DECISION ON ADMISSIBILITY AND MERITS

(delivered on 9 June 2000)

Case no. CH/98/698

Rasim JUSUFOVIĆ

against

THE REPUBLIKA SRPSKA

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

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

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

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

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

I. INTRODUCTION

1. The case concerns the attempts of the applicant, a citizen of Bosnia and Herzegovina of Bosniak descent, to regain possession of an apartment in Bijeljina, Republika Srpska, over which he holds the occupancy right. He lived in the apartment until 1994, when he was forcibly evicted from it by a group of armed men. The applicant has initiated various administrative and judicial proceedings to regain possession of the apartment, so far without success.

2. The case raises issues under Articles 6 and 8 of the European Convention on Human Rights, under Article 1 of Protocol No. 1 to the Convention and under Article II(2)(b) of the Agreement in relation to discrimination.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted on 16 June 1998 and registered on the same day.

4. On 9 October 1996 the applicant applied to the Human Rights Ombudsperson for Bosnia and Herzegovina concerning the same matter. His application to that office was registered under no. 224/96. On 31 March 1999 he submitted to the Chamber a copy of a letter he had sent to the Ombudsperson, in which he requests that office to cease dealing with his application in order that the Chamber could consider it. On 6 April 1999 the Ombudsperson informed the applicant in writing that she had decided not to open an investigation into the matter.

5. On 11 May 1999 the application was transmitted to the respondent Party for its observations on its admissibility and merits, which were received on 31 July 1999.

6. The applicant's further observations, including a claim for compensation, were received on 3 and 6 August 1999 and transmitted to the respondent Party on 4 and 16 August 1999. The respondent Party was requested to submit observations on the claim for compensation submitted by the applicant but did not do so. On 17 April 2000 the applicant submitted certain further factual information to the Chamber, which on 25 April 2000 was transmitted to the respondent Party for information.

7. On 6 April and 10 May 2000 the Chamber considered the admissibility and merits of the application. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

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

9. On 14 April 1979 the applicant was granted the occupancy right over an apartment located at Žrtava Fašističkog Terora street 25/13 in Bijeljina, by the holder of the allocation right over it, the local Gymnasium (secondary school). On 1 August 1979 he entered into a contract for the use of the apartment with the appropriate body. The applicant lived in the apartment until August 1994, when he was forcibly evicted from it by members of a paramilitary group known as the "Panthers". The applicant went to Montenegro in the Federal Republic of Yugoslavia.

10. On 14 November 1994 and again on 26 February 1996, the holder of the allocation right over the apartment purported to grant the occupancy right over it to R.Đ, a teacher of Serb origin at the school, who still occupies it. The holder of the allocation right had not initiated court proceedings for the termination of the applicant's occupancy right over the apartment.

11. On 10 September 1996 the applicant applied to the Department for Housing-Communal Affairs of the Municipality of Bijeljina, requesting that he be allowed to regain possession of the apartment. He has not received any reply to this request to date.

12. On 2 October 1996, soon after his return to Bijeljina, the applicant initiated proceedings before the Court of First Instance in Bijeljina against the Gymnasium, R.Đ and the housing company in Bijeljina, requesting that he be entitled to regain possession of the apartment. The court held a number of hearings in the case and requested information from the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Bijeljina, a department of the Ministry for Refugees and Displaced Persons, concerning whether the apartment had ever been declared abandoned. At a hearing held before the Court on 9 April 1997 R.Đ presented to it a decision of the Commission dated 28 November 1996, allocating the apartment to him for his use on the basis that it was abandoned property.

13. On 28 May 1997 the court issued its decision. It declared itself absolutely incompetent to decide the matter as it concerned abandoned property, taking into account a decision of the Regional Court in Bijeljina dated 5 March 1997 in which it was stated that courts of first instance should declare themselves incompetent to deal with cases involving property declared abandoned under the Law on Use of Abandoned Property.

14. On 28 August 1997 the applicant lodged an appeal to the Regional Court in Bijeljina against the decision of the Court of First Instance of 28 May 1997. The ground of his appeal was that the apartment had never been entered into the register of abandoned property and therefore, within the meaning of the Law on Use of Abandoned Property, was not abandoned. On 18 December 1997 the applicant submitted to the Regional Court a certification from the appropriate administrative organ in Bijeljina that the apartment had never been entered into the list of abandoned apartments.

15. On 25 March 1998 the Regional Court refused the applicant's appeal and confirmed the decision of the Court of First Instance. The reason for this refusal was that the Commission had allocated the apartment to R.Đ. as abandoned property and the question of whether this was in accordance with the law or not was not within the scope of the courts to decide. Instead, such a question should be decided in administrative proceedings.

16. The applicant lodged a request for review of the decision of the Regional Court to the Supreme Court of the Republika Srpska, which is an extraordinary remedy. On 19 May 1999 the Supreme Court refused the request. The reason it gave was that the legal regime concerning abandoned property was a special one and that issues concerning such property could only be decided in administrative proceedings, and not in court proceedings.

17. On 5 March 1998 the applicant applied to the Executive Board of the municipality in the same regard. On 9 March 1998 the board issued an "Information note" that in view of the fact that the applicant had applied to the Court of First Instance in Bijeljina in the same matter it would request the court to proceed with those proceedings in a speedy manner.

18. On 25 July 1998 the applicant applied to the Commission in Bijeljina, requesting that it annul its decision of 28 November 1996 (see paragraph 12 above) and allow him to regain possession of the apartment. There has been no decision on this application to date.

19. On 19 and 23 December 1998, soon after the entry into force of the Law on Cessation of Application of the Law on Use of Abandoned Property, the applicant again applied to the Commission in Bijeljina to regain possession of the apartment. There has been no decision on this application to date.

20. In the meantime, on 11 August 1997 the applicant had applied to the Commission for Real Property Claims ("Annex 7 Commission") for a decision that he is the holder of the occupancy right over the apartment and entitling him to regain possession of it. On 28 October 1999 he received a decision in these terms. On 29 December 1999 he submitted this decision to the Commission in Bijeljina, requesting that it be enforced, in accordance with the Law on Enforcement of Decisions of the Commission for Property Claims of Refugees and Displaced Persons (see paragraphs 51-57

below). According to the latest information provided by the applicant, no steps have been taken by the relevant national authorities in this regard to date.

21. The applicant has not yet regained possession of the apartment.

B. Relevant legislation

1. Constitution of the Republika Srpska

22. Article 121 of the Constitution of the Republika Srpska reads as follows:

> "The judicial function is performed by the courts. The courts are independent and decide upon the basis of the Constitution and laws.
>
> The courts protect human rights and freedoms, established rights and interests of legal entities and legality."

2. The Law on Use of Abandoned Property

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

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

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

26. Article 15 reads as follows:

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

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

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

29. Article 39 reads as follows:

> "The owner of abandoned property, in the event of permanent return, may claim the right to return of his property, or the right to a fair reimbursement within the context of a settlement

between the Republika Srpska, the Federation of Bosnia and Herzegovina and the Republic of Croatia."

30. Article 40 reads as follows:

"In the event referred to in the previous Article, if the abandoned property or apartment has not been allocated for utilisation, it shall be possible for the owner to regain possession of the property or apartment within 15 days of the date of lodging the request for return of possession.

If in the situation referred to in the previous Article the abandoned property or apartment has been allocated to someone whose own property or apartment is located in the Federation of Bosnia and Herzegovina or the Republic of Croatia, such property or apartment shall be returned to the owner:
- within 30 days from the day the person who was the occupier of the property returns to his property or apartment
- at the latest after 60 days have expired from the date of payment of compensation to the user of the property or apartment for the property he himself has abandoned as well as possible costs incurred by the previous user, or after the provision of suitable alternative accommodation. …."

31. Article 42 reads as follows:

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

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

32. The Law on Cessation of Application of the Law on Use of Abandoned Property of 11 December 1998 (OG RS no. 38/98; "the 1998 law"), as amended, establishes a detailed framework for persons to regain possession of property considered to be abandoned. It puts the 1996 law out of force.

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

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

35. Upon receipt of an application, the responsible body shall determine, within the thirty-day time-limit for deciding upon a request for repossession of property, whether the temporary user is entitled under the 1998 law to be provided with alternative temporary accommodation. If it determines that this is the case, the relevant body of the Ministry (i.e. the local Commission) shall provide the temporary user with appropriate accommodation before the expiry of the deadline for him or her to vacate the property concerned.

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

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

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

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

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

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

4. The Law on General Administrative Proceedings

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

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

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

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

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

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

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

49. Article 286 states that if the person against whom execution is ordered does not comply with the decision, the administrative body which made the decision shall ensure the execution of the

decision. The administrative body shall warn the person against whom execution is ordered that if he or she does not comply with the decision within a specified period that forceful means shall be employed to ensure execution of the decision. If he or she fails to comply with the decision within this specified period, the threatened means shall be applied immediately and also a further date shall be set for execution, involving the use of further, stronger, means.

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

5. Law on Enforcement of Decisions of the Commission for Property Claims of Refugees and Displaced Persons

51. The Law on Enforcement of Decisions of the Commission for Property Claims of Refugees and Displaced Persons (OG RS no. 31/99) was imposed as a law of the Republika Srpska by a decision of the High Representative in Bosnia and Herzegovina on 27 October 1999. It sets out a regime for the enforcement of decisions of the Annex 7 Commission. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

52. Article 2 states that decisions of the Annex 7 Commission are final and binding as of the day of their issuance. Such decisions confirm the rights over the property concerned in the decision, in favour of the person named in such decision.

53. Article 3 states that such decisions are to be enforced by the Commission of the Ministry for Refugees and Displaced Persons for the area in which the relevant property is located.

54. Article 4 sets out the categories of persons who may seek enforcement of a decision of the Annex 7 Commission. In respect to socially-owned property, one of these categories is the person named in the decision as being the holder of the occupancy right over the apartment.

55. Articles 5 and 6 set out the formal requirements which a request for enforcement of a decision of the Annex 7 Commission must comply with.

56. Article 7 states that the competent organ, i.e. the local Commission, is obliged to issue a conclusion authorising the execution of the decision within 30 days of the date of a request for such enforcement. It also sets out the details which such conclusion must contain.

57. Article 9 states that a decision of the Annex 7 Commission is enforceable against the current occupants of the property concerned, regardless of what basis they so occupy it.

IV. COMPLAINTS

58. The applicant complains of violations of his rights as guaranteed by Articles 6, 8 and 13 of the Convention and of discrimination in the enjoyment of those rights.

V. SUBMISSIONS OF THE PARTIES

59. The Republika Srpska, in its observations, received in July 1999, on the admissibility and merits of the application, alleges that the applicant has not applied to regain possession of the apartment under the 1998 law. In addition, the applicant initiated court proceedings at domestic level and submitted his application to the Chamber while these proceedings were still pending.

60. The Republika Srpska also states that the applicant has applied to the Ombudsperson concerning the same matter and concludes that, for these reasons, the Chamber should declare the application inadmissible.

61. The applicant maintains his complaint. He claims that the remedies available to him are ineffective, as he has sought to avail himself of all the remedies available to him in the legal system of the Republika Srpska, without success.

VI. OPINION OF THE CHAMBER

A. Admissibility

62. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

1. Exhaustion of domestic remedies

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

64. The Chamber notes that the applicant initiated proceedings before the Court of First Instance in Bijeljina, seeking to regain possession of the apartment. However, these proceedings were rejected by the court and the applicant's appeal and subsequent request for review of the decision of the Regional Court upon that appeal were refused as ill-founded (see paragraphs 12-16 above).

65. The Chamber notes that in its decision on the applicant's request for review of the decision of the Regional Court (see paragraph 16 above), the Supreme Court of the Republika Srpska held that matters concerning abandoned property are within the sole competence of the Ministry, as such issues should be decided by an administrative procedure rather than by the courts.

66. Accordingly, having recourse to the courts does not appear to be an effective remedy, as the Chamber has previously held (see, e.g., cases nos. CH/98/659 *et al*., *Pletilić and others,* decision on admissibility and merits delivered on 10 September 1999, paragraphs 151–152, Decisions August-December 1999).

67. The Chamber notes that the applicant has applied under the 1998 law to regain possession of the apartment. However he has not yet received any decision under this law, despite the time-limit for the issuing of such a decision having expired in January 1999.

68. As the Chamber noted in its decision in *Eraković* (case no. CH/97/42, decision on admissibility and merits delivered on 15 January 1999, paragraph 40, Decisions January-July 1999) a remedy such as that provided for by the law applicable in the Federation of Bosnia and Herzegovina, analogous to the 1998 law in the Republika Srpska, could in principle qualify as an effective one. The Chamber finds that its analysis in that case applies equally to the 1998 law, i.e. the Republika Srpska law, relevant to the present case.

69. In the *Eraković* case, the Chamber considered the factual background to the case in the context of its admissibility. It held that the circumstances of that case, including the failure to adhere to the relevant time-limits, meant that the applicant could not be required to exhaust any further remedy provided for by national law. The Chamber finds that the same applies in the present case.

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

2. *Res judicata* and *lis alibi pendens*

71. The Republika Srpska claims that the Chamber should refuse to accept the case, as an application concerning the same matter is pending before the Ombudsperson. However the applicant has requested that institution to cease dealing with the matter so that the Chamber can consider it and on 6 April 1999 the Ombudsperson decided not to open an investigation into the matter. Therefore, the case is not inadmissible on this ground.

72. The Chamber notes that the applicant has received a decision of the Annex 7 Commission (see paragraph 20 above). 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 which has already been submitted to another procedure of international investigation or settlement.

73. The Annex 7 Commission, in Article XI of Annex 7, has a mandate of issuing decisions on claims for real property in Bosnia and Herzegovina, where the property has not been sold voluntarily or otherwise transferred since 1 April 1991 and where the claimant does not now enjoy possession of that property. In the present case, the applicant has raised issues other than those within the competence of the Annex 7 Commission. He complains of the conduct of the court proceedings he initiated and also that he has been discriminated against on the ground of his ethnic origin. For the same reasons as in case no. CH/98/756 *Đ.M.* (decision on admissibility and merits delivered on 14 May 1999, Decisions January-July 1999), these matters fall outside the competence of the Annex 7 Commission and therefore the Chamber is not precluded from considering the case on this ground.

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

B. Merits

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

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

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

(a) Article 6 of the Convention

77. Article 6 of the Convention, insofar as relevant, provides as follows:

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

78. The applicant claimed that he had been a victim of a violation of his rights as guaranteed under this provision.

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

80. The Chamber recalls that it has held that the right to enjoyment of one's occupancy right is a civil right, within the meaning of Article 6 of the Convention (see, e.g., case no. CH/97/93*, Matić,* decision on admissibility and merits delivered on 11 June 1999, paragraph 74, Decisions January-July 1999).

81. The Chamber notes that the applicant initiated proceedings before the Municipal Court in Bijeljina on 2 October 1996, requesting that he be entitled to regain possession of the apartment. On 28 May 1997 the court declared itself incompetent to deal with the matter, as proceedings concerning return of property may only be dealt with in administrative proceedings. The applicant's appeal against this decision was refused by the Regional Court in Bijeljina on the same ground, as was his request for review to the Supreme Court (see paragraphs 14-16 above). As the Chamber has previously noted (see *Pletilić and others,* sup. cit., paragraph 192), the courts of the Republika Srpska have a practice of suspending consideration of claims for repossession of abandoned and other property, holding that such questions are to be determined by administrative proceedings before the Ministry.

82. The Chamber notes that Article 121 of the Republika Srpska Constitution states that the establishment of legal rights and interests is the role of the courts. It also states that the courts shall decide upon the basis of, *inter alia*, the laws of the Republika Srpska (see paragraph 22 above). Accordingly, for any subject matter to be removed from their jurisdiction, this would have to be done by a law or other valid legal instrument. Such a removal would require a specific statement to this effect. The Chamber has previously found that in the absence of a specific statement to that effect, the 1996 law did not remove court jurisdiction over property that was considered to be abandoned (see *Pletilić and others,* sup. cit., paragraph 194).

83. Nevertheless, the practical effect of the decisions of the courts in the applicant's proceedings is that it is impossible for him to have the merits of his civil action for the return into his possession of the apartment over which he holds the occupancy right determined by a tribunal within the meaning of Article 6 paragraph 1 of the Convention. Accordingly, there has been a violation of his right to effective access to court as guaranteed by Article 6 paragraph 1 of the Convention.

(b) Article 8 of the Convention

84. Article 8 provides as follows:

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

85. The applicant claimed that he had been a victim of a violation of his rights as guaranteed under this provision.

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

87. The Chamber notes that the applicant lived in the apartment without interruption from 1979 until August 1994, when he was forcibly evicted from it. The Chamber has previously held that persons seeking to regain possession of properties they lost possession of during the war retain sufficient links with those properties for them to be considered their "home" within the meaning of Article 8 of the Convention (see, e.g., case no. CH/98/777, *Pletilić,* decision on admissibility and merits delivered on 8 October 1999, paragraph 74, Decisions August-December 1999). The Chamber therefore considers that the apartment is the applicant's "home" for this purpose.

88. As the applicant was evicted from the apartment prior to the entry into force of the Agreement, the Chamber has no competence *ratione temporis* to examine that event.

89. On 28 November 1996 the Commission in Bijeljina allocated the apartment to R.Đ. on the basis that it was abandoned property.

90. Furthermore, as noted above (see paragraphs 11-19 above), the applicant has initiated court and administrative proceedings seeking to regain possession of the apartment. However, these proceedings have been unsuccessful to date and he has not yet regained possession of it.

91. In addition, the applicant has received a decision of the Annex 7 Commission confirming his occupancy right over the apartment. He has requested enforcement of this decision, in accordance with the appropriate law (see paragraph 20 above). However, despite the fact that the time-limit for the issuing of a conclusion authorising him to regain possession of it having expired, the Commission in Bijeljina has not issued such a conclusion.

92. Therefore, the applicant has been unable to regain possession of the apartment due to the failure of the authorities of the Republika Srpska to deal effectively with his various applications in this regard, which he commenced in October 1996, three years and eight months ago.

93. As a result, the respondent Party is responsible for the interference with the right of the applicant to respect for his home, as a result of the allocation of the apartment to R.Đ. for use in 1996 and as a result of the failure of its judicial and administrative authorities to deal with the applicant's applications to regain possession of it.

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

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

96. Neither in the domestic proceedings initiated by the applicant nor in the proceedings before the Chamber has any evidence been produced showing that the apartment concerned was ever entered into the register of abandoned property, as required by the law in force at the time, the 1996 law (see paragraph 24 above). The applicant has provided evidence from the competent organ to show that the apartment was never so registered (see paragraph 14 above). Accordingly the decision of the Commission of 28 November 1996 was not in accordance with the law.

97. As the Chamber has noted in the context of its examination of the case under Article 6 of the Convention (see paragraph 81 above), the courts of the Republika Srpska refused the applicant's application to regain possession of his home, as they consider themselves incompetent in such matters. The Chamber has found that this is not in accordance with the Constitution of the Republika Srpska. Accordingly, the failure of the courts to decide upon the applicant's proceedings is not "in accordance with the law" as required by paragraph 2 of Article 8.

98. As both the interferences with the applicant's right to respect for his home referred to above are not "in accordance with the law", it is not necessary for the Chamber to examine whether they pursued a "legitimate aim" or were "necessary in a democratic society".

99. Regarding the administrative proceedings initiated by the applicant, he still has not received a decision on his request to regain possession of the apartment, despite the time-limit for this having expired in January 1999 (see paragraph 19 above). Accordingly, also the failure of the Commission to act is not "in accordance with the law".

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

(c) Article 13 of the Convention

101. Article 13 of the Convention provides as follows:

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

102. The applicant alleged a violation of his rights as guaranteed by this provision. The respondent Party did not submit any observations under this provision.

103. The Chamber, having regard to the violation of the applicant's rights it has found in its examination of the case under Article 6 of the Convention, does not consider it necessary to examine the case under this provision.

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

104. Article 1 of Protocol No. 1 reads as follows:

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

105. The applicant claimed that he had been a victim of a violation of his rights as guaranteed under this provision.

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

107. The Chamber notes that the applicant is the holder of the occupancy right over the apartment in question. The Chamber has previously held as follows (case no. CH/96/28, *M.J.*, decision on admissibility and merits delivered on 3 December 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997):

> "... An occupancy right is a valuable asset giving the holder the right, subject to the conditions prescribed by law, to occupy the property in question indefinitely. ... In the Chamber's opinion it is an asset which constitutes a "possession" within the meaning of Article 1 [of Protocol No. 1] ..."

108. In addition, the applicant's occupancy right over the apartment has been confirmed by a decision of the Annex 7 Commission (see paragraph 20 above). Accordingly, the Chamber considers that the applicant's rights in respect of the apartment constitute his "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention.

109. The Chamber considers that the allocation of the apartment by the Commission to R.Đ. on 28 November 1996 and the failure of the authorities of the Republika Srpska to allow the applicant to regain possession of the apartment constitutes an "interference" with his right to peaceful enjoyment of that possession. This interference is ongoing as the applicant still does not enjoy possession of that apartment.

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

111. The Chamber has found, in the context of its examination of the case under Article 8 of the Convention, that the actions of the authorities in relation to the allocation of the apartment to R.Đ. and the failure to allow him to regain possession of it were not in accordance with the law. This is in itself sufficient to justify a finding of a violation of the applicant's right to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1. Accordingly, the right of the applicant under this provision has been violated.

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

112. The applicant also alleged that he had been discriminated against in the enjoyment of his rights as protected by the Agreement. The Chamber will consider this allegation in the context of Article II(2)(b) of the Agreement, which states that the Chamber shall consider:

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

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

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

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

116. The Chamber recalls that the obligation on the Parties to the Annex 6 Agreement to "secure" the rights and freedoms mentioned in the agreement to all persons within their jurisdiction not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to protect those rights (see *Đ.M.,* sup. cit., paragraph 75).

117. The Chamber notes that the applicant is of Bosniak origin and that his occupancy right over the apartment concerned in the application has never been disputed in the various proceedings he has initiated to regain possession of it. This right has been confirmed by a decision of the Annex 7 Commission (see paragraph 20 above). In addition, his occupancy right over the apartment has never been terminated. Nevertheless, his various attempts to regain possession of the apartment, which have so far lasted three years and eight months, have been unsuccessful, both at the judicial and administrative level.

118. The applicant's administrative proceedings under the 1998 law to regain possession of his apartment have been pending since December 1998. The time-limit for the issuing of a decision by the Commission in Bijeljina expired in January 1999, but he has not received such a decision (see paragraph 19 above).

119. The right of the applicant to occupy the apartment is not in dispute. He is clearly entitled under the law of the Republika Srpska to regain possession of it. Furthermore, that law sets out clearly the procedure for dealing with the current occupant of the apartment in respect of alternative accommodation and specifies that the requirement to provide such a person with alternative accommodation cannot delay the return of the pre-war occupant to a property.

120. In addition, the Chamber has found that the standpoint of the courts in the Republika Srpska (see paragraph 81 above) was such as to deny the applicant his right of access to court. The decision of the Annex 7 Commission confirming the applicant's occupancy right over the apartment has not been enforced to date, despite the applicant having requested such enforcement in accordance with the appropriate law (see paragraph 20 above).

121. The applicant has sought to avail himself of various legal procedures to regain possession of the apartment since October 1996. He has initiated court proceedings, lodged an appeal against the first instance decision and lodged a request for review of the second instance decision. He has initiated administrative proceedings, and received a decision from the Annex 7 Commission.

122. Despite all of these efforts, he still has not succeeded in regaining possession of the apartment. The respondent Party has not put forward any credible reasons for this delay and the Chamber cannot of its own motion find any.

123. The Chamber notes that the vast majority of persons who were forced to leave their homes during the war were persons who were in a minority. The Chamber considers that the only plausible reason for the deliberate obstruction experienced by the applicant in seeking to regain possession of the apartment is the fact that he is of Bosniak origin. Persons belonging to the majority ethnic group in Bijeljina, Serbs, will not suffer obstruction in their efforts to regain possession of property, as they were never forced to leave it in the first place. Furthermore, the obstruction suffered by persons in the applicant's position has the direct effect of protecting the position of persons who currently occupy property which members of a minority were forced to leave. These persons are of Serb origin.

124. The Chamber recognises that after the war in Bosnia and Herzegovina the entities are faced with serious problems due to the number of damaged properties and refugees and displaced persons. However this cannot excuse obstruction of persons seeking to regain possession of what they are clearly entitled to, especially when this obstruction is carried out against members of a minority ethnic group to protect members of a majority ethnic group.

125. The Chamber concludes that the applicant has been discriminated against in the enjoyment of his rights under Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention and that this discrimination has been on the ground of his Bosniak origin.

VII. REMEDIES

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

127. The Chamber considers it appropriate to order the respondent Party to take all necessary steps to enable the applicant to regain possession of the apartment within one month.

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

129. In his claim for compensation the applicant requests compensation for the following matters:
- for the costs of redecorating the apartment upon his regaining of possession: 3,000 Convertible Marks (*Konvertibilnih Maraka,* "KM");
- for his inability to use the apartment since August 1994: KM 200 per month;
- for each day after the decision of the Chamber until the date he regains possession of the apartment: KM 30;
- for mental suffering: KM 20,000;
- for his personal belongings which he claims were taken from the apartment, which he supplies a list of: KM 28,195;
- interest on the above sums.

130. In addition, the applicant requests that the Republika Srpska be ordered to return to him a painting which was in the apartment called "*Cvijet*" ("flower"), which is of particular emotional value to him.

131. Concerning the applicant's claim for his personal belongings, the Chamber notes that there is no evidence before it that these belongings were alienated after 14 December 1995, the date of entry into force of the Agreement. Accordingly, the Chamber has no competence ratione temporis to examine this issue. In addition, there is no indication that the respondent Party is responsible for any damage that may have occurred to his belongings. Accordingly, this claim must be rejected. The same reasoning applies to the painting "Flower" the applicant requests to be returned to him.

132. Regarding the applicant's claim for moral damages, the Chamber does consider it appropriate to award him a sum under this head. The applicant has undoubtedly suffered stress as a result of the fact that he has, despite initiating various administrative and court proceedings, been unable to regain possession of the apartment over which he holds the occupancy right. As the Chamber found, this inability is due to the discriminatory actions of the authorities of the Republika Srpska. In a group of cases where the Chamber made a similar finding (see *Pletilić and others,* sup. cit., paragraph 236), the Chamber awarded each applicant the sum of KM 1,200 under this head. The Chamber therefore considers that this is a reasonable sum to award the applicant in the present case and will accordingly award the applicant this sum.

133. Concerning the applicant's request for KM 3,000 for the costs of redecoration of the apartment, as the Chamber held in *Pletilić and others* (sup. cit., paragraph 239), such claims relate to possible future costs which the applicant may incur and therefore must be rejected as unsubstantiated.

134. The applicant claims the sum of KM 200 per month from August 1994, as a result of his inability to use the apartment. He has supplied a letter from the housing company in Bijeljina, in which it is stated that an apartment such as that concerned in the present case would cost approximately KM 200 per month to rent. The Chamber considers this to be a reasonable sum. However it must be determined as from what date the Republika Srpska is responsible for the inability of the applicant to use the apartment. As noted above, the Chamber only has competence to examine issues that occurred after 14 December 1995.

135. The Chamber considers that the Republika Srpska can only be considered to be responsible for this inability to use the apartment as and from the passing of a reasonable time after the applicant's first steps to regain possession of the apartment, i.e. when he applied to the Municipality of Bijeljina on 10 September 1996 (see paragraph 11 above). The Chamber considers that the authorities of the Republika Srpska must be allowed a reasonable time to deal with requests for return of property. In the present case, the Chamber considers this reasonable time to have expired on 31 December 1996, nearly four months after the applicant's first attempt to regain possession of the apartment. Accordingly, the Republika Srpska is responsible for the inability of the applicant to regain possession of his apartment as and from 1 January 1997 and therefore the Chamber will order the Republika Srpska to pay to him the sum of KM 8,400 in respect of the period from 1 January 1997 to the end of the month in which this decision is delivered (i.e. June 2000) and KM 200 per month from 1 July 2000 until the date the applicant actually regains possession of the apartment. Additionally, the Chamber awards 4% (four per cent) interest as of the date of expiry of the period set for the implementation of the present decision, on the above sums.

VIII. CONCLUSION

136. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the impossibility for the applicant to have the merits of his civil action determined by a tribunal constitutes a violation of his right to effective access to court within the

meaning of Article 6 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that there has been and continues to be a violation of the right of the applicant to respect for his home within the meaning of Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, that there has been and continues to be a violation of the right of the applicant to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, that the applicant has been and continues to be discriminated against in the enjoyment of his rights as protected by Articles 6 and 8 of the Convention and by Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

6. unanimously, to order the Republika Srpska, as soon as possible and in any event no later than one month after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, to take all necessary steps to ensure that the applicant regains possession of the apartment over which he holds the occupancy right located at Žrtava Fašističkog Terora 25/13 in Bijeljina, Republika Srpska;

7. unanimously, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 1,200 (one thousand two hundred) Convertible Marks as compensation for moral suffering;

8. unanimously, to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 8,400 (eight thousand four hundred) Convertible Marks in respect of his inability to use the apartment concerned in the application from 1 January 1997 until 30 June 2000;

9. unanimously, to pay to the applicant, within one month from the date when he regains possession of the apartment concerned in the application, the sum of 200 (two hundred) Convertible Marks per month from 1 July 2000 until the end of the month in which he regains possession of that apartment;

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

11. unanimously, to order that simple interest at an annual rate of four per cent will be payable on the sums awarded in conclusions 7, 8 and 9 above after the expiry of the period set in those conclusions for the payment of such sums; and

12. unanimously, to order the Republika Srpska to report to it, within two weeks of the expiry of the time-limit referred to in conclusions 6, 7, 8 and 9 above, on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel