DECISION ON ADMISSIBILITY AND MERITS

DELIVERED ON 14 MAY 1999

Case No. CH/98/756
Đ. M.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 13 April 1999 with the following members present:

Ms. Michele PICARD, President
Mr. Giovanni GRASSO Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Vlatko MARKOTIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Manfred NOWAK
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

Mr. Leif BERG, 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 ("the General Framework Agreement");

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

I. INTRODUCTION

1. In 1997 the applicant, a citizen of Bosnia and Herzegovina of Bosniak origin, initiated proceedings before the Municipal Court and municipal authorities in Livno, Canton 10, seeking to regain possession of her house. She claims she was forced out of it by persons of Croat origin in 1993, and thereafter lived abroad before returning in January 1998. The applicant complains that due to her ethnic origin she has been denied her right to a fair hearing before an independent and impartial tribunal, her right to equality before the law, her right to respect for her home, her right to an effective remedy and her right to the peaceful enjoyment of property.

2. The case primarily raises issues of discrimination in relation to Articles 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and Article 1 of Protocol No. 1 to the Convention as well as under Article 26 of the International Covenant on Civil and Political Rights ("the Covenant"). The application also raises issues in relation to the aforementioned Convention provisions in isolation.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced and registered on 10 July 1998. It contained a request for a provisional measure to be ordered pursuant to Article X(1) of the Agreement. The request did not specify the measure sought.

4. On 17 July 1998 the Chamber refused the request for a provisional measure but decided to transmit the application to the respondent Party for its observations on the admissibility and merits pursuant to Rule 49(3)(b) of the Rules of Procedure. A time-limit expiring on 11 September 1998 was set for the receipt of such observations. No observations were received. On 29 September 1998 the respondent Party requested an "extension" of the time limit for submitting its observations.

5. On 14 October 1998 the Chamber refused the respondent Party's request for a new time limit and decided to proceed without any observations from it. On 21 October 1998 the Chamber invited the applicant to submit her final written observations and any claim for compensation before 23 November 1998. She was warned that a claim for compensation or other relief would only be considered if a claim to this effect had been made in her written observations, unless the Chamber, for special reasons, decided to admit a claim at a later stage. In a letter dated 18 November 1998 the applicant stated that she did not wish to submit a claim for compensation at that time.

6. On 13 November 1998 the Chamber decided to hold a public hearing on the admissibility and merits of the case during its December session 1998. The Chamber invited the Institution of Ombudsmen of the Federation of Bosnia and Herzegovina to take part in the proceedings as *amicus curiae.* The Chamber further decided to summon as witnesses Mr. Midhad Osmančaušević, Assistant Federation Ombudsman in Livno, and Mr. Milan Kolak, judge of the Municipal Court in Tomislavgrad. The hearing was later fixed for 17 December 1998. The applicant was invited to state, at the hearing, any claim for compensation of expenses relating to her attendance at that hearing. The applicant did not request the reimbursement of such expenses at the hearing but did so in her claim for compensation of 5 February 1999 (see paragraphs 15 and 99 below).

7. On 9 December 1998 Mr. Kolak informed the Deputy Registrar that he would be unable to attend the Chamber's hearing due to his "busy schedule". On 10 December 1998 the Registrar reminded Mr. Kolak of his duty to comply with the summons issued under Article X(1) of the Agreement and Rule 39 of the Rules of Procedure. On 11 December 1998 the Registrar informed the respondent Party of Mr. Kolak's intention not to appear as witness, and reiterated the respondent Party's undertaking under Article X (5) of the Agreement "to co-operate fully" with the Chamber. To this end, the respondent Party was requested to take all necessary steps so as to ensure Mr. Kolak's attendance at the hearing, and to report to the Chamber on those steps.

8. By a letter of 10 December 1998 received by the Chamber on 14 December 1998 Mr. Kolak confirmed his intention not to appear before the Chamber, referring, *inter alia,* to transportation problems. Though denying that he himself had ever been biased in a case, Mr. Kolak admitted that "certain difficulties (did) exist with regard to the passing of judgements (involving a party of Bosniak

origin) and particularly as regards the enforcement (of such judgements)".

9. On 10 December 1998 the Centre for the Affirmation of Human Rights and Freedoms proposed that Mr. Aziz Jahijefendić, lawyer of the Centre, be heard as witness.

10. On 14 December 1998 the Chamber decided to summon Mr. Jahijefendić to appear as witness. The Chamber also deliberated in respect of Mr. Kolak's clear intention not to appear before it. On 15 December 1998 he was again reminded of his duty to comply with the summons issued under Article X(1) of the Agreement. On 15 December 1998 the President reiterated the Chamber's demand that the respondent Party take all necessary steps (if necessary coercive) to ensure Mr. Kolak's attendance at the public hearing.

11. On 15 December 1998 the respondent Party submitted written observations on the admissibility and merits of the case.

12. At the Chamber's hearing on 17 December 1998 in the Cantonal Court in Sarajevo there appeared the applicant in person; Ms. Seada Palavrić, Agent of the respondent Party; Mr. Sead Bahtijarević, Assistant Federation Ombudsman acting on behalf of *amicus curiae*; as well as Mr. Midhad Osmančaušević and Mr. Aziz Jahijefendić in their capacity as witnesses. Certain written documentation was also handed in during the hearing. The applicant claimed compensation for pain and suffering.

13. On 19 December 1998 the Chamber deliberated on the admissibility and merits of the case. It further decided to invite the parties to submit before 8 January 1999 their possible further observations pursuant to Rule 50 on the written documentation received during and after the hearing. No such observations were received.

14. On 27 January 1999 the Chamber forwarded copies to the respondent Party of Mr. Kolak's correspondence with the Chamber, for possible observations by 8 February 1999. No such observations were received.

15. On 5 February 1999 the applicant submitted a claim for compensation for pecuniary damages (see paragraphs 6 and 99). On 4 March 1999 the respondent Party submitted its observations on this claim.

16. The Chamber further deliberated on the admissibility and merits of the case on 12 and 13 February, on 12 March as well as on 12 and 13 April 1999. The Chamber adopted its decision on the last-mentioned date.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

17. The facts of the case are not in dispute between the parties. The applicant, of Bosniak origin, owns a house with a surrounding plot in Kablići, Livno (Canton 10) in the Federation of Bosnia and Herzegovina. The applicant's house was broken into and occupied on 10 September 1993 by B.J., a police officer of Croat origin posted in Bugojno, and his relatives. The applicant and her family left the country shortly thereafter and lived in Croatia, Hungary and Switzerland before they were obliged to return to Livno in January 1998. Since that time she and her husband have had to live separately with relatives, caring for one child each.

18. On 24 September 1997 the applicant applied to the Department of Urbanism, Building and Housing Affairs of the Municipality of Livno for the return of her house pursuant to Article 25 of the Law on Temporarily Abandoned Real Property Owned By Citizens. She did not receive any response.

19. On 15 October 1997 the applicant initiated civil proceedings before the Municipal Court in Livno against B.J., seeking to regain physical possession of her house and the eviction of the temporary occupants. The applicant's action was registered on the same day. There have been no subsequent developments in these proceedings to date.

20. On 18 May 1998 the applicant petitioned the Department of Geodetic and Legal Affairs of the Municipality of Livno, reclaiming her property "as soon as possible" on the basis of Article 12 of the 1998 Law on the Cessation of the Law on Temporarily Abandoned Real Property Owned By Citizens ("the 1998 Law"). There has been no response.

21. On 18 May 1998 the applicant also submitted an application to the Commission for Real Property Claims of Displaced Persons and Refugees (established by Annex 7 to the General Framework Agreement; henceforth "the Annex 7 Commission").

22. On 2 November 1998 the applicant complained about "the silence of the administration" to the Cantonal Ministry of Justice and Administration. There has been no response.

B. Particular written evidence

23. In a letter of 28 October 1997 addressed to, among others, all courts and mayors in Canton 10, Mr. Mirko Baković, then Governor of the Canton, forwarded certain conclusions from a meeting held on 6 July 1997 with Dr. Christian Schwarz-Schilling, International Mediator for the Federation of Bosnia and Herzegovina and Republika Srpska, and Mr. Goran Magaš, adviser of the President of the Federation of Bosnia and Herzegovina. The letter read as follows:

> "To: Ministry of Interior of Herzeg-Bosnia Canton
> Ministry of Labor and Welfare,
> Courts in the area of Canton Herzeg-Bosnia Canton
> Mayors in the area of Herzeg-Bosnia Canton
>
> Subject: Conclusions relating to the accommodation of displaced persons.
>
> Concerning the very frequent phenomenon of evicting displaced persons from houses where they found accommodation we wish to inform you that on 6 July 1997 we held a meeting with the International Mediator for the Federation of BiH, Mr. Christian Schwarz-Schilling, attended also by Mr. Goran Magaš, adviser to the President of the Federation of BiH, which resulted in the following conclusions:
>
> - displaced persons must not be thrown out of the houses they are occupying, no matter whom they belong to (Serbs, Croats, Muslims);
>
> - displaced persons are to remain in the buildings they occupy until their status has been resolved either by enabling them to return to their own homes or by finding them other accommodation, which will be taken care of by municipal authorities in the municipalities where they reside now;
>
> - the ownership over the mentioned buildings is recognised;
>
> - we also point out here that the corresponding services have been advised of this orally; we are under the impression that those instructions have not been complied with because it has come to our attention that pressure is being applied on displaced persons to move out of the houses where they are accommodated;
>
> - should, …, displaced persons in the area of our Canton ask for help and assistance from cantonal authorities, you are under an obligation to comply with this agreement.
>
> - Please advise the competent services of this matter for the purpose of protecting the displaced persons in the area of our Canton …"

24. In a letter of 20 March 1998 to Governor Baković, Dr. Schwarz-Schilling, referring to the purported agreement between the two, stressed that under Annex 7 to the General Framework Agreement refugees and displaced persons were entitled to return to their pre-war places of

residence. The implementation of Annex 7 therefore necessitated "lawful evictions of the current occupants of dwellings belonging to such returnees". Dr. Schwarz- Schilling requested Mr. Baković to ensure that the cantonal and municipal authorities would understand his position clearly, and correctly inform the public thereof.

25. The Centre for the Affirmation of Human Rights and Freedoms in Livno has drawn up a list of 56 cases, including that of the applicant, in which the Centre, between 3 February 1997 and 2 April 1998, assisted plaintiffs in bringing repossession claims before the municipal courts of Livno and Tomislavgrad. According to the Centre, 50 of the claims concerned real property owned by the plaintiffs, most of whom had returned from abroad without any accommodation awaiting them. Almost 90 per cent of the properties concerned had been occupied illegally. In none of the cases has any hearing, even of a preparatory character, been scheduled.

26. A report submitted by the Federation Ombudsmen's office in Livno on 13 July 1998 noted that 365 cases involving labour and property rights and brought by members of the (Bosniak) minority were pending before the municipal courts of Livno and Tomislavgrad. In a considerable number of the cases no preparatory hearing had yet been held. The Ombudsmen further alluded to their reports of 16 March and 19 May 1998 in which they had quoted judge Kolak of the Municipal Court of Tomislavgrad as having stated essentially that the cases in question would start to be resolved once there had been a political resolution to the problem of displaced persons.

C. Oral testimony

1. Mr. Aziz Jahijefendić

27. Mr. Aziz Jahijefendić is a lawyer of the Centre for the Affirmation of Human Rights and Freedoms based in Livno. This organ is sponsored by the United Nations High Commissioner for Refugees and provides legal aid principally in matters relating to claims for repossession of private and socially-owned property.

28. The Centre assisted the applicant in lodging her action of 15 October 1997 with the Municipal Court in Livno, where her case was registered on the same day. Nothing has happened in the case since that date. The Centre further assisted the applicant in lodging the various requests with the municipal organs which have taken no action. Most recently, in November 1998 the Centre assisted the applicant in complaining to the Cantonal Ministry of Justice and Administration about the silence of the administration. No action has been taken. In other cases the Ministry declared itself incompetent to deal with such complaints, referring to the fact that there exists no appellate organ to which appeals could be addressed against administrative acts of the municipal departments for property matters.

29. The witness was unaware of any decision declaring the applicant's house abandoned and/or allocating it to the present occupants. He concluded that no such decision can exist and that the house is therefore occupied illegally. In roughly 80 per cent of the cases in which the Centre has intervened, displaced persons from Bugojno moved into houses without the approval of the competent municipal organ. Out of those who have invoked the 1998 Law, the Centre has not registered a single case where the refugee had been reinstated into his private house or into a socially-owned apartment. Although under the 1998 Law there is a right of appeal to a cantonal organ for property matters no such appellate body has been established in Canton 10.

30. According to the witness, no action has been taken by the Livno Municipal Court in any of the 56 cases in which the Centre has assisted plaintiffs in claiming repossession of their property. By way of comparison, the witness referred to the Centre's assistance to a person of Croat origin, whose claim for repossession had been processed immediately by the Municipal Court. The witness concluded that in proceedings of this nature Bosniak and Serb claimants are not placed on an equal footing with those of Croat origin.

31. The witness further stated that there are only two officials of Bosniak origin in the administrative and judicial bodies in Livno. These were the only persons of that origin to be re-employed after the war. All heads of departments are of Croat origin.

2. Mr. Midhad Osmančaušević

32. Mr. Midhad Osmančaušević is Assistant Ombudsman of the Federation, based in Livno. The Ombudsmen's office in Livno is competent for the whole of Canton 10, that is to say for the municipalities Livno, Kupres, Tomislavgrad, Drvar, Bosansko Grahovo and Glamoc. The witness was a judge of the Livno Municipal Court until 1993 when he was dismissed "for his personal security" and "for having participated in an armed riot". In the Livno Municipal Court there are currently, in addition to the Croat judges, two Serb judges, one of them being married to a Croat.

33. The witness stated that the legal conditions for the appointment of judges in Canton 10 are being respected. Nevertheless, the judiciary is not independent. Out of the 1,160 cases pending before the Federation Ombudsmen in Livno a majority concerns claims for repossession of property which, particularly in Livno and Tomislavgrad, remains occupied by citizens of Croat origin from Bugojno. The judges in these two towns schedule hearings rarely if ever, if the plaintiff in disputes relating to property or employment is of Bosniak or Serb origin. Judge Kolak of the Tomislavgrad Court is the judge on approximately 100 cases brought by Bosniaks against companies or municipal institutions. He has not scheduled a single hearing in any of those cases. In response to a query by the witness as to the reasons therefor, judge Kolak had answered that those were "political issues which were going to be resolved by politics and not by the courts". The witness had noticed a certain fear in judge Kolak, who then stated openly that he would fear for his own safety if he were to schedule hearings in such cases.

34. The witness further stated that prior to the entry into force of the 1998 Law, about 100 cases had been brought before the Livno Municipal Court by returning Bosniaks against temporary occupants from the Bugojno area. Hearings were scheduled very rarely and the proceedings never came to a close. The Ombudsmen assisted in three cases where the proceedings were concluded in the plaintiff's favour but judge Mirko Bralo declined to examine the requests for enforcement, referring the matter to "the competent municipal organ". Judge Bralo had stated to the witness that he did not dare to schedule hearings since he had received "orders from the top" to the effect that he should not "flunk".

35. The witness further referred to the letter of the then Governor of Canton 10, referring to an agreement between him and the international mediator Dr. Schwarz-Schilling to the effect that temporary users of property could not be evicted as long as the necessary conditions had not been created (see paragraphs 23–24 above). The Governor's letter had been shown to the witness by the judge on the applicant's case, Ms. Ozrenka Vidaček. Unlike her colleague, judge Kolak, she has never spoken openly about the problems with the independence of the judiciary. Nonetheless, her approach to the cases referred to in the letter has been the same as his. In reply to a question from the witness, Dr. Schwarz-Schilling later publicly denied having reached any such agreement. In the opinion of the witness, the Governor's letter amounts to an instruction to judges and other officials prohibiting them from taking any action in order to evict temporary occupants.

36. By way of further exemplifying the differential treatment of plaintiffs in Canton 10, the witness referred to an action for repossession of real property which had been brought before the Livno Municipal Court in April 1994. The first hearing was held in June 1998. A judgement in the plaintiff's favour became enforceable in November 1998 but judge Bralo had told the plaintiff the judgement "could not be executed". However, in July 1997 companies holding a right to allocate occupancy rights in socially-owned apartments had succeeded to have the contracts of Bosniak and Serb occupancy rights holders quickly terminated by the same tribunal.

37. The witness finally stated that so far no appeal body has been established in matters relating to claims for repossession of property. Even the post as Head of the Department for Property Law Matters/Housing Issues (the first instance) has been vacant for months. As a result, no decisions can be signed and delivered. All administrators are of Croat origin.

C. Relevant domestic law

1. The Law on Temporarily Abandoned Real Property Owned by Citizens

38. The Law on Temporarily Abandoned Real Property Owned By Citizens (*Službeni List (*Official Gazette) of the former Republic of Bosnia and Herzegovina ("RBiH"), Nos. 11/93 and 13/94) was in force up to 4 April 1998, when it was replaced by the Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned By Citizens (*Službeni Novine* (Official Gazette) of the Federation of Bosnia and Herzegovina ("FBiH"), No. 11/98; "the 1998 Law; see paragraphs 41-42).

39. According to the Law on Temporarily Abandoned Real Property Owned by Citizens, real property was to be considered abandoned within the meaning of this Law, if it had been abandoned or had temporarily ceased to be used by its owners, or members of the owner's household, after 30 April 1991. Real property used by third persons on the basis of a valid contract concluded with the owner was not to be considered abandoned (Article 5). The municipal administrative organ for housing affairs was competent *ex officio* to declare property abandoned and to place it under the administration of the municipality for the purpose of allocating it for temporary use (Articles 7 and 12).

40. On his or her return to the municipality, the owner could reclaim the property at any time. The competent organ was to respond within three days from the day of receipt of the owner's request, by issuing a decision terminating the municipal administration over the property and returning it to the owner. If the property had been allocated for temporary use, the temporary user was to be ordered to vacate it and return it to the owner within eight days from the day of delivery of the decision to this end (Articles 25 and 26).

2. The Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens

41. Under the Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens ("the 1998 Law") the legislation and regulations governing temporarily abandoned property owned by citizens in the period between 30 April 1991 and the entry into force of the 1998 Law shall cease to be applied (Article 1).

42. The owner of real property declared abandoned shall have the right to reclaim it at any time. For the purpose of this Law, the owner shall be understood to mean the person who, according to the legislation in force, was the owner of the real property at the moment when it was declared abandoned (Articles 4-5 and 10). A claim for repossession shall include, *inter alia*, the date when the owner intends to return to the property (Article 11(3)(3)). The temporary user of the property shall continue to use it on the conditions and in a manner prescribed by the Law on Temporarily Abandoned Real Property Owned By Citizens, until the issuance of a decision under Article 12 (Article 6). This decision shall be issued within 30 days from receipt of the claim and shall stipulate*, inter alia*, a time limit within which the property shall be vacated by the temporary occupant. An appeal lies to the cantonal administrative body competent in property law matters within 15 days. A party affected by the decision may at any time file a claim with the Annex 7 Commission (Articles 13-14).

3. The Constitution of the Federation of Bosnia and Herzegovina

43. According to Article 1 of Chapter IV(C)(1) of the Constitution of the Federation of Bosnia and Herzegovina, the judicial functions in the Federation shall be exercised, *inter alia*, by the Supreme Court of the Federation, by the cantonal courts as prescribed in Chapter V(11) and by the municipal courts as prescribed in Chapter VI(7). Under Chapter V(6) the cantonal legislatures shall, *inter alia,* elect the judges of the cantonal courts.

44. Chapter V(11) of the Constitution reads as follows:

> "1) Each canton shall have courts, which shall have appellate jurisdiction over the courts of its municipalities and original jurisdiction over matters not within the competence of those courts and as provided by law.
>
> 2) Cantonal judges shall be nominated by the Cantonal President from among outstanding

jurists and be elected by a majority vote in the Cantonal Assembly, in such a way as to ensure that the composition of the judiciary as a whole shall reflect that of the population of that Canton.

3) Cantonal Judges shall serve until the age of 70, unless they resign or are removed from office by consensus among the judges of the Supreme Court. The conditions of service shall be determined by cantonal legislation. ...

4) Each cantonal court shall elect its own President."

45. Chapter VI(7) provides as follows:

"1) Each municipality shall have courts, which may be established in co-operation with other municipalities, and which shall have original jurisdiction over all civil and criminal matters, except to the extent original jurisdiction is assigned to another court by this or the Cantonal Constitution or by any Law of the Federation or the Canton.

2) Municipal courts shall be established and funded by the Cantonal Government.

3) Judges of municipal courts shall be appointed by the President of the ... Cantonal Court after consultation with the Mayor of the municipality.

4) Judges of municipal courts shall serve until age 70, unless they resign or are removed from office by consensus among the judges of the ... Cantonal Court. The conditions of service shall be determined by cantonal legislation. ..."

4. The Constitution of Canton 10

46. Chapter IV(c) of the Constitution of Canton 10 (Official Gazette of Canton 10, No. 1/96) states, as far as relevant, as follows:

Article 45:

"The judicial authorities in the Canton are independent and shall execute their power based on the Constitution and the laws of the Federation and Canton."

Article 46:

"The courts in the Canton shall ensure an equal position to all parties to judicial proceedings."

Article 48:

"The cantonal courts shall be established in accordance with the law of the Canton."

Article 51:

"The judges of the Cantonal Court shall be proposed by the Governor of the Canton from among prominent lawyers, and shall be elected by (the Cantonal) Assembly, whereby the national composition of the judiciary as a whole shall reflect the national structure of the population of the Canton."

Article 52:

"The judges of the cantonal and municipal courts shall serve until the age of 70, unless they resign or are removed from office as follows:

a) the judges of the Cantonal Court by consensus among the judges of the Supreme Court of the Federation; and

b) the judges of a municipal court by consensus among the judges of the Cantonal Court.

The terms of service shall be determined in a separate law of the Canton. ..."

Article 53:

"The Cantonal Court shall elect its President in accordance with the law."

Article 54:

"All the judges of the cantonal and the municipal courts shall be prominent lawyers of the highest moral qualities. The judges of the cantonal and the municipal courts shall not be criminally prosecuted or (held) responsible in civil proceedings for any action undertaken in performing their functions."

Article 73:

"The judges of the municipal courts shall be appointed by the President of the Cantonal Court upon consultations with the Mayor of the municipality."

5. The Law on the Judiciary of Canton 10

47. The Law on the Judiciary (Official Gazette of Canton 10, No. 1/97) governs, *inter alia,* the competence of the courts of the canton and the appointment of their judges (Article 1).

Article 4:

"The courts of the Canton shall perform its judicial function under the Constitution of the Federation of Bosnia and Herzegovina (hereinafter "the Federation") and the Constitution and laws of the Canton."

Article 11:

"The judges and lay judges ... are appointed and removed from office by the competent authorized body established by this Law."

Article 44:

"A citizen of the Federation who resides on the territory of the Federation, is a lawyer ... with a barrister's exam and a jurist of recognized competence, can be appointed judge. Judges are appointed for an unlimited period of time and may remain in service until they reach the age of 70. The national composition of the judges as a whole shall reflect the national structure of the population of the Canton."

Article 46:

"Judges of the municipal courts are appointed by the President of the Cantonal Court upon consultations with the Mayor of the municipality."

Article 47:

"Judges of the Cantonal Court are appointed by a majority of votes of the Cantonal Assembly, on the proposal by the Governor of the Canton."

Article 48:

"The appointment of judges shall be performed on the basis of a public announcement published in media available to all citizens of the Canton. This public announcement is published by the Ministry of Justice ..."

Article 49(4):

"(4) The applications received ... shall be analyzed by the Ministry which shall make a list of candidates in alphabetic order and, with its opinion on the competence of the candidates, transmit it to the Governor and the President of the Cantonal Court for further procedure."

Article 51:

"Before taking up their duty judges shall make the solemn declaration. It reads as follows:
'As the judge I solemnly declare that I will adhere to the Constitution and the law of the Federation and the Constitution and the law of the Canton, and that I will perform my duty conscientiously and impartially.'"

Article 54:

"The duty of the judge shall be terminated by his/her removal from office or by his/her resignation."

Article 55:

"The procedure for the removal from office of a judge is set in motion:
- if he/she is convicted of a criminal act which makes him/her unworthy of exercising the duty of a judge;
- if it is established that he/she seriously abused her position as a judge or damaged the reputation of the judicial office;
- if it is established that he/she is not qualified for the post as judge, if he/she does not achieve satisfactory results in his/her duty for a longer period of time or if he/she performs his/her duty as a judge in a disorderly manner for a longer period of time; (or)
- if it is established that he/she is permanently disabled to act in the position of a judge on the basis of an opinion of the competent medical service."

Article 56:

"A proposal to remove a Cantonal Court judge from office shall be made by the Governor on the initiative of the President of the Supreme Court of the Federation, the President of the Cantonal Court or the Minister of Justice and Administration (of the Canton). A proposal to remove a municipal court judge from office is made by the President of the Cantonal Court or the President of the Municipal Court."

Article 62:

"Lay judges on the Cantonal Court are appointed by the Cantonal Assembly on the proposal of the Governor. Lay judges on the Municipal Court are appointed by the President of the Cantonal Court on the proposal of the Mayor."

IV. COMPLAINTS

48. The applicant complains that due to her Bosniak origin she has been denied her right to a fair hearing within a reasonable time before an independent and impartial tribunal, her right to respect for her home, her right to an effective remedy and her right to the peaceful enjoyment of property (Articles 6, 8 and 13 of the Convention as well as Article 1 of Protocol No. 1 to the Convention).

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

49. The respondent Party argues, with reference to Article VIII(2)(d) of the Agreement, that the application should be rejected as being inadmissible or at least that the consideration thereof should be deferred, since the applicant has also petitioned the Annex 7 Commission, where the matter remains pending.

50. In the alternative, the Federation submits, with reference to Article VIII(2)(a) of the Agreement, that the applicant's claim under the 1998 Law was incomplete and therefore she failed to exhaust effective domestic remedies. More particularly, the applicant's repossession claim under the 1998 Law did not specify the date when she wished to move back into her house, although such mention is required by Article 11(3)(3) of that law. The applicant's statement that she wished to be reinstated immediately was inadequate, thereby resulting in a delay in the issuing of the decision in response to her claim. It is the respondent Party's contention that the 1998 Law is applicable in the applicant's case regardless of whether or not her property was formally declared abandoned and even though the applicant initiated proceedings prior to the entry into force of that law. Moreover, the 1998 Law does not afford to the Municipal Court any competence to deal with the applicant's case. It follows from Article 14 of the 1998 Law that an appeal against acts of any municipal or cantonal organ may be lodged with the Annex 7 Commission.

51. Should the Chamber find that the admissibility requirements have been met, the respondent Party concedes that problems with the independence and efficiency of the courts in Canton 10 do exist. However, the courts of the cantons are independent of the Federation except for the fact the Supreme Court of the Federation may remove judges from their office in cantonal courts. The Federation is working on resolving the problems in the judiciary in Canton 10. However, judges cannot be deprived of their freedom of association or of their right to sympathise with a political party. Moreover, the aforementioned problems have not had any impact on the applicant's case and the fact that she has still not regained her property.

B. The applicant

52. As for the admissibility requirements, the applicant maintains that her house was forcibly and unlawfully occupied by B.J. She was never notified of any decision declaring her property abandoned and allocating it for temporary use to the current occupants but was nevertheless advised to reclaim her possession also under the 1998 Law. With respect to the merits of the case, the applicant maintains her complaints.

C. *Amicus curiae*

53. As for the admissibility of the case, *amicus curiae* submits that under the Law on Civil Proceedings the Municipal Court is competent to deal with the applicant's action of 15 October 1997 for reclaiming physical possession of her property by having the illegal occupants evicted. The 1998 Law is therefore inapplicable in her case, as there is no evidence that the applicant's property was ever declared abandoned. Even if the 1998 Law were to apply, the municipal administration was under a duty to invite the applicant to correct any inaccuracies in her repossession claim of 18 May 1998.

54. As for the merits of the case, a*micus* submits that the applicant's rights under the Agreement have been violated due to the respondent Party's failure to meet its obligation to secure those rights. *Amicus* was last in contact with the Municipal Court on 4 December 1998, by which date there had been no developments in the applicant's case, even with a view to having her rectify or complete her action of 15 October 1997. Her case is an example of a well-orchestrated policy not to process repossession claims lodged by Bosniaks.

55. *Amicus* further points out that five of the six judges on the Livno Municipal Court are of Croat origin, the remaining being a Serb. Under the domestic law the judges of the municipal courts are appointed by the President of the Cantonal Court after consultations with the Mayor of the

municipality. Proposals for appointment are being made exclusively by the ruling political party and all appointments are made according to these criteria. Accordingly, all judges are at least sympathisers of that party, which creates an objective appearance that the courts are not impartial and that there cannot be fair proceedings. The same is true for the officials of the municipal body seized of repossession claims. In Canton 10 this has resulted in obvious discrimination by the majority of the population (of Croat origin) against the Bosniak and Serb minorities.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione temporis*

56. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. According to Article VIII(2)(c), the Chamber shall dismiss an application which it considers incompatible with the Agreement. The Chamber recalls that in accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively (see, e.g., *Matanović v. The Republika Srpska*, Case No. CH/96/1, decision of 13 September 1996, Decisions 1996-1997).

57. The Chamber notes that the applicant's complaints concern actions and omissions of the authorities of the respondent Party from October 1997 onwards which therefore fall within the Chamber's competence *ratione temporis*. The application is thus compatible with the Agreement for the purposes of Article VIII(2)(c).

2. *Lis alibi pendens*

58. According to Article VIII(2)(b) of the Agreement, the Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure of international investigation or settlement. Moreover, under 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.

59. The Chamber notes that the applicant has also claimed the return of her real property by petitioning the Annex 7 Commission. According to Article XI of Annex 7, the mandate of that Commission is confined to decisions on claims for real property in Bosnia and Herzegovina, where the property has not been sold voluntarily or otherwise transferred since 1 April 1992 and where the claimant does not now enjoy possession of that property. The Chamber notes that in the present case the applicant has raised several complaints substantially different from the subject matter which she has brought before the Annex 7 Commission. In addition to the complaint relating to her property rights, the case before the Chamber raises issues of potential discrimination with respect to the applicant's enjoyment of various rights guaranteed to her under the (Human Rights) Agreement (Annex 6). These matters all fall outside the Annex 7 Commission's competence.

60. The Chamber finds therefore that the applicant's pending claim before the Annex 7 Commission does not preclude the Chamber from examining the whole of her present case before the Chamber. Moreover, even if one of the subject-matters now before the Chamber remains pending before the Annex 7 Commission, the Chamber does not find it appropriate to defer further consideration of the present application. It follows that the admissibility requirements spelled out in Article VIII(2)(b) and (d) of the Agreement have also been met.

3. Requirement to exhaust effective domestic remedies

61. The Chamber must next consider whether, for the purposes of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of her complaints and, in the affirmative, whether she has demonstrated that they have been exhausted. 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. Moreover, in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants. In the absence of any indication of such a remedy the onus is on the respondent Party to show that there was a remedy available to the applicant other than his application based on the Agreement. It is incumbent on a respondent Party claiming non-exhaustion to satisfy the Chamber 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 capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, e.g., *Čegar v. The Federation of Bosnia and Herzegovina*, Case No. CH/96/21, decision on admissibility of 11 April 1997, Decisions 1996-1997, paragraphs 11, 14; *Blentić v. The Republika Srpska,* Case No. CH/96/17, decision of 3 December 1997, Decisions 1996-97, paragraphs 19-21, both with reference to case-law of the European Court).

62. In the present case the respondent Party has argued that the applicant failed to make proper use of the remedy available to her under the 1998 Law, as her repossession claim should have stated a precise date when she wished to return to her house. The applicant has maintained that she did not receive notice of any decision declaring her house abandoned and allocating it to the current occupants. On the contrary, she insists that her property was taken from her under threat and occupied illegally.

63. The Chamber will first examine the applicability of the 1998 Law in the instant case. According to Article 4, only the owner of real property which has been declared abandoned shall have the right to file a claim for the return of such property. The Chamber finds that the Federation has not provided any evidence to show that the applicant's property has ever been declared abandoned by the competent authorities, let alone allocated for temporary use to B.J. In these circumstances the Chamber cannot find it established that an effective remedy was or would even in theory be available to the applicant under the 1998 Law.

64. The Chamber finds, on the contrary, that the applicant must be presumed to have had "normal recourse" to the remedies available to her, that is to say, by seizing the Municipal Court and various authorities. The respondent Party has not even argued that these remedies would be "effective" within the meaning of the Agreement. Noting the lack of any progress in the processing of any of the applicant's petitions, the Chamber concludes that the admissibility requirement in Article VIII(2)(a) of the Agreement has also been met.

B. Merits

65. Under Article XI of the Agreement the Chamber must in the present decision address the question whether the facts found disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", including the rights and freedoms provided for in the treaties listed in the Appendix to the the Agreement.

66. 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, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ.

67. The Chamber has considered the present case under Article II(2)(b) of the Agreement in relation to Articles 6(1), 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and

Article 26 of the Covenant. The Chamber has further considered the case under Article II(2)(a) of the Agreement in relation to the said provisions of the Convention.

68. The Chamber has held in *Hermas v. The Federation of Bosnia and Herzegovina* (Case No. CH/97/45, decision on admissibility and merits of 16 January 1998, Decisions and Reports 1998, p. 196-197, paragraph 82) that the prohibition of discrimination is a central objective of the Agreement to which the Chamber must attach particular importance. It will therefore first consider whether the applicant was discriminated against.

1. Discrimination in the enjoyment of the applicant's right to a fair hearing within a reasonable time before an independent and impartial tribunal, to equal protection of the law, to respect for her home and to the peaceful enjoyment of her property

69. Article 6(1) of the Convention provides, as far as relevant, as follows:

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

Article 26 of the Covenant reads as follows:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth, or other status."

Article 8 of the Convention provides, as far as relevant, as follows:

"1. Everyone has the right to respect for his … family life, 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 …. for the protection of the rights and freedoms of others."

Article 13 of the Convention provides as follows:

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

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."

70. The Chamber recalls that the right to one's property and "home" is a "civil right" within the meaning of Article 6(1) of the Convention (cf., e.g., *Kevešević v. The Federation of Bosnia and Herzegovina*, Case No. CH/97/46, decision of 10 September 1998, Decisions and Reports 1998, p. 217, paragraph 63). The dispute before the Livno Municipal Court regarding the applicant's right to her property therefore comes within the ambit of that provision. The applicant's grievances also fall within the ambit of Articles 8 and 13 of the Convention as well as of Article 1 of Protocol No. 1.

71. The Chamber observes that Article 26 of the Covenant sets out an independent right to equality before the law and equal protection of the law (cf. *Marčeta v. The Federation of Bosnia and Herzegovina*, Case No. CH/97/41, decision of 6 April 1998, Decisions and Reports 1998, p. 165 et seq., paragraphs 61 et seq.). In the present case the Chamber notes that the applicant has seized the Municipal Court of the matter and, in addition, petitioned various administrative authorities of the municipality and the canton, before which she may assert her right to equal and effective protection of the law, as guaranteed under Article 26 of the Covenant. In these circumstances, the Chamber will also consider whether the applicant has been discriminated against in the enjoyment of her right to equal protection of the law.

72. In examining whether there has been discrimination contrary to the Agreement the Chamber recalls the jurisprudence of the European Court of Human Rights with respect to Article 14 of the Convention, of the UN Human Rights Committee with respect to Articles 2 and 26 of the Covenant, and the jurisprudence of other international courts and monitoring bodies. Article 14 of the Convention and Article 2 of the Covenant stipulate that the enjoyment of the rights and freedoms set forth in the respective treaties shall be secured without discrimination on any ground. Article 26 of the Covenant goes further and guarantees an independent right to equality before the law, equal protection of the law, prohibition of discrimination and protection against discrimination. The European Court and the Committee on Human Rights have consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in the relevant provisions, including religion or national origin. In previous cases, the Chamber has taken the same approach (see the above-mentioned *Hermas* decision, loc.cit., p. 197, paragraphs 86 et seq., and the *Kevešević* decision, loc.cit., p. 221, paragraph 92).

73. In the present case both *amicus curiae* and the witnesses examined by the Chamber have stated that there is a pattern of discrimination against persons of Bosniak origin with respect to the enjoyment of their rights before the courts of Canton 10. The respondent Party has conceded that there is "a problem" in the court system in Canton 10 "in respect of both efficiency and independence".

74. The Chamber recalls that the obligation on the Parties to the Annex 6 Agreement to "secure" the rights and freedoms mentioned in the agreement to all persons within their jurisdiction not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to protect those rights (see the above-mentioned *Matanović* decision, loc.cit., paragraph 56, with references to corresponding case law of the European Court).

75. The Chamber notes that Canton 10 is comprised of a majority population of Croat descent where, consequently, the applicant belongs to a minority population. Both the Constitution of Bosnia and Herzegovina (Chapter V(11)) and the Constitution of Canton 10 (Article 51) stipulate that the composition of the judiciary shall reflect the population structure of the Canton. Canton 10's own Law on the Judiciary provides in Article 46 that the judges of the municipal courts shall be appointed by the President of the Cantonal Court following consultations with the relevant Mayor. Under Article 47 judges of the Cantonal Court are appointed by the Cantonal Assembly on the proposal of the Governor of the Canton.

76. The Chamber considers at the outset that the manner in which municipal judges are appointed in Canton 10, namely after consultations with the leading local politician who may normally be presumed to have been elected from the party supported by a majority of the population in the municipality, lend credence to the susceptibility of judges to political influence. In this respect the Chamber notes Governor Baković's letter of 28 October 1997 which seeks to influence the judges and mayors not to evict displaced persons from their temporary dwellings. Even if the letter does not recommend such non-execution solely in respect of displaced persons who are temporarily occupying dwellings owned by Bosniaks, it is clear that the Governor's intention was to instruct the judges of the Canton to refrain from certain action. First and foremost, the Governor's letter discloses his perception that the judges of the Canton could and should be influenced by such a message.

77. Turning to the composition of the tribunal now in question, the Chamber finds it established that out of the six judges on the Livno Municipal Court none is of Bosniak origin and that hardly any Bosniaks have been appointed to the municipal administration. According to the witness evidence, the Livno Municipal Court has rarely if ever processed law suits filed by returning Bosniaks against temporary occupants from the Bugojno area. The reason for such inertia appears to be, if not a genuine pressure on judges either to delay hearing cases involving Bosniak plaintiffs or face negative consequences, then at least a perception among judges that such cases should be resolved by political means (see paragraphs 33-34). The Chamber also notes the written concession of the judge who refused to testify before it, to the effect that "difficulties" exist with regard to the passing of judgements involving a party of Bosniak origin and particularly as regards their enforcement (see paragraph 8 above).

78. The Chamber recalls that the applicant's ownership of the house in question has never been in dispute. Nevertheless, her attempts to seek assistance from the authorities in order to regain the actual control over that property have been met by complete silence both at the judicial and administrative level. The Chamber further notes that in none of the 55 other cases, in which similar proceedings have been initiated before the Livno Municipal Court with the assistance of the Centre for Affirmation of Human Rights and Freedoms and which appear to have been initiated predominantly by Bosniaks, has there been any development. On the other hand, the Chamber also finds it established that claims submitted by plaintiffs of Croat origin have resulted in swift action by the Livno Municipal Court, whereas other claims submitted earlier, including the applicant's claim, have resulted in no action on the part of the court.

79. The evidence before the Chamber suggests that in Canton 10 there is a pattern of discrimination consisting of the courts' and the municipal authorities' failure to process claims for repossession of property belonging to returning Bosniaks, or of not enforcing judgements rendered in favour of such plaintiffs against defendants of the Croat majority, whether or not they are lawful temporary occupants. For the purposes of this case, the Chamber need not determine whether this pattern of discrimination is based on an outright policy seeking to discourage the return of Bosniak refugees to Canton 10.

80. In light of all the aforementioned considerations the Chamber finds it established that in the proceedings before the Municipal Court of Livno as well as in her dealings with the municipal administration the applicant, on account of her Bosniak origin, has been subjected to differential treatment compared with the Croat majority in similar situations. The respondent Party has not suggested any justification for the differential treatment in issue and the Chamber cannot, of its own motion, find any such justification. Accordingly, the applicant has been discriminated against in the enjoyment of her right under Article 6(1) of the Convention to a fair hearing before an independent and impartial tribunal, and in the enjoyment of her right under Article 26 of the Covenant to equal protection of the law. The discrimination found has also barred the applicant from any effective use of a remedy on the domestic level within the meaning of Article 13 of the Convention and has prevented her from returning to her home and property within the meaning of Article 8 of the Convention and Article 1 of Protocol No. 1.

81. The Chamber concludes that the applicant has been discriminated against in the enjoyment of her rights under Articles 6, 8 and 13 of the Convention, Article 26 of the Covenant and Article 1 of Protocol No. 1 to the Convention.

82. The Chamber will next consider the case under Article II(2)(a) of the Agreement in relation to Articles 6, 8 and 13 of the Convention as well as to Article 1 of Protocol No. 1 of the Convention in isolation. In doing so it will have regard also to the facts and circumstantial evidence on which it has based its findings of discrimination in the enjoyment of the applicant's rights under the Agreement.

2. Article 6 of the Convention

83. The Chamber has considered under Article 6 of the Convention in isolation whether the applicant can expect to have the dispute regarding her right to her home and property determined within a reasonable time by an independent and impartial tribunal within the meaning of this

provision.

84. The Chamber has already found that the civil proceedings instituted by the applicant have been met by silence, a situation which has continued up to this day. Accordingly, there is a continuing deprivation of the applicant's right of effective access to court for the purpose of having her civil claim determined within a reasonable time, as guaranteed by Article 6 (cf., e.g., *Medan and Others v. Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, Cases Nos. CH/96/3, 8, and 9, decision of 7 November 1997, Decisions 1996-1997, paragraph 40). The Chamber finds no justification for this procrastination.

85. In considering whether a judicial body is "independent" for the purposes of the Convention, the Chamber will consider the manner of appointment of the judges, the duration of their term of office, the existence of guarantees against outside pressures and the question of whether a body presents an appearance of independence (see, e.g., *Damjanović v. the Federation of Bosnia and Herzegovina*, Case No. CH/96/30, decision on the merits of 5 September 1997, Decisions 1996-97, paragraph 39-40). In respect of the last criterion the Chamber recalls that justice must not only be done, it must also be seen to be done. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see, e.g., Eur. Court HR., *Sramek v. Austria* judgement of 22 October 1984, Series A No. 84, p. 20, paragraph 42).

86. The Chamber notes that under Article 46 of the Law of Canton 10 on the Judiciary the judges of the municipal courts are appointed by the President of the Cantonal Court following consultations with the Mayor of the relevant municipality. Article 47 of the same law provides that the judges of the Cantonal Court are appointed by the Cantonal Assembly, a political body. The appointment of judges by a political assembly may as such be acceptable under Article 6(1) of the Convention, if the practice of appointment as a whole is satisfactory and there exist guarantees against outside pressures (see *Crociani and Others v. Italy,* European Commission of Human Rights, decision of 18 December 1980, Decisions and Reports No. 22, p. 147, 220 et seq.). It is also true that under Article 52 of the Constitution of Canton 10 municipal and cantonal judges shall serve up to the age of 70, unless they resign or are removed from office if they do not achieve "satisfactory" results or on one of the other grounds enumerated in Article 55 of the Canton 10 Law on the Judiciary.

87. In this case, however, it has not been contested by the respondent Party, and it would appear established, that the current practice in Canton 10 is that only members or sympathisers of the ruling Croat party are appointed to judicial office. The respondent Party has in fact conceded that there is "a problem" in the court system in Canton 10 "in respect of both efficiency and independence". In addition, one of the witnesses before the Chamber has testified that the judge on the applicant's case had received the letter of the Governor of the Canton dated 28 October 1997 (see paragraphs 23 and 35). The Chamber need not determine whether this letter is formally binding on judges in the Canton to the effect that they shall refrain from processing certain claims for repossession of property such as the civil action brought by the applicant. The evidence before the Chamber is sufficient to reveal that at least some of the judges in Canton 10, for fear that their tenure might be subject to political considerations resulting in their removal from office for reasons other than those prescribed by law, feel compelled to act in a manner accommodating certain political views. In the Chamber's opinion it is therefore very likely that the judge on the applicant's case before the Livno Municipal Court does not process the case for the aforementioned reason.

88. The Chamber has found, moreover, that the applicant has been discriminated against, *inter alia,* in the enjoyment of her right to a fair hearing before an independent tribunal within the meaning of Article 6(1) of the Convention. With reference also to the reasons on which it has based its finding of discrimination, the Chamber concludes that an objective observer may legitimately doubt that the Municipal Court in Livno in general and the judge on the applicant's case in particular have been and will be independent in the applicant's case. A court which is not entirely independent of the political bodies cannot objectively comply with the requirement of impartiality. It follows from the above finding that the applicant cannot, as matters stand today, expect to receive a fair hearing of her case before the Livno Municipal Court.

89. For the various reasons above, the Chamber concludes that the applicant's rights under Article 6(1) of the Convention have been violated already at the present stage of the proceedings before the Livno Municipal Court.

3. Article 8 of the Convention

90. The Chamber noted in *Blentić v. The Republika Srpska*, (loc.cit., paragraph 26) that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it may also give rise to positive obligations, which are inherent in an effective respect for the rights which it guarantees, and that in this context, as in others, a fair balance must be struck between the general interest and the interests of the people concerned. The Chamber held that the authorities of the respondent Party had failed to take effective, reasonable and appropriate measures to deal with the difficulties posed by an assembly of people obstructing the applicant's return to his home. The police had remained completely passive and no attempt had been made to prosecute those responsible for the obstruction. Such a situation was incompatible with the rule of law and had therefore violated Article 8 (ibid., paragraphs 28-29).

91. In the present case the Chamber finds that the passivity shown by the municipal and cantonal authorities in response to the applicant's various petitions aiming at her being able to re-enter a house which is indisputably hers amount to a lack of respect at least for her "home" within the meaning of Article 8(1) of the Convention. The respondent Party has made no attempt to justify this lack of respect. Nor can the Chamber find any such justification of its own motion. The Chamber therefore concludes that the applicant's rights under Article 8 of the Convention in isolation have also been violated.

4. Article 13 of the Convention

92. As the Chamber has recalled in *Galić v. The Federation of Bosnia and Herzegovina*, Article 13 guarantees the availability of a remedy at national level to enforce the substance of the Convention rights in whatever form they may happen to be secured in the domestic legal order. For Article 13 to apply, it is not necessary for an applicant to show an actual violation of another one of his Convention rights; it is sufficient that he has an arguable claim that such a violation has occurred (Case No. CH/97/40, decision of 12 June 1998, Decisions and Reports 1998, p. 149, et seq., paragraph 53 et seq., with further reference to case law of the European Court).

93. "Effectiveness" in the context of Article 13 comprises four elements: institutional effectiveness, which requires that a decision-maker be independent of the authority at fault for the alleged or actual violation; substantive effectiveness, which requires that the applicant be able to raise the substance of the right at issue before the national authority before which he is seeking the remedy; remedial effectiveness, which requires that the national authority be capable of finding a violation of the right or rights of the applicant which are at issue and material effectiveness, which requires that any remedy the applicant may have awarded in his favour be such that the applicant may take effective advantage of it (ibid.)

94. The present applicant clearly had an arguable claim that her rights had been violated and accordingly she was entitled to an effective remedy in respect of those claims. The Chamber has already found that there has been no response whatsoever to the applicant's various claims and petitions to the administrative authorities. It follows that in this respect there has also been a violation of Article 13 of the Convention in isolation.

5. Article 1 of Protocol No. 1

95. In the present case the term "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention includes the applicant's house and surrounding real property. The Chamber recalls that Article 1 of Protocol No. 1 contains three rules. The first is the general principle of peaceful enjoyment of possessions. The second rule covers deprivation of property and subjects it to the requirements of public interest and conditions laid out in law. The third rule deals with control of use of property and subjects this to the requirement of the general interest and domestic law. It must be determined in respect of all of these situations whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's fundamental rights (see, e.g., the aforementioned *Blentić* decision, loc.cit., paragraphs 31-32). Although States Parties to the Convention enjoy a wide margin of appreciation in

judging what is in the general interest, that judgement must not be manifestly without reasonable foundation (see Eur. Court H.R., *James and Others v. the United Kingdom* judgement of 21 February 1986, Series A no. 98, p. 32, paragraph 46). In the assessment of whether an applicant has had to bear "an individual and excessive burden" it is also of relevance whether he has had the possibility of effectively challenging the measure taken against him (see Eur. Court HR., *Hentrich v. France* judgement of 22 September 1994, Series A No. 296-A, p. 21, paragraph 49). Article 1 of Protocol No. 1 may, like other Convention guarantees, give rise to positive obligations on the authorities to provide effective protection for the individual's rights (see, e.g, the aforementioned *Blentić* decision, loc. cit., paragraph 32 and the case law of the European Court referred to therein). Such positive obligations may include the provision of necessary assistance in the recovery of property by means of eviction.

96. The Chamber is here concerned with a failure by the authorities to protect the applicant against a continuing unlawful occupation of her possessions within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1. The Chamber finds, for essentially the same reasons as it has given in relation to Article 8 of the Convention, that this failure of the authorities to assist the applicant in recovering her property also amounts to a breach of her rights under Article 1 of Protocol No. 1 in isolation.

6. Conclusion

97. Summing up, the Chamber has found that this case involves discrimination against the applicant in the enjoyment of her rights under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 26 of the Covenant. The case further involves separate violations of Articles 6, 8 and 13 of the Convention as well as Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

98. 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 breaches of the Agreement which it has found, including orders to cease and desist, and monetary relief.

99. The applicant requests that the respondent Party enable her to return to her home. In a letter of 5 February 1999 the applicant also requests compensation in the total amount of DEM (German Marks) 6,910 for rent paid elsewhere (DEM 120 per month during a period of 13 months = DEM 1,560; water and electricity costs incurred by the applicant's husband and daughter while living with the applicant's parents-in-law (DEM 150 a month = DEM 1950); costs in the amount of DEM 450 incurred for the schooling of the applicant's son elsewhere (books, costs for his transfer and admission into another school, transportation costs and clothing), costs for the wardrobe of her daughter of DEM 300; costs for winter food supply of DEM 250; lost revenue from the sale of vegetables from her garden of DEM 350; and DEM 2,050 for costs incurred coming to Sarajevo for the hearing as well as other legal costs. The applicant explained her tardiness in claiming compensation by the fact that she had appeared before the Chamber as a lay woman and that at the time of the hearing her only wish was to return home.

100. The respondent Party submits that no compensation should be awarded. As for the claims regarding winter food provisions and expenses relating to the applicant's children, the respondent Party submits, in the alternative, that these costs would have been incurred even if the applicant and her family had remained in her home. These claims are therefore ill-founded. All other costs have not been substantiated. In any case, the claims should have been put before the Chamber in accordance with its Order of proceedings.

101. In the present case the Chamber finds it appropriate to order that the respondent Party through its authorities take immediate steps to reinstate the applicant into her house.

102. The Chamber notes that the applicant was warned at an early stage of the proceedings that, subject to an exception, any compensation claim must be submitted either during the written proceedings preceding the hearing or, in respect of certain expenses, at the hearing itself. Prior to the

hearing the applicant explicitly stated that she had no claims. In these circumstances the Chamber considers that the reasons invoked by the applicant in support of the compensation claim for pecuniary damage which was lodged only after the hearing do not constitute grounds for taking that claim into account. It must therefore be rejected.

103. The Chamber notes, however, that at its hearing the applicant made a general claim for compensation for pain and suffering, thereby affording the Agent of the respondent Party a possibility to comment thereon. Article XI(1)(b) of the Agreement does not preclude the Chamber from ordering monetary relief not quantified by an applicant. The Chamber finds that the applicant has suffered a feeling of injustice stemming from her treatment by the authorities. She has further suffered from a *de facto* loss of her home resulting in the separation of her family. By its nature, the damage suffered does not lend itself to precise quantification. Deciding on an equitable basis, the Chamber will award the applicant KM (*Konvertibilnih Maraka)* 4,000 in respect of damage up to and including the date of this decision. Further compensation in the amount of KM 10 a day will be payable to the applicant from the day of delivery of the Chamber's decision until she is reinstated into her house (cf. the aforementioned *Galić* decision, loc.cit., p. 150, paragraph 67).

VIII. CONCLUSIONS

104. For the reasons given above, the Chamber decides:

1. by 9 votes to 4, to declare the application admissible under Article VIII of the Agreement;

2. by 9 votes to 4, that the applicant has been discriminated against in the enjoyment of her rights under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 26 of the Covenant, the respondent Party thereby being in violation of Article I of the Agreement;

3. by 9 votes to 4, that there has been a violation of the applicant's right under Article 6(1) of the Convention to a fair hearing within a reasonable time before an independent and impartial tribunal established by law, the respondent Party thereby being in violation of Article I of the Agreement;

4. by 9 votes to 4, that there has been a violation of the applicant's right under Article 8(1) of the Convention to respect for her home, the respondent Party thereby being in violation of Article I of the Agreement;

5. by 9 votes to 4, that there has been a violation of the applicant's right under Article 13 of the Convention to an effective remedy before a national authority, the respondent Party thereby being in violation of Article I of the Agreement;

6. by 9 votes to 4, that there has been a violation of the applicant's right under Article 1 of Protocol No. 1 to the Convention to the peaceful enjoyment of her possessions, the respondent Party thereby being in violation of Article I of the Agreement;

7. by 9 votes to 4, to order that the respondent Party through its authorities take immediate steps to reinstate the applicant into her house;

8. by 9 votes to 4, to order the respondent Party to pay to the applicant, within three months, KM 4,000 by way of compensation for non-pecuniary damage;

9. by 8 votes to 5, to order the respondent Party to pay to the applicant, within three months from her reinstatement and by way of further compensation for non-pecuniary damage, KM 10 for each day from the date of delivery of the present decision until she is reinstated into her house;

10. by 9 votes to 4, that simple interest at an annual rate of 4% will be payable over the above sums or any unpaid portion thereof from the day of expiry of the above-mentioned three-month periods until the date of settlement;

11. unanimously, to order the respondent Party to report to the Chamber by 14 August 1999 on

the steps taken by it to comply with the above orders.

(signed)
Leif BERG
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate dissenting opinion by Mr. Vlatko Markotić and Mr. Želimir Juka, joined by Mr. Vitomir Popović and Mr. Miodrag Pajić:

SEPARATE DISSENTING OPINION OF MR. VLATKO MARKOTIĆ AND MR. ŽELIMIR JUKA, JOINED BY MR. VITOMIR POPOVIĆ AND MR. MIODRAG PAJIĆ

I. INTRODUCTION

Before the beginning of the war in 1992 Bosnia and Herzegovina had about four million inhabitants. During the war an exodus of the population took place so that on 14 December 1995, the day of the entry into force of the General Framework Agreement for Peace in Bosnia and Herzegovina, there were two million refugees and displaced persons which is half of the pre-war population. Before the Chamber made this decision (three years after the entry into force of the General Framework Agreement) several hundred thousand refugees had come back from exile assisted by the international community, through the machinery prescribed by the Annex 7 Agreement on Refugees and Displaced Persons which - pursuant to Article 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina - makes Annex 7 a constituent part thereof. (No one has returned through the machinery of Annex 6.) According to this Article, the protection of refugees and displaced persons is OF VITAL IMPORTANCE IN ACHIEVING A LASTING PEACE in Bosnia and Herzegovina. In our opinion, this context forms the right way in which the proceedings before the Chamber should have been directed, as the applicant is a refugee who has the right to and wants to return to her home, but her home has been occupied by some other refugees who are unable to return to their home despite wishing to do so, given that their home was destroyed during the war. According to the Declaration of the Peace Implementation Council (Madrid, 16 December 1998) there are still 1,231,100 refugees who have not yet returned to their homes.

II. RELEVANT PROCEDURAL FACTS

1. Application for re-possession of the applicant's house lodged with the Commission for Real Property Claims of Displaced Persons and Refugees established under Annex 7 of the Dayton Agreement ..... on 18 May 1998

2. Application for re-possession of the applicant's house lodged with the Municipality of Livno .....on 18 May 1998

3. The applicant escaped to Switzerland because of the war.....in 1993

4. After she had gone into the exile the house was abandoned and according to the facts in the application the refugees from Bugojno moved in.....on 10 September 1993

5. The applicant returned from exile to Livno.....in January 1998

6. Application for re-possession of her house was submitted to the Human Rights Chamber.....on 10 July 1998

7. The applicant submitted a complaint to an incompetent authority – the Municipal Court in Livno - whereby she sought repossession of her house from the refugee, B.J.,.....on 14 October 1997

C O N C L U S I O N

1. Seeking to regain possession of her house, the applicant applied to the Annex 7 Commission established by the Dayton Agreement and to the Municipality of Livno (which is competent for considering repossession of abandoned real property) two months before she applied to the Human Rights Chamber. The proceedings before the Annex 7 Commission and the Municipality of Livno had been pending for seven months when a public hearing was held before the Chamber.

2. Proceedings before the Municipal Court in Livno (which is incompetent for the repossession of abandoned real property) have been pending for fourteen months.

3. Abandoned real properties, pursuant to the laws of the Federation, fall within the jurisdiction of the Municipality, and the application for repossession of the house was submitted against the refugee occupying the applicant's house.

III. RELEVANT SUBSTANTIAL FACTS

1. The applicant is a joint owner of a house in Livno. During the war in Bosnia and Herzegovina she escaped to Switzerland in 1993 with her husband and two children, and her house was abandoned.

2. After she had gone into exile, as stated in the application to the Chamber, Mrs. J. with her three children, on 10 September 1993, moved into the applicant's house; together with her children she had fled from the nearby Municipality of Bugojno. She had no place to go back to as her house had been destroyed in the war.

3. During the war between the Bosniaks and Croats the Municipality of Livno was controlled by the Croat Army, and the Municipality of Bugojno by the Bosnian Army.

4. The applicant returned from exile in Switzerland in January 1998.

5. Regarding the fact that one of Mrs. J.'s sons is employed in the police force of the Federation BiH in Bugojno and commutes to and from Livno (about 70 kilometres), the applicant requested the authorities in Bugojno to provide accommodation in Bugojno for their police officer, his mother and brothers, so that she (the applicant) would be able to move back into her house in Livno with her family. The authorities in Bugojno (consisting exclusively of Bosniaks) did not find any solution for accommodating the J. family and the applicant's initiative was in vain. Due to this failure the applicant, on the same day (18 May 1998) applied to the Commission for Real Property Claims of Displaced Persons and Refugees established under Annex 7 of the Dayton Agreement and the municipal authorities in Livno requesting to regain possession of her house. Two months following that, on 10 July 1998, she made a similar request to the Human Rights Chamber.

6. On the occasion of the applicant's visit to her house, she demanded that the refugee, Mrs. J., return possession of her house, which Mrs. J. did not do but replied that she would do so when the authorities would provide her with another house instead of the destroyed one.

The aforementioned facts compared with the facts in the introduction to this separate opinion (in Bosnia and Herzegovina the issue of accommodation - home - house still remains unsolved for about a million and a half refugees and displaced persons) are only the relevant facts regarding the direction in which the proceedings before the Human Rights Chamber should have been conducted. All other allegations in the Chamber's decision are essentially not substantial facts but consequences of the relevant substantial facts mentioned in this chapter as well as in the introduction to this separate opinion.

7. At the stage of the written proceedings the Chamber never received the respondent Party's observations on the admissibility and merits. Therefore the Chamber's action was correct when, on the basis of its competence under Article X(1) of Annex 6 to the Dayton Agreement, it started *ex officio* to gather evidence about the alleged violation of human rights. However, when the Chamber

decided to collect evidence *ex officio*, it should have requested such evidence from the authorities of the Federation, Canton 10 and the Municipality and not from the institutions from which such evidence was sought, as those have no relevant evidence at their disposal except possible incomplete general information, which may be everyday political or personal opinions. Such information is not sufficiently comprehensive for the substantial truth to be established. Therefore the procedure for establishing the relevant substantial facts should have been directed at searching for evidence from the Federal Ministry for Refugees and Displaced Persons, from the Ministry for Displaced Persons and Refugees of Canton 10 and from the municipal executive authorities responsible for solving the status of refugees as these are the only competent authorities in the Federation which, together with the UNHCR, the International Mediator for the Federation and the other Annex 7 institutions, have the exclusive competence to define and implement mechanisms concerning the return of all refugees in a region, according to the plans and programs of return, which involve the reconstruction of destroyed houses, repair of the damaged ones, construction of temporary settlements etc., etc. There is no implementation of Annex 7 without that. In the same way, i. e. *ex officio*, it should also have been established what the Federal Ministry for Refugees and Displaced Persons had done and what it had failed to do with a group of refugees who had returned from Switzerland; the applicant was one of them; and whether or not the authorities had implemented the plans for return which encompass both the applicant and Mrs. J.

8. It is not to be established through witnesses, or on the basis of their personal opinion, whether the judiciary in Livno is functioning or not. If this fact is a relevant one, evidence should not have been sought from a new inexperienced non-governmental organisation in Livno and from the Assistant Ombudsman of the Federation, but from the Ministry of Justice of the Federation and Canton 10, as well as from the Municipal Court and Cantonal Court, which regularly submit reports about their work to the legislative authority. Indeed it would not have been difficult to obtain such reports. Only on the basis of such reports could the assessment whether the Court in Livno is functioning have been made.

9. A time limit was set for the applicant to submit any claim for compensation before 23 November 1998. In a letter dated 18 November 1998 the applicant explicitly stated that she did not wish to submit such a claim at that time. At the hearing the applicant was invited to state any claim for compensation but she did not request any specific sum for pecuniary or non-pecuniary damage, despite persuasion during the hearing.

C O N C L U S I O N

1. The applicant, a refugee, is the owner of a house which has been occupied by another refugee whose house was destroyed in the course of the war. The proceedings before the Chamber did not reveal in which way the enforcement of the issue of home for both of the refugees had been planned.

2. The applicant did not submit a claim for any kind of compensation foreseen under Article XI (1)(b) of Annex 6, i.e. for pecuniary and non- pecuniary damages.

3. On her return from exile in Switzerland, the applicant became a displaced person within the Federation and she did not assert the right to accommodation and other things as provided to displaced persons by Annex 7 to the Dayton Agreement.

IV. PROCEEDINGS BEFORE THE MUNICIPAL COURT OF LIVNO

1. In the course of the war half the population of Bosnia and Herzegovina were in exile. The authorities at that time as well as the international community were faced with a refugee catastrophe, particularly for the reason that several hundred thousand houses and homes had been destroyed. It was a human tragedy the consequences of which have today been remedied by various international mechanisms and by those prescribed by the laws of the Federation. In those circumstances, the legislative and executive authorities during the war passed a TEMPORARY regulation which was called the Law on TEMPORARILY Abandoned Real Property Owned by Citizens, for the purpose of accommodating refugees. THESE REAL PROPERTIES WERE PLACED UNDER THE ADMINISTRATION OF THE MUNICIPALITY for the purpose of housing refugees and displaced persons ("*Službeni list RBiH*" No. 11/93 and 13/94). Such an act of the authorities during the war, WHEN THE USE OF

POSSESSIONS BECAME LIMITED was, without doubt IN THE GENERAL AND PUBLIC INTEREST, in accordance with the second paragraph of Article 1 Protocol No. 1 to the Convention.

In co-ordination with the High Representative for Bosnia and Herzegovina and the team of experts from his Office, the quoted war Law on Temporarily Abandoned Real Property Owned by Citizens was repealed by the Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens ("*Službene novine Federacije BiH"*, No. 11 of 3 April 1998). Pursuant to Article 3 of this Law, and on the basis of the second paragraph of Article 1 Protocol No. 1, the real properties declared abandoned by the war Law still remain under the administration of the Municipality until their return to the owner, due to the physical impossibility that the remaining million and a half of refugees immediately be cared for. Pursuant to Article 11 of the same Law, the municipal administrative organ (not a court) is the competent authority for the return of real properties to the owners, and pursuant to Article 12 of this Law, the very last time-limit for the return of a real property to its owner shall be one year following the day of filing a claim for repossession. Within this time limit an alternative accommodation must be ensured for the temporary user (a refugee).

The time limit in question expires on 18 May 1999 (after the adoption of the Chamber's decision). Against a possibly negative decision by the municipal administrative organ on the request for return of a real property to the owner, an appeal may be lodged with the administrative organ of the Canton (Article 13 of the Law). If the second instance organ also makes a negative decision, or does not make any decision at all, an administrative dispute may be initiated before the Cantonal Court. These remedies have not been exhausted. THE GENERAL PRINCIPLE OF INTERNATIONAL LAW IS BASED ON THE BELIEF THAT EVERY POSSIBILITY SHOULD BE AFFORDED TO A STATE TO REMEDY THROUGH ITS LEGAL CHANNELS A BREACH OF ITS INTERNATIONAL OBLIGATIONS (European Court of Human Rights, the judgment *of Guzzardi v. Italy* of 1980*,* European Court of Human Rights, Series A No. 39). That is why an applicant must exhaust all remedies foreseen in the domestic law.

2. Article 14 of the aforementioned Law of the Federation dated 3 April 1998 prescribes that if a person seeking the return of real property lodges the same request with the Annex 7 Commission for Property Claims of Refugees and Displaced Persons all proceedings pending before the authorized organs (not to mention the unauthorized ones) will be suspended until the decision of the Annex 7 Commission which shall be FINAL AND BINDING. (What is more, the proceedings will be suspended even if they were at the stage of enforcement.) This legal solution is identical to the legal principle stated in Article VIII(2)(d) of Annex 6 to the Dayton Agreement.

C O N C L U S I O N

1. The Municipal Court in Livno is not competent to decide on the return of temporarily abandoned real properties when such a property is occupied by another refugee.

2. Even if the Court were to have such competence, the application should have been submitted to the Municipality which has the competence to rule over the abandoned real properties.

V. COMPETENCE FOR PROTECTING TEMPORARILY ABANDONED REAL PROPERTIES WHEN SUCH PROPERTY WAS OCCUPIED BY ANOTHER REFUGEE IN THE COURSE OF THE WAR, AND THIS STATUS REMAINS

A. 1. The chapter of this separate opinion entitled RELEVANT SUBSTANTIAL FACTS resulted in the conclusion that the applicant is a refugee and the owner of a house which is occupied by another refugee whose house was destroyed in the war. The applicant is seeking to regain possession of her house before all domestic authorities, the Annex 7 Commission of the Dayton Agreement and before the Human Rights Chamber.

2. The following are relevant provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement) and its Annexes:

a) The basic principles of the Dayton Agreement set out in Article VII are:
- the observance of human rights through the machinery of Annex 6

- the protection of refugees and displaced persons through the machinery of Annex 7, which relates to their right to return, and the right to have their property restored to them.

In Article VII of the Agreement it is pointed out explicitly that these two rights are of "vital importance in achieving a lasting peace". For the purpose of these two rights two quasi-international bodies *sui generis* have been established with a five- year mandate; their decisions shall be final.

b) Pursuant to Article VIII (2) of Annex 6 the Chamber may reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decisions of cases, or any other Commission established by the Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina.

c) Article I of Annex 7 reads as follows:
"ALL refugees and displaced persons have the right freely to return TO THEIR HOMES..."

d) Article II (1) of Annex 7 provides as follows:
"...The Parties shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, ORDERLY AND PHASED MANNER, IN ACCORDANCE WITH THE UNHCR REPATRIATION PLAN." (This provision is consistent with the second paragraph of Article 1 Protocol No. 1 of the European Convention on Human Rights.)

e) Article III (1) of Annex 7 reads: "The Parties note with satisfaction the leading humanitarian role of UNHCR, which has been entrusted by the Secretary-General of the United Nations with the role of coordinating among all agencies assisting with the repatriation and RELIEF of refugees and displaced persons."

f) By Annex 7 a Commission for Displaced Persons and Refugees has been established, and in Article IX it is foreseen that the Commission shall be composed of nine members; the Federation of Bosnia and Herzegovina shall appoint four members and Republika Srpska shall appoint two members, for a term of either three or four years. The President of the European Court of Human Rights shall appoint the remaining members, each for a term of five years.

g) Article XI of Annex 7 governs the mandate (of the Commission) and 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." Not without reason, the competence of the Commission goes back to 1 April 1992 (when the war in Bosnia and Herzegovina began), while the Chamber is competent for violations of human rights which allegedly took place after 14 December 1995 (the day of the entry into force of the Dayton Agreement).

h) Article XII(2) of Annex 7 provides as follows: "Any person requesting the return of property who is found by the Commission to be the lawful owner of that property shall be awarded its return. ..."

i) Pursuant to Article XIII, "(the) Parties ....may temporarily house refugees and displaced persons in vacant property, subject to final determination by the Commission and to such temporary lease provisions as it may require." (This provision is also consistent with the second paragraph of Article 1 Protocol No. 1 to the Convention which allows limitations on the use of possessions in accordance with the public interest.)

B. The Agreement on Implementing the Federation of Bosnia and Herzegovina, signed in Dayton on 10 November 1995 (item E; titled *Refugees and Displaced Persons*) provides as follows:
"by 10 December 1995, the Minister for Refugees and Social Policies and his Deputy Minister together shall establish a comprehensive and detailed plan for the return of refugees and displaced persons in the Federation territory. Implementation of this plan will begin immediately. We shall closely cooperate with UNHCR in developing and implementing the plan." (Neither in this Agreement nor in any of the other numerous agreements was any matter placed within the jurisdiction of the

municipal courts in the Federation.)

C. The applicant made a claim for the return of her house to the Annex 7 Commission on 18 May 1998, following which she filed an application to the Human Rights Chamber for the return of her house, on 12 July 1998.

C O N C L U S I O N

1. The applicant obviously chose to realize her right by means of the Annex 7 machinery which she had addressed two months before she sought the same right from the Human Rights Chamber.

2. The return of all the refugees and displaced persons to their houses and homes and caring for those whose houses were destroyed or heavily damaged and who are currently occupying the houses of other refugees are being settled by means of the Annex 7 machinery. According to that, no one shall be left without shelter and food, as every human being as such enjoys human rights. This problem involving a million and a half of refugees could never be solved by decisions of the municipal courts in Bosnia and Herzegovina. If the courts were able to solve this problem the engagement of this huge international apparatus and domestic executive authorities would be unnecessary.

VI. REGARDING THE LETTER OF THE GOVERNOR OF THE HERZEG-BOSNIAN CANTON DATED 28 OCTOBER 1997

1. The subject of the letter is as follows: "Subject: Conclusions relating to the accommodation of the exiled" (refugees and displaced persons)

2. The letter states that on 6 July 1997 it was agreed with the International Mediator for the Federation, Dr. Christian Schwarz-Schilling, as follows:

> a) " displaced persons must not be evicted from the houses they are occupying no matter to whom they belong (Serbs, Croats, Moslems);
>
> b) displaced persons are to remain in the dwellings which they occupy, until their status is solved, either by enabling them to return to their own homes or by finding them alternative accommodation, …."

This letter was addressed to the executive and judicial authorities of the Canton, and the final sentence of this letter reads as follows: "YOU ARE KINDLY REQUESTED that the competent services BE INFORMED ABOUT THIS."

C O N C L U S I O N

1. The Governor Baković did not issue any order.

2. The Governor only informed the authorities of the Canton of the content of the agreement on the status of refugees and displaced persons reached with the International Mediator for the Federation. Otherwise, he would have been responsible pursuant to Annex 10 to the Dayton Agreement.

3. The conclusions listed in the Governor's letter are in fact the conclusions of the international community, and if there was any suspicion in this respect, this should have been checked in the Office of the international mediator for the Federation, not through witness Osmančaušević, who was not obliged to and did not participate in all the meetings.

4. The conclusions listed in the Governor's letter are in accordance with Annex 7 of the Dayton Agreement and all international Conventions which govern the status of refugees, as set out in chapter V of this separate opinion.

VII. REVIEW OF PARTICULAR PARAGRAPHS OF THE CHAMBER'S DECISION ON THE ADMISSIBILITY AND MERITS

AD III 17 a) In her complaint to the Municipal Court in Livno of 14 October 1997 the applicant explicitly stated that her house had been occupied by a refugee from Bugojno AFTER SHE HAD GONE INTO EXILE.

b) On 24 September 1997, in her claim for the return of her house submitted to Municipal Administration, the applicant stated, in particular, that after she had abandoned the family house a refugee from Bugojno had moved in.

c) On 18 May 1998, in her claim for the return of the house which she submitted to the Municipal Court of Livno, the applicant stated, in particular, that she had been living in her house with her children until the end of 1993.

d) On 10 July 1998, in her application submitted to the Human Rights Chamber, the applicant stated that her house had been occupied on 10 September 1993.

e) At the public hearing before the Chamber on 17 December 1998, the applicant stated that her house had been broken into by the refugees from Bugojno on 10 September 1993.

The applicant did not explain the above-stated contradictions. The Chamber did not give any reasons in support of its finding that the applicant was forced out of her house on 10 September 1993.

AD II 5 The applicant claimed compensation before the Chamber on 5 February 1999, and the public hearing was held on 17 December 1998. She was invited at the hearing by some participants in the proceedings to claim compensation but she did not do so. Before the public hearing she had informed the Chamber that she did not wish to submit a claim for compensation.

For the above stated reasons the applicant' s right to compensation cannot be recognised.

AD II 7, 8 Judge Kolak is a judge of the Municipal Court in Tomislavgrad, while the applicant's case is pending before the Municipal Court in Livno. No authority exists, in particular not executive, in respect of how the Municipal Court of Livno should adjudicate cases following orders by a judge of the Municipal Court of Tomislavgrad. Judge Kolak's letter which the Chamber received on 14 December 1998 was missing from the list of documents which were distributed to the members. We did not get a copy of judge Kolak's letter and probably the other members of the Chamber did not get it either.

We are suspicious as to whether this letter contains any relevant facts regarding this case, and, at the same time, it is not incumbent on us now to investigate and make evaluations of the facts contained in this letter, as the procedure involving the Parties was concluded without the information contained therein.

In the case of Đ.M. it is not relevant what judge Kolak was doing. What could be relevant is whether the Judge in the Đ.M. case was ordered how to adjudicate and whether such an order was obeyed. In this respect the Chamber did not establish a single fact.

AD III 22 The time-limit set for receiving a response from the second instance organ in the administrative procedure following the applicant's appeal expired on 2 January 1999. The Chamber's public hearing was held on 17 December 1998 and the Chamber's decision was made before the expiry of this time limit.

AD III 24 The letter of the International Mediator, Dr. Schwarz-Schilling, of 20 March 1998 was placed on the list of documents which were distributed to the members of the Chamber before the public hearing. We, being the members of the Chamber, did not receive this letter but we doubt that this letter would result in the conclusion that the applicant, who is a refugee, should be reinstated in her house which is occupied by another refugee, before a shelter for this refugee is provided.

For the reasons given above, we neither have the right nor is it incumbent on us to seek and evaluate the relevance of this proof after the close of the procedure involving the Parties to the proceedings.

AD 59 and 60

1) In paragraph 59 of its decision the Chamber quoted incorrectly the mandate of the Annex 7 (Article 11) Commission. Article 11 of Annex 7 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."

For the reasons given above, the conclusion in paragraph 60 of the decision that the Chamber is competent in this case is not correct.

2) In her applications to the Chamber and to the Annex 7 Commission and in all her claims to the domestic authorities the applicant seeks only to be reinstated into her house. It is her only reason for initiating these proceedings.

On the ground of the above-stated, it can be concluded that the Chamber only expressed its opinion, without any reasoning, that it is competent in this case, but did not quote any legal basis for its competence as set out in Annex 6 or in any other section of the General Framework Agreement for Peace in BiH.

AD 61 The Chamber notes that the burden of proof is on the respondent Party to show that available remedies exist. This is contrary to Article VIII 2(a) of Annex 6 which reads as follows:

"Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted and that the applicant has been filed with the Commission within six months from such date on which the final decision was taken."

AD 63 Article 4 of the quoted Law of the Federation is contrary to Article 13 of Annex 7 which reads as follows:

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

AD 73 In this paragraph the Chamber finds that the respondent Party has conceded that "problems" in the judicial system of the Herzeg-Bosnian Canton regarding "efficiency and independence" do exist. In the course of this case the Agent of the Federation before the Chamber was Assistant to the Minister of Justice of the Federation BiH and, serving in this office, she knows or should know the facts which the Chamber wanted to be informed of. Had the Agent of the Federation presented these facts to the Chamber, the Chamber's conclusion in this decision would surely have been different. The statement of the Agent of the Federation at the public hearing, to the effect that the Municipal Court and the Cantonal Court are inefficient and partial was strange. At the public hearing held on the same day in Case No. CH/97/67, *Zahirović v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, after the Agent had been asked by a member of the Chamber about the functioning of the municipal and cantonal courts in Livno, no such conclusion could be made. The question which a member of the Chamber addressed to the Agent of the Federation, who was persistent in pointing out the length of the proceedings before the Court in Livno, was: "You probably know how many judges are engaged at the Municipal Court in Livno, and how big the workload of the Court was, i.e. how many cases were pending before the Court in Livno in 1997 and in 1998 ?" The Agent of the Federation replied: "I am not in a position to know how many judges there are at the Municipal Court in Livno and I do not know the number of cases pending before the Court either."

To the next statement, made by the member of the Chamber ("In your submission to the Chamber of

14 December 1998, at the end of the first page, you stated that because of the behaviour of the Court of Canton 10 the applicant was unable to exhaust a remedy...") the Agent of the Federation answered as follows: "In my opinion, no responsibility falls on the Court of the Canton 10 if the applicant has not appealed against the decision by which the complaint was rejected". It is the Ministry of Justice which is responsible for the functioning of courts; the Agent of the Federation did not present to the Chamber a single fact concerning this Ministry from her Report on the functioning of the courts in the Federation and the Municipal Court in Livno.

AD 77 As appears from the statement of the former Mayor of Livno, Mr. Mate Franjičević, made at the Chamber's public hearing in Case No. CH/97/67 *Zahirović v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, the political Party of Democratic Action (SDA), composed almost exclusively of Bosniaks, has - pursuant to the results of the elections carried out by the OSCE - the right to take part in the municipal administration but does not wish to participate in the executive and judicial authorities. It participates only in the work of the Municipal Assembly of Livno.

AD 79 The applicant did not allege a single fact, neither in her application nor at the public hearing, on the basis of which it would be possible to conclude that she has been discriminated against. She never mentioned, let alone explained that an action had a DISCRIMINATORY EFFECT against her.

VIII. THE NAME "*HERCEG-BOSANSKA ŽUPANIJA*" (HERZEG-BOSNA CANTON)

The Federation of Bosnia and Herzegovina is composed of ten cantons *(županija)*. Each of them has its own Constitution which, among other things, provides the name of the canton. One of these cantons is named Herzeg-Bosna Canton. The Constitutional Court of the Federation BiH found that this name of the Canton is not IN ACCORDANCE with the Constitution of the Federation.

Pursuant to chapter IV.C (3) Article 10 (2)(b) of the Constitution of the Federation, the Constitutional Court of the Federation indeed has competence to establish whether the Constitution of a Canton is IN ACCORDANCE with the Constitution of the Federation. However, the Constitution of the Federation does not provide jurisdiction for the Constitutional Court to ANNUL the Constitution of a Canton. Accordingly, in this case the Constitutional Court of the Federation finds the disputed provisions INCONSISTENT with the Constitution of the Federation. Thus, the Constitution of the Federation has prescribed that the Constitutional Court of the Federation can not be a CO-PRODUCER of the Constitution of the Canton but only a SUPERVISOR thereof. The Constitution of the Federation does not provide that the Constitutional Court should be a RESERVE LEGISLATOR of the Constitution of the Canton, as it is said in the science of law.

For the above reasons, on the aforementioned legal issue, the Human Rights Chamber for Bosnia and Herzegovina has no legal basis, pursuant to Annex 6 of the Dayton Agreement, to use in this decision "CANTON 10" as the name of the canton.

IX. FINAL CONCLUSION

1. Based on all what was displayed in the decision on the admissibility and merits, we herewith add this separate dissenting opinion with the Chamber's decision.

2. The applicant has the right to return to her home which is in joint ownership, but not through the machinery of Annex 6 but through that of Annex 7 to the Dayton Agreement, by which, at the same time, a shelter for the J. family, who is occupying the applicant's house, will be ensured. This final conclusion, made by both of us, is in our opinion entirely in accordance with Strasbourg case law, i.e. the case of *Tyrer v. the United Kingdom,* where the Court emphasised that the Convention is a dynamic instrument which has to be interpreted in light of the current conditions (judgement of 1978, Series A No. 26, p. 15-16, paragraph 31). This means that the Chamber should have taken into account the complex social and economic conditions in Bosnia and Herzegovina, as set out in the INTRODUCTION (I) to this separate opinion.

(signed)

Vlatko MARKOTIĆ

(signed)

Želimir JUKA

We join this separate dissenting opinion:

(signed)

Prof. Dr. Vitomir POPOVIĆ

(signed)

Miodrag PAJIĆ