanja u vezi sa pravom vlasništva, zavisno od rezultata ovog postupka.

84. Prema tome, podnosilac prijave je mogao podnijeti tužbu nadležnom sudu prema članu 54. Zakona o parničnom postupku, te dokazivati postojanje i pravnu valjanost ugovora o otkupu predmetnog stana. (vidi, na primjer, Odluku o prihvatljivosti, CH/98/289 i drugi, *B.Č. protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine*, od 8. februara 2005. godine). Podnosilac prijave nije dokazao da ovaj pravni lijek nije djelotvoran niti se Komisiji tako čini. Prema tome, Komisija smatra da podnosilac prijave nije iscrpio djelotvorne pravne lijekove, kako se zahtijeva članom

VIII(2)(a) Sporazuma, zbog čega je prijava preuranjena. Komisija, zbog toga, odlučuje da ovaj dio prijave proglasi neprihvatljivim.

A.3. Zaključak u pogledu prihvatljivosti

85. Komisija proglašava prijavu neprihvatljivom *ratione personae* u dijelu u kojem je upućena protiv Bosne i Hercegovine, neprihvatljivom u dijelu koji se tiče uknjiženja prava vlasništva, jer je preuranjena i prihvatljivom u dijelu u kojem je upućena protiv Federacije Bosne i Hercegovine u pogledu pitanja dužine postupka.

B. Meritum

86. 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.

87. Komisija zaključuje da predmetna prijava mora biti ispitana u pogledu člana 6. Evropske konvencije.

B.1. Član 6. Evropske konvencije

88. 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.

89. Kao što je prethodno navedeno, podnosilac prijave se žali na pravo djelotvornog pristupa sudu, jer dužina trajanja postupka vraćanja njegovog stana u posjed nije bila razumna i onemogućavala ga je da dođe do konačne odluke povodom njegovog zahtjeva. Komisija ponavlja da podnosilac prijave nema, prema kriterijima Komisije (vidi tačku 81. ove Odluke), valjan kupoprodajni ugovor. Međutim, u tom slučaju, podnosilac prijave se mora tretirati kao nosilac stanarskog prava, a to je građansko pravo zaštićeno članom 6. Evropske konvencije. Samim tim, ovo pravo uključuje i pravo na pristup sudu.

90. 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 (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 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).

91. 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 Državi. 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, 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 povratka u "razumnom roku".

92. Komisija, najprije, zapaža da je podnosilac prijave podnio zahtjev za povrat stana u posjed 1998. godine. Ovaj postupak nije okončan. Takav zaključak, sam po sebi, je protivan navodima iz prethodne tačke ove Odluke.

93. Za razliku od "klasičnih" slučajeva pristupa sudu, konkretni predmet vodi ka zaključku da je pristup sudu bio formalno omogućen, ali da nije bio djelotvoran. Predmet je po žalbi vraćan na ponovno odlučivanje tri puta, od toga je rezultat postupka bio dva puta isti. Upravni organi su u više navrata nedostatno utvrđivali činjenično stanje, dok viši organ, tj. sud, nije sam ispravljao greške, već je konstantno poništavao rješenja nižih organa i vraćao predmet na ponovni postupak. Ovim se može zaključiti da su organi bili aktivni, ali da podnosilac prijave nije mogao doći do konačnog mišljenja nadležnih organa, znači, ne i djelotvorni. Konačno, u postupcima u toku 2004. godine, podnosilac prijave je upućen na pokretanje postupka utvrđivanja vlasništva nad stanom, a nadležni organi nisu nastavili postupak vraćanja spornog stana podnosiocu prijave u svojstvu predratnog nosioca stanarskog prava. Time su mu nedležni organi neosnovano negirali i navode da je vlasnik stana, što Komisija afirmativno potvrđuje (vidi tačku 80. *et sequ.*), ali i svojstvo predratnog nosioca stanarskog prava, što Komisija ne može da prihvati. Time je stopiran postupak, bez adekvatnog uporišta u zakonu.

94. U vezi ukidanja, poništavanja odluka i stalnog vraćanja na ponovni postupak, Komisija navodi da ukidanje odluka 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 aplikantu 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.

95. Osim toga, 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 30 dana. Uzimajući u obzir čak i mogućnost vođenja upravnog spora, navedeni rokovi i stvarna dužina postupka u konkretnom slučaju nisu u razumnom odnosu.

96. S druge strane, Komisija smatra da u slučajevima u kojima upravni organi ne postupe po zakonom određenim rokovima ili na drugi način povrijede pozitivno-pravne propise (pogrešno utvrde činjenično stanje, pogrešno primijene pozitivno-pravne propise, itd), sudovi, u upravnim sporovima, moraju biti veoma oprezni u pogledu pitanja da li poništenje upravnih akata i vraćanje na ponovni postupak predstavlja povredu prava na razumnu dužinu postupka. Prema tome, sudovi moraju imati mogućnost da u upravnom sporu donesu presudu u meritumu, bez vraćanja predmeta upravnim organima. U takvim situacijama, njihova nadležnost mora inkorporirati kako mogućnost rješavanja ključnih pravnih pitanja, tako i utvrđivanja činjeničnog stanja u skladu sa standardima iz člana 6. Evropske konvencije. U protivnom, ne bi se radilo o sudu pune jurisdikcije, što je neprihvatljivo sa tačke gledišta Evropske konvencije uzimajuću u obzir činjenicu da su u prethodnim instancama odlučivali upravni organi (vidi u tom smislu Odluku Ustavnog suda Bosne i Hercegovine, *U 19/00*, od 4. maja 2001. godine, "Službeni glasnik Bosne i Hercegovine", broj 27/01). Konkretan slučaj je klasičan primjer kako su sudovi, umjesto donošenja meritornih odluka bez vraćanja na ponovni postupak, ispravljali greške organa tužene strane, a posljedice je neosnovano trpio podnosilac prijave.

97. Na kraju, Komisija napominje da upravni organi i sudovi u upravnim sporovima imaju pravo da direktno primjenjuju Evropsku konvenciju (član I/2. Ustava Bosne i Hercegovine). Ova prednost dolazi do izražaja upravo u situacijama kada sam procesni zakon ne dozvoljava jednom organu da sam meritorno odluči, bez vraćana na ponovni postupak, a što bi bilo neophodno da bi se donijela konačna odluka u razumnom roku. S druge strane, svi organi imaju pravo da pokrenu postupak konkretne ocjene ustavnosti pravnih akata pred Ustavnim sudom Bosne i Hercegovine, ako su mišljenja da je određena pravna osnova, a koja je bitna za odlučivanje u konkretnom slučaju, protivna Ustavu Bosne i Hercegovine. U tom smislu, Ustavni sud Bosne i Hercegovine jer naveo:

> Da bi se riješio ovaj konflikt [konflikt protivustavnog zakona i Ustava Bosne i Hercegovine], nadležni sudovi, kada se suoče sa takvim problemom, imaju obavezu da pokreću postupke konkretne kontrole ustavnosti, pri čemu oni uživaju dispoziciju u pogledu ocjene pitanja da li se radi o protivustavnom zakonu, ali ne i slobodu inicijative pokretanja postupka pred Ustavnim sudom u smislu člana VI/3.c) Ustava Bosne i Hercegovine. Drugim riječima, sudovi su dužni da primjenjuju Ustav Bosne i Hercegovine u svakom konkretnom slučaju, pazeći na konzistentnost općih pravnih akata sa najvišim pravnim aktom države, Ustavom Bosne i Hercegovine. Time sudovi kontrolišu zakonitost u državi, što je jedna od osnovnih fukcija i obaveza koja proizilazi iz principa pravne države, kao njegovog inherentnog elementa (član I/2. Ustava Bosne i Hercegovine (Odluka Ustavnog suda Bosne i Hercegovine*, U 106/03*, od 26. oktobra 2004. godine, stav 33).

98. Komisija, zbog svega navedenog, zaključuje da je Federacija Bosne i Hercegovine prekršila pravo podnosioca prijave prema članu 6. Evropske konvencije, zbog toga što mu nije omogućila djelotvoran pristup sudu.

99. S obzirom na zaključke u vezi prihvatljivosti ove prijave i u vezi sa članom 6. Evropske konvencije, Komisija ne smatra potrebnim da raspravlja pitanje povrede člana 13. Evropske konvencije i člana 1. Protokola broj 1 uz Evropsku konvenciju.

B.2. Zaključak o meritumu

100. Komisija zaključuje da je došlo do povrede prava podnosioca prijave na pristup sudu koje štiti član 6. Evropske konvencije.

101. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 6. Evropske konvencije, Komisija ne smatra potrebnim da ispita prijavu u vezi sa članom 13. Evropske konvencije, te članom 1. Protokola broj 1 uz Evropsku konvenciju.

102. Na kraju Komisija napominje da, u skladu sa pravilom broj 62. Pravila procedure Komisije, odluke Komisije konačne su i obavezujuće i dužno ih je poštovati svako fizičko i pravno lice. Svi organi vlasti tuženih strana u smislu Sporazuma, dužni su, u okviru svojih nadležnosti utvrđenih ustavom i zakonom, provoditi odluke Komisije. U datim rokovima, tužena strana, koja je obavezna da izvrši odluku Komisije, dužna je dostaviti obavijest o preduzetim mjerama u cilju izvršenja odluke Komisije, kako je to naznačeno u odluci. U slučaju nepostupanja, odnosno kašnjenja u izvršenju ili obavještenju Komisiji o preduzetim mjerama, Komisija donosi rješenje kojim se utvrđuje da odluka Komisije nije izvršena. Ovo rješenje dostavlja se nadležnom tužiocu i nadležnom agentu tužene strane. Komisija napominje da neizvršenje odluka Komisije, u skladu sa članom 239. Krivičnog zakona Bosne i Hercegovine, predstavlja krivično djelo.

VIII. PRAVNI LIJEKOVI

103. 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.

104. Komisija je utvrdila povredu prava na djelotvoran pristup sudu podnosioca prijave. Podnosilac prijave je tražio naknadu materijalne i nematerijalne štete. Imajući u vidu dosadašnju praksu Doma/Komisije, Komisija smatra pravičnim da naloži tuženoj strani, Federaciji Bosne i Hercegovine, da podnosiocu prijave isplati iznos od 1000 KM (hiljadu konvertibilnih maraka) na ime naknade nematerijalne štete, u roku od mjesec dana od dana prijema ove Odluke i da mu 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.

IX. ZAKLJUČAK

105. Iz ovih razloga, Komisija odlučuje,

1. jednoglasno, da prijavu proglasi neprihvatljivom 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 prijavu proglasi neprihvatljivom u dijelu koji se odnosi na priznavanje vlasništva podnosioca prijave;

4. jednoglasno, da dio prijave, koji se odnosi na pravo na djelotvoran pristup sudu u pogledu zahtjeva za povrat stana u posjed, proglasi prihvatljivim;

5. 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;

6. jednoglasno, da nije potrebno ispitivati prijavu prema članu 8. Evropske konvencije i članu 1. Protokola 1 uz Evropsku konvenciju;

7. jednoglasno, da naredi Federaciji Bosne i Hercegovine da preduzme neophodne korake i osigura konačno rješavanje zahtjeva za povrat stana podnosioca prijave u hitnom postupku, a najkasnije u roku od 6 mjeseci od dana prijema ove Odluke;

8. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave isplati paušalan iznos od 1000 KM (hiljadu konvertibilnih maraka) na ime naknade nematerijalne štete u roku od mjesec dana od dana prijema ove Odluke;

9. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave 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; i

10. jednoglasno, da naredi Federaciji Bosne i Hercegovine da Komisiji, u roku od mjesec dana od isteka roka iz zaključka broj 7, dostavi informaciju o preduzetim mjerama po pravnim lijekovima.

(potpisao)	(potpisao)
Nedim Ademović	Miodrag Pajić
Arhivar Komisije	Predsjednik Komisije

HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

ДОМ ЗА ЉУДСКА ПРАВА
ЗА БОСНУ И ХЕРЦЕГОВИНУ

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 5 November 1999)

Case no. CH/98/1245

Persa SLAVNIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 1 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, resident in Banja Luka, Republika Srpska. She is a refugee from Šibenik, Croatia. In November 1992 her husband exchanged their apartment in Šibenik for one in Banja Luka. Due to the hostilities the applicant was not able immediately to enter into possession of the apartment in Banja Luka after the contract on exchange was made. When she came to Banja Luka in November 1993 the apartment was already occupied by an employee of the holder of the allocation right. In November 1993 the applicant's husband initiated civil proceedings, requesting the eviction of the occupant. By several decisions taken by the Municipal Court and the Regional Court in Banja Luka, the request was refused. However, the Supreme Court of Republika Srpska has quashed these decisions and referred the case back to the Municipal Court, where the case is currently pending.

2. The holder of the allocation right permanently allocated the apartment to the occupant. On 4 October 1994 the applicant's husband initiated administrative proceedings before the Municipality of Banja Luka, requesting that he be able to enter into possession of the apartment. The Municipality granted her request, and the Ministry for Urbanism, Housing-Communal Affairs and Civil Engineering refused the occupant's appeal. The occupant then initiated an administrative dispute before the Supreme Court. The Supreme Court ordered the occupant to vacate the apartment and return it to the holder of the allocation right until the civil proceedings have been concluded. After a number of attempts to evict the occupant, he still occupies the apartment in question.

3. 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

4. The application was received on 21 October 1998 and registered on the same day. At the time of submitting the application the case was already pending before the Office of the Human Rights Ombudsperson (OHRO). On 20 April 1999 the applicant informed the Registry that on 13 April 1999 the Ombudsperson had decided to close the investigation.

5. On 14 May 1999 the Chamber decided to transmit the case to the respondent Party for its observations under Article 6 of the Convention and Article 1 of Protocol No. 1.

6. The respondent Party's observations were received on 22 July 1999, and were transmitted to the applicant for further observations and any compensation claim she wished to make.

7. The applicant's further observations, containing a claim for compensation, were received on 24 August 1999. The respondent Party's observations on the compensation claim were received on 23 September 1999.

8. The Chamber deliberated on the admissibility and merits of the case on 9 September, 7 October and 1 November 1999.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

9. The facts of the case have not been contested by the respondent Party and can be summarised as follows.

1. The allocation and contracts regarding the apartment

10. The applicant and her husband were forced to leave Šibenik, Croatia, where they lived before the war, as they were of Serb origin. Initially they went to Travnik, the Federation of Bosnia and

Herzegovina. From Travnik they contacted I.B., a third person, and offered to exchange their apartment in Šibenik for the one I.B. had in Banja Luka.

11. On 26 November 1992 the holder of the allocation right ("the allocation company") over I.B.'s apartment in Banja Luka, located at K. Hercegovca No. 7, consented to an exchange of occupancy rights. On 27 November 1992 the applicant's husband and I.B. concluded the exchange contract. On 26 December 1992 also the holder of the allocation right over the apartment in Šibenik gave its consent to the exchange. However, on 10 March 1993 consent of the allocation company in Banja Luka was revoked. On 5 May 1993 the applicant's husband concluded a contract on the use of the apartment with the Housing Company of Banja Luka. The applicant was not able to enter into possession of the apartment immediately, as the hostilities started. They came to Banja Luka in November 1993.

12. On 3 June 1993 the allocation company allocated the Banja Luka apartment to another person ("the occupant") for a twelve-month period. On 25 June 1993 the occupant entered into a contract on the use of the apartment with the Housing Company. On 7 March 1994 the allocation was extended for a further twelve months.

13. On 4 December 1996 the Housing Company informed the applicant that the contract on the use of the apartment the Housing Company entered into with the occupant was invalid, as it was concluded upon an illegal decision on allocation. Furthermore, the Housing Company confirmed that the applicant and her husband were considered as holders of the occupancy right over the apartment.

2. The first set of court proceedings

14. On 13 November 1993 the applicant's husband initiated proceedings before the Municipal Court in Banja Luka requesting the court to invalidate the contract the occupant had with the Housing Company and to order him to vacate the apartment. When the applicant's husband died she succeeded into the proceedings he had initiated.

15. On 5 August 1994 the Municipal Court refused the applicant's request. In the reasoning the court stated that the contract on exchange of the apartments was invalid, and as a result the applicant had never become the holder of the occupancy right. The contract was considered invalid as the allocation company had given its consent to a non-existing contract, and as the allocation company had later withdrawn its consent. On 13 September 1994 the applicant appealed against this decision. On 30 November 1994 the Regional Court in Banja Luka refused the appeal.

16. On 9 March 1995 the applicant requested the Supreme Court to review the decision of 30 November 1994. In reply the Housing Company, as one of the respondent parties in these proceedings, agreed with the applicant's request. On 15 March 1996 the Supreme Court issued a procedural decision annulling the decisions of the Municipal and Regional Courts and ordering the Municipal Court to reconsider the case. In the reasoning the Supreme Court stated as follows:

> "…According to the opinion of this court the lower instance courts applied the law wrongly, when they decided to refuse the request of the claimant. Namely, the facts that the consent to the exchange of the apartments … was given on 26 November 1992, that the contract was concluded on 27 November 1992, and that the holder of the allocation right on 10 March 1993 revoked the consent given, do not make the contract absolutely invalid. The lower instance courts wrongly established the fact of invalidity of this contract."

17. The Supreme Court argued that the purpose of Article 32 paragraph 3 of the Law on Housing Relations (see paragraph 36 below), i.e. that the contract on the exchange needs to be submitted to the holders of the allocation rights, is to inform the holders of the allocation rights in order to avoid possible problems (i.e. if the exchange is fictitious, inadequate etc.). The fact whether the contract has been signed or not does not affect its validity.

18. The Supreme Court further found that:

> "The finding of the lower instance courts that the holder of the allocation right revoked its consent so that the consent no longer exists, is wrong, since such a possibility is not provided for by law. Namely, Article 33 of the Law [on Housing Relations, see paragraph 37 below] gives reasons for which the holder of the allocation right can refuse to give its consent. Article 34 of the same Law [see paragraph 38 below] gives a possibility to the holder to file a lawsuit to the competent court when there is doubt the contract has been fictitious. … It is beyond any doubt that the holder of the allocation right … has not sought to use this right.
>
> Because of the wrong legal finding that the contract on the exchange of the apartments was absolutely invalid the lower instance courts did not go into examination of the grounds on which …[the occupant] occupies the apartment. The courts did not examine whether he had entered into a contract on the use of the apartment upon a valid act of the holder of the allocation right over the apartment. The claimant [the applicant] claims to have certain rights on the apartment and the courts needed to establish whose right was stronger …
>
> In the renewed proceedings the lower instance courts will remove the irregularities pointed out, and then upon the results of the proceedings as a whole the courts will pass an appropriate and lawful decision."

3. The second set of court proceedings

19. On 8 July 1997 the Municipal Court issued a decision refusing the applicant's request (as sent back for reconsideration by the Supreme Court) with the same reasoning as the decision of 5 August 1994. The decision was passed after an oral and public hearing had been held. The Municipal Court gave the following reasons for its decision:

> "…the apartment was allocated to [the occupant] by a decision of his [employer]. The decision was issued upon this law [Article 24 of the Law on Housing Relations] … This decision is final and binding since it has not been revoked in a labour dispute within the meaning of the Law on Housing Relations. All this means that this decision could have been disputed only in a labour dispute upon the Law on Housing Relations and general act of the Working Organisation [i.e. the holder of the allocation right] as the owner of the apartment. Therefore the finding of the Supreme Court … of 24 October 1995 [see paragraph 28 below] in which it decided, in the administrative dispute, and from which it appears that the decision on allocation was invalidated, is wrong. It is generally known that such an issue cannot be decided upon in the administrative proceedings, i.e. in an administrative dispute, but only before a regular court and in the labour proceedings."

20. The Municipal Court then gave its reasons for not accepting the applicant's occupancy right as valid and stated as follows:

> "Deciding ... on the validity of the contract on the use of the apartment, entered into upon the contract on the exchange of the apartments this court came to the conclusion that the contract on the exchange of the apartments is not legally valid, and therefore the contract on the use of the apartments is not legally valid. This legal finding of the court is based on the indisputable fact that the consent to the exchange was given by the owner prior to the entry into the contract. … From the above stated it follows that the consent given on the contract on the exchange is legally invalid, upon the law itself, and as such could have been revoked by the owner of the apartment, since it was given contrary to the Law on Housing Relations. This is because the consent to the contract on the exchange of the apartments can be given only if such a contract was concluded. The contract is not concluded if it is not signed. Therefore the finding of the Supreme Court … that in the concrete case the consent could not have been withdrawn although it was given at the time when the contract did not exist is unacceptable. This is because if we accept the mentioned finding of the Supreme Court, that means that a consent can be given even on a contract that does not exist. This really would be lacking not only any legal grounds but also any sense or reason at all."

21. On 27 April 1998 the Regional Court refused the applicant's appeal against the decision of

8 July 1997. The Regional Court agreed with the Municipal Court's reasoning.

22. On 20 July 1998 the applicant filed a request with the Supreme Court for review of the decision of 27 April 1998. On 18 March 1999 the Supreme Court again granted the applicant's request, invalidated the decisions of 8 July 1997 and 27 April 1998 and ordered the Municipal Court to reconsider the case.

23. The decision of the Supreme Court of 18 March 1999 stated that the fact that the allocation company's consent was given prior to the conclusion of the contract was of no relevance, since the allocation company had seen the terms of contract and had given its consent to that basis. The lower instance courts had not considered the copy of the contract of 27 November 1992, although the applicant had submitted it, but only the copy of 26 November 1992 (which does not contain the signatures of the holders of the occupancy rights). By this failure the lower instance courts had violated the applicable procedure. The Supreme Court further stated that only oral exchange contracts to which there is no written consent are invalid. Therefore the fact that the consent had been given a day before the contract was signed did not make the contract invalid. Furthermore, the holder of the allocation right was not entitled to withdraw the consent given.

24. The Supreme Court instructed the Municipal Court to follow the guidelines of the decision of 18 March 1999, giving special attention to the contract of 27 November 1992.

25. The Municipal Court scheduled a hearing for 20 July 1999, but the hearing has been postponed for 7 September 1999. It is not known to the Chamber whether the hearing was held and if any decision was passed.

4. The administrative proceedings

26. On 4 October 1994 the applicant initiated administrative proceedings before the Municipality of Banja Luka. On 11 January 1995 the Municipal Secretariat for Economy issued a decision ordering the occupant to vacate the apartment, on the basis that he was an illegal occupant.

27. On 27 March 1995 the Ministry for Urbanism, Housing-Communal Affairs and Civil Engineering refused the appeal lodged by the occupant. The occupant initiated an administrative dispute before the Supreme Court against the Ministry's decision.

28. On 24 October 1995 the Supreme Court issued a decision annulling the decisions of 11 January and 27 March 1995, but declaring the occupant to be an illegal occupant and ordering him to vacate the apartment and place it at the disposal of the holder of allocation right. The Court stated that the applicant was not the holder of the occupancy right over the apartment and, therefore, was not entitled to request the occupant's eviction (see paragraph 34 below). Nevertheless, the occupant was not the holder of the occupancy right either, since the act upon which he occupied the apartment was not a valid one. Therefore the apartment had to be put at the disposal of the allocation company until the question of who is the holder of the occupancy right had been resolved.

29. Upon the decision of 24 October 1995 the applicant requested the Municipal Secretariat for Housing Affairs ("the Secretariat") to evict the occupant. There have been seven attempts to carry out the eviction, without success. On 21 October 1998 the occupant was apparently evicted and the apartment was given to the holder of allocation right. The applicant states that the occupant vacated the apartment, but as soon as the representatives of the OSCE and the IPTF had left the scene he moved back in.

30. This allegation is confirmed by the fact that another eviction was scheduled for 5 November 1998. It was not carried out, however, since the local police failed to appear on the ground that the Minister of Internal Affairs had not signed their order.

31. The applicant requested to meet the Secretary of the Secretariat in order to find out about the reasons for not carrying out the occupant's eviction. On 8 July 1999 the Secretary replied to her in writing that the occupant had been evicted and that, accordingly, the decision of the Supreme Court of 24 October 1995 had been complied with. The Secretary further stated that on 28 October 1998.

(i.e. after the occupant was evicted) the allocation company had issued a decision again allocating the apartment to the occupant until the final decision in the civil proceedings initiated by the applicant. Therefore there has been no issue for the Secretariat to deal with, since the decision of the Supreme Court has been complied with.

32. The applicant states that the occupant is still occupying the apartment.

5. Proceedings before the Human Rights Ombudsperson

33. On 29 August 1996 the applicant filed an application with the Office of the Human Rights Ombudsperson for Bosnia and Herzegovina. On 13 April 1999 the Ombudsperson decided to close the investigation in the applicant's case, as the occupant had been evicted on 21 October 1998 and as the holder of the allocation right had caused the delay in the eviction proceedings.

B. Relevant legislation

1. The Law on Housing Relations

34. Article 11 of the Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 14/84) provides that an occupancy right is acquired through legal entry into possession of an apartment, carried out in accordance with the contract on the use of the apartment.

35. Article 22, in its relevant parts, prescribes that if the holder of the occupancy right dies, and his or her spouse does not continue to use the apartment, other members of the family household should agree on who will succeed into the occupancy right. The members of the family household are to inform the holder of the allocation right about the agreement they have reached.

36. Article 32, in its relevant parts, reads as follows:

> "The holder of the occupancy right can exchange the apartment for an apartment of another holder of the occupancy right. Exchange is done in writing.
> …
> The written consent of the holders of the allocation rights is required for the exchange of the apartments. Such consent is to be requested by submitting the contract on exchange to the holders of the allocation rights.
> …
> The contract which has not been made in writing and which has not been approved by the holders of the allocation rights does not have any legal effects.
>
> In the case of the exchange of the apartments the occupancy right is acquired by moving into the apartment upon a valid contract.
>
> Fictitious exchange of the apartments is forbidden."

37. Article 33, in its relevant parts, reads as follows:

> "The holder of the allocation right can refuse to give its consent to the exchange for the following reasons:
>
> 1) if it is possible to provide, within six months, an apartment corresponding to the one the holder of the occupancy right intends to acquire by the exchange;
> …
> 3) if the contract on the use of the apartment has been invalidated prior to submitting the contract for the consent of the holder of the allocation right;
> 4) if the occupancy right of the holder, who is to enter into the apartment upon the exchange contract, has been terminated upon his responsibility;
> 5) if the rent has not been paid;
> 6) if the holder of the allocation right considers that the exchange is fictitious.

The refusal to give consent to the exchange of apartments needs to be done in writing and with the reasons given.
…"

38. Article 34 of the Law reads as follows:

"The holder of the allocation right can initiate proceedings before the competent court for invalidation of the contract on the use of apartment … in case that after the exchange has been done it considers that the exchange was fictitious. The lawsuit in this direction needs to be filed within 30 days from the date of awareness of the fact that the contract has been fictitious, and the latest within 2 years from the date the exchange has been carried out".

2. The Law on Civil Proceedings

39. Article 384 of the Law on Civil Proceedings (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77) prescribes that the Court of Review (i.e. the Supreme Court) will return the case for reconsideration by a lower instance court if the factual background has not been completely or correctly established.

40. Article 395 provides that the Court of Review will pass a judgment by which it will change the disputable decision of the lower instance courts in case the laws have been applied wrongly.

IV. COMPLAINTS

41. The applicant generally complains of violations of her property rights and the treatment she has had before the courts. She has not alleged any specific violation of her human rights as protected by the Agreement, but complains that she has been denied her rights to property and fair proceedings before the domestic organs.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

42. The respondent Party submits that the application should be rejected as the applicant has not exhausted available domestic remedies. The applicant's prospect of success in the domestic proceedings is allegedly beyond any doubt, since her request for review was adopted by the Supreme Court on 18 March 1999.

43. The respondent Party further submits that the applicant filed the application with the Ombudsperson on 29 August 1996 and that the Ombudsperson decided to close the investigation in the applicant's case since the respondent Party could not be held responsible for any violation of the applicant's human rights.

B. The applicant

44. The applicant maintains that the Supreme Court by its decision of 24 October 1995 (see paragraph 28 above) ordered the occupant to vacate the apartment. She further argues that her late husband was the only holder of the occupancy right and that none of the parties to the exchange contract sought to have the contract invalidated. The holder of the allocation right has not initiated proceedings for invalidation of the consent it had given for the exchange contract. It is not true that the occupant was evicted on 21 October 1998. She substantiates her claim with the conclusion of 26 October 1998 by which the Secretariat scheduled an attempt to evict him for 5 November 1998 (see paragraph 30 above).

45. The applicant further argues that the respondent Party in its observations only gives an overview of the proceedings, neglecting the non-compliance with the Supreme Court judgment upon her request for review (see paragraph 16 above). The respondent Party appears to neglect the

judgment of the Supreme Court in the administrative dispute (see paragraph 28 above).

46. As regards the argument that the Ombudsperson decided to close the investigation in the case, the applicant states that she had no contact with that office for months, and since the case before this institution is finished she wants the Chamber to help her.

47. The applicant also states that she has never been summoned to give a statement before the courts or the Municipality. On 15 December 1997 she filed a criminal report against the director of the holder of the allocation right, but there has been no action upon it.

VI. OPINION OF THE CHAMBER

A. Admissibility

48. 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. Requirement to exhaust effective domestic remedies

49. 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.

50. The respondent Party submits that the application should be rejected since the applicant failed to exhaust available domestic remedies (see paragraph 42 above). The applicant argues that the remedies available could not be considered as "effective" within the meaning of the Agreement.

51. The Chamber notes that on 15 March 1996 the Supreme Court of the Republika Srpska adopted the applicant's request for review and ordered the Municipal Court to consider as valid the contract on exchange of the apartments and the contract on the use of the apartment the applicant's husband had entered into. The lower instance courts refused to implement the Supreme Court's finding. Therefore the decision of the Supreme Court of 18 March 1999 by which the Municipal Court was again instructed to reconsider the case could not be considered to be an effective remedy. This remedy has already proved to be ineffective.

2. Criteria set out in Article VIII(2)(d) of the Agreement

52. According to Article VIII(2)(d) of the Agreement, the Chamber may reject or defer further consideration of a case, if it concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement.

53. The respondent Party submits that the application should be rejected as already decided upon by the Human Rights Ombudsperson. The applicant submits that the investigation before the Ombudsperson was closed (see paragraph 46 above).

54. The Chamber notes that it shall reject only the cases that are currently pending before the bodies mentioned in Article VIII(2)(d). The applicant's case before the Ombudsperson was terminated by the decision to close the investigation. As the case is no longer pending before that office, there are no grounds for the Chamber to reject it under this provision of the Agreement.

3. Competence *ratione temporis*

55. The Chamber must consider to what extent it is competent *ratione temporis* to consider the case, bearing in mind that the applicant exchanged the apartment on 27 November 1992 and initiated proceedings before the Municipal Court on 13 November 1993, i.e. prior to the entry into force of the Agreement. The Chamber has previously held that it can only consider violations of the Agreement which were alleged to have occured after the entry into force of the Agreement (see, e.g., case no. CH/98/1171, *Čuturić*, decision on admissibility and merits delivered on 8 October 1999, paragraph 19).

56. The applicant's proceedings before the Court have been pending since 13 November 1993. The time that the Chamber can take into account commences on 14 December 1995, the date of entry into force of the Agreement. Nonetheless, the Chamber can take into consideration the events which occurred prior to the entry into force of the Agreement, if they have repercussions on the applicant's current situation.

57. Accordingly, the Chamber is competent to examine the case insofar as it relates to the conduct in the applicant's proceedings in relation to her occupancy right, as they have continued after 14 December 1995.

B. Merits

58. 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

59. The applicant did not specifically allege any violation of her rights as protected by Article 6 paragraph 1 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.

60. Article 6 paragraph 1 of the Convention, insofar as relevant to the present case, 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...."

61. The Chamber must examine whether the proceedings as a whole were "fair" within the meaning of Article 6 paragraph 1 of the Convention. In this respect it has considered whether the refusal of the municipal and regional courts to follow the decision of the Supreme Court in the review proceedings infringed the right to a "fair" hearing.

62. The Chamber notes that the Supreme Court, in its decision of 15 March 1996, gave a clear ruling on two questions of law which arose in the case, namely whether consent to an exchange contract which had not yet been signed was valid and whether such consent could be withdrawn. It ruled that such consent was valid and could not be withdrawn (see paragraphs 16-18 above). It instructed the lower court to remove the irregularities it had pointed out and then take an appropriate and lawful decision (see paragraph 18 above). The Municipal Court, in its decision of 8 July 1997, refused to follow the Supreme Court's instructions and stated that the opinion of the Supreme Court was "lacking not only any legal grounds but also any sense or reason at all". The Regional Court agreed with the Municipal Court.

63. It is not the Chamber's function, in applying Article 6 of the Convention, to review the decisions of domestic courts and decide whether they have correctly applied domestic law. It can only consider whether the proceedings have been "fair" or not. However, the obligation on domestic courts to act fairly includes, in the Chamber's opinion, an obligation to interpret and apply domestic law in good faith. This implies, *inter alia,* that they should treat relevant decisions of superior courts with due respect. Legal certainty and the "rule of law" referred to in the preamble to the Convention require this. In the present case both the Municipal Court and the Regional Court refused to follow the Supreme Court's clear rulings on questions of law. Neither court stated any convincing reason for this refusal. In these circumstances the Chamber concludes that they did not act "fairly" in considering the issues of law which arose.

64. Accordingly, the Chamber considers that the applicant's right to a "fair hearing", as provided for by Article 6 paragraph 1 of the Convention, has been violated.

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

65. 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."

66. The respondent Party has not submitted any observations under this provision. The applicant maintains that she is the holder of the occupancy right over the apartment in question.

(a) The applicant's claim

67. The Chamber notes that the applicant has not yet become the holder of the occupancy right over the apartment in question. The Law on Housing Relations requires her not only to have valid grounds to occupy the apartment but also to enter into possession of it. The Chamber further notes that it was the applicant's husband who entered into the exchange contract and the contract on the use of the apartment. Her husband is still considered to be the party in the domestic proceedings (since he initiated them and the applicant only succeeded into the proceedings at a late stage). None of the respondents in the domestic proceedings nor the respondent Party in its observations disputed her right to pursue her claim.

68. Therefore, the Chamber finds that the applicant can be considered as entitled to seek to enter into possession of the apartment in question.

(b) Whether "possessions" are at issue

69. The Chamber must first consider whether the applicant's contract on the use of the apartment constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention.

70. The Supreme Court, in its judgment of 24 October 1995 in the administrative dispute, considered the decision on allocation of the apartment to the occupant as invalid. Although the Municipal Court in its decision of 8 July 1997 points out that the Supreme Court could not decide on the occupant's occupancy right, this judgment of the Supreme Court is final and binding.

71. The Supreme Court, in its decision of 15 March 1996, found that the contracts that the applicant's husband entered into needed to be considered as valid. Then the Supreme Court ordered the lower instance courts to compare the rights of the applicant's husband and the occupant and decide who had the stronger right to the apartment. Since the Supreme Court has already found that the occupant's occupancy right was not valid it is obvious that there are no rights to compare.

72. The Chamber has previously held that contractual rights, although subject to some uncertainty should be regarded as "possessions" (see, e.g., cases nos. CH/96/3, 8 and 9, *Medan, Bastijanović and Marković*, decision on the merits delivered on 7 November 1997, paragraph 33, Decisions on Admissibility and Merits 1996-1997). Furthermore, the European Court of Human Rights has held that even revocable rights, if found valid by a decision of a domestic court constitute "possessions" for the purposes of Article 1 of Protocol No. 1 (see, e.g., *Stran Greek Refineries v. Greece* judgment of 9 December 1994, Series A no. 301-B, paragraph 62).

73. In the light of the above, the Chamber concludes that the legal position of the applicant, as described in the factual part of this decision, constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

(c) Justified interference with the peaceful enjoyment of one's possessions

74. Having established that the applicant's right from the contract on the use of the apartment constitutes her possession, the Chamber next finds that the conduct of the domestic courts in dealing with her request to be enabled to enter into possession of it, interfered with her right to peaceful enjoyment of her possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

75. The Chamber finds that this interference is still ongoing. 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.

76. The Chamber notes that there are no justified reasons for the municipal and regional courts to keep refusing the applicant's request to be enabled to enter into possession of her apartment. Three decisions of the Supreme Court of the Republika Srpska support her request. None of them have been complied with. Two of these decisions (i.e. the decisions passed in the civil proceedings) are not enforceable. The third decision (the judgment passed in the administrative dispute) is enforceable, but it has not been complied with.

77. 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.

(d) Conclusion

78. Accordingly, the Chamber finds that there has been a violation of the applicant's right to peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

79. 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.

80. The Chamber considers it appropriate to order the respondent Party to take all necessary steps to enable the applicant to enter into possession of her apartment without further delay.

81. The applicant requests to be reinstated into the apartment, to enter into possession of the belongings and to be compensated for not being able to use her property since May 1993. She further claims compensation for the fear she suffered. She also requests to be compensated for her health that has been impaired because she had to live under bad conditions. The applicant wants to be compensated for not being provided with accommodation, which she was entitled to as a refugee. She also wants the damage caused to her reputation to be remedied. The applicant did not set a sum that she considers would be appropriate to compensate her for the damages she allegedly suffered. The applicant has not substantiated any of her claims.

82. The respondent Party submits that it cannot be held responsible for any violation of the applicant's rights provided for by the Agreement. Therefore the compensation claim is ill-founded and as such should be rejected.

83. The Chamber considers that it cannot reject the claim for compensation submitted by the applicant on the grounds suggested by the respondent Party, as it has not accepted analogous

arguments relating to the admissibility of the application (see paragraphs 48-54 above). As the two arguments are inextricably linked, the fact that the Chamber has not accepted them in relation to the admissibility of the application precludes the Chamber from accepting them in relation to the claim for compensation.

84. However, considering that the applicant has failed to substantiate her claim for compensation for pecuniary damages she has allegedly suffered the Chamber considers that her request should be rejected.

85. Nevertheless, 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 enter into possession of her apartment, especially in view of the fact that she has taken various steps to do so.

86. Accordingly, the Chamber will order the respondent Party to pay to the applicant the sum of 2,000 Convertible Marks (*Konvertibilnih Maraka*, "KM") in recognition of her suffering as a result of her inability to enter into possession of her apartment.

87. Additionally, the Chamber awards 4% 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 the preceding paragraph.

VIII. CONCLUSIONS

88. For these reasons, the Chamber decides,

1. by 6 votes to 1, to declare the application admissible;

2. by 6 votes to 1, that the conduct of the municipal and regional courts in Banja Luka constituted a violation of the applicant's right to a fair hearing within the meaning of Article 6 paragraph 1 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. by 6 votes to 1, that by such conduct of the courts the applicant's right to peaceful enjoyment of her possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention has been violated, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. by 6 votes to 1, to order the Republika Srpska to enable the applicant to enter into possession of her apartment located at K. Hercegovca Street No. 7 in Banja Luka, without further delay;

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

    (a) to pay to the applicant within three months of the delivery of this decision the sum of 2,000 (two thousand) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for mental suffering; and

    (b) to pay simple interest at the rate of four (4) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above three-month period until the date of settlement;

6. unanimously, to reject the remainder of the applicant's compensation claim; and

7. 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 orders.

(signed)	(signed)
Anders MÅNSSON	Michèle PICARD
Registrar of the Chamber	President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 4 April 2003)

Case no. CH/98/1251

Smail SOFTIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 6 March 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
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 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 Bosniak origin. He is both an owner and co-owner of real property in the Gradiška area in the Republika Srpska which he was forced to leave during the armed conflict. During his absence, his property was occupied by refugees and displaced persons of Serb origin.

2. The case concerns the applicant's attempts to regain possession of his property before administrative and judicial authorities of the Republika Srpska. With this aim, the applicant applied to the Ministry for Refugees and Displaced Persons in Gradiška (the "Ministry") under the Law on the Use of Abandoned Property, which entered into force in February 1996 ("the old Law", see paragraphs 31-37 below) and under the Law on Cessation of the Application of the Law on the Use of Abandoned Property, which entered into force in December 1998 ("the new Law", see paragraphs 38-52 below). The applicant also initiated proceedings before the Court of First Instance in Gradiška ("the Court") in 1998. On 17 May 2000 and again on 29 June 2001, the respondent Party informed the Chamber that the applicant had been reinstated into possession of his real property in October 1999. However, the applicant disputed this information, and the respondent Party later explained that it had received incorrect information from the Ministry. Finally, on 18 November 2002, the applicant was in fact reinstated into possession of his real property.

3. The case raises issues principally under Article 6 (right to a fair hearing) and Article 8 (right to home) of the European Convention on Human Rights (the "Convention") and under Article 1 of Protocol No. 1 to the Convention (peaceful enjoyment of possessions).

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced on 23 October 1998. At the beginning the applicant contacted the Chamber through the legal assistance center "Terra" in Gradiška.

5. The applicant requested that the Chamber order the respondent Party, as a provisional measure, to reinstate him into possession of his property. On 10 March 1999, while deciding along with a group of 19 cases (cases nos. CH/98/1118 *et al., Hasan TUFEKOVIĆ and Others v. the Republika Srpska*), the Second Panel of the Chamber decided to reject the provisional measure requested. It further decided to transmit the case, along with other similar cases, to the respondent Party for its observations on the admissibility and merits. On 17 March 1999, the application was so transmitted.

6. On 24 March 1999, the observations of the respondent Party on the admissibility of the case were received by the Chamber[1]. On 13 April 1999, these observations were sent to the applicant and he was asked to submit any further observations he wished to make in reply. On 19 April 1999, the representative of the applicants[2] submitted further observations to the Chamber in response to the respondent Party's observations of 24 March 1999.

7. On 20 April 1999, the applicant informed the Chamber that the Ministry had issued a procedural decision, dated 28 March 1999, confirming his property rights and terminating the right of the current occupants to use his property. He underlined, however, that he did not repossess his property. In the same submission, he presented a compensation claim.

8. On 21 May 1999, the Chamber sent the applicant's further observations to the respondent Party for its additional observations in reply.

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[1] The Chamber notes that the submissions of the respondent Party prior to 17 May 2000 were of a general nature and related to the entire mentioned group of 19 similar cases.

[2] The Chamber notes that the submissions made on behalf of the applicant prior to 20 April 2000 were related to the group of similar cases.

9. On 22 June 1999, the respondent Party submitted its observations upon the applicant's compensation claim.

10. On 17 May 2000 and 29 June 2001, the respondent Party informed the Chamber that the applicant had repossessed his property in October 1999.

11. In his letter of 1 November 2001, the applicant disputed the information provided by the respondent Party and stressed that he had not repossessed all his property.

12. On 19 September 2002, the applicant informed the Chamber that there had been no factual changes in his proceedings before the Ministry.

13. On 23 January 2003, upon the Chamber's request, the respondent Party confirmed that the applicant did not regain possession over all his property in October 1999 and that the information it had earlier provided to the Chamber (see paragraph 10 above) was based upon incorrect information it received from the Ministry. The respondent Party asserted that the applicant had finally been reinstated into possession of all his property on 18 November 2002.

14. On 3 February 2003, the applicant confirmed the respondent's Party information of 23 January 2003. Furthermore, he explained that while he considers this part of his application to be resolved, he maintains his compensation claim.

15. The Chamber deliberated on the admissibility and merits of the application on 6 March 2003. On the same date it adopted the present decision.

III. STATEMENT OF THE FACTS

16. The applicant is the owner of a house situated in Orahova, Municipality Gradiška, Cadastre lot no. 2251 registered at plot no. 606 and a co-owner, together with his brother, of another house also situated in Orahova, Municipality Gradiška, registered at plot no. 467.

17. As a result of the armed conflict, the applicant was forced to leave his property. During his absence, his property was occupied by refugees and displaced persons of Serb origin in accordance with decisions of the Commission for Refugee Accommodation and Management of Abandoned Property, issued in accordance with the old Law.

18. On 20 August 1998, the applicant applied to the Ministry to regain possession of his property under the old Law. On 24 September 1998, he appealed to the second instance organ within the Ministry. No decision was reached upon his appeal. In 1998 the applicant also initiated proceedings before the Court of First Instance in Gradiška to regain possession of his property.

19. On 25 January 1999, the applicant also applied for repossession of his property under the new Law.

20. On 28 March 1999, the Ministry issued a procedural decision recognising the applicant's right to regain possession over the properties concerned (see paragraph 16 above) and terminating the right of the temporary occupants to use them. The procedural decision provided that the right of the temporary users to use the properties in question expired on 28 June 1999.

21. Sometime in late 1999, the applicant and his brother were reinstated into possession of their co-owned property registered at plot no. 467.

22. On 31 July 2000, the applicant submitted a proposal to the Ministry for enforcement of the procedural decision of 28 March 1999.

23. On 11 April 2001, the First Instance Court in Gradiška, after three years of proceedings, issued a judgment ordering the temporary occupant to vacate the property registered at plot no. 606

within the time-limit of 15 days starting from the date when the judgment became final and binding. It is further clear from the reasoning of the decision that the Ministry's procedural decision of 28 March 1999 had been partially enforced in late 1999 (on an exact date unknown to the Chamber) and that the applicant had repossessed his co-owned property registered at plot no. 467 at that time. However, the applicant's attempts to repossess the remainder of his property were unsuccessful for the next three years.

24. On 18 November 2002, the applicant finally repossessed the property he owns registered at plot no. 606.

IV. RELEVANT LEGAL PROVISIONS

A. Law on General Administrative Procedure

25. The Law on General Administrative Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia — hereinafter "OG SFRY" — no. 47/86) was taken over as law of the Republika Srpska. This Law was applicable at the time when the Ministry's procedural decision of 28 March 1999 was issued and when it became enforceable. The new Law on General Administrative Procedure came into force in March 2002 (Official Gazette of the Republika Srpska — hereinafter "OG RS" — no. 13/02), but all provisions relevant to this case remained unchanged. The Law on General Administrative Procedure (OG SFRY no. 47/86) governs all administrative proceedings and the relevant provisions are summarised below.

26. Article 2 provides that individual issues of procedure for a specific administrative area may be differently regulated by a special law. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedure.

27. Chapter XVII (Articles 270–288) concerns the procedure for enforcement of rulings and conclusions.

28. Article 270 (now Article 255) 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 an appeal expires without any such appeal having been submitted. Further, if the procedural decision provides that the action that is subject to enforcement must be enforced within a given deadline, then the procedural decision becomes enforceable upon the expiration of such deadline after the date of delivery of the procedural decision to the party.

29. Article 274 (now Article 258) 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.

30. Article 275 (now Article 259) states that execution shall be carried out either through an administrative or court procedure, as prescribed by the law. The execution of decisions like the one at issue in the present case (*i.e.* for reinstatement into possession of property) shall be carried out by an administrative procedure.

B. Law on the Use of Abandoned Property

31. The Law on the Use of Abandoned Property (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 Gazette of the Republika Srpska on 26 February 1996, and it entered into force the following day. It establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property shall be considered as abandoned, and it 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.

32. 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.

33. Article 3 states that abandoned property shall 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 shall be carried out by the appropriate administrative bodies in each municipality.

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

35. 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."

36. 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. (…)"

37. Article 42 reads as follows:

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

C. Law on the Cessation of the Application of the Law on the Use of Abandoned Property

38. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property of 11 December 1998 (OG RS nos. 38/98, 41/98, 12/99, 31/99, 38/99, 65/01, 13/02, 64/02) ("the new Law") establishes a detailed framework for persons to regain possession of property considered to be abandoned. At the time when the Ministry issued its procedural decision on 28 March 1999, the new Law, together with the amendments of 1998, were applicable. Accordingly, these are the provisions explained below.

39. The new Law renders the old Law out of force.

40. 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.

41. 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/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.

42. Article 6 concerns the arrangements to be made for persons who are required to vacate property in order to allow the previous owner, possessor, or user to return. If such a person cannot, or does not wish to, return to his/her pre-war home, and he/she has not been provided with alternative temporary accommodation, then the relevant body of the Ministry (*i.e.* the local Commission) shall provide that person with appropriate accommodation before the expiry of the deadline for him/her to vacate the property concerned.

43. If a person who temporarily occupies a property is to be evicted from it and provides evidence that he/she applied to regain possession of his/her pre-war home, then that person cannot be evicted until he/she can regain possession or freely dispose of his/her own home. An exception to this prohibition on eviction exists where the temporary occupant is provided with alternative accommodation within a period of one year of providing evidence of an application to regain possession of his/her own pre-war home.

44. If the person who is required to vacate the property has had his/her request to return to his/her property resolved, then any failure of the responsible authority to provide alternative accommodation for such a person cannot delay the return of the owner, possessor, or user of such property.

45. If a temporary occupier of abandoned property occupies that property without a legal basis, then the Ministry is not obliged to provide him/her with alternative accommodation.

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

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

48. Article 10 states that proceedings concerning return of property shall, unless otherwise specified, be carried out in accordance with the Law on Administrative Procedure and treated as an expedited procedure.

49. 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/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 that is sooner than 90 days from the date of lodging the application. If a property is not currently occupied, then 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. The relevant Commission must also provide detailed documentation to the Ministry regarding the lack of available alternative accommodation.

50. 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 "CRPC"). If this occurs, then all other proceedings regarding the property, including those under Article 11, shall be stayed pending the final decision of the CRPC. Any decision of the CRPC shall be enforced by the appropriate authorities of the Republika Srpska.

51. Article 27 states that a decision made under Article 11 may be appealed to the Ministry within 15 days of receipt of such decision.

52. Article 29 of the Law 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 entered into force on 21 January 1999 (OG RS no. 1/99). Article 6 of this instruction states that a person who has submitted a claim under the previously applicable regulations (*i.e.* under the old Law) and such claim has not yet been properly resolved should submit a new claim under the new Law. However, if they do not do so, then such previous claim shall constitute a valid claim under the new Law. If such a previously submitted claim does not meet the requirements of the new Law, then the applicant shall be requested to submit the additional information as prescribed by the new Law.

V. COMPLAINTS

53. The applicant complains of violations of his rights protected under Articles 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

54. In its general observations of 24 March 1999, the respondent Party submitted that the Chamber was not competent to decide upon the application. It stated that the application is, in essence, a request for the return of real property into his possession. Such a claim should be decided by the CRPC or the competent organ in the Republika Srpska under the Law on Cessation of Application of the Law on Use of Abandoned Property. The respondent Party further claimed that the applicant had not exhausted the domestic remedies available to him and that accordingly the Chamber should refuse to accept his application in accordance with Article VIII(2)(a) of the Agreement.

55. In its submissions of 17 May 2000 and 29 June 2001, the respondent Party informed the Chamber that the applicant had been reinstated into possession of his property. However, thereafter, on 23 January 2003, the respondent Party corrected its previous submission and stated that the applicant was only reinstated into possession of his property on 18 November 2002. The respondent Party explained that it had previously received incorrect information from the Ministry.

B. The applicant

56. The applicant maintains his complaints. In addition, he stated that he has exhausted all the domestic remedies available to him. He denied that the application should be decided solely by the CRPC. He claimed that he was unable to realise his right to repossession of his property for a long time due to the inaction of the authorities of the Republika Srpska. The applicant confirmed that he was finally reinstated into possession of all his property on 18 November 2002; none the less, he maintains his compensation claim.

VII. OPINION OF THE CHAMBER

A. Admissibility

57. 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. Requirement to exhaust effective domestic remedies

58. The respondent Party contends that the case should be declared inadmissible because the applicant failed to exhaust effective domestic remedies (see paragraph 54 above).

59. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted ...."

60. The Chamber notes that on 20 August 1998 the applicant unsuccessfully applied to the relevant organ under the old Law to regain possession of his property. Accordingly, he sought, for a long period of time, to avail himself of this remedy.

61. In *Onić v. the Federation of Bosnia and Herzegovina* (case no. CH/97/58, decision on admissibility and merits of 12 February 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."

62. The Chamber, further, notes that on 25 January 1999, the applicant applied under the new Law to regain possession of his property. He received a procedural decision of 28 March 1999 from the Ministry entitling him to regain possession over his property. However, the time limits for such repossession were not adhered to. Although the applicant was in possession of an enforceable procedural decision, he was not in a position to regain his property within a reasonable time, and he did not in fact regain such property until 18 November 2002.

63. In these circumstances, the Chamber finds that the applicant could not be required to exhaust, for the purposes of Article VIII(2)(a) of the Agreement, any further remedy in this context provided for in the domestic law. The Chamber therefore rejects this ground for declaring the application inadmissible.

2. Possibility of submission to the CRPC

64. The respondent Party also claims that the application should be declared inadmissible as the applicant has not applied to the CRPC seeking a decision on his request for the return of his property (see paragraph 54 above).

65. According to Article VIII(2)(d) of the Agreement:

> "the Chamber may reject or defer further consideration of a case, if it concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement."

66. Article XI of Annex 7 to the General Framework Agreement for Peace sets out the mandate of the CRPC. It reads as follows:

> "The Commission 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 April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return."

67. As the Chamber held in *Pletilić and Others v. the Republika Srpska* (case nos. CH/98/659 *et. al.*, decision on admissibility and merits of 9 July 1999, Decisions August—December 1999),

"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."

68. Article VIII(2)(d) of the Agreement enables the Chamber to declare an application inadmissible if the same matter is already pending before the CRPC. However, in the present case, the applicant did not apply to the CRPC, but instead, chose to apply to the Chamber. Therefore, Article VIII(2)(d) is inapplicable in the present case and the application is not inadmissible under that provision.

3. Conclusion as to admissibility

69. The Chamber finds that none of the grounds for declaring the case inadmissible has been established. Accordingly, the Chamber declares the application admissible with respect to Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention as well as to discrimination in the enjoyment of the mentioned rights.

B. Merits

70. Under Article XI of the Agreement, the Chamber 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.

1. Article 8 of the Convention

71. In his application to the Chamber, the applicant claimed to be the victim 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."

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

73. The Chamber notes that the applicant had lived in the house situated on his property and used it as his home until such time as he was forced to leave. The Chamber has previously held that links that persons in similar situations retained to their dwellings were sufficient for those dwellings to be considered to be their "homes", within the meaning of Article 8 of the Convention (*see, e.g.*, aforementioned *Onić* decision, paragraph 48; case no. CH/97/46, *Kevešević*, decision on the merits of 10 September 1998, paragraphs 39-42, Decisions and Reports 1998). In addition, the respondent Party did not contest that the property may be considered the applicant's home. Therefore, the property may be considered as the applicant's "home" for the purposes of Article 8 of the Convention.

74. The Chamber notes that the applicant was forced to leave his home due to fear for his safety resulting from the hostilities. The property was then occupied by refugees and displaced persons of Serb origin. These persons occupied the property concerned in accordance with decisions of the Commission for Refugee Accommodation and Management of Abandoned Property issued in accordance with the old Law. Therefore, the respondent Party was responsible for the interference with the rights of the applicant to respect for his home prior to his repossession of it on 18 November 2002.

75. 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 *Onić* decision at paragraph 48). There will be a violation of Article 8 if any one of these conditions is not satisfied.

76. The property was considered to be abandoned in accordance with the old Law (see paragraph 32 above). Moreover, the applicant tried to regain possession of his property in accordance with Articles 39 and 42 of the old Law. This old Law sought to provide for a regime for the administration of abandoned property in the Republika Srpska. The property was allocated to temporary occupants by the Ministry.

77. The Chamber must decide whether the old Law can be considered to be a "law" in the context of Article 8(2) of the Convention. The Chamber has previously held that the term "law" is related to certain qualitative criteria of a norm, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see *Kevešević d*ecision at paragraph 52). In the above-mentioned *Kevešević* case, the Chamber held that the concept of the rule of law contains the following three elements: firstly, the law must be adequately accessible: a citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to allow the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee with reasonable certainty the consequences of his actions. Thirdly, a law must provide safeguards against abuse.

78. The Chamber notes that the procedure for regaining possession was set forth in Articles 39-42 of the old Law (see paragraphs 35-37above). In *Esfak Pletilić and Others v. the Republika Sprka*, the Chamber found that "the precise effect of these Articles is unclear" (case no. CH/98/659 *et al.*, decision on admissibility and merits of 9 July 1999, paragraph 173, Decisions August—December 1999). The Chamber noticed that, "Article 39 allows for the regaining of possession of property within the context of an overall settlement between the Republika Srpska, the Federation of Bosnia and Herzegovina and the Republic of Croatia. The Article does not specify what the terms of any such settlement are to be and gives no guidance as to what, if any, procedures are to be followed prior to the conclusion of any such settlement. Further, Article 40 is drafted in such a way as to render it practically impossible for an owner of property who is a refugee or internally displaced person to secure possession of it under the Law. Article 42 of the old Law states that Articles 37-41 are to be applied on the basis of reciprocity, without any explanation of how this is to be applied in practical terms. It is accordingly clear that the old Law did not enable a person seeking to regain possession of his or her property to establish what actions he or she must take to do so. The law also did not provide any safeguards against possible abuse, but was in itself a source of arbitrariness and abuse" (*id.*).

79. In conclusion, in the *Pletilić* case the Chamber found that "the legal provisions in question did not meet the standards required of a "law" under Article 8(2) of the Convention. This is in itself sufficient for there to be a finding that there has been a violation on these grounds of the applicant's rights as guaranteed by that provision" (*id.* at paragraph 174). The same conclusion applies to the present case.

80. The Chamber notes that the new Law has been adopted in order to remedy the violations caused by the old Law. The Chamber further notes that, although the authorised Ministry decided upon the applicant's request for repossession, it failed, for a long period of time, to enforce its procedural decision in order to in fact reinstate the applicant into possession of his property.

81. The Chamber recalls that Article 10 of the new Law provides that proceedings concerning the return of property shall, unless otherwise specified, be carried out in accordance with the Law on Administrative Procedure (see paragraph 48 above) and be treated in an expedited procedure. It is clear that the Ministry did not comply with the above-mentioned provision since the applicant's repossession to all his property did not occur until 18 November 2002, although he submitted his request for enforcement of the procedural decision of 28 March 1999 on 31 July 2000. Thus, there was a two and one half-year year delay in following through on what should have been an expedited request. Such interference by the respondent Party was not in accordance with the new Law.

82. Further, the Chamber notes that the respondent Party twice wrongly informed the Chamber about the applicant's alleged repossession of his property (see paragraph 10 above). In so doing, the respondent Party likely delayed the applicant's reinstatement into possession of all his property and prevented the Chamber from earlier deciding upon this case along with other Gradiška property cases (*e.g.*, case nos. CH/98/659 *et al.*, *Esfak Pletilić and Others*, decision on admissibility and merits of 9 July 1999, Decisions August— December 1999). While the Chamber accepts that the respondent Party's submission of this incorrect information was made in good faith, none the less, the Chamber cannot ignore that it further infringed upon the applicant's rights and aggravated the interference with his right to home, as protected by Article 8 of the Convention.

83. Taking into account that the interference with the applicant's right to his home prior to 18 November 2002 was not in accordance with the law, there is no requirement for the Chamber to examine whether the acts complained of pursued a "legitimate aim" or were "necessary in a democratic society".

84. In conclusion, the Chamber finds that there has been a violation by the respondent Party of the right of the applicant to respect for his home as guaranteed by Article 8 of the Convention.

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

85. The applicant complains that his right to peaceful enjoyment of his possessions has been violated as a result of his inability to regain possession of all his property within a reasonable time. 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."

86. The Chamber finds that the property concerned, which was owned or co-owned by the applicant, constitutes his "possession", within the meaning of Article 1 of Protocol No. 1 to the Convention.

87. The Chamber considers that the allocation of the applicant's property to third parties for their use constituted an "interference" with the applicant's right to peaceful enjoyment of his possessions. The Chamber notes that this interference came to an end on 18 November 2002, when the applicant finally entered into possession of all his property.

88. The Chamber must therefore examine whether the above 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. This means that the deprivation must have a basis in national law and that the law concerned must be both accessible and sufficiently certain.

89. The Chamber has already found that the old Law does not meet the standards of a "law" in a democratic society (see paragraphs 77-79 above). This is, in itself, sufficient to warrant a finding that there has also been a violation of Article 1 of Protocol No. 1 to the Convention.

90. The Chamber again notes that the new Law has been adopted in order to remedy the violations caused by the old Law. However, the Chamber further notes that the applicant received an enforceable procedural decision of 28 March 1999 entitling him to regain possession of his property (see paragraph 20 above). The Chamber has previously held that "the positive obligations of the Parties to provide effective protection for the rights of an individual includes the enforcement of court decisions" (case no. CH/98/1019, *Sp.L., J.L., Sv.L. and A.L.*, decision on admissibility and merits of 3 April 2001, paragraph 37, Decisions January–June 2001). This principle can be applied, *mutatis mutandis*, in the present case. The unnecessary delay of enforcement of the decision of 28 March

1999 lasted for two and one half years after the applicant submitted his request for enforcement on 31 July 2000. This delay was caused by the respondent Party's hesitation to take adequate steps to enforce the procedural decision of 28 March 1999 and by its reliance on incorrect information that the applicant had repossessed all his property. Accordingly, this delay constitutes a failure by the respondent Party effectively to secure the applicant's right to peaceful enjoyment of his possessions.

91. In conclusion, the Chamber finds that there has been a violation of the rights of the applicant to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention.

3. Article 6 of the Convention

92. The applicant did not specifically claim that his right protected by Article 6 of the Convention had been violated. However, in view of the fact that he complained of the conduct of the proceedings he had initiated before the domestic organs, the Chamber raised this issue *proprio motu* when it transmitted the application to the respondent Party for its observations on admissibility and merits (see paragraph 5 above).

93. Article 6 paragraph 1 of the Convention reads, in pertinent 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 ...."

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

95. The Chamber recalls 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.*, Eur. Court HR, *Langborger v. Sweden,* judgment of 22 June 1989, Series A no. 71, page 12, paragraph 23). The Chamber has held that one of the guarantees provided by Article 6 of the Convention is the right to a fair hearing within a reasonable time (case no. CH/97/54 *Mitrović*, decision on admissibility of 10 June 1997, paragraph 10, Decisions and Reports 1998).

96. The European Court of Human Rights has held that Article 6 applies to enforcement proceedings, regard being had to the purpose of initiating proceedings, namely to settle disputes. The Court has held that the enforcement proceedings constitute a second stage, which should be considered under Article 6 paragraph 1 (Eur. Court HR, *Martins Moreira v. Portugal*, judgment of 26 October 1988, Series A no. 143; *Silva Pontes v. Portugal*, judgment of 23 March 1994, Series A no. 286 A). The Chamber has also previously held that Article 6 applies to enforcement proceedings (*see, e.g.*, case no. 98/603, *R.T.*, decision on admissibility and merits of 4 November 2002, Decisions July— December 2002). Moreover, in the *Scollo* case the Court found that prolonged delay in the enforcement of a judgment entitling the applicant to possession of an apartment had involved a breach of Article 6 of the Convention, because the inertia of the competent administrative authorities engaged the responsibility of the State (Eur. Court HR, *Scollo v. Italy*, judgment of 29 September 1995, Series A no. 315C, paragraphs 44 -45). Consequently, Article 6 paragraph 1 of the Convention is applicable to the entire length of the proceedings, including the enforcement proceedings.

97. The first step in establishing the length of the proceedings is to determine the period of time to be considered. The Chamber recalls that the applicant initiated proceedings for repossession of his property before the competent administrative authorities on 20 August 1998 (under the old Law) and on 25 January 1999 (under the new Law). He requested enforcement of the procedural decision issued in his favour by the administrative authorities on 31 July 2000. Further, in 1998 the applicant initiated proceedings before the First Instance Court in Gradiška requesting repossession of his property. The first instance proceedings were completed on 11 April 2001 (*i.e.*, after 3 years). None the less, it was not until 18 November 2002 that the applicant finally regained possession over his property through the administrative proceedings before the Ministry (*i.e.*, 4 years and two months after he first requested repossession and 2 years and 4 months after he requested enforcement of the decision in his favour).

98. 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, 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).

99. The issue in the applicant's case was whether he was entitled to repossession of his pre-war property. The Chamber cannot find that this is a particularly complicated issue, particularly in light of the fact that the applicant has documentation showing that he is the owner of the property and the fact that the administrative body, and thereafter the court, both concluded that he was entitled to possession. Nor can it be argued that the law is particularly complicated on this point. Once the issue concerning the applicant's property right was decided, it was merely a matter of enforcing the decision. The time limits within which to enforce such decisions are clear in the applicable law (see paragraph 49 above).

100. The new Law clearly sets forth that a rightful owner has the right to repossession of his home within at most 90 days, barring extreme circumstances, none of which appear in this case. Accordingly, the delay in the enforcement proceedings must be imputed to the respondent Party.

101. The Chamber has previously noted that a person who has lost his home has an important personal interest in the speedy outcome of the dispute and in securing a final and binding decision that will, in fact, provide him with the relief that he seeks (case no. CH/00/3546, *Tuzlić,* decision on admissibility and merits of 13 January 2001, Decisions January-June 2001).

102. The question in the present case is whether the particular difficulties associated with enforcing the applicant's right to repossession of his property are attributable to the applicant or to the authorities of the respondent Party. In this regard, the Chamber recalls that the authorities have the duty to organise their judicial system in such a way as to meet each of the requirements in Article 6 paragraph 1 (Eur. Court HR, *Garyfallou AEBE v. Greece*, judgment of 24 September 1997, Reports of Judgments and Decisions 1997-V, page 1821). Moreover, the Chamber takes particular notice of the fact that for at least two years the respondent Party relied upon incorrect information that the applicant had previously been reinstated into possession of his property. Although this mistake appears to have been made in good faith, it still must be imputed to the respondent Party, the result being that the conduct of the relevant authorities unnecessarily prolonged the proceedings in the applicant's case.

103. The Chamber therefore finds that the respondent Party violated the right of the applicant protected by Article 6 paragraph 1 of the Convention to a fair hearing within a reasonable time in the determination of a civil right.

4. Article 13 of the Convention

104. The applicant alleges that his right protected under Article 13 of the Convention was violated.

105. Article 13 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."

106. Taking into consideration its conclusion that the respondent Party has violated the applicant's rights protected by Article 6 of the Convention, the Chamber decides that it is not necessary separately to examine the application under Article 13 of the Convention.

5. The complaint of discrimination

107. In the light of its findings of a violation of Articles 6 and 8, and of Article 1 of Protocol No. 1 to the Convention, the Chamber does not consider it necessary to examine the applicant's complaint of discrimination in the enjoyment of the above rights under Article II(2)(b) of the Agreement.

VIII. REMEDIES

108. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Party to remedy established breaches of the Agreement. In this regard the Chamber shall consider issuing orders to cease and desist, monetary relief, as well as provisional measures.

109. On 20 April 1999, the applicant submitted a claim for compensation for mental suffering allegedly caused to him and to members of his family as a result of his inability to regain possession of his property. The applicant requested 2,500 Convertible Marks (*Konvertibilnih Maraka* "KM") per each household member, in the total amount of 5,000 KM. He also requested compensation for the rent he paid for accommodation prior to his return to his property in the amount of 100 KM per month for nine months (it appears that the applicant moved into his son's house and thereafter incurred no further rental expenses), in the total amount of 900 KM. Lastly, he claimed 700 KM for miscellaneous expenses. Although he confirmed that he finally repossessed all his property on 18 November 2002, in his submission of 3 February 2003, the applicant stated that he maintains his claim for compensation.

110. In its general observations of 22 June 1999, the respondent Party argued that the claim for compensation is ill-founded and inadmissible. It stated that in accordance with Article VIII of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the respondent Party was entitled to accommodate refugees and displaced persons in abandoned property, pending resolution of the ownership and possession of that abandoned property by the CRPC. Since the applicant had not applied to the CRPC, the respondent Party maintained that it acted in accordance with its duties. Furthermore, the respondent Party opined that the applicant contributed to his present situation by moving from the place where he had been temporary accommodated.

111. As the Chamber considered in *Esfak Pletilić and Others,* the compensation claim submitted by the applicant can not be rejected on the grounds suggested by the respondent Party, as it has not accepted analogous arguments relating to the admissibility of the application. As the two arguments are inextricably linked, the fact that the Chamber has not accepted them in relation to the admissibility of the application precludes the Chamber from accepting them in relation to the claim for compensation.

112. Taking into consideration the established violations of the applicant's human rights, the Chamber considers it appropriate to award a sum to the applicant in recognition of the sense of injustice he has suffered as a result of his inability to regain possession of his property within a reasonable time. The Chamber does not consider it appropriate, however, to award such sums to members of the applicant's family; it can only award compensation to the applicant. The Chamber will order the respondent Party to pay to the applicant the sum of 1,800 KM as compensation for non-pecuniary damage.

113. In accordance with its decision in *Pletilić and Others* (case no. CH/98/659 *et al.*, decision on admissibility and merits of 9 July 1999, paragraph 238, Decisions August—December 1999), the Chamber considers that the sum of 100 KM is appropriate to compensate for the loss of use of the property for each month he did not use it. The Chamber considers it appropriate that this sum should be payable starting two months after the end of the month in which he lodged his first application to the Ministry to regain possession of his property under the old Law, *i.e.* 1 November 1998, until the date he regained possession of his property on 18 November 2002, in the total amount of 4900 KM.

114. The Chamber will dismiss the remainder of the applicant's claims for compensation as they have not been substantiated.

115. Additionally, the Chamber awards simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in paragraphs 112-113 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 the sums awarded or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

116. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible with respect to Articles 6, 8, and 13 of the European Convention on Human Rights, Article 1 of Protocol No. 1 to the European Convention on Human Rights and in relation to the complaint of discrimination in the enjoyment of the mentioned rights;

2. unanimously, that there has been a violation of the right of the applicant to respect for his home within the meaning of Article 8 of the Convention, 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 right of the applicant 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, that the applicant's inability to achieve enforcement of a final, binding and enforceable administrative decision constitutes a violation of his right to a fair hearing within a reasonable time, within the meaning of Article 6 paragraph 1 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, that it is not necessary to examine the application under Article 13 of the Convention and in relation to the complaint of discrimination;

6. by 6 votes to 1, to order the Republika Srpska 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 1,800 Convertible Marks by way of compensation for non-pecuniary damages;

7. by 6 votes to 1, to order the Republika Srpska 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 4,900 Convertible Marks by way of compensation for pecuniary damages for the loss of use of his property;

8. unanimously, to dismiss the remainder of the applicant's claims for compensation;

9. unanimously, to order the Republika Srpska to pay to the applicant simple interest at an annual rate of 10% 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 the sums awarded or any unpaid portion thereof until the date of settlement in full; and

10. unanimously, to order the Republika Srpska to report to it by 11 June 2003 on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michele PICARD
President of the First Panel

HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 October 2003)

Case no. CH/98/1297

D.B. and J.B.

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 2 September 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
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 Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina ("the General Framework Agreement");

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

I. INTRODUCTION

1. The applicants are a married couple of Serb origin. They own a piece of real estate with a house in Sanski Most, where they used to live before the armed conflict in Bosnia and Herzegovina broke out. In autumn 1995, when hostilities approached the region, the applicants left their house and fled to Banja Luka. Today, their house is completely destroyed. According to the applicants, the destruction took place after April 1996, *i.e.* after the integration of the Municipality of Sanski Most into the territory of the Federation of Bosnia and Herzegovina. The applicants have attempted to initiate civil proceedings against the Federation of Bosnia and Herzegovina with a view to obtaining compensation before the Municipal Court in Sanski Most. However, that Court refused to register the applicant's lawsuit until they advance court fees in the amount of 7,500 Convertible Marks (*Konvertibilnih Maraka*, hereinafter "KM"), which the applicants declined to do.

2. The application raises issues under Article 6 paragraph 1 of the European Convention on Human Rights (hereinafter: "the Convention") and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 4 November 1998 and registered on the same day. The applicants are represented by Ms. Vesna Rujević, a lawyer practising in Banja Luka.

4. On 22 July 1999, the application was transmitted to Bosnia and Herzegovina and to the Federation of Bosnia and Herzegovina as respondent Parties. Observations of Bosnia and Herzegovina regarding the admissibility and merits of the case were received on 13 September 1999, and the Federation of Bosnia and Herzegovina sent observations on 22 September and 10 December 1999 and 31 July 2003. The applicants replied on 24 January 2000 and submitted further information on 12 February 2003.

5. The Chamber deliberated on the admissibility and merits of the case on 8 July 1999, 2 July and 2 September 2003. On the latter date, it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

6. The applicants are a married couple of Serb origin from the village of Kamengrad, which belongs to the Municipality of Sanski Most. They are co-owners of a two-storey residential building built in 1984 on a piece of land registered as cadastral lot no. 754/2 in the cadastral books of Kamengrad. Throughout the armed conflict in Bosnia and Herzegovina, Sanski Most was under the control of Bosnian Serb authorities. In October 1995, when the Army of Bosnia and Herzegovina was approaching the area of Sanski Most, the applicants left their house in Kamengrad and fled to Banja Luka, where they still reside today.

7. After the end of the armed conflict and the conclusion of the General Framework Agreement, Sanski Most became part of the Federation of Bosnia and Herzegovina. The applicants contend that until April 1996, their house in Kamengrad remained intact. They allege that after that date, their former home was ransacked and subject to wanton destruction by persons unknown to them. In the applicants' opinion, the Federation of Bosnia and Herzegovina bears responsibility for these events to the extent that its authorities have not interfered to prevent the destruction, although they have been in a position to do so.

8. On 27 October 1998, the applicants filed a claim against the Federation of Bosnia and Herzegovina before the Municipal Court in Sanski Most ("the Municipal Court") with a view to being compensated for the destruction of their house in the amount of 250,000 KM. On the same occasion, the applicants requested to be exempted from paying court fees in advance since they were in a difficult financial situation. The applicants did not provide the Municipal Court with verified documents regarding their financial standing.

9. Thereafter, on an unspecified date, the President of the Municipal Court in Sanski Most, Adil

Draganović, wrote a letter to the applicants containing the following statement:

> "We return the lawsuit you have lodged before this Court with a view to obtaining compensation from the Federation of Bosnia and Herzegovina for the reason that you are obliged to submit a receipt that you have paid court fees in the amount of 7,500 KM. The Court cannot allow an exemption from paying the expenses for the forthcoming proceedings because the plaintiffs are both self-employed shopkeepers in Prijedor.
>
> (signed) President of the Court, Adil Draganović"

IV. RELEVANT LEGISLATION

A. The Law on Civil Procedure of the Federation of Bosnia and Herzegovina

10. The Law on Civil Procedure of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina nos. 42/98 and 3/99), under its heading XII, contains detailed provisions regarding the expenses of court proceedings. Articles 159 – 164 contain provisions regarding the exemption from court fees.

11. Article 159 of the Law provides, in relevant part:

> "(1) The court shall exempt a party from paying expenses if that party, according to its general financial situation, cannot meet this obligation without harm to its own or its family's basic support.
> ...
> (3) When reaching a decision on exemption of paying expenses, the court shall carefully take into consideration all circumstances, in particular the value of the dispute …."

12. Article 160 of the Law provides:

> "(1) The court shall decide, upon the request of a party, on the exemption of paying expenses.
>
> (2) The party is obliged to attach verified documentation of the competent administrative organ on its financial standing.
>
> (3) If necessary, the court shall *ex officio* investigate the necessary information and inform the party which requested to be exempted from paying expenses, and the court may hear the opposite party on that matter.
>
> (4) No appeal is allowed against the decision of the court to exempt a party from paying expenses."

13. Article 163 of the Law provides, in relevant part:

> "(1) The court can, during the proceedings, revoke its decision to exempt a party from paying expenses if it is satisfied that the party can settle the expenses."

B. The Law on Court Fees of the Una-Sana Canton

14. The Law on Court Fees of the Una-Sana Canton was adopted on 24 April 1997 and entered into force on 30 April 1997 (Official Gazette of the Una-Sana Canton no. 3/97). It contains provisions for the payment of court fees applicable to all courts of the Canton (Article 1).

15. Article 4 of the Law provides, in relevant part:

> "Unless otherwise regulated by this Law, the obligation to pay fees arises:

1. for initiating proceedings – at the moment when the claim it is handed in,
…"

16. Article 5 of the Law provides:

"The fee is to be paid at the moment when the obligation to pay it arises, unless otherwise regulated by this Law."

17. Article 8 of the Law provides:

"(1) Unpaid or not completely paid fees shall not prevent the lodging of the claim or the processing of the claim by the court.
…"

18. Article 10 of the Law provides, in relevant part:

"(1) The following persons are exempted from paying fees:
…
4. citizens of poor financial standing,
…
Citizens of poor financial standing within the meaning of paragraph 1 subparagraph 4 of this Article are to be regarded as those persons who are of poor financial standing according to provisions of the Federation, the Cantons and the units of local self-administration where they reside.
…"

19. Article 12 of the Law provides, in relevant part:

"(1) The exemption from paying fees in civil proceedings is granted in accordance with provisions of the Law on Taking over the Law on Civil Proceedings (OG RBiH no. 2/92).
…"

20. According to a list appended to Article 46 of the Law, the amount of court fees to be paid when proceedings are initiated for claims exceeding 5,000 German Marks (hereinafter "DEM") is 3% of the dispute's value, and in no case more than 10,000 DEM.

V. COMPLAINTS

21. The applicants allege a violation of their right of access to a court (Article 6 paragraph 1 of the Convention), their right to an effective remedy (Article 13 of the Convention), as well as their right to peacefully enjoy their possessions (Article 1 of Protocol No. 1 to the Convention).

VI. SUBMISSIONS OF THE PARTIES

A. Bosnia and Herzegovina

22. In its observations received on 13 September 1999, Bosnia and Herzegovina suggests to declare the application inadmissible because the applicants have not availed themselves of civil proceedings to protect their rights. Bosnia and Herzegovina did not comment on the Municipal Court's request that the applicants advance the sum of 7,500 KM as court fees.

B. The Federation of Bosnia and Herzegovina

23. The Federation of Bosnia and Herzegovina, in its observations of 22 September 1999, calls into question that the applicants' house was destroyed at a point in time after Sanski Most was

integrated into the territory of the Federation. As the applicants had not submitted evidence in that respect, it is stated, it was more likely that their home was destroyed in the course of the take-over of the area by the Army of Bosnia and Herzegovina, *i.e.* already before the entry into force of the Agreement on 14 December 1995. The Chamber, therefore, would be incompetent to examine this part of the application *ratione temporis*.

24. In addition, the Federation suggests, the application should be declared inadmissible for non-exhaustion of domestic legal remedies because the applicants have not gone through regular court proceedings with a view to being compensated. Moreover, the Federation claims that it could not be held responsible for damages inflicted on the applicants' building by unknown third parties.

25. As to the merits of the case, the Federation denies any responsibility for violations of the applicants' rights that may have occurred.

C. The applicants

26. According to the applicants, between October 1995 and November 1996, persons wearing military uniforms, probably members of the Army of Bosnia and Herzegovina, were using their abandoned home. This provides an additional argument that the Federation of Bosnia and Herzegovina incurs responsibility for the devastation of the house that took place within that period of time.

27. The applicants contend that they were unlawfully prevented from exhausting domestic legal remedies with respect to their compensation claim for the destruction of their house, as the Municipal Court refused to register their lawsuit and to deal with the claim. Since they cannot afford to pay in advance a sum as high as 7,500 KM, the applicants complain that they are left without legal redress.

VII. OPINION OF THE CHAMBER

A. Admissibility

28. 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 of the Agreement. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept and in what priority to address them. In so doing, the Chamber shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted…. (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

1. Concerning events before 14 December 1995

29. The Chamber notes that it remains in dispute at what time and by whom the house in Kamengrad was destroyed. The applicants claim that until April 1996, the building remained intact, whereas the Federation of Bosnia and Herzegovina puts forward the assumption that no such destruction could have taken place after 14 December 1995, the date when the Agreement entered into force.

30. The Chamber cannot find that there is sufficient substantiation for the fact that the destruction of the applicants' house took place after the entry into force of the Agreement on 14 December 1995. Moreover, the Chamber has repeatedly found that in accordance with generally accepted principles of law, the Agreement cannot be applied retroactively, and it will also in this case confine its examination to considering whether the human rights of the applicants have been violated or threatened with violation since that date (see case no. CH/96/30, *Damjanović v. The Federation of Bosnia and Herzegovina*, decision on admissibility of 11 April 1997, paragraph 13, Decisions on Admissibility and Merits 1996-1997). It follows that the application is incompatible *ratione temporis* with the provisions of the Agreement, within the meaning of Article VIII(2)(c), insofar as it concerns allegations of events occurring prior to 14 December 1995.

2. Responsibility of Bosnia and Herzegovina

31. The Chamber further notes that the applicants direct their application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. They submit that uniformed men, supposedly members of the Army of Bosnia and Herzegovina, were seen in and around their house between October 1995 and November 1996. However, recalling the above finding that the part of the application relating to events prior to 14 December 1995 is inadmissible *ratione temporis*, the applicants have not provided any indication that Bosnia and Herzegovina is responsible for any of the actions they complain of after that date. The competencies of Bosnia and Herzegovina are set out in Article III of the Constitution of Bosnia and Herzegovina, contained in Annex 4 to the General Framework Agreement. These do not include military matters. Accordingly, any action by military personnel after 14 December 1995 is within the competence of the Entities, in this case the Federation of Bosnia and Herzegovina. It follows that the application is inadmissible *ratione personae* as directed against Bosnia and Herzegovina.

3. Requirement to exhaust effective domestic remedies

32. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted. In the *Onić* case (case no. CH/97/58, *Onić v. The Federation of Bosnia and Herzegovina*, decision on admissibility and merits of 12 February 1999, Decisions January-July 1999, paragraph 38), the Chamber held that it was necessary to take realistic account not only of the existence of formal remedies in the domestic system, but also of the general legal and political context in which they operate.

33. The Chamber notes that the applicants have submitted a claim to the Municipal Court in Sanski Most with a view to being compensated for the damages that occurred to their house in Kamengrad. However, their lawsuit was not registered until they would advance court fees in the amount of 7,500 KM, which the applicants refused to do given their financial situation.

34. The Chamber observes that the ability to institute civil proceedings before the domestic courts is indispensable in order to have the claims with respect to the destruction of the applicants' house determined. As concerns the applicants' complaint arising from this inability to institute such proceedings, the Federation of Bosnia and Herzegovina has not shown that there was an effective remedy that could challenge the decision of the President of the Municipal Court not to deal with the applicants' lawsuit. It follows that the applicants did not have an effective domestic remedy to exhaust in this respect.

4. Conclusion as to admissibility

35. No other grounds for declaring the case inadmissible have been raised or are apparent. Accordingly, the application will be declared admissible insofar as it is directed against the Federation of Bosnia and Herzegovina with regard to the complaints under Article 6 paragraph 1 of the Convention, Article 13 of the Convention, and Article 1 of Protocol No. 1 thereto, relating to events after 14 December 1995. The remainder of the application will be declared inadmissible.

B. Merits

36. Under Article XI of the Agreement, the Chamber must next address the question whether the facts found disclose a breach by the Federation of Bosnia and Herzegovina 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.

1. Article 6 of the Convention

37. Paragraph 1 of Article 6 of the Convention reads, in relevant part:

> "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.
> ..."

38. The applicants complain that the President of the Municipal Court in Sanski Most has unlawfully conditioned the registration of their lawsuit upon an advance payment of 7,500 KM as court fees. As a consequence, they were prevented from initiating civil proceedings to pursue their rights. The Federation of Bosnia and Herzegovina does not raise a particular argument regarding this issue.

(a) Whether the obligation to pay court fees imposed by the Municipal Court amounted to a violation of Article 6 paragraph 1 of the Convention

39. The Chamber observes that it is settled jurisprudence of the European Court of Human Rights that Article 6 paragraph 1 of the Convention encompasses the right of access to a court (*Golder v. United Kingdom*, judgment of 21 February 1975, Series A no. 18, paragraphs 26 *et seq.*). The right of access means access in law, as well as in fact. However, this right is not an absolute one, and the European Court has never ruled out that the interests of the fair administration of justice may justify imposing a financial restriction on the individual's access to a court (*Tolstoy Miloslavsky v. United Kingdom*, judgment of 13 July 1995, Series A no. 316 B, paragraphs 61 *et seq.*).

40. Nonetheless, the Chamber must satisfy itself that the limitations applied by the Municipal Court in Sanski Most do not restrict or reduce the access left to the applicants to an extent that the very essence of the right guaranteed under Article 6 paragraph 1 of the Convention is impaired. The European Court has previously held that a restriction must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, *e.g.*, *Fayed v. United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, paragraph 65).

41. According to Article 4 of the Law on Court Fees of the Una-Sana Canton (see paragraph 15 above), a plaintiff is required to pay court fees at the moment of filing a civil lawsuit. The Chamber is of the opinion that in civil proceedings, the requirement to pay court fees in advance does not *per se* constitute a restriction on the right of access to a court that is incompatible with Article 6 paragraph 1 of the Convention. To the contrary, it cannot be gainsaid that the obligation of a party to civil proceedings to advance court fees serves the aim of securing costs arising from the conduct of those proceedings before the courts and of discouraging frivolous litigation. As a consequence, the Chamber cannot find that the mere obligation to pay court fees in advance imposed by the Municipal Court amounted to a violation of Article 6 paragraph 1 of the Convention.

(b) Whether the fee required from the applicants for initiating their lawsuit restricted their "right of access to a court" in a manner contrary to Article 6 paragraph 1 of the Convention

42. Still, the Chamber must examine the amount of the fees required to be paid by the applicants, taking into account all particular circumstances of the case. The applicants were requested to pay 7,500 KM for the initiation of proceedings with an amount in dispute of 250,000 KM, those fees thus constituting 3% of the dispute's value, in accordance with the Law on Court Fees of the Una-Sana Canton (see paragraph 20 above). The Chamber finds that, even though the sum of 7,500 KM may be deemed high in absolute terms, the percentage of the total amount in dispute can hardly be regarded as excessive. Nonetheless, the Chamber is particularly aware of Article 8 of the Law on Court Fees, which stipulates that a claim can be lodged and shall be processed even if the court fee was not paid in advance (see paragraph 17 above).

43. As regards a possible exemption from this obligation, the Chamber notes that Articles 10 and 12 of the Law on Court Fees of the Una-Sana Canton (see paragraphs 18 and 19 above), in conjunction with the provisions with the Law on Civil Procedure (see paragraphs 11 *et seq.* above), provide for such an exception. In assessing whether a party is entitled to such privilege, the civil court has to take into account all circumstances relating to the financial situation of the party. A party shall

support its request for exemption with documentation confirmed by an administrative organ, but the court shall *ex officio* make inquiries to that end if it deems necessary. An exemption from the payment of court fees can at any time be revoked by the court if the basis therefore has ceased to exist.

44. In the instant case, the Chamber observes that the letter of the President of the Municipal Court in Sanski Most, sent on an unspecified date, not only required the applicants to pay court fees in advance, but simultaneously refused the applicants' request to be granted an exemption on the ground that they were shopkeepers. Their submission of 27 October 1998 was sent back to them, and the Municipal Court never dealt with the matter.

45. Recalling that according to the Law on Court Fees, a court may not refuse registration and the processing of a civil claim on the mere ground that the party initiating the lawsuit has not paid court fees in advance, the Chamber finds that the decision of the President of the Municipal Court violated the applicable law. Furthermore, the Chamber is not convinced that the applicants' request to be exempted from paying court fees in advance, which was rejected by a mere statement, was dealt with in accordance with the procedural safeguards contained in the law and with due diligence. These acts resulted in the applicants' desisting from their claim and in their case never being heard by a court. In the Chamber's opinion, that impaired the very essence of their right to a court.

46. Moreover, the Chamber finds that with regard to Article 163 of the Law on Civil Proceedings, allowing the applicants to proceed with their claim at the initial phase of the proceedings would not have prevented the Municipal Court from collecting court fees thereafter if the applicants' financial situation had turned out to be different than stated by them.

47. Assessing the facts of the case as a whole, and also having regard to the prominent place held by the right of access to a court in a democratic society, the Chamber finds that the Federation of Bosnia and Herzegovina failed to strike a fair balance between, on the one hand, its own interest in collecting court fees for dealing with claims and, on the other hand, the applicants' interest in vindicating their claim through the courts. It follows that the Federation of Bosnia and Herzegovina has violated the applicants' right of access to a court, as guaranteed by Article 6 paragraph 1 of the Convention.

2. Article 13 of the Convention

48. In view of the finding of a violation under Article 6 paragraph 1 of the Convention, the Chamber does not consider it necessary to examine whether there has been any violation of the applicants' rights under Article 13 of the Convention, given that the right of access to a court under Article 6 paragraph 1 of the Convention provides a stricter guarantee than Article 13 of the Convention (*see also* case no. CH/98/698, *Jusufović v. The Republika Srpska,* decision on admissibility and merits of 9 June 2000, Decisions January-June 2000, paragraph 101).

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

49. Article 1 of Protocol No. 1 to the Convention reads as follows:

> "(1) 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.
> …"

50. The Chamber recalls its above finding that the Federation of Bosnia and Herzegovina has violated the applicants' right of access to a court. When this violation is remedied it should be possible for the applicants to pursue their compensation claims before the domestic courts. In these circumstances, the Chamber decides that it is not necessary separately to examine the application under Article 1 of Protocol No. 1 to the Convention.

VIII. REMEDIES

51. Under Article XI(1)(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. 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 applicants.

52. The Chamber finds it appropriate to order the Federation of Bosnia and Herzegovina to provide the applicants with access to a court without the restrictions previously imposed on them and in accordance with the reasoning contained in the present decision.

IX. CONCLUSIONS

53. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible as directed against the Federation of Bosnia and Herzegovina with regard to the complaints under Article 6 of the European Convention on Human Rights, under Article 13 of the Convention, and under Article 1 of Protocol No. 1 thereto, relating to events after 14 December 1995;

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

3. unanimously, that there has been a violation of the applicants' right of access to a 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;

4. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary action to provide the applicants with access to a court, thereby ensuring that their claim can be determined;

5. unanimously, that it is not necessary to examine the application under Article 13 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention; and

6. unanimously, to order the Federation of Bosnia and Herzegovina to report to it or to its successor institution 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 on the steps taken by it to comply with the above order.

(signed) Ulrich GARMS Registrar of the Chamber	(signed) Michèle PICARD President of the First Panel

ODLUKA O PRIHVATLJIVOSTI I MERITUMU

Predmet broj CH/98/1298

Nikola TRESKANICA

protiv

BOSNE I HERCEGOVINE

FEDERACIJE BOSNE I HERCEGOVINE

Komisija za ljudska prava pri Ustavnom sudu Bosne i Hercegovine, na zasjedanju Velikog vijeća od 8. marta 2006. godine, sa sljedećim prisutnim članovima:

Gosp. Miodrag PAJIĆ, predsjednik
Gosp. Mehmed DEKOVIĆ, potpredsjednik
Gosp. Želimir JUKA, član
Gđa Hatidža HADŽIOSMANOVIĆ, član
Gosp. Jovo ROSIĆ, 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. Nikola Treskanica (u daljnjem tekstu: podnosilac prijave), podnio je prijavu Domu 5. novembra 1998. godine. Predmet se odnosi na zahtjev podnosioca prijave, kao pripadnika bivše Jugoslovenske narodne armije (u daljnjem tekstu: JNA), da vrati u posjed stan u ulici Aleja Branka Bujića broj 3 (sada Ulica Aleja Bosne Srebrene broj 3) u Sarajevu.

2. Podnosilac prijave je dopisom od 17. jula 2002. godine proširio svoj zahtjev iz prijave. Podnosilac prijave traži da mu tužene strane naknade materijalnu štetu nastalu zbog nekorištenja predmetnog stana i imovine u njemu u iznosu od 40.000 KM, kao i zbog nekorištenja kuće za odmor u Binježevu i pokretne imovine u njoj u iznosu od 87.470 KM za period od 1. aprila 1992. godine do 25. aprila 2002. godine, kada je istu prodao. Podnosilac prijave, također, traži da mu tužene strane naknade nematerijalnu štetu zbog pretrpljenih duševnih patnji i bola, te teškog oboljenja supruge u iznosu od 20.000 KM, kao i iznos od 5.000 KM na ime naknade troškova postupka.

3. Predmet postavlja pitanja u vezi čl. 6. i 13. Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda (u daljem tekstu: Evropska konvencija), člana 1. Protokola broj 1 uz Evropsku konvenciju.

II. ČINJENICE U PREDMETU

4. Činjenice koje su dole iznijete proizilaze iz prijave i priložene dokumentacije.

5. Podnosilac prijave je sa Zajednicom stanovanja Jugoslovenske narodne armije zaključio ugovor, broj 17-1210 od 22. januara 1990. godine, o korištenju predmetnog stana.

6. Podnosilac prijave zaključio je sa bivšim Saveznim sekretarijatom za narodnu odbranu Jugoslovenske narodne armije (u daljem tekstu: SSNO JNA) ugovor o kupoprodaji predmetnog stana, broj 3513-874-4 od 4. marta 1992. godine. Ugovor je potpisan od strane obje ugovorne strane i ovjeren od strane vojnog pravobranioca. Ugovor ne sadrži pečat nadležne poreske uprave. Podnosilac prijave je Domu dostavio uplatnice kao dokaz o plaćenoj kupoprodajnoj cijeni. Podnosilac prijave je napustio svoj stan prije početka ratnih dejstava u Sarajevu.

7. Podnosilac prijave je 21. novembra 1997. godine podnio zahtjev za povrat predmetnog stana Komisiji za imovinske zahtjeve izbjeglica i raseljenih lica (u daljnjem tekstu: CRPC). CRPC je odlukom, broj 302-3616-2/1 od 9. jula 2002. godine, potvrdila da je podnosilac prijave 1. aprila 1991. godine bio savjestan posjednik predmetnog stana.

8. Podnosilac prijave je 22. juna 1999. godine podnio zahtjev za vraćanje u posjed predmetnog stana Upravi za stambena pitanja Kantona Sarajevo (u daljnjem tekstu: Uprava). Uprava je donijela rješenje, broj 23/5-372-2779/99 od 25. jula 2003. godine, kojim se odbija zahtjev podnosioca prijave, kao neosnovan. Zahtjev je odbijen jer podnosilac prijave nije dostavio ugovor o korištenju predmetnog stana, tako da Uprava nije mogla utvrditi da je podnosilac prijave nosilac stanarskog prava na predmetnom stanu, te da je aktivno legitimisana stranka u ovoj pravnoj stvari. U obrazloženju pomenutog rješenja Uprave se, također, navodi da podnosilac prijave nije podnio zahtjev za izvršenje odluke CRPC-a.

9. Ministarstvo stambenih poslova Kantona Sarajevo (u daljem tekstu: Ministarstvo) je, rješavajući po žalbi podnosioca prijave donijelo rješenje, broj 27/02-23-5440/03 od 28. aprila 2004. godine, poništilo rješenje Uprave, broj 23/5-372-2779/99 od 25. jula 2003. godine, i predmet vratilo Upravi na ponovni postupak. U obrazloženju pomenutog rješenja Ministarstva se navodi je Uprava u ponovnom postupku dužna utvrditi da li je podnosilac prijave na dan 30. aprila 1991. godine bio

nosilac stanarskog prava na predmetnom stanu i da li je isti za podnosioca prijave predstavljao dom u smislu člana 8. Evropske konvencije.

10. Uprava je zaključakom, broj 23/5-372-2779/99 od 18. avgusta 2004. godine, prekinula postupak u predmetu vraćanja u posjed stana podnosioca prijave Odlukom Zastupničkog doma Parlamenta Federacije Bosne i Hercegovine, koja je objavljena u "Službenim novinama Federacije Bosne i Hercegovine" broj 28/04. Navedenom odlukom je propisano 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, a koji je u parlamentarnoj proceduri.

11. Uprava je održala usmenu raspravu 27. januara 2005. godine na kojoj je sačinjen Zapisnik, broj 23/5-372-2779/99. Prema zapisniku podnosilac prijave se nije odazvao pozivu na raspravu iako je uredno obaviješten.

12. Tužena strana je u svojim dodatnim informacijama od 22. februara 2005. godine dostavila odgovor podnosioca prijave na poziv Uprave na usmenu raspravu, u kom obavještava Upravu "[...] da ne nalazi opravdan razlog da se odazove na poziv, obzirom da nema aktivan upravni postupak [...]".

13. Uprava je rješenjem, broj 23/5-372-2779/99 od 23. juna 2005. godine, odbila zahtjev za vraćanje u posjed predmetnog stana kao neosnovan. U obrazloženju rješenja se navodi da je prema aktu Ministarstva za odbranu Republike Srpske, broj 8-03-37-140/04 od 3. marta 2005. godine, utvrđeno da je podnosilac prijave riješio svoje stambeno pitanje iz stambenog fonda Vojske Srbije i Crne Gore. S obzirom na to, a u skladu sa članom 1. Zakona o izmjenama i dopunama Zakona o prestanku primjene Zakona o napuštenim stanovima ("Službene novine Federacije Bosne i Hercegovine", broj 29/03), odbija se zahtjev podnosioca prijave kao neosnovan.

14. Ministarstvo je, odlučujući po žalbi podnosioca prijave, donijelo rješenje, broj 27/02-23-16468/05 od 22. augusta 2005. godine, kojim se poništava rješenje Uprave, broj 23/5-372-2779/99 od 23. juna 2005. godine, i predmet vraća prvostepenom organu na ponovni postupak. U obrazloženju rješenja Ministarstva se navodi da će prvostepeni organ uredno pozvati podnosioca prijave da se izjasni o svom zahtjevu za vraćanje predmetnog stana u posjed, odnosno na nesumnjiv način utvrditi da li je podnosilac prijave u toku postupka odustao od zahtjeva za vraćanje u posjed predmetnog stana, te, nakon toga, donijeti odluku u ovoj upravnoj stvari u skladu sa važećim propisima.

15. Prema dopisu podnosioca prijave, upućenom Komisiji 20. oktobra 2005. godine, postupak pred Upravom još nije okončan.

16. Podnosilac prijave je Federalnom ministarstvu odbrane podnio zahtjev za izdavanje naloga za uknjižbu prava vlasništva na predmetnom stanu. Federalno ministarstvo odbrane je podneskom, broj 04-03-42-701/00 od 31. marta 2000. godine, vratilo navedeni zahtjev podnosiocu prijave, uz obrazloženje da s obzirom da podnosilac prijave nije korisnik predmetnog stana mora sačekati ishod postupka po zahtjevu za povrat stanarskog prava.

III. POSTUPAK PRED DOMOM/KOMISIJOM

17. Prijava je podnesena i registrovana 5. novembra 1998. godine.

18. Podnosilac prijave je 17. jula 2002, 20. maja 2004. i 20. oktobra 2005. godine dostavio obavještenje o daljim događanjima u vezi sa prijavom.

19. Komisija je 25. marta 2004. godine obavijestila punomoćnika podnosioca prijave da je odlučila da organizuje postupak. Komisija je 24. marta 2004. i 14. juna 2005. godine proslijedila

tuženoj strani, Federaciji Bosne i Hercegovine, prijavu podnosioca radi dostavljanja pisanih zapažanja.

20. Komisija je 26. aprila 2004. i 11. jula 2005. godine zaprimila pisana zapažanja tužene strane Federacije Bosne i Hercegovine.

21. Komisija je proslijedila zapažanja o prihvatljivosti i meritumu tužene strane, Federacije Bosne i Hercegovine, podnosiocu prijave na njene navode.

22. Podnosilac prijave je 20. maja 2004. godine poslao Komisiji svoj odgovor na pisanja zapažanja o prihvatljivosti tužene strane Federacije Bosne i Hercegovine. U navedenom dopisu podnosilac prijave traži da mu tužena strana isplati iznos od 183.600 EUR, te da danom isplate navedene sume podnosilac prijave gubi pravo na bilo kakvo potraživanje od tužene strane.

IV. RELEVANTNE ZAKONSKE ODREDBE

A. Zakoni Socijalističke Federativne Republike Jugoslavije i Socijalističke Republike Bosne i Hercegovine

23. **Zakon o stambenom obezbjeđenju u JNA** ("Službeni list Socijalističke Federativne Republike Jugoslavije", broj 84/90). Ovaj Zakon je usvojen 1990. godine, a stupio je na snagu 6. januara 1991. godine. Zakon je, u osnovi, regulisao stambene potrebe vojnih i građanskih lica na službi u JNA. Član 21, navedenog Zakona navodi opći način na koji se trebala odrediti otkupna cijena stana. Prilikom određivanja cijene uzimala se u obzir revalorizovana građevinska vrijednost, umanjena za vrijednost amortizacije stana i dalje je umanjivana 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, također, bio ovlašten da propiše tačnu metodologiju za određivanje cijene otkupa.

24. **Uputstvo o metodologiji za utvrđivanje otkupne cijene stanova stambenog fonda Jugoslovenske narodne armije** (u daljnjem tekstu: Uputstvo). 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.

25. **Pravilnik o otkupu stanova iz stambenog fonda Jugoslovenske narodne armije** (u daljnjem tekstu: Pravilnik). 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.

26. **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 podnosilac prijave 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. Zakoni Republike Bosne i Hercegovine

27. **Uredba 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). Predsjedništvo tadašnje Republike Bosne i Hercegovine je 15. juna 1992. godine donijelo navedenu Uredbu. Skupština Republike Bosne i Hercegovine je 17. juna 1994. godine usvojila ovu Uredbu 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. Članom 2. određeno je 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. Izmijenjenim i dopunjenim članom 10. propisano je da se, ako nosilac stanarskog prava ne otpočne koristiti stan u propisanom roku, smatra da je stan trajno napustio, te da se prestanak stanarskog prava utvrđuje rješenjem nadležnog organa.

C. Zakoni Federacije Bosne i Hercegovine

28. **Zakon o prestanku primjene Zakona o napuštenim stanovima** ("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), (u daljnjem tekstu: Zakon o prestanku primjene) stupio je na snagu 4. aprila 1998. godine i potom je u više navrata dopunjavan i mijenjan. Ovim Zakonom ukinut je raniji Zakon o napuštenim stanovima. 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). 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).

Član 3.

> 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 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini.

Raniji član 3a, st. 1. i 2, koji je bio na snazi između 4. jula 1999. i 1. jula 2003. godine, određivao je sljedeće:

> 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 SRBiH 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 BiH, ili ako je stekao novo stanarsko pravo van teritorije BiH.

Član 3a, koji je stupio na snagu 1. jula 2003. godine, određuje sljedeće:

> 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.

29. **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.

30. **Zakon 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) (u daljnjem tekstu: Zakon o prodaji stanova), stupio je 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 (u daljnjem tekstu: OHR). Odredbe, koje se odnose na otkup vojnih stanova, su značajno izmijenjene i dopunjene 16. oktobra 2004. godine, a posebno članovi 39, 39a. i 39e.

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.

Član 27. predviđa da se pravo vlasništva na stanu stiče uknjižbom tog prava u zemljišne knjige nadležnog suda.

Član 39. je, u relevantnom dijelu, predviđao:

> Nosiocima 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.

Izmijenjeni član 39, koji je na snazi od 16. oktobra 2004. godine, predviđa:

> Nosilac 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 6. aprila 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.

Član 39a.

> 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.

Član 39b.

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.

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).

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.

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 BiH.

Izmijenjeni član 39e. predviđa sljedeće:

Nosiocu prava iz kupoprodajnog ugovora koji je zaključio pravno obavezujući ugovor iz člana 39. stava 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, sticanjem novoga stana raskinut je ugovor o otkupu stana u Federaciji Bosne i Hercegovine, te nema pravo na upis prava vlasništva nad tim stanom.

Nosilac prava iz kupoprodajnog ugovora koji je zaključio pravno obavezujući ugovor iz člana 39. stava 1. Zakona, koji je nakon 14. decembra 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 u skladu sa članom 18. Zakona, umanjenu za amortizaciju.

Nosilac prava iz kupoprodajnog ugovora koji je zaključio pravno obavezujući ugovor iz člana 39. stava 1. Zakona za čiji stan je sadašnji korisnik, u skladu sa 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 stava 2. ovoga člana, izuzev nosioca prava kupoprodajnog ugovora iz stava 1. ovoga člana.

31. **Zakon o parničnom postupku** ("Službene novine Federacije Bosne i Hercegovine", br. 42/98, 3/99 i 53/03)

Član 54.

> 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 člana neće se smatrati preinakom tužbe.

V. ŽALBENI NAVODI

32. Podnosilac prijave se žali na činjenicu da nije vraćen u posjed svog stana i da nije priznat njegov ugovor o otkupu stana. On smatra da je vlasnik stana i da mu se mora omogućiti raspolaganje istim. Također, žali se na trajanje postupka odlučivanja o njegovom zahtjevu za povrat stana.

33. Prema mišljenju Komisije, prijava pokreće pitanja u vezi s čl. 6. i 13. Evropske konvencije, te članom 1. Protokola broj 1 uz Evropsku konvenciju.

VI. ODGOVOR TUŽENE STRANE

A. Odgovor tužene strane Federacije Bosne i Hercegovine

34. U vezi sa činjenicama, tužena strana navodi u svojim zapažanjima o prihvatljivosti i meritumu da je zahtjev za povrat predmetnog stana podnosioca prijave odbijen, jer podnosilac prijave nije dokazao svojstvo nosioca stanarskog prava (nije prezentirao rješenje i ugovor o korištenju stana)

35. Po pitanju prihvatljivosti, tužena strana u svojim zapažanjima navodi da je prijava preuranjena, jer je prvostepeni upravni organ u ponovnom postupku donio odbijajuću odluku. Protiv navedene odluke, podnosilac prijave može izjaviti žalbu drugostepenom organu, odnosno, pokrenuti upravni spor pred nadležnim sudom. Tužena strana, također, navodi u svojim zapažanjima da kupoprodajni ugovor podnosioca prijave nije valjan, jer ne sadrži pečat poreske uprave. Podnosilac prijave nije pokrenuo parnični postupak pred nadležnim sudom radi utvrđivanja valjanosti ugovora o otkupu predmetnog stana.

36. U pogledu merituma prijave, tužena strana ističe u svojim pisanim zapažanjima da nije povrijeđen član 6. Evropske konvencije. Ističe da podnosilac prijave nije iscrpio sve pravne lijekove, niti pred organima uprave, a, naročito, ne takve pravne lijekove u kojima bi svoje učešće imao sud. Tužena strana, također, navodi da je postupanje podnosioca prijave dovelo do produžavanja postupka pred upravnim organima. Tužena strana u svojim zapažanjima, konačno,

navodi da je podnosilac prijave nakon napuštanja stana u Sarajevu riješio svoje stambeno pitanje na prostoru druge države, na koji način su mu prestala sva prava na stanu u Sarajevu. S obzirom na sve gore navedeno, organi uprave, nisu povrijedili član 6. Evropske konvencije.

VII. MIŠLJENJE KOMISIJE

A. Prihvatljivost

37. 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.

A1. Prihvatljivost prijave u dijelu upućenom protiv Bosne i Hercegovine

38. 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 također odbiti svaku žalbu koju bude smatrala nespojivom sa ovim Sporazumom, ili koja je očigledno neosnovana, ili predstavlja zloupotrebu prava žalbe."

39. Komisija zapaža da podnosilac prijave upućuje svoju prijavu protiv Bosne i Hercegovine i Federacije Bosne i Hercegovine.

40. U ranijim predmetima, u kojima je Dom odlučio o pitanju u vezi sa stanovima JNA, Dom je smatrao da je Država odgovorna za donošenje zakona kojima su ugovori o otkupu JNA stanova retroaktivno poništeni (vidi, na primjer, odluke o prihvatljivosti i 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).

41. Komisija, međutim, zapaža da u ovom predmetu postupanje organa, koji su odgovorni za postupke na koje se podnosilac prijave žali, 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).

42. Komisija, zbog toga, odlučuje da prijavu proglasi neprihvatljivom protiv Bosne i Hercegovine.

A2. Prihvatljivost prijave u dijelu upućenom protiv Federacije Bosne i Hercegovine

43. 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.“

a) Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevom za povrat stana u posjed

44. Podnosilac prijave tvrdi da nema mogućnost da dođe do konačnog meritornog odlučenja povodom povrata njegovog stana, da postupak traje van razumnog roka, te da mu nije omogućen djelotvoran pravni lijek, uzimajući u obzir cjelokupnu situaciju.

45. Tužena strana navodi da podnosilac prijave nije iscrpio djelotvorne pravne lijekove u postupku vraćanja u posjed predmetnog stana i uknjiženja vlasništva na istom.

46. Komisija podsjeća da je podnosilac prijave pokrenuo postupak za povrat u posjed predmetnog stana u toku 1999. godine. Od tada je prošlo više od 6 godina, a postupak vraćanja nije meritorno okončan. 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 najduže 30 dana. Uzimajući u obzir čak i mogućnost vođenja upravnog spora, navedeni rokovi i stvarne dužine postupaka nisu u razumnom odnosu.

47. 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, “Službeni glasnik Bosne i Hercegovine“, broj 25/01, tačka 20). 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, bez obzira što sami postupci, pozitivno-pravnim propisima, nisu definisani kao takvi, može se posmatrati kao takve posebne okolnosti.

48. Komisija, nadalje, zapaža da se o predmetu podnosioca prijave odlučivalo i više puta nakon što je dva puta vraćen na ponovno odlučivanje od strane Ministarstva, ali, i nakon ponovnih postupaka po zahtjevu, postupak nije pravomoćno okončan. Konačno, za vrijeme postupaka, pravna osnova se mijenjala više puta, što je dodatno otežavalo situaciju podnosioca prijave.

49. Dovodeći u vezu dvije prethodne tačke ove Odluke sa činjenicom da podnosilac prijave smatra da mu je povrijeđeno pravo pristupa sudu, zbog nemogućnosti da dođe do konačne odluke, Komisija smatra da je prijava prihvatljiva po ovom pitanju. Naime postupak je trajao od 1999. godine i još uvijek nije okončan. S obzirom da se radi o upravnom postupku u vezi sa povratom stana, ova činjenica govori da prijava, po ovom pitanju, nije *prima facie* neosnovana.

50. 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 podnosiocu prijave da se žali 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).

51. Komisija, zbog svega, navedenog zaključuje da je prijava u ovom dijelu prihvatljiva protiv Federacije Bosne i Hercegovine u vezi sa članom 6. Evropske konvencije.

b) Iscrpljivanje domaćih pravnih lijekova u vezi sa zahtjevima za priznavanje vlasništva

52. Federacija Bosne i Hercegovine, *inter alia,* tvrdi da podnosilac prijave nije iscrpio domaće pravne lijekove koji su mu dostupni u vezi s uknjižbom vlasništva na stanu, jer podnosilac prijave nije pokrenuo sudski postupak za utvrđivanje valjanosti svog kupoprodajnog ugovora.

53. 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). S 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 sa nametanjem kriterija za ispitivanje valjanosti predmetnih ugovora, Dom je bio prisiljen da utvrdi koji su stvarni kriteriji koje određeni ugovori moraju ispuniti. Tako je Komisija utvrdila da podnosioci prijava moraju imati valjan ugovor, koji u smislu člana 39. 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, 15/02 i 54/04) 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.

54. Slijedeći tu praksu, Komisija primjećuje da ugovor koji je predmet ovog slučaja ne ispunjava te kriterije. Ugovor, koji podnosilac prijave posjeduje je potpisan i ovjeren od strane vojnog pravobranioca. Međutim, ugovoru nedostaju pečat nadležne poreske uprave.

55. Komisija, konačno, podsjeća da Zakon o parničnom postupku, u članu 54. ("Službene novine Federacije Bosne i Hercegovine", broj 53/03) predviđa mogućost podnošenja tužbe kojom se utvrđuje postojanje ili nepostojanje nekog prava, pravnog odnosa ili istinitost odnosno neistinitost neke isprave. Komisija podsjeća da je Dom, u ranijoj praksi, utvrdio da je član 54. Zakona o parničnom postupku (ili član 172. bivšeg Zakona o parničnom postupku, "Službene novine Federacije Bosne i Hercegovine", br. 42/98 i 3/99) djelotvoran domaći pravni lijek koji se mora iscrpiti u slučaju kada podnosilac prijave nema u posjedu valjan kupoprodajni ugovor, nego se mora utvrditi da li je on vlasnik, i to na osnovu koraka koje su preduzeli u procesu otkupa stana tokom 1991. i 1992. godine (vidi, na primjer, odluke o prihvatljivosti, *CH/98/1160, CH/98/1177, CH/98/1264, Pajagić, Kuruzović i M.P. protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine* od 9. maja 2003. godine). Komisija je nastavila sa primjenom navedenog pristupa ovom problemu (vidi, na primjer, Odluku o prihvatljivosti i brisanju, *CH/99/1921, Blagojević protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine*, od 16. januara 2004. godine). Komisija smatra da je navedeni pristup, također, primjenljiv i u slučaju kada treba utvrditi da li predmetni ugovor sadrži sve potrebne elemente propisane zakonom, a što je slučaj sa ugovorom u konkretnom predmetu. U ovakvim situacijama, Komisija smatra razumnim da očekuje da podnosilac prijave mora snositi teret pokretanja sudskog spora radi utvrđivanja postojanja ugovornog odnosa ili bilo kog ugovornog prava. Tek po okončanju postupka dokazivanja postojanja i valjanosti ugovora pred nadležnim sudom, on će imati mogućnost daljnjeg postupanja u vezi sa pravom vlasništva, zavisno od rezultata ovog postupka.

56. Prema tome, podnosilac prijave je mogao podnijeti tužbu nadležnom sudu prema članu 54. Zakona o parničnom postupku, te dokazivati postojanje i pravnu valjanost ugovora o otkupu predmetnog stana. (vidi, na primjer, Odluku o prihvatljivosti, *CH/98/289 i dr, B.Č. protiv Bosne i Hecegovine i Federacije Bosne i Hercegovine*, od 8. februara 2005. godine). Prema stanju spisa podnosilac prijave nije dokazao da ovaj pravni lijek nije djelotvoran niti se Komisiji tako čini. Prema tome, Komisija smatra da podnosilac prijave nije iscrpio djelotvorne pravne lijekove, kako se zahtijeva članom VIII(2)(a) Sporazuma, zbog čega je prijava preuranjena. Komisija, zbog toga, odlučuje da ovaj dio prijave proglasi neprihvatljivim.

c) Ostalo

57. Podnosilac prijave je dopisom od 17. jula 2002. godine proširio svoj zahtjev iz prijave. Podnosilac prijave traži da mu tužene strane naknade materijalnu štetu nastalu zbog nekorištenja

predmetnog stana i imovine u njemu u iznosu od 40.000 KM, kao i zbog nekorištenja kuće za odmor u Binježevu i pokretne imovine u njoj u iznosu od 87.470 KM za period od 1. aprila 1992. godine do 25. aprila 2002. godine. Podnosilac prijave, također, traži da mu tužene strane naknade nematerijalnu štetu zbog pretrpljenih duševnih patnji i bola, te teškog oboljenja supruge u iznosu od 20.000 KM, kao i iznos od 5.000 KM na ime naknade troškova postupka. U odnosu na proširenje zahtjeva podnosioca prijave za naknadu materijalne štete i nematerijalne štete, kao u naknade troškova postupka, Komisija, takođe, zaključuje da je prijava preuranjena. Naime, prema stanju spisa podnosilac prijave nije pokrenuo relevantni postupak pred nadležnim sudom. Prema tome, pravni lijekovi nisu iscrpljeni kako se zahtijeva članom VIII(2)(a) Sporazuma, zbog čega Komisija zaključuje da je prijava u ovom dijelu neprihvatljiva.

58. Konačno, podnosilac prijave je 20. maja 2004. godine dostavio Komisiji svoj odgovor na pisana zapažanja o prihvatljivosti tužene strane, Federacije Bosne i Hercegovine. U navedenom dopisu podnosilac prijave traži da mu tužene strane isplate iznos od 183.600 EUR, te da danom isplate navedene sume podnosilac prijave gubi pravo na bilo kakvo potraživanje od tuženih strana. U skladu sa pravilom 50. stavom 1(f) Pravila procedure, Komisija zaključuje da nije nadležna *ratione temporis* da razmatra dio prijave *koji se odnosi na izmjenu zahtjeva podnosioca prijave.* Naime, Komisija zapaža da je ovaj zahtjev podnesen Komisiji po prvi put nakon 31. decembra 2003. godine, a prema članu 3. Sporazuma i pravilu 44. Pravila procedure Komisije, Komisija može odlučivati samo o "predmetima" odnosno "prijavama" podnesenim Domu do 31. decembra 2003. godine. Komisija smatra da se ovi izrazi ne odnose samo na potpuno nove prijave, nego i na nove zahtjeve od strane podnosioca prijave koji se ne odnose na stvar iznesenu u ranije podnesenoj prijavi. Novi zahtjev, koji je postavio podnosilac prijave, spada u tu kategoriju. Slijedi da je zahtjev nespojiv sa odredbama mandata Komisije predviđenog Sporazumom iz 2005. godine. Komisija, zbog toga, odlučuje da ovaj zahtjev proglasi neprihvatljivim *ratione temporis.*

A.3. Zaključak u pogledu prihvatljivosti

59. Komisija zaključuje da je prijava prihvatljiva u odnosu na žalbu podnosioca prijave na povredu njegovog prava iz čl. 6. i 13. Evropske konvencije i iz člana 1. Protokola broj 1 uz Evropsku konvenciju, u pogledu nemogućnosti da vrati u posjed svog stana.

60. Komisija zaključuje da je prijava neprihvatljiva *ratione personae* u dijelu u kojem je upućena protiv Bosne i Hercegovine.

61. Komisija zaključuje da je prijava neprihvatljiva zbog neiscrpljivanja pravnih lijekova u dijelu koji se tiče naknade štete.

62. Komisija zaključuje da je prijava neprihvatljiva *ratione temporis* u dijelu u kojem je zahtjev podnosioca prijave izmijenjen njegovim dopisom od 20. maja 2004. godine, kojim je proširio zahtjev.

B. Meritum

63. 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.

64. Komisija zaključuje da predmetna prijava mora biti ispitana u pogledu člana 6. Evropske konvencije.

B.1. Član 6. Evropske konvencije

65. 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.

66. Kao što je prethodno navedeno, podnosilac prijave se žali na pravo djelotvornog pristupa sudu, jer dužina trajanja postupka vraćanja njegovog stana u posjed nije bila razumna i onemogućavala ga je da dođe do konačne odluke povodom njegovog zahtjeva. Komisija ponavlja da podnosilac prijave nema, prema kriterijima Komisije (vidi tačku 53. ove Odluke), valjan kupoprodajni ugovor. Međutim, u tom slučaju, podnosilac prijave se mora tretirati kao nosilac stanarskog prava, a to je građansko pravo zaštićeno članom 6. Evropske konvencije. Samim tim, ovo pravo uključuje i pravo na pristup sudu.

67. 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 (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, što zavisi od datih okolnosti svakog pojedinog slučaja. Obaveza obezbjeđivanja efikasnog prava na pristup nadležnim organima spada u kategoriju dužnosti, tj. pozitivne obaveze države (vidi presude Evropskog suda za ljudska prava, *Golder protiv Velike Britanije,* od 21. februara 1975. godine, Serija A, broj 18, st. 34-36; i *Philis protiv Grčke*, od 27. avgusta 1991. godine, Serija A, broj 209, stav 59). Vladavina prava u građanskim stvarima se teško može zamisliti bez postojanja mogućnosti pristupa sudovima (*ibid, Golder protiv Velike Britanije*).

68. 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 6 i 7 Sporazuma, garantuju pravo na pravično suđenje, koje obuhvata kako efikasan pristup sudu tako i odlučivanje o predmetu spora u vezi sa povratkom u "razumnom roku".

69. Komisija, najprije, zapaža da je podnosilac prijave 1999. godine pokrenuo postupak za povrat u posjed predmetnog stana. Evidentno je da se postupak vodio od tada sve do današnjeg dana. *In conclusio*, postupak, koji je još u toku, traju duže od 6 godina. Takav zaključak, sam po sebi, protivan je navodima iz prethodne tačke ove Odluke.

70. Za razliku od "klasičnih" slučajeva pristupa sudu, konkretni predmet vodi ka zaključku da je pristup sudu bio formalno omogućen, ali da nije bio djelotvoran. Podnosilac prijave je podnio zahtjev za povrat predmetnog stana 22. juna 1999. godine. Prvostepeni organ je tek 23. jula 2003. godine tj. nakon pune 4 godine odlučio po zahtjevu podnosioca prijave. Time je znatno prekoračen razumni rok u kom je trebalo donijeti odluku po zahtjevu podnosioca prijave. Predmet je po žalbi vraćan na ponovno odlučivanje dva puta, a rezultat postupka je oba puta bio isti – bez konačne i

pravosnažne odluke. Prvostepeni organ je u više navrata nedostatno utvrđivao činjenično stanje, dok viši organ, tj. Ministarstvo, nije sam ispravljao greške, već je konstantno poništavao rješenja nižeg organa i vraćao predmet na ponovni postupak. Ovim se može zaključiti da su organi bili aktivni, ali da podnosilac prijave nije mogao doći do konačnog mišljenja nadležnih organa, znači, ne i djelotvorni.

71. U vezi sa ukidanjem, poništavanjem odluka i stalnim vraćanjem na ponovni postupak, Komisija navodi da ukidanje odluka 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. U konkretnim slučajevima, jasno je da je tužena strana prekršila ovo pravilo.

72. Osim toga, 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 30 dana. Uzimajući u obzir čak i mogućnost vođenja upravnog spora, navedeni rokovi i stvarna dužina postupka u konkretnom slučaju nisu u razumnom odnosu.

73. Komisija, konačno, napominje da upravni organi i sudovi u upravnim sporovima imaju pravo da direktno primjenjuju Evropsku konvenciju (član I/2. Ustava Bosne i Hercegovine). Ova prednost dolazi do izražaja upravo u situacijama kada sam procesni zakon ne dozvoljava jednom organu da sam meritorno odluči, bez vraćana na ponovni postupak, a što bi bilo neophodno da bi se donijela konačna odluka u razumnom roku. S druge strane, svi organi imaju pravo da pokrenu postupak konkretne ocjene ustavnosti pravnih akata pred Ustavnim sudom Bosne i Hercegovine, ako su mišljenja da je određena pravna osnova, a koja je bitna za odlučivanje u konkretnom slučaju, protivna Ustavu Bosne i Hercegovine.

74. Na kraju, Komisija zapaža da je u predmetu podnosioca prijave Uprava prekinula postupak da bi sačekala izmjene i dopune Zakona o prodaji stanova na kojima postoji stanarsko pravo. Komisija, međutim, smatra da je ovakvo postupanje jednog organa u suprotnosti sa članom 6, koji zahtijeva da se donose odluke u skladu sa važećim zakonom u trenutku trajanja postupka. 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 i princip zakonitosti propisan članom I/2. Ustava Bosne i Hercegovine. Prema tome, Uprava je imala obavezu odlučiti u skladu sa svojom nadležnošću o pravnoj stvari koja se pred njom 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 1999. godine. Dakle, podnosilac prijave nema mogućnost da se o njegovom zahtjevu odluči ni nakon punih 6 godina.

75. Komisija, zbog svega navedenog, zaključuje da je Federacija Bosne i Hercegovine prekršila pravo podnosioca prijave prema članu 6. stavu 1. Evropske konvencije, zbog toga što im nije omogućila djelotvoran pristup sudu.

B.2. Zaključak o meritumu

76. Komisija zaključuje da je došlo do povrede prava podnosioca prijave na pristup sudu koje štiti član 6. stav 1. Evropske konvencije.

77. U svjetlu svog gornjeg zaključka u vezi sa meritornom odlukom u vezi sa članom 6. Evropske konvencije, Komisija ne smatra potrebnim da ispita prijavu u vezi sa članom 13. Evropske konvencije, te članom 1. Protokola broj 1 uz Evropsku konvenciju.

VIII. PRAVNI LIJEKOVI

78. 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 Fedracija 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.

79. Komisija nalazi da bi, uzevši u obzir dugotrajnost nastojanja podnosilaca prijava da ostvare svoja prava pred upravnim, odnosno sudskim organima, bilo korisno da podnosioc prijave dobije pravomoćnu odluku u vezi sa svojim zahtjevima. Komisija, stoga, odlučuje da naredi Federaciji Bosne i Hercegovine da poduzme neophodne korake i osigura konačno rješavanje upravnog postupka i spora za povrat stana podnosioca prijave. U provođenju navedenih mjera, Federacija Bosne i Hercegovine će uzeti u obzir hitnost u rješavanju ovih postupaka u skladu sa obrazloženjem ove Odluke.

80. Osim toga, Komisija nalaže tuženoj strani Federaciji Bosne i Hercegovine da podnosiocu prijave isplati određeni iznos na ime naknade za povredu prava na suđenje u razumnom vremenu. Pri izračunavanju iznosa kompenzacije, Komisija će se pozvati na kriterije koje je utvrdio Evropski sud za ljudska prava u svojoj praksi, a koja je već prihvaćena u Bosni i Hercegovini (vidi, na primjer, odluku Ustavnog suda Bosne i Hercegovine, broj *AP 938/04*, od 17. novembra 2005. godine) – hitnost postupka rješavanja zahtjeva za povrat, godišnja osnova i ukupna dužina trajanja postupka. Naime, u navedenoj odluci, Ustavni sud Bosne i Hercegovine je naveo (tač. 49. i 50):

> Ustavni sud se poziva na praksu Evropskog suda za ljudska prava u predmetu *Apicella protiv Italije i devet drugih slučajeva protiv Italije* (vidi presudu od 10. novembra 2004. godine), u kojem je utvrđen obrazac za izračunavanje nadoknade na ime nematerijalne štete u slučajevima dužine postupka. U navedenom predmetu, Evropski sud za ljudska prava je zaključio da, kao opšta smjernica, podnosioci predstavke koji mogu da dokažu da je član 6. stav 1. Evropske konvencije povrijeđen odlaganjima, treba da dobiju između 1.000 i 1.500 EUR na ime nadoknade za svaku godinu trajanja postupka, bez obzira da li su podnosioci predstavke dobili ili izgubili domaći postupak, ili je postignuto prijateljsko poravnjanje. Ovaj iznos, međutim, može biti umanjen da bi se uzeo u obzir standard života u zemlji u pitanju, kao i držanje podnosioca predstavke. Odšteta Evropskog suda za ljudska prava, također, će biti umanjena, ako je podnosilac predstavke primio presudu domaćeg suda da je zahtijev "razumnog roka" člana 6. stav 1. Evropske konvencije povrijeđen i dobio nadoknadu, iako neodgovarajuću, od domaćih institucija. Ova osnovna rata treba biti uvećana na 2.000 EUR, ako se slučaj odnosi na pitanje koje zahtijeva posebnu ažurnost.
>
> Ustavni sud smatra da, prilikom utvrđivanja obrasca za izračunavanje nadoknade na ime nematerijalne štete u slučajevima dužine postupka u Bosni i Hercegovini, standard života i ekonomske prilike treba posmatrati kroz parametar ukupnog nacionalnog dohotka (GDP-Gross Domestic Product ili vrijednost svih konačnih roba i usluga proizvedenih u zemlji tokom godine podijeljena sa prosječnom populacijom za istu godinu). U navedenom predmetu Evropskog suda za ljudska prava, slučaj se odnosio na Italiju, u kojoj je za 2004. godinu, GDP iznosio 29.014 USD, dok je za Bosnu i Hercegovinu iznosio 2.125 USD, dakle, oko 13 puta manje (izvor: http://en.wikipedia.org). Imajući u vidu navedeno, Ustavni sud smatra da se apelantima u Bosni i Hercegovini, u slučajevima kada su ispunjeni uslovi za to, kao nadoknadu na ime nematerijalne štete, treba isplatiti iznos od približno 150 KM za

svaku godinu odlaganja donošenja odluke od strane domaćih sudova, odnosno dvostruki iznos u predmetima koji zahtijevaju posebnu hitnost.

S obzirom da postupak traje već 6 godina, da se radi o hitnom postupku, Komisija će narediti tuženoj strani, Federaciji Bosne i Hercegovine da isplati podnosiocu prijave iznos od 1.800 KM (hiljadu osamsto) na ime naknade za povredu prava na suđenje u razumnom vremenu u roku od tri mjeseca od dana prijema ove Odluke, te da podnosiocu prijave isplati zateznu kamatu od 10% (deset posto) na ovaj dosuđeni iznos ili na svaki njegov neisplaćeni dio po isteku roka predviđenog za tu isplatu do datuma pune isplate ovog naređenog iznosa.

81. Na kraju Komisija napominje da, u skladu sa pravilom broj 62. Pravila procedure Komisije, odluke Komisije konačne su i obavezujuće i dužno ih je poštovati svako fizičko i pravno lice. Svi organi vlasti tuženih strana u smislu Sporazuma, dužni su, u okviru svojih nadležnosti utvrđenih ustavom i zakonom, provoditi odluke Komisije. U datim rokovima, tužena strana, koja je obavezna da izvrši odluku Komisije, dužna je dostaviti obavijest o preduzetim mjerama u cilju izvršenja odluke Komisije, kako je to naznačeno u odluci. U slučaju nepostupanja, odnosno kašnjenja u izvršenju ili obavještenju Komisiji o preduzetim mjerama, Komisija donosi rješenje kojim se utvrđuje da odluka Komisije nije izvršena. Ovo rješenje dostavlja se nadležnom tužiocu i nadležnom agentu tužene strane. Komisija napominje da neizvršenje odluka Komisije, u skladu sa članom 239. Krivičnog zakona Bosne i Hercegovine, predstavlja krivično djelo.

IX. ZAKLJUČAK

82. 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 u vezi sa čl. 6. i 13. Evropske kovencije i članom 1. Protokola 1 uz Evropsku konvenciju, a u odnosu na zahtjev za povrat stana u posjed;

3. jednoglasno, da prijavu proglasi neprihvatljivom u dijelu koji se odnosi na priznavanje vlasništva podnosioca prijave zbog neiscrpljivanja pravnih lijekova;

4. jednoglasno, da prijavu proglasi neprihvatljivom u dijelu koji se odnosi na naknadu materijalne i nematerijne štete zbog neiscrpljivanja pravnih lijekova;

5. jednoglasno, da prijavu proglasi neprihvatljivom u dijelu koji se odnosi na proširenje zahtjeva podnosioca prijave zbog nenadležnosti Komisije *ratione temporis*;

6. jednoglasno, da je prekršeno pravo podnosioca prijave na pravično suđenje prema članu 6. stavu 1. Evropske konvencije u postupku povrata stana, čime je Federacija Bosne i Hercegovine prekršila član I Sporazuma;

7. jednoglasno, da nije potrebno ispitivati prijavu prema članu 13. Evropske konvencije i članu 1. Protokola 1 uz Evropsku konvenciju;

8. jednoglasno, da naredi Federaciji Bosne i Hercegovine da preduzme neophodne korake i osigura pravosnažno rješavanje zahtjeva za povrat stana podnosioca prijave u hitnom postupku, a najkasnije u roku od 6 mjeseci od dana prijema ove Odluke;

9. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave isplati iznos od 1.800 KM (hiljadu osamsto) zbog povrede prava na suđenje u razumnom roku u roku od

mjesec dana od dana prijema ove Odluke;

10. jednoglasno, da naredi Federaciji Bosne i Hercegovine da podnosiocu prijave 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; i

11. jednoglasno, da naredi Federaciji Bosne i Hercegovine da Komisiji, u roku od mjesec dana od isteka roka iz zaključaka br. 8, 9. i 10. 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 7 September 2001)

Case nos.
CH/98/1309, CH/98/1312, CH/98/1314, CH/98/1318, CH/98/1319, CH/98/1321, CH/98/1322, CH/98/1323 and CH/98/1326

Almasa KAJTAZ, Dobrila BIJEDIĆ, Azira SIVČEVIĆ, Altijana MEŠIĆ, Rasema BEGIĆ, Elvedin DEVIĆ, Radenka CVIJETIĆ, Jasna ŠLJIVO, and Dženana ŠEHOVIĆ

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 4 September 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. Ulrich GARMS, 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)(c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicants, who are of various ethnic origins, were employees in the Ministry of Justice and General Administration of the Republic of Bosnia and Herzegovina. In December 1997, a new Ministry for Civil Affairs and Communication (the "Ministry") was established and the applicants were not officially assigned to any post within this new Ministry.

2. The applicants allege that after the establishment of the Ministry, they continued working within the new Ministry, in the same positions until various dates in the beginning of 1999. On 8 September 1998, they learned that they had been relegated to the status of "unassigned" workers and that as a result they received lower salaries than other employees and stopped receiving benefits commencing on or around June 1998. They stopped receiving any compensation on 31 December 1998. They actually ceased working sometime between January and March 1999, respectively. They have never received procedural decisions terminating their working relations or relegating them to the status of unassigned workers.

3. In November 1998 the applicants, except for Dženana Šehović, initiated civil proceedings before the Municipal Court I in Sarajevo. The applicants requested compensation for lost salaries and other income due from their working relations. The applicants were allegedly unable to institute proceedings requesting reinstatement because they never received procedural decisions actually terminating their employment. To date, no decision has been issued in any of the applicants' cases.

4. The applicants complain that they have not received procedural decisions regulating their employment, that they were summarily dismissed from their jobs with the Ministry of Civil Affairs and Communication, and that the Law on State Administration was not complied with. The applicants also complain that they were discriminated against in their right to employment based on their national origin. Four of the applicants complain, specifically, that they have been discriminated against based on the fact that they are from mixed backgrounds.

5. These cases raise issues primarily under Article 6(1) of the European Convention of Human Rights (the "Convention") and Article II(2)(b) of Annex VI of the General Framework Agreement for Peace in Bosnia and Herzegovina in relation to Article 25(c) of the International Covenant on Civil and Political Rights (the "ICCPR").

II. PROCEEDINGS BEFORE THE CHAMBER

6. The applications were submitted to the Chamber between 27 and 30 November 1998. On 9 July 1999 the First Panel considered the cases and decided to transmit them to the respondent Party. It also refused a request for provisional measures made by the applicants. The applicants had requested that the Chamber order Bosnia and Herzegovina as a provisional measure to take no further steps to terminate their employment.

7. On 13 July 1999 the cases were transmitted to the respondent Party for observations on their admissibility and merits. On 13 September 1999 the respondent Party wrote to the Chamber asking for an extension of the time limit to file their observations stating that they had not received information which they had requested from the Council of Ministers. The respondent Party's observations were received on 9 November 1999. Further observations and claims for compensation were received from most of the applicants between 28 December 1999 and 5 January 2000. Further replies were not received in two cases, CH/98/1314 Azira SIVČEVIĆ and CH/98/1318 Altijana MEŠIĆ.

8. The further observations of the applicants and claims for compensation were sent to the agents of the respondent Party on 10 January 2000 for observations. No further observations have been received.

9. The Chamber wrote to the respondent Party requesting further information on 17 October and 30 November 2000. Further information was received from the respondent Party on 1 December 2000.

10. At its session in December 2000, the Panel decided to hold a public hearing on the admissibility and merits of the case in January 2001.

11. On 10 January 2001 the Panel held a public hearing on the admissibility and merits of the applications in the Cantonal Court building in Sarajevo. Of the nine applicants Almasa Kajtaz, Dobrila Bijedić, Azira Sivčević, Altijana Mešić and Rasema Begić were present. Almasa Kajtaz represented all of the applicants, including the applicants who were not present at the hearing. Bosnia and Herzegovina was represented by two of its agents, Mr. Jusuf Halilagić and Mrs. Gordana Milovanović. Mr. Nudžeim Rečica, Deputy Minister for Civil Affairs and Communications appeared as a witness.

12. On 10 January 2001, the Chamber received further claims for compensation from Azira Sivčević (CH/98/1314) and Altijana Mešić (CH/98/1318). On 8 August 2001 the Chamber transmitted these claims to the respondent Party and requested any observations within 3 weeks. On 22 August 2001 the Chamber received a response from Bosnia and Herzegovina, which, however, did not comment on the compensation claims.

13. The Panel deliberated on the admissibility and merits of the applications on 11 January, 6 and 8 June, 2 and 3 July and 4 September 2001 and adopted the present decision on the latter date.

III. FACTS

A. General

14. In establishing the facts in the present case the Chamber will refer to the parties' submissions, the documents before it and its own findings from the testimony heard at the public hearing.

15. The central government of the Republic of Bosnia and Herzegovina was comprised of five ministries. These ministries were established by the Law on Ministries and Other Bodies of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina 3/96, 16/96 and 26/96 –hereinafter "OG RBiH"). The five ministries were**:** the Ministry of Finance, the Ministry of Foreign Affairs, the Ministry of Justice and General Administration, the Ministry for Refugees and Displaced Persons and the Ministry of Foreign Trade and International Communications.

16. The applicants were all permanently employed in the former Ministry of Justice and General Administration of RBiH. They were all employed at some time between May and September of 1996.

17. Pursuant to the Law on the Council of Ministers of Bosnia and Herzegovina and Ministries of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina "OG BiH" nos. 4/97 and 16/99), that entered into force on 24 December 1997, three ministries of BiH were established. They are as follows: the Ministry of Foreign Affairs, the Ministry of Civil Affairs and Communications, and the Ministry of Foreign Trade and Economic Relations. According to the respondent Party, part of the affairs of the former Ministry of Finance was taken over by the Ministry of Foreign Trade and Economic Relations and the Ministry of Civil Affairs and Communications. Affairs of the former Ministry of Justice and General Administration and the former Ministry for Refugees and Displaced Persons were taken over by the Ministry of Civil Affairs and Communications.

18. Pursuant to Article 49(1) and (3) of the Law on the Council of Ministers, Bosnia and Herzegovina had an obligation to enact, within 15 days from the date of entry into force of the Law, the Regulations on Internal Organisation of the Ministry, and to employ workers within 30 days from the day of adoption of the Regulations. Article 51 of the Law on the Council of Ministers obliged Bosnia and Herzegovina within 30 days after the entry into force of this Law to decide in which manner the existing administrative bodies would be continued, modified or dissolved.

19. The Rules on Internal Organisation of the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina were adopted on 26 March 1998. Pursuant to Article 31 of these Rules, 93 persons were to be employed with the Ministry of Civil Affairs and Communication. Pursuant to Article 4, seven internal divisions were established within the Ministry. Pursuant to Article 32, legal regulations are to be issued whereby the working positions in the Ministry shall be defined. Pursuant to Article 33, the Minister in agreement with the Deputy Ministers was to carry out the admission and disposition of the Ministry's employees to perform tasks and assignments, within 30 days from the date of issuance of the Rules of Procedure.

20. Unofficially, the applicants learned that on 8 July 1998 the Council of Ministers had passed a decision concerning the material rights of employees of the Council of Ministers with effect from 1 May 1998. Based on this decision the salaries and other material rights of the employees who were to be employed by the new Council of Ministers were established. According to the applicants, persons received decisions employing them based on this 8 July decision at different points in time depending on their national origin**.** Persons of Croat origin received decisions employing them in the Ministries in August 1998 and Bosniaks in October 1998. The applicants are unaware whether persons of Serb origin ever received a decision. None of the applicants ever received such a decision formally employing them with the new Ministry.

21. Nonetheless, the applicants continued working with the new Ministry performing the same duties at the same salary until 8 September 1998. On 8 September 1998, the applicants learned from the cashier, for the first time, that there were two lists for salaries, one for "appointed" employees and the other for "non-appointed" employees. All of the applicants were on the list of "non-appointed" employees. Persons on this list received reduced salaries, no remuneration for meals or transport, or vacation bonuses. However, the applicants to this day have not been served with any procedural decision changing their status or position.

22. After 8 September 1998, the applicants, while receiving less salary and no remuneration for meals and transport, or vacation bonus, continued working in the same positions until various times in 1999. The applicants stopped receiving any payment at all on 31 December 1998. According to the applicants, and the respondent Party has not contested, the refusal of the Ministry to issue a procedural decision on their labour relations prevented them from seeking protection of their rights through administrative or court procedures.

23. According to a number of applicants, on 11 September 1998 a meeting was held wherein they learned about a Decision on Reimbursement of Employees of Former State Organs of the Republic and Organs of State Administration of the Council of Ministers. The decision concerns employees who have not concluded their labour relations with the new Ministry. This decision states as follows:

> "This decision shall establish the right to reimbursement of employees of the former state organs of the Republic and organs of State administration which were engaged in tasks from the jurisdiction of institutions of Bosnia and Herzegovina as users of the Budget of Bosnia and Herzegovina for 1998 (Official Gazette of BiH No. 7/98) of 1 June 1998.
>
> Employees referred to in paragraph I of this decision who have not concluded labour relations in Institutions of Bosnia and Herzegovina shall have the right to reimbursement in the amount of their salary from May 1998 to the date of concluding their labour relations, and at the latest 31 December 1998.
>
> Reimbursement as referred to in paragraph II of this decision shall be paid by the Ministry of Civil Affairs and Communications out of means provided for that purpose in the Budget of Bosnia and Herzegovina for 1998.
>
> Institutions of Bosnia and Herzegovina for which the employees referred to in paragraph I of this decision were working shall be obliged to submit the list of above mentioned employees to the Ministry of Civil Affairs and Communications before 20 September 1998."

This decision was never dated or signed. It appears that none of the applicants were officially given a written copy of this decision.

24. Six of the applicants wrote to the Deputy Ministers inquiring about their labour status on 10 November 1998. These applicants received letters in response from Deputy Minister Milan Križanović on 11 November 1998 and from Deputy Minister Nudžeim Rečica on 17 November 1998.

25. In his letter of 11 November 1998, Deputy Minister Križanović stated that he was "surprised that you as long term employees in the State Administration could not foresee it," as it was known that there would be a reorganisation. Further, he pointed out the need to achieve a national balance as required by law. He further pointed out that the applicants had never been employees of the Ministry for Civil Affairs and Communications, because only people who received procedural decisions on assignment to a post signed by the Minister and his two Deputies were actually employed by the Ministry. Additionally, he stated that the "key date" was 1 June 1998, and that from that date on employees of the former State Ministries have the right to reimbursement until the end of 1998. Finally, he told them that on the basis of what was stated above, those persons who did not receive procedural decisions assigning them to a post have no obligation and no right to continue coming to work.

26. In his letter of 17 November 1998 Deputy Minister Rečica responded to the applicants letter and explained, somewhat, the new structure of the Ministry. He stated that based on the Rules of Internal Organisation of the Ministry of Civil Affairs and Communications persons were employed and commenced their working relations on 1 June 1998. Further, he stated that according to the Rules the total number of employees is 93. Of the total number one-third, or 31 employees, are from the Republika Srpska, and two-thirds, or 62, from the Federation. Additionally, in accordance with the constitutional competencies of the institutions of Bosnia and Herzegovina a smaller number of tasks were taken over from the Ministry of Justice and General Administration, and these tasks are implementation of international and inter-entity criminal law and tasks concerning citizenship.

27. He went on to explain that the total number of employees in the Sector for international and inter-entity criminal law is six and of this number three are Bosniaks, two are Serbs and one is a Croat, "as established by the Rules of Internal Organisation." The total number of employees in the Sector for Citizenship and Immigration and Asylum is ten and of this number four are Bosniaks, three are Serbs, two are Croats and one belongs to the category of "Others". Of all of the employees of the former Ministry of Justice and General Administration, eighteen employees were not employed in the Ministry of Civil Affairs and Communications and of this number 11 are Bosniak, 5 Serbs and 2 Croats.

28. Further, in his opinion, the Law on the Council of Ministers did not contain provisions on the rights of former employees of organs of the former Republic. The only provision relating to this issue was Article 51 (see paragraph 18 above). On the basis of Article 51 the Council of Ministers at its 59th session of 10 September 1998 had issued a Decision on Remuneration for Employees of Former State Organs and Organs of the State Administration. By this decision, persons who did not establish working relations in the institutions of Bosnia and Herzegovina had the right to remuneration up to and no later than 31 December 1998. By this decision he states that the Council of Minsters "practically" decided on the status of employees of the former State organs.

29. Finally, he stated that if the number of Ministries was expanded, "former Ministry of Justice and General Administration of Bosnia and Herzegovina employees who did not start their working relations in new institutions of Bosnia and Herzegovina should have priority for employment in these Ministries."

30. During November and December 1998, the applicants, except for Dženana Šehović, initiated civil proceedings before the Municipal Court I in Sarajevo. The applicants requested compensation for lost salaries and other income due from their working relations. The applicants were allegedly unable to institute proceedings regarding the status of their labour relations because they had never received procedural decisions actually terminating their employment. The applicants were also deprived of the

ability to apply to the Labour Inspector because he too was "unassigned" and there was no Labour Inspector on the State level.

31. A new Law on the Council of Ministers of Bosnia and Herzegovina and Ministries of Bosnia and Herzegovina was adopted on 14 April 2000 and entered into force in November 2000 (OG BiH 11/00)(the "New Law"). Pursuant to Article 38 of the New Law the following additional three Ministries were established: the Ministry of Human Rights and Refugees; the Ministry of BiH Institutions Treasury and the Ministry for European Integration.

32. The applicants allege that during January 1999 they were told that their employment rights had ceased as of 31 December 1998. They further allege that they were clearly told that none of them would receive a procedural decision on termination of their employment.

B. The facts of the individual applications

1. Almasa KAJTAZ - CH/98/1309

33. On 1 June 1996 the applicant, who is of Bosniak origin, was employed as a permanent employee with the former Ministry of Justice and General Administration. She was employed as an Associate Administrator in Second Instance Administrative Proceedings, Department for Citizenship, Travel Documents, Foreigners, and Border Crossings. The applicant worked in the Presidency building, located at Musala 9 in Sarajevo.

34. Specifically, the applicant was responsible for: 1) drafting procedural decisions granting and withdrawing BiH citizenship; 2) handling permissions for the extension of travel documents to the citizens of BiH abroad; 3) dealing with issuance of visas to foreigners who are coming from countries which come under the visa regime; and 4) dealing with the refugee status of persons who escaped from Sandžak and Kosovo.

35. The applicant then learned on 8 September 1998 of the two lists referred to in paragraph 21 above. From that point on, the applicant began receiving less salary than "appointed" employees. The applicant also stopped receiving all other benefits. The applicant did not receive any compensation for September and October 1998. The applicant stopped receiving any compensation or benefits as of 31 December 1998. The applicant never received a procedural decision formally terminating her employment.

36. On 11 November 1998 the applicant instituted legal proceedings before the Municipal Court I in Sarajevo. The applicant requested compensation for lost salary and other income due from her working relations. To date, no decision has been taken in the applicant's case.

37. The applicant continued working in the same position until 25 March 1999. On that day the applicant alleges that Deputy Minister Nudžeim Rečica orally ordered the guards not to allow the applicant and her colleagues, who had also filed complaints with the Municipal Court I, to enter the building. As of that day, the applicant alleges that the room she worked in has been locked and that a few hundred cases she had been working on lay strewn all over the floor.

38. The applicant informed the Minister Marko Ašanin in April 1999 and again, in writing on 7 May 1999, of the fact that she and other employees were forbidden from entering the Presidency building. The applicant also informed the Council of Ministers of BiH of the ongoing situation in the Ministry. No reply was ever received.

39. The applicant alleges in her further reply to the respondent Party's observations, and the respondent Party has not denied, that Mr. Bakir Dautbašić, who is of the same ethnic origin as the applicant, is now performing the duties that the applicant had performed. The applicant alleges that Mr. Dautbašić has lesser qualifications than she and no experience. The applicant argues that this fact establishes that her treatment was not simply a matter of achieving a national balance, as the person who replaced her was of the same national origin. Rather, she argues, it was simply a matter of arbitrary and unlawful conduct.

40. In further support of her argument that the Ministry acted arbitrarily, the applicant states that Mrs. Amela Bašić, who is of Bosniak origin, was immediately rehired by the Ministry after she withdrew her application from the Chamber.

41. The applicant requests the Chamber to order the respondent Party to issue a procedural decision concerning her labour status and to pay her both pecuniary and non-pecuniary compensation.

2. Dobrila BIJEDIĆ - CH/98/1312

42. On 1 June 1996 the applicant, who is of mixed ethnic origin and in a mixed marriage, was employed as a permanent employee with the former Ministry of Justice and General Administration. She was employed as an Associate Administrator in Second Instance Administrative Proceedings, Department for Citizenship, Travel Documents, Foreigners, and Border Crossing. The applicant was employed as a Croat, although in 1990 she declared herself as a "Bosnian Catholic". The applicant alleges that she was told by a Minister, Mr. Križanović, that she would not be employed as a Croat since she did not declare herself as such. He further told her to speak with Mr. Rečica, the Bosniak Deputy Minister, about assigning her to a post. She alleges that Mr. Rečica would not meet with her.

43. Specifically, the applicant's responsibilities and duties were the same as Ms. Kajtaz's.

44. In May 1998 the applicant started receiving a lower salary than others and no benefits. The applicant then learned on 8 September 1998 of the two lists referred to in paragraph 19 above. The applicant did not receive any compensation for September and October 1998. The applicant stopped receiving any compensation or benefits at all as of 31 December 1998. The applicant never received a procedural decision formally terminating her employment.

45. On 13 November 1998 the applicant brought a lawsuit before the Municipal Court I in Sarajevo. The applicant requested compensation for lost salary and other income due from her working relations. The applicant alleges that the respondent Party failed to appear at any of the scheduled court hearings. Accordingly, each hearing has been postponed. To date, no decision has been taken in the applicant's case.

46. The applicant continued working in her position, nonetheless, until 25 March 1999. On that day the applicant alleges that Deputy Minister Nudžeim Rečica orally ordered the guards not to allow the applicant, and her colleagues, who had also filed complaints with the Municipal Court I, to enter the building. The applicant alleges that this action was taken in retaliation for the applicant having provided evidence to the Municipal Court I. As of that day, the applicant alleges that the room she worked in has been locked and that a few hundred cases she was working on lay strewn all over the floor. The applicant further alleges that she has been denied access to any materials in her former office.

47. The applicant alleges, and the respondent Party does not deny, that the Ministry appointed a person of Croat origin to fill her place. This person allegedly had previously worked for the former Ministry of Refugees and Displaced Persons. According to the applicant this person has no prior experience with citizenship issues.

48. The applicant requests the Chamber to order the respondent Party to issue a procedural decision concerning her labour status and to pay her both pecuniary and non-pecuniary compensation.

3. Azira SIVČEVIĆ - CH/98/1314

49. On 7 August 1996 the applicant, who appears to be of Bosniak origin, was employed as a permanent employee with the former ministry. She was employed in the position of file manager with the Ministry of Justice and General Administration, Department for Citizenship, Travel Documents, Foreigners, and State Borders. Specifically, the applicant was responsible for registering procedural decisions issued by the Ministry, consents for the issuance of travel documents, retrospective registration of births, and archives.

50. Commencing in August 1998, the applicant began receiving a lesser salary as a non-appointed employee and no benefits. The applicant stopped receiving any salary at all as of 31 December 1998. However, the applicant continued working at the same job until 1 March 1999. The applicant's employment record was concluded on 31 December 1998.

51. The applicant filed a lawsuit with the Municipal Court I in Sarajevo on 13 November 1998. The case is still pending.

52. The applicant alleges, and the respondent Party has not contested, that she was replaced by her colleague Mira Radić, presumably of Serb origin.

53. The applicant alleges that she was humiliated when she complained about the situation and one of her colleagues told her that "she should be happy that her employment record was concluded at all."

54. On 1 March 1999 the applicant found other employment. However, her previous year of employment is not connected so that there is a gap in her employment record from 1 January 1999 through 1 March 1999.

4. Altijana MEŠIĆ - CH/98/1318

55. On 28 November 1996 the applicant, who appears to be of Bosniak origin, was hired as a permanent employee with the former ministry. She was employed in the position of a data processor with the Ministry of Justice and General Administration Department for Citizenship, Travel Documents, Foreigners, and State Borders.

56. Commencing in September 1998, the applicant began receiving a lesser salary as a non-appointed employee and no benefits. The applicant stopped receiving any salary as of 31 December 1998. However, the applicant continued working in the same position until 15 February 1999. The applicant's employment record was concluded on 31 December 1998.

57. The applicant filed a lawsuit with the Municipal Court I in Sarajevo on 13 November 1998. The case is still pending.

58. The applicant found other employment on 15 February 1999. The applicant alleges that she was told by a colleague, who was employed by the new Ministry that she should be happy that her employment record was concluded at all because many persons' records have not been concluded. The applicant further alleges that the Ministry has denied the applicant access to any of her documents that could be used as evidence in this case or the case before the domestic court. The applicant finally alleges that any employee who would provide her with such documents would lose their jobs.

59. The applicant requests both pecuniary and non-pecuniary compensation.

5. Rasema BEGIĆ – CH/98/1319

60. On 1 June 1996 the applicant, who is of Bosniak origin, was employed as a permanent employee with the former Ministry of Justice and General Administration. The applicant was employed

as the officer in charge of documentation and electronic data processing, Department for Citizenship, Travel documents, Foreigners and State Borders.

61. Commencing in June 1998, the applicant began receiving a reduced salary as a non-appointed employee and no benefits. The applicant stopped receiving any salary at all as of 31 December 1998. However, the applicant continued working at the same job until 31 March 1999. The applicant's employment record has not been concluded.

62. The applicant filed a lawsuit with the Municipal Court I in Sarajevo on 17 November 1998. The case is still pending.

63. The applicant alleges, and the respondent Party has not contested, that the position that she occupied has not been abolished. However, someone else has been employed. Further, the applicant alleges that after 1 September 2000, two extra persons, of Bosniak origin, were employed to perform the same duties that the applicant had been performing.

64. The applicant requests the Chamber to order the respondent Party to issue a procedural decision concerning her labour status, to return the applicant to her previous post, and to pay her both pecuniary and non-pecuniary compensation.

6. Elvedin DEVIĆ – CH/98/1321

65. On 10 September 1996 the applicant, who is of Bosniak origin, was employed as a permanent employee with the former Ministry of Justice and General Administration. The applicant was employed as a courier in the Department for General and Mutual Affairs.

66. Commencing in June 1998, the applicant began receiving a lesser salary as a non-appointed employee and no benefits. The applicant stopped receiving any salary as of 31 December 1998. However, the applicant continued working at the same job until approximately March 1999.

67. According to the applicant the decision on Reimbursement of Employees of Former State Organs of the Council of Ministers was read at an 11 September 1998 meeting. That decision stated that certain employees "shall have the right to reimbursement" in the amount of their salaries from May 1998 until at the latest 31 December 1998. The applicant also learned at that meeting that essentially his employment could be terminated without any notice on 31 December 1998.

68. The applicant filed a lawsuit with the Municipal Court I in Sarajevo on 11 November 1998. According to the Chamber's information, the applicant's case has not been decided.

69. During the public hearing the Chamber was informed that the applicant had been employed by the Ministry for Civil Affairs and Communication on 10 September 2000.

70. The applicant maintains his claim for compensation.

7. Radenka CVIJETIĆ – CH/98/1322

71. On 1 June 1996 the applicant, who is of Serb origin living in the Federation, was employed as a permanent employee with the former Ministry of Justice and General Administration, Department for General and Mutual Affairs. The Applicant was employed in the position of officer for personnel and general affairs.

72. The applicant's job responsibilities included: registration and checking out of employees, making procedural decisions on employment or suspension of employment, making procedural decision on salaries, making procedural decisions on annual leave, closing employment books.

73. On 8 September 1998 the applicant received her June and August reduced salary as a "non-appointed" employee and no benefits.

74. The applicant filed a lawsuit with the Municipal Court I in Sarajevo on 11 November 1998. The case is still pending.

75. The applicant alleges that she has been discriminated against because she 1) is of Serb origin and resides in the Federation; and 2) because of the national balance of the employees within the new Ministry 1/3 of the positions are for Serbs from the Republika Srpska, 1/3 for Bosniaks and 1/3 for Croats from the Federation. As the applicant is of Serb origin living in the Federation she has been discriminated against.

76. By letter dated 31 October 2000 the applicant informed the Chamber that, by a procedural decision of the Ministry of Civil Affairs and Communications (no. 01/1-823/00) of 5 October 2000, she was assigned to the post of officer for register with the Sector for International and Inter-Entity Criminal Law.

77. The applicant informed the Chamber that she maintains her claim for compensation and to have her seniority recognised. The applicant also complains of the fact that she was recruited as a Bosniak, probably because she lives in the Federation.

8. Jasna ŠLJIVO – CH/98/1323

78. On 1 May 1996 the applicant, who is of mixed ethnic origin, was employed as a permanent employee with the former Ministry of Justice and General Administration. The applicant was employed in the office for copying.

79. On 8 September 1998 the applicant received her June-August salary in a reduced amount as a "non-appointed" employee and no benefits. She was told by the cashier on that date that there were two lists for assigned and unassigned employees. From that date onwards she received a reduced salary and no reimbursements. The applicant received no salary for September and October 1998.

80. According to the applicant, the decision on Reimbursement of Employees of Former State Organs of the Council of Ministers was read at an 11 September 1998 meeting. That decision stated that certain employees "shall have the right to reimbursement" in the amount of their salaries from May 1998 until at the latest 31 December 1998. The applicant also learned at that meeting that essentially her employment could be terminated without any notice on 31 December 1998. The applicant points out that that decision was never signed.

81. The applicant alleges that on several occasions she attempted to speak with Deputy Minister Križanović, but he would not receive her. On 10 and 16 November 1998 she and the other applicants sent letters to Deputy Ministers inquiring about their status. On 17 November 1998 the applicant received a response.

82. The applicant alleges that on 8 July 1998 the Council of Ministers issued a decision regarding the status of employed people and their labour rights. That decision is signed.

83. On 12 November 1998 the applicant initiated a lawsuit with the Municipal Court I in Sarajevo. To the Chamber's knowledge this lawsuit is still pending.

84. The applicant continued working until 1 February 1999. The applicant alleges that on that date her immediate supervisor literally threw her out of the office.

85. The applicant alleges that she has been discriminated against because she is from a mixed family. She alleges that her immediate supervisor told her that he could not help her because she was from a mixed family and that he was Bosniak and would help only Bosniaks. In March 1998 everyone had to write biographies and one of the questions asked was about their respective nationalities. The applicant declared herself a Croat. The applicant further alleges that her post was filled by a person of Bosniak origin who has less experience than she.

86. On 1 August 1999 the applicant gained other employment. However, she has not been registered as an employee because her employment record has not been concluded and, therefore, she cannot be registered with her new employer.

87. The applicant requests the Chamber to order the respondent Party to issue a procedural decision concerning her labour status and to pay her both pecuniary and non-pecuniary compensation.

9. Dženana ŠEHOVIĆ – CH/98/1326

88. On 26 August 1996 the applicant, who is of Bosniak origin, was employed as a permanent employee with the former Ministry of Justice and General Administration. The applicant was employed in the position of an administrator in the sector for application of international and inter-entity politics and criminal regulations.

89. On 8 September 1998, the applicant learned that she had been placed on the "non-appointed" employee list. As a result, commencing in June of 1998 she received less salary than others and no benefits. She stopped receiving any remuneration as of 31 December 1998.

90. According to the applicant, the decision on Reimbursement of Employees of Former State Organs of the Council of Ministers was read at an 11 September 1998 meeting. In that decision it was stated that certain employees "shall have the right to reimbursement" in the amount of their salaries from May 1998 until the latest 31 December 1998. The applicant also learned at that meeting that essentially her employment could be terminated without any notice on 31 December 1998. The applicant points out that that decision was never signed.

91. On 5 October 1998 some persons who were employed by the Ministry received proper decisions on employment. According to the applicant, those decisions were retroactive to 1 June 1998. However, a copy of the decision in the case file states that the decision is retroactive to 1 May 1998.

92. On 5 November 1998 the applicant sent a written request to Mr. Rečica regarding the status of her labour rights. On 17 November 1998 the applicant received a letter from Deputy Minister Rečica. In that letter Mr. Rečica stated that the total number of employees in the Sector for International and Inter-Entity Criminal Law is six employees of which three are Bosniaks, two Serbs and one Croat. An employee who meets the requirements prescribed by the Rules of Internal Organisation of the Ministry of Civil Affairs and Communications was appointed to the position of administrator for data processing and verification abroad. Mr. Rečica also informed the applicant that seventeen employees, besides the applicant, were not employed from the former Ministry of Justice and General Administration, of which ten were of Bosniak origin. He further informed the applicant about the 10 September 1998 decision regarding compensation for unassigned employees. Finally, he stated that if the number of employees in the Council of Ministers increased she would priority in employment in those ministries.

93. The applicant was informed that her exact position still exists in the new ministry, that the number of employees was not reduced in her specific case, but that her job was given to someone else. The person who replaced her was also of Bosniak origin. The applicant alleges that that person is not qualified for the position.

94. On 10 May 1999 the applicant informed the Chamber that she had started working on 1 March 1999 for another employer. In order to gain full working rights with her new employer the applicant needs to conclude her working book as of 28 February 1999. However, she was refused and they agreed to conclude her book as of 31 December 1998. Nonetheless, it appears that her book was never concluded.

95. On 1 October 2000 the applicant was re-employed by the Ministry of Civil Affairs and Communication. The applicant maintains her claims for pecuniary and non-pecuniary compensation.

C. Oral evidence received at the public hearing

96. Mr. Rečica, the Deputy Minister for Civil Affairs and Communications, appeared as a witness and gave testimony regarding the appointment of employees for the Ministry. He stated that the competencies of the Council of Ministers, in comparison with the previous Government, were considerably reduced. Therefore, the Ministry could not take over all of the employees of the former ministries. He further stated that employment had to be done in accordance with the principle of "equal representation" as set forth in the Law of the Council of Ministers.

97. Until the issuance of the Rules on Internal Organization, which came into force in March 1998, the former ministries continued formally and all employees were coming to work. They worked and received salaries for their work within the same scope and capacity as they did in 1996. According to Mr. Rečica, "this means a continuity was created." However, he did not think that there was legal continuity, therefore, creating a "legal vacuum" with respect to the regulation of the status of employees who lost their jobs. Mr. Rečica stated that the Law on the Council of Ministers does not recognize the continuity of the former institutions. In view of that, he stated that the Ministry did not have the competence to terminate the employment of persons they did not employ in the first place.

98. Within the structure of the former Ministries, approximately 80% of the employees were Bosniaks. Within the Ministry of Civil Affairs and Communications there was the department of citizenship which was planned to have eight employees and the department of international and inter-entity criminal law which was meant to have six or seven employees. This means that the two departments could employ only fifteen persons in total, and the national balance had to be taken into account. Persons who were formally employed with the new Ministry of Civil Affairs and Communication received procedural decisions appointing them.

99. With respect to "equal representation" he stated that the Ministry employed 40% Bosniaks, 23% Croats from the Federation and 33% of Serbs from Republika Srpska. Some persons were employed without their ethnic origin being taken into account. The exact manner in which this was implemented was not explained. Generally, he stated that this notion of "equal representation" was implemented through "a political balance, political agreement, assessment as to what was important and what was less important." He further stated that the issue of persons who did not fit neatly into one of the three categories was never resolved by the Council of Ministers formally, but that they tried to take care of such persons.

IV. RELEVANT LEGISLATION

1. Constitution of Bosnia and Herzegovina

100. The Constitution of Bosnia and Herzegovina is contained in Annex 4 to the General Framework Agreement. Article I of the Constitution is entitled "Continuation". Article 1 reads in relevant part:

> "The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders…"

101. Annex 2 of the Constitution of Bosnia and Herzegovina is entitled "Transitional Arrangements". Annex 2 Article II is entitled "Continuation of Laws" and reads as follows:

> "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution 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."

102. Annex 2 Article IV reads as follows:

> "Administrative functions, institutions and other bodies in Bosnia and Herzegovina shall function in accordance to applicable agreements or laws."

2. Laws in Force Bosnia and Herzegovina

(a) The Law on State Administration

103. The Law on State Administration (Official Gazette of the Republic of Bosnia and Herzegovina no. 26/93 - hereinafter "OG R BiH") was taken over as the law of Bosnia and Herzegovina pursuant to Annex 2 Article II of the Constitution of Bosnia and Herzegovina. It establishes a detailed regime for regulating, among other things, the working relations of employees in the State Administration.

104. Articles 323 through 327 deal with the rights of employees in case of the reduced scope of activities. According to Article 323 of this law, employees whose positions become unnecessary due to reduction in workload shall be appointed to other duties and activities in accordance to his/her education, within the same or another organ of the same social-political community. In case an employee cannot be appointed to duties and activities in such manner he/she shall remain unassigned for no longer than 6 months.

105. Article 325 provides that an unassigned worker, if not assigned within 6 months from the day he/she became unassigned, shall terminate working relations with the administrative organ. The 6-month notice period shall run from the date of receipt of a procedural decision establishing that a worker is unassigned.

106. Article 326 provides that an unassigned worker is entitled to an increase of salary, as well as other remuneration, in the same manner as other administrative workers working at that administrative organ.

107. Articles 328 deals with workers' rights in case of the termination of administrative organs. Article 328 provides that an administrative organ taking over the activities of the terminated administrative organ shall take over workers employed with that organ on the day that the administrative organ is terminated. The taking over of employees shall be performed automatically with the taking over of related activities. Workers of a terminated administrative organ that are not assigned within the administrative organ taking over, shall be provided with the rights encompassed in the Law on rights of workers in case of reduced scope of activities within administrative organs.

108. Articles 332 through 335 deal with the rights and liabilities of workers. Article 333 provides, in relevant part, that an employee who considers that his/her rights have been violated by a procedural decision adopted by the official managing administrative organ may submit an objection to that organ. An objection shall be submitted within 15 days from the day of receipt of the procedural decision. Article 335 provides that such workers shall be entitled to seek protection from the regular courts against procedural decisions negatively impacting on their working relations issued by the official managing administrative organ.

(b) Instruction on Employment Record Card

109. The Instruction on Employment Record Card (Official Gazette of the Socialist Republic of Bosnia and Herzegovina 41/90 - hereinafter "OG SR BiH") as amended by the Instruction on Amendments to the Instruction on Employment Record Card (OG R BiH 14/93) provides, among other things, a detailed procedure for the issuance of employment record cards, annulment and issuance of new employment record cards. Article 18 provides that that a company or other legal person is obligated to return the Employment Record Card to the worker, correctly filled in, within 5 days of cessation of his/her working relation. The date of cessation of work shall be entered as the date determined in the decision (if the decision is final- the date determined in the final decision, or if the decision is legal- the date determined in the valid decision, in accordance with the general act and the law).

(c) Law on Republic Ministries and Other Organs of Republic Administration

110. The Law on the Ministries of the Republic of Bosnia and Herzegovina (OG RBiH 3/96, 16/96 and 26/96) established and regulated the functions of the Ministries of the Republic of Bosnia and Herzegovina. The law came into force on 27 January 1996.

111. On the basis of Article 3, the Republic Ministries of the then RBiH were established. Article 3 established the Ministry of Justice and General Administration as one of the Republic Ministries that was the successor of the former Ministry of Justice. It was responsible for the following:

> "The Ministry of Justice and General Administration performs administrative, professional and other activities from the competence of Bosnia and Herzegovina, relating to the preparation, suggestion, determination and execution of laws, other regulations and acts in the fields related to Republic citizenship, passports, immigration, asylum, implementation of international and inter-entity policies and regulation of criminal procedures."

(d) Law on the Council of Ministers of Bosnia and Herzegovina

112. The Law on the Council of Ministers of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina 4/97 – hereinafter "OG BiH") regulates the organisation and responsibilities of the Council of Ministers of Bosnia and Herzegovina. It entered into force on 24 December 1997. Pursuant to this Law the Council of Ministers has responsibility for carrying out the policies and decisions in the fields as specified by the Constitution of Bosnia and Herzegovina. (Article 2). The Ministry of Foreign Affairs, the Ministry of Civil Affairs and Communications and the Ministry of Foreign Trade and Economic Relations were created by this Law (Article 42).

113. The Ministry of Civil Affairs and Communications has responsibility for: Citizenship, immigration, refugee and asylum policy and regulation and international and inter-entity criminal law enforcement, including relations with Interpol. Additionally, it has responsibility for the establishment and operation of common and international communication facilities, regulation of inter-entity transportation and the budget of the common institutions of Bosnia and Herzegovina (Article 44).

114. In exercising its rights and duties, the Council of Ministers shall adopt decrees, decisions, instructions, conclusions and other normative acts (Article 16). Further, decisions which require signature enter into force when signed by the Co-Chairs and Vice-Chair. Other decisions enter into force on the day of the adoption of the minutes of the meeting at which the decision was taken, unless the Council of Ministers decides otherwise (Article 20).

115. Pursuant to this Law, the Council of Ministers shall more precisely define the scope and structure of the staff of the services of the Council of Ministers within 15 days of the entry into force of this Law (Article 22). The Minister and Deputy Ministers of the each Ministry shall within 15 days from the entry into force of this law by consensus pass a Regulation on the Internal Organisation of the Ministry with the prior consent of the Council of Ministers.

116. The Regulation on Internal Organisation of the Ministry shall establish internal organisational units, regulate the appointment of managers, employees with special authorisations, determine the distribution of the tasks and regulate other issues concerning the management of the Ministry. (Article 49, paragraph 1). Further, the hiring of staff shall be done in accordance with the principle of equitable representation of the constituent peoples of Bosnia and Herzegovina and others within 30 days of the adoption of the Regulation on Internal Organisation of the Ministry (Article 49, paragraph 3). Finally, the Council of Ministers shall, within 30 days after entry into force of this Law, decide in which manner existing administrative bodies performing functions which are within the competence of Bosnia and Herzegovina will be continued, modified or dissolved (Article 51).

(e) New Law on the Council of Ministers

117. The new Law on the Council of Ministers was adopted on 14 April 2000 and entered into force in November 2000 (OG BiH 11/00). Pursuant to Article 38 three additional ministries were created, the Ministry of BiH Institutions Treasury, the Ministry for European Integration and the Ministry of Human Rights and Refugees. Within 30 days from the entry into force of this Law, the Council of Ministers shall pass a decision on the way of continuation of work, modification or

dissolution of the existing administrative bodies, which perform duties from within the responsibilities of Bosnia and Herzegovina (Article 50).

(f) Law on the Court of Bosnia and Herzegovina

118. The Law on the Court of Bosnia and Herzegovina (OG BiH 29/00) was published on 29 November 2000 and became effective as of 8 December 2000. The Law provides for a competent court on the State level. Article 14 provides, generally, that the Court shall have administrative jurisdiction over actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina.

119. The Court of Bosnia and Herzegovina has not been established to this day.

V. COMPLAINTS

120. The applicants complain, generally, about inhuman and degrading treatment by the Ministry for Civil Affairs and Communications of Bosnia and Herzegovina. They allege a violation of Article 23 paragraph 2 ("everyone without any discrimination, has the right to equal pay for equal work.") of the Universal Declaration on Human Rights of 1948 and of Article 4 paragraphs 3 and 4 of the European Social Charter. Additionally, they allege a violation of Article 6 paragraph 1 of the European Convention on Human Rights.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

121. With respect to the admissibility of the applications, the respondent Party in its submission of 9 November 1999 argues that the applicants have failed to exhaust the domestic remedies available to them. Specifically, the respondent Party argues that the applicants filed their complaints with the Municipal Court I in Sarajevo between 27 to 30 November 1998 respectively and applied to the Chamber on 15 July 1999. Accordingly, the cases had only been pending for a few months at the time of submission and as such a reasonable time limit for these cases to be heard has not expired.

122. However, in its submission to the Chamber, dated 1 December 2000 and during the public hearing, the respondent Party stated that pursuant to the Law on Civil Procedure of the Federation (OG FbiH 42/98, 3/99) the courts of the Federation are not competent to hear cases involving the State. The respondent Party goes on to state that "there is no guilt on Bosnia and Herzegovina's side because, under Article III of BiH Constitution, the jobs within the judicial competence do not fall within the scope of the Institutions of Bosnia and Herzegovina, so Bosnia and Herzegovina has no court of regular competence." Further, as the State does not have a public attorney's office, there is no legal representative for the State. Additionally, during the public hearing the respondent Party stated that the Council of Ministers issued a decision authorising one representative to appear in court when the State is one of the respondent Parties. However, this representative only has authority to seek postponement of such hearings for some reasonable time until the date of the establishment of the public attorney's office on the State level.

123. With respect to the merits, in its letter to the Chamber dated 15 September 1999, requesting more time to submit its observations, the respondent Party points out the fact that the Council of Ministers has discussed the status of employees who were put on the waiting list on several occasions. During their 15th session, held on 13 July 1999, the Council of Ministers, under item 18.1, has "concluded that the co-chairman of the Council of Ministers shall decide about the final solution of the labour and legal status of the employees on the waiting list, after the Legal Department first prepares an Opinion on this issue".

124. In its observations submitted to the Chamber on 9 November 1999, the respondent Party argued that the employment of workers was done in accordance with the Law on the Council of

Ministers and the Rules of Internal Organisation. Pursuant to these documents the number of ministries was reduced and therefore the number of employees had to be reduced. Further, these documents contained provisions that required that there be a fair balance among the constituent nations. For these reasons, the applicants were not employed with the Ministry.

125. Additionally, the respondent Party argues that the labour and legal status of these workers was not solved in either of these documents. Therefore, the Council of Ministers adopted the decision on allowances for the workers from the former State bodies of the Republic dated 10 September 1998 by which only the right to allowances for the workers of the former State bodies of the Republic was established. The respondent Party concedes that the legal labour status of the applicants was not solved by this decision.

126. During the public hearing the agent of the respondent Party acknowledged that there is a legal vacuum concerning the employment status of the applicants. Further, the agent stated that the Law on the Council of Ministers did not provide for the legal continuity of the prior Ministries. Finally, the respondent Party did not deny the legal existence of the Law on State Administration, and seemed to argue, consecutively, that either it does not apply, or that it does apply and has been followed.

B. The applicants

127. In response, the applicants essentially maintain their claims. They further reiterated that the respondent Party's observations merely confirmed the crux of their claims, namely that they have not received procedural decisions regulating their labour relations. As a consequence, they cannot seek redress from the courts. Further, the applicants point out that the respondent Party either did not appear at all at the hearings before the domestic courts or appeared simply to postpone the hearings.

VII. OPINION OF THE CHAMBER

A. Admissibility

128. 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. 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.

129. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted. The Chamber has held that the domestic remedies available to an applicant "must be sufficiently certain not only in theory but (also) 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… but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants." (see case no. CH/97/58, *Onić,* decision on admissibility and merits delivered on 12 February 1999, Decisions January-July 1999, paragraph 38). It is incumbent on the respondent Party claiming non-exhaustion to satisfy the Chamber that there was an effective remedy available.

130. In its observations of 9 November 1999, the respondent Party essentially objects to the admissibility of the applications on the ground that domestic remedies have not been exhausted. However, during the public hearing the respondent Party stated its opinion that the domestic courts are not competent to hear cases where the State is the respondent Party. Further, as the State does not have a public attorney's office there is no legal representative for the State before the courts. Finally, the respondent Party acknowledged that a court on the State level has not been established. Clearly, the statements provided by the respondent Party at the public hearing contradict the objections made in the respondent Party's observations of 9 November. When this contradiction was pointed out to the agent of the respondent Party during the public hearing, she stated that whilst she does not retract these statements, she stands by the objections in the written observations.

131. The applicants, except for Dženana Šehović, initiated lawsuits before the Municipal Court I in Sarajevo between November and December 1998. However, they only submitted claims for compensation, not for regulating their labour status, as they do not have procedural decisions from which to appeal. The Municipal Court has not declared itself incompetent to hear cases against the State, nor does it appear that the State has made a motion to have the cases dismissed for lack of jurisdiction. However, the respondent Party has stated clearly that it does not believe that the Municipal Court has jurisdiction over it, nor has it bothered to defend itself properly in the lawsuits. In these conditions, it appears from the outset that a question arises as to whether these alleged domestic remedies are effective even in theory.

132. Further, the respondent Party has failed to address the arguments put forward by the applicants, namely that they can not even go to court to challenge their labour status as no final procedural decision concerning their employment has been given. Without such a decision there is no domestic remedy to pursue, even if the State were to accept the jurisdiction of the courts of the Federation.

133. The European Court of Human Rights has pointed out in *Akdivar and others v. Turkey* (Reports of Judgments and Decisions 1996), that the purpose of the exhaustion requirement is to afford the respondent Parties the opportunity of preventing or putting right the violation alleged against them, before those allegations are put forth before the European Court of Human Rights. This rule is based on the assumption, reflected in Article 13 of the Convention, with which it has a close affinity, that there is an effective remedy in the domestic system (see among other authorities, *Selmouni v. France,* Reports of Judgments and Decisions 1999). In this case, the Chamber notes that: 1) the respondent Party concedes that the applicants do not have the necessary procedural decisions upon which to challenge the legality of the decision effectively terminating their employment, 2) there is no State Court and 3) there is no State attorney appointed to represent the State before the Federation courts, which they claim lack jurisdiction anyway. Thus, even though it has been over six years since Bosnia and Herzegovina came into existence there is simply no effective domestic remedy for the alleged violations of which the applicants complain.

134. The burden of proof is on the respondent Party to establish that there was a remedy available to the applicants that they failed to exhaust. In light of the above, the Chamber finds that the respondent Party has failed to meet its burden. In these cases the remedies do not even appear to be effective in theory much less practice. Further, since the respondent Party claims that the domestic courts have no jurisdiction in these cases they are barred from arguing that the remedies are effective. In these circumstances, the Chamber is satisfied that the applicants cannot be required to exhaust any further domestic remedies for the purposes of Article VIII(2)(a) of the Agreement.

135. As no other ground for declaring these cases inadmissible have been put forward or is apparent the Chamber declares the applications admissible in their entirety.

B. Merits

136. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the State 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.

1. Article 6 of the Convention

137. The Chamber will now consider the allegation that there has been a violation of Article 6 of the Convention in that the applicants complain that they have been denied access to court.

1. Article 6 of the Convention provides in relevant part:

> "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. . . "

138. The Chamber notes that the European Court of Human Rights held in the past that Article 6(1) does not extend to "disputes relating to the recruitment, careers and termination of civil servants" (see eg., *Massa v. Italy* judgment of 24 August 1993, Series A No 265-B p. 20, paragraph 26). The case law in this area had become convoluted and difficult to apply. Therefore, the Court recently adopted a functional approach to analysing this issue (i.e. based on an examination of the jobs and duties of a particular applicant). Keeping in mind the importance of the protections afforded by Article 6 the Court has adopted a restrictive interpretation. Specifically, the Court has found that the only persons excluded from Article 6(1) protection are those applicants whose duties involve "direct or indirect participation in the exercise of powers conferred by public law and duties assigned to safeguard the general interests of the State or of other public authorities" (see *Pellegrin v. France* judgment of 8 December 1999 to be published in Reports of Judgments and Decisions 1999).

139. During the public hearing the Chamber asked the respondent Party and the witness what the official responsibilities of the applicants were, in particular Almasa Kajtaz (CH/98/1309) and Dobrilja Bijedić (CH/98/1312), in order to decide on the applicability of Article 6. The respondent Party and the witness answered that only Ministers or Deputy Ministers had decision-making authority. The Chamber further notes that the respondent Party did not raise any objection as to the applicability of Article 6 at any point during the proceedings and therefore any doubts must be resolved in favour of the applicants.

140. The Chamber must now examine whether there has been a violation of the applicants' right of access to a court. In the case of *Golder v. U.K.*, the European Court of Human Rights held that Article 6 "embodies the right to a Court" wherein the other rights guaranteed under Article 6 are respected (*Golder v. U.K.*, judgment of 21 February 1975, Series A vol. 18, page 18). In reaching this conclusion the Court noted the importance given to the concept of the "rule of law" throughout the European Convention of Human Rights. In the preamble of the Convention the signatory governments declare that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration of 10 December 1948". Further, citing the reasoning of the European Commission of Human Rights, the Court in *Golder* explained that "Article 6 (1)… is intended to protect in itself the right to a good administration of justice, of which the right that justice should be administered constitutes an essential and inherent element. Further, the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice." The Court then found that Article 6(1) must be read in light of these principles.

141. However, the right of access to court enshrined in Article 6 is not absolute; it may be subject to limitations. However, these limitations cannot reduce or restrict the access left to the individual in such a way that "the very essence of the right is impaired" (see among other authorities, *Guerin v. France* judgment of 29 July 1998, 1998-V). Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Bellet v. France* judgment of 20 November 1995, Series A vol. 333).

142. In the present cases, the applicants initiated lawsuits before the Municipal Court I in Sarajevo attempting to, at least, obtain compensation. These cases are still pending. During the public hearing, the State stated its position that the courts of the Federation are not competent to hear cases involving the State. In support of this argument it cites Article 28 of the Law on Civil Proceedings which provides that the courts of the Federation have subject matter jurisdiction as determined only by the laws of the Federation or of the Cantons. ("OG FbiH 42/98).

143. Further, the State argues that, as there is no attorney's office on the State level, there is no attorney competent to represent the State before the domestic courts. However, it does not appear

that the State has argued this before the domestic courts thereby putting the applicants on notice that they do not accept even this claim. Additionally, the Chamber notes that the Law on the Court of Bosnia and Herzegovina came into force on 8 December 2000. However, to this day no State Court has been established. Accordingly, it becomes clear, and the respondent Party concedes, that there is simply no court in Bosnia Herzegovina wherein the applicants can pursue their claims.

144. The Municipal Court I has not declared itself incompetent to hear cases involving acts or omissions of the state authorities. However, given the fact that the State does not believe that the Court has jurisdiction over it, it is unlikely that any decision that may be rendered in the applicants' favour would be respected. Regardless of whether the Federation Court has jurisdiction or not the failure of the State to participate in the proceedings has created extreme uncertainty for the applicants if not the complete absence of the right to a court.

145. In the case of *De Geouffre De La Pradelle v. France* (judgment of 16 December 1992, Series A no. 253-B) the European Court of Human Rights held that the degree of access afforded to an individual must be sufficient to afford individuals the "right to a court". Specifically, the Court stated that "the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own; in particular he should have had a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right of property" (see id. at page 43, paragraph 34). In that case the Court found that the complexity of certain legislation regulating the designation of conservation of places of interest and the attendant complexity regarding how to calculate the time-limit for bringing an appeal against such designation created a level of legal uncertainty that was incompatible with Article 6(1).

146. In the present cases, the Chamber concludes that whether or not the Municipal Court eventually declares itself competent to hear these cases, the overall legal system for adjudicating these claims is not sufficiently coherent or clear. In fact, it can be concluded that the applicants simply do not have a court in which to actually have their claims heard. The opportunity to file a claim but not have the claim determined does not satisfy the requirements of Article 6(1). Having regard, therefore, to the circumstances of these cases as a whole, the Chamber finds that the applicants do not have a practical, effective right of access to court in Bosnia and Herzegovina, the State therefore being in violation of Article 6(1) of the European Convention of Human Rights.

2. Article 13 of the Convention

147. The applicants essentially argued that they did not have an effective remedy before a domestic court. These cases were transmitted to the respondent Party under Article 13, which provides:

> "Everyone whose rights and freedoms as set forth in the 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."

148. In view of its decision concerning Article 6, the Chamber considers that it does not have to examine the case under Article 13. The requirements of that Article are less strict than those of Article 6 and are in this instance absorbed by them (see e.g., *Philis v. Greece* judgment of 27 August 1991, Series A no. 209, p.23 par. 67).

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

149. Under Article II of the Agreement, the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the European Convention of Human Rights 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.

150. The Chamber has held in the case of *Hermas* (case no. CH/97/45, decision on admissibility and merits delivered on 18 February 1998, Decisions and Reports 1998, paragraph 118) that the prohibition of 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 Civil and Political Rights (hereinafter "ICCPR").

151. The Chamber will consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Article 25(c) of the ICCPR, which as far as relevant, reads as follows:

> "Every citizen shall have the right and the opportunity, without (any discrimination) and without unreasonable restrictions:
> ….
>
> c) To have access, on general terms of equality, to public service in his country.
>
> …"

(a) Impugned acts and omissions

152. The Chamber will now examine which precise acts and omissions affecting the applicants can be imputed to the State. The acts possibly attracting the responsibility of the State under the Agreement include: unequal pay after the applicants were declared "unassigned"; the failure to apply the Law on State Administration; the failure to give the applicants procedural decisions terminating their employment; the failure to inform the applicants of the reasons why they were not given assignments; the basis upon which it was decided which employees of the former ministries would be formally assigned and which would not; and finally the consideration of each applicant's ethnic origin in the decision making process.

153. All of these acts potentially constitute an interference with the applicants' rights under Article 25(c) of the ICCPR, as well as a potential failure of the State's positive obligation to secure protection of those rights without discrimination.

(b) Differential treatment and possible justification

154. 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 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 not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see e.g. case no. CH/97/67 *Zahirović,* decision on admissibility and merits delivered on 8 July 1999, Decisions January-July 1999, paragraph 120; and case no. CH/97/50 *Rajić,* decision on admissibility and merits delivered on 7 April 2000, Decisions January – July 2000, paragraph 53).

155. In the present cases, it is obvious that the applicants were treated differently from the similarly situated employees of the former Ministries who were formally employed by the new ministries. The applicants received less salary for a period of time and were eventually *de facto*

removed from their jobs without receiving procedural decisions resolving their labour status as required by the Law on State Administration. Therefore, the question becomes whether the process of recruitment of employees for the new Ministry involved differential treatment on prohibited grounds.

156. With respect to the selection process referred to above, the respondent Party in both its observations and during the public hearing stated that the selection was done in accordance with the law which required the staff of the Ministries to reflect an "equitable representation" of the constituent peoples of Bosnia and Herzegovina. The respondent Party further referred to the Rules on Internal Organisation and stated that education and work experience were taken into account when selecting people for assignments in the new Ministry.

157. During the public hearing the witness, Deputy Minister Rečica, explained the process by which it was determined which employees were assigned and which were not. The Chamber notes in the first instance that he explicitly stated that this process was informal and not established by law. He then stated that the criteria were as follows: 1) duties that were taken over and continued; 2) qualifications and competence of people who could apply to relevant new positions; 3) recommendation of previous supervisors; and 4) regard to ethnic origin in order to achieve an ethnic balance of the constituent peoples of Bosnia and Herzegovina as prescribed by Article 49 of the Law on the Council of Ministers.

158. However, upon further questioning the following was established: persons were not asked to identify their ethnic origin, so that it is unclear how this system of equal representation was applied; there were former employees of mixed origin who did not fit neatly into any of these categories; there was never an application process, and the applicants were never told why they were not chosen so as to be able to contest the decision. Further, neither the witness nor the respondent Party explained whether the criterion used within this system of "equal representation" was residency or ethnic origin. It was established, however, that two-thirds of the employees were to be Bosniak or Croat from the Federation and one-third were to be Serb from Republika Srpska. This obviously created a problem for a Serb living in the Federation or vice-versa. When specifically asked about the treatment of someone in this situation, no specific response was forthcoming. Further, a number of applicants appear to have been replaced by persons of the same ethnic origin. Accordingly, it becomes even less clear in what way the "equal representation" requirement was applied and the reasons for assignment or non-assignment.

159. It does become clear, however, that there was differential treatment of all of the applicants, based on ethnic origin. In such a situation, 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, 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 paragraph 86 et seq., case no. CH/97/46, *Kevešević,* decision on the merits delivered on 10 September 1998, Decisions and Reports 1998, paragraph 92, and case no. CH/98/756, *Đ.M.*, decision on admissibility and merits delivered on 14 May 1999, Decisions January-July 1999, paragraph 72).

160. In these cases the aim of this differential treatment appears to be the promotion of the public confidence in the administration of the State government in the aftermath of the war. In fact, this sort of necessity for "equal representation" is found throughout the General Framework Agreement and seems to have been deemed necessary for the cohesion of Bosnia and Herzegovina at this point in history. Further, as stated by the witness, prior to the reconstitution of the Council of Ministers there were no Serbs from Republika Srpska working for the Ministries, a factual inequality that the responsible authorities might reasonably consider legitimately needed to be redressed.

161. The European Court of Human Rights has held in the *Belgian Linguistic* case (Judgment of 23 July 1968, Series A Vol. 6) that not all differential treatment is unacceptable and that "certain legal inequalities tend only to correct factual inequalities." Accordingly, in light of the case law of the European Court and the above stated, the Chamber accepts that the differential treatment arising from the attempt to obtain fair representation of the major ethnic groups in public service in Bosnia and Herzegovina may pursue a legitimate aim.

162. The next question becomes whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this regard, the Chamber notes that the process of assigning employees to posts within the new Ministry was not even remotely transparent, making it almost impossible to assess.

163. Even allowing that the aim to achieve a national balance is legitimate in this context, in order for this aim to be achieved in a legitimate manner the process must at the very least be transparent, fair and objective. The Court of Justice of the European Communities in the case of *Badeck and Others v. Germany*, held that a directive which provides for special treatment of women in employment sectors where women have been historically underrepresented is legitimate provided that "the rule (directive) guarantees that candidatures are the subject of an objective assessment which takes account of the specific and personal situations of all candidates" (European Court Reports 2000 Page I-1875).

164. In the cases before the Chamber, no clear reasons were given as to why these particular applicants were not employed. Specific questions regarding the actual implementation of the "equal representation" requirement went unanswered. However, what has become clear throughout the proceedings is that decisions were taken not only based upon national origin but also based upon political considerations and agreements (see paragraphs 97 and 158 above). Additionally, it appears that even the Rules on Internal Organisation were not followed (see paragraphs 16 and 17 above). In this regard, the Chamber notes that Article 51 of the Law on the Council of Ministers required the Council of Ministers, within 30 days after the entry into force of the Law, to decide precisely this issue, namely, the manner in which the existing administrative bodies would be continued, modified or dissolved. The Law did not envision a permanent legal vacuum. These facts, together with the established facts that the applicants were never interviewed, never given reasons for the decisions and never given proper procedural decisions concerning their labour relations, make it clear that the selection process was arbitrary.

165. Further evidence of the vague and inadequate selection process is found with respect to the applicants of mixed origin or mixed marriages, or the applicant who is of Serb origin but living in the Federation. In these cases, again, the Chamber cannot find that the means were proportional to the legitimate aim pursued, as these persons were simply not even provided for in the employment scheme. In fact, during the public hearing, the witness acknowledged that it created a problem if someone did not fit squarely into one ethnic group. In fact, he stated that they wanted to resolve this issue in the Council of Ministers, but it was not resolved (see paragraph 97 above).

166. Specifically, the Chamber recalls that Dobrila Bijedić (CH/98/1312) is of mixed ethnic origin and in a mixed marriage. In 1990 she declared herself as a "Bosnian Catholic". She alleges that she was told by Deputy Minister Križanović that she would not be employed as a Croat since she did not declare herself as such. A person of Croat origin replaced the applicant. The respondent Party has not denied these allegations.

167. Radenka Cvijetić (CH/98/1322) is of Serb origin and lives in the Federation. She alleges that she was discriminated against because of the fact that she was of Serb origin living in the Federation. In this respect the Chamber recalls that at the public hearing no answer was forthcoming regarding how someone in this situation would be dealt with.

168. Jasna Šljivo (CH/98/1323) is of mixed ethnic origin, her father being Croat and her mother Bosniak. The applicant alleges, and the respondent Party does not deny, that she was told by her supervisor that he could not help her because she is from a mixed family and he was Bosniak and could only help Bosniaks. The applicant further alleges, contrary to the witness' statement at the public hearing, that in 1998 she was required to declare her ethnic origin. She declared herself as a Croat. The applicant alleges that someone of Bosniak origin filled her position.

169. Based on all of the above, the Chamber concludes that the applicants have been discriminated against on the ground of national and ethnic origin in their enjoyment of the right to access to public service under Article 25(c) of the ICCPR. Accordingly, Bosnia and Herzegovina 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 treaty in question.

VIII. REMEDIES

170. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement.

171. With regard to possible remedies, the Chamber first recalls that in accordance with its order for proceedings in the respective cases, all applicants were afforded the possibility of submitting their claims for compensation within the time-limit fixed by the Chamber. All of the applicants, except for Azira Sivčević (CH/98/1314) and Altijana Mešić (CH/98/1318) submitted their claims for compensation in a timely manner. All of the applicants request resolution of their labour status and compensatory and non-compensatory damages.

172. Ms. Almasa Kajtaz (CH/98/1309) claims compensation for the following: 1) loss of income from 1 June until 31 December 1998 in the amount of 200 Convertible Marks (Konvertibilnih Maraka "KM") per month totalling 1.400 KM; 2) loss of remuneration for meal tickets and transportation from 1 June until 31 December 1998 amounting to a total of 875 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1000 KM; 4) loss of humanitarian support received by assigned employees from 1 June 1998 to 31 December 1998 in the amount of 300 KM per month totalling 2.100 KM; 5) loss of income from 1999 in the amount of 800 KM per month from 1 January until 30 June 1999 and 920 KM per month from 1 July until 31 December 1999 amounting to a total of 10.320 KM; 6) loss of remuneration for meal tickets and public transportation for 1999 amounting to a total of 1.920 KM; 7) loss of remuneration for vacation days for 1999 amounting to 600 KM; 8) loss of humanitarian support received by other employees in the amount of 300 KM per month for 1999 totalling 3.600 KM; 9) loss of income from 1 January to 31 December 2000 amounting to 1.440 KM; 10) loss of remuneration for vacation days for 2000 amounting to 600 KM.; 11) loss of humanitarian support received by assigned employees from 1 January to 31 December 2000 in the amount of 300 KM per month totalling 3.600 KM; 12) compensation for stress and psychological suffering in the amount of 30 KM per day from 8 September 1998 to the present.

173. Additionally, Ms. Kajtaz asks that the respondent Party be ordered to issue a procedural decision concerning her labour status.

174. Ms. Dobrila Bijedić (CH/98/1312) claims compensation for the following: 1) loss of income (difference in salaries) from 1 June 1998 until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 2) loss of remuneration for meal tickets and transportation from 1 June until 31 December 1998 amounting to a total of 875 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1000 KM; 4) loss of humanitarian support received by assigned employees from 1 June 1998 until 31 December 1998 in the amount of 300 KM per month totalling 2.100 KM; 5) denial of support in case of death of a close family member in the amount of three monthly salaries, that was given to assigned employees, in the amount of 2.400 KM; 6) loss of income for 1999 in the amount of 800 KM per month totalling 9.600 KM; 7) loss of remuneration for hot meal tickets and public transportation for 1999 amounting to 1920 KM; 8) loss of remuneration for vacation days for 1999 in the amount of 600 KM; 9) loss of humanitarian support received by assigned employees for 1999 in the amount of 300 KM per month totalling 3.600 KM; and 10) compensation for mental suffering and stress in the amount of 30 KM per day from 8 September 1998 to the present.

175. Ms. Bijedić also asks that the respondent Party be ordered to issue a procedural decision concerning her labour status.

176. Ms. Azira Sivčević (CH/98/1314) claims compensation for the following: 1) loss of income (difference in salaries) from 1 June 1998 until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 2) loss of remuneration for meal tickets and transportation from 1 June until 31 December 1998 amounting to a total of 875 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1.000 KM; 4) loss of humanitarian support received by assigned employees from 1 June 1998 until 31 December 1998 in the amount of 300 KM per month totalling 2.100 KM; 5) loss of income from 1 January 1999 to 1 March 1999 which amounts to

1.000 KM; 6) loss of remuneration for meal tickets and transportation from 1 January to 1 March 1999 in the amount of 320 KM; and 7) compensation for moral suffering, stress and psychological pain from 8 September 1998 to 31 December 2000 in the amount of 30 KM per day which amounts to 25.200 KM.

177. Ms. Altijana Mešić (CH/98/1318) claims compensation for the following: 1) loss of income (difference in salaries) from 1 June 1998 until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 2) loss of remuneration for meal tickets and transportation from 1 June until 31 December 1998 amounting to a total of 875 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1.000 KM; 4) loss of humanitarian support received by assigned employees from 1 June 1998 until 31 December 1998 in the amount of 300 KM per month totalling 2.100 KM; 5) loss of income from 1 January 1999 to 15 February 1999 which amounts to 750 KM; 6) loss of remuneration for meal tickets and transportation from 1 January to 1 March 1999 in the amount of 260 KM; and 7) compensation for moral suffering, stress and psychological pain from 8 September 1998 to 31 December 2000 in the amount of 30 KM per day which amounts to 25.200 KM.

178. Ms. Rasema Begić (CH/98/1319) claims compensation for the following: 1) loss of income (difference in salaries) from 1 June 1998 until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 2) withholding of hot meal compensation from 1 June to 31 December 1998 amounting to 595 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1000 KM; 4) loss of income from 1 January to 31 March 1999 (the time period within which the applicant continued working) in the amount of 650 KM per month; 5) loss of remuneration for hot meal tickets from 1 January to 31 March 1999 in the amount of 120 KM per month; 6) loss of income and benefits from 1 April 1999 to the present; 7) loss of payments for pension and social security contributions from 1 January 1999 to the date on which the applicant's labour status is resolved; and 8) compensation for moral suffering, stress and physical pain from 8 September 1998 to the date on which the Chamber issues its decision, in an amount to be determined by the Chamber in accordance with its usual practise.

179. Ms. Begić further asks that the respondent Party be ordered to issue a procedural decision concerning her labour status and re-employ her to her previous post.

180. Mr. Elvedin Dević (CH/98/1321) claims compensation for the following: 1) difference in salary from 1 June until 31 December 1998; 2) loss of remuneration for hot meal and transportation tickets for 1 June until 31 December 1998; 3) loss of remuneration for vacation days and religious days in 1998; 4) loss of income and other benefits for 1999; and 5) compensation for moral suffering, stress and mental pain from 8 September 1998 in an amount that the Chamber determines.

181. Mr. Dević was re-employed by the Ministry for Civil Affairs and Communication on 1 September 2000. He maintains his compensation claims.

182. Ms. Radenka Cvijetić (CH/98/1322) claims compensation for the following: 1) difference in salary from 1 June until 31 December 1998; 2) loss of remuneration for hot meal and transportation tickets for 1 June until 31 December 1998; 3) loss of remuneration for vacation days and religious days for 1998; 4) loss of income and other benefits for 1999; and 5) compensation for moral suffering, stress and mental pain from 8 September 1998 in an amount to be determined by the Chamber.

183. Ms. Cvijetić informed the Chamber that she was re-employed by the Ministry of Civil Affairs and Communications by a decision of 5 October 2000. The applicant maintains her claims for compensation.

184. Ms. Jasna Šljivo (CH/98/1323) requests compensation for the following: 1) loss of income from 1 June until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 2) loss of remuneration for meal tickets and transportation from 1 June until 31 December 1998 amounting to a total of 875 KM; 3) loss of remuneration for vacation days and religious holidays amounting to a total of 1000 KM; 4) loss of humanitarian support received by assigned employees from 1 June until 31 December 1998 of 300 KM per month amounting to 2.100 KM; 5) loss of

income for 1999 in the amount of 530 KM from 1 January through 30 June totalling 3.180 KM and 620 KM per month from 1 July through 1 August totalling 620 KM; 6) loss of humanitarian support received by assigned employees from 1 January until 1 August 1999 in the amount of 300 KM per month totalling 2.400 KM; and 7) compensation for moral sufferings, stress and mental pain from 8 September 1998 until December 1999 in the amount of 10.000 KM. Ms. Šljivo's total claim for compensation amounts to 20.575 KM.

185. Ms. Šljivo, who gained other employment on 1 August 1999 maintains her claim for pecuniary and non-pecuniary compensation. Further, she requests that the respondent Party be ordered to complete her employment book.

186. Ms. Dženana Šehović (CH/98/1326) requests compensation for the following: 1) contributions to the pension and social security funds; 2) loss of income from 1 June until 31 December 1998 in the amount of 200 KM per month totalling 1.400 KM; 3) loss income from 1 January 1999 until 1 March 199 in the amount of 1.000 KM; 4) loss of remuneration for hot meal tickets from 1 June 1998 until 1 March 1999 in the amount of 765 KM; 5) loss of remuneration for transportation tickets from 1 June 1998 until 1 March 1999 in the amount of 360 KM; 6) loss of remuneration for vacation and religious days in 1998 in the amount of 700 KM; and 7) compensation for mental suffering and stress because of the "termination of my employment" which was not substantiated and without reason, after many years of work for the respondent Party, in an amount to be determined by the Chamber in accordance with its usual practise.

187. The respondent Party did not submit observations on the claims for compensation either in writing or during the public hearing.

188. The Chamber considers it reasonable to hold that on account of the breaches found of Article 6(1) of the Convention and Article II(2)(b) of the Agreement in conjunction with Article 25(c) of the ICCPR the applicants have suffered loss of opportunity in connection with employment, as they were not treated fairly during the recruitment process and have not had their labour books completed, and have suffered emotional distress stemming from the uncertainty surrounding their employment status. Accordingly, on an equitable basis, the Chamber will order the respondent Party to pay each of the nine applicants a lump sum covering moral and pecuniary damage, including lost salaries and contributions. The Chamber considers it appropriate to award the amounts stated below to the applicants in recognition of the sense of injustice they have suffered as a result of their inability to have their legal labour status resolved, especially in view of the fact that they have all taken various steps to do so. Additionally, in the particular circumstances at hand the Chamber will also award the applicants in cases nos. CH/98/1314 Sivčević and CH/98/1318 Mešić the same sum, even though their claims for compensation were received out of time.

189. The Chamber considers it appropriate to award to each applicant the following amounts based on their specific claims for compensation, lost earnings for the time period during which they respectively continued coming to work and did not receive salary, average of lost salary for time period during which they remained unemployed, lost benefits, and moral damages. The sums should be paid to each applicant, at the latest, 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.

a) Bosnia and Herzegovina is ordered to pay Ms. Kajtaz (CH/98/1309) a total of 9,155 KM for lost and income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 20,000 KM ;

b) Bosnia and Herzegovina is ordered to pay Ms. Bijedić (CH/98/1312) a total of 9,155 KM for lost and income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 20,000 KM;

c) Bosnia and Herzegovina is ordered to pay Ms. Sivčević (CH/98/1314) a total of 6,695 KM for lost income and benefits from 1 June 1998 through 29 February 1999, when the applicant found other employment, and 1,000 KM for moral damages;

d) Bosnia and Herzegovina is ordered to pay Ms. Mešić (CH/98/1318) a total of 6,385 KM for lost income and benefits from 1 June 1998 through 15 February 1999, when the applicant found other employment, and 1,000 KM for moral damages;

e) Bosnia and Herzegovina is ordered to pay Ms. Begić (CH/98/1319) a total of 5,965 KM for lost income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 18,000 KM;

f) Bosnia and Herzegovina is ordered to pay Mr. Dević (CH/98/1321) a total of 4,000 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and an average of lost income, benefits and moral damages from 1 March 1999 through September 2000, when the applicant was re-employed by the Ministry, in a lump sum of 4,500 KM;

g) Bosnia and Herzegovina is ordered to pay Ms. Cvijetić (CH/98/1322) a total of 4,000 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and an average of lost income, benefits and moral damages from 1 March 1999 through October 2000, when the applicant was re-employed with the Ministry, in a lump sum of 7,000 KM;

h) Bosnia and Herzegovina is ordered to pay Ms. Šljivo (CH/98/1323) a total of 6,205 KM for lost income and benefits from 1 June 1998 through 31 January 1999 and average of lost income, benefits and moral damages from 1 February 1999 through 31 June 1999, when the applicant found other employment, in a lump sum of 3,000 KM;

i) Bosnia and Herzegovina is ordered to pay Ms. Šehović (CH/98/1326) a total of 4,225 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and 1,000 KM for moral damages;

190. The Chamber further awards simple interest at an annual rate of 10% (ten) percent as of the date of the expiry of the one month period set in paragraph 189 for the implementation of the present decision, on the sums awarded in paragraph 189 (a)-(i) or any unpaid portion thereof until the date of settlement in full (see e.g., case no. CH/00/6142, *Dušan & Mila Petrović*, decision on admissibility and merits delivered on 9 March 2001, paragraph 72).

IX. CONCLUSIONS

191. For these reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. unanimously, that the applicants Azira Sivčević, Altijana Mesić, Rasema Begić, Elvedin Dević, Jasna Šljivo, and Dženana Šehovićs' right of access to court under Article 6 paragraph 1 of the European Convention of Human Rights has been violated, Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

3. by 4 votes to 3, that the applicants Almasa Kajtaz, Dobrila Bijedić and Redenka Cvijetićs' right of access to court under Article 6 paragraph 1 of the European Convention of Human Rights have been violated, Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that the applicants have been discriminated against in their right to access to public service as guaranteed by Article 25(c) of the International Covenant on Civil and Political Rights, Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, that it is not necessary to examine the application under Article 13 of the Convention;

6. unanimously, to order Bosnia and Herzegovina to establish the legal labour relations of all of the applicants in accordance with the Law on State Administration;

7. unanimously, to order Bosnia and Herzegovina to pay to the applicants 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 the following sums:

a) to Ms. Kajtaz (CH/98/1309) a total of 9,155 KM for lost and income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 20,000 KM ;

b) to Ms. Bijedić (CH/98/1312) a total of 9,155 KM for lost and income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 20,000 KM;

c) to Ms. Sivčević (CH/98/1314) a total of 6,695 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and 1,000 KM for moral damages;

d) to Ms. Mešić (CH/98/1318) a total of 6,385 KM for lost income and benefits from 1 June 1998 through 15 February 1999 and 1,000 KM for moral damages;

e) to Ms. Begić (CH/98/1319) a total of 5,965 KM for lost income and benefits from 1 June 1998 through 31 March 1999 and an average of lost income, benefits and moral damages from 1 April 1999 through October 2001 in a lump sum of 18,000 KM;

f) to Mr. Dević (CH/98/1321) a total of 4,000 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and an average of lost income, benefits and moral damages from 1 March 1999 through September 2000 in a lump sum of 4,500 KM.

g) to Ms. Cvijetić (CH/98/1322) a total of 4,000 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and an average of lost income, benefits and moral damages from 1 March 1999 through October 2000 in a lump sum of 7,000 KM.

h) to Ms. Šljivo (CH/98/1323) a total of 6,205 KM for lost income and benefits from 1 June 1998 through 31 January 1999 and average of lost income, benefits and moral damages from 1 February 1999 through 31 June 1999 in a lump sum of 3,000 KM.

i) to Ms. Šehović (CH/98/1326) a total of 4,225 KM for lost income and benefits from 1 June 1998 through 29 February 1999 and 1,000 KM for moral damages.

8. unanimously, to order that simple interest at an annual rate 10% (ten percent) will be payable on the amount, or any unpaid portion thereof, awarded in conclusion 7 above outstanding to the applicant at the end of the period set out in those conclusions for such payment;

9. unanimously, to order Bosnia and Herzegovina to report to it not later than 7 October 2001 on the steps taken by them to comply with the above orders.

(signed) Ulrich GARMS Registrar of the Chamber	(signed) Michele PICARD President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 6 September 2002)

Cases nos. CH/98/1311 and CH/01/8542

Džavid KURTIŠAJ and M.K.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 2 September 2002 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. Ulrich GARMS, 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 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The case is about the attempt of the applicants, who are husband and wife, to repossess an apartment in Sarajevo, Federation of Bosnia and Herzegovina, and to be registered as the owners.

2. Džavid Kurtišaj concluded a purchase contract of the apartment with the Yugoslav National Army (hereinafter "JNA") and on 17 February 1992 paid the full price. He was not registered as the owner due to the war. Džavid Kurtišaj submitted several unsuccessful requests to local bodies and to the CRPC in regard to his claims.

3. Džavid Kurtišaj was an active member of the JNA until 6 August 1999. The Administration of Housing Affairs of the Sarajevo Canton therefore held that he falls under Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments in connection with Article 39e of the Law on the Sale of Apartments with an Occupancy Right. Article 3a came into force on 1 July 1999.

4. Article 3a essentially prevents persons who were in active military service with the JNA on 30 April 1991, who were not citizens of the Socialist Republic of Bosnia and Herzegovina as of that date, and who had not been granted refugee or other equivalent protective status in a country outside of the former Socialist Federal Republic of Yugoslavia ("SFRY") from repossessing apartments in the Federation of Bosnia and Herzegovina. Additionally, persons who remained in active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 are barred from repossessing apartments in the Federation of Bosnia and Herzegovina.

5. On 12 November 1998, M.K. was taken to the police for entering into the apartment by force after the housing authority had locked and sealed the door. She claims that the police maltreated her.

6. The cases raise issues under Articles 3 and 8 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 1 to the Convention, as well as of discrimination in the enjoyment of the rights guaranteed by these provisions.

II. PROCEEDINGS BEFORE THE CHAMBER

7. The original application was submitted by M.K. to the Chamber on 30 November 1998 and registered the same day (CH/98/1311). In the application form M.K. is named as the applicant.

8. On 11 January 2000 Džavid Kurtišaj informed the Chamber that, instead of his wife, he was to be considered to be the applicant, as his wife had applied on his behalf.

9. On 10 March 2000, the Chamber decided to treat Džavid Kurtišaj as the applicant and accordingly re-registered the case.

10. Case no. CH/98/1311 was transmitted on 24 March 2000 for observations to the respondent Party. On 24 May 2000 the Chamber received the submissions of the respondent Party.

11. On 10 July 2000 Džavid Kurtišaj filed a claim for compensation.

12. On 24 August 2000, the Chamber received from the respondent Party additional written observations on the claim for compensation.

13. On 2 April 2001, upon a request of Džavid Kurtišaj, the Chamber issued a provisional measure ordering the respondent Party to refrain from any action to evict the applicant Džavid Kurtišaj and his family from the apartment.

14. In April 2001 a new case file, no. CH/01/8542, was opened with M.K. as the applicant because her claims might raise issues not included in her husband's case. Case no. CH/01/8542

was transmitted for observations to the respondent Party on 21 December 2001. On 21 February 2002 the Chamber received the submissions of the respondent Party.

15. On 11 April 2002 the Chamber decided to join the cases pursuant to Rule 34 of the Chamber's Rules of Procedure.

16. The Chamber deliberated on the admissibility and merits of the applications on 8 May 2001, 11 April 2002, 3 July 2002 and 2 September 2002 and adopted the present decision on the latter date.

III. FACTS

17. On 10 February 1992 Džavid Kurtišaj entered into a contract to purchase from the JNA an apartment in Sarajevo (Grbavica), Đure Salaja No. 6, now Kemala Kapetanovića No. 6, over which he had an occupancy right. The contract was authorised by the First Instance Court II in Sarajevo on 13 February 1992 under no. 265/1992. Džavid Kurtišaj did not register his ownership rights with the Land Registry Office in Sarajevo because soon thereafter the armed conflict broke out. Džavid Kurtišaj paid the total amount of the sale price in accordance with the contract, as shown by a certificate on the payment dated 17 February 1992.

18. On 14 April 1992 the applicants and their family left the apartment as the apartment was close to the first front line. The applicants left Sarajevo on 18 June 1992 with a Military Convoy.

19. On 3 October 1997 Džavid Kurtišaj submitted a request for the repossession of his apartment to the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). To the Chamber's knowlegde, this request has not been decided as of to date.

20. In February 1998 the applicants returned to Sarajevo, but another person, Lj.R., was living in their apartment. M.K. temporarily, from February 1998 until November 1998, resided in the apartment together with Lj.R. The other family members lived with relatives.

21. On 31 July 1998 Džavid Kurtišaj submitted a request for repossession, which was registered by the Administration for Housing Affairs in Sarajevo.

22. On 11 November 1998 Lj.R. left the apartment as she was told to do so by the Housing Organ of the Army of the Federation of Bosnia and Herzegovina. The Army locked the door and sealed the apartment. M.K. was not present in the apartment at that time. In the afternoon of the same day M.K. returned to the apartment and entered into the apartment forcing the seal. Since 11 November 1998 the applicants and their family have kept living in the apartment.

23. On 12 November 1998 M.K. was taken to the police for breaking the seal. She claims that she was assaulted by the police, threatened and verbally abused and forced to sign a document. She claims to have been repeatedly interrogated on other occasions by the police and that she was maltreated and verbally discriminated against because of her Albanian origin.

24. On 16 November 1998 the Army Housing Organ brought another person, Dž.P., into the apartment without any procedural decision, but he didn't stay, because the applicants were living in the apartment.

25. On 18 November 1998 Džavid Kurtišaj submitted a request for withdrawal of his request for repossession of the apartment to the Administration for Housing Affairs in Sarajevo because he had regained possession.

26. On 10 March 2000 Džavid Kurtišaj submitted a request to register his right of ownership over the apartment at the Department for Defence of the Federal Ministry of Defence of the Municipality Novo Sarajevo.

27. On 20 December 2000 the Administration for Housing Affairs of Sarajevo issued a decision rejecting the request for regaining the occupancy right over the purchased apartment.

28. On 10 January 2002 the Municipal Court II in Sarajevo sentenced M.K. to three months imprisonment for the criminal act of breaking the official seal on 11 November 1998. However, she does not have to serve the sentence if she does not commit any further criminal act within a one year probation period.

29. As a consequense of the provisional measure issued by the Chamber on 2 April 2001, which is still in force, both applicants and their family are currently living in the apartment.

IV. RELEVANT DOMESTIC LEGISLATION

A. Relevant legislation of the Socialist Federal Republic of Yugoslavia

30. Džavid Kurtišaj contracted 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 Yugoslav National Army ("JNA").

31. 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 authority responsible for the apartment. Article 21 laid out a formula for calculating the price payable for apartments so purchased. The price was based on a valuation of the apartment, subject to a number of deductions. In particular, provisions were made for a deduction in the purchase price based on the amount of contributions made by a particular purchaser to the JNA Housing Fund. Article 23 of the Law placed an obligation on the purchaser of an apartment to submit, within 30 days of the conclusion of the purchase contract, a request to the Land Registry to register the ownership of the apartment. This Law was never adopted as part of the law of Bosnia and Herzegovina.

32. Article 33 of the Law on Basic Ownership Relations provided that the ownership over immovables was acquired when the ownership was registered in a registry book (OG SFRY nos. 6/80 and 36/90). This Law was in force in the Federation of Bosnia and Herzegovina until 17 March 1998, when the Law on Basic Property Relations (Official Gazette of the Federation of Bosnia and Herzegovina-hereinafter "OG FBiH"-no. 6/98) entered into force.

B. Relevant Legislation of the Socialist Republic of Bosnia and Herzegovina and after 11 April 1992, following independence, the Republic of Bosnia and Herzegovina

33. On 15 February 1992 the Government of the Socialist Republic of Bosnia and Herzegovina issued a Decree imposing a temporary prohibition on the sale of apartments previously characterised as social property (Official Gazette of the Socialist Republic of Bosnia and Herzegovina-hereinafter "OG SR BiH" no. 4/92"). Article 1 of this Decree temporarily prohibited the sale of socially owned apartments located in the territory of the Socialist Republic of Bosnia and Herzegovina to holders of occupancy rights in them, where sales were being concluded in accordance with the Law on Securing Housing for JNA. Article 3 of the Decree declared invalid any purchase contract or other contract relating to a property right in such an apartment where that contract was inconsistent with the provisions of the Decree. Article 4 of the Decree prohibited courts and other state organs from notarising such contracts and from registering them either in property registers or in court registers. Article 5 of the Decree provided that the temporary prohibition on sales should remain in force until the entry into force of a law regulating *inter alia* the sale of apartments within the JNA's control, and at longest for a year following the date of issue of the Decree (15 February 1993).

34. On 11 April 1992 the Presidency of the Republic of Bosnia and Herzegovina issued the Decree with force of law according to which the Law on Securing Housing for JNA should not be applied in the territory of Bosnia and Herzegovina.

35. On 15 June 1992 the Presidency issued a Decree with Force of Law on Taking Over of Resources of the former SFRY into the Property of RBiH which provided that all property belonging to the JNA and other state organs of the Socialist Federal Republic of Yugoslavia located on the territory of Bosnia and Herzegovina should be considered as belonging to the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina –hereinafter- "OG RBiH" no. 6/92). This Decree thereby established that the Republic of Bosnia and Herzegovina was the *de jure* owner of apartments that had previously been alienated by the Socialist Federal Republic of Yugoslavia.

36. The Law on Abandoned Apartments, issued on 15 June 1992 as a Decree with force of law, was adopted as law on 1 June 1994 and amended on various occasions (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.

37. According to the 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 1990 (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). There were, however, certain exceptions to this definition. For example, an apartment was not to be considered abandoned if the apartment was destroyed, burnt or in direct jeopardy as a result of war actions (Article 3 paragraph 2).

38. 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).

39. 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).

40. On 13 March 1993 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with the force of law on the Resources and Financing of the Army of Bosnia and Herzegovina which provided that the social resources of the former Socialist Federal Republic of Yugoslavia which had been used by the JNA were placed under the temporary use and management of the army of the Republic (OG RBiH nos. 6/93 and 17/93).

41. On 1 June 1994 the Assembly of the Republic of Bosnia and Herzegovina adopted all previously issued Decrees with legal force as Law (OG RBiH no. 13/94). Thus, all Decrees with legal force listed above were adopted as laws on this date.

42. On 12 July 1994 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law amending the Law on Real Property Transactions (OG RBiH no. 18/94). Article 1 provided that contracts relating to real property transactions must be in writing and that the signatures of the contracting parties must be verified by a competent court. It further provided that any contract, relating to property transactions, that had been concluded in a manner that did not conform with the provisions of paragraph 1 of this Article shall have no legal force or effect. Article 3 of the Decree provided that written contracts concluded prior to the entry into force of the Decree were valid if the parties had fulfilled all obligations arising from the contracts completely or substantially. It further provided that contracts concluded prior to the entry into force of the Decree would be considered valid provided the parties had their signatures certified by a competent court within six months of the entry into force of the Decree.

43. On 25 November 1994 the Assembly of the Republic of Bosnia and Herzegovina introduced a Law on the Transformation of Social Property (OG RBiH no. 33/94). The effect of this Law was to transform all property that had formerly been categorised as socially owned property into state property. This Law entered into force on 25 November 1994 and was applied as of 1 January 1995.

44. On 3 February 1995 the Presidency of the Republic issued a Decree with force of law amending the Law on the Resources and Financing of the Army (OG RBiH no. 5/95). This Decree provided that for the protection of the housing fund of the army, until the issuing of the Law on Housing in the Republic, courts and other state authorities should adjourn proceedings relating to the purchase of apartments and other properties under the Law on Securing Housing for the JNA. This Decree came into force on 10 February 1995, the date of its publication in the Official Gazette.

45. On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law amending the Law on the Transfer of Resources of the Socialist Federal Republic of Yugoslavia into the property of the Republic. This Decree provided that contracts for the sale of apartments and other property concluded on the basis of *inter alia* the Law on Securing Housing for the JNA were invalid. This Decree also provided that questions connected with the purchase of real estate, which was the subject of annulled contracts, would be resolved under a law to be adopted in the future. This Decree came into force on 22 December 1995. It was adopted as law by the Assembly of the Republic of Bosnia and Herzegovina on 18 January 1996 (OG RBiH no. 2/96).

C. Relevant Legislation of the Federation of Bosnia and Herzegovina

1. The Law on the Cessation of the Application of the Law on Abandoned Apartments

46. The Law on Abandoned Apartments was repealed by the Law on Cessation of Application of the Law on Abandoned Apartments (“the Law on Cessation”) which entered into force on 4 April 1998 and has been amended on several occasions thereafter (OG FBiH- nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 11/01 and 56/01).

47. According to the Law on Cessation, 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 Law on Cessation. Pursuant to the amendment of the Law of 13 April 1999, 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).

48. 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. Persons who left their apartments between 30 April 1991 and 4 April 1998, the date when the Law on Cessation entered into force, shall be considered to be refugees or displaced persons under Annex 7 of the General Framework Agreement (Article 3 paragraphs 1 and 2).

49. Article 3a provides for an exception to Article 3, paragraph 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina, at the disposal of the Federation Ministry of Defence. It provides as follows:

> “the occupancy right holder shall not be considered a refugee if on April 30, 1991 s/he was in active service in the SSNO (Federal Secretariat for National Defence)- JNA (i.e. not retired) and was not a citizen of the Socialist Republic of Bosnia and Herzegovina according to the citizenship records, unless s/he had residence approved to him or her in the capacity of a

> refugee, or other equivalent protective status, in a country outside the Former SFRY before 14 December 1995."
>
> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if s/he remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995, or if s/he has acquired another occupancy right outside the territory of Bosnia and Herzegovina."

Article 3a of the Law on Cessation came into force according to the High Representative's Decision of 1 July 1999.

50. All claims for repossession shall be presented to the municipal administrative authority competent for housing affairs (Article 4). 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).

51. 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.

52. 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 repossession 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 responsible for housing affairs within 15 days from the date of receipt of the decision. However, an appeal has no suspensive effect (Article 8).

2. The Law on Sale of Apartments with an Occupancy Right

53. Relevant to the current cases, Article 39a of the Law on Sale of Apartments with an Occupancy Right (OG FBiH nos. 27/97 and 11/98) 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. Article 39c states that Article 39a shall also apply to an occupancy right holder who has "exercised the right to repossess the apartment under the Law on Cessation of the Application of the Law on Abandoned Apartments."

54. Article 39d states that if an individual fails to realise their rights to the apartment with the Federation Ministry of Defence, they may initiate proceedings before the competent court.

55. Article 39e provides that an individual who is not entitled to repossession of the apartment in accordance with the provisions of Articles 3 and 3a of the Law on the Cessation of the Application of the Law on Abandoned Apartments and who entered into a legally binding contract on the purchase of an apartment with the JNA before 6 April 1992, shall have the right to submit a request to the Federation Ministry of Defence for compensation of the funds paid on that basis, unless it is proved that these funds were acknowledged for purchase of an apartment outside the territory of Bosnia and Herzegovina.

3. Law on Housing Relations

56. Relevant to the current case, Article 19 of the Law on Housing Relations (OG SRBiH nos. 14/84, 12/87 and 36/89; OG RBiH nos. 2/93; OG FBiH nos. 11/98, 38/98 and 19/99) provides that only one person may be the occupancy right holder over one apartment. If the contract on use of the apartment is concluded by one of the spouses who lives in the household, the other spouse shall also be considered the occupancy right holder.

4. The Law on Administrative Proceedings

57. Under Article 216 paragraph 1 of the Law on Administrative Proceedings (OG FBiH no. 2/98) the competent administrative organ has to issue a 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").

V. ALLEGED AND APPARENT VIOLATIONS OF HUMAN RIGHTS

58. The applicants complain of the fact that the housing authority within the Federal Ministry of Defence of the Novo Sarajevo Municipality refuses to issue the order and documents pursuant to which the competent court will register the applicants as the owners of the apartment. They request the Chamber to recognise the contract on purchase and the registration of their ownership rights over the apartment in the landbooks. They also complain of the fact that they did not receive any response on the request for repossession of the apartment and occupancy right. The Chamber has considered and communicated these complaints under Articles 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

59. M.K., in addition, complains of being maltreated physically and mentally by the police when she was taken to the police station on 12 November 1998 for entering the apartment after breaking the seal. The Chamber has considered and communicated these complaints under Article 3 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

60. The respondent Party suggests to strike out the cases since the applicants live in the apartment since 11 November 1998 and therefore regained possession of it. According to the respondent Party, the case of M.K. should in any case be struck out because her case is already to be considered through the application of her husband.

61. With respect to admissibility, the respondent Party argues that the Chamber should declare the case inadmissible because the applicants failed to exhaust domestic remedies which are provided for in Articles 39 and 39e of the Law on Sale of Apartments with an Occupancy Right. According to Article 39d of the Law on Sale of Apartments with an Occupancy Right, the applicants could have brought a civil action before the competent court in order to establish the validity of the legal transaction related to the purchase of the apartment.

62. With respect to the merits, the respondent Party argues that there cannot be a violation of Article 6 of the Convention, since the applicants didn't apply to a court. Article 8 of the Convention has not been violated since the applicants left their home of their own free will, without interference from the respondent Party, and are now living in the apartment together with their family. According to the respondent Party, Article 1 of Protocol No. 1 to the Convention has not been violated by the organs of the respondent Party since the applicants have not been deprived of their right to regain the possession of their apartment. In a time of constant lack of housing space, the interference with the right to property with the purpose of securing housing for those who are in need is justified. As an active officer in the Army of Yugoslavia until 1999, Džavid Kurtišaj realised the right to an apartment

in another state. Finally, the respondent Party argues that the Chamber should bear in mind the margin of appreciation granted to contracting States under the Convention. The applicants are not discriminated against. According to the respondent Party, as there has been no violation of anyone of the above mentioned rights of the applicants, there cannot be discrimination in the peaceful enjoyment of these rights.

63. With respect to the complaint of M.K. of a violation of Article 3 of the Convention, the respondent Party argues that this part of the application is manifestly ill-founded because the applicant did not offer evidence in support of her statements. M.K. was taken to the Public Security Center Novo Sarajevo in a completely legal manner. Also, when M.K. signed her statement, she didn't complain of the behaviour of the policemen and did not mention the issue of bad treatment to any of the officials.

64. The respondent Party concludes that the case should be declared inadmissible or manifestly ill-founded.

B. The Applicants

65. The applicants maintain the complaints made in their applications. They are of the opinion that the members of the Military Housing Fund and the Police try by any means to deny the acquired right to property of the applicants.

VII. OPINION OF THE CHAMBER

A. The request to strike out the applications

66. In accordance with Article VIII(3) of the Agreement, "the Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that … (b) the matter has been resolved; … provided that such a result is consistent with the objective of respect for human rights."

67. The respondent Party is of the opinion that the case should be struck out since the applicants are living in the apartment and the matter has thereby been solved. However, since the applicants live in their apartment due to a provisional measure issued by the Chamber and the nature of a provisional measure is not of a definitive character, the case is not solved.

68. Moreover, the applicants complain that they have not been able to obtain registration of the apartment as their property. This situation remains unsolved.

69. The Chamber will therefore not strike out the cases or any part of them.

B. Admissibility

70. Before considering the merits of these cases 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)(a), the Chamber shall consider whether effective remedies exist and, if so, whether they have been exhausted. Under Article VIII(2)(c), the Chamber shall dismiss any application, which it considers manifestly ill-founded.

1. The alleged ill-treatment of M.K.

71. M.K. alleges that she was maltreated by the police after she was taken to the police station for breaking the seal of the apartment. She claims to have been assaulted, threatened, verbally abused and forced to sing a document. The respondent Party on the other hand states that the procedure for questioning was applied and no irregularities have occurred. Despite these statements of the respondent Party, M.K. has failed to substantiate these allegations. She has failed to submit any evidence which could support her allegations, nor has she explained why she hasn't complained

of the alleged behaviour of the police at the moment that it allegedly happened or any time later on. Therefore, the Chamber finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application insofar as it relates to violations of Article 3 of the Convention inadmissible.

2. Exhaustion of domestic remedies

72. The respondent Party objects to the admissibility of the applications on the ground that the applicants have failed to exhaust domestic remedies. Specifically, the respondent Party argues that Džavid Kurtišaj has withdrawn his request for repossession of the apartment to the Administration for Housing Affairs in Sarajevo because he regained possession. However, at the same time, the respondent Party argues that the Federal Ministry of Defence has properly applied Article 3a of the Law on Cessation in deciding that the applicants are not entitled to regain possession of the apartment in question. Accordingly, the Chamber notes that, even if the applicants had sought to avail themselves of further domestic remedies available to them, they would have no prospect of success as a result of the application of Article 3a of the Law of Cessation in conjunction with Article 39 of the Law on Sale of Apartments with an Occupancy Right. In these circumstances, the Chamber is satisfied that the applicants cannot be required to exhaust any further domestic remedies for the purposes of Article VIII(2)(a) of the Agreement (see e.g., case no. CH/98/800, *Gogić*, decision on admissibility and merits of 13 May 1999, paragraph 46, Decisions January–July 1999). The fact that Džavid Kurtišaj has withdrawn his request for repossession of the apartment to the Administration for Housing Affairs doesn't influence this reasoning since, as the respondent Party submits, the Administration for Housing Affairs could only have denied his request.

73. The Chamber considers that no other ground for declaring the application inadmissible has been established. Accordingly, it decides to declare the remainder of the case admissible.

C. Merits

74. 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.

75. 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 (including the Convention), where such a violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ. The Chamber has consistently found (see, e.g. case no. CH/97/45, *Hermas,* decision on admissibility and merits of 18 February 1998, paragraph 118, Decisions and Reports 1998) that the prohibition of discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance.

76. Before considering the merits of this case, the Chamber clarifies that it considers the legal reasoning relied on by the Plenary Chamber in *Miholić & Others* (cases nos. CH/97/60 et al., decision on admissibility and merits, delivered on 7 December 2001, hereinafter: *Miholić & Others Cases*) to be jurisprudence which is to be applied in similar cases.

77. The Chamber also determines that since Džavid Kurtišaj concluded a purchase contract, the Chamber will focus on his rights as the owner of the apartment in order to establish whether his rights have been violated. As a consequence, there is no need to examine his rights as an occupancy right holder. Since M.K. did not conclude such a contract and since she cannot derive any rights from the contract her husband concluded, the Chamber decides that the application of M.K. does not raise

a separate issue under Article 8 of the Convention or under Article 1 of Protocol No. 1 to the Convention. Therefore, the Chamber will not examine the alleged violations of these articles with regard to M.K.

1. Article 1 of Protocol No. 1 to the Convention and discrimination in the enjoyment of the right to peaceful enjoyment of possessions

(a) Right to peaceful enjoyment of possessions

78. Džavid Kurtišaj (hereinafter: the applicant) alleges a violation of his right to peaceful enjoyment of his possessions and discrimination in the enjoyment of these rights. Specifically, the applicant alleges that he has been discriminated against in that he was prevented from repossessing and registering his apartment that he purchased from the JNA, whereas other persons who purchased apartments from the JNA are permitted, according to Articles 39a and 39c of the Law on Sale of Apartments with an Occupancy Right, to repossess their apartments and register their ownership (see paragraph 53 above). Since the Chamber finds that in the present case, as in the *Miholić & Others Cases* (see paragraph 143), the analysis of the allegation of discrimination is inextricably linked with the question of the justification of the interference with the applicant's enjoyment of his claimed possessions, the Chamber will consider the complaint under Article 1 of Protocol No. 1 to the Convention and the complaint of discrimination together. 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."

79. Article 1 of Protocol No. 1 thus contains three rules. The first rule enunciates the general principle that one has the protected right to 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 among other authorities, *Blentić,* case no. CH/96/17, decision on admissibility and merits, paragraphs 31-32, Decisions 1996-1997; case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, Decisions January-July 1999). Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(b) Prohibition of discrimination

80. In order to determine whether the applicant has been discriminated against, the Chamber must determine whether the applicant was treated differently from others in the same or relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Chamber has consistently held that there is a particular onus on the respondent Party to justify otherwise prohibited differential treatment which is based on any of the grounds explicitly enumerated in Article 1(14) of the Agreement (see e.g. cases nos. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraphs 120-121, Decisions January-June 1999 and CH/98/1309 et al., *Kajtaz and others,* decision on admissibility and merits of 4 September 2001, paragraphs 154 and 159).

(c) The existence of "possessions" under Article 1 of Protocol No. 1

81. The Chamber must first consider whether the applicant had any rights under his contract that constituted "possessions" for the purposes of Article 1 of Protocol No. 1. In this regard, the Chamber refers to its decisions in *Medan and Others*, *Podvorac and Others*, *Ostojić and 31 Other JNA Cases* and *Huseljić and Others* (*loc. cit.* paragraphs 32-34, case no. CH/96/2 et al, decision on admissibility and merits of 14 May 1998, paragraphs 59-61, Decisions and Reports 1998, case no. CH/97/82 et al, decision and admissibility and merits of 13 January 1999, paragraph 91, Decisions January-July 1999, and case no. CH/98/159 et al, decision on admissibility and merits of 14 April 1999, paragraph 37, Decisions January-July 1999). In the aforementioned cases, the Chamber has 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 Chamber notes that in the present case Džavid Kurtišaj has concluded such a contract under factual circumstances similar to those obtaining in the cases cited and therefore sees no reason to differ from its previous jurisprudence. As considered in paragraph 77, M.K. does not have any rights relating to the apartment which qualify as possessions for the purpose of Article 1 of protocol No. 1.

(d) Interference with the applicant's rights

82. The effect of the Decree of 22 December 1995 (adopted as law) was to annul the applicant's rights under his purchase contract. The Law on Cessation and the Law on Sale of Apartments with an Occupancy Right continue to deprive the applicant of his rights. The housing authority within the Ministry of Defence has refused to issue the order for the applicant Džavid Kurtišaj's registration as owner in the Land Books, which is necessary pursuant to Article 39a of the Law on the Sale of Apartments with an Occupancy right. Accordingly, the applicant has been continuously "deprived of his possessions" by the Decree, the Law on Cessation and the Law on Sale of Apartments with an Occupancy Right. Although the applicant is *de facto* living in the apartment, this kind of possession is not "legally using the apartment" as Article 39a requires in order to be able to be registered as the owner. It is accordingly necessary for the Chamber to consider whether these deprivations are justified under Article 1 of Protocol No. 1 as being "in the public interest" and "subject to conditions provided for by law".

(e) In the public interest

83. The Chamber recalls that it found in the case of *Medan and others* that the Decree of 22 December 1995, which effectively deprived the applicants in these cases of their apartments, in the first instance, might in principle be regarded as having pursued a legitimate aim. However, the Chamber has consistently held in all of its JNA apartments decisions that, even accepting the need to equalise the rights of all occupancy right holders to purchase apartments, the Chamber is not satisfied that there was any form of social injustice of such a magnitude as to justify retroactive legislation annulling the purchase contracts concluded under the Law on Securing Housing for the JNA (see *Medan and other loc. cit.* paragraph 37, *Podvorac and Others*, case no. CH/96/2 et al, decision on admissibility and merits of 14 May 1998, paragraphs 59-61, Decisions and Reports 1998, *Ostojić and 31 Other JNA cases* case no. CH/97/82 et al, decision and admissibility and merits of 13 January 1999, paragraph 91, Decisions January-July 1999, and *Huseljić and Others* case no. CH/98/159 et al, decision on admissibility and merits of 14 April 1999, paragraph 37, Decisions January-July 1999). The same reasoning applies in the case of the applicant now before the Chamber. Accordingly, the Chamber finds, as in the earlier JNA cases decided on the merits, that the Decree of 22 December 1995 violated the rights of the applicant under Article 1 of Protocol No. 1 to the Convention.

84. The Chamber further notes that in July of 1999, based upon an agreement with the OHR, the result of which was Article 3a of the Law on Cessation and an amendment to the Law on Sale of Apartments, the Federation of Bosnia and Herzegovina has begun to implement the Chamber's prior JNA decisions and register owners of JNA apartments. However, the applicant in the case now pending before the Chamber is still unable to enjoy possession of his apartment due to the

application of Article 3a of the Law on Cessation in connection with Article 39 of the Law on Sale of Apartments.

85. Accordingly, the applicant in this case now before the Chamber is being treated differently from other persons who purchased and can now register their ownership over JNA apartments. Therefore, the central issue of this case, and what the Chamber must now examine, is whether the continuing interference or deprivation of the applicant's property rights ensuing as a result of the application of Article 3a on the Law on Cessation in connection with Article 39 of the Law of Sale of Apartments can be justified as "in the public interest".

86. 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,* judgement of 23 September 1982, Series A no. 52, pp. 26-28, paragraphs 70-73).

87. 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 reasonable 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*, judgement of 21 February 1986, Series A no. 98, p. 40, paragraph 46).

(f) Legitimate aims

88. With respect to the Law on Cessation in conjunction with the Law on Sale of Apartments with an Occupancy Right, the respondent Party has submitted that the aim of these laws is twofold. First that the Laws are aimed at correcting the factual inequalities that existed between occupancy right holders over JNA apartments and all other occupancy right holders. Second, the aim was to protect the rights of others, namely active fighters and their families or persons who were forced to leave their homes due to the war hostilities.

89. As in the *Miholić & Other Cases* (see paragraph 153 and 154), the Chamber accepts with respect to the first aim put forth, as stated above, that the aim of putting all holders of occupancy rights on an equal footing as regards their right to purchase apartments might be regarded as a legitimate one. However, now as then, there is no evidence that the applicant was placed in an especially privileged position. With respect to the second aim put forth, the Chamber can also accept, in principle, that the national authorities' decision to give aid to its war veterans and families can be regarded as a legitimate one. However, as the Chamber also found in the *Miholić & Others Cases,* there is no evidence that the property is necessarily being used for this stated purpose.

(g) Proportionality

90. Assuming that these reasons can be regarded as legitimate aims, the Chamber must now examine whether there was a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, it must be established whether the applicant had to bear "an excessive burden" in pursuit of the stated aims. In this respect, the Chamber notes that the effects of Article 3a of the Law on Cessation and Article 39 of the Law on Sale Apartments with an Occupancy Right was to solidify the annulment of the applicant's contractual rights. In the case of the applicant it is the second paragraph of Article 3a that applies and thereby constitutes the basis for the refusal of the Ministry of Defence to recognize him as occupancy right holder under Article 3a. This refusal in turn bars the issuance of an order for his registration as owner. The Chamber will therefore look closely at the second paragraph of Article 3a, which is the key to the continued failure to recognize the applicant's rights under the purchase contract.

(h) Active military service in a foreign army after 14 December 1995

91. The second paragraph of Article 3a, by excluding them from being considered as refugees, denies persons who remained in active military service outside of Bosnia and Herzegovina after 14 December 1995 from registering and repossessing their JNA apartment. In this context, the respondent Party has stated that persons who fall into this category can have their housing needs met elsewhere. Therefore, considering the housing shortage in the Federation and the categories of persons in greater need for a solution of their housing problem, the deprivation of their right to the apartment is justified. However, as the Chamber previously has held in the *Miholić & Others Decison,* the fact that someone might possibly obtain an occupancy right elsewhere cannot bar that person from exercising their rights under a valid purchase contract in Bosnia and Herzegovina. The Chamber therefore cannot find that excluding this category of persons from the peaceful enjoyment of their possessions in Bosnia and Herzegovina is proportional to the stated aims.

92. Additionally, the Chamber finds that persons who served in the JNA and continued to serve in a foreign army are treated differently from former JNA members who joined the Army of the Republic of Bosnia and Herzegovina and then joined the Federation Army, with respect to recognition of valid purchase contracts. The Chamber considers that there is no reasonable relationship of proportionality with respect to this differential treatment and the accomplishment of the stated goals. It could potentially be reasonable and necessary to bar persons serving in a foreign army from the exercise of certain rights, however service in a foreign army is not a basis for stripping a person of an otherwise valid property contract. As such, the Chamber finds that the applicant, who has not been able to register his purchase contract and, as a consequence of that, to peacefully enjoy his apartment under this provision of Article 3a, has been discriminated against.

(i) Conclusion

93. The Chamber finds that the applicant, by the application of Article 3a of the Law on Cessation in connection with Article 39e of the Law on the Sale of Apartments with an Occupancy Right**,** was made to bear an "individual and excessive burden" that simply cannot be justified. This is particularly clear in light of the fact that the reasons for denying the applicant the enjoyment of his property rights were based, in part, on discriminatory grounds. As such, these interferences can not be considered to be in accordance with the public interest. The Chamber, therefore, finds a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention as well as discrimination in the enjoyment of this right, the respondent Party being responsible for those violations.

2. Article 8 of the Convention

94. The applicant alleges violations of his right to respect for his home, as protected by Article 8 of the Convention. Article 8 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."

95. Considering that the applicant is de facto living in the apartment, which is confirmed by the respondent Party which didn't state that the applicant would have been evicted if the Chamber had not issued the order for provisional measures, the Chamber finds it unnecessary to examine whether there has also been a violation under Article 8 of the Convention.

VIII. REMEDIES

96. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Parties 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.

97. The applicant requests to be registered in the land books as the owner of the apartment. The breaches of Article 1 of Protocol No. 1 which the Chamber has found, arose initially from the Decree of 22 December 1995 and continued as a result of the Laws of the Federation, namely, Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments and Article 39 of the Law on Sale of Apartments with an Occupancy Right. In these circumstances, the Chamber considers that it is the responsibility of the Federation to take necessary legislative or administrative action to render ineffective the annulment of the applicant's contract and enable the applicant to register his ownership over his apartment, thus permitting him to exercise his property rights. It will therefore make an order against the Federation to that effect.

98. Considering the fact that the applicant is de facto living in the apartment, the Chamber will not decide upon the request for reinstatement. The Chamber, however, prolongs the order for provisional measures issued on 2 April 2001 until the applicant is registered in the land books as the owner of the apartment.

99. The Chamber will further order the respondent Party 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 it has taken to comply with this decision.

100. The applicants filed a claim for compensation because of material damage, suffered fear and the charges brought against M.K. and the maltreatment as a result of the interrogations undergone by her. The applicants didn't claim a specific amount of compensation.

101. The respondent Party is of the opinion that the claim for compensation is inadmissible because the claim is ill-founded and unsubstantiated by material evidence.

102. The Chamber considers that this decision and the finding of a violation of the rights of the applicant under Article 1 of Protocol No. 1 to the Convention constitute sufficient satisfaction. The Chamber therefore rejects the claim for compensation for non-pecuniary damage. Since the claim for pecuniary damage is not substantiated, this claim will also be rejected. With regard to compensation related to the alleged maltreatment of M.K., the Chamber considers that it can only award compensation if it finds a violation. It will therefore not award any compensation on account of this complaint.

IX. CONCLUSIONS

103. For the above reasons, the Chamber decides,

1. unanimously, to declare the application of M.K. inadmissible in respect of Article 3 of the Convention;

2. unanimously, to declare the remainder of the applications admissible;

3. by 4 votes to 3, that the right of Džavid Kurtišaj to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention has been violated by the respondent Party and, further, that he has been discriminated against in his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the respondent Party thereby being in breach of Article I of the Agreement;

4. unanimously, that it is not necessary to examine the application of Džavid Kurtišaj under Article 8 of the Convention;

5. by 5 votes to 2, to order the respondent Party to take all necessary steps, within 3 months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, by way of legislative or administrative action, to render ineffective the annulment of the contract of Džavid Kurtišaj and to allow for registration of ownership of his apartment;

6. by 5 votes to 2, that the order for provisional measures issued on 2 April 2001 will remain in force until Džavid Kurtišaj is registered in the land books as the owner of the apartment;

7. unanimously, to order the respondent Party to report to it within 3 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)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Dissenting opinion of Mme. Michèle Picard

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mme. Michèle Picard.

DISSENTING OPINION OF MME. MICHÈLE PICARD

I disagree with the majority that there has been a violation of the applicant's right to property in this case for the reasons that were stated in the partly dissenting opinion of Mr. Nowak, which I joined, in the Miholić decision (*Miholić & Others,* cases nos. CH/97/60 et al., decision on admissibility and merits, delivered on 7 December 2001). As in the Miholić case, the applicant bought the apartment only a few weeks before the outbreak of the war. He left Bosnia and Herzegovina with the JNA in June 1992 and remained in active service of the army of Yugoslavia until 1999. The non-recognition of his contract of purchase by the authorities of the Federation of Bosnia and Herzegovina is, in my opinion, within the broad margin of appreciation a state enjoys under Article 1 of Protocol No. 1 to the Convention.

(signed)
Michèle Picard

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 8 March 2002)

Case no. CH/98/1324

Milan HRVAČEVIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 February 2002 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to 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. On 14 March 1996 he was arrested in Sarajevo on suspicion of having committed the criminal act of war crimes against the civilian population. When the applicant was arrested there was no approval of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") for the arrest and for the institution of criminal proceedings as required by the "Rules of the Road". The consent of the ICTY Prosecutor was received by the Higher Court in Sarajevo on 17 May 1996, when the investigation proceedings had been pending for over two months. In June 1997 the Cantonal Court in Sarajevo found the applicant guilty of having committed the criminal act of war crimes against the civilian population and sentenced him to 15 years imprisonment. The applicant filed an appeal to the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court"). In June 1998 the Supreme Court issued a decision without holding a public hearing, by which it reduced the applicant's sentence to 12 years imprisonment.

2. The applicant complains that his rights as guaranteed under Articles 6 and 7 of the European Convention on Human Rights ("the Convention") have been violated. The applicant's complaint under Article 6 of the Convention raises three different issues. The first issue refers to the Cantonal Court's assessment of the evidence. The second issue refers to the applicant's allegation that he was not allowed to call witnesses on his behalf and to present his own evidence. The third issue is that no public hearing was held before the Supreme Court.

3. This case also raises issues under Article 5 of the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced with the Chamber on 1 December 1998.

5. The applicant also lodged an application before the Office of the Human Rights Ombudsperson for BiH. By a letter dated 16 September 1999 the Deputy Ombudsperson informed the Chamber that, pursuant to Rule 16(1) of the Ombudsperson's Rules of Procedure, no investigation would be opened in the case. Explaining his decision, the Deputy Ombudsperson stated that the applicant had not provided any evidence in support of his allegations.

6. On 1 December 1999 the Chamber transmitted the case (only) to the Federation as the respondent Party for its observations on the admissibility and merits. Although the applicant did not invoke Article 5 of the Convention, the Chamber decided to transmit the case under this Article as well. On 31 January 2000 the Chamber received the Federation's observations.

7. The Federation's observations were forwarded to the applicant and on 14 March 2000 the Chamber received the applicant's reply and a compensation claim.

8. On 11 May 2000 the Chamber received further observations from the Federation.

9. On 11 June 2001 the Chamber requested the parties to submit additional information.

10. On 26 June 2001 the Chamber received additional information from both parties.

11. On 12 December 2001 the Chamber requested the respondent Party to provide further information. On 25 December 2001, the Chamber received the requested information from the respondent Party.

12. The Chamber deliberated on the admissibility and the merits of the case on 4 November 1999, 6 June 2001, 6 December 2001, 6 and 8 February 2002. On the latter date the Chamber adopted the present decision.

III. FACTS

13. The applicant was arrested on 14 March 1996 in Sarajevo on suspicion of having committed the criminal act of war crimes against civilian population. Immediately after the arrest an investigation procedure was instituted before the Higher Court in Sarajevo (now the Cantonal Court Sarajevo) upon the request of the Higher Public Prosecutor's Office (now the Cantonal Prosecutor's Office Sarajevo). When the applicant was arrested there was no consent of the ICTY Prosecutor for the arrest and for the institution of criminal proceedings in accordance the Rome Agreement of 18 February 1996 ("the Rules of the Road", see paragraphs 19-22 below). The consent of the Hague Tribunal Prosecutor was received by the Higher Court in Sarajevo on 17 May 1996, when the investigation proceedings had been pending for over two months.

14. On 13 September 1996 the Higher Public Prosecutor's Office in Sarajevo issued an indictment against the applicant charging him with the criminal act of war crimes against civilian population pursuant to Article 142 of the Criminal Law of SFRY (see paragraph 23-24 below).

15. On 26 June 1997 the Cantonal Court Sarajevo (the Higher Court in Sarajevo had at this point become the Cantonal Court) issued a judgement by which the applicant was found guilty of having committed the criminal act of war crimes against civilian population under Article 142 of the above mentioned Criminal Law. The applicant was found guilty because he:

> "As a reserve officer-engineer in the former JNA who was mobilised in the Army of Republika Srpska, upon the order of the commander Aleksandar Petrović, had planned and, with the help of other soldiers he had previously trained, had committed in January 1993 the destruction of a part of the residential-business building in Milutina Đuraškovića Street in Sarajevo, known as "Loris", by taking 100 kg of TNT explosive and planting it next to the embankment pillars of the building, and after personally activating the explosive, destroying so a part of the mentioned building and causing pecuniary damage amounting to DEM 1.197.254,30;
>
> In January 1994, upon the order of the commander Aleksandar Petrović, he had organised, with a group of soldiers, the planting of 60 kg TNT explosive on the vital elements of the supporting construction of the residential-business facility in Zagrebačka Street in Sarajevo, known as 'Invest-banka", committing so the demolition of the mentioned facility and causing pecuniary damage amounting to DEM 1.641.475,00;"

By the same ruling the applicant was found not guilty of the charges that he had, both personally and on behalf of a higher commander, ordered artillery and sniper fire which had resulted in death and injury of many people and great material damage on civilian buildings.

16. The applicant was sentenced to fifteen (15) years of imprisonment.

17. The applicant lodged an appeal against the judgement of the Cantonal Court to the Supreme Court of the Federation of Bosnia and Herzegovina as the second instance court. The applicant stated that the Cantonal Court had wrongly assessed the evidence and that it had breached procedural provisions prescribed by the Law on Criminal Procedure. The applicant did not suggest any new evidence in his appeal, neither did he propose that the Supreme Court hold a public hearing in his case. The applicant's brother submitted a supplement to the appeal, within the prescribed time-limit, which included a document issued by the armed forces of the Serbs in Bosnia and Herzegovina, "the Army of Republica Srpska"("VRS"), stating that the destroyed buildings were military targets.

18. On 2 June 1998 the Supreme Court issued a decision sentencing the applicant to 12 years imprisonment for having committed the criminal act of war crimes against civilian population. The applicant's appeal was "partly taken into account" by the Supreme Court. The Supreme Court did not hold a public hearing in the case and its decision was based on the facts established by the Cantonal Court.

IV. RELEVANT LEGAL PROVISIONS

A. The Rome Agreement of 18 February 1996 ("The Rules of the Road")

19. 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 sub-paragraph of paragraph 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."

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

21. At the public hearing before the Chamber in cases no. CH/96/21 *Čegar*, no. CH/97/41 *Marčeta* and no. CH/97/45 *Hermas*, the Agent of the Federation stated, in relation to the legal status of the Rome Agreement, as follows (see case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 18, Decisions and Reports 1998):

> "Legally, the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law."

22. This view of the direct applicability as domestic law of the Rules of the Road is confirmed and elaborated in the decision (no. Kž-465/97) of the Supreme Court of the Federation of 28 May 1998 in the case of D.B. The accused in this case had been found guilty of war crimes against the civilian population under Article 142 of the Criminal Law by the (then) High Court in Mostar in the absence of an opinion by the ICTY Prosecutor on the charges against him. The Supreme Court quashed the conviction and sent the case back to the High Court for renewed proceedings with the following reasoning:

> "… the courts in the Federation of Bosnia and Herzegovina are obliged to apply the Rome Agreement ('The Rules of the Road'). According to the Rome Agreement ('The Rules of the Road'), the court of first instance cannot begin a criminal procedure before the Prosecutor of the ICTY reviews the indictment and gives his or her opinion on whether the indictment is consistent with international legal standards. This Court is also of the opinion that doing so violated Article 349, paragraph 1(4) of the Law on Criminal Procedure, because an approval or opinion of the competent authority necessary for the criminal proceedings was not previously obtained. This Court finds a violation of the provisions of an international agreement (the Rome Agreement), that has been signed and approved by Bosnia and Herzegovina, and the courts in the Federation of Bosnia and Herzegovina are obliged to apply it."

B. The relevant criminal law

23. At the time of the applicant's arrest and trial the applicable criminal law provisions were contained in the Criminal Law of the former Socialist Federal Republic of Yugoslavia ("SFRY"), adopted

as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (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; Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94). Genocide and war crimes against civilians are now punishable under Articles 153 and 154 of the new Criminal Law of the Federation of Bosnia and Herzegovina, which entered into force on 28 November 1998 (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 43/98).

24. Article 142 of the Criminal Law concerned war crimes against the civilian population. It provided that anyone who, in violation of the rules of international law in time of war, armed conflict or occupation, ordered or committed any of a number of defined acts, would be punished by imprisonment for at least five years or by the death penalty. Its full terms were 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."

C. The relevant provisions on criminal procedure

25. The criminal procedure provisions relevant to the present case were contained in the Law on Criminal Procedure of the SFRY (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90), adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (OG RBiH nos. 2/92, 9/92, 16/92 and 13/94). After the conclusion of the proceedings in the present case, on 28 November 1998, the new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 43/98).

26. Articles 190 and 191 concerned pre-trial arrest and custody. Article 190 read:

> "(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."

27. Article 191 paragraph 1 provided:

"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."

28. Article 359 to 399 of the Law on Criminal Procedure concerned procedure for regular legal remedies. Article 363 provided:

"A judgement 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 sentence…"

29. Article 366 provided:

"1. A judgement 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.
…"

30. Article 371, concerning criminal appeals proceedings provided:

"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 … 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."

"3. The session of the panel shall begin with the report of the reporting judge concerning the state of affairs. The Panel may request the necessary explanations in connection with the allegations of the appeal from the principals attending the session. The principals may propose that particular documents be read to supplement the report, if the presiding judge so allows, or they may request the opportunity to furnish the necessary explanations for their positions, without repeating what was contained in the report."

"4. The failure of a party to appear, although duly notified, shall not prevent the session of the panel from being held."

31. Article 372 provided:

"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."

32. Article 373 provided:

"1. A hearing shall be held before the second instance court only if it is necessary for the 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.
…"

33. Article 381 provided:

> "… 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."

34. Article 385 provided:

> "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".

V. COMPLAINTS

35. The applicant complains that his rights under Article 6 and Article 7 of the Convention have been violated.

36. With regard to the alleged violation of Article 6, the applicant states that according to the Convention everyone is entitled to an independent and impartial tribunal established by law. The applicant states that his criminal liability established by the Cantonal Court was based exclusively on the Higher Public Prosecutor's witnesses as well as on experts residing in the territory of the Federation of Bosnia and Herzegovina. He further states that he was not allowed to present evidence confirming his statements throughout the criminal proceedings before the Cantonal Court. He claims that the second instance court did not examine the evidence *ex officio*. The applicant also states that the witnesses and the representatives of official institutions had a partial attitude in the proceedings against him as an "enemy soldier", since the criminal procedure against him was conducted immediately after the cessation of the armed conflict between the Army of the Republic of Bosnia and Herzegovina ("Army of the RBiH") and the VRS.

37. The case also raises issues under Article 5 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

38. The Federation is of the opinion that the application is inadmissible because the applicant has not exhausted all domestic remedies. The Federation is referring to extraordinary remedies as provided for by new the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina.

39. The respondent Party is further of the opinion that the proceedings have been fair and that the application therefore is manifestly ill-founded.

40. As to the merits, the Federation is of the opinion that there has been no violation of the applicants rights because there was a reasonable suspicion that the applicant had committed the criminal offence, the applicant was informed promptly of the reasons of his arrest and he was brought promptly before a judge. Therefore, according to the respondent Party, there has been no violation of Article 5 of the Convention.

41. The respondent Party argues that the Courts and the Prosecutor's Offices in the Federation learnt about the Rules of the Road only on 17 October 1996, when the Federal Ministry of Justice distributed the text of the Rules of the Road to them. According to the respondent Party the Rules of

the Road did not become positive law until this date since they had not been translated and transmitted to any relevant authority of the Federation.

42. The respondent Party further states that the Court system guarantees both independence and impartiality. The respondent Party points out that the case was dealt with within reasonable time and that the applicant was informed promptly of the reasons of the charges. Therefore, according to the respondent Party, there has been no violation of Article 6 of the Convention.

43. The respondent Party also submits that the applicant was declared guilty of having committed a criminal offence which, at the time when it was committed, constituted a criminal offence according to national and international law. Therefore there has been no violation of Article 7 of the Convention according to the respondent Party.

44. As to the applicant's claims for compensation, the Federation states that the applicant's compensation claims are completely ill-founded, unsubstantiated and excessive.

45. In its reply to the Chamber's questions, received by the Chamber on 26 June 2001, the respondent Party states that the applicant's allegation that he was not given an opportunity to present his own evidence and to propose his own witnesses, is incorrect. The respondent Party maintains that the applicant did not propose any evidence that was not accepted by the Cantonal Court and that the Cantonal Court *ex officio* gathered more evidence in order to check the allegations from the bill of indictment.

46. The respondent Party further states that the applicant did not propose a public hearing before the Supreme Court and that the only new evidence presented in the appeal proceedings was a document from the VRS stating that the destroyed buildings were military targets. According to the respondent Party, this evidence was not considered relevant since the applicant had confessed that there were no members of the RBiH Army in the buildings when they were destroyed. Furthermore, material evidence collected by the Court confirmed this.

B. The applicant

47. The applicant states that his detention was illegal since the Higher Court in Sarajevo did not have the consent of the Prosecutor of the ICTY, as required by the Rules of the Road. He further maintains the allegations in his application.

48. The applicant also submitted his claim for compensation. He claims KM 40.000,00 for his illegal detention and imprisonment from 14 March 1996 until the issuance of the Chambers decision. He also claims KM 100.000,00 as compensation for his weakened health, which according to the applicant, got worse during the proceedings. The applicant submitted a letter from the Clinical Center of General Clinics Kasindol providing information about his health. The applicant did not submit any other evidence.

VII. OPINION OF THE CHAMBER

A. Admissibility

49. 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. According to Article VIII(2)(a), the Chamber shall consider whether effective domestic remedies exist and whether the applicant has demonstrated that they have been exhausted. Article VIII(2)(c) states that the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right of petition.

1. Bosnia and Herzegovina

50. The applicant directs his application against Bosnia and Herzegovina and the Federation of

Bosnia and Herzegovina. The Chamber notes that Article III paragraph 1 of the Constitution of Bosnia and Herzegovina establishes which matters are the responsibility of the institutions of the State of Bosnia and Herzegovina. The administration of justice is not among them, with the exception of "international and inter-Entity criminal law enforcement". The applicant has not provided any indication that Bosnia and Herzegovina could in any way be responsible for the actions he complains of, nor can the Chamber on its own motion find any such evidence. The application is therefore incompatible *ratione personae* with the Agreement insofar as it is directed against Bosnia and Herzegovina.

2. Federation of Bosnia and Herzegovina

51. The Chamber notes that the actions complained of by the applicant are within the competence of the Federation of Bosnia and Herzegovina.

(a) The alleged violation of Article 7 of the Convention

52. The applicant complains that his rights as guaranteed by Article 7 of the Convention have been violated. Article 7 of the Convention reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

53. The Chamber notes that this provision, at least its first paragraph, enshrines the principle of *nullum crimen sine lege, nulla poena sine lege*. In the present case, the acts on account of which the applicant was found guilty constituted criminal offences under Article 142 of the, then applicable, Criminal Law of the SFRY (see paragraphs 23-24 above). The complaint under this provision is therefore inadmissible as manifestly ill-founded.

(b) Exhaustion of domestic remedies

54. The Federation also argues that the applicant has not exhausted the available domestic remedies as he was given the possibility to use extraordinary remedies in accordance with new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina. The Chamber notes that it has previously held that extraordinary remedies do not need to be exhausted for the purposes of Article VIII(2)(a) of the Agreement (see case no. CH/98/1366, *V.Č.*, decision on admissibility and merits of 7 March 2000, paragraph 59, Decisions on Admissibility and Merits January-June 2000). Consequently, the Chamber finds that the applicant has complied with the requirements of that provision.

3. Conclusion as to admissibility

55. The Chamber further finds that no other ground for declaring the cases inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to Article 5 and Article 6 of the Convention, insofar as it is directed against the Federation of Bosnia and Herzegovina. The remainder of the application is inadmissible.

B. Merits

56. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above 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 in the Convention.

1. Article 5 paragraph 1 of the Convention

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

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> (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;
> …"

58. Under the Rules of the Road, "persons … 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". Charges of war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer.

59. As stated by the respondent Party at the public hearing held before the Plenary Chamber in the cases of *Čegar, Marčeta* and *Hermas*, and held also by the Supreme Court of the Federation (see paragraphs 21-22 above), the Rules of the Road apply as domestic law in the Federation.

60. The respondent Party has argued that the courts and the prosecutor's offices in the Federation learnt about the Rules of the Road first on 17 October 1996 when the Federal Ministry of Justice distributed them. According to the respondent Party, the Rules of the Road did not become positive law until this date since they had not been translated and transmitted to any relevant authority of the Federation.

61. The Chamber notes that the Rules of the Road were agreed upon on 18 February 1996. The Chamber finds that the respondent Party, after having signed and agreed upon the Rules of the Road, had a positive obligation to transmit them and make them known to all relevant authorities in the Federation. Moreover, the Chamber notes that the prompt distribution of the text of the Rules of the Road to the judicial authorities is a responsibility of the respondent Party. If, as the respondent Party has stated, the Federal Ministry did indeed wait until 17 October 1996 to inform the relevant authorities of the existence of the Rules of the Road, it is the respondent Party that is to be held responsible for the consequences of this omission. The Chamber further recalls that it has previously held that the Rules of the Road entered into force on 18 February 1996 (see case no. CH/98/1374, *Pržulj*, decision on the admissibility and merits of 10 January 2000, paragraph 135, Decisions January-July 2000; and case no. CH/99/1366, *V.Č.,* decision on the admissibility and merits of 7 March 2000, Decisions January-July 2000, paragraph 65). Accordingly, the Chamber concludes in this case also that the Rules of the Road entered into force on 18 February 1996.

62. The Chamber also notes that the respondent Party's argument that the relevant authorities did not know about the Rules of the Road until 17 October 1996 is contradicted by the fact that the Higher Court in Sarajevo received the approval of the Hague Tribunal Prosecutor for the arrest and for the institution of criminal proceedings on 17 May 1996. In other words, the consent of the ICTY Prosecutor was received exactly 5 months before the respondent Party states that the Rules of the Road became known.

63. It is undisputed that the applicant was arrested on 14 March 1996 on charges of war crimes and that the opinion of the ICTY Prosecutor, stating that there was sufficient evidence by international standards to justify proceedings for serious violation of international humanitarian law, was obtained only on 17 May 1996. The respondent Party has not been able to provide the Chamber with information regarding when, and by whom, the ICTY Prosecutor was requested to give his

approval for the arrest and institution of criminal proceedings against the applicant. Further, the Chamber has not by its own motion been able to obtain the relevant information. However, it is clear that no approval for an order, warrant or indictment against the applicant from the ICTY Prosecutor was received by the Higher Court in Sarajevo before 17 May 1996. The Rules of the Road, which require such order, warrant or indictment to be approved by the ICTY Prosecutor, entered into force on 18 February 1996. The applicant's arrest and detention from 14 March 1996 to 17 May 1996, i.e. for more than 2 months, were therefore not "lawful" as required by paragraph 1(c) of Article 5.

64. As to the applicant's detention after 17 May 1996, the Chamber notes that he was detained because he was suspected of having committed war crimes against the civilian population under Article 142 of the Criminal Law of the SFRY, punishable with the death penalty or imprisonment for at least five years. The applicant's pre-trial detention after 17 May 1996 appears therefore to have been in accordance with Article 191 of the then applicable Law on Criminal Procedure (see paragraph 27 above).

65. The Chamber concludes that the applicant's arrest and detention from 14 March 1996 to 17 May 1996 constituted a violation of Article 5 paragraph 1 of the Convention.

2. Article 6 of the Convention

66. The applicant claims that his rights as guaranteed under Article 6 of the Convention have been violated. The complaint raises three different issues. The first issue refers to the Cantonal Court's decision that the destroyed buildings were to be considered as civilian buildings, i.e. the assessment of the evidence. The second issue refers to the applicant's allegation that he was not allowed to call witnesses on his behalf and to present his own evidence. The third issue is that no public hearing was held before the Supreme Court.

67. Article 6 paragraphs 1 and 3 of the Convention, in so far as relevant, provides as follows:

> "In the determination of .... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law."
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> ..."

68. With regard to the first issue, the Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, and case no. CH/99/2629, *Nurković*, decision on admissibility of 8 December 1999, paragraphs 9 and 10, Decisions August-December 1999).

69. As to the complaint that the applicant could not call his own witnesses and bring forward his own evidence the Chamber recalls the well established case law of the European Court that, as a general rule, it is for the domestic courts to assess the relevance of the evidence which defendants seek to adduce (see, *inter alia*, Eur. Court HR, *Barbèra, Messegué and Jabardo v. Spain* judgment of 6 December 1988, Series A no. 146, paragraph 68). More specifically, Article 6(3)(d) leaves it to the domestic courts, again as a general rule, to assess whether it is appropriate to call witnesses; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" (see Eur Court HR, *Engel and others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, paargraph 91). The Chamber's task therefore, is to ascertain whether the proceedings

considered as a whole, including the way in which evidence was taken, were fair (see, *inter alia*, Eur. Court HR *Asch v. Austria* judgment of 26 April 1991, Series A, No. 203, paragraphs 25-26 and *Vidal v. Belgium* judgment of 22 April 1992, Series A, No. 235-B, paragraph 33).

70. In the present case, the minutes of the trial before the Cantonal Court show that the applicant had the possibility to call his own witnesses and present his own evidence. The minutes also show that the Cantonal Court did not refuse any of the applicant's suggested witnesses or evidence. Finally, the minutes show that the prosecutor and the defence counsel were given the same opportunity to examine the called witnesses. Under these circumstances and in accordance with the relevant case-law of the European Court, the Chamber does not find any evidence before it which would lead it to conclude that the applicant was unable to exercise his right to examine witnesses as guaranteed under Article 6(3)(d) of the Convention.

71. The third issue concerns the fact that the Supreme Court did not hold a public hearing in the case and based its decision on the facts as established by the Cantonal Court.

72. The Chamber notes that 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, in which the applicant submitted a written appeal but was not given the opportunity to make oral submissions.

73. Addressing the question whether the guarantees under Article 6 of the Convention also apply 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).

74. 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.

75. According to the laws applicable 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 29 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, paragraph 34 above). 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 (Article 381, paragraph 33 above).

76. In his appeal letter, the applicant's representative challenged the Cantonal Court's legal findings, factual findings and the length of the sentence pronounced. However, the representative did not request the Supreme Court to hold a public hearing.

77. The Chamber notes that Articles 372 and 373 of the Law on Criminal Procedure (paragraph 31-32 above) provided for a session of a panel of the Supreme Court or a hearing. A hearing should be held before the second instance court only if it was necessary for the presentation of new evidence or repetition of evidence already presented, because the state of the facts was erroneously or incompletely established and if there were legitimate reasons for not returning the case for retrial to the court of first instance. According to Article 372, it is for the Supreme Court to decide whether to hold a hearing or not.

78. The Chamber further notes that Article 371 of the Law on Criminal Procedure (paragraph 30 above) states that notice of the session should be given to the parties who in a timely manner requested to be notified. The court could decide to give notice of the session of the panel to the parties even if they had not requested to be notified.

79. The Chamber has previously found that the lack of a public hearing before the Supreme Court could amount to a violation of Article 6 of the Convention (see case no. CH/98/934, *Garaplija*, decision on admissibility and merits of 3 July 2000, paragraph 63, Decisions July-December 2000). However, the Chamber notes that the applicant in that case formally requested to be present in the appeal proceedings. As noted above, the applicant in the present case did not request to be present before the Supreme Court in the appeal proceedings.

80. Having in mind the fact that the applicant did not request to be present in the appeal proceedings and also considering that a great amount of evidence was gathered and examined before the Cantonal Court, the Chamber concludes that the absence of a public hearing before the Supreme Court did not deny the applicant the right to a fair trial. Accordingly, there has been no violation of Article 6 of the Convention.

VIII. REMEDIES

81. 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 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.

82. The applicant requests the Chamber to issue a decision by which it orders the respondent Party to annul the decision of the Supreme Court and to reopen the proceedings in his case. The applicant further requests compensation in the amount of KM 40,000.00 for his illegal stay in detention from 14 March 1996 until the date of the delivery of the present decision. Finally, the applicant requests compensation in the amount of KM 100,000.00 for the deterioration of his health during the proceedings.

83. The Federation argues that the claims for compensation are ill-founded or unsubstantiated and in any case excessive.

84. With regard to the applicant's request for compensation for his illegal detention from 14 March 1996 until the date of the delivery of the present decision, the Chamber notes its finding above (see paragraph 65 above) that the applicant was illegally detained only until 17 May 1996. After that date the applicant's detention was in accordance with the law. The Chamber notes that the Supreme Court, when deciding upon the applicant's sentence, took into account the time he had spent in detention from 15 March 1996. The Chamber is therefore of the opinion that a decision finding a violation of the applicant's human rights is sufficient satisfaction as a remedy for the harm suffered by him.

IX. CONCLUSION

85. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible against Bosnia and Herzegovina;

2. by 5 votes to 2, to declare inadmissible the part of the application relating to the applicant's complaint under Article 7 of the European Convention on Human Rights;

3. unanimously, to declare admissible the remainder of the application;

4. by 6 votes to 1, that the arrest and detention of the applicant from 14 March 1996 to 17 May 1996 constituted a violation of the applicant's right 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 Human Rights Agreement;

5. by 5 votes to 2, that there has been no violation of the applicant's rights as guaranteed by Article 6 of the Convention;

6. by 4 votes to 3, that a decision finding a violation of the applicant's human rights is an appropriate remedy for the harm suffered by him and to dismiss the applicant's claims for compensation and other remedies.

(signed) Ulrich GARMS Registrar of the Chamber	(signed) Giovanni GRASSO President of the Second Panel

HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

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

Case no. CH/98/1366

V.Č.

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 March 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. Anders MÅNSSON, 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 is a citizen of Bosnia and Herzegovina of Serb nationality from Foča (now Srbinje), Republika Srpska. In June 1996 he was arrested in Sarajevo on account of charges of war crimes and genocide committed in 1992 against the Muslim civilian population of Foča. In April 1997 the indictment against the applicant was transmitted to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the Hague in order to comply with the "Rules of the Road". The Prosecutor expressed the view that the evidence presented to her was sufficient only to justify proceedings for unlawful confinement or imprisonment of civilians. In the following, the indictment was amended several times in order to bring it in line with the opinion of the ICTY Prosecutor. On 19 January 1998 the Cantonal Court in Sarajevo found the applicant guilty on two counts and sentenced him to 11 years of imprisonment. The appeals judgment of 16 June 1998 reduced the sentence imposed to nine years. In the meantime, the applicant has been released on probation.

2. This case raises issues under Articles 5 and 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 16 December 1998 and was registered on the same day. The applicant is represented by Ms. Senka Nožica, a lawyer practising in Sarajevo.

4. On 13 July 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's observations were received on 15 September 1999.

5. The applicant's reply to the Federation's observations and a claim for compensation were received on 28 October 1999.

6. On 5 November 1999 the Chamber was informed that the applicant, who had on 27 January 1998 submitted an application concerning the same matter to the Human Rights Ombudsperson for Bosnia and Herzegovina, wished to pursue his application before the Chamber.

7. On 2 December 1999 the Federation submitted observations in reply to the applicant's compensation claim.

8. The Chamber deliberated on the admissibility and merits of the case on 4 November 1999 and on 11 January and 6 and 7 March 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

1. The applicant's arrest and pre-trial detention and the opinion of the ICTY Prosecutor

9. The applicant was arrested in Sarajevo on 2 June 1996 and detained on account of an investigation concerning genocide and war crimes allegedly committed in 1992 against the Muslim civilian population of Foča (Srbinje).

10. On 4 June 1996 the applicant was interrogated by the investigating judge for the first time. He claims that before his first appearance before the judicial authorities he was beaten up by a prison guard and that he gave his statement to the investigating judge under the influence of this ill-treatment. The applicant also claims that he provided information sufficient to identify this prison guard to both the first instance and appeal courts, which did not follow up his complaint. The respondent Party disputes that the applicant was beaten and submits that in any case the ill-treatment would have been of no consequence, as the applicant's statement to the investigative

judge was rendered in the presence of his defence lawyer. The applicant, however, submits that he did not at the time have undisturbed contact to his defence counsel, so that he could not inform him of the ill-treatment.

11. On 29 November 1996 the Cantonal Prosecutor's Office issued an indictment charging the applicant with genocide and war crimes.

12. In April 1997, i.e. ten months after the arrest, the documents relating to the charges against the applicant were transmitted to the Prosecutor of the ICTY for review under the Rome Agreement of 18 February 1998 ("the Rules of the Road", see paragraphs 36-39 below). On 7 May 1997 the ICTY Prosecutor expressed the following view:

> "… for the purpose of determining whether criminal proceedings should be pursued at this stage, on the papers transmitted by you the evidence is insufficient by international standards to provide reasonable grounds for believing that V.Č. may have committed the serious violations of international humanitarian law with which he has been charged, other than charges relating to the unlawful confinement of members of the civilian population. The Prosecutor does consider that the evidence is sufficient by international standards to justify proceedings for unlawful confinement or imprisonment of civilians."

2. The trial before the Cantonal Court in Sarajevo

13. In spite of the view expressed by the ICTY Prosecutor, the Sarajevo Cantonal Prosecutor's Office did not amend the indictment and the first hearing was held on 11 June 1997. Subsequent to an intervention by the Office of the High Representative ("OHR"), the Cantonal Prosecutor's Office issued an amended indictment on 15 August 1997, dropping the genocide charges.

14. On 9 September 1997 the Federal Minister of Justice requested from the Cantonal Prosecutor's Office and the Cantonal Court information concerning the respect of the Rules of the Road in the applicant's case. On 17 September 1997 the Federal Minister of Justice instructed the Federal Prosecutor's Office to instruct the Cantonal Prosecutor's Office to bring the indictment against the applicant in line with the obligations arising under the Rules of the Road. The Federal Minister of Justice expressly stated that the institutions of the State and of the Federation are bound to comply with the Rules of the Road and that the indictment against V.Č. contains charges that were not acceptable to the ICTY Prosecutor because of lack of evidence.

15. Amended indictments were issued by the Cantonal Prosecutor's Office on 21 November and 12 December 1997. The latter one charges the applicant, as a member of the Serb paramilitary forces in the Foča area holding the rank of a reserve captain of the Yugoslav National Army, with the commission of war crimes against the civilian population. The first count comprises alleged war crimes "ordered and personally commanded" by the applicant in connection with a prisoner camp for Muslim civilians, in particular the establishment of a prison camp for Muslim civilians, where these were kept in degrading conditions, the capturing and transport to the prison camp of Muslim civilians, as well as having enabled members of paramilitary formations and the camp guards to kill and ill-treat the prisoners. A second count in the indictment charges the applicant with having personally activated a hand grenade that killed a civilian in the course of the attack on the town centre of Foča.

16. On 3 December 1997 the applicant wrote to the Prime Minister of the Federal Government, Mr. Edhem Bičačkić, asking him to intervene for an amendment of the indictment that would bring it in compliance with the opinion of the ICTY Prosecutor.

17. In the meantime the trial had been going on and prosecution witnesses had been heard also in relation to the charges that went beyond unlawful confinement or imprisonment of civilians. According to the applicant, at the hearing of 12 November 1997, in the presence of representatives of the OHR and of the International Police Task Force (IPTF), the Deputy Cantonal Prosecutor assigned to the case, Mr. Zlatan Tersić, declared that the indictment would be amended only after all witnesses had been heard.

18. The applicant states that during December 1997 and at the beginning of January 1998, the Deputy Cantonal Prosecutor made statements to the newspapers *Dnevni avaz* and *Dani*, accusing the OHR and the Federal Prosecutor of exercising pressure in order to interfere with the case. He allegedly also declared that he would insist for the trial to continue in the present form, regardless of the violations of the Rules of the Road and of the position taken by the Federal Prosecutor. The respondent Party has not disputed these allegations.

19. On 19 January 1998 the Cantonal Court rendered its judgment. It found the applicant guilty, under Article 142 of the Criminal Law then in force (cfr. paragraph 27 below), on two counts of war crimes against the civilian population, as in the amended indictment. The applicant was firstly found guilty of having taken part in the establishment of a prison camp for Muslim civilians, where these were kept in degrading conditions, in the capturing and transport to the prison camp of Muslim civilians, and of having enabled members of paramilitary formations and the camp guards to kill and ill-treat the prisoners. Secondly he was found guilty of having personally activated a hand grenade that killed a civilian in the course of the attack on the town centre of Foča. He was sentenced to 11 years of imprisonment.

3. The appeals judgment of the Supreme Court of the Federation

20. On 16 February 1998 the applicant appealed against the judgment on grounds of violation of the Rules of the Road, of the criminal procedure and of incorrect appraisal of the evidence by the court. In his appeal he also mentioned that the statement to the investigative judge on 4 April 1996 had been made after he had been beaten by a prison guard.

21. On 16 June 1998 the Supreme Court rendered the appeals judgment. As to the applicant's complaint that there was no ICTY approval for the prosecution of the crimes he was convicted for, the Supreme Court dismissed it as ill-founded, on the ground that the ICTY Prosecutor does not "approve" the indictment but just "gives an opinion". The Supreme Court also held that the changes to the indictment during the proceedings did not alter its essence, so that a new opinion of the ICTY Prosecutor was not necessary.

22. With regard to the evaluation of evidence by the Cantonal Court, the Supreme Court held that the first instance court was correct in relying on the applicant's partial confession, and that the first instance court took into consideration and correctly evaluated the defence evidence.

23. Without expressly stating so, the Supreme Court then proceeded to reducing significantly the factual basis of the applicant's conviction. It stated:

> "[T]here is reliable evidence only for those actions which are cited in the factual state of this [the Supreme Court's] judgment. Important are only those actions which refer to the illegal arrests and internment of Bosniak population in the camp under the name "Livade" (Meadows) and their subsequent transfer to the Foča prison. This was the foundation of the factual description of the felony as stated in the judgment, which is fully compatible with the content of the mentioned letter of the Prosecutor of the International Tribunal, who stated that there is enough evidence according to international standards to justify the criminal prosecution of the defendant for arrest and detention of civilians".

24. As to the sentencing, the Supreme Court found that the penalty imposed on the applicant was too harsh, on the grounds that he had not been previously convicted of any offence, that the fact that the civilian population was not armed was an element of the crime and could therefore not be counted as an aggravating circumstance, and, finally, that the defendant was found guilty of a small number of criminal actions. The Supreme Court therefore reduced the sentence from 11 to 9 years of detention.

4. The applicant's request for review and release on probation

25. On 18 November 1998 the applicant filed a petition for review proceedings. It was rejected by the Cantonal Court in Sarajevo on 9 April 1999. By a decision of 14 September 1999 the Supreme Court of the Federation confirmed the decision to refuse the applicant's petition.

26. On 1 December 1999 the applicant was transferred to the detention centre in Foča, where, having served one third of his sentence, he was immediately released on probation.

B. Relevant legislation

1. The relevant criminal law

27. At the time of the applicant's arrest and trial the applicable criminal provisions were contained in the Criminal Law of the former Socialist Federal Republic of Yugoslavia ("SFRY"), adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (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; Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94). Genocide and war crimes against civilians are now punishable under Articles 153 and 154 of the new Criminal Law of the Federation of Bosnia and Herzegovina, which entered into force on 28 November 1998 (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 43/98).

28. Article 141 of the Criminal Law related to the crime of genocide. It provided that anyone who, with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, ordered or committed murders or other defined acts would be punished by imprisonment of at least five years or by the death penalty. The full terms of Article 141 were as follows:

> "Anyone who – with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group – orders the killing of, the causing of serious bodily injury to or serious impairment of the physical or mental health of members of that group, orders the forced expatriation of the population or the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, orders the imposition of measures intended to prevent births within the group or orders the forcible transfer of children of the group to another group, or anyone who – with the same intent – commits any of the aformentioned crimes, shall be punished by imprisonment for at least five years or by the death penalty."

29. Article 142 of the Criminal Law concerned war crimes against the civilian population. It provided that anyone who, in violation of the rules of international law in time of war, armed conflict or occupation, ordered or committed any of a number of defined acts, including the subjection of the civilian population to unlawful confinement in concentration camps, would be punished by imprisonment for at least five years or by the death penalty. Its full terms were 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 relevant provisions on criminal procedure

30. The criminal procedure provisions relevant to the present case were contained in the Law on Criminal Procedure of the SFRY (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90), adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution") of the General Framework Agreement for Peace in Bosnia and Herzegovina (OG RBiH nos. 2/92, 9/92, 16/92 and 13/94). After the conclusion of the proceedings in the present case, on 28 November 1998, the new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 43/98).

31. Articles 190 and 191 concerned pre-trial arrest and custody. Article 190 read:

"(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."

32. Article 191 paragraph 1 provided:

"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."

33. Article 74 concerned the contacts between an accused in pre-trial detention and his defence counsel. This provision, which has not been taken over into the new Law on Criminal Procedure of 1998, read:

"(1) If the accused is detained and has been interrogated, the defence counsel can contact him personally or in writing.

(2) The investigating judge can order that the letters sent by the accused to his defence counsel or vice versa shall be transmitted only after he himself has checked them, and that the accused can speak with his counsel only in his presence or in the presence of another official.

(3) When the investigation procedure is over, or when the indictment or the bill of indictment is issued with no previous examination or investigation, the accused cannot be forbidden to contact his lawyer orally or in writing freely and without supervision."

34. Article 348 established that, at the conclusion of a criminal trial, the court shall render a judgment either "rejecting the charge", or acquitting the accused or declaring him guilty.

35. Article 349 spelled out the cases in which the court should render a judgment "rejecting the charge". They are (1) that the court lacked jurisdiction over the case, (2 and 3) that the proceedings had not been initiated by the competent prosecutor or that the prosecutor dropped the charges, (4) that the necessary approval (to prosecute) is lacking or the competent government body withheld its approval, (5) that the accused has already been either convicted or acquitted on the same charges,

and (6) that prosecution is precluded by an applicable amnesty, pardon, or statute of limitations or on any other ground.

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

36. 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 sub-paragraph of paragraph 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."

37. The expressions "International Tribunal" and "Tribunal" refer to the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has its seat in The Hague. The above-quoted provision is normally referred to as the Rules of the Road. On 10 September 1996 the ICTY Prosecutor sent a document entitled "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996" to the Prime Minister of Bosnia and Herzegovina, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and the Ministries of Foreign Affairs of the Federal Republic of Yugoslavia and of Croatia. These "Procedures and Guidelines" provide for the procedure for the submission of cases to the ICTY Prosecutor, for the contents of a request for review by the ICTY Prosecutor and of the response of the ICTY Prosecutor. Appendix B to the "Procedures and Guidelines" contains standard markings to be employed by the ICTY Prosecutor in responding to requests for review, which typically read:

> "I return this case, the Prosecutor having taken the view that for the purposes of determining whether criminal proceedings should be continued/initiated at this stage …"

It was followed by a statement as to whether the evidence is sufficient by international standards to provide reasonable grounds for believing that the person who is the subject of the report has committed the serious violation of international humanitarian law he is charged with (see paragraph 12 above for the text of standard marking "G" applied to the applicant's case).

38. At the public hearing before the Chamber in cases no. CH/96/21 *Čegar*, no. CH/97/41 *Marčeta* and no. CH/97/45 *Hermas*, the Agent of the Federation stated, in relation to the legal status of the Rome Agreement, as follows (see case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 18, Decisions and Reports 1998):

> "Legally, the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law."

39. This view of the direct applicability as domestic law of the Rules of the Road is confirmed and elaborated in the decision (no. Kž-465/97) of the Supreme Court of the Federation of 28 May 1998 in the case of D.B. The accused in this case had been found guilty of war crimes against the civilian population under Article 142 of the Criminal Law by the (then) High Court in Mostar in the absence of an opinion by the ICTY Prosecutor on the charges against him. The Supreme Court quashed the conviction and sent the case back to the High Court for renewed proceedings with the following reasoning:

> "… the courts in the Federation of Bosnia and Herzegovina are obliged to apply the Rome Agreement ('The Rules of the Road'). According to the Rome Agreement ('The Rules of the Road'), the court of first instance cannot begin a criminal procedure before the Prosecutor of the ICTY reviews the indictment and gives his or her opinion on whether the indictment is consistent with international legal standards. This Court is also of the opinion that doing so violated Article 349, paragraph 1(4) of the Law on Criminal Procedure, because an approval or opinion of the competent authority necessary for the criminal proceedings was not previously obtained. This Court finds a violation of the provisions of an international agreement (the Rome Agreement), that has been signed and approved by Bosnia and Herzegovina, and the courts in the Federation of Bosnia and Herzegovina are obliged to apply it."

IV. COMPLAINTS

40. The applicant complains that his right to liberty and security of person, protected by Article 5 paragraph 1 of the Convention, was violated by his arrest and detention in violation of the Rules of the Road.

41. The applicant also claims that his trial and conviction disregarding "the binding opinion expressed by the ICTY Prosecutor" amounted to a violation of his rights protected by Article 7 of the Convention.

42. The applicant further complains of several violations of his rights as an accused person in relation to the criminal proceedings against him. He complains of a lack of impartiality of the Prosecutor and the courts and alleges that the way in which trial against him was conducted disregarding the binding opinion expressed by the ICTY Prosecutor, indicates the intention of the judicial organs to impute to him acts for which no evidence existed. He further complains that his right to have the witnesses against him examined and to obtain the attendance and examination of witnesses on his behalf, enshrined in Article 6 paragraph 3(d), were violated in connection with the evaluation by both the first and the second instance court of the witness, in particular defence witness, testimony. He also submits that he did not have unhindered contact to his lawyer in violation of Article 14 paragraph 3(b) of the International Covenant on Civil and Political Rights ("ICCPR"). He finally complains that his right not to be compelled to confess guilt, protected by Article 14 paragraph 3(g) of the ICCPR, was violated by the beating inflicted on him before the first interrogation by the investigating judge took place.

V. SUBMISSIONS OF THE PARTIES

1. The respondent Party

43. As to admissibility, the respondent Party submits that the application is inadmissible on the ground that the Chamber is incompetent *ratione materiae* to consider alleged violations of the Rules of the Road. The respondent Party stresses that the ICTY was established by an international procedure and appears to argue that only the ICTY would be competent to adjudicate the applicant's complaint of a violation of the Rules of the Road. The respondent Party also argues that the applicant has not exhausted the available domestic remedies as, at the time of the Federation's observations, the request for review of the criminal proceedings in his case was still pending.

44. In case the Chamber should find the application admissible, the respondent Party argues that the applicant's arrest and pre-trial detention were in accordance with the law, as he was accused of crimes for which pre-trial detention is mandatory.

45. The respondent Party further disputes that the applicant was maltreated before his statement to the investigative judge on 4 June 1996. It adds that in any case, even if his allegation was true, it would be irrelevant on the ground that his statement to the investigative judge was then rendered in the presence of his defence lawyer.

46. The respondent Party maintains that the indictment was amended so as to render it compatible with the opinion of the ICTY Prosecutor.

47. With regard to the applicant's trial, the respondent Party submits that the applicant had sufficient time to prepare his defence with the assistance of an attorney, and that numerous witnesses for the defence were heard at the trial and the facts accurately and impartially assessed.

2. The applicant

48. The applicant maintains his complaints. As to the exhaustion of domestic remedies, he submits that the request for review is an extraordinary remedy which does not fall among the remedies to be exhausted for the purposes of Article VII(2)(a) of the Agreement.

VI. OPINION OF THE CHAMBER

A. Admissibility

49. 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. According to Article VIII(2)(a), the Chamber shall consider whether effective domestic remedies exist and whether the applicant has demonstrated that they have been exhausted. Under Article VIII(2)(b), the Chamber shall not address any application which is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement. Article VIII(2)(c) states the Chamber shall dismiss any application which it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right of petition.

1. As to the admissibility of the application against Bosnia and Herzegovina

50. The applicant directs his application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. The Chamber notes that Article III paragraph 1 of the Constitution of Bosnia and Herzegovina establishes which matters are the responsibility of the institutions of the State of Bosnia and Herzegovina. The administration of justice is not among them, with the exception of "international and inter-Entity law enforcement". The applicant has not provided any indication that Bosnia and Herzegovina could in any way be responsible for the actions he complains of, nor can the Chamber on its own motion find any such evidence. The application is therefore incompatible *ratione personae* with the Agreement insofar as it is directed against Bosnia and Herzegovina.

2. As to the Chamber's competence to adjudicate violations of the Rules of the Road

51. The Federation argues that the application is inadmissible on the ground that the Chamber is incompetent *ratione materiae* to consider alleged violations of the Rules of the Road. It stresses that the ICTY was established by an international procedure and appears to argue that only the ICTY would be competent to adjudicate the applicant's complaint of a violation of the Rules of the Road.

52. The Chamber notes that under the Rules of the Road the ICTY is competent to review arrest warrants and indictments where a person is suspected or accused of a serious violation of international humanitarian law. There is no provision in the Rules of the Road, nor in the Statute or the Rules of Procedure of the ICTY, to the effect that the ICTY is competent to investigate and judge alleged violations of the Rules of the Road by the Federation authorities.

53. The Chamber also recalls that, in several previous cases, it has found that it is the responsibility of the Federation to ensure that its organs comply with the Rules of the Road, and that a failure to do so constitutes a violation of the Agreement (see, e.g., the aforementioned *Hermas* decision, paragraphs 46-47, and case no. CH/98/1374, *Pržulj*, decision on admissibility and merits delivered on 13 January 2000, paragraphs 133-137). To sum up, this challenge to the Chamber's jurisdiction over the present case is groundless.

3. As to the complaint under Article 7 of the Convention

54. The applicant complains that his trial and conviction for offences going beyond those covered by the opinion of the ICTY Prosecutor violated his rights guaranteed by Article 7 of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

55. The Chamber notes that this provision, at least its first paragraph, enshrines the principle of *nullum crimen sine lege, nulla poena sine lege*. In the present case, the acts on account of which the applicant was found guilty constituted criminal offences under Article 142 of the, then applicable, Criminal Law of the SFRY (see paragraph 29 above). The allegation that the applicant was found guilty by the Cantonal Court and the Supreme Court of certain acts for which, according to the opinion of the ICTY Prosecutor, there was not sufficient evidence to raise criminal charges, does not raise any issue under Article 7 of the Convention. The complaint under this provision is therefore inadmissible as manifestly ill-founded.

4. As to the complaints under Article 14 of the ICCPR

56. The applicant further complains of violations of his rights to have unhindered contact to his counsel and not to be compelled to confess guilt, enshrined in Article 14 of the ICCPR, paragraphs 3(b) and 3(g) respectively.

57. The Chamber recalls that its jurisdiction extends to the examination of alleged or apparent violations of the European Convention on Human Rights and of discrimination on any ground mentioned in Article II(2)(b) of the Agreement in the enjoyment of the rights guaranteed by the international agreements listed in the Appendix to the Agreement, among them the ICCPR. The applicant does not explicitly allege that he was discriminated against in the enjoyment of the rights guaranteed by Article 14 paragraphs 3(b) and 3(g) of the ICCPR, nor can the Chamber find such discrimination on its own motion. Accordingly, the Chamber has no jurisdiction *ratione materiae* to consider these complaints under the provisions mentioned by the applicant. This shall not, however, preclude the Chamber from examining the substance of the complaints under Article 6 of the Convention, insofar as it raises issues under that provision.

58. The Chamber notes that the applicant's complaint that he was beaten up by a prison guard before his first interrogation by the investigating judge, could raise issues in relation to the right not to be subjected to inhuman or degrading treatment protected by Article 3 of the Convention. The applicant, however, has not made a complaint under that provision, and the Chamber considers that the allegations of ill-treatment are not sufficiently substantiated for it to raise the issue *ex officio*.

5. As to the exhaustion of domestic remedies

59. It is also argued that the applicant has not exhausted the available domestic remedies, as he submitted a request for review, which was pending at the time of the application. The Chamber notes that a request for review is an extraordinary remedy that need not be exhausted for the purposes of Article VIII(2)(a) of the Agreement. Consequently, the Chamber finds that the applicant has complied with the requirements of that provision.

6. Conclusion as to admissibility

60. To sum up, the Chamber declares the application admissible in relation to Article 5 paragraph 1 and Article 6 of the Convention, insofar as it is directed against the Federation of Bosnia and Herzegovina. The remainder of the application is inadmissible.

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 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 in the Convention.

1. Article 5 paragraph 1 of the Convention

62. The applicant complains that he was unlawfully arrested and detained in violation of Article 5 paragraph 1 of the Convention, which in the relevant part reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> (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;
> …"

63. Under the Rules of the Road, "persons … 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". Charges of genocide and war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer.

64. As stated by the respondent Party at the public hearing held before the Plenary Chamber in the cases of *Čegar, Marčeta* and *Hermas*, and held also by the Supreme Court of the Federation (see paragraphs 38-39 above), the Rules of the Road apply as domestic law in the Federation. The Rules of the Road had been circulated to all the courts in the Federation, and the Sarajevo Cantonal Public Prosecutor's office could not have been unaware of them.

65. It is undisputed that the applicant was arrested on 2 June 1996 on charges of genocide and war crimes and that the opinion of the ICTY Prosecutor, stating that there was sufficient evidence by international standards to justify proceedings for unlawful confinement or imprisonment of civilians, was obtained only on 7 May 1997. No order, warrant or indictment against the applicant had been preliminarily submitted to the ICTY after the Rules of the Road entered into force on 18 February 1996, as required by these Rules. The applicant's arrest and detention from 2 June 1996 to 7 May 1997, i.e. for more than 11 months, were therefore not "lawful" as required by paragraph 1(c) of Article 5.

66. As to the applicant's detention after 7 May 1997, the Chamber notes that the "unlawful confinement or imprisonment of civilians" was a war crime against the civilian population under Article 142 of the Criminal Law of the SFRY, punishable with the death penalty or imprisonment for at least five years. The applicant's pre-trial detention after 7 May 1997 appears therefore to have been in accordance with Article 191 of the Law on Criminal Procedure (see paragraph 32 above).

67. The Chamber concludes that the applicant's arrest and detention from 2 June 1996 to 7 May 1997 constituted a violation of Article 5 paragraph 1 of the Convention.

2. Article 6 of the Convention

68. The applicant has raised a number of complaints in relation to the pre-trial proceedings and the first instance and appeal trials in his case (see paragraphs 41 and 42 above), which the Chamber shall examine under Article 6 paragraph 1 and paragraph 3(b), (c) and (d) of the Convention, which insofar as relevant to the case at hand read:

> "1. In the determination … of any criminal charge against him, everyone shall be 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:
> …
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing …;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> …"

69. The Chamber recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 (see Eur. Court HR, *Barberà, Messegué and Jabardo v. Spain* judgment of 23 September 1987, Series A no. 146, p. 31, paragraph 67; and the Chamber's case no. CH/98/638, *Damjanović*, decision on admissibility and merits delivered on 11 February 2000, paragraph 79); it will therefore have regard to them when examining the facts under paragraph 1.

70. The Chamber shall consider the applicant's complaints under three headings: (a) alleged violation of the Rules of the Road, (b) alleged violation of the applicant's right to a fair trial and to assistance of a lawyer in the preparation of his defence by way of the restrictions on his contacts with his lawyer, and (c) alleged violation of the applicant's right to obtain the attendance and examination of defence witnesses under the same conditions as prosecution witnesses.

(a) The alleged violation of the Rules of the Road

71. The applicant complains of a lack of impartiality of the Cantonal Prosecutor and the courts and alleges that the conduct of the trial against him, disregarding the binding opinion expressed by the ICTY Prosecutor, indicates the intention of the judicial organs to impute to him acts for which no evidence existed. The Chamber will address this issue from a slightly different angle and examine whether the trial and conviction of the applicant, allegedly in violation of the opinion of the ICTY Prosecutor, constituted a violation of the right to a fair trial enshrined in Article 6 of the Convention. To this end, the Chamber will first examine whether the Rules of the Road apply to criminal trials. If so, the Chamber will then proceed to examine whether there was a violation of the Rules of the Road in relation to the applicant's trial and, if so, whether this violation resulted in a violation of the applicant's right to a fair trial.

(i) *Whether a violation of the Rules of the Road would raise issues under Article 6 of the Convention*

72. The Chamber notes that it has already found, in the present case as in several previous cases before it, a violation of the right to liberty and security of person under Article 5 paragraph 1 of the Convention, on the ground that the Rules of the Road were not respected in the arrest and pre-trial detention of the applicant. However, the complaint that the applicant's trial and conviction, which he alleges to have been in violation of the Rules of the Road, amounted to a violation of Article 7 of the Convention has been found manifestly ill-founded by the Chamber (see paragraph 55 above).

73. The Chamber must now determine whether the allegation that the applicant was found guilty of crimes which were not acceptable according to the opinion given by the ICTY Prosecutor in accordance with the Rules of the Road gives rise to an issue under Article 6 of the Convention. The

Chamber notes that, on their face, the Rules of the Road appear to apply only to the arrest and detention of a person suspected of serious violations of international humanitarian law, and not to the determination of criminal charges against that person at trial. Indeed, the second sub-paragraph of paragraph 5 of the Rome Agreement of 18 February 1996 reads:

> "Persons … 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. …"

74. The Chamber recalls that, in its judgment of 16 June 1998 in the applicant's case, the Supreme Court stated that the opinion of the ICTY Prosecutor was, for the purposes of trial and conviction of the applicant, not binding (see paragraph 21 above).

75. The Chamber, however, cannot disregard the fact that a narrow interpretation of the scope of the Rules of the Road would frustrate the purpose of paragraph 5 of the Rome Agreement of 18 February 1996, which significantly is entitled "Cooperation on War Crimes and Respect for Human Rights". The object and purpose of the Rules of the Road should not be interpreted as being limited to preventing arbitrary arrests or that the exercise of the right to freedom of movement within Bosnia and Herzegovina and of the right to return of refugees and internally displaced persons are obstructed by arbitrary arrests on groundless war crimes charges. These provisions also aim at ensuring that the necessary prosecution of persons suspected of serious violations of international humanitarian law is carried out in accordance with international standards, not only at the ICTY in The Hague, but also and especially before the courts in Bosnia and Herzegovina, where these crimes took place. A prerequisite for the prosecution of war crimes in accordance with international fair trial standards is to avoid charges being raised and persons being put to trial where no reasonable grounds exist to believe that they committed the crimes they are accused of. It is therefore necessary that the application of the Rules of the Road extends beyond the moment of the arrest of a war crimes suspect to the determination of the charges against him at trial.

76. The Chamber notes that this interpretation of the scope of the Rules of the Road is supported also by the text of the standard markings (see paragraph 37 above), according to which the ICTY Prosecutor takes a view "for the purposes of determining whether criminal proceedings should be continued or initiated", and not only for the purpose of determining whether the applicant should be arrested on certain charges. In the applicant's case the ICTY Prosecutor expressed a view as to "whether criminal proceedings should be pursued" (see paragraph 12 above).

77. The Chamber must next address the question whether the "Rules of the Road" are adhered to by obtaining the opinion of the ICTY Prosecutor, or whether this opinion is a "binding opinion" which has to be complied with by the domestic authorities, as submitted by the applicant. The Chamber notes that under paragraph 5 of the Rome Agreement persons may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order or indictment, which not only was reviewed by the ICTY Prosecutor, but also "deemed consistent" with international legal standards. The only possible conclusion to be drawn from this wording is that, where the order or indictment is not deemed consistent with international legal standards, the charges have to be dropped. On the basis of the correspondence in the case-file, the Chamber furthermore notes that the Federal Prosecutor, the Federation Minister of Justice and the Office of the High Representative all shared the view that the obligation to comply with the opinion expressed by the ICTY Prosecutor was not met by simply obtaining the opinion. This obligation also required the Cantonal Prosecutor and the courts to bring the charges against the applicant in line with that opinion (see paragraph 14 above). The Chamber finally notes that in a decision rendered on 28 May 1998 – three weeks before its judgment in the applicant's case – the Supreme Court of the Federation held that, where an accused is brought to trial on war crimes charges that have not been previously approved by the ICTY Prosecutor, the court can only issue a judgment "rejecting the charges" under Article 349 paragraph 1(4) of the Criminal Procedure Law (see paragraph 39 above). This means that the court can only make a finding that it is precluded from deciding on the accused's guilt or innocence because a necessary procedural pre-condition for deciding the case on the merits is lacking.

78. The Chamber accordingly concludes that the obligation to comply with the opinion expressed by the ICTY Prosecutor extends to the charges brought against a person accused of serious violations of international humanitarian law at trial, and, as a consequence, to the determination of those criminal charges at trial. A violation of this obligation by the courts is therefore capable of raising issues under Article 6 of the Convention.

(ii) *Whether the applicant's trial and conviction involved a violation of the Rules of the Road and, if so, a violation of Article 6 paragraph 1 of the Convention*

79. Turning back to the specific case before it, the Chamber notes that the indictment against the applicant was amended several times between 7 May 1997, when the opinion of the ICTY Prosecutor was obtained, and the final indictment of 12 December 1997. These amendments consisted of a progressive reduction of the charges raised against the applicant. However, the judgment of the Cantonal Court of 19 January 1998, which substantially reflects the charges brought by the prosecution in its last indictment, still finds the applicant guilty of charges for which, according to the opinion of the ICTY Prosecutor, "the evidence is insufficient by international standards to provide reasonable grounds for believing that [V.Č.] may have committed" the offence. These findings of guilt concern the applicant's complicity in the ill-treatments and killings carried out in the "Livade" prison camp and the killing of a Muslim civilian with a hand grenade. There is no doubt that these findings constituted a violation of the Rules of the Road.

80. In this regard the Chamber also notes that, in reviewing the indictment or arrest warrant issued by the domestic authorities, the ICTY Prosecutor establishes whether, on the papers transmitted by the domestic authorities, there is sufficient evidence to provide reasonable grounds for believing that the suspect or accused has committed the serious violations of international humanitarian law with which he is charged (see the text of the opinion of the ICTY Prosecutor in the applicant's case, paragraph 12 above). It is apparent that the probatory threshold for a finding of guilt at trial by a court on certain charges must be higher than the threshold for a positive opinion of the ICTY Prosecutor regarding the arrest of a suspect on the same charges. It has not been claimed that during the trial significant evidence confirming the charges against the applicant was available, which had not been available when the opinion of the ICTY Prosecutor was requested.

81. It is not the Chamber's task to substitute its own assessment of the charges for that of the Cantonal Court. The Chamber considers, however, that the fact that the Cantonal Court, in violation of its obligations under the Rules of the Road, found the applicant guilty on charges for which according to the ICTY Prosecutor no reasonable grounds existed, raises doubts as to whether the Cantonal Court's examination of these charges was impartial and fair. In this respect, the Chamber also notes that the Cantonal Court took no steps to counteract the Cantonal Deputy Prosecutor's open defiance of the limits imposed on his action by the opinion of the ICTY Prosecutor (see paragraphs 17 and 18 above).

82. In his appeal to the Supreme Court of the Federation, the applicant complained, *inter alia*, of the fact that he had been found guilty of charges excluded by the opinion of the ICTY Prosecutor. In its judgment of 16 June 1998 the Supreme Court found that there was reliable evidence only for the applicant's involvement in the illegal arrests and internment of the Bosniak population in the "Livade" camp (see paragraph 23 above), which is the charge for which the ICTY Prosecutor had concluded that the evidence was sufficient to justify proceedings. Nonetheless, the Supreme Court conspicuously avoided to state that the first instance court had erred in finding the applicant responsible for the ill-treatments and killings that took place in the detention camp and of killing one Muslim civilian with a hand grenade, notwithstanding the fact that the applicant's appeal was directed specifically against these findings. In this connection, it should be noted that the Supreme Court dismissed as ill-founded the applicant's complaint that there was no ICTY approval for the prosecution of these charges, finding that the ICTY Prosecutor just "gives an opinion". Not even three weeks earlier, the Supreme Court (sitting in a panel composed in three of its five elements of the same members) had decided in another case that the ICTY Prosecutor's approval was a necessary pre-condition for a finding on war crimes charges, in the absence of which the court could only terminate the trial by rejecting the charges. Furthermore, in reducing the applicant's sentence, the Supreme Court mentioned aggravating and mitigating circumstances, but "forgot" that the factual basis on which it found the applicant guilty had radically changed in comparison to the first instance

judgment and that its judgment did not contain a finding of guilt as to the most serious crimes of which the applicant had been found guilty by the Cantonal Court.

83. These shortcomings in the Supreme Court's reasoning can hardly be explained as an oversight. The Chamber concludes, on the contrary, that the ambiguous and contradictory stance taken by the Supreme Court in relation to the core argument of the applicant's appeal and its failure to make a clear ruling on the applicant's guilt under the charges excluded by the opinion of the ICTY Prosecutor is incompatible with the requirements of a fair trial. There has therefore been a violation of Article 6 paragraph 1.

(b) Restrictions on the applicant's right to legal assistance in the preparation of his defence

84. The applicant complains that during the initial phase of his detention he had no contact with his lawyer and that during his first appearance before the investigating judge he was intimidated by the beating inflicted on him just before it. The Chamber has already declared these complaints inadmissible in relation to Article 14 paragraph 3(b) and paragraph 3(g) of the ICCPR (paragraphs 56 and 57 above). The Chamber has also found that the complaint of ill-treatment is not sufficiently substantiated to be considered on its own (paragraph 58 above). It shall now examine the complaint concerning the restrictions on the applicant's contacts with his lawyer under Article 6 paragraph 1 and paragraph 3(b) and (c) of the Convention. In this respect, the Chamber will also take into account the applicant's argument that the intimidation that resulted from the beating had adverse consequences on the rest of the proceedings in his case, because he did not have the possibility to communicate with his lawyer before the interrogation by the investigating judge.

85. The Chamber notes that the Convention does not expressly guarantee the right of an accused to communicate freely with his defence counsel, for the preparation of his defence or otherwise. As the European Commission on Human Rights has stated, the fact that this right is not specifically mentioned in the Convention does not mean that it may not be inferred from its provisions, and in particular those of Article 6 paragraph 3(b) and (c). The Commission has recognised that the possibility for an accused to communicate freely with his lawyer is a fundamental part of the preparation of his defence (*Can v. Austria* case, Opinion of the European Commission of Human Rights as expressed in the Commission's report of 12 July 1984, Series A no. 96, p. 17, paragraph 52). However, the Commission has added that, in the absence of an express provision, it cannot be maintained that the right to have conversations with one's lawyer and exchange confidential information with him, as implicitly guaranteed by Article 6 paragraph 3, is without restrictions.

86. In the same Opinion in the *Can* case, the Commission extensively analysed the relevance of Article 6 paragraph 3(c) to the communication between a detained accused and his defence counsel. The Commission stated as follows (p. 17-18, paragraphs 54-57):

> "54. The Commission now turns to the consideration of the case under Article 6 paragraph 3(c) of the Convention, which guarantees the right of the accused to defend himself *inter alia* through legal assistance of his own choosing. Unlike Article 6 paragraph 3(b) this guarantee is not especially tied to considerations relating to the preparation of the trial, but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings. The Commission refers in this context to the dictum of the European Court of Human Rights in the *Artico* case (Eur. Court HR, Series A no. 37, pp. 15-16, paragraph 33) where it was stated with particular reference to this provision "that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".
> 55. In order to find out whether Article 6 paragraph 3(c) requires that the remand prisoner be given a right to communicate in private with his defence counsel at the initial stage of the preliminary investigations, it is important to consider the functions which the defence counsel has to perform during this stage of the proceedings. They include not only the preparation of the trial itself, but also the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he

might wish to make in relation to his detention concerning its justification, length and conditions and generally to assist the accused who by his detention is removed from his normal environment.

56. Several of these functions are interfered with or made impossible if the defence counsel can communicate with his client only in the presence of a court official. The accused will find it difficult to express himself freely *vis-à-vis* his lawyer on the basic facts underlying the criminal charges because he must fear that his statement might be used, or might be forwarded for use against him by the court official who is listening. Under these circumstances it is e.g. difficult to discuss with the accused the question whether or not it is advisable in his case to make use of the right of silence, or to advise him to make a confession. The defence counsel will find it difficult to discuss the defence in general. Apart from these matters directly related to the defence, the accused might also find it difficult to raise complaints regarding his detention as he may fear reprisals if he expresses them in the presence of a court official. In this respect, it is not relevant whether such fears are justified.

57. For these reasons it is apparent that generally speaking the defence counsel cannot fulfil his tasks properly if he is not allowed to communicate with his client in private. Therefore it is in principle incompatible with the right to effective assistance by a lawyer as guaranteed by Article 6 paragraph 3(c) of the Convention to subject the defence counsel's contacts with the accused to supervision by the court. This does not mean, however, that the right of free contact with the defence counsel must be granted under all circumstances and without any exceptions. Any restrictions in this respect must however remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case."

87. In the present case heavy restrictions were imposed on the applicant's contacts with his defence counsel during the entire phase of preliminary investigations, as prescribed by the then applicable Article 74 of the Law on Criminal Procedure. The applicant did not have any access to legal assistance during the two days preceding his first interrogation. In the subsequent period, until the conclusion of the preliminary investigations and the issuing of the indictment against him, the applicant was granted contact with his lawyer only in the presence of the investigating judge or a court or prison official. In the legal system of Bosnia and Herzegovina the investigation proceedings are generally of crucial importance to the outcome of a criminal trial. The statement given by the applicant to the investigating judge on 4 June 1996 was relied on by the Cantonal Court in its judgment. The Supreme Court confirmed the Cantonal Court's reliance on the applicant's statement to the investigating judge. In these circumstances, the restrictions placed on the applicant's contacts with his lawyer in the preliminary investigation phase constituted an inadmissible interference with his right to adequately prepare his defence with the assistance of a lawyer.

88. The Chamber concludes that the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge, constitute a violation of the fair trial guarantee contained in paragraph 1 of Article 6 of the Convention, as well as a violation of the specific guarantees set out in paragraph 3(b) and (c) of that provision.

(c) Right of attendance and examination of defence witnesses

89. The applicant complains of a violation of Article 6 paragraph 3(d) of the Convention, in that no equal hearing was given to the testimony of defence witnesses, as opposed to the witnesses of the prosecution. However, in further explaining this complaint, the applicant states that:

"The Court fully rejected testimonies of the defence witnesses, stating that they were vague, while from the testimonies of the prosecution witnesses, it is clear that these were vague, particularly when referring to anything related to the applicant, [V.Č.]. All knowledge of the prosecution witnesses on [V.Č.] was circumstantial. The partiality of the Court in respect of the criminal responsibility of the defendant, [V.Č.], related also to the omission of the court to establish whether the persons detained had been civilians or military men".

90. From this submission it is apparent that the applicant's complaint actually refers to the evaluation of the prosecution and defence evidence by the Cantonal Court, and not to the right to "have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", as guaranteed by Article 6 paragraph 3(d). The Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, and case no. CH/99/2629, *Nurković*, decision on admissibility of 8 December 1999, paragraphs 9 and 10, Decisions August-December 1999).

91. As to the complaint that no equal hearing was given to the testimony of defence witnesses as opposed to the witnesses of the prosecution, the Federation submits that, notwithstanding the difficulties in obtaining the attendance of witnesses residing in the Republika Srpska, the witnesses summoned on behalf of the applicant attended the trial and were close to equal in number to those called on behalf of the prosecution. The respondent Party further submits that the courts took into consideration the testimony of the defence witnesses and the documents submitted by the applicant.

92. The Chamber finds that these submissions by the Federation are not seriously challenged by the applicant and not contradicted by the judgments and the court records in the case-file. Therefore the applicant's complaint does not reveal a violation of Article 6 paragraph 3(d) of the Convention.

(d) Conclusion as to the complaints under Article 6 of the Convention

93. The Chamber finds that there has been a violation of the applicant's right to a fair trial, in the way in which the Cantonal Court and the Supreme Court disregarded the binding opinion of the ICTY Prosecutor, as well as in the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge. The latter also constitute a violation of the specific guarantees set out in paragraphs 3(b) and 3(c) of Article 6. Finally, the Chamber concludes that the application does not reveal a violation of Article 6 paragraph 3(d) of the Convention.

VII. REMEDIES

94. 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.

95. The Chamber has found that the applicant's right to a fair trial was seriously violated in several respects, during the preliminary investigation phase, before the Cantonal Court and before the Supreme Court. It therefore finds it appropriate to order the Federation of Bosnia and Herzegovina to grant the applicant a re-trial, should the applicant again lodge a petition to this effect.

96. The applicant claims pecuniary compensation in the amount of 5,000 Convertible Marks (*Konvertibilnih Maraka*, KM) for each month of detention from 2 June 1996 to the date of his compensation claim, 28 October 1999. He thus claims overall compensation in the amount of KM 210,000.

97. The Chamber notes that the applicant's compensation claim relies on the assumption that his detention since 2 June 1996 has been unlawful in its entirety. The Chamber recalls that it can order remedies only for violations it has found. In the present case, the Chamber has found that the applicant was unlawfully detained between 2 June 1996 and 7 May 1997, i.e. for approximately 11 months. It will therefore order pecuniary compensation only for that period of detention.

98. In assessing the appropriate amount of compensation the Chamber has further taken into consideration that the applicant has not made any submissions as to pecuniary damage caused to

him by his detention. The Chamber will therefore consider the applicant's compensation uniquely as a claim for compensation for moral damages. The Chamber has finally taken into account that the applicant's detention on remand is counted as time served for the purposes of the sentence imposed on him by the Cantonal Court. This has allowed the applicant to be released on probation already on 1 December 1999, notwithstanding the sentence of eleven years of imprisonment imposed by the Cantonal Court on 19 January 1998, reduced by the Supreme Court to nine years.

99. In the light of these considerations, the Chamber decides to order the respondent Party to pay to the applicant KM 4,000 as compensation for the unlawful detention suffered between 2 June 1996 and 7 May 1997.

VIII. CONCLUSIONS

100. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible in relation to the complaints under Articles 5 and 6 of the European Convention on Human Rights, insofar as these complaints are directed against the Federation of Bosnia and Herzegovina;

2. unanimously, to declare inadmissible the applicant's complaints under Article 7 of the Convention and under Article 14 of the International Covenant on Civil and Political Rights, insofar as these complaints are directed against the Federation of Bosnia and Herzegovina;

3. unanimously, to declare inadmissible all the applicant's complaints, insofar as they are directed against Bosnia and Herzegovina;

4. unanimously, that the arrest and detention of the applicant from 2 June 1996 to 7 May 1997 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 Human Rights Agreement;

5. unanimously, that the way in which the Cantonal Court and the Supreme Court disregarded the binding opinion of the ICTY Prosecutor, as well as the restrictions on the applicant's contacts with his lawyer during the preliminary investigation phase, in combination with the use made of his statement to the investigating judge, constituted a violation of the right of the applicant to a fair trial in the determination of criminal charges against him as guaranteed by Article 6 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that the restrictions placed on the applicant's contacts with his lawyer during the preliminary investigation phase constituted a violation of the right of the applicant to the assistance of a lawyer in the preparation of his defence, as guaranteed by Article 6 paragraph 3(b) and (c) of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, that there has been no violation of the right of the applicant to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as guaranteed by Article 6 paragraph 3(d) of the Convention;

8. by 4 votes to 2, to order the Federation of Bosnia and Herzegovina to take all necessary steps to grant the applicant a re-trial, should the applicant lodge a petition to this effect;

9. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, 4,000 Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for the unlawful deprivation of his freedom from 2 June 1996 to 7 May 1997;

10. unanimously, that simple interest at an annual rate of 4 per cent will be payable on the amount awarded in conclusion number 9 above from the expiry of the three-month period set for such payment until the date of final settlement of the amount due to the applicant; and

11. 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 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)
Giovanni GRASSO
President of the Second Panel

Annex Partly dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Mr. Mehmed Deković

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Mr. Mehmed Deković.

PARTLY DISSENTING OPINION OF MR. VIKTOR MASENKO-MAVI, JOINED BY MR. MEHMED DEKOVIĆ

For several reasons, I cannot support conclusion no. 8, which provides for a re-trial in the applicant's case. It is now becoming a general tendency in the Chamber's practice to issue orders of a consequential nature (see cases nos. CH/98/638, *Damjanović*, CH/98/1374, *Pržulj*, and CH/98/1786, *Odobašić*). Considering the particular features of the existing judicial system in the country – taking into account the fact that it is still burdened by the devastating consequences of the recent war – one cannot say that in all of the cases it would be inappropriate for the Chamber to give such orders. Thus, for example, in the *Pržulj* and *Odobašić* cases the consequential orders to carry out investigations were appropriate. However, the nature of the consequential order in the present case – like in the *Damjanović* case, in which I also voted against the order providing for a re-trial – is different. In my opinion, this kind of order is totally unacceptable for the following reasons.

The Chamber has no mandate to issue such orders. With the order, the Chamber in fact assumes the role of an appellate court that can order the lower instance courts to reconsider a case. As is evident from the provisions of Annex 6, the Chamber has no such powers. Its decisions have no direct effect in the judicial system of Bosnia and Herzegovina; it can only impose on the respondent Party an obligation to bring about a certain result.

The conditional character of the order (it provides for a re-trial, "should the applicant lodge a petition to this effect"), formulated in the light of the fact that the applicant has been released on probation, makes it even more confusing. Firstly, if the order is conditioned on the actions of the applicant, can it be considered a remedy? Secondly, there is a clear pre-judgment in respect of the end-result of the applicant's petition: if there is a petition, there should be a re-trial. Thirdly, one can only wonder what would happen if the re-trial would end with the applicant being convicted on the charges excluded by the opinion of the ICTY Prosecutor.

Moreover, with this kind of orders, the Chamber is putting itself in a rather difficult position. It has to establish some general principles – which would be extremely difficult – as to which circumstances would warrant an order for a re-trial. What would be the guiding rule in determining the need for such an order? The weight and seriousness of the violation found? How can it be objectively decided that some of the violations found give reason to order a re-trial and others not? The more one thinks about the consequences of this order, the more one becomes embarrassed.

(signed)
Viktor Masenko-Mavi

(signed)
Mehmed Deković

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 10 May 2002)

Case no. CH/98/1373

Aleksandar BAJRIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 9 April 2002 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. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to 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 was arrested by the police of the Federation of Bosnia and Herzegovina for allegedly unlawfully possessing munitions after the car he was driving was stopped on 22 May 1996. The applicant's detention was thereafter extended several times at the request of the Municipal Prosecutor who allegedly was also investigating the applicant for war crimes. The applicant was finally released following an order of the Cantonal Court in Bihać of 24 March 1997 after the Municipal Prosecutor withdrew its charges of war crimes as against the applicant. The charges related to the possession of munitions were dropped by the Court of First Instance in Sanski Most on 27 September 2000 as the Municipal Prosecutor indicated that it would no longer pursue the case.

2. The case mainly raises issues under Articles 3 and 5 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. This case was referred to the Chamber by the Ombudsperson for Bosnia and Herzegovina (hereinafter "the Ombudsperson") on 2 December 1998 at the applicant's request in accordance with paragraph 5 of Article V and paragraph 1 of Article VIII of Annex 6 to the Agreement. It was registered with the Chamber on 23 March 1999. It originated in an application lodged with the Ombudsperson on 11 December 1996 against the Federation of Bosnia and Herzegovina.

4. On 24 May 1999 the Chamber transmitted the application to the respondent Party for observations on Article 3, Article 5 paragraphs 1 and 5, Article 6 and Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement pursuant to Rule 49(3)(b) of the Chamber's Rules of Procedure.

5. The respondent Party's written observations on admissibility and merits were received on 23 July 1999. On 27 August 1999 the applicant responded to the above and submitted his claim for compensation. The respondent Party's observations on these claims were received on 19 October 1999. Further observations were received from the respondent Party on 17 April 2000 and from the applicant on 29 November 2001.

6. By letter sent 27 February 2000, the respondent Party was requested to supply evidence that the domestic procedures referred to in its observations on admissibility and merits provide an effective remedy and to provide a copy of the decision of the First Instance Court of Sanki Most of 4 February 1999 in which the court declares itself incompetent to deal with the applicant's request for compensation.

7. In its response of 17 April 2000 the respondent Party stated that it would provide court decisions demonstrating that the domestic procedures provide an effective remedy. The respondent Party, however, has failed to do so until the present date. The respondent Party submitted the requested copy of the decision of the first-instance Court of Sanki Most of 4 February 1999 in which the court declares itself incompetent.

8. On 27 April 2000 the applicant submitted further observations.

9. On 16 November 2001 the Chamber asked the respondent Party for more information in regard to the original application of the applicant to the Human Rights Ombudsperson. This information was received on 29 November 2001.

10. On 16 January 2002 the Chamber re-transmitted the case to the respondent Party, this time asking for observations on Article 5, paragraphs 2 and 3 of the Convention. These observations were received on 18 February 2002 and on 22 February 2002 sent to the applicant for his comment. The Chamber received the applicant's response on 19 March 2002. On 3 March 2002 the Chamber received additional information regarding the compliance of the respondent Party with the "Rules of the Road".

11. The Chamber deliberated on the admissibility and merits of the case on 10 March 1999, 14 May 1999, 8 February 2000, 9 November 2001, 8 January 2001 and 9 April 2002. On 9 April 2002 the Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

12. The following is a summary of the facts as found in the application, the observations of the parties, the findings of the International Police Task Force ("IPTF") and the documents submitted to the Ombudsperson and the Chamber.

13. On 22 May 1996 the applicant, who is from a mixed Serb-Bosniak marriage, was driving through Sanski Most on the road from Prijedor to Ključ when he was arrested for unlawful possession of munitions. The applicant was detained in a military camp in Tomina, and later on the same day brought to the police station in Sanski Most for questioning. His car was confiscated, but has subsequently been returned to the applicant's family. On the same day, 22 May 1996, the Municipal Court in Sanski Most ordered that the applicant be detained for 30 days for the purpose of investigating whether he had committed the criminal act of illegal possession of weapons and explosive materials as prohibited by Article 213 paragraphs 1 and 2 of the Criminal Law of the Republic of Bosnia and Herzegovina. The respondent Party claims that only one hour later, at 11 a.m., this decision was delivered to the applicant. The applicant disputes that he was delivered the decision on 22 May 1996. He claims that he only saw and signed the decision on 6 June 1996. He further claims that he was only arrested in the evening hours of 22 May 1996 after 4 p.m. and therefore could not possibly have been delivered a decision on his arrest at 11 a.m. the same day. The applicant alleges that he was not heard in court by the investigative judge in regard to his pre-trial detention.

14. The applicant alleges that during the time of his detention he was subject to severe beatings on numerous occasions by police of Sanski Most and persons in civil outfit, one of whom the applicant recognized to be Elvedin Rizvan, a person of Bosniak origin from his home town Prijedor. The applicant claims that he obtained heavy injuries to his head and chest. As a result he suffered from headaches, a numb feeling in his face, problems with his left eye and impairment of his ability to hear with his left ear. He further claims that he suffered from a contusion of the ribs on the left side of his chest which made it difficult for him to breathe deeply. The applicant submitted to the Chamber medical documents to support his claims. There is also evidence contained in the IPTF reports that the applicant was subject to physical ill-treatment of a serious nature during his detention. Most of this is based on hearsay, reporting claims made by co-detainees of the applicant. In a report dated 24 June 1996 the IPTF monitor Kim Meyer reports that he visited the applicant who had suffered injuries.

15. The applicant further claims that he was mentally abused and that he was repeatedly insulted on the basis of his ethnic origin and residence in the Republika Srpska. In particular he claims that he was repeatedly referred to as "Chetnik", an expression which the applicant considers to be a derogatory term for persons of Serb origin. He claims that he was not registered as being detained and that he was hidden during visits of the IPTF on several occasions so that the IPTF could not find out about the mistreatment. The respondent Party disputes that the applicant was physically injured during his detention and that he suffered long-lasting pain.

16. On 3 June 1996 the First Instance Prosecutor in Sanksi Most submitted to the First Instance Court in Sanski Most a request for investigation against the applicant because of the suspicion of having committed the criminal act of illicit possession of weapons and explosives under Articles 213 paragraphs 1 and 2 of the RBiH Criminal Code.

17. On or about 6 June 1996 the applicant was transferred to the prison in Bihać. The applicant claims that only then he was for the first time informed of the charges against him, as he was given a copy of the decision of the Municipal Court ordering his pre-trial detention referred to in paragraph 13 above.

18. By decision dated 21 June 1996 the Higher Court in Bihać ordered that the applicant be detained for another 60 days (until 22 August 1996), pursuant to Articles 191(1) and 191(2) of the Law on Criminal Procedure of the Republic of Bosnia and Herzegovina for the purpose of hearing more witnesses in the investigation of the charges related to the alleged unlawful possession of munitions. The applicant had the right to appeal against this decision within 3 days from the moment of receipt of the decision. He did not appeal the decision.

19. A report prepared by the IPTF indicates that on 24 June 1996 the applicant was visited in the Bihać prison by two IPTF monitors. The memorandum describes various injuries of the applicant, including "scars over both eyes" and pain in his ribs which the applicant claimed to have received during multiple beatings while held at the Sanski Most police station.

20. By decision dated 21 August 1996 the Higher Court in Bihać ordered that the applicant be detained for another 30 days, but this time for the purpose of investigating alleged war crimes committed by the applicant. According to an "Incident Report" of the United Nations Civil Police ("UNCIVPOL") of the same date, the applicant had been brought to a hearing before a judge on that date. When the judge asked how he was being treated, the applicant replied that he currently was treated well, but that he had been beaten every day from his arrest on 22 May 1996 until 6 June 1996, when he was transferred from Sanski Most to Bihać. According to a report by the IPTF, the IPTF were told by the applicant on 22 August 1996 that a lawyer, Ms. Delista Delić, had *ex offcio* been assigned to him for the hearing on 21 August 1996, but that he had not been given the opportunity to consult with the lawyer prior to the hearing. In addition when the lawyer visited him the following days she allegedly told the applicant that she could not help him as he was a "political case" and requested her dismissal.The respondent Party disputes this and claims that the applicant was given the opportunity to consult with the lawyer.

21. In his observations, the applicant also states that 21 August 1996 was the first and only time that he was brought before a judge during his detention.

22. By decision dated 16 September 1996 the Higher Court in Bihać ordered an investigation into the alleged commission of war crimes by the applicant, pursuant to Article 142(1) of the Criminal Law of the SFRY and Article 159(1) of the Law on Criminal Procedure. The decision states that the applicant was suspected of having committed war crimes as a member of the army of the Republika Srpska, including murder, torture and robbery in May, June and July 1992, and specifically that he, as a member of a sniper group, in Prijedor shot and killed at least 10 civilians from the top of a building and also killed at least two others; physically abused others, including beating certain people and forcing one to eat grass; and robbed homes of other people. The applicant had the right to appeal against this decision within 3 days from the moment of receipt of the decision. The applicant did not appeal the decision.

23. By decision dated 19 September 1996 the Higher Court in Bihać, pursuant to Article 142 of the Criminal Law of the SFRY and Article 191(1) of the Law on Criminal Procedure, ordered the applicant detained for another two months (until 21 November 1996) for the purpose of hearing more witnesses in the investigation of the charges related to the alleged war crimes. The applicant had a right of appeal against this decision that had to be lodged within 3 days from the moment of receipt of the decision. The applicant did not appeal the decision.

24. On 12 November 1996 the investigative judge of the Higher Court in Bihać sent the case file to the International Criminal Tribunal for the former Yugoslavia in The Hague (the "ICTY") to review the case in accordance with the "Rules of the Road".

25. By decision dated 15 November 1996 the Supreme Court of the Federation ordered the applicant detained for another three months and six days (until 21 February 1997) for the purpose of continuing the investigation of the charges related to the alleged war crimes. According to a report of the IPTF from 14 November 1996, a lawyer had been assigned to the applicant.

26. By decision dated 17 February 1997, the Municipal Prosecutor's Office in Sanski Most (previously the First Instance Prosecutor's office) brought charges against the applicant concerning the illegal trade in munitions pursuant to Article 129(3) of the Criminal Code of Bosnia and

Herzegovina

27. By decision dated 20 February 1997 the Cantonal Court in Bihać ordered that the applicant be detained for another two months (until 21 April 1997) for the purpose of continuing the investigation of the charges related to the alleged war crimes. The applicant had the right to appeal against this decision within 3 days from the moment of receipt of the decision. The applicant did not appeal the decision. On the same day the Cantonal Prosecutor's Office in Bihać indicted the applicant for war crimes under Article 142 paragraph 1 of the SFRY Criminal Code.

28. By decision dated 21 February 1997 the Cantonal Court in Bihać *ex officio* appointed a lawyer for the applicant, Ms. Silvia Seferagić. The applicant claims that he was never given the opportunity to meet or consult with this lawyer.

29. On 10 March 1997 the Deputy Prosecutor at the ICTY, in reply to the investigative judge's request of 12 November 1996, informed the investigative judge that the ICTY did not find sufficient evidence that the applicant has committed a serious violation of international humanitarian law.

30. On 24 March 1997 the Cantonal Court in Bihać issued a decision terminating the criminal procedure against the applicant because the Cantonal Prosecutor had withdrawn the indictment related to war crimes on 21 March 1997. The same day the applicant's detention was terminated and he was released.

31. On 9 June 1997 the applicant filed a lawsuit in Municipal Court in Sanski Most against the Federation, seeking compensation for the detention and alleged beatings. Specifically, the applicant claimed KM 80,000 (*Konvertibilnih Maraka*) for physical pain, KM 60,000 for mental suffering, KM 40,000 for general reduced ability to engage in life activities and KM 20,000 for embarrassment resulting from disfigurement.

32. By decision dated 4 February 1999 the Municipal Court in Sanski Most declared itself locally incompetent to hear the case in accordance with Article 40 of the Law on Civil Disputes.

33. On 2 May 1999 the applicant submitted a claim to the Ministry of Justice of the Federation of Bosnia and Herzegovina for compensation for his arrest and imprisonment, based upon the same information provided in the lawsuit filed on 9 June 1997.

34. By letter dated 16 June 1999 the Ministry of Justice of the Federation of Bosnia and Herzegovina rejected, without explanation, the applicant's claim for compensation for his arrest and imprisonment, and advised him to file a lawsuit for compensation in the appropriate court. The applicant did not file such a lawsuit.

35. By decision dated 27 September 2000 the Court of First Instance in Sanski Most dropped the charges of unlawful possession of weapons against the applicant from the May 1996 arrest, and the new charges brought in February 1997.

IV. RELEVANT LEGISLATION

A. The Criminal Code of the Socialist Federal Republic of Yugoslavia

36. Article 142 paragraph 1 of the Criminal 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."

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

37. The provisions on arrest, detention and related issues are contained in the Law on Criminal Procedure, the Law on Application of the Law on Criminal Procedure, the Federation of Bosnia and Herzegovina Law on Internal Affairs and the Law on Obligations. While the Law on Criminal Procedure in the Federation was substituted by the new Federation Law on Criminal Procedure which entered into force on 28 November 1998 (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98) the old provisions quoted below were in effect at the time of the alleged violations in this case.

38. 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.

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 detention and the time of presentation of the warrant must be indicated in the record.

(4) An individual who has been taken into custody may appeal the decision on custody to the panel of judges (Article 23 paragraph 6) within 24 hours from the time when the warrant was presented. If the person taken into custody is examined for the first time after that period has expired, 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 24 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 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."

39. 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) 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."

40. The Law on Criminal Procedure (Consolidated text) continued 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."

41. 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.

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[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 words "this law" in Article 4 paragraph (a) in fact refer to the Law on Criminal Procedure.

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."

42. The Law on Criminal Procedure 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.

43. 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*, provided:

"(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."

44. The Law on the Application of the Law on Criminal Procedure was in force from 15 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.

45. Articles 542 paragraph 2. 543 paragraph 1 and 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."

46. In the new Federation Law on Criminal Procedure which entered into force on 28 November 1998 (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98) the question of compensation is now regulated as follows:

Article 524:

"(1) The right to compensation for damage shall expire 5 years from the date when the verdict

in the first instance acquitting the accused of the charge or dismissing the charge became valid or the date when the decision in the first instance dismissing the proceeding became final; and if it occurred when a higher court was ruling on an appeal, from the date when the decision of the higher court was received.

"(2) Before filing with the court a plea for compensation of damage the injured party must present his petition to the Federal Ministry of Justice so that agreement might be reached as to the existence of damage and the type and amount of compensation.

Article 525:

"(1) If a petition for compensation of damage is not accepted or if the Federal Ministry of Justice does not render a decision concerning such petition within 3 months from the date when the petition was filed, the injured party may file a plea with the competent court for compensation of damages. If an agreement has been reached only concerning a part of the petition, the injured party may file suit with respect to the remainder of the claim.

"(2) So long as the proceeding referred to in Paragraph 1 of this article persists, the statute of limitations envisaged in Article 524, paragraph 1, of this law shall not run.

"(3) The plea for compensation of damage shall be filed against the Federation."

Article 527

"(1) An individual shall also be entitled to compensation for damage in the following cases:

1. if he has been in custody, and a criminal proceeding was not instituted, or the proceeding has been dismissed by a decision that has become final, or he has been acquitted of the charge by a verdict that has become final, or the charge was dismissed;

2. if he has served a prison sentence, but in a retrial or in response to a petition for protection of legality a shorter sentence than he has served is pronounced against him or a criminal sanction is pronounced against him which does not consist of imprisonment, or he is found guilty but released from punishment;

3. if because of an error or illegal act by an authority he has been falsely arrested or kept for a prolonged period in custody or other institution for serving punishment or measure;

4. if he has spent a longer time in custody than the prison sentence pronounced against him."

47. Articles 195 paragraphs 1 and 2, and 200 paragraphs 1 and 2 of the Law on Obligations provide as follows:

Article 195 paragraph 1:

"Who inflicts a bodily injury or impairs someone's health is under obligation to reimburse the medical expenses to that person and other necessary costs and expenses in this regard as well as the income lost because of that person's inability to work during the time of his or her medical treatment."

Article 195 paragraph 2:

"If the injured person due to his or her partial inability to work loses income, or his necessities increase permanently, or the possibilities of his or her further development or advancement are ruined or reduced, the responsible person is under obligation to pay to the injured person a fixed annuity as compensation for that damage."

> Article 200 paragraph 1:
>
> "For sustained physical pains, for mental suffering because of reduced quality of life, disfigurement, damaged reputation, honour, freedom or rights of personality, death of a close person as well as fear, the court shall, if it finds that the circumstances of the case, especially the strength of pains and fear and their duration justify it, award a fair pecuniary compensation, regardless of the compensation for physical damages as well as in its absence."
>
> Article 200 paragraph 2:
>
> "When deciding upon a compensation claim for non-pecuniary damages as well as the amount thereof, the court shall take into account the importance of the damaged asset and the purpose of the compensation is aimed at, but also that it does not favour the aspirations incompatible with its nature and social purpose."

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

48. 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 sub-paragraph of paragraph 5, entitled "Co-operation 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."

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

50. At the public hearing before the Chamber in cases no. CH/96/21 *Čegar*, no. CH/97/41 *Marčeta* and no. CH/97/45 *Hermas*, the Agent of the Federation of Bosnia and Herzegovina stated, in relation to the legal status of the Rome Agreement, as follows (see case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 18, Decisions and Reports 1998):

> "Legally, the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law."

51. This view of the direct applicability as domestic law of the Rules of the Road is confirmed and elaborated in the decision (no. Kž-465/97) of the Supreme Court of the Federation of 28 May 1998 in the case of D.B. The accused in this case had been found guilty of war crimes against the civilian population under Article 142 of the Criminal Code by the then High Court in Mostar in the absence of an opinion by the ICTY Prosecutor on the charges against him. The Supreme Court quashed the conviction and sent the case back to the High Court for renewed proceedings with the following reasoning:

> "… the courts in the Federation of Bosnia and Herzegovina are obliged to apply the Rome Agreement ('The Rules of the Road'). According to the Rome Agreement ('The Rules of the

Road'), the court of first instance cannot begin a criminal procedure before the Prosecutor of the ICTY reviews the indictment and gives his or her opinion on whether the indictment is consistent with international legal standards. This Court is also of the opinion that doing so violated Article 349, paragraph 1(4) of the Law on Criminal Procedure, because an approval or opinion of the competent authority necessary for the criminal proceedings was not previously obtained. This Court finds a violation of the provisions of an international agreement (the Rome Agreement), that has been signed and approved by Bosnia and Herzegovina, and the courts in the Federation of Bosnia and Herzegovina are obliged to apply it."

IV. COMPLAINTS

52. The applicant, referring to his detention, alleges that his right to life, the right not to be tortured or treated in an inhuman or humiliating manner, his right to liberty and security of person and his right to freedom of movement and residence have been violated. He states that he was not informed of any charges against him until fifteen days into his imprisonment, he was not brought before a judge or assigned a lawyer for the first three months of his imprisonment, and only once during his imprisonment was he brought before a judge or given the opportunity to consult with a lawyer. The applicant further complains about a violation of his right to property as he was deprived of his car which was confiscated by the police at the time of his arrest.

V. SUBMISSIONS OF THE PARTIES

1. The respondent Party

53. 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 RBiH Law on Criminal Procedure, the similar provisions of the Federation Law on Criminal Procedure and the Law on Obligations (see above paragraphs 37-40), the applicant could have initiated administrative or court proceedings for compensation related to his detention. With respect to the detention, the Federation states that the applicant could have appealed against the decisions ordering his detention, pursuant to Article 192 of the Law on Criminal Procedure, but failed to do so.

54. 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. The Federation considers that the final decision to be counted from was the 24 March 1997 decision of the domestic court terminating the applicant's detention.

55. As for the merits under Article 3, the respondent Party states that the applicant was not subjected to torture or inhumane or degrading treatment, and has not provided any evidence of such treatment.

56. With regard to Article 5, the Federation argues that the detention of the applicant was lawfully pursued under Article 213 of the Criminal Law of the SR BiH and Article 142 of the Criminal Law of the SFRY. The Federation further claims that on the day of the arrest, 22 May 1996, the applicant was told the reasons for the arrest and questioned at the Sanski Most Police station. The applicant was then allegedly promptly taken before the investigative judge at 10 a.m. and delivered the decision on his pre-trial detention at 11 a.m. on 22 May 1996.

57. With regard to Article 5(5), the respondent Party submits that the applicant has available domestic remedies for achieving compensation.

58. With regard to Article 6, the respondent Party submits that there has been no violation of Article 6(1) as the length of the applicant's detention was justified by the complexity of the charges against him and the need to hear witnesses on those charges. It further submits that there also is no violation of Article 6(3), as the applicant was immediately informed of the charges against him upon his detention and was provided a lawyer and adequate time to prepare his defense.

59. With regard to Article 13, the respondent Party submits that the applicant has available to him domestic remedies for achieving redress for the alleged violations.

60. With regard to Article 1 of Protocol No. 1, the respondent Party finds that there is no violation as the applicant's vehicle was returned to his family.

61. With regard to Article II(2)(b) of the Agreement, the respondent Party states there is no evidence of discrimination against the applicant.

2. The applicant

62. The applicant maintains his complaints.

VI. OPINION OF THE CHAMBER

A. Admissibility

63. 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. Six Month Rule

64. 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 on which the final decision was taken in the matter at the domestic level. The Federation objects to the admissibility of the application submitted by the applicant under this provision, stating that he lodged his application to the Chamber on 23 March 1999, more than six months after his release from detention.

65. The Chamber notes that the application was lodged with the Human Rights Commission, as required by Article VIII(2)(a) of the Agreement, by submission to the Ombudsperson on 11 December 1996. Accordingly, the application was submitted to the Human Rights Commission 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 (s*ee* CH/98/1027 and CH/99/1842, *R.G and Matković*, decision on admissibility and merits delivered 9 June 2000, paragraphs 113-114).

2. Exhaustion of Domestic Remedies

66. 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.

67. The Federation claims that it was open to the applicant to seek compensation for alleged illegal detention under the domestic law (see above paragraph 43-46).

68. However, it does not appear to the Chamber that the domestic provisions provide a sufficient remedy for the applicant. As the Chamber noted in case no. CH/98/1374, *Pržulj,* decision on admissibility and merits, delivered 13 January 2000, at paragraphs 120-124, the provisions of both the old and new laws on criminal procedure do not provide a sufficient remedy in that the noted laws had no definitive provision for the award of non-pecuniary damage. In addition, in cases nos. CH/98/1027and CH/99/1842, *R.G. and Matković*, decision on admissibility and merits, delivered 9 June 2000, at paragraphs 116-118, the Chamber found the laws on criminal proceedings to be insufficient for compensation in that they do not explicitly provide for compensation for actions predating the re-instatement of the law on 23 December 1996.

69. With respect to the possibility to initiate civil proceedings under the Law on Obligations, in *Pržulj* the Chamber stated "to sue private individuals for monetary compensation cannot be considered a remedy for violations of the applicant's right not to be subjected to inhuman or degrading treatment, where these individuals have acted in their capacity as public officials" (paragraph 119).

70. The Chamber has invited the Federation to specifically demonstrate the efficacy of these provisions, and to thereby substantiate its instant argument. The Chamber requested, by letter dated 27 March 2000, that the Federation provide any court decisions in which individuals claiming to have been unlawfully arrested or detained were granted compensation in a domestic court proceeding. By letter, received 17 April 2000, the Federation advised that it would so do.

71. As of the date of the adoption of this decision in April 2002, almost two full years after the above correspondence with the Federation, not even a single court decision has been provided to the Chamber in which an individual was granted such compensation by a domestic court. The Federation's actions in this regard have made it abundantly clear that, in reality, the applicant had no realistic chance of obtaining redress before the domestic courts.

72. The Chamber therefore finds that the respondent Party has failed to show that the remedies available to the applicant had any reasonable prospect of success. The application is therefore not inadmissible on the ground of non-exhaustion of domestic remedies.

3. The applicant's complaint that his right to life has been violated

73. Regarding the applicant's claim that his right to life has been violated, the Chamber notes that the applicant's factual allegations do not raise any issues with regard to the right to life as protected by Article 2 of the Convention. The Chamber is therefore of the opinion that this part of the application is manifestly ill-founded.

4. Conclusion

74. The Chamber does not consider that any other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber decides to declare the application admissible under Article 3 and 5 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II (2) (b) of the Agreement. The applicant's complaint of a violation of his right to life is inadmissible.

B. Merits

1. Article 3 of the Convention

75. Article 3 of the Convention reads as follows:

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

76. The applicant is of the opinion that his rights under Article 3 of the Convention were violated in that he was subject to verbal and physical abuse during the fifteen days in which he was imprisoned in Sanski Most. In support of this claim, the applicant has submitted records of doctor visits from April and May 1997. These records indicate that the applicant had suffered fractured bones in his face, had difficulty breathing through his nose, had headaches and problems with his hearing. The notes of a psychiatrist indicate that the applicant suffers from anxiety, depression, paranoia, loss of appetite and has difficulty sleeping.

77. The respondent Party disputes that the applicant was subjected to the complained-of abuse.

78. 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 case no. CH/97/45, *Hermas*, decision on admissibility and merits, delivered 18 February 1998, 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).

79. The Chamber recalls that where a person is taken into custody by police organs in good health and is, after release from that custody, found to be injured, the respondent Party bears the burden to provide a plausible explanation as to the causes of the injury, failing which an issue arises under Article 3 of the Convention (see case no. CH/98/1374, *Pržujl*, decision on admissibility and merits of 13 January 2000, paragraph 146, Decisions January-June 2000 and Eur. Court HR, *Tomasi v. France* judgment of 27 August 1992, Series A no. 241, paragraphs 108-111).

80. As noted above, in support of his claim under this Article the applicant has submitted both his own written statements, and doctor's records made shortly after the termination of the detention. Similarly, the reports of the IPTF written during the detention (see above paragraphs 14 and 19) also substantiate that the applicant showed signs of having been beaten. The respondent Party has submitted no response to any of these records to cast doubt on their validity, nor have they submitted any statements from either police or prison officials to rebut the allegations. The Chamber is not persuaded by the respondent Party's naked denial of the allegations in the face of the evidence before it. The evidence demonstrates that the applicant was subjected to beatings while imprisoned by the respondent Party.

81. The Chamber recalls that the European Court of Human Rights has held that the treatment complained of must have attained a minimum level of severity if it is to fall within the scope of Article 3 (see Eur. Court HR. *Ireland v. The United Kingdom* judgment of 18 January 1978, series A no. 25, paragraph 162).

82. In this respect the Chamber notes the particular vulnerability of a person held in police custody and its considerations in previous decisions that any recourse to physical force against a person held in police custody, which has not been made strictly necessary by the person's own conduct diminishes human dignity and is, in principle, an infringement of Article 3 (see e.g. case no. CH/97/45, *Hermas*, decision on admissibility and merits of 18 February 1998, paragraph 29, Decisions and reports 1998, with reference to the corresponding case law of the European Court).

83. In the present case the applicant was repeatedly maltreated and received bruises that could be seen days later by members of the IPTF visiting the applicant. As noted above, according to the medical records submitted by the applicant he suffered fractured bones in his face, and still in April and May 1997 as a consequence of his maltreatment had difficulty breathing through his nose, headaches and problems with his hearing. The applicant who was held in custody could not protect himself against the police officers and civilians punching, kicking and beating his body and head. The Chamber finds that this treatment that was inflicted to the applicant amounted to inhuman and degrading treatment as mentioned in Article 3 of the Convention.

84. The Chamber recalls that, in accordance with its own jurisprudence in the Bihać cases (see cases nos. CH/98/1335 et al., *Rizvić et al.*, partial decision on admissibility and decision on the merits of 8 March 2002, paragraph 212) and the jurisprudence of the European Court (see e.g. Eur. Court HR *Osman v. United Kingdom* judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, paragraphs 115-116), the obligation on states, contained in Article 1 of the Convention, to "secure" the rights and freedoms set out in the Convention to all persons within their jurisdiction not only obliges states to refrain from violating those rights and freedoms, but also entails positive obligations on the states to protect those rights. In line with this jurisprudence, the Chamber has held in *Matanović* (case no. CH/96/1, decision on the merits of 11 July 1997, paragraph 56, Decisions on Admissibility and Merits 1996-1997) that the same principle applies to the obligation on the Parties to the Annex 6 Agreement to "secure" the rights and freedoms mentioned in the Agreement. In the Chamber's opinion this responsibility of the Parties to ensure and protect human rights means that the Parties have to provide not only the appropriate structures to guarantee the exercise of rights, but also appropriate means whereby violations will be prevented,

investigated and, where necessary, punished (see also case no. CH/99/1568, *Čoralić*, decision on admissibility and merits of 7 December 2001, paragraph 39).

85. In the present case, as recorded in the "Incident Report" of the UNCIVPOL (see paragraph 19 above), the applicant, when asked by the judge of the Higher Court in Bihać how he was being treated, replied that he had been beaten every day from 22 May 1996, the day of his arrest until 6 June 1996, the day he was transferred from Sanski Most to Bihać.

86. Nothing in the Chamber's case files indicates that the investigative judge initiated any form of investigation whatsoever into the applicant's allegations. Taking this into consideration, along with the fact that the IPTF in a memorandum prepared on 24 June 1996 recorded that the applicant had various visible injuries including "scars over both eyes" and pain in the ribs allegedly stemming from beatings at the Sanski Most Police station, leads the Chamber to believe that there has been a maltreatment which was obvious to the respondent Party's authorities and which has not been investigated.

87. In light of its considerations as mentioned in paragraph 85 above, the Chamber finds that the failure of the investigative judge to take any steps to investigate the allegations made by the applicant, violates the positive obligation of the respondent Party to secure the applicant's rights as protected by Article 3 of the Convention.

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

2. Article 5 of the Convention

89. 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 fulfillment 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 unauthorized 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 authorized 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."

90. The applicant considers that he was the victim of a violation of his right to liberty and security.

91. The respondent Party disputes the applicant's contentions.

92. The Chamber notes at the outset that it is not disputed that the applicant was deprived of his liberty.

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

93. The applicant claims that his detention was unlawful. The respondent Party in its observations on the admissibility and merits disputes this. It expresses its opinion that the detention of the applicant was lawful in accordance with Article 5 paragraph 1 (c) of the Convention as the applicant was in pre-trial detention under the suspicion of having committed the criminal act of illicit possession of weapons and explosive materials as prohibited by Article 213 paragraphs 1 and 2 of the Criminal Code of RBiH and the criminal act of war crimes as prohibited by Article 142 paragraph 1 of the Criminal Code of SFRY.

(aa) Detention in the period from 22 May 1996 to 21 August 1996

94. As noted above the applicant was arrested on 22 May 1996 under the suspicion the criminal act of illicit possession of weapons and explosive materials as prohibited by Article 213 paragraphs 1 and 2 of the Criminal Code of RBiH. By decision of the same day the First Instance Court in Bihać ordered his detention for the period of one month based on the danger that the applicant might flee the criminal proceedings if not held in detention. On 21 June 1996 in accordance with Article 197 paragraph 2 of the Law on Criminal Procedure the Higher Court in Bihać extended the pre-trial detention for two more months until 21 August 1996.

95. The Chamber recalls that Article 5 paragraph 1(c) of the Convention provides that detention is lawful "for the purpose of bringing him (the applicant) 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."

96. The Chamber finds that in light of the fact that munitions were found in the applicant's car the suspicion of the respondent Party's authorities that the applicant had committed the criminal act of unlawfully possessing munitions was reasonable and that the respondent Party's decisions to hold the applicant in pre-trial detention fulfilled the requirements of Article 5 paragraph 1(c) of the Convention. The detention of the applicant for the period until 21 August 1996 does not violate Article 5 paragraph 1 of the Convention.

(bb) Detention in the period from 21 August 1996 until 24 March 1997

97. On 21 August 1996 the Higher Court in Bihać ordered another 30 days of pre-trial detention. This time it based the pre-trial detention no longer on the suspicion of illict possession of weapons and explosives but on the allegation that the applicant had committed war crimes as prohibited by Article 142 paragraph 1 of the Criminal Code of SFRY. The Chamber must examine whether this prolonged pre-trial detention in accordance with Article 5 paragraph 1(c) of the Convention was lawful.

98. As the respondent Party based its decision to hold the applicant in pre-trial detention after 21 August 1996 on the suspicion that he had committed war crimes, the Chamber finds that the Rules of the Road should have been taken into account in the present case. The Chamber notes that the

opinion of the ICTY prosecutor was only requested on 12 November 1996 and obtained on 10 March 1997 . No order, warrant or indictment against the applicant had been preliminary submitted to the ICTY after the Rules of the Road had entered into force on 18 February 1996, as required by these Rules. The applicant's detention was therefore in breach of the "Rules of the Road" and not lawful as required by paragraph 1 (c) of Article 5 of the Convention.

99. The Chamber concludes that the detention of the applicant from 21 August 1996 until his release on 24 March 1997 constitutes a violation of Article 5 paragraph 1 of the Convention.

(b) Article 5 paragraph 3 of the Convention

100. The applicant claims that he was the victim of a violation of Article 5 paragraph 3 of the Convention because he was not brought promptly before a judge, brought to trial within a reasonable time or released pending trial.

101. The respondent Party disputes the applicant's allegations. It states that the applicant was brought before the investigative judge on 22 May 1996, the day of the arrest, at 10 a.m..

102. The applicant states that his arrest on 22 May 1996 took only place in the early evening after 4 p.m.. He further claims that he was brought before a court only on 21 August 1996, three months after his arrest. He states that he saw the procedural decision of 22 May 1996 ordering his pre-trial detention for the first time on 6 June 1996 when he was transferred to the prison in Bihać. He also alleges that he was then forced to sign it and no indication was added that this signature was only made 15 days after the date of the decision. As of that date, he was kept in detention for the stated purpose of investigating his alleged unlawful possession of munitions and involvement in war crimes.

103. Also in this respect the respondent Party, in spite of a specific request from the Chamber of 13 March 2002, provides no evidence to substantiate its bare denial of the applicant's allegation that he was not brought before the competent investigative judge before 21 August 1996. The respondent Party fails to provide any documents to prove that the applicant was brought before the investigative judge, such as the minutes of the hearing before the investigative judge, or any written statement of the investigative judge himself or any other official with personal knowledge of the matter. The Chamber is hence persuaded of the truthfulness of the applicant's allegation that he was not brought promptly before a judge.

104. The Chamber notes that applicant should 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 applicant 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 applicant should have been brought without delay before the competent investigative judge of the lower court in whose jurisdiction the crime was committed.

105. The failure to appropriately bring the applicant before a judge in a timely fashion constitutes a violation of Article 5 paragraph 3 of the Convention.

3. Freedom of movement, as protected by Article 2 of Protocol No. 4 to the Convention

106. The applicant complains of a violation of his right to freedom of movement as guaranteed by Article 2 paragraph 1 of Protocol No. 4 to the Convention. The provision reads as follows:

> " Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

107. In view of its findings in respect of the unlawful detention of the applicant as prohibited by

Article 5 of the Convention the Chamber does not deem it necessary to examine the case under Article 2, paragraph 1 of Protocol No. 4 to the Convention.

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

108. 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.

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

110. 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 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.

111. 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.

112. Concerning the violations of the rights of the applicant as guaranteed by Article 3 of the Convention, the Chamber recalls that the applicant was subject to verbal abuse, namely being called "Chetnik" while he was being physically abused. The Chamber is persuaded by this evidence that the applicant's perceived ethnicity was, in fact, at least a partial basis for the beatings he endured. The Chamber considers that the fact that he was treated to abusive language and treatment on the basis of his perceived religion and national origin constitutes differential treatment for which there is no possible justification. The Chamber therefore finds that he was also subjected to discrimination in the enjoyment of this right.

113. Concerning the violations of the rights of the applicant as guaranteed by Article 5 of the Convention, on the basis of the evidence before it the Chamber cannot find that the applicant was discriminated against in the enjoyment of this right.

114. In conclusion, the Chamber finds that the applicant was discriminated against in the enjoyment of his rights as guaranteed by Article 3 of the Convention.

5. Article 1 of Protocol No. 1 to the Convention - deprivation of the vehicle

115. The applicant complains that the fact that the respondent Party confiscated his vehicle constituted a violation of his right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention. This provision 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."

116. The Chamber considers that in light of the fact that the respondent Party returned the car to the applicant's family after the confiscation, the issue has been solved. Hence it is not necessary to examine the case under Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

117. Under Article XI(1) 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.

118. The Chamber notes that it has found that the applicant has suffered violations of his right not to be subjected to inhuman and degrading treatment and of his right to liberty and security of person. In view of these findings, the Chamber considers it necessary to order the respondent Party to initiate, in accordance with its internal legal procedures, an investigation into the conduct of the police and prison officials involved in the violations of the applicant's rights, with a view to initiating criminal proceedings against them in accordance with the law of the Federation of Bosnia and Herzegovina.

119. The Chamber will now turn to the question of monetary relief. The applicant states that he has suffered physical and mental injuries as a result of the detention, and claims entitlement to monetary compensation as follows:

(1) KM 60,000 compensation for continuing physical pain;

(2) KM 30,000 compensation for psychological harm suffered;

(3) KM 90,000 compensation for reduced ability to perform life's activities, resulting from injuries to his nose and ribs and hearing loss;

(4) KM 20,000 compensation for embarrassment suffered as a result of the physical deformation in the visible injuries to his nose.

120. The respondent Party submits that the each of these claims is ill-founded and excessive because the applicant did not suffer physical or psychological pain to warrant compensation.

121. The Chamber notes that it has established that the applicant has suffered a violation of his rights as protected by Article 3 and 5 of the Convention. This violation is of a very serious nature: The Chamber takes into consideration that according to medical documents submitted by the applicant he continues to suffer from the injuries he obtained while he was in detention. His hearing is impaired and his nose is deformed. In addition, the applicant was kept in unlawful detention for seven months and three days. It is therefore appropriate to award the applicant a substantial amount of compensation for the non-pecuniary damages. The Chamber considers that the applicant is entitled to KM 30,000.

122. Additionally, the Chamber awards 10 percent interest as of the date of the expiry of the time period set for the implementation of the present decision, on the sums awarded in the relevant conclusion below.

VIII. CONCLUSION

123. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible in so far as it concerns the applicant's

complaint of a violation of his right to life as protected by Article 2 of the European Convention on Human Rights ("the Convention");

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

3. unanimously, that there has been a 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 Human Rights Agreement;

4. unanimously, that the detention of the applicant from 21 August 1996 to 24 March 1997 was unlawful in violation of Article 5 paragraph 1 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 5 paragraph 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 the applicant has been discriminated against in the enjoyment of his rights under Article 3 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of its obligations under Article I of the Agreement;

7. unanimously, that the applicant has not been discriminated against in the enjoyment of his rights under Article 5 of the Convention;

8. unanimously, that it is not necessary to consider the applicant's complaint under Article 2 of Protocol No. 4 to the Convention that his right to freedom of movement has been violated;

9. unanimously, to order the Federation of Bosnia and Herzegovina to carry out an investigation into the conduct of the police and prison officials involved in the violation of the applicant's rights, with a view to initiating criminal proceedings against them in accordance with the law of the Federation of Bosnia and Herzegovina;

10. by six votes to one, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of KM 30,000 by way of compensation for pecuniary and non-pecuniary injury;

11. by six votes to one, that simple interest at an annual rate of 10 per cent will be payable over the sum awarded in conclusion 10 or any unpaid portion thereof from the day of expiry of the above-mentioned time period until the date of settlement in full;

12. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber, one month after the 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 under conclusions numbers 10 and 11 and six months after the 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 under conclusion number 9.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 13 January 2000)

Case no. CH/98/1374

Velimir PRŽULJ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

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

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

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

Having considered the admissibility and merits of 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. In January 1997 the applicant, a Republika Srpska policeman, was arrested by the Federation police in the vicinity of the Inter Entity Boundary Line at Vraca, Sarajevo, on charges of genocide and war crimes. In the course of his arrest and on the way to the police station, he was maltreated by his captors. The following day the investigation was terminated and the applicant released.

2. The application raises issues under Articles 3 and 5 of the European Convention on Human Rights. It also raises the question whether the applicant was discriminated against in the enjoyment of the rights guaranteed by these provisions.

II. PROCEEDINGS BEFORE THE OMBUDSPERSON

3. The case was introduced by the applicant to the Ombudsperson on 26 March 1997 and registered on 28 March 1997.

4. By a decision of 19 February 1998 the Ombudsperson decided to open an investigation into the possible violation of Articles 3 and 5 of the Convention. In the course of the investigation, the Ombudsperson had several contacts with the International Police Task Force (henceforth "IPTF"). On 21 July 1997 two representatives of the Ombudsperson's Office visited the Kasindol Hospital, where they met the director, Dr. Slavko Ždrale, and inspected the applicant's medical records.

5. On 25 February 1998 the Ombudsperson invited the respondent Party to submit written observations on the admissibility and the merits of the case, but the respondent Party never replied.

6. On 18 December 1998 the Ombudsperson referred the case to the Chamber pursuant to paragraph 5 of Article V of the Agreement (see paragraph 96 below).

III. PROCEEDINGS BEFORE THE CHAMBER

7. On 21 December 1998 the case was registered with the Chamber.

8. On 9 February 1999 the Chamber decided to transmit the case to the respondent Party for its observations on admissibility and merits under Rule 49(3)(b) of the Rules of Procedure.

9. The respondent Party's observations were received on 18 May 1999 and transmitted to the applicant for his reply on 20 May 1999. In the same letter the applicant was reminded that any claim for compensation had to be submitted in written form within a month. No reply was received within the time allotted. According to the applicant and his lawyer, neither of them received the respondent Party's observations.

10. On 8 July 1999 the Chamber decided to re-transmit the respondent Party's observations to the applicant and to extend the time-limit for submission of comments thereto and of the compensation claim. The applicant's reply was received on 25 August 1999.

11. On 7 October 1999 the Chamber held a public hearing on admissibility and merits of the application in the Cantonal Court building in Sarajevo. The applicant was present and represented by Mr. Miroslav Drašković, a lawyer practicing in Belgrade. The respondent Party was represented by Ms. Safija Kulovac, lawyer of the respondent Party's Office for Cooperation with and Representation before the Human Rights Commission. The Ombudsperson was represented by Mr. Nedim Osmanagić, Deputy Ombudsperson, Ms. Tanja Rakusić-Hadžić, Senior Legal Expert, and Mr. Feđad Začiragić, Legal Expert.

12. The Chamber heard addresses from the applicant's representative, from Mr. Začiragić for the Ombudsperson and from Ms. Kulovac for the respondent Party. It then heard the evidence of the following witnesses: Dr. Milan Pejić, Dr. Slavko Ždrale, Dr. Zoran Kezunović, Dr. Slobodan Đokić, Ms. Milojka Pržulj, Ms. Svjetlana Pržulj, Mr. Nermin Fazlagić, and Mr. Obren Šehovac. Of the

witnesses summoned, only Mr. Nedim Dizdarević failed to appear. The members also put questions to the applicant and to the representative of the respondent Party. Both the applicant and the respondent Party submitted documents to the Chamber. The respondent Party informed the Chamber that the Office of the Public Prosecutor in Sarajevo had refused to produce the request to open an investigation against the applicant as requested by the Chamber through the Agent of the respondent Party.

13. On 14 October 1999 the Chamber requested additional documents from the applicant and the respondent Party. On 18 October 1999 the Chamber requested certain information from IPTF. The reply by IPTF was received on 9 December 1999. On 1 November 1999 the Chamber received additional observations from the respondent Party.

14. On 29 November 1999 the Chamber requested from the applicant documents substantiating his compensation claim for medical expenses. No reply was received from the applicant.

15. On 8 October, 2 and 4 November, 8 and 9 December 1999 and 10 January 2000 the Chamber deliberated on the admissibility and merits of the case. On the last mentioned date it adopted the present decision.

IV. ESTABLISHMENT OF THE FACTS

A. The undisputed facts of the case

16. Most of the facts of the case are in dispute among the parties, and the Chamber has received contradictory evidence in their respect. The following facts are not in dispute.

17. The applicant is a citizen of the Federal Republic of Yugoslavia of Serb descent, residing in Srpsko Sarajevo, Republika Srpska, Bosnia and Herzegovina. At the time of the events he was an officer of the Republika Srpska police serving in Srpsko Sarajevo.

18. On 26 January 1997, around noon, the applicant was arrested by at least two Federation policemen in Derviša Numica street, on or in the immediate vicinity of the Inter Entity Boundary Line ("IEBL") at Vraca, Sarajevo. The applicant was armed but did not make any use of his gun. His arrest involved the use of force by the Federation police. The applicant was taken to the Federation police station Novo Sarajevo, from where some hours later he was transferred to the Sarajevo Public Security Centre. The next morning he was visited by IPTF officers, who informed him that he was being detained on charges of genocide and war crimes. The applicant then received a decision, dated 27 January 1997, by the then High Court in Sarajevo (now Cantonal Court), terminating the investigation against him. The applicant was released the same day and taken back to Srpsko Sarajevo by IPTF.

B. The applicant's submissions as to the facts

19. The applicant has made submissions as to the facts of his arrest in the application to the Ombudsperson, in an additional statement given to the Ombudsperson on 4 September 1997, in his written submissions to the Chamber of 25 August 1999, and especially at the public hearing. His version of the facts giving rise to his complaints may be summarised as follows.

20. On 26 January 1997, around noon, the applicant arrived at the IEBL at Vraca in a car with his mother and sister in order to meet Mr. S.H., a lawyer from Sarajevo. The purpose of the meeting with S.H., which did not take place, was to sign and hand over a power of attorney for the sale of real property in Sarajevo owned by the applicant, his mother and sister. While the applicant's mother and sister waited in the car at a certain distance, the applicant stood on the Republika Srpska side of the separation line waiting for the lawyer. Between 12.20 and 12.30 p.m. he was approached by a man in civilian clothes (identified at the public hearing as witness Nermin Fazlagić, see paragraphs 38 and following below), who asked him to produce his identity card. While the applicant reached into his pocket to find the requested document, he was assaulted by Mr. Fazlagić, who was immediately joined by a second man in civilian clothes. The second man kicked the applicant in his face and on

other parts of his body. A police van approached and policemen in uniform dragged the applicant into the back of the van. There the applicant was physically maltreated and verbally abused with reference to his ethnic background. The applicant was handcuffed and the maltreatment became more severe, as he could no longer protect his face with his hands from the fists and feet of the attackers. The applicant started bleeding and then lost consciousness. The Federation police also took the applicant's official gun which fell out of its pocket during the maltreatment.

21. The applicant regained consciousness upon arrival at the police station Novo Sarajevo, were he was uncuffed and allowed to wash his face. The applicant was briefly visited by an IPTF officer. He was not interrogated, but overheard that he was under investigation for crimes under Articles 141 and 142 of the, then still applicable, Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFR Yugoslavia"), i.e. genocide and war crimes.

22. Half an hour or an hour later the applicant was again handcuffed and taken by car to the Sarajevo Security Centre by two men in civilian clothes. On the way to the Sarajevo Security Centre he was again verbally abused with reference to his ethnic background.

23. At the Sarajevo Security Centre the applicant was uncuffed. He met several acquaintances among Federation police officers and related what had happened to him to two senior Federation police officers, Messrs. Sejfo Sejfić and Jozo Andžić. The applicant was again visited by two IPTF officers, but the Federation police would not allow the applicant to speak to the IPTF officers alone. Therefore, when asked about the bruises on his face, the applicant stated that he injured himself entering the police van. The applicant also states that he was told by one of the IPTF officers that he was on a secret list of persons indicted for war crimes kept by the Federation authorities. This list allegedly comprised two and a half thousand policemen who at the outbreak of the war stopped working for the Ministry of Interior of the Republic of Bosnia and Herzegovina and joined the Republika Srpska police forces.

24. From the Sarajevo Public Security Centre the applicant was taken to the Sarajevo Central Prison where he spent the night. The following day, the applicant received a decision by the Sarajevo High Court, dated 27 January 1997, terminating the investigation against him. He was released in the afternoon of that day and taken back to his police station in Srpsko Sarajevo by IPTF.

25. During the following days the applicant's arrest and detention were extensively covered by TV-stations and newspapers in the Federation. The applicant was portrayed as a war criminal and as a member of a criminal gang involved in the trafficking of stolen cars and the murder of taxi drivers.

26. On 28 January 1997 the applicant visited the Clinic Centre of the General Hospital Kasindo, Republika Srpska, where he was visited and received treatment as an outpatient by an otorinolaryngologist, Dr. Pejić, and by a surgeon, Dr. Ždrale.

27. On 7 February 1997 the applicant also visited the Psychiatric Hospital in Sokolac, as the feelings of stress and anxiousness he suffered since the incident did not recede. There he was visited by Dr. Kezunović, who prescribed painkillers and psychopharmaceutical drugs. At the public hearing the applicant stated that he continued to suffer from insomnia, anxiousness, unwillingness to socialise and even hallucinations. He therefore visited a general practitioner in Srpsko Sarajevo, who in October 1998 referred him back to the Psychiatric Hospital in Sokolac. The applicant was hospitalised at the hospital in Sokolac from November 1998 to April 1999. Moreover, due to the psychological damage suffered as a result of the incident, he has been on sick leave since July 1998.

C. The respondent Party's submissions as to the facts

28. The respondent Party disputes most of the factual allegations made by the applicant. With regard to the applicant's arrest, it points to the contradictions between the testimonies of the applicant's mother and sister. The respondent Party disputes that the applicant's presence was due to an appointment with a lawyer supposed to come from Federation territory. It also states that the applicant was arrested on the territory of the Federation.

29. As to the grounds for the applicant's arrest and detention, the respondent Party appears to

claim that the applicant was arrested because he failed to produce his identity card when requested and tried to escape, while he was later on detained on charges of genocide and war crimes. The respondent Party states that the applicant was informed of the reasons for his arrest and detention, i.e. the investigation against him, at the police station Novo Sarajevo.

30. As to the applicant's alleged maltreatment at the hands of Federation policemen, the respondent Party states that in the light of the short duration of the journey and of the limited space in a police van, it is implausible that the applicant was physically abused on the way from Vraca to the Novo Sarajevo police station. It further recalls that the applicant denied having been maltreated when asked by the IPTF officers.

31. The respondent Party also disputes the formal validity and substantial accuracy of the medical documentation produced by the applicant. Regarding the psychological trauma allegedly suffered by the applicant, the respondent Party submits that the applicant continued to work as an armed policeman after the incident, which would constitute a violation of medical professional rules and regulations governing the police officers' duties. The respondent Party vigorously disputes the existence of a causal link between the applicant's alleged maltreatment and detention in January 1997 and his hospitalisation in November 1998. With respect to the applicant's ongoing sick leave and reduced income, finally, the respondent Party emphasises that the document submitted by the applicant does not constitute relevant and sufficient evidence, and that the applicant should have been required *ex officio* to be examined by a pension and disability assessment panel.

D. Oral testimony

1. Ms. Milojka Pržulj

32. Ms. Milojka Pržulj, the applicant's mother, stated that on 26 January 1997 she and her daughter, Ms. Svjetlana Pržulj, were supposed to meet a lawyer from Sarajevo, Mr. S.H., on the IEBL at Vraca. To this end they had driven to Vraca and at 12 noon parked at about 20 meters from the separation line. While she and her daughter were waiting in the car, the applicant was standing on the Republika Srpska side of the line and waiting for the lawyer. At 12.20 p.m. the applicant was approached by two men in civilian clothes and suddenly assaulted. Several uniformed men appeared and dragged the applicant towards a van, still hitting him. She asked taxi drivers who were standing there for help and they informed IPTF of the incident.

33. The following day, possibly around 4 p.m., the applicant's mother saw the applicant again. His face was bruised and swollen and his nose deformed. The applicant went immediately to the hospital.

34. Since then the applicant, who used to be a very cheerful and communicative person, is depressive and aggressive. He is under constant medical observation, is treated with psychopharmaceutical drugs and was even hospitalised for psychiatric treatment.

2. Ms. Svjetlana Pržulj

35. Ms. Svjetlana Pržulj is the applicant's sister. She stated that on 26 January 1997 she and her mother were waiting in the car at about 100 to 150 meters from the IEBL at Vraca. The applicant was standing exactly on the separation line, waiting for the lawyer from Sarajevo they had an appointment with. The applicant was approached by a man in civilian clothes. After a brief conversation, this man hit the applicant to the ground. Four or five police officers, some in uniform, others in civilian clothes, emerged from a van to which they dragged the applicant and drove away. She asked a taxi driver who was standing there for help and he informed IPTF of the incident.

36. The following day, possibly around 4 p.m., the applicant returned accompanied by IPTF officers. His face was swollen and covered with haematoma, his nose and his stomach hurt. The applicant went immediately to the hospital from which he was released the same evening.

37. Since then the applicant is very depressive and incommunicative. He is still under medical

treatment.

3. Mr. Nermin Fazlagić

38. Mr. Nermin Fazlagić, a policeman of the Federation police, stated that on 26 January 1997 he was on duty in civilian clothes at the IEBL at Vraca together with a colleague, Mr. Nedim Dizdarević. At the same time, uniformed Federation policemen with a police van were on duty in the same area.

39. According to Mr. Fazlagić, two or three days before the day of Mr. Pržulj's arrest, Federation police patrolling that area had halted two persons and asked them to produce their identity cards. The two persons escaped to the Republika Srpska, leaving their identity cards in the hands of the Federation police. One of the two was N., a man wanted for war crimes.

40. On 26 January 1997 the second person, later on identified as Z.R., approached the uniformed policemen patrolling at Vraca and asked for the identification documents he had left in their hands two or three days before. In the meantime, Mr. Fazlagić had grown suspicious about the applicant, who was standing without any apparent purpose at about 50 to 80 meters distance. Suspecting that the applicant might be N., Mr. Fazlagić, closely followed by his colleague Mr. Dizdarević, approached him and asked him to identify himself. The applicant first stated that his identity documents were in the car and then pushed Mr. Fazlagić and tried to escape into Republika Srpska territory. Mr. Fazlagić, however, managed to get hold of the applicant. A brief scuffle ensued, at the end of which the two Federation policemen in civilian clothes, assisted by their uniformed colleagues, managed to subdue and handcuff the applicant. The applicant was slightly injured in the process and was bleeding from his nose.

41. Only after the struggle the Federation policemen noted that the applicant was armed with a pistol and disarmed him. Being handcuffed, the applicant indicated to the Federation policemen his pocket containing the documents identifying him as a Republika Srpska policeman authorised to carry a weapon. Via radio Mr. Fazlagić communicated the applicant's name to the Novo Sarajevo police station, and was informed that the applicant was wanted on charges of war crimes. From then on the applicant was detained on account of the investigation against him.

42. The applicant was taken to the Novo Sarajevo police station in the police van. Z.R. was asked to come in the van to the police station, too, as a witness of the incident and in order to be given back his identity papers. According to Mr. Fazlagić, six persons rode in the van: two uniformed policemen in the front and the two policemen in civilian clothes, the applicant and Z.R. in the back. No further incidents occurred during the transport and at the Novo Sarajevo police station the applicant, having been allowed to wash his bloody face, was handed over to officers of the criminal investigation police.

43. During the public hearing, Mr. Fazlagić was asked to explain certain contradictions between his testimony and the report he drafted after the arrest on 26 January 1997, which does not mention the applicant's injury and identifies Z.R. as a second person arrested together with the applicant (see paragraph 52 below). Mr. Fazlagić confirmed the correctness of his oral testimony and indicated his lack of experience and the shock suffered due to the arrest as probable causes of the inaccuracies in his written report.

4. Mr. Obren Šehovac

44. Mr. Obren Šehovac is a policeman of the Republika Srpska police. Around 1 p.m. on 26 January 1997 he was informed by a taxi driver of the arrest of his colleague, the applicant. He immediately informed the IPTF station at Kula, Srpsko Sarajevo, of the incident.

5. Dr. Milan Pejić

45. Dr. Milan Pejić is an otolaryngologist working at the Kasindol Hospital. He explained that he could not remember visiting the applicant, but recognised the medical certificate produced by the applicant as issued by him (see paragraph 60 below). Accordingly, he confirmed having visited the

applicant on 28 January 1997 and having found a fracture of the nose and a haematoma on the nasal partition. He also explained that it was not uncommon for nose fractures not to be visible on X-rays.

6. Dr. Slavko Ždrale

46. Dr. Slavko Ždrale is a surgeon and director of the Kasindol Hospital, specialised in chest surgery. He recalled the visit by the applicant, with whom he was previously acquainted, and recognised the medical certificate produced by the applicant as issued by him (see paragraph 61 below). Accordingly, he confirmed having visited the applicant on 28 January 1997 and having found injuries of the cartilagious part of the fourth and fifth rib. He explained that such injuries do not appear on X-rays.

7. Dr. Zoran Kezunović

47. Dr. Zoran Kezunović is a psychiatrist exercising his profession at the Psychiatric Hospital in Sokolac. He recalled having visited the applicant on 7 February 1997 and recognised the psychiatric finding produced by the applicant as issued by him (see paragraph 63 below). He confirmed 7 February 1997 was the only time he visited the applicant.

8. Dr. Slobodan Đokić

48. Dr. Slobodan Đokić is a psychiatrist exercising his profession at the Psychiatric Hospital in Sokolac. He stated that he treated the applicant from October 1998 to May 1999 as a hospitalised patient.

49. According to Dr. Đokić, the applicant suffered from a psycho-neurotic disease which resulted in depression, fear and frequent changes of mood. Such psycho-neurotic diseases are normally the result of a serious psychological trauma suffered by the patient. Dr. Đokić said that he could not state with certainty that the incident of 26 and 27 January 1997 was the traumatic event leading to the applicant's neurosis. He also stated that persons suffering from psycho-neurotic diseases as the applicant's were very likely to relapse as a consequence of stressful events, even of minor intensity.

E. Written evidence

50. The following documents have been either transmitted to the Chamber with the Ombudsperson's file or produced by the Parties at various stages of the proceedings before the Chamber.

1. Documents relating to the applicant's arrest and detention

51. The applicant has produced a power of attorney, dated 25 January 1997, by which he authorised S.H., lawyer practising in Sarajevo, to act on his behalf in the conclusion of the sale of his house in Sarajevo.

52. The Chamber has received the report of the arrest of the applicant, dated 26 January 1997 and signed by policemen Dizdarević and Fazlagić of the Novo Sarajevo police station. According to this report, on 26 January 1997, while performing their regular patrol duty in Derviša Numica street, the two policemen saw a person that three days before had run away while the police asked him to identify himself. The two policemen now found out that this person was Z.R., a merchant from Montenegro. In his company they found another person. Asked for his identity card, this man first told the policemen that he had left it in his car and then tried to escape across the IEBL towards Republika Srpska by pushing policeman Fazlagić. The policemen managed to stop the man, who was then identified as the applicant, who was wanted by the Federation authorities on the basis of a genocide charge pending against him. A pistol was found on the applicant. The applicant and Z.R. were taken to the Novo Sarajevo police station.

53. The Chamber has also received the IPTF file relating to the arrest and detention of the

applicant. According to a first report dated 26 January 1997, at about 12.45 p.m. the police station Novo Sarajevo informed IPTF that they had arrested "two Serbian men". The report summarises the facts that led to the applicant's and Z.R.'s arrest along the lines of the report by the Federation policemen (paragraph 52 above). It also relates that an IPTF patrol rushed to Vraca, where it found a gathering of people from the Republika Srpska side, among them policemen from the Lukavica police station, upset about the incident.

54. An internal telefax of IPTF dated 27 January 1997 contains the following additional information: On 27 January 1997, at about 9.30 a.m., the applicant was visited at the Sarajevo Central Prison by two IPTF officers. On that occasion the applicant assured the IPTF officers that he had not been maltreated by the Federation police.

55. According to a further entry in the IPTF file, on 27 January 1997 at 2.15 p.m. the IPTF Regional Commander, "after talking to all political parties involved in the arrest of Serbian Police officer", was advised that the applicant would be released within an hour. At approximately 3.30 p.m. the IPTF Regional Headquarters were informed that the applicant was ready to be released. Immediately two IPTF officers went to the Sarajevo Central Prison, took custody of the applicant and transported him back to his police station in Srpsko Sarajevo.

56. The respondent Party submitted to the Chamber the decision by the then Sarajevo High Court (now Cantonal Court), dated 27 January 1997, to terminate the investigation against the applicant on the ground that, at that moment, the evidence against him was insufficient to pass the scrutiny of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in accordance with the "Rules of the Road" (see below paragraphs 73 and following). This decision makes reference to a decision to open an investigation against the applicant on charges of genocide and war crimes issued by the Sarajevo High Court on 7 January 1994. The decision of 27 January 1997 also mentions that the Sarajevo Prosecutor's Office would continue to gather evidence against the applicant in order to submit an indictment against the applicant to the ICTY at a later stage.

57. The Chamber requested from the respondent Party the submission of the decision to open an investigation against the applicant of 7 January 1994. The respondent Party submitted a letter from the Sarajevo Cantonal Prosecutor, addressed to the Agent of the respondent Party. According to this letter, a decision to open an investigation was taken and an arrest warrant issued against the applicant on charges of genocide and war crimes, but the relevant documents are confidential and can therefore not be produced.

58. The Chamber also requested from the respondent Party the police report concerning the escape of Z.R. on 23 January 1997. The respondent Party failed to produce the requested document.

2. Documents relating to the injuries sustained by the applicant and to his health since the incident

59. According to the specialist finding of the otolaryngologist Dr. Pejić dated 28 January 1997, the applicant had a broken nose and haematoma on both sides of the nasal partition, as well as a tumefaction and a smaller haematom below the right eye. The fracture of the nose was diagnosed on the basis of the obvious turgescence and deformation and of the pathology in the motion of the nose. The therapy consisted in the draining of the haematoma, the application of a tampon and the prescription of antibiotic drugs.

60. Upon the Chamber's request, the applicant produced a radiological profile of his skull, carried out on 28 January 1997.

61. According to the specialist finding of Dr. Ždrale, dated 28 January 1997, the applicant felt pain when breathing. Dr. Ždrale diagnosed a contusio hemithoracis on the right side and fractures of the cartilaginis of the fourth and fifth rib. He prescribed a drug and exercises. On 30 January and 8 February 1997 the applicant saw Dr. Ždrale for check-up visits. On the latter date Dr. Ždrale noted that the applicant's condition was better and recommended a further check ten days later, which appears not to have taken place.

62. The Ombudsperson submitted to the Chamber a report by two lawyers of her office who, on

21 July 1997, visited the Kasindol Hospital in order to verify the allegations made by the applicant. They met Dr. Ždrale, who remembered examining the applicant. The applicant felt pain breathing and Dr. Ždrale also noticed bruises on the applicant's face and advised him to see an otolaryngologist. The two lawyers of the Ombudsperson's Office checked the admission book of the otolaryngology department and found an entry matching the specialist finding submitted by the applicant. The admission book of the radiology department confirmed that a radiological exam of the applicant's nose and chest had been carried out on 28 January 1997.

63. According to the finding issued by the psychiatrist Dr. Kezunović, dated 7 February 1997, the applicant was suffering from hallucinations, depressive mood and restlessness. Dr. Kezunović prescribed psychofarmaceutical drugs.

64. The following medical documents were submitted by the applicant after the public hearing, upon request of the Chamber.

65. On 23 October 1998 a doctor in Vojkovići, having diagnosed a psychosis reactiva, referred the applicant to a neuropsychitrical specialist.

66. On 29 October 1998 Dr. Đokić examined the applicant. He found the applicant's condition "subjectively without significant changes. Continued feelings of fear, nervousness, occasional hallucinations. Objectively: pycho-motions slow, essential spirits low" and diagnosed a psychosis reactiva which rendered treatment in hospital necessary.

67. The discharge letter of the Psychiatric Hospital in Sokolac shows that the applicant was treated in the hospital from 3 November 1998 to 12 March 1999. The applicant's condition appears not to have changed substantially during the period of hospitalisation. Upon release, Dr. Đokić established that a psychologist's examination of the applicant was necessary and that the applicant could not work.

68. Dr. Đokić carried out control visits of the applicant on 16 April, 4 June, 3 August, 7 September and 5 October 1999. The applicant's condition appears to have been without substantial changes throughout this period. The psychiatrist found continued fear, insecurity, depressive mood, emotional instability and concluded that the applicant was not able to work.

69. The applicant has also produced a certificate issued by the Republika Srpska Ministry of Internal Affairs, Department for Material and Financial Affairs of the Center of Public Security in (Srpsko) Sarajevo. The certificate, dated 7 October 1999, states that the applicant, an employee of the Public Security Center in Ilidža, has been on sick leave as of September 1998 until the date of issuance "as a consequence of the grievous bodily injuries he sustained when arrested on 26 January 1997 by the Federation Police in Vraca". The certificate furthermore states that the applicant has been paid a reduced income, the overall loss in income amounting to 1,524 Convertible Marks (*Konvertiblnih Maraka*; "KM").

3. Newspaper articles produced in support of the applicant's claim that his reputation was ruined

70. The first newspaper article produced by the applicant was published in the Sarajevo newspaper *Oslobođenje* on 28 January 1997. It identifies the applicant by name, date of birth and profession and reports that he was arrested and detained on charges of genocide and war crimes. On the basis of the copy handed in by the applicant it cannot be established whether the article also informed that the applicant had subsequently been released.

71. Another article produced by the applicant, entitled "Pržulj walked all around Sarajevo", was published in the Sarajevo newspaper *Večernje Novine* on 29 January 1997. According to this article, on 26 January 1997 at 8.30 p.m. the applicant and a friend took a taxi from the Federation part of Sarajevo to Vraca, where the taxi was stopped by the Federation police and the applicant was arrested on charges of genocide and war crimes. The journalist reports that the judicial authorities had to release the applicant because they had not obtained the authorisation to arrest and prosecute him from the ICTY. The article, however, clearly implies that the applicant probably was a dangerous

criminal.

72. The third article produced by the applicant, entitled "Taxi drivers for trap shooting", was published in the newspaper *AS* (the date of publication cannot be gleaned from the copy of the article submitted). It links the applicant with a crime ring trafficking stolen cars and killing Sarajevo taxi drivers. The journalist calls the applicant a "top-dog dealer".

F. Relevant legislation

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

73. 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."

74. 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".

75. At the public hearing before the Chamber in the cases no. CH/96/21 *Čegar*, no. CH/97/41 *Marčeta* and no. CH/97/45 *Hermas*, the Agent of the Federation stated, in relation to the legal status of the Rome Agreement, as follows (see case no. CH/97/45 *Hermas*, decision on admissibility and merits of 16 January 1998, paragraph 18, Decisions and Reports 1998):

> "Legally the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law."

2. The Law on Criminal Procedure

76. The Law on Criminal Procedure in force at the time of the alleged violations (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) was substituted in the Federation of Bosnia and Herzegovina 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 overtaken without substantive changes.

(a) Provisions granting the victim of a crime a right to take part in prosecutorial activity

77. Article 149 of the old law provides that private citizens should report crimes which are prosecuted *ex officio* in order to ensure social self-protection.

78. Article 60 of the old law provided as follows:

"(1) When the public prosecutor finds that there are no grounds to undertake the prosecution of a crime which is prosecuted *ex officio*, he must inform the injured party of this within a period of 8 days and inform him that he or she may undertake the prosecution him- or herself. The same procedure shall be followed by a court if it has rendered a decision to halt proceedings because the public prosecutor has withdrawn from prosecution.

(2) The injured party has the right to undertake or to resume prosecution within 8 days from the date of receipt of the notification referred to in paragraph 1 of this Article.

(3) If the public prosecutor has withdrawn the bill of indictment, in undertaking prosecution the injured party may abide by the bill of indictment already preferred or file a new one.

(4) An injured party who has not been informed that the public prosecutor did not undertake prosecution or withdrew from prosecution may make his statement that proceedings be resumed before the competent court within 3 months from the date when the public prosecutor rejected the charge or from the date when the decision to halt proceedings was rendered.

(5) When the public prosecutor or court informs the injured party that he may undertake prosecution, he shall also be delivered instructions as to which steps he may undertake in order to exercise that right."

(b) Compensation claim against perpetrator of crime raised within the criminal proceedings

79. Paragraph 1 of Article 104 of the old law (Article 97 of the new law) reads as follows:

"(1) The motion to realize a claim under property law in criminal proceedings may be filed by the person entitled to pursue that claim in civil suit."

80. Paragraph 1 of Article 105 of the old law (Article 98 of the new law) reads as follows:

"(1) A petition to pursue a claim under property law in criminal proceedings shall be filed with the body or agency to whom the criminal charge is submitted or to the court before which proceedings are being conducted."

(c) Compensation for unlawful detention

81. Articles 542 paragraph 2, 543 paragraph 1 and 545 paragraph 3 of the old law provided as follows (similar provisions are contained in Articles 524, 525 and 527 of the new law):

Article 542 paragraph 2:

"Before submitting a claim for compensation for damages to the court, the person concerned is obliged to address his request to the Administration authority of the Republic which is competent for the legal matters [now the Federal Ministry of Justice]."

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 or her freedom or kept for a longer period of time under custody or in prison than would otherwise have been the case."

82. Article 527 paragraph 2 of the new law reads:

"A person who under Article 187 of this law has been arrested without legal grounds shall be entitled to compensation for damage if custody was not pronounced against him …"

Article 187 of the new law states the rights of persons arrested and detained on the ground of the suspicion that they have committed an offence.

3. Decisions of the Supreme Court of the former SFR Yugoslavia concerning compensation for non-pecuniary damages suffered in detention

83. The following two statements of the Supreme Court of the former SFR Yugoslavia concern the scope of the right to compensation for damages suffered in the course of unlawful detention:

"The Court is obliged to examine whether the illness of the applicant, which admittedly occurred after the detention, had been entirely or partially caused by his detention, and if so, whether it caused certain property loss. The illness, i.e. deterioration of his health, may also constitute a kind of non-pecuniary damage, for which he is also entitled to compensation." (decision no. Kž-24/69, Collection of Courts' Decisions concerning application of the Laws on Criminal Procedure, publication of the University of Sarajevo, 1996, p. 308).

"When no pecuniary damage was caused by illegal detention, on account of illness stemming from being in detention, this illness or deterioration of health may represent an aspect of non-pecuniary damage to the compensation of which the damaged person is entitled under Article 541 of the Law on Criminal Procedure [establishing the right to compensation for detention on account of a conviction subsequently annulled]." (decision no. Kž-36/70, Collection of Courts' Decisions concerning application of the Laws on Criminal Procedure, publication of the University of Sarajevo, 1996, p. 310).

4. The Law on Obligations

84. Articles 195 and 200 of the Law on Obligations (OG SFRY nos. 29/78, 39/85 and 45/89 and OG RBiH nos. 2/92, 13/93 and 13/94) provide for the possibility to claim in civil proceedings pecuniary and non-pecuniary damages suffered in case of bodily injury or impairment of health.

85. Article 195 reads as follows:

"(1) Who inflicts a bodily injury or impairs someone's health is under obligation to reimburse the medical expenses to that person and other necessary costs and expenses in this regard as well as the income lost because of that person's inability to work during the time of his or her medical treatment.

(2) If the injured person due to his or her complete or partial inability to work loses income, or his necessities increase permanently, or the possibilities of his or her further development or advancement are ruined or reduced, the responsible person is under obligation to pay to the injured person a fixed annuity as compensation for that damage."

86. Article 200 reads as follows:

"(1) For sustained physical pains, for mental suffering because of reduced quality of life, disfigurement, damaged reputation, honour, freedom or rights of personality, death of a close person as well as fear, the court shall, if it finds that the circumstances of the case, especially the strength of pains and fear and their duration justify it, award a fair pecuniary

compensation, regardless of the compensation for physical damages as well as in its absence.

(2) When deciding upon a compensation claim for non-pecuniary damages as well as the amount thereof, the court shall take into account the importance of the damaged asset and the purpose the compensation is aimed at, but also that it does not favour the aspirations incompatible with its nature and social purpose."

V. COMPLAINTS

87. In his application to the Ombudsperson, the applicant complained that during his arrest he was subjected to ill-treatment in violation of his rights under Article 3 of the Convention. He also complained that he was unlawfully detained in violation of his rights under Article 5 of the Convention. The applicant furthermore complained that his arrest by the Federal police constituted a violation of his right to freedom of movement guaranteed by Article 2 of Protocol No. 4 to the Convention, and of his right to a fair trial protected by Article 6 of the Convention, as he did not receive the decision on his arrest. The applicant finally complained that he was discriminated against in the enjoyment of these rights on the ground of his Serb nationality.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

88. The respondent Party argues that the application should be declared inadmissible on the ground that the applicant has failed to use any of the remedies the domestic legal system provides. It makes reference to the claim for compensation to which, pursuant to the Law on Criminal Proceedings (see paragraphs 81-82 above), everyone who was detained and subsequently not found guilty can have recourse. The respondent Party further refers to the possibility to initiate court proceedings for damages suffered due to the ill-treatment inflicted by organs of the respondent Party. It finally stresses that these remedies have proved effective in the legal system of the Federation.

2. As to the merits

89. As to the merits, the Federation denies that any issue arises under Article 3 of the Convention, as it disputes that the applicant was ill-treated.

90. With regard to the applicant's arrest and detention, the respondent Party submits that the applicant was deprived of his freedom for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed acts of genocide and war crimes, in accordance with the applicable national law and Article 5 paragraph 1(c) of the Convention. The respondent Party further submits that the applicant was promptly informed of the reasons for his arrest.

91. In relation to the applicant's complaint under Article 6 of the Convention, the respondent Party again argues that the applicant was promptly informed of the charges against him, and that, in any case, the competent court terminated the investigation against the applicant after a very brief period of detention.

92. Regarding the alleged violation of Article 2 of Protocol No. 4 to the Convention, the respondent Party claims that "no act of the respondent Party challenged the freedom of movement as such, which is a category utterly independent from the 'physical freedom of a person' protected by Article 5 of the Convention".

93. As for the alleged discrimination against the applicant, the respondent Party argues that the applicant's complaint is completely unsubstantiated.

B. The applicant

1. As to the admissibility

94. The applicant does not dispute that the applicable laws of the Federation establish the remedies for maltreatment at the hands of police officers and unlawful detention referred to by the respondent Party. He submits, however, that, in consideration of his experience with the Federation authorities, he has a reasonable lack of confidence in those authorities and cannot be expected to claim compensation from them. He appears to argue that for this reason the remedies were not accessible to him.

2. As to the merits

95. The applicant maintains his complaints.

C. The Ombudsperson

1. As to the admissibility

96. The Ombudsperson, who referred the case to the Chamber (see paragraph 6 above), submits that the application is inadmissible because the applicant has not exhausted domestic remedies, as required by Article VIII(2)(a) of the Agreement. In fact, she states, the applicant did not pursue any domestic remedy.

(a) Admissibility of the complaint under Article 3 of the Convention

97. The Ombudsperson submits that, "where the applicant alleges ill-treatment at the hands of the police, criminal proceedings against the perpetrators and/or a claim for compensation might be considered effective remedies". The Ombudsperson points out the possibility to submit to the public prosecutor a criminal report against the perpetrators of the violation, and to raise a claim for compensation of pecuniary and non-pecuniary damages in criminal proceedings. In the alternative, she submits that the applicant could have sought compensation of pecuniary and non-pecuniary damages through a civil action against the perpetrators.

98. As to the alleged inaccessibility or inefficiency of the remedies provided by law, the Ombudsperson recalls that the rule of exhaustion of domestic remedies is inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective. The Ombudsperson submits that the applicant has not shown the existence of such a practice.

99. Regarding the applicant's reluctance to enter Federation territory in order to pursue remedies before the courts, the Ombudsperson submits that even if his fears were to be considered legitimate in view of the heavy injuries he allegedly sustained there in January 1997, nothing prevented him from engaging a lawyer for this purpose. In this respect the Ombudsperson further maintains that the exhaustion of domestic remedies may take place after the introduction of the application and that, as a consequence, the applicant cannot justify his failure to pursue domestic remedies by referring to the general circumstances prevailing in 1997.

(b) Admissibility of the complaint under Article 5 of the Convention

100. As to the alleged violation of Article 5, the Ombudsperson submits that the remedy required is an action before a court leading to a legally binding award of compensation for arrest and detention in violation of Article 5. The Ombudsperson maintains that such a remedy exists in the legal system of the respondent Party, both presently and under the laws applicable at the time of the alleged violation. She submits that domestic legislation provides not only for compensation for pecuniary damages, but also for compensation for non-pecuniary damages suffered due to unlawful

arrest and detention.

101. Regarding the applicant's claim that the remedies provided by the respondent Party's legal system were not accessible to him, the Ombudsperson refers to her observations concerning the admissibility of the case under Article 3 of the Convention.

(c) Admissibility of the remaining complaints

102. With regard to the alleged violation of the applicant's freedom of movement, the Ombudsperson submits that, as the case falls within the sphere of application of Article 5 of the Convention, it is not necessary to examine it under Article 2 of Protocol No. 4 to the Convention, which protects against less intensive restrictions of personal liberty.

103. The Ombudsperson further submits that Article 6 of the Convention is inapplicable to the present case, since the charges against the applicant were dropped the morning after his arrest and the applicant was never put to trial.

104. As far as the alleged discrimination against the applicant is concerned, the Ombudsperson considers the complaint completely unsubstantiated with regard to the enjoyment of the rights guaranteed by Article 5, while she reserves her position regarding discrimination in the enjoyment of the right protected by Article 3.

105. In summary, the Ombudsperson considers the present case inadmissible in its entirety.

2. As to the merits

106. In case the Chamber finds the application admissible, the Ombudsperson maintains that the application raises issues under Articles 3 and 5 paragraph 1 of the Convention. As to Article 3, she recalls that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the respondent Party to provide a plausible explanation as to the origin of the injury.

107. As to the rights protected by Article 5 paragraph 1, the Ombudsperson submits that the reasons for the applicant's arrest and detention are not clear. Should he have been detained pursuant to the 1994 decision to open an investigation against him for genocide and war crimes, the detention would have been in violation of the Rules of the Road, and therefore not in accordance with the law and in violation of the Convention.

VII. OPINION OF THE CHAMBER

A. Admissibility

108. 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. 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. According to Article VIII(2)(c) of the Agreement, the Chamber shall dismiss any application which it considers manifestly ill-founded.

109. The Chamber recalls that in cases where the applicant was never actually put on trial, the question, under Article 6 of the Convention, whether the applicant had a "fair hearing … by an independent and impartial tribunal" in the "determination of any criminal charge against him" does not arise (see case no. CH/97/41, *Marčeta*, decision on admissibility and merits of 3 April 1998, paragraph 46, Decisions and Reports 1998). Similarly, as the applicant was never put on trial, the question whether he was informed of the charges against him is relevant under Article 5 paragraph 2, dealing with the conditions to be met in depriving persons of their personal liberty, and not under Article 6 paragraph 3(a). The Chamber therefore finds that the applicant's complaints under Article 6 are manifestly ill-founded.

110. The Chamber notes that in the present case it is undisputed that the applicant has not pursued any domestic remedy. The question before the Chamber therefore is whether the remedies indicated by the respondent Party and the Ombudsperson could be considered insufficient or ineffective from the outset, or whether, in the circumstances of the case, the applicant was otherwise dispensed from having recourse to domestic remedies.

111. Given that the Agent of the respondent Party and the Ombudsperson very vigorously raised a preliminary objection of non-exhaustion, the Chamber will once more recall the statement of principle with regard to Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11 to the Convention) made by the European Court of Human Rights in the case of *Akdivar and Others v. Turkey* (judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV). The Court held in paragraphs 66-69 of that judgment:

> "66. Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. 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 […].
>
> Article 26 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used […].
>
> 67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the 'generally recognised rules of international law' there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal […]. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective […].
>
> 68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement […]. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.
>
> 69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism […]. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case […]. This means amongst other things that it must 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."

112. Regarding the exhaustion of domestic remedies for the alleged maltreatment, the Chamber also recalls that the European Court of Human Rights has held (Eur. Court HR, *Aydin v. Turkey* judgment of 25 September 1997, Reports of Judgments and Decisions 1997-VI, paragraph 103) that:

> "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".

113. 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 and degrading treatment short of torture (see the aforementioned *Hermas* decision, paragraph 109).

114. The Chamber recalls that in the course of the public hearing the applicant stated that at the Sarajevo Public Security Centre he told at least three policemen, Messrs. Safet Obhođaš, Sejfo Sejfić and Jozo Andžić, how he had been maltreated. Mr. Sejfić appears to have been a senior police officer at the Public Security Centre, while Mr. Andžić even was, according to the applicant, the Chief of Criminal Police of the Cantonal Ministry of Interior. The Chamber notes that the respondent Party did not dispute these allegations, neither in the course of the hearing, nor in the additional observations submitted on 29 October 1999, in which it disputed most of the applicant's statements and of the testimony rendered by the witnesses at the public hearing.

115. The fact that the applicant told these two senior police officers about his maltreatment at the hands of Federation policemen constitutes *de facto* a report to the competent authority. On the basis of this report (and of the visible signs of maltreatment on the applicant before them), it would have been their duty to open *ex officio* an investigation and to report the events to the Sarajevo Prosecutor's Office. Their failure to do so constitutes an instance of "national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents", a circumstance which, according to the above cited statement of principle by the European Court (see paragraph 111 above), can absolve the applicant from the requirement to exhaust domestic remedies.

116. The Chamber also recalls that in none of the cases of unlawful detention or inhuman or degrading treatment by Federation authorities it has decided up to date (the aforementioned *Marčeta* and *Hermas* cases; case no. CH/96/21, *Čegar*, decision on the merits of 20 February 1998, Decisions and Reports 1998; case no. CH/98/946, *H.R. and Momani*, decision on admissibility and merits of 6 October 1999, to be published), an investigation into the criminal responsibilities of the respondent Party's agents involved in the violation of the applicants' rights was carried out. Nor has the respondent Party mentioned any cases in which its judicial authorities prosecuted state agents on charges of serious misconduct towards detainees. In this respect the Chamber furthermore notes that the dates of release from unlawful detention of the applicants in the above-mentioned cases vary between 16 July 1996 and 12 August 1997. The applicant's detention squarely falls within the same period.

117. The Chamber finally notes that the decision by the then Sarajevo High Court terminating the investigation against the applicant expressly mentions that the Prosecutor's Office would continue to gather evidence against the applicant in order to submit an indictment against him to the ICTY at a later stage (see paragraph 56 above). The Chamber concludes that the Prosecutor's activity against the applicant was only formally closed, and that the applicant was in fact clearly told that if he ventured into Federation territory again he risked being arrested anew.

118. In the light of these circumstances obtaining at the time of the applicant's arrest and release, both general and specific to the applicant's case, the Chamber is not satisfied that the filing of a criminal report against the perpetrators constituted an effective remedy, "available in theory and in

practice at the relevant time, that is to say … capable of providing redress in respect of the applicant's complaints and offer(ing) reasonable prospects of success" (see paragraph 68 of the *Akdivar and Others v. Turkey* judgment quoted in paragraph 111 above).

119. As regards the possibility to initiate civil proceedings against the perpetrators in order to obtain, in civil proceedings, compensation for the damages suffered, the Chamber does not consider this an adequate remedy in case of an alleged violation of Article 3. To sue private individuals for monetary compensation cannot be considered a remedy for violations of the applicant's right not to be subjected to inhuman or degrading treatment, where these individuals have acted in their capacity as public officials (see, *mutatis mutandis*, Eur. Court HR, *Pine Valley Developments Ltd and Others v. Ireland* judgment of 29 November 1991, Series A no. 222, p. 22, paragraph 48). The same applies to the possibility to raise a claim for monetary compensation within criminal proceedings, which moreover presupposes that there is a reasonable prospect of obtaining a conviction of those individuals for misconduct in their capacity as such officials.

120. As to the remedies available in case of unlawful arrest and detention, both the respondent Party and the Ombudsperson have made reference to the possibility to claim compensation under Article 545 of the old Law on Criminal Procedure (Article 527 of the new law).

121. As in relation to the possibility to initiate criminal proceedings against the perpetrators of the ill-treatment, the Chamber is not satisfied that, in the light of the circumstances prevailing at the time of the applicant's arrest and release (see paragraphs 115-117 above), a claim for compensation for the unlawful detention suffered would have constituted a remedy offering reasonable prospects of success. The respondent Party has not cited any case-law of any court in the Federation from which it would appear that the procedure provided for by Article 542 paragraph 2 had ever been successfully followed by any person in a position comparable to the applicant's.

122. Moreover, the Chamber notes 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. The Chamber is not satisfied that the mechanism provided for in Articles 541-545 of the old Law on Criminal Procedure (or the analogous provisions of the new law) meets this criterion. It recalls that in the aforementioned *Hermas* case (paragraph 77) the Agent of the respondent Party stated that there was no provision for non-pecuniary damages. In the present case, the Ombudsperson submits that "irrelevant of the Agent's approach to this issue in the *Hermas* case, it is true that under both Laws at issue, an individual might successfully claim both pecuniary and non-pecuniary damage before the competent authority". In support of her submission, she quotes certain case-law of the Supreme Court of the former Yugoslavia (see paragraph 83 above).

123. The Chamber is of the view that the two statements of the Supreme Court of the former SFR Yugoslavia show that Articles 541-545 were interpreted so as to include compensation for a very specific and limited category of non-pecuniary damage, i.e. long-term deterioration of health that does not, however, directly result in any medical expenses or in a reduced income. The Chamber notes that the applicant, like many other persons who have been unlawfully detained, claims compensation also for different forms of non-pecuniary damage: for the fear and pain suffered in the course of the detention and for the harm allegedly suffered to his honour and reputation. Nothing in the quoted case-law of the Supreme Court of the former SFR Yugoslavia supports the view that the applicant could have obtained compensation for these alleged damages, nor has the respondent Party or the Ombudsperson quoted any case-law of the courts of the Federation that allows for compensation of these forms of non-pecuniary damage.

124. The Chamber therefore concludes that the remedy for the alleged violation of Article 5 indicated by the respondent Party and the Ombudsperson was neither sufficient in theory to redress the harm complained of, nor did the applicant in practice have reasonable prospects to pursue it successfully.

125. As no other remedies available to the applicant have been indicated, nor any other ground for declaring the case inadmissible established, the Chamber declares the application admissible, except for the complaint under Article 6 of the Convention.

B. Merits

126. 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.

127. 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 16 international agreements listed in the appendix (including the Convention), where such a violation is alleged or appears to have been committed by 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 5 of the Convention

(i) *Article 5 paragraph 1 – lawfulness of the applicant's arrest and detention*

128. The applicant complains that he was unlawfully arrested and detained in violation of Article 5 paragraph 1 of the Convention, which in the relevant part reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> (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;
> …"

129. The respondent Party submits that the applicant was arrested on the territory of the Federation because he failed to identify himself and attempted to escape from the policemen trying to establish his identity. According to the respondent Party, the applicant was subsequently, once his identity had been established, deprived of his freedom for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed acts of genocide and war crimes, in accordance with the applicable national law and Article 5 paragraph 1(c) of the Convention.

130. The applicant claims that his arrest was a planned action by the Federation police. He further submits that there could not be any reasonable suspicion of having committed genocide and war crimes against him, as after three years of investigation the Sarajevo Public Prosecutor had not been able to gather enough evidence against him to submit the indictment to the ICTY under the Rules of the Road (see paragraph 73 above). The applicant suggests that the "investigation" against him was based solely on the fact that he was a former member of the police forces of the Republic of Bosnia and Herzegovina who, at the outbreak of the war, had decided to join the police forces of the Republika Srpska.

131. On the basis of the evidence before it, the Chamber finds that on 26 January 1997, around 12.20 p.m., the applicant was arrested by Federation police forces, among them Messrs. Fazlagić and Dizdarević, in the vicinity of the IEBL at Vraca. The evidence gathered also indicates that the applicant's arrest was not accidental, but the result of a well-planned police action aimed at arresting a person charged with genocide and war crimes in an investigation opened by the Sarajevo Public Prosecutor. The role of Z.R. in the applicant's arrest, if any, remains unclear.

132. The respondent Party has failed to produce the request to open an investigation against the applicant and the arrest warrant on the basis of which he was arrested and detained. The Chamber finds the applicant's allegation credible, that the prosecutorial activity against him was based solely on the fact that he was a former member of the police forces of the Ministry of Interior of the

Republic of Bosnia of Herzegovina who had joined the Republika Srpska police.

133. Under the Rules of the Road, "persons … 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". Charges of genocide and war crimes concern exactly those "serious violations of international humanitarian law" to which the Rules of the Road refer.

134. As stated by the respondent Party at the public hearing held before the Plenary Chamber in the cases of *Čegar, Marčeta* and *Hermas*, the Rules of the Road contained in the Rome Agreement of 18 February 1996 applied as domestic law in the Federation. The Rules of the Road had been circulated to all the courts in the Federation, and the Sarajevo Public Prosecutor's office could not have been unaware of them.

135. The decision of 27 January 1997 terminating the investigation against the applicant (see paragraph 56 above) unequivocally proves that no order, warrant or indictment against the applicant had been previously submitted to the ICTY after the Rules of the Road entered into force on 18 February 1996, as required by these Rules. The applicant's arrest and detention were therefore not "lawful" as required by paragraph 1(c) of Article 5.

136. In the light of this finding, it is neither relevant to establish whether the applicant was arrested on Republika Srpska or Federation territory, nor whether the applicant's arrest was otherwise in accordance with the law of the Federation.

137. The Chamber concludes that there has been a violation of Article 5 paragraph 1.

(i) *Article 5 paragraph 2*

138. Paragraph 2 of Article 5 provides:

> "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."

139. The respondent Party argues that "it is not in dispute that the applicant was informed promptly of the reasons for his arrest".

140. The applicant states that in the police station Novo Sarajevo he saw – but did not receive – a charge against him, accusing him of genocide and war crimes under Articles 141 and 142 of the (then applicable) Criminal Code. The IPTF officers visiting the applicant at the Center for Public Security Services informed the applicant that he had been arrested because he was suspected of having committed war crimes. The applicant's lawyer maintains that the applicant was not informed of the reasons for his arrest in accordance with legal standards, as neither the procedural decision opening an investigation nor the arrest warrant was delivered to the applicant.

141. The Chamber finds that, in the course of his detention, the applicant somehow learned that he was detained on account of charges of genocide and war crimes. He was formally informed about the reasons for his arrest when he received the decision terminating the investigation against him. In view of the fact that the applicant was detained for only about 27 hours, that he was informally acquainted with the reasons for his detention and that the decision terminating the investigation was communicated to him before he was ever interrogated, the Chamber finds that the case does not reveal a violation of Article 5 paragraph 2.

(b) Article 3 of the Convention

142. The applicant claims to have suffered, during his arrest and transport to the Novo Sarajevo police station, ill-treatment incompatible with Article 3 of the Convention, which provides as follows:

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

143. The Chamber notes that this complaint raises two issues: firstly, that of the causal

connection between the treatment which the applicant suffered during his arrest and transport and the injuries found by the doctors who examined him two days later; and, secondly and if necessary, the gravity of the treatment inflicted.

(i) *The causal connection between the treatment complained of and the injuries found*

144. The applicant states that, in the course of his arrest and on the way to the police station Novo Sarajevo, he was ill-treated by Federation policemen, among them Mr. Fazlagić and Mr. Dizdarević, and suffered injuries in the face and on the chest. During at least part of this maltreatment the applicant was handcuffed and did not offer any resistance to the police. The ill-treatment stopped when the applicant arrived at the Novo Sarajevo police station.

145. The respondent Party states that the use of force was necessary during the arrest of the applicant, while it disputes that he was ill-treated during transport to the Novo Sarajevo police station, submitting that the applicant's allegations on how he was maltreated in the police van are highly implausible. The respondent Party further disputes the medical evidence produced by the applicant.

146. The Chamber notes that where a person is taken into custody by police organs in good health and is, after release from that custody, found injured, the respondent Party bears the burden to provide a plausible explanation as to the causes of the injury, failing which an issue arises under Article 3 of the Convention (see Eur. Court HR, *Tomasi v. France* judgment of 27 August 1992, Series A no. 241, pp. 40-41, paragraphs 108-111).

147. On 28 January 1997, the day following his release from custody (and not in the afternoon of 27 January 1997, as stated by witnesses Milojka and Svjetlana Pržulj), the applicant was visited by Dr. Pejić and Dr. Ždrale at the Kasindol Hospital. The doctors established that the applicant had a broken nose, a haematoma on the nasal partition and injuries of the cartilaginous part of two ribs. He also felt pain breathing. These injuries did not require hospitalisation of the applicant, but the applicant came to the hospital for follow-up visits on 30 January and 8 February 1997. The Chamber sees no ground to doubt the accuracy of the findings of these two doctors, who have confirmed and explained their findings at the public hearing. The Chamber further notes that the medical records of the Kasindol Hospital were inspected by members of the Ombudsperson's office, who found everything to be in accordance with the applicant's submissions.

148. No one has claimed that the injuries found on the applicant on 28 January 1997 could have dated from a period prior to his arrest, or that he injured himself during the night between 27 and 28 January 1997. In order to prove that the applicant was only subjected to the force necessary to arrest him against his will, it would have been sufficient to subject him to a brief medical examination when at the Novo Sarajevo police station Mr. Fazlagić noted that the applicant was bleeding from his nose. However, the fact that the applicant was injured in the course of the arrest was not recorded by the police. This casts serious doubt on the respondent Party's argument that use of force was necessary during the arrest.

149. The Chamber therefore concludes that the applicant's injuries as assessed by Dr. Pejić and Dr. Ždrale are the consequence of the applicant's deliberate ill-treatment at the hands of the Federation policemen.

(ii) *The gravity of the treatment complained of*

150. The European Court of Human Rights has held that the treatment complained of must have attained a minimum level of severity if it is to fall within the scope of Article 3 (see the *Ireland v. The United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65, paragraph 162).

151. The Chamber has previously held that any recourse to physical force against a person which has not been made strictly necessary by the person's own conduct diminishes human dignity and is, in principle, an infringement of Article 3 (see the aforementioned *Hermas* decision, paragraphs 28-29, with reference to the case-law of the European Court).

152. The Chamber notes the particular vulnerability of a person held in police custody. It also recalls that the applicant has stated that during at least part of his maltreatment he was handcuffed and could not protect himself against the police officers punching and kicking his face and his body. The Chamber therefore finds that the treatment inflicted to the applicant by the police amounted to inhuman and degrading treatment.

(iii) *Conclusion*

153. The Chamber concludes that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention.

(c) Article 2 of Protocol No. 4 to the Convention

154. In his application to the Ombudsperson the applicant complained that his arrest constituted a violation of his right to freedom of movement guaranteed by Article 2 of Protocol No. 4 to the Convention, which insofar as relevant reads as follows:

> "1. Everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement and freedom to choose his residence.
>
> …
>
> 3. No restriction shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

155. The Ombudsperson noted that the difference between Article 5 of the Convention and Article 2 of Protocol No. 4 to the Convention was in the degree or intensity of the right of freedom to move. Considering that Article 5 was applicable to the complaints raised by the applicant, the Ombudsperson did not consider that an examination of the case under Article 2 of Protocol No. 4 to the Convention was necessary.

156. The Chamber is of the same opinion and, in the light of its finding of a violation of Article 5 paragraph 1 of the Convention, concludes that it is not necessary to examine the application under Article 2 of Protocol No. 4 to the Convention.

2. Article II(2)(b) of the Agreement – complaint of discrimination

157. The applicant claimed that it is "obvious" that he was discriminated against on the basis of his nationality.

158. The respondent Party argues that the applicant did not explain how he was treated differently from others. The respondent Party further argues that neither did the applicant provide any evidence of the discrimination against him nor was such discrimination apparent from the case file.

159. As far as discrimination in the enjoyment of the right to liberty and security of person is concerned, the Ombudsperson submitted that the applicant was either arrested in execution of an arrest warrant or after failing to produce a proper identification document. She stated that the applicant was not treated differently from other persons in that situation and concluded that he could not therefore have been discriminated against in the enjoyment of his rights guaranteed by Article 5. The Ombudsperson reserved her opinion in relation to the complaint of discrimination insofar as it concerns the enjoyment of the right enshrined in Article 3.

160. Under Article II(2)(b) of the Agreement, the Chamber has jurisdiction to consider alleged or apparent discrimination on any ground in the enjoyment of any of the rights and freedoms provided for in the 16 international agreements listed in the Appendix to the Agreement.

161. The Chamber notes that it has already found violations of the rights of the applicant as protected by Articles 3 and 5 paragraph 1 of the Convention. It must now consider whether he has suffered discrimination in the enjoyment of those rights.

162. 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*, case no. CH/98/756, *Đ.M.*, decision on admissibility and merits of 13 April 1999, paragraph 72). 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.

(a) Discrimination in relation to Article 5 of the Convention

163. The applicant submits that the investigation against him was based solely on the fact that he is a former member of the police forces of the Ministry of Interior of the Republic of Bosnia and Herzegovina who, at the outbreak of the war, decided to join the police forces of the Republika Srpska. The Chamber recalls that the respondent Party was requested to submit the request to open an investigation against the applicant in order to shed some light on the elements that led to the charges against the applicant. The respondent Party did not produce the requested document.

164. The Chamber notes that, in general, a respondent Party's failure to produce a document capable of disproving an allegation by the applicant can lead to a finding accepting and endorsing the applicant's allegation. In the present case, however, the Chamber holds that the evidence before it is not sufficient to sustain a finding of discrimination against the applicant in the enjoyment of his right to liberty and security of person.

(b) Discrimination in relation to Article 3 of the Convention

165. The applicant claims that during his arrest, while he was assaulted, kicked and punched by the policemen, he was verbally abused with reference to his nationality. The respondent Party denies that the applicant was ill-treated at all.

166. The Chamber has already found that the applicant was subjected to degrading and inhuman treatment during his arrest and the transport in the police van. The Chamber notes, however, that several factors different from the applicant's nationality, such as the rancour caused by the extreme gravity of the crimes the applicant was charged with and the resistance he allegedly opposed to his arrest, can explain the misconduct of the policemen.

167. The Chamber is therefore not satisfied that the evidence before it is sufficient to sustain a finding of discrimination in the enjoyment of the applicant's right not to be subjected to inhuman or degrading treatment.

VIII. REMEDIES

168. Under Article XI(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.

169. The Chamber notes that it has found that the applicant has suffered violations of his right not to be subjected to inhuman and degrading treatment and of his right to liberty and security of person. The Chamber has found that Messrs. Fazlagić and Dizdarević played a major role in the violation of the applicant's right not to be subjected to inhuman and degrading treatment.

170. In view of the fact that Messrs. Fazlagić and Dizdarević seriously violated the applicant's human rights, and thereby exceeded their authority and abused their position, the Chamber finds it appropriate that criminal proceedings should be initiated against them and the other policemen involved in the applicant's arrest. It considers that such acts, which not only adversely affected the applicant but also the police service of the Federation of Bosnia and Herzegovina and indeed the Federation as a whole, should not go unpunished.

171. The Chamber therefore considers it necessary to order the respondent Party to initiate, in accordance with its internal legal procedures, an investigation into the conduct of Messrs. Fazlagić and Dizdarević, as well as against the other policemen involved in the arrest, in relation to the arrest and detention of the applicant, with a view to initiating criminal proceedings against them in accordance with the law of the Federation of Bosnia and Herzegovina.

172. The Chamber will now turn to the question of monetary relief. On 7 August 1999 the applicant submitted a first compensation claim. He requested compensation for the fear and pain suffered, for the "reduced general ability", i.e. reduced working and general living ability, for the ruined reputation and honour and for medical expenses in the overall amount of KM 20,000.

173. In the course of the public hearing of 5 October 1999, the applicant put forward a new compensation claim, on which the Chamber will base its consideration of the issue of monetary relief for the violations found. The applicant claimed:

(a) KM 10,000 for the damage done to his reputation and honour and additionally KM 5,000 on the ground that this damage was done through the media;

(b) KM 8,000 for the pain and fear inflicted to him;

(c) KM 5,000 for "the mental suffering of his mother and his sister who spent more than one day in fear for the life of their son and brother respectively";

(d) KM 2,000 for the medical expenses which are not borne by his health insurance; and

(e) KM 1,800 (i.e. KM 120 per month) for the reduced personal income due to the sick leave which he has allegedly been forced to take for 15 months as of the date of the hearing.

The overall compensation claimed at the public hearing is thereby KM 31,800.

174. The Chamber notes that the applicant has also lodged a request for compensation of the fees and expenses due to his representative for his participation in the proceedings before the Ombudsperson and the Chamber. According to the applicant's representative these amount to KM 640, of which KM 120 for the proceedings before the Ombudsperson.

175. In support of his claim for compensation of the damage done to his reputation and honour the applicant has produced three newspaper articles published in the days following his arrest. The Chamber notes that one of the articles (see paragraph 72 above) relates to facts completely different from those concerned by the present application. The Chamber further notes that on the basis of the copy of that article it is not possible to determine whether it was published in the days following the applicant's arrest.

176. The Chamber also notes that the article published in *Večernje Novine* (see above paragraph 71) expressly mentions that the charges against the applicant were dropped and the applicant released, while the copy of the article published in *Oslobođenje* (paragraph 70 above) is incomplete, so that the Chamber cannot establish whether it contained this information.

177. The Chamber finally notes that it cannot award compensation for the alleged television coverage of the applicant's arrest and the damage thereby possibly done to his reputation, as no evidence of this coverage was submitted to it.

178. In the light of these considerations, the Chamber takes the view that the present decision, finding that the applicant was unlawfully arrested and treated in violation of his right not to be subject to inhuman or degrading treatment, constitutes sufficient redress for the harm, if any, done to his honour and reputation. It will therefore not award any compensation under this item.

179. As far as the applicant's claim for compensation on account of "the fear and pain suffered" is concerned, the Chamber understands this claim to refer to the bodily and mental suffering during the arrest, the custody and the immediate aftermath of the custody, e.g. the pain the applicant felt breathing for several days after release. The Chamber notes the difficulties inherent in the determination of an adequate monetary compensation under this item. It also notes that the present decision in itself, taken after the proceedings before the Chamber, will in large part constitute recognition of the wrongs done to the applicant. Nevertheless, the Chamber considers it appropriate to award the applicant a monetary sum as compensation for the treatment he suffered. It considers an appropriate sum to be KM 3,000 and will accordingly order the Federation of Bosnia and Herzegovina to pay this sum to the applicant within three months from the day when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

180. With regard to the applicant's claim for compensation for the mental suffering of his mother and sister, the Chamber notes that it is competent only to award damages to the applicant and not to persons who are not parties of the proceedings before the Chamber.

181. The Chamber notes that the history of the applicant's psychological problems, of their cause and of their psychiatric treatment is unclear and lacunose. The applicant visited a psychiatrist, Dr. Kezunović, on 7 February 1997 and was hospitalised at the Psychiatric Clinic Sokolac on 3 November 1998. In between the two dates, the applicant was not assisted by a psychiatrist. Dr. Đokić, the psychiatrist treating the applicant during his hospitalisation, was not in a position to establish with certainty a causal link between the incident of 26 and 27 January 1997 and the psychological problems the applicant has been suffering from. On the other hand, it has not been alleged that the applicant suffered any other traumatic event between February 1997 and October 1998 that could serve as an alternative explanation of the *psychosis reactiva* consistently found by the doctors who have treated him since February 1997.

182. Moreover, the Chamber notes that while according to medical documentation - especially the applicant's "case history" signed by Dr. Đokić - the applicant suffers exclusively from neurological and psychological problems, the certificate issued by the applicant's employer on 7 October 1999 states that he has been on sick leave since September 1998 "as a consequence of the grievous bodily injuries he sustained when arrested on 26 January 1997 by the Federation Police in Vraca".

183. In view of the above, the Chamber concludes that it is at present not in a position to conclude or exclude that there is a causal link between the deterioration of the applicant's mental and psychological health and the violations of his human rights found in this decision. It cannot, therefore, rule within the present decision on the applicant's claim for compensation for the medical expenses after 7 February 1997 or for the reduced personal income due to the sick leave since September 1998 or on the claim for "reduced general ability" originally raised by the applicant (paragraph 172 above). The Chamber reserves its decision on these parts of the applicant's compensation claim until a later date.

184. As far as the claim for compensation for the expenses incurred due to the medical treatment between 28 January and 7 February 1997 is concerned, the Chamber has not received from the applicant any documents substantiating his claim and will, therefore, not award any compensation.

185. As for legal fees and expenses incurred in the present proceedings and in the proceedings before the Ombudsperson, the Chamber orders the respondent Party to pay compensation to the applicant, within three months from the day when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in the amount of KM 640, a sum not questioned by the respondent Party.

186. 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 179 and 185 above.

IX. CONCLUSIONS

187. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible in relation to the complaints under Articles 3 and 5 of the European Convention on Human Rights, Article 2 of Protocol No. 4 to the Convention and of discrimination in the enjoyment of the rights guaranteed by these provisions;

2. unanimously, to declare inadmissible the applicant's complaint under Article 6 of the Convention;

3. unanimously, that the arrest and detention of the applicant by the police in Sarajevo on 26 and 27 January 1997 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 Human Rights Agreement;

4. unanimously, that the case does not reveal a violation of the applicant's right to be promptly informed of the reasons for his arrest and of any charges against him under Article 5 paragraph 2 of the Convention;

5. by 5 votes to 1, that the treatment to which the applicant was subjected by the police during his arrest and transport in the police van on 26 January 1997 constituted inhuman and degrading treatment and thus violated the applicant's rights under Article 3 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, that it is not necessary to examine the complaint under Article 2 of Protocol No. 4 to the Convention;

7. by 5 votes to 1, that there is not sufficient evidence to conclude that the applicant has been discriminated against in the enjoyment of his rights as guaranteed by Article 5 of the Convention;

8. unanimously, that there is not sufficient evidence to conclude that the applicant has been discriminated against in the enjoyment of his rights as guaranteed by Article 3 of the Convention;

9. unanimously, to order the respondent Party to carry out an investigation into the conduct of Messrs. Fazlagić and Dizdarević, as well as of the other policemen involved in the applicant's arrest on 26 January 1997 at the Inter Entity Boundary Line at Vraca and in the applicant's transportation in the police van to the Novo Sarajevo police station, with a view to initiating criminal proceedings against them in accordance with the law of the Federation of Bosnia and Herzegovina;

10. by 5 votes to 1, to order the respondent Party 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 Chamber's Rules of Procedure, the sum of 3,000 (three thousand) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for the fear and pain suffered during the arrest and detention, as well as in the immediate aftermath of the release;

11. by 4 votes to 2, to reserve its decision on the applicant's claim for compensation for the medical expenses after 7 February 1997, for the reduced personal income due to the sick leave since September 1998, and on the claim for "reduced general ability";

12. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, within three months from the day when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 640 (six hundred and forty) Convertible Marks

(*Konvertibilnih Maraka*) by way of compensation for the legal fees and expenses incurred in the proceedings before the Chamber and the Ombudsperson;

13. unanimously, that simple interest at an annual rate of 4% (four per cent) will be payable on the sums awarded in conclusions number 10 and 12 above from the expiry of the three-month period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

14. 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 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
(delivered on 6 June 2003)

Case no. CH/98/1493

Milan PILIPOVIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 May 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Mato TADIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
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 an applicant complaining of the fact that Article 3a paragraph 1 of the Law on Cessation of the Application of the Law on Abandoned Apartments prevents him from repossessing his pre-war apartment located in Bihać in the Federation of BiH. The applicant further complains that the Federation of BiH does not recognise him as the owner over the apartment in question on the basis of the steps taken by the applicant in 1992, aimed at purchasing the apartment from the then Yugoslav National Army ("JNA"). Those steps included paying the purchase price, but did not include concluding a written purchase contract.

2. The case raises issues under Articles 6, 8 and 13 of the European Convention on Human Rights ("Convention"), 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 introduced on 20 November 1998.

4. On 20 January 1999, the Chamber transmitted the case to Bosnia and Herzegovina and the Federation of BiH for their 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 22 March 1999, the Federation of BiH submitted its observations on the admissibility and merits.

6. On 24 May 1999, the applicant submitted his response.

7. On 25 June 1999, 31 December 2001 and 9 December 2002, the Federation of BiH submitted additional observations.

8. On 5 July 1999, Bosnia and Herzegovina submitted its observations contesting the applicant's compensation claim as being unsubstantiated.

9. On 27 February 2002, 3 December 2002 and 20 December 2002, the applicant submitted additional comments.

10. On 29 November 2002, the Chamber invited the Organisation for Security and Co-operation in Europe ("OSCE") to participate in the proceedings in this case as *amicus curiae*. On 3 January 2003, the OSCE submitted its observations in that capacity.

11. On 10 January 2003, the Chamber retransmitted the case to the Federation of BiH for its observations on the admissibility and merits also under Article 8 of the Convention and Article II(2)(b) of the Agreement.

12. On 27 January 2003, the Federation of BiH submitted its observations on the admissibility and merits.

13. On 12 February 2003, the applicant submitted his response.

14. The Chamber deliberated on the admissibility and merits of the application on 14 January 1999, 8 January 2003, 4 March 2003, 1 April 2003 and 8 May 2003 and adopted the present decision on the latter date.

III. STATEMENT OF FACTS

15. The applicant is a citizen of Croatia by birth. He acquired citizenship of Bosnia and Herzegovina in 1999.

16. The applicant is the pre-war occupancy right holder over an apartment located at Harmani H-2 in Bihać. The applicant moved into the apartment on 15 September 1987. The allocation right holder over the apartment was the then JNA (the applicant served in the then JNA as a civilian employed by the armed forces).

17. On 10 February 1992, the applicant requested the then JNA to sell the apartment to him in accordance with the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia – "OG SFRY" – no. 84/90). On 12 February 1992, the applicant paid the purchase price totalling, after deduction of contributions made to the JNA housing fund, 400,000 Yugoslav Dinars (*jugoslovenskih dinara*, "YUD"). The applicant did not conclude a purchase contract with the then JNA due to circumstances that were beyond the control of the contracting parties[1].

18. The applicant was a member of the then JNA until 19 May 1992. On 20 May 1992 he joined the Republika Srpska armed forces and has served in these forces since then, still as a civilian employed by the armed forces. According to the applicant, he and his family occupied the apartment at issue until 18 May 1992. The applicant alleges that he left Bihać for two reasons. First, he was afraid for his own safety and the safety of his family. Wives and children of service members of the then JNA were allegedly insulted on a regular basis in order to make them leave Bihać. Secondly, his entire unit was ordered by the higher chain of command within the military structure to move from Bihać to Banja Luka.

19. On 15 December 1992, the Army of the Republic of Bosnia and Herzegovina ("RBiH Army") declared the apartment temporarily abandoned and allocated the apartment to Mr. Z.M., a member of the RBiH Army. On 23 June 1996, the RBiH Army declared the apartment permanently abandoned because the applicant did not return to it before 6 January 1996 (*i.e.* 15 days after the war in Bosnia and Herzegovina officially stopped) in accordance with Article 10 of the 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).

20. On 1 September 1998, the applicant requested the Service of Reconstruction, Housing and Public Utilities of the Bihać Municipality ("Service") to reinstate him into his apartment.

21. On 28 November 2000, the Service issued a procedural decision refusing the applicant's request. The request was refused on the basis of Article 3a paragraph 1 of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of BiH – "OG FBiH" – nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02) ("Law on Cessation"). This provision denies the right to repossess his or her pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date. On 15 February 2001, the Ministry for Building, Physical Planning and Environmental Protection of the Una-Sana Canton ("Ministry") confirmed the procedural decision of 28 November 2000.

22. On 26 March 2001, the applicant initiated an administrative dispute before the Cantonal Court in Bihać ("Cantonal Court") and requested it to declare the procedural decision of 15 February 2001 null and void. On 14 January 2002, the Cantonal Court issued a judgment refusing the applicant's request and thus confirming the procedural decision of 15 February 2001.

23. On 7 February 2002, the applicant appealed against the judgment of 14 January 2002 to the Supreme Court of the Federation of Bosnia and Herzegovina ("Supreme Court"). The case is currently pending before the Supreme Court.

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[1] In several other cases before the Chamber, the Federation of BiH has submitted that not a single purchase contract was concluded with the former JNA in the Bihać region due to the fact that, under the former JNA internal organisation, the Bihać region was attached to a unit controlled out of Zagreb in Croatia. As the Law on Securing Housing for JNA was never applied in Croatia, the Federation of BiH submits, apartments in the Bihać region could not possibly have been purchased. At some point the Bihać region was transferred to a unit controlled out of Sarajevo. However, no contracts on purchase were ever concluded in the Bihać region.

24. According to the applicant, he and his family rent an apartment in Laktaši, the Republika Srpska, while waiting for the request for reinstatement to be decided. More than four and a half years have elapsed since the applicant requested the Federation of BiH to reinstate him.

IV. RELEVANT LEGAL FRAMEWORK

A. Constitution of Bosnia and Herzegovina set out in Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina

25. Article II(2) reads:

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

B. Agreement on Refugees and Displaced Persons set out in Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina

26. Article I paragraph 1 reads:

> "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 and to be compensated for any property that cannot be restored to them. 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."

C. Law on Abandoned Apartments (OG RBiH nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95)

27. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments. 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.

28. Under Article 1, an occupancy right was to be suspended if the holder of that right and the members of his or her household had abandoned the apartment after 30 April 1991. Article 3 provided for some exceptions. For example, according to Article 3, the occupancy right was not to be suspended:

> (a) where the occupancy right holder and members of his or her household had been forced to leave the apartment as a result of aggressive actions intended to execute a policy of ethnic cleansing of a particular population from certain areas or in the course of a pursuit of other goals of the aggressors;
>
> (b) where the apartment was destroyed, burnt or in direct jeopardy as a result of war actions;
>
> (c) where the occupancy right holder or a member of his or her household had been drafted or voluntarily enlisted himself or herself into the armed forces of the then Republic of Bosnia and Herzegovina.

29. The Decision on the Cessation of State of War entered into force on 22 December 1995, the date when it was placed on the bulletin board of the Presidency of the Republic of Bosnia and Herzegovina. The issue of the Official Gazette comprising this Decision (OG RBiH no. 50/95) was published on 28 December 1995.

30. If the pre-war occupancy right holder failed to resume using the apartment before 29 December 1995 (if he or she had been staying within the territory of the Republic of Bosnia and Herzegovina) or before 6 January 1996 (if he or she had been staying outside that territory), the pre-war occupancy right holder was to be regarded as having abandoned the apartment permanently. According to Article 10, it was to result in the deprivation of the occupancy right.

D. Law on Cessation of the Application of the Law on Abandoned Apartments (OG FBiH nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02)

31. This Law entered into force on 4 April 1998. Article 1 paragraph 1 expressly repealed the Law on Abandoned Apartments. According to Article 2 paragraph 1, all administrative, judicial and other decisions terminating the occupancy right on the basis of the Law on Abandoned Apartments shall be null and void.

32. Article 3 paragraphs 1 and 2, as amended, read:

> "The occupancy right holder of an apartment declared abandoned or a member of his/her household defined in Article 6 of the [Law on Housing Relations] (hereinafter the "occupancy right holder") shall have the right to return in accordance with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.
>
> Paragraph 1 of this Article shall be applied only to those occupancy right holders who have the right to return to their homes of origin under Article I of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina. Persons who have left their apartments between 30 April 1991 and 4 April 1998 shall be considered to be refugees and displaced persons under Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.
>
> …"

33. Article 3a entered into force on 4 July 1999 and reads:

> "As an exception to Article 3, paragraphs 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of BiH, at the disposal of the Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 she or he was in active service in the SSNO (Federal Secretariat for National Defence) – JNA (*i.e.* not retired) and was not a citizen of Bosnia and Herzegovina according to the citizenship records, unless she or he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former SFRY before 14 December 1995.
>
> A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if she or he remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995, or if she or he has acquired another occupancy right outside the territory of Bosnia and Herzegovina."

34. 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.

35. According to Article 6 paragraph 1, as amended, the competent authority shall decide upon a claim for repossession within 30 days starting from the date when the claim was submitted. The competent authority shall decide upon the claim in the chronological order in which the claim was received, unless specified otherwise in law.

36. According to Article 10, proceedings initiated by the claims for repossession of the pre-war apartments shall be considered urgent.

37. Article 18d paragraph 6, as amended, reads:

"Exceptionally, in respect of apartments at the disposal of the Ministry of Defence, where an occupancy right to an apartment is cancelled in accordance with Article 5[2] or Article 12[3], or where the claim is finally rejected in accordance with this Law, the competent body of the Ministry of Defence may issue a new contract on use to a temporary user of an apartment in cases where she or he is required to vacate the apartment under this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that her or his housing needs are not otherwise met."

E. Instruction on Application of the Law on Cessation of the Application of the Law on Abandoned Apartments ("Instruction on Application of the Law on Cessation") (OG FBiH nos. 43/99 and 56/01)

38. Point 23 reads:

"The rules and procedures in the Law and this Instruction concerning allocation of abandoned apartments not claimed in accordance with the applicable deadline shall also apply to apartments at the disposal of the Ministry of Defence, subject to the following variations as explained in point 24 of this Instruction."

39. Point 24, as amended, reads:

"(i) The temporary user of an apartment at the disposal of the Ministry of Defence may be entitled to a new or revalidated contract on use if the requirements of Article 2 paragraph 4 of the Law and Articles 18c and 18d of the Law are met. In such cases, the body which issued the contract shall be authorised to revalidate a cancelled contract on use in accordance with points 10 and 11 of this Instruction, following any procedures which are necessary to ensure that the requirements of the Law and this Instruction are met, including among others that the housing needs of the temporary user are not otherwise met under point 24(ii) of this Instruction and that the temporary user has no other accommodation available to him or her under point 9 of this Instruction.

(ii) In other cases, the responsible military housing body may issue a new contract on use of an apartment which is unclaimed or for which a claim is finally rejected to a temporary user who is currently occupying an apartment at the disposal of the Ministry of Defence, who is required to vacate that apartment pursuant to the provisions of this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that his or her housing needs are not otherwise met, as explained by the Law and this Instruction.

(iii) All bodies dealing with apartments at the disposal of the Ministry of Defence shall co-operate with competent international and local bodies to ensure that apartments are not used in violation of the Law by people whose housing needs are otherwise met. This co-operation shall include making available information on past and present use of apartments which are at the disposal of the Ministry of Defence."

F. Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina – "OG SRBiH" – nos. 14/84, 12/87 and 36/89; OG RBiH nos. 2/93; OG FBiH nos. 11/98, 38/98, 12/99 and 19/99)

40. Article 83a, as amended, reads:

"The occupancy right holder may not be given a notice on the termination of the contract on use of apartment under this Law if the circumstances, which are the basis for the termination of the contract, occurred within the period while the occupancy right holder was absent from

[2] If the pre-war occupancy right holder failed to file a request for repossession of his or her pre-war apartment before 4 July 1999.

[3] If the pre-war occupancy right holder over an apartment failed to file a request for eviction of the current occupant of the apartment within 30 days after the deadline for the vacation of the apartment had expired.

the apartment in the capacity of a refugee or a displaced person under Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

All valid court decisions issued in the proceedings referred to in paragraph 1 of this Article, under which the occupancy right holder was given a notice on the termination of the contract on use of apartment from 30 April 1991 until the day when this Law enters into force, are null and void.

Proceedings for the termination of the contract on use of apartment for the reasons determined by the Law, which were initiated prior to the entering into force of this Law and in which a valid decision was not issued by the time of its entering into force, are terminated.

The return of an apartment into the possession of the occupancy right holder referred to in paragraph 2 of this Article shall be carried out in accordance with the [Law on Cessation]."

G. Law on Sale of Apartments with Occupancy (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 25/01, 32/01, 61/01 and 15/02)

41. Article 8a, as amended, reads:

"An occupancy right holder over an apartment that was declared abandoned in accordance with the Law on Abandoned Apartments and other regulations that define the issue of abandoned apartments, or an occupancy right holder that left the apartment in the period between 30 April 1991 and 4 April 1998[4], in case when the apartment has not been officially declared abandoned, is entitled to purchase that apartment in accordance with conditions set forth in this Law immediately after repossessing the apartment, or at the latest one year after repossession of the apartment, or within one year after this provision has been published in the Official Gazette of the Federation of BiH, depending on which date is later".

42. Article 15 paragraph 1 reads:

"The Ministry of Defence shall sell, in accordance with this Law, the apartments formerly at the disposal of the JNA and SSNO."

43. Article 39 reads, 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."

44. Article 39a reads:

"The Ministry of Defence shall issue an order that the occupancy right holder over an apartment at the disposal of that Ministry be registered as the owner with the competent court, when the occupancy right holder is legally using the apartment and when he concluded a legally valid contract on purchase of the apartment with the [JNA] in accordance with the Laws indicated in Article 39 of this Law."

45. According to Article 39c, Article 39a shall also apply to an occupancy right holder who has realised the right to repossess her or his pre-war apartment pursuant to the Law on Cessation.

46. Article 39d states that if an individual has unsuccessfully tried to realise his or her rights with the Ministry of Defence pursuant to this Law, he or she may initiate proceedings before the competent court.

[4] The Law on Cessation entered into force on 4 April 1998.

H. Instruction on Application of Articles 39a, 39b and 39c of the Law on Sale of Apartments with Occupancy Right (OG FBiH no. 6/00)

47. Article 6 reads, in relevant part:

> "In cases when an occupancy right holder has a receipt confirming that he paid a certain amount on the seller's account, but he does not have a contract on purchase which would show the total price of the apartment, the Ministry [of Defence] shall, based on the request by the occupancy right holder, conclude a new contract on purchase of the apartment and shall subtract from the newly established purchase price the previous sum paid.
>
> …"

I. Law on Administrative Procedure (OG FBiH nos. 2/98 and 48/99)

48. According to Article 221, the party shall be entitled to appeal against the first instance procedural decision.

49. According to Article 244, the second instance body shall decide upon the appeal and deliver the second instance decision to the party within 30 days starting from the date when the appeal was submitted.

J. Law on Administrative Disputes (OG FBiH nos. 2/98 and 8/00)

50. Article 1 provides that the court shall decide in an administrative dispute on the lawfulness of administrative acts. According to Article 10, an administrative dispute may be instituted against the second instance administrative act. According to Article 11, an administrative dispute may be instituted also if the second instance administrative body has failed to decide upon the appeal against the first instance administrative decision (the action against the "silence of the administration").

51. Once the administrative dispute has been initiated, there is no time limit in which the court must issue its decision in the matter. There is also no legal remedy to speed up the proceedings before the court in question.

K. Law on Civil Procedure (OG FBiH nos. 42/98 and 3/99)

52. Article 172 reads:

> "The plaintiff may initiate a lawsuit and request that the court establish the existence or non-existence of some right or legal relationship, and authenticity or non-authenticity of some document, respectively.
>
> Such 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 authenticity or non-authenticity of some document before the maturity date of the claim for enforcement from the same relationship or when the plaintiff has some other legal interest to initiate such lawsuit.
>
> If a certain legal relationship has become disputable in the course of a pending lawsuit and if the decision in the lawsuit depends on whether that legal relationship 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 legal relationship, if the court before which the lawsuit is pending is competent for such complaint.
>
> Filing a complaint under the provision in paragraph 3 of this Article shall not be deemed modification of the lawsuit."

L. Decision of the Constitutional Court of Bosnia and Herzegovina in the case no. U-14/00 of 4 May 2001 (Official Gazette of Bosnia and Herzegovina – "OG BiH" – no. 33/01)

53. On 4 May 2001, the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") issued its judgment in case no. U-14/00. The appellant in that case, Ž.M. had lodged an appeal before the Constitutional Court requesting the Court to annul the lower-instance decisions in his case. The contested decisions refused the appellant's claim for repossession because he had not concluded a contract on use of the apartment and therefore did not acquire the occupancy right over the apartment, due to circumstances that were beyond his control[5].

54. The Constitutional Court decided that the authorities of the Federation of BiH violated Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention in the appellant's case. The Constitutional Court reasoned that the appellant's pre-war apartment constituted his "home" in the sense of Article 8 of the Convention and that the appellant's right over his pre-war apartment constituted "possessions" in the sense of Article 1 of Protocol No. 1 to the Convention. The Constitutional Court found that the interference of the Federation of BiH was not "necessary in a democratic society" and was not in the "public interest":

> *"The Constitutional Court considers that the interference initially served a legitimate aim in accordance with the meaning of Article 8 paragraph 2 of the Convention. The relevant aim was the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war. Indeed, the war in Bosnia and Herzegovina caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities of, at the time, the Republic of Bosnia and Herzegovina enacted a law which temporarily solved the housing problems caused by a great number of refugees.*
>
> *However in the present case, the appellant has still not been able to realise his rights. Therefore, the "interference", which initially could have been justified and in compliance with the principle of "necessity", can no longer, five years after the end of the war, represent a necessary "interference in a democratic society" with the appellant's right to return to his home."*[6]
>
> *"The Court accepts that there may have been strong reasons in the war period justifying the use of the apartment for giving shelter to refugees. However, the conditions, which then prevailed have fundamentally changed and can no longer justify an interference with the appellant's rights. It is also true that the apartment is at present occupied by other persons and that their interests must be taken into account when determining whether the interference with the appellant's rights is proportionate. However, when weighing the various interests involved, the Court must pay particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP*[7] *and the Constitution and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective."*[8]

The Constitutional Court also established that a situation where any temporary occupant continued to use an abandoned apartment after 4 April 1998[9] was unlawful, given the fact that the Law on Cessation declared null and void "all administrative, judicial and any other decisions enacted on the

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[5] According to the housing legislation, an individual shall acquire the occupancy right over an apartment once a contract on use of the apartment has been concluded. That contract on use shall be based on a decision of the allocation right holder. In the case at issue, the appellant had obtained a decision of the allocation right holder granting an apartment to him, but did not conclude a contract on use of the apartment for reasons beyond his control. Nevertheless, the appellant lived in the apartment from 1987 to 1994, when he left Bosnia and Herzegovina.

[6] The above-mentioned decision of the Constitutional Court, paragraphs 24-25.

[7] General Framework Agreement for Peace in Bosnia and Herzegovina.

[8] The above-mentioned decision of the Constitutional Court, paragraph 34.

[9] The Law on Cessation entered into force on 4 April 1998.

basis of [the Law on Abandoned Apartments] terminating occupancy right". The Constitutional Court also pointed out that an important reason behind the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement") was to enable return of refugees and displaced persons to their pre-war places of residence. Accordingly, the factual situation on 30 April 1991 had to be a starting point when deciding legal disputes pertaining to the repossession of pre-war apartments and houses.

V. COMPLAINTS

55. The applicant complains of not being reinstated into his apartment, of not being recognised as the owner over that apartment and of being discriminated against in that regard. The applicant also complains of the length of the proceedings before the competent authorities. Therefore, the Chamber transmitted the case to Bosnia and Herzegovina under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention and to the Federation of BiH under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

VI. SUBMISSIONS OF THE PARTIES

A. Bosnia and Herzegovina

56. Bosnia and Herzegovina submitted observations exclusively on the applicant's compensation claim. The Chamber has not received any observations on the admissibility and merits from Bosnia and Herzegovina.

B. The Federation of Bosnia and Herzegovina

57. In its observations of 22 March 1999, the Federation of BiH submits that the application is inadmissible because: (a) the applicant did not exhaust available domestic remedies (at that time, the case was pending before the Service in Bihać); (b) the applicant did not file his application with the Chamber within six months from the date of "final decision" in his case (in the opinion of the Federation of BiH, the date of "final decision" was 26 January 1996 when the Parliament of RBiH adopted as law the Decree annulling all contracts on purchase of the former JNA apartments[10]).

58. In regard to the merits, the Federation of BiH states that it did not violate Article 1 of Protocol No. 1 to the Convention. Article 1 of Protocol No. 1 protects the peaceful enjoyment of one's possessions. The Federation of BiH understands that provision as preventing it from evicting the applicant from an apartment that he occupies. As the applicant has not been evicted from his apartment, but he voluntarily left it in 1992, the Federation of BiH did not interfere with the applicant's right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. Even if the Chamber found that the Federation of BiH interfered with the applicant's right to the peaceful enjoyment of his possessions by not reinstating him into his apartment, such interference would be justified under Article 1 of Protocol No. 1 to the Convention. The Federation of BiH continues to defend the annulment of contracts on purchase of the former JNA apartments although the applicant has not concluded such a contract. The Federation of BiH states that the former JNA discriminated against citizens of Bosnia and Herzegovina who did not serve in the JNA by selling JNA apartments to JNA service members on favourable terms. Finally, the Federation of BiH submits that it did not violate Articles 6 and 13 of the Convention because the applicant did not exhaust effective domestic remedies.

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[10] On 22 December 1995, the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Amendments of the Law on Transfer of Assets of the former SFRY to the Republic of Bosnia and Herzegovina (OG RBiH no. 50/95). The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 26 January 1996 and renamed the Decree the "Law on Amendments of the Law on Transfer of Assets of the former SFRY to the Republic of Bosnia and Herzegovina" (OG RBiH no. 2/96).

59. In its observations of 31 December 2001, the Federation of BiH submits that the applicant was not the owner of his apartment but only the occupancy right holder because he has not concluded a contract on purchase of the apartment. The Federation of BiH also suggests to the Chamber to hold a public hearing in this case in order for the Federation of BiH to prove that the present case differs substantially from *Miholić and others* (case nos. CH/97/60 *et al, Miholić and others,* decision on admissibility and merits of 9 November 2001, Decisions July – December 2001).

60. On 15 November 2002, the Chamber requested the Federation of BiH to answer the following questions: (a) whether the Supreme Court had decided in any case that legislation in force in the Federation of BiH is contrary to the Convention and, therefore, had directly applied or instructed lower courts to apply a provision of the Convention in the relevant case (in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina and Article II(A)(6) of the Constitution of the Federation of BiH); (b) whether the Federation of BiH believed that the Chamber's reasoning in *Miholić and others* (see the above-mentioned *Miholić and others* decision) should *mutatis mutandis* apply equally to persons who had not concluded a purchase contract for their apartments with the then JNA.

61. On 3 December 2002, the Federation of BiH responded that: (a) the Supreme Court had directly applied provisions of the Convention in a number of cases; (b) *Miholić and others* was applicable exclusively when an applicant had concluded a contract on purchase of his or her apartment with the then JNA before 6 April 1992, when such contract had been verified by the competent court and when the purchase price of the apartment had been fully paid.

62. On 20 December 2002, the Federation of BiH submitted four procedural decisions of the Supreme Court in case nos. Už-61/01, Už-46/01, Už-455/01 and Už-449/01 of 4 April 2002, 25 April 2002, 23 May 2002 and 24 October 2002, respectively. In those four cases, the Supreme Court quashed judgments of the Cantonal Courts in Bihać and Sarajevo because, in the opinion of the Supreme Court, the Cantonal Courts wrongly considered the cases against domestic laws exclusively. The Supreme Court instructed the Cantonal Courts to apply directly the Convention (particularly Article 8 and Article 1 of Protocol No. 1). However, the Supreme Court did not give any instructions or indications to the Cantonal Courts as to how the application of the Convention should affect the cases.

63. In its observations of 27 January 2003, the Federation of BiH submits that the applicant did not exhaust available domestic remedies (at that time, the case was pending before the Supreme Court). As to the alleged violation of Article 8 of the Convention, the Federation of BiH decides to refrain from commenting until the Supreme Court has decided upon the applicant's appeal. The Federation of BiH further submits that the applicant's complaint of discrimination is unsubstantiated.

C. The applicant

64. In his observations of 11 May 1999, the applicant submits that the only available domestic remedy, at that time, is the appeal against the "silence of the administration" and he does not consider that remedy to be effective. The applicant explains that Bosnia and Herzegovina and the Federation of BiH have done everything in order to deprive service members of the former JNA of their apartments. The applicant also states that he is the owner over his apartment (and not only the occupancy right holder) although he did not enter into a contract on purchase, because the contract was not concluded due to circumstances that were beyond the control of the contracting parties.

65. In his observations of 27 February 2002, the applicant argues that Article 3a of the Law on Cessation is not applicable in his case because he served in the then JNA as a civilian employed by the armed forces. The applicant then repeats that he is the owner over his apartment (and not the occupancy right holder). The applicant also submits that on 25 December 2000 he vacated an apartment in Laktaši, the Republika Srpska, that had been temporarily allocated to him and that he had to rent another apartment as of then. Finally, the applicant complains of his low salary totalling 238 Convertible Marks (*konvertibilnih maraka,* "KM") at that time.

66. In his observations of 20 December 2002, the applicant repeats that Article 3a of the Law on Cessation is not applicable in his case because he served in the then JNA as a civilian employed by the armed forces. The applicant also contests the submission of the Federation of BiH that *Miholić*

and others (see the above-mentioned *Miholić and others* decision) is applicable exclusively when an applicant has concluded a contract on purchase of his or her apartment with the then JNA before 6 April 1992, when such contract has been verified by the competent court and when purchase price of the apartment has been fully paid. The applicant states that such a situation is "non-existent in practice". In the applicant's opinion, *Miholić and others* should be applied in his case because the occupancy right, as a *sui generis* right, constitutes a "possession" in the sense of Article 1 of Protocol No. 1 to the Convention. Finally, the applicant refers to the above-mentioned decision of the Constitutional Court[11].

67. In his observations of 12 February 2003, the applicant submits that he has exhausted all effective domestic remedies. He alleges to have no possibility to speed up the pending proceedings in his case before the Supreme Court. The applicant further submits that, in cases of this type, it is the established practice of the Supreme Court to return the cases to the Cantonal Courts. The applicant is of the opinion that such practice is designed in order to postpone final decisions in the cases where Article 3a of the Law on Cessation is applicable.

D. Submission of the Organisation for Security and Co-operation in Europe ("OSCE") acting as *amicus curiae*

68. In its submission of 3 January 2003, the OSCE holds that the conclusions reached by the Chamber in *Miholić and others* (see the above-mentioned *Miholić and others* decision) should not be distinguished from the present case involving occupancy right. A brief summary of the line of reasoning of the OSCE follows.

69. The OSCE first asserts that the occupancy right, as defined in domestic legislation, does amount to a "possession" under Article 1 of Protocol No. 1 to the Convention[12].

70. The OSCE then states that the Federation of BiH interfered with the applicant's right to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, by implementing Article 3a of the Law on Cessation.

71. The OSCE proceeds to explore whether the interference is justified, that is, whether the interference pursues a legitimate aim and whether the measures employed are proportionate to the aim pursued. The OSCE raises serious objections as to the actual use of the JNA apartments, where the repossession request of a pre-war occupant has been refused on the basis of Article 3a of the Law on Cessation:

> *"The International Community has received numerous reports of non-compliance on the part of the Ministry of Defence, particularly regarding allocation of apartments to individuals whose housing needs are otherwise met and therefore do not meet the legal criteria for such allocation. The Ministry of Defence often neglected to provide information regarding the current status of apartments to the International Community so that such reports could be assessed accurately. Information on apartments held by Croat elements was rarely made available. In particular, many high-ranking officials of the Army of the Federation of BiH who do not meet the legal criteria have been allocated apartments. In numerous meetings staff of the Ministry of Defence informed members of the International Community that they would not apply provisions of the Law on Cessation and Instruction to high-ranking officials, despite warnings that such action clearly violated the Law on Cessation and Instruction."*[13]

The OSCE adds that the Ministry of Defence has almost 2,000 unclaimed JNA apartments at its disposal to pursue the legitimate aim of housing war veterans whose housing needs have not been otherwise met without the need to, as in the case at hand, reject the claims of the pre-war occupancy right holders.

[11] See paragraphs 53-54 above.
[12] As the Chamber, in *Miholić and others,* has found a violation of Article 1 of Protocol No. 1 to the Convention only, the OSCE commented on the alleged violation of that human right.
[13] Submission of the OSCE Acting as *Amicus Curiae* of 3 January 2003, p. 8.

72. Finally, the OSCE holds that the applicant in the present case has been treated differently from occupancy right holders over non-JNA apartments who were deprived of their possessions during the course of the 1992-1995 armed conflict. The right to return of occupancy right holders over non-JNA apartments is dependent neither on their status as a refugee or displaced person, nor on their citizenship, or whether they were allocated housing abroad, or whether they are in active military service in any foreign armed forces. The applicant in the present case has been treated differently also from occupancy right holders over JNA apartments located in the Republika Srpska. Such occupancy right holders are entitled to return to their pre-war homes without any of the restrictions prescribed in Article 3a of the Law on Cessation of the Federation of BiH. The OSCE objects to the justification for the difference in treatment offered by the Federation of BiH (*i.e.* that the JNA apartments, which pre-war occupants were refused on the basis of Article 3a of the Law on Cessation, have been used to meet the housing needs of the war veterans) and asserts:

> *"Given that there is no justification demonstrated by the FBiH Government for singling out this group of occupancy right holders and no legitimate aim is being accomplished, there appears no reasonable proportionality between the means used and the aims sought. Thus Article 3a of the Law on Cessation should be found discriminatory and contrary to Article 1 of Protocol 1 ECHR."*[14]

VII. OPINION OF THE CHAMBER

A. Admissibility

73. 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. Further, pursuant to Article VIII(2)(c), the Chamber shall dismiss any application, which it considers incompatible with the Agreement (*ratione temporis, ratione materiae* or *ratione personae*).

1. Bosnia and Herzegovina

74. The present case was transmitted to Bosnia and Herzegovina.

75. Bosnia and Herzegovina did not submit any observations on the admissibility of the present case.

76. In the previous cases decided by the Chamber in the matter 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 nos. CH/96/3, CH/96/8 and CH/96/9, *Medan, Bastijanović 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 nos. 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; the above-mentioned *Miholić and others* decision).

77. In the present case, the Chamber notes that the applicant did not submit a written purchase contract. Moreover, the applicant admits that he never concluded such contract with the former JNA. Furthermore, it has not been established in any proceedings in the domestic courts that an informal contract of a legally valid nature existed. It is not shown therefore that the retroactive annulment of the purchase contracts affected the applicant's situation. The Chamber further notes that the conduct of the Service in Bihać, the Ministry in Bihać, the Cantonal Court in Bihać and the Supreme Court, the bodies responsible for the proceedings complained of by the applicant, engages the

[14] *Ibid,* p. 5.

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). The Chamber therefore decides to declare the application inadmissible as against Bosnia and Herzegovina.

2. The Federation of BiH

a. Complaint that the Federation of BiH failed to reinstate the applicant into his pre-war apartment

78. The applicant complains of the fact that the Federation of BiH failed to reinstate him into the apartment in question.

79. 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 domestic remedies 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).

80. The Chamber notes that, according to its long established case law, it is incumbent on the respondent Party, claiming non-exhaustion, to satisfy the Chamber that there was an effective remedy available (see *e.g,* case nos. CH/96/3, *Medan,* decision on admissibility of 4 February 1997, section IV, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/8, *Bastijanović,* decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/9, *Marković,* decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997). In the present case, an effective remedy would be one that would have a reasonable prospect of enabling the applicant to repossess his apartment. According to Article 3a of the Law on Cessation, the applicant is not entitled to do so.

81. The Federation of BiH submits that individuals, whose requests for repossession have been refused under Article 3a of the Law on Cessation, generally have effective domestic remedies available to them. In other words, the applicant in the present case has prospects of being reinstated into his pre-war apartment regardless of the very clear wording of Article 3a of the Law on Cessation, which deprives him of the right to be reinstated. The respondent Party points out that the Constitutions of both Bosnia and Herzegovina and the Federation of BiH oblige public bodies (including administrative bodies and courts) to give priority to the Convention over all other law. The respondent Party has provided the Chamber with several procedural decisions of the Supreme Court of the Federation of BiH, in which the Supreme Court instructed the lower courts to apply directly the Convention.

82. The Chamber observes that the Supreme Court recently annulled several judgments of Cantonal Courts and informed the Cantonal Courts of their constitutional duty to apply directly the Convention. The Chamber recognises the significance of such decisions. However, the Supreme Court left open the main question in the present case, which is whether individuals who fall under Article 3a of the Law on Cessation have or have not the right to repossess their pre-war apartments in accordance with the Convention. The Chamber is not aware of any individual who falls under Article 3a of the Law on Cessation and who repossessed a pre-war apartment on the ground that his or her rights under the Convention should prevail over the Law on Cessation. In these circumstances, the Chamber is satisfied that the applicant cannot be required to exhaust any further domestic remedies for the purpose of Article VIII(2)(a) of the Agreement.

b. Complaint that the Federation of BiH failed to recognise the applicant as the owner over his pre-war apartment

83. The applicant additionally complains because the Federation of BiH has not recognised him as the owner on the basis of the steps he took in 1992, aimed at purchasing the apartment from the then JNA. Those steps included paying the purchase price, but did not include concluding a written purchase contract.

84. The Chamber notes that the applicant failed to raise this question before the domestic organs. The applicant could have initiated a lawsuit and requested the court to establish his ownership under Article 172 of the Law on Civil Procedure[15]. Alternatively, the applicant could have raised this question in the administrative dispute that has been pending since 26 March 2001 (Article 172 paragraph 3 of the Law on Civil Procedure). In his complaints to the Cantonal Court in Bihać and the Supreme Court, the applicant only requested to be reinstated in the capacity of the pre-war occupancy right holder. Accordingly, insofar as the applicant argues that he has validly purchased the apartment, the applicant has not exhausted domestic remedies as required by Article VIII(2)(a) of the Agreement.

c. Conclusion as to admissibility

85. The Chamber finds that none of the other grounds for declaring the application inadmissible have been established. Accordingly, the application is declared admissible insofar as the applicant complains of his inability to repossess his pre-war apartment and inadmissible, due to non-exhaustion of domestic remedies, insofar as the applicant complains of his inability to be registered as the owner over the apartment.

B. Merits

86. 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.

87. 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 (including the Convention), where such a violation is alleged or appears to have been committed by the Parties to the Agreement.

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

88. Article II(2)(a) of the Agreement provides that the Chamber shall consider:

> "Alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto."

a. Article 8 of the Convention

89. The applicant alleges a violation of the right to respect for his home, as protected by Article 8 of the Convention. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[15] See paragraph 52 above.

> 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."

90. The Chamber must first determine whether the applicant's pre-war apartment constitutes his "home" for the purposes of Article 8 of the Convention. If so, the Chamber must determine whether the Federation of BiH has interfered with the applicant's right to respect for his home under Article 8 of the Convention. Finally, the Chamber must determine whether the interference of the Federation of BiH is justified. The Chamber recalls that the conditions upon which a respondent Party may interfere with the right to respect for one's home are set out in Article 8 paragraph 2. The interference is only justified if it is: (a) "in accordance with the law"; (b) in the interest of one or more of the legitimate aims listed; and (c) "necessary in a democratic society". Therefore, a proper balance must be struck between the legitimate aim pursued and the means employed, taking into account the respondent Party's margin of appreciation.

(i) Whether the apartment at issue is the applicant's "home" for the purposes of Article 8 of the Convention

91. The applicant used to live in the claimed apartment and use it as his home until the outbreak of the armed hostilities in his community. On 1 September 1998, the applicant requested the competent body to reinstate him into his pre-war apartment. The Chamber has previously held that links that persons in the applicant's situation retained to their apartments were sufficient for them to be considered to be their "homes" within the meaning of Article 8 of the Convention (see *e.g,* case nos. CH/97/46, *Kevešević,* decision on the merits of 15 July 1998, paragraphs 39-42, Decisions and Reports 1998; CH/97/58, *Onić,* decision on admissibility and merits of 12 January 1999, paragraph 48, Decisions January – July 1999; CH/00/4566 *et al, Jusić and others,* decision on admissibility and merits of 10 May 2002, paragraph 62, to be reported).

92. The Chamber holds in the instant case that the applicant's pre-war apartment is his "home" for the purpose of Article 8 of the Convention.

(ii) Interference with the applicant's right

93. On 23 June 1996, the RBiH Army, whose legal successor is the Army of the Federation of BiH, declared the apartment at issue permanently abandoned and confirmed the previous allocation of the apartment to Mr. Z.M., a serving member of the RBiH Army. The RBiH Army acted on the basis of the Law on Abandoned Apartments. The applicant did not have any remedies available to him to repossess his pre-war apartment until 4 April 1998.

94. On 4 April 1998, the Law on Cessation entered into force. This Law expressly repealed the Law on Abandoned Apartments and declared all administrative, judicial and other decisions terminating the occupancy right on the basis of the Law on Abandoned Apartments null and void. It provided the pre-war occupancy right holders with the right to repossess the apartments at issue and regulated the procedure to do so. Namely, the pre-war occupancy right holders were to submit a request for repossession to the competent bodies and the competent bodies were to decide within 30 days from the date of submission of the request. The present applicant duly submitted his request for repossession on 1 September 1998. However, the competent body failed to decide on his request before 4 July 1999.

95. On 4 July 1999, Article 3a of the Law on Cessation entered into force. This Article completely deprived the applicant of the right to repossess the apartment at issue and the authorities of the Federation of BiH accordingly refused the applicant's request for repossession. The applicant is still not able to repossess his pre-war apartment due to the effect of Article 3a of the Law on Cessation.

96. The Chamber thus concludes that the Federation of BiH interfered, and continues to interfere, with the applicant's right to respect for his home.

(iii) Legality of the interference

97. The interference of a respondent Party is only lawful if the law, which is the basis of the interference, is: (a) accessible to the citizens of the respondent Party; (b) precise so as to enable the citizens to regulate their conduct; (c) compatible with the rule of law, meaning that the legal discretion granted to the executive must not be unrestrained (*i.e.* the law must provide the citizens with adequate protection against arbitrary interference) (see *e.g,* Eur. Court HR, *Sunday Times,* judgment of 26 April 1979, Series A no. 30, p. 31, paragraph 49; Eur. Court HR, *Malone,* judgment of 2 August 1984, Series A no. 82, pp. 32-33, paragraphs 67-68).

98. Prior to 4 April 1998, the interference of the Federation of BiH was based on the Law on Abandoned Apartments. The Chamber has previously held that the Law on Abandoned Apartments failed to meet the standards of a "law" as this expression is to be understood for the purposes of Article 8 of the Convention, in particular the requirements of accessibility and compatibility with the rule of law (see the above-mentioned *Kevešević* decision, paragraphs 55-58). In the present case the Chamber sees no reason to differ. The interference of the Federation of BiH was accordingly not "in accordance with the law", in so far as it was based on the Law on Abandoned Apartments.

99. On 4 April 1998, the Federation of BiH passed the Law on Cessation expressly repealing the Law on Abandoned Apartments. The Law on Cessation provided the applicant with the right to be reinstated into his pre-war apartment. The applicant submitted his request to the Service in Bihać on 1 September 1998. According to Article 6 paragraph 1 of the Law on Cessation, the authorities of the Federation of BiH had 30 days to issue a decision on the reinstatement of the applicant into his pre-war apartment. The interference of the Federation of BiH was "in accordance with the law" from 4 April 1998, the date of the entry into force of the Law on Cessation, until 1 October 1998, that is to say the date on which the 30-day time limit for issuance of the decision elapsed.

100. From 1 October 1998 until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the interference of the Federation of BiH was again not "in accordance with the law".

101. Finally, as of the entry into force of Article 3a on 4 July 1999, the interference of the Federation of BiH was again "in accordance with the law".

102. The Chamber observes that the applicant's continuing complaint concerns only the interference under Article 3a of the Law on Cessation. The crux of the present case is thus the introduction and application of Article 3a in the case of the applicant. The Chamber thus proceeds to establish whether the interference that has been based on Article 3a, and which interference the Chamber has found to be "in accordance with the law", is justified under Article 8 paragraph 2 of the Convention.

(iv) Whether the interference with the applicant's right pursues a legitimate aim under Article 8 paragraph 2, *i.e.* the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others

103. The Federation of BiH submits that the aim of Article 3a of the Law on Cessation is to free scarce housing space for former soldiers of the RBiH Army and their families. In that context, the Federation of BiH points out that the 1992-1995 armed conflict caused massive destruction of its housing fund and huge migrations of its population. The Chamber notes that according to Article 18d of the Law on Cessation and Points 23 and 24 of the Instruction on Application of the Law on Cessation, apartments that are not repossessed by their pre-war occupants due to Article 3a of the Law on Cessation should be allocated to individuals whose housing needs were not otherwise met.

104. The Chamber is aware that JNA apartments, where the repossession request of the pre-war occupant was refused on the basis of Article 3a of the Law on Cessation, are not necessarily being used for the purpose asserted by the respondent Party, as it has been explained in the submission of the OSCE acting as *amicus curiae* of 3 January 2003 (see paragraph 71 above). Notwithstanding,

the Chamber can accept, in principle, that the national authorities' decision to provide housing for former soldiers of the RBiH Army and their families pursues the legitimate aim of "protection of the rights and freedoms of others" in the sense of Article 8 paragraph 2 of the Convention.

(v) Is the interference necessary in a democratic society for the protection of the rights and freedoms of others, *i.e.* is there a proper balance between the legitimate aim pursued and the means employed?

105. As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be made to the case law of the European Court (see *e.g,* the above-mentioned *Sunday Times* decision, pp. 35-36, paragraph 59; Eur. Court HR, *Lingens,* judgment of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-40; Eur. Court HR, *Gillow,* judgment of 24 November 1986, Series A no. 109, p.22, paragraph 55). The notion of necessity implies a pressing social need. In particular, the measure employed must be proportionate to the legitimate aim pursued. If the Chamber establishes that the measure employed is proportionate to the legitimate aim pursued, it will find that the Federation of BiH is acting within its margin of appreciation.

106. As to the scope of the margin of appreciation enjoyed by the respondent Party, it will depend not only on the nature of the aim pursued, but also on the nature of the right involved. In the instant case, the common interest of the protection of the housing needs of former soldiers of the RBiH Army and their families must be balanced against the applicant's right to respect for home, a right which is germane to his personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Federation of BiH.

107. The applicant was born outside the territory of Bosnia and Herzegovina, in Croatia. He was thus registered as the citizen of the republic of his birth. He requested and acquired citizenship of Bosnia and Herzegovina only recently, although he has lived in Bosnia and Herzegovina since 1987. During the 1992-1995 armed conflict, the applicant served with the Republika Srpska armed forces.

108. The national authorities refused his request for repossession on the basis of Article 3a paragraph 1 of the Law on Cessation. This provision denies the right to repossess a pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date.

109. As to the active service requirement as of 30 April 1991, the Chamber has held in *Miholić and others* (see the above-mentioned *Miholić and others* decision, paragraphs 161-162) that, at that time, Bosnia and Herzegovina was still a part of the former SFRY. Persons who served in the JNA were accordingly serving in the armed forces of the then unified country.

110. As to the citizenship requirement as of 30 April 1991, the Chamber has held in *Miholić and others* (see the above-mentioned *Miholić and others* decision, paragraphs 157-160) that, prior to the dissolution of the former SFRY, there was no real need to ensure that one was actually a registered citizen of the republic in which one lived. Accordingly, many citizens who had SFRY citizenship and were residents of the Socialist Republic of Bosnia and Herzegovina were not registered in the citizenship records, although they participated fully as citizens of Bosnia and Herzegovina in all other respects. Furthermore, the Chamber has established that this requirement is discriminatory in its intent or at least in its impact. Namely, since citizenship in 1991 was predominantly based upon where a person was born, the citizenship requirement appears to be targeted at persons of Serb or Croat descent, having been born outside of Bosnia and Herzegovina.

111. In the present case, the Federation of BiH deprived the applicant, who is an internally displaced person, of his pre-war apartment in order to meet the housing needs of a former soldier of the RBiH Army, Z.M., and of his family. The Chamber acknowledges that the Federation of BiH has had a difficult task in reconciling the right of the pre-war occupant to repossess the disputed apartment and of the current occupant to have his housing needs met. However, the Federation of BiH did not assure the Chamber that Z.M. fell into those particularly vulnerable categories for which

housing space was to be freed by introducing Article 3a. Moreover, the Chamber is of the opinion that the Federation of BiH, when weighing the opposing interests of those individuals should give preference to the right of the applicant to return. The Constitutional Court has established (see paragraph 54 above) that the right to return of refugees and internally displaced persons is a primary objective of the Constitution of Bosnia and Herzegovina and of the Dayton Peace Agreement in general. Additionally, the Chamber recalls its conclusion in *Miholić and others* (see the above-mentioned *Miholić and others* decision) related to the citizenship and active service requirements where both were found to be unreasonable and therefore not proportionate. The Chamber considers that these conclusions also apply when occupancy right is in question. The deprivation of the applicant of his pre-war apartment was thus not proportionate to the legitimate aim pursued. The applicant was made to bear an "excessive burden".

112. Therefore, the Chamber concludes that the Federation of BiH overstepped the margin of appreciation enjoyed by public authorities and accordingly violated Article 8 of the Convention, by the application of Article 3a paragraph 1 of the Law on Cessation in the present case.

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

113. The applicant alleges a violation of the right to the peaceful enjoyment of his 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."

114. The Chamber must first determine whether the applicant's occupancy right constitutes "possessions" in the sense of Article 1 of Protocol No. 1 to the Convention. Then, the Chamber must determine whether the Federation of BiH has interfered with the applicant's right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. Finally, the Chamber must determine whether the interference of the Federation of BiH has been justified. The interference is only justified if it is: (a) "subject to the conditions provided for by law" and (b) "in the public interest". If the said requirements have not been met, the Chamber will hold that the Federation of BiH has overstepped its margin of appreciation and accordingly violated Article 1 of Protocol No. 1 to the Convention.

(i) Whether the occupancy right constitutes a "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention

115. According to the Chamber's long established case law, an occupancy right is an asset that constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention (see *e.g,* case no. CH/96/28, *M.J,* decision on admissibility and merits of 7 November 1997, paragraph 32, Decisions on Admissibility and Merits March 1996 – December 1997).

(ii) Interference with the applicant's right

116. On 23 June 1996, the RBiH Army, whose legal successor is the Army of the Federation of BiH, deprived the applicant of the occupancy right over his pre-war apartment in accordance with the Law on Abandoned Apartments.

117. On 4 April 1998, the Law on Cessation entered into force and the applicant was able to initiate the procedure to repossess his pre-war apartment. The applicant duly submitted his request for repossession on 1 September 1998. However, the competent body failed to reinstate him.

118. On 4 July 1999, Article 3a of the Law on Cessation entered into force. As of that date, the applicant has been barred by law from repossessing his pre-war apartment.

119. The Chamber thus concludes that the Federation of BiH deprived the applicant of his possessions in the sense of Article 1 of Protocol No. 1 to the Convention.

(iii) Legality of the interference

120. The European Court of Human Rights and the Chamber give all legality clauses (such as, for example, "in accordance with the law" clause in Article 8 and "subject to the conditions provided for by law" clause in Article 1 of Protocol No. 1) an identical interpretation, as not to do so "could lead to different conclusions in respect of the same interference" (see Eur. Court HR, *Silver and others,* judgment of 25 March 1983, Series A no. 61, pp. 32-33, paragraph 85). Therefore, a deprivation will be "provided for by law" for the purposes of Article 1 of Protocol No. 1 to the Convention whenever such interference is "in accordance with the law" for the purposes of Article 8 of the Convention.

121. The Chamber has established in paragraphs 98 and 100 above that the interference was unlawful prior to 4 April 1998 and again from 1 October 1998 until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation. The interference was lawful in the short period between 4 April 1998, the date of the entry into force of the Law on Cessation and 1 October 1998, and again after 4 July 1999, the date of entry into force of Article 3a of the Law on Cessation (see paragraphs 99 and 101 above).

122. The Chamber will proceed to establish whether the interference based on Article 3a, and which interference the Chamber has found to be "provided for by law", is justified under Article 1 of Protocol No. 1 to the Convention.

(iv) Is the interference in the public interest?

123. The European Court has previously held that governments enjoy a wide margin of appreciation with respect to the interference with the right to the peaceful enjoyment of one's possessions under Article 1 of Protocol No. 1 to the Convention. The European Court said in *James and others* (see Eur. Court HR, *James and others,* judgment of 21 February 1986, Series A no. 98, p.32, paragraph 46):

> *"The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation."*

124. 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 of Human Rights: (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 (see Eur. Court HR, *Sporrong and Lönnroth,* judgment of 23 September 1982, Series A no. 52, p.26, paragraph 69). 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.28, paragraph 73).

125. The Chamber notes that a wide margin of appreciation is granted to respondent Parties under Article 1 of Protocol No. 1 to the Convention. Nevertheless, the Chamber finds that the interference of the Federation of BiH with the applicant's right to the peaceful enjoyment of his possessions placed on him an "excessive burden" for the reasons stated in paragraph 111 above. The Chamber decides that the Federation of BiH has exceeded even that wide margin of appreciation.

126. Therefore, the Chamber concludes that the Federation of BiH violated Article 1 of Protocol No. 1 to the Convention in the present case.

c. Article 6 of the Convention

127. The applicant complains of the length of the proceedings before the competent authorities. 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…"

128. In view of its decision concerning Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the Chamber considers that it is not necessary to examine the case also under Article 6 of the Convention.

d. Article 13 of the Convention

129. The present case was transmitted to the respondent Parties under Article 13 of the Convention, 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."

130. In view of its decision concerning Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the Chamber considers that it does not have to examine the case also under Article 13 of the Convention.

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

131. The applicant complains of being discriminated against with respect to the rights to respect for his home under Article 8 of the Convention and to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention. The Chamber has already established that the Federation of BiH violated those rights of the applicant (see paragraphs 112 and 126 above).

132. Article II(2)(b) of the Agreement provides 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 Annex[16], where such violation is alleged or appears to have been committed by the Parties, including any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority or such official or organ".

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[16] 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 International Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities.

a. Definition of "discrimination"

133. The Chamber has held that it must attach a particular importance to the prohibition of discrimination (see *e.g,* case no. CH/97/45, *Hermas,* decision on admissibility and merits of 16 January 1998, paragraph 82, Decisions and Reports 1998).

134. The Chamber has previously held that, in order to establish that there has been discrimination contrary to the Agreement, it is necessary first to determine whether an applicant has been treated differently from others in the same or relevantly similar situations. Any difference in treatment is to be deemed discriminatory if it has no objective and reasonable foundation, 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 pursued (see *e.g,* case nos. CH/97/67, *Zahirović,* decision on admissibility and merits of 10 June 1999, paragraph 120, Decisions January – July 1999; CH/97/50, *Rajić,* decision on admissibility and merits of 3 April 2000, paragraph 53, Decisions January – June 2000; CH/98/1309 *et al, Kajtaz and others,* decision on admissibility and merits of 4 September 2001, paragraph 154, Decisions July – December 2001).

b. Whether there is a difference in treatment

135. Prior to 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the applicant fell under the same legal regime as other individuals who had left their apartments during the 1992-1995 armed conflict in Bosnia and Herzegovina, as regards the question of repossession of pre-war apartments.

136. Article 3a of the Law on Cessation entered into force on 4 July 1999. It is an extraordinary provision in domestic legislation. It is the only provision of the legislation of the Federation of BiH that places obstacles for the realisation of the right to return to a definable group of individuals. There is no such provision in the legislation of the Republika Srpska or Bosnia and Herzegovina. Article 3a applies exclusively to the apartments at the disposal of the Federation Ministry of Defence, that is, former JNA apartments that were declared abandoned on the basis of the then Law on Abandoned Apartments. The authorities of the Federation of BiH accordingly treat differently requests for repossession of the former JNA apartments compared with requests for repossession of all other apartments located in this Entity. When a former JNA apartment is at stake, the authorities of the Federation of BiH investigate where the potential returnee was born, whether he was granted refugee or other equivalent status abroad, in what armed forces has he served or does he currently serve and whether he acquired another occupancy right abroad. This is not the case when any other apartment is at stake. The Chamber considers that the Federation of BiH treated the applicant differently due to his status as a former service member of the then JNA who did not join the RBiH Army (Bosniak-dominated armed forces) or HVO (Croat-dominated armed forces). Given the ethnic nature of the 1992-1995 armed conflict and prevailingly ethnic structure of all the armed forces that were engaged in that conflict, to treat differently individuals who did not join the RBiH Army or HVO carries also connotations of differential treatment on the ground of national origin.

c. Whether the difference in treatment is justified

137. The difference in treatment will only be justified if it pursued a legitimate aim and if the measure employed was proportionate to the legitimate aim pursued. When the European Court of Human Rights interprets the provision of the Convention prohibiting discrimination (*i.e.* Article 14 of the Convention), it applies some of the same principles of interpretation applied also in relation to those Articles of the Convention with restriction clauses (such as Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention). In the present case, the Chamber will adopt a similar approach to that of the European Court of Human Rights in this respect. Accordingly, all it has said in paragraphs 103-112 and 123-126 above, regarding the legitimate aim and proportionality requirements, applies also when it comes to the alleged discrimination.

138. The Chamber has established in paragraph 136 above that the applicant has been treated differently on the ground of his status as a former JNA service member who did not join the RBiH Army or HVO. This difference in treatment has pursued a legitimate aim, namely the protection of the

housing needs of a war veteran, Z.M., and of his family. However, the Chamber is of the opinion that the measures employed were not proportionate to the legitimate aim pursued (for the discussion see paragraph 111 above).

139. Therefore, the Chamber concludes that the Federation of BiH discriminated against the applicant with respect to the rights to respect for his home under Article 8 of the Convention and to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention.

VIII. REMEDIES

140. The Chamber has established that the Federation of BiH violated the right of the applicant to respect for his home under Article 8 of the Convention, the right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention and discriminated against the applicant in the enjoyment of those rights. 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 breaches. In this connection the Chamber shall consider, *inter alia,* issuing orders to cease and desist and monetary relief (including pecuniary and non-pecuniary damages).

141. The applicant requests repossession of his pre-war apartment.

142. The Chamber will order the Federation of BiH to take all necessary steps to ensure that the applicant is reinstated into his pre-war apartment without further delay and at the latest within three months from the delivery of the present decision.

143. Further, the applicant seeks compensation for pecuniary damages in the amount of KM 12,600 for the cost of renting of another apartment since 1992.

144. The respondent Parties object to the claim for compensation as not being substantiated.

145. The Chamber first recalls that its competence *ratione temporis* is limited to the period after 14 December 1995, the entry into force of the Agreement. This means that the Chamber cannot award any compensation for damages suffered before that date or relating to events occurring before that date. The Chamber also notes that the applicant lived in another person's house on a temporary basis until 25 December 2000, the date of return of the pre-war occupant of that house. In that period, the applicant did not have to pay for his accommodation. Since the applicant had to provide for his own accommodation as of 1 January 2001, the Chamber will order the respondent Party to compensate the applicant for the loss of use of his home. The Chamber considers it appropriate that this sum should be KM 200 per month up to and including May 2003 and should be paid to the applicant no later than three months from the delivery of the present decision. This sum should continue to be paid at the same rate until the end of the month in which the applicant regains possession of his apartment and these monthly payments should be made within 30 days from the end of the month to which they relate.

146. The Chamber will further award simple interest at an annual rate of 10% as of the date of expiry of the three-month and 30-day time limits set in paragraph 145 above on the sums awarded in the same paragraph or any unpaid portions thereof until the date of settlement in full.

IX. CONCLUSIONS

147. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible insofar as it is directed against Bosnia and Herzegovina;

2. unanimously, to declare the application admissible against the Federation of Bosnia and Herzegovina insofar as the applicant complains of his inability to repossess his pre-war apartment;

3. unanimously, to declare the application inadmissible against the Federation of Bosnia and Herzegovina insofar as the applicant complains of not being recognised as the owner over the apartment;

4. by 12 votes to 1, that the right of the applicant to respect for his home within the meaning of Article 8 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;

5. by 12 votes to 1, 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 been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. by 12 votes to 1, that the applicant has been discriminated against in the enjoyment of the rights to respect for his home within the meaning of Article 8 of the European Convention on Human Rights and to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, that it is not necessary to examine the application under Article 6 of the European Convention on Human Rights;

8. unanimously, that it is not necessary to examine the application under Article 13 of the European Convention on Human Rights;

9. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is reinstated into his pre-war apartment without further delay and no later than 7 September 2003;

10. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant 5800 Convertible Marks (*konvertibilnih maraka,* “KM”), no later than three months after the delivery of the present decision;

11. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant 200 Convertible Marks (*konvertibilnih maraka,* “KM”) for each further month that he remains excluded from his apartment as from June 2003 until the end of the month in which he is reinstated, each of these monthly payments to be made within 30 days from the end of the month to which they relate;

12. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay simple interest at an annual rate of 10% (ten per cent) on the sums specified in conclusion nos. 10 and 11 above or any unpaid portions thereof from the date of expiry of the three-month and 30-day time limits specified in the same conclusions until the date of settlement in full; and

13. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber on the steps taken to comply with the above orders no later than 7 September 2003.

(signed) Ulrich GARMS Registrar of the Chamber	(signed) Michèle PICARD President of the Chamber

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 10 September 1999)

Case no. CH/98/1495

Uroš ROSIĆ

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 5 November 1992 he was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 31 July 1997 and again on 8 September 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 29 August 1997 the applicant appealed against the first 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 for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and under Article 1 of Protocol No. 1 to that Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant introduced his application to the Chamber on 20 November 1998. It was registered under the above case number on 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 him being evicted from the apartment.

5. On 24 November 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 the same day, 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 24 November 1998.

7. On 14 December 1998 the Chamber received observations on the case from the Commission. These were accepted by the Chamber as the observations of the respondent Party as the respondent Party at that time did not have an Agent to represent it before the Chamber.

8. On 5 February 1999 the observations of the respondent Party were transmitted to the applicant for his further observations. He was also invited to submit any claim for compensation he wished to make. On 25 February 1999, the applicant's written statement, which did not include a claim for compensation, were received.

9. On 5 February 1999 the Chamber received a submission from the person who had been allocated the apartment concerned in the application by the Commission. This person requested that the Chamber withdraw the order for provisional measures made in the case. The First Panel of the Chamber considered this submission at its session in May 1999 and decided not to withdraw the provisional measure issued in the case. The author of the submission and the parties to the case were informed of this decision on 24 May 1999.

10. On 24 May 1999 the applicant's written statement was transmitted to the Agent of the respondent Party for information.

11. 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

12. 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.

13. The applicant is the holder of the occupancy right over an apartment located at Miloša Obrenovića F-12, Prijedor, Republika Srpska. On 5 November 1992, he was granted the occupancy right by the holder of the allocation right, the Agricultural and Food Processing School in Prijedor ("the School"). The applicant entered into a contract with the relevant housing company on 21 December 1992.

14. On 31 July 1997 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 20 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. He appealed against this decision on 29 August 1997. He has not received any reply to this appeal to date. On 8 September 1998 the Commission issued a further decision in the same terms as that of 31 July 1997. The eviction of the applicant was scheduled for 19 November 1998 but was not executed.

15. On 2 September 1997 the applicant entered into an agreement with the School and with the Economic and Catering School in Prijedor. The applicant, since being allocated the right to occupy the apartment by the School, had ceased his employment with it and commenced employment with the Economic and Catering School. This contract states that the Economic and Catering School will seek to allocate another apartment to the applicant for his use. In this event, the apartment concerned would be returned to the school. Alternatively, the Economic School will, on an unspecified future date, transfer the allocation right over another apartment to the School.

16. The applicant still occupies the apartment.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

17. 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 Gazette 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.

18. 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.

19. 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.

20. 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.

21. 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."

22. 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

23. 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 puts the old law out of force.

24. 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/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/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/her former apartment in accordance with this Law."

25. 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

26. 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.

27. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on 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.

28. 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."

29. 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

30. 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 Decision on Cessation of State of War and Immediate Threat of War

31. The Decision on Cessation of State of War and Immediate Threat of War (OG RS no. 15/96) was adopted on 19 June 1996 and entered into force on 8 July 1996.

6. The Decree on Court Taxation

32. 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

33. 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

34. The Commission, which submitted observations on behalf of the respondent Party (see paragraph 7 above) claims that the apartment is clearly abandoned property as the previous occupant left Republika Srpska. It claims that the applicant is an illegal occupant of the apartment and that the decision of the Commission ordering the applicant to vacate the apartment under threat of forcible eviction is designed to allow displaced persons to enter into possession of the property, in accordance with the provisions of the old Law.

35. The applicant states that the apartment cannot be considered to be abandoned property as he was validly allocated it by a decision of the holder of the allocation right over it. He claims that the Law on the Use of Abandoned Property was not in accordance with international law, hence the fact that it was replaced by the Law on the Cessation of the Application of the Law on the Use of Abandoned Property (see paragraphs 23–25 above).

VI. OPINION OF THE CHAMBER

A. Admissibility

36. 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.

37. 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.

38. The applicant lodged an appeal to the Ministry against the decision of the Commission of 31 July 1997. However, the lodging of such an appeal does not have any suspensive effect.

39. 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.

40. 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.

41. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 31 July 1997 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.

42. 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

43. 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

44. The applicant did not specifically allege a violation of his rights as protected by Article 8 of the Convention. The Chamber considers *proprio motu* that the case raises an issue under this provision. 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."

45. The Chamber notes that the applicant has lived in the apartment since November 1992, when he was allocated the occupancy right over it by the School. It is therefore clear that the house is to be considered as his "home" for the purposes of Article 8 of the Convention.

46. The Chamber has already held that the threatened eviction of a person from their home constitutes an "interference by a public authority" with the exercise of the right to respect for home (case no. CH/96/31, *Turčinović*, decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decisions 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 his right to respect for his home.

47. 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.

48. The Chamber notes that the decision of the Commission dated 31 July 1997 ordering the applicant to vacate the apartment within three days under threat of forcible eviction was based on a record made by the Prijedor Municipal Secretariat for Urbanism and Housing-Communal Affairs ("the Secretariat") dated 29 October 1996. This record noted the fact that the previous applicant had left the apartment on 20 October 1992. It also notes the fact that the applicant currently occupies the apartment "in accordance with the normal procedure for dealing with abandoned property".

49. After the previous occupancy right holder left the Republika Srpska, the apartment was validly allocated to the applicant by the holder of the allocation right over it. This occurred on 5 November 1992, over three years before the date of entry into force of the old Law. Therefore, the apartment was not abandoned property when the Secretariat made its record on 29 October 1996. Articles 2 and 11 of the old Law defines abandoned property as real and personal property which has been abandoned by its owner or the holder of the occupancy right over it, and which is entered in the register of abandoned property.

50. On the date of entry into force of the old Law, the holder of the occupancy right over the apartment was the applicant, who resided in it at that time. It cannot therefore be considered to have been abandoned by him and accordingly the apartment cannot be considered to have been "abandoned property" either within the meaning of the old Law or in an autonomous sense.

51. Accordingly the decisions of the Commission of 31 July 1997 and 8 September 1998 did not comply with the requirements of the old Law and therefore the decisions of the Commission ordering the applicant to vacate the house cannot be considered to have been "in accordance with the law" within the meaning of paragraph 2 of Article 8 of the Convention.

52. 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

53. 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 considers *proprio motu* that the case raises an issue under this provision. 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."

54. 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 School on 5 November 1992. However, Article 2 of the new Law, as amended, (see paragraph 24 above) cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

55. 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.

56. 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 person who made a submission to the Chamber regarding the case contends that the applicant has alternative accommodation available to him at his father's house in Omarska, near Prijedor. The applicant denies this. The Chamber 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 his 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 the applicant has alternative accommodation available to him is a factual question for the appropriate national authorities to determine in the event that the applicant applies for his occupancy right to effectively be converted into a permanent one.

57. 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 is in a position to obtain a permanent occupancy right.

58. The Chamber does not consider that the agreement that the applicant entered into on 2 September 1997 regarding the apartment (see paragraph 15 above) alters this state of affairs, as it relates to a possible future exchange of the apartment and does not of itself affect the right of the applicant to occupy the apartment.

59. 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.

60. 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 (case no. CH/97/93, *Matić*, decision on admissibility and merits delivered on 11 June 1999, paragraphs 73-74, Decisions January-July 1999).

61. Accordingly, the Chamber considers that the applicant's temporary occupancy right constitutes a "possession" within the meaning of Article 1 of Protocol No. 1, 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 Law.

62. Having established that the applicant's right to occupy the house 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.

63. 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.

64. The Chamber notes that the decision ordering the applicant's eviction from the apartment was not in accordance with the old Law (see paragraph 51 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.

65. 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

66. 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.

67. 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 and that he be allowed to remain in the apartment.

68. 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.

69. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decisions of the Commission of 31 July 1997 and 8 September 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

70. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the decisions of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 31 July 1997 and 8 September 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies constitute a violation of his right to respect for his home within the meaning of Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

3. unanimously, that the decisions of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 31 July 1997 and 8 September 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies, constitute 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 decisions of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 31 July 1997 and 8 September 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 7 December 2001)

Case no. CH/99/1568

Bahra ĆORALIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in as the Second Panel on 7 November 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. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant has been a judge in Bihać since 1989. On 8 June 1995 she was abducted and badly beaten by three men. On 28 July 1995 Emir Bešić, Abdulah Bešić and Hazim Kosovac were taken into custody on suspicion of committing this assault. They were released from custody on 5 September 1995. On 18 March 1999 they were convicted. On 1 October 1997 the applicant brought criminal charges before the Public Prosecutor's Office against the former Chief of Police, Edhem Bešić, in connection with the assault. However, he was never indicted. On 15 April 1998 the applicant filed an action for compensation against the three convicted men and Edhem Bešić. There has been no final decision in this case to date.

2. The application raises issues under Articles 3, 5 and 6 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 12 February 1999 and registered on 17 February 1999.

4. On 25 October 1999 the case was transmitted to the respondent Party for observations on the admissibility and merits. On 24 December 1999 the respondent Party submitted its observations.

5. On 25 January 2000 the applicant submitted additional observations and a claim for compensation.

6. On 28 January 2000 the Chamber invited the respondent Party to submit additional observations regarding the applicant's compensation claim. The Chamber received these observations on 28 February 2000 and transmitted them to the applicant on 16 March 2000.

7. On 8 May 2001 the Chamber received a letter from the applicant containing further information on the civil proceedings in the case.

8. On 2 August 2001 the Chamber requested the respondent Party to submit further information regarding the civil proceedings. The respondent Party replied on 22 August 2001 and submitted additional information on 9 October 2001.

9. The Chamber deliberated on the admissibility and merits of the case on 8 September 2001, 10 October 2001 and 7 November 2001. It adopted the present decision on the latter date. Under Rule 21(1)(b) of the Rules of Procedure, Mr. Mato Tadić excused himself from participation in the deliberations as had been involved in the case in his then capacity of Federal Minister of Justice.

III. ESTABLISHMENT OF THE FACTS

10. The facts of this case are essentially not in dispute and may be summarised as follows.

11. The applicant has been a judge in Bihać since 1989. On 2 February 1995 she issued a decision ordering the Social Audit Service to pay a former employee of the Bihać Police Force monthly payments of 350 German Marks (DEM) out of the account of the Bihać Police.

12. The Bihać Police tried to stop the enforcement of this decision by ordering the Social Audit Service on several occasions, in writing signed by the Chief of Police, Edhem Bešić, not to make the payments. However, on 18 May 1995 the Social Audit Service informed the police that it was going to make the payments ordered by the First Instance Court (i.e., the applicant).

13. On 8 June 1995, around midnight, three men forced themselves into the applicant's apartment and dragged her, barefooted and dressed only in her nightdress, into a police car. They then drove to the city cemetery meanwhile beating her in the back of the car. There they dragged her out of the car, handcuffed her and continued beating her. Finally they removed the handcuffs and left her there. The applicant alleges that as a result of these events, she suffered the following injuries: broken teeth, a broken nose, a damaged eardrum and severe bruising and swelling of face and body.

14. On 28 July 1995 Emir Bešić, Abdulah Bešić and Hazim Kosovac were taken into detention on suspicion of having committed the above-mentioned assault. Emir Bešić and Abdulah Bešić are full cousins of the Chief of the Bihać Police Force, Edhem Bešić, who was replaced in July 1995. In addition, Emir Bešić was the Chief's personal driver and Hazim Kosovac his personal courier. On 5 September 1995 their detention was terminated.

15. On 18 October 1995 the Municipal Court in Bihać referred the case to the Municipal Court Cazin.

16. In Cazin hearings were scheduled for 19 December 1995, 22 January 1996, 4 March 1996, 4 April 1996, 9 May 1996, 25 November 1996, 16 December 1996, 20 January 1997, 28 May 1997, 25 June 1997, 27 August 1997, 23 September 1997, 24 June 1998 and 27 August 1998. However, the Court decided at each hearing that the requirements for proceeding were not met for various reasons (e.g., non-appearance of one or more of the lawyers and/or defendants, scheduling of hearings on national holidays, etc.) and postponed the proceedings each time.

17. On 24 September 1998 the first actual hearing took place. The next two hearings were scheduled for 15 October 1998 and 15 November 1998, but did not take place as one of the lawyers did not appear. On 17 November 1998 another hearing took place, followed by hearings on 15 December 1998, 28 January 1999 and 25 February 1999.

18. On 18 March 1999 the Municipal Court finally issued its decision, convicting Emir Bešić, Abdulah Bešić and Hazim Kosovac of the above-mentioned assault. On 13 July 1999 the Second Instance Court issued its decision in the case and the conviction became final and binding.

19. The applicant spoke to the police, the Municipal and Cantonal Prosecutor, the Investigative Judge and the Judge in charge about the possible involvement in the assault of the former Chief of Police, Edhem Bešić. She also addressed the President of the Canton, Mirsad Veladžić, the Chairman of the Presidency of Bosnia and Herzegovina, Alija Izetbegović, the Minister of Justice of the Una-Sana Canton, Mirza Karaberg, the Federal Minister of Justice, Mato Tadić, and his Deputy, Sead Hodžić. However, Edhem Bešić was not indicted. Finally, the applicant brought criminal charges before the Municipal Prosecutor's Office herself, on 1 October 1997.

20. On 15 March 1999 the Municipal Prosecutor in Bihać transmitted the applicant's request of 1 October 1997 and the investigation was opened by a procedural decision of the Municipal Court Bihać of 2 June 1999. During this investigation the witness Ahmet Šehović was heard. He stated that Edhem Bešić had ordered the perpetrators to liquidate the applicant. The Municipal Prosecutor still did not bring charges against Edhem Bešić, but submitted a request for further investigation. However, the investigation procedure ended by a procedural decision on termination of the procedure in light of the Law on Amnesty.

21. The applicant also filed an action for compensation of damages against the Una-Sana Canton, Emir Bešić, Abdulah Bešić, Hazim Kosovac and Edhem Bešić on 15 April 1998. Hearings were scheduled for 7 June 1999, 16 August 1999, 3 November 1999 and 1 December 1999, but did not take place because the defendants were not summoned correctly.

22. In February 2001 the Municipal Court in Bihać, on request of the Municipal Prosecutor's Office, asked the Supreme Court to refer the case to a court outside the Una-Sana Canton. The Supreme Court granted this request and referred the case to the Municipal Court Travnik, where it is currently pending. A hearing was scheduled for 19 September 2001. However, the proceedings were postponed until 31 October 2001.

IV. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" -no. 43/98)

23. Article 139 paragraph 1(6) reads as follows:

"(6) The term "injured party" designates a person injured or threatened in some personal or property right or by a crime."

24. Article 55 provides:

"(1) The injured party and the private prosecutor have the right during the examination to call attention to all facts and suggest evidence which has a bearing on establishing the crime, on finding the perpetrator of the crime or on establishing their claims under property law.

(2) In the main trial they have the right to propose evidence, to put questions to the accused, witnesses and expert witnesses, and to make remarks and present clarifications concerning their testimony, and also to make other statements and make other proposals.

(3) The injured party, the injured party as prosecutor and the private prosecutor have the right to examine the records and articles presented as evidence. …

(4) The investigative judge and the presiding judge of the panel shall inform the injured party and private prosecutor of their rights as referred to in Paragraphs 1 through 3 of this article."

25. Article 159 provides:

"(1) During the inquiry the parties and the defence counsel and the injured party may file motions with the investigative judge that certain investigative actions be taken. …

(2) The principals and the defence counsel and the injured party may file the motions referred to in Paragraph 1 of this article either with the investigative judge or the law enforcement agency ordered to perform certain investigative actions. If the investigative judge or law enforcement agency does not concur in the motion, it shall so inform the proponent, who may file the same motion with the investigative judge of the competent court."

B. Law on Civil Procedure (OG FBiH no. 42/98)

26. Article 10 reads as follows:

"The court is obliged to ensure that the proceedings are conducted without delay … and not to allow any abuse of the rights attributed to the parties in the proceedings."

27. Article 105 paragraph 1 provides:

"(1) The court may postpone a hearing if it is necessary in order to obtain evidence or for other justified reasons."

V. COMPLAINTS

28. The applicant complains that the events of 8 June 1995 violated her rights as guaranteed by Articles 3 and 5 of the Convention. She further complains that the manner in which the criminal proceedings against Emir Bešić, Abdulah Bešić and Hazim Kosovac were conducted and the length of

these proceedings violated Article 6 of the Convention. She also alleges that the non-indictment of Edhem Bešić violated Article 6 of the Convention. Finally, the applicant complains of a violation of Article 6 of the Convention regarding the civil proceedings.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

29. The Federation of Bosnia and Herzegovina states that since the assault took place prior to 14 December 1995, the application should be declared inadmissible. It is further of the opinion that the applicant did not exhaust all domestic remedies since both the criminal and civil proceedings were still pending when the application was filed.

30. It further states that since it was not the respondent Party's organs that subjected the applicant to torture, inhuman or degrading treatment or punishment or deprived her of her liberty, there can be no violation by the respondent Party of Articles 3 and 5 of the Convention. The respondent Party is of the opinion that it is not responsible for the actions of individuals.

31. Regarding the length of the criminal proceedings, the respondent Party recalls that the court building in Cazin burned down in November 1998. According to the respondent Party, this caused a delay in the criminal proceedings, which cannot be said to be due to any fault of the respondent Party and therefore cannot be considered to constitute a violation of Article 6.

32. As to the civil proceedings, the respondent Party states that the first hearing was scheduled for 7 June 1999. The reason no hearing was scheduled before that date, was that the Court was awaiting the outcome of the criminal proceedings. Eight hearings were scheduled in total, but all postponed since the defendants were not summoned correctly.

33. As to the question, put to the respondent Party by the Chamber, why the Court waited three years to submit a request for referral to the Supreme Court, the respondent Party states that the Court thought it could deal with the case itself more promptly and efficiently than any other court and therefore did not request a referral *ex officio*. However, when the request for referral was received, the Court forwarded the case to the Supreme Court immediately. The Supreme Court decided to refer the case to the Municipal Court Travnik and the Municipal Court Bihać took care of this immediately as well. The case is now pending before the Municipal Court Travnik.

34. Finally, the respondent Party is of the opinion that the applicant's compensation claim that she submitted to the Chamber on 25 January 2000, was not filed within the given time-limit and is manifestly ill-founded.

B. The applicant

35. The applicant maintains her complaints and claims that the remedies available to her are ineffective. She also states that only part of the court building in Cazin burned down and that the Court continued to function normally. Furthermore, she states that the files relating to these criminal proceedings were not destroyed.

36. In light of the allegations of the applicant toward Edhem Bešić, she submitted information to the Chamber, indicating that Borislav Padjen, another Bihać judge, submitted a written statement to the President of the Court in which he stated that on 30 April 1994 the Chief of Police, Edhem Bešić, told him how to administer justice in order not to cause trouble for himself. The applicant states that soon after this occurred, the judge left Bihać. Furthermore, she states that Judge Predrag Ibrahimpašić was arrested in 1994 by the Chief of Police, Edhem Bešić.

VII. OPINION OF THE CHAMBER

A. Admissibility

37. Before considering the application on the merits the Chamber shall determine whether to accept it, taking into account the admissibility criteria set out in Article VIII of the Agreement.

1. The Chamber's competence *ratione temporis*

38. The Chamber notes that the applicant's complaints relate in part to the assault of 8 June 1995, thus to events which occurred before 14 December 1995, when the Agreement entered into force. In accordance with generally accepted principles of international law and the Chamber's own case-law, the Agreement cannot be applied retroactively (see case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, Decisions on Admissibility and Merits 1996-1997). The Chamber must confine its examination of the case to considering whether the human rights of the applicant have been violated or threatened with violation since that date (see case no. CH/97/30, *Damjanović*, decision on admissibility of 11 April 1997, paragraph 13, Decisions on Admissibility and Merits 1996-1997).

39. The Chamber has held in *Matanović* (*loc. cit.*) that the obligation on the Parties to the Annex 6 Agreement to ensure human rights "entails positive obligations to protect these rights." In the Chamber's opinion, this responsibility of the Parties to ensure and protect human rights means that the Parties have to provide not only the appropriate structures to guarantee the exercise of rights, but also appropriate means whereby violations will be prevented and, where necessary, punished. However, in the Chamber's view and in line with the case-law of the European Court of Human Rights (see Eur. Court HR, *Svinarenkov v. Estonia*, decision on admissibility of 15 February 2000 and *Kadikis v. Latvia*, decision on admissibility of 29 June 2000), this obligation applies only if the initial violation occurred after the entry into force of the Agreement (see case no. CH/96/15, *Grgić*, decision on the merits of 5 August 1997, paragraph 17, Decisions on Admissibility and Merits 1996-1997).

40. In light of the above, the Chamber finds that the application, in so far as it refers to the assault of 8 June 1995 and the positive obligations of the respondent Party to protect the rights of the applicant that are allegedly violated by this assault, therefore fall outside its competence *ratione temporis*.

2. The Chamber's competence *ratione materiae*

41. The relevant parts of Article 6 paragraph 1 of the Convention provide as follows:

> "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. ..."

42. The Chamber notes that Article 6 of the Convention does not indicate that the applicant, as a victim of a crime, has a viable claim under that Article (see also case no. CH/99/2150, *Unković*, decision on admissibility and merits of 9 November 2001, paragraph 87). The applicant herself has not been "charged" with an offence within the meaning of Article 6 of the Convention and it has not been shown that her "civil rights" would be determined in these criminal proceedings (see also case no. CH/98/981, *Galijašević*, decision on admissibility adopted 12 November 1998, paragraph 10, Decisions and Reports 1998). Although domestic law provides the applicant with the right to participate in criminal proceedings as an injured party (see paragraphs 23–25 above), this is not a right guaranteed by the Convention. The applicant's claim under Article 6 of the Convention, in so far as it concerns the criminal proceedings against Emir Bešić, Abdulah Bešić and Hazim Kosovac and the investigation into the role of Edhem Bešić in the assault of 8 June 1995, is therefore outside the scope of Article 6 of the Convention. The Chamber therefore finds this part of the application inadmissible, as it is incompatible with the Agreement *ratione materiae*.

3. Requirement to exhaust effective domestic remedies

43. 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 *Onić* case (case no. CH/97/58, decision on admissibility and merits delivered on 12 February 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 (also) 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 … but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants."

44. The respondent Party objects to the admissibility of the application on the ground that the proceedings in the domestic courts were still pending at the time of the application. Therefore, it argues that the domestic remedies had not yet been exhausted.

45. In light of the Chamber's findings mentioned in paragraphs 38–42 above, the Chamber will limit its consideration as to the requirement of exhaustion of the domestic remedies, to the civil proceedings.

46. As in *Cipot-Stojanović* (case no. CH/99/2239, decision on admissibility and merits of 9 June 2000, paragraph 34, Decisions January – June 2000), the Chamber takes the view that, as regards the applicant's complaints relating to the length of the civil proceedings before the domestic courts, there are no domestic remedies at the applicant's disposal which she could have been required to exhaust. It therefore follows that, in this regard, the respondent Party's arguments must be rejected.

4. Conclusion as to admissibility

47. In so far as the applicant complains that her rights have been violated after 14 December 1995 in the civil proceedings, her complaints are within the competence of the Chamber *ratione temporis* and *ratione materiae* under Article VIII(2)(c) of the Agreement.

48. The Chamber finds no other reasons to declare the application inadmissible. It concludes therefore that the application should be accepted and examined on its merits in so far as it concerns the applicant's complaint of a violation of her human rights in light of the allegedly unreasonable length of the civil proceedings.

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 Bosnia and Herzegovina of its obligations under the Agreement.

50. The applicant complains of the length of the civil proceedings that she initiated against the Una-Sana Canton, Emir Bešić, Abdulah Bešić, Hazim Kosovac and Edhem Bešić. She initiated these proceedings on 15 April 1998 and has not received a decision to date. The proceedings therefore have been pending for 3 years and 9 months and are still ongoing.

51. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Chamber, namely the complexity of the case, the conduct of the applicant and of the relevant authorities and the other circumstances of the case (see e.g. case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998, with reference to the corresponding case-law of the European Court).

1. The complexity of the case

52. The case concerns the finding of liability of the Una-Sana Canton and four persons for damages suffered by the applicant. On 18 March 1999, i.e., 11 months after the applciant started

the civil proceedings, three of the five defendants were found guilty by the criminal court of having committed the crime that caused the damages complained of. On 13 July 1999 this conviction became final and binding. As a result, the civil case against these three men was not a complex one. All that remained to be ascertained, was the responsibility of the other two defendants for the crime committed. This question did not make the case so complex as to justify a delay in the proceedings of another two years and five months (as of the date of this decision).

2. The conduct of the applicant

53. On the basis of the information provided to the Chamber, there does not appear to be any conduct on the part of the applicant which could be considered to have contributed to the delay in the proceedings.

3. The conduct of the national authorities

54. The Chamber recalls that the applicant initiated civil proceedings against the above-mentioned persons and the Una-Sana Canton before the Municipal Court Bihać on 15 April 1998. In the course of 1999 several hearings were scheduled, but did not take place because, as the respondent Party has stated, the defendants were not summoned correctly. Not until February 2001, nearly three years after the proceedings were initiated, did anything substantial happen in the case, when the Municipal Court, in response to a request from the Public Prosecutor's Office, requested the Supreme Court to refer the case to a court outside of the Una-Sana Canton.

55. The respondent Party states that the reason for not scheduling a public hearing in the civil proceedings until 7 June 1999, 1 year and 2 months after the proceedings were initiated, was that the Municipal Court Bihać was awaiting the outcome of the criminal proceedings, as the Court could not proceed without the prior establishment of the guilt of the defendants. The Chamber notes that 14 hearings were scheduled in the criminal proceedings, over a period of 2 years and 8 months, each of the hearings being postponed. Only at the fifteenth hearing was the Municipal Court Cazin able to proceed to actually deal with the case on its merits. All in all, it took the authorities three years and eight months to issue a decision in the criminal case. The manner in which these criminal proceedings were conducted therefore added to great extent to the length of the proceedings in the civil case.

56. The Chamber further notes that once the Municipal Court Bihać did finally proceed to deal with the case in June 1999, the defendants were summoned incorrectly. This did not happen once, but four times over the course of the following six months, until December 1999. There is nothing in the Chamber's file that indicates that any hearings were scheduled in the case before the Municipal Court Bihać, nor that the case was being dealt with in any other way after December 1999, until February 2001 when the Court requested the Supreme Court to refer the case to a Court outside the Una-Sana Canton. Therefore, an additional 14 months passed during which the applicant's case was not being dealt with.

57. As to the question why a request for referral was not submitted by the Municipal Court Bihać immediately *ex officio*, the respondent Party stated that the Municipal Court Bihać was of the opinion that it could deal with the case more promptly and efficiently than any other court. Considering the way in which the Municipal Court Bihać in fact dealt with the case, the Chamber finds this statement unconvincing. Moreover, the same Court had declared itself incompetent in the criminal proceedings.

4. Conclusion

58. Having regard to the above, the Chamber considers that the delay in the civil proceedings can be considered to be entirely due to the conduct of the Municipal Court Bihać, for which the respondent Party is to be held responsible. Moreover, the length of the criminal trial, which is also imputable to the respondent Party, further contributed to the delay in the adjudication of the applicant's civil claim. The Chamber notes finally that, in light of the manner in which the criminal proceedings were conducted, it would have expected the Municipal Court Bihać to have been more expedient when dealing with the civil proceedings in this particular case.

59. The Chamber therefore finds that the length of time that the applicant's proceedings have been pending before the courts of the respondent Party is unreasonable and that the applicant's right to a fair trial within a reasonable time in the determination of a civil right guaranteed by Article 6 paragraph 1 of the Convention has been violated as a result.

VIII. REMEDIES

60. In accordance with Article XI(1)(b) of the Agreement, the Chamber must next address the question which steps should be taken by the respondent Party to remedy the established breaches of the Agreement. In this regard, the Chamber shall consider orders to cease and desist, pecuniary compensation and provisional measures.

61. The applicant submitted a claim for compensation to the Chamber. However, the claims made by the applicant relate only to damages suffered as a direct consequence of the assault of 8 June 1995. Since the Chamber has considered that the question whether the assault constitutes a violation of the applicant's rights guaranteed by the Convention falls outside its competence *ratione temporis*, it follows that the Chamber will not award any compensation for damages resulting from that assault.

62. The Chamber notes that it has found a violation of the applicant's right to a trial within a reasonable time as guaranteed by Article 6(1) of the Convention. It considers it appropriate to order the respondent Party to take all necessary steps to ensure that the applicant's proceedings are decided upon expeditiously by the Municipal Court Travnik and that the continued proceedings are conducted entirely in accordance with the applicant's rights as guaranteed by the Agreement.

63. Furthermore, the Chamber *proprio motu* 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 have her case decided before the domestic organs.

64. Accordingly, the Chamber will order the respondent Party to pay to the applicant the sum of 5,000 (five thousand) Convertible Marks (*Konvertibilnih Maraka*; "KM") in recognition of her suffering as a result of her inability to have her case decided within a reasonable time. The sum should be paid to the applicant, at the latest, 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.

65. The Chamber further awards simple interest at an annual rate of 10 per cent as of the date of the expiry of the one month period set in paragraph 64 for the implementation of the present decision, on the sum awarded in paragraph 64 or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

66. For the above reasons, the Chamber decides,

1. unanimously, to declare admissible the application under Article 6 of the European Convention on Human Rights in so far as it relates to the civil proceedings initiated by the applicant against the Una-Sana Canton, Emir Bešić, Abdulah Bešić, Hazim Kosovac and Edhem Bešić on 15 April 1998;

2. unanimously, to declare inadmissible the application under Articles 3 and 5 of the Convention as outside its competence *ratione temporis*;

3. unanimously, to declare inadmissible the application under Article 6 of the Convention in so far as it relates to the criminal proceedings as outside its competence *ratione materiae*;

4. unanimously, that the civil proceedings were not concluded within a reasonable time and that there has been a violation of Article 6 paragraph 1 of the Convention in this respect, 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 to ensure that the applicant's proceedings before the Municipal Court Travnik are decided upon expeditiously and in accordance with the applicant's rights as guaranteed by the Agreement;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay to 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 of Procedure the sum of 5,000 (five thousand) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for non-pecuniary damage;

7. unanimously, to order that simple interest at an annual rate of 10 (ten) per cent will be payable on the amount, or any unpaid portion thereof, awarded in conclusion 6 above outstanding to the applicant at the end of the period set out in that conclusion for such payment; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to it no later than six months after 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)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel