DECISION ON REVIEW
(delivered on 12 October 2001)

Case no. CH/98/1066

Savka KOVAČEVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 October 2001 with the following members present:

Ms. Michèle PICARD, President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Jakob MÖLLER
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the request for review from the respondent Party of the decision of the Second Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the First Panel's recommendation;

Having regard to its decision of 6 July 2001 accepting the respondent Party's request for review;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement (the "Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as Rule 65 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. On 11 May 2001, the Second Panel delivered its decision on admissibility and merits in the case in which it found violations of the applicant's property rights guaranteed by Article 8 of the European Convention on Human Rights (the "Convention") and Article 1 of Protocol No. 1 to the Convention. Considering the respondent Party's request for review of this decision filed on 11 June 2001, the plenary Chamber accepted review of the case with respect to issues related to the interpretation and application of Articles II(2), VIII(2)(b), VIII(2)(d), VIII(3), and XI(1) of the Agreement.

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

2. On 11 May 2001 the Second Panel's decision on admissibility and merits was delivered pursuant to Rule 60 of the Chamber's Rules of Procedure (Annex A).

3. On 11 June 2001, the respondent Party submitted a request for review of the decision on admissibility and merits. On 11 June 2001, the Organisation for Security and Cooperation in Europe (OSCE), pursuant to Rule 32 *ter* of the Chamber's Rules of Procedure, submitted a request to be allowed to participate in the review proceedings of the present case as *amicus curiae*.

4. In accordance with Rules 64(1) and 32 *ter* of the Chamber's Rules of Procedure, the First Panel considered the request for review and the OSCE's request to appear as *amicus curiae*. On 5 July 2001, the First Panel unanimously recommended that the plenary Chamber accept the respondent Party's request for review. The First Panel referred the OSCE's request to appear as *amicus curiae* to the plenary Chamber.

5. On 6 July 2001, the plenary Chamber issued a decision on request for review, accepting the request in accordance with the First Panel's recommendation (Annex B). The Chamber also accepted the OSCE's request to participate as *amicus curiae* in the review proceedings.

6. On 24 July 2001, the OSCE withdrew its request to participate as *amicus curiae* in the review proceedings.

7. On 17 August 2001, the applicant submitted her written observations on the review of the case.

8. The plenary Chamber deliberated on the request for review on 6 July, 4 and 7 September, and 8 October 2001. On 8 October 2001, the Chamber adopted the present decision on review.

III. DECISION ON ADMISSIBILITY AND MERITS OF SECOND PANEL

9. The Chamber refers to the Second Panel's decision on admissibility and merits of 11 May 2001, which is appended to the present decision (Annex 1). In this decision, the Second Panel unanimously found the respondent Party responsible for violations of the applicant's rights guaranteed by Article 8 of the Convention (right to respect for home) and Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions) due to the failure of the competent organs of the respondent Party, in particular the Novo Sarajevo Administration for Housing Affairs of Sarajevo Canton (hereinafter the "Administration"), to issue a decision awarding the applicant repossession of her apartment in a timely manner, delayed enforcement of that eventual decision, and non-enforcement of a decision by the Commission for Real Property Claims (CRPC) in the applicant's favour.

10. As remedies for the violations, the Second Panel ordered the respondent Party to take the following actions, which are summarised from the decision: a) to pay to the applicant the sum of 2000 KM in respect of non-pecuniary damage; and b) to pay to the applicant the sum of 5600 KM as compensation for the loss of use of the apartment and for any extra costs during the time the applicant was forced to live in alternative accommodation until 4 December 2000.

IV. ADDITIONAL FACTS RELEVANT TO REVIEW PROCEEDINGS

A. Application to the Human Rights Ombudsperson for Bosnia and Herzegovina

11. On 28 January 1998, the applicant lodged an application against the Federation of Bosnia and Herzegovina with the Human Rights Ombudsperson for Bosnia and Herzegovina (application no. 2999/99). The Ombudsperson registered this application eighteen months later on 29 July 1999. On 28 September 1999, the Ombudsperson transmitted the application to the Federation of Bosnia and Herzegovina for its written observations on the application with respect to issues concerning Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

12. On 17 December 1999, the Ombudsperson adopted her Report on the application filed by Ms. Savka Kovačević, application no. 2999/99, in addition to similar applications filed by nine other applicants (*Ivan Fidler and others v. the Federation of Bosnia and Herzegovina*, Report No. 2771/99 of the Ombudsperson adopted on 17 December 1999). In the Report, the Ombudsperson described the applications as concerning "the applicants' inability to regain possession of apartments over which they held the occupancy rights due to the failure of the competent authorities to enforce final and binding decisions". The Ombudsperson established the following facts in the case of Ms. Savka Kovačević:

> "Since 1986 the applicant has been the holder of the occupancy right over the apartment located at 41 Hamdije Čemerlića St. in Sarajevo. She left Sarajevo due to the war-related reasons and her apartment had been allocated temporarily to third persons. The applicant applied for repossession of her apartment to the CRPC and she received a decision issued on 28 January 1999, whereby her occupancy right is recognised as well as her right to be reinstated into the apartment. The decision is final and binding for the competent administrative and judicial authorities, which are obliged to reinstate the applicant upon her request. On 19 March 1999 the applicant lodged a request for enforcement to the Administrative Department Novo Sarajevo. To date the decision has still not been enforced."

13. In the Report adopted on 17 December 1999, the Ombudsperson found violations of Article 6(1) and Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. She recommended that the respondent Party reinstate the applicant to the apartment over which she is the occupancy right holder within six weeks of receipt of the Report, but she did not recommend the payment of any compensation to the applicant.

14. On 24 April 2000, the Ombudsperson notified the High Representative of the failure of the Government of the Federation of Bosnia and Herzegovina to comply with the recommendations of the Ombudsperson with regard to Ms. Kovačević's case, plus 28 other cases. Also on 24 April 2000, the Ombudsperson referred these cases to the President of the Federation of Bosnia and Herzegovina for further action.

B. Application to the Human Rights Chamber

15. On 16 November 1998, the applicant filed an application with the Human Rights Chamber and the application was registered on the same day. Section VI.B. of the application form asked the applicant the following question: "Has [your complaint] been submitted to any other Commission established by the Dayton Agreement? If so, give details, including application number and date." In response to this question, the applicant could indicate, by marking corresponding boxes, one of four different Commissions or "Other". The applicant in this case circled the box indicating the "Commission for Real Property Claims of Displaced Persons and Refugees (Annex 7)", but she made no notation on or near the box indicating the "Office of the Human Rights Ombudsperson for Bosnia and Herzegovina (Annex 6)".

16. On 21 February 2001, the Chamber transmitted the case to the respondent Party for its observations on the admissibility and merits of the application, in particular with respect to Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

17. Prior to its delivery of its decision on admissibility and merits on 11 May 2001, the Chamber received no information from the parties or any other person or organisation regarding the applicant's previous application to the Ombudsperson. Neither did the respondent Party object to the application prior to the Chamber's delivery of its decision on admissibility and merits based upon the applicant's previous application to the Ombudsperson.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

18. In its request for review submitted on 11 June 2001, the respondent Party challenges the decision on admissibility and merits delivered on 11 May 2001 in three primary respects. Firstly, it argues that the application should have been declared inadmissible on the basis of *lis alibi pendens* because on 28 January 1998, the applicant filed an appeal to the Ombudsperson for Bosnia and Herzegovina and abused her right of petition by intentionally keeping such information from the Chamber. On 17 December 1999, the Ombudsperson issued a Report on the applicant's case in which she found violations of Article 1 of Protocol No. 1 and Articles 6 and 8 of the Convention. The Ombudsperson recommended that the respondent Party reinstate the applicant to the apartment over which she is the occupancy right holder, but she did not recommend the payment of any compensation to the applicant. According to the respondent Party, the adoption of such report by the Ombudsperson should have prevented the Chamber from further consideration of the case under the principle of *res judicata*.

19. Secondly, the respondent Party challenges the decision on admissibility and merits because the applicant had been reinstated into possession of her apartment on 4 December 2000, five months prior to delivery of the Chamber's decision finding the respondent Party responsible for violations of the Convention. The respondent Party argues that the Chamber can only find a violation (and award compensation for that violation) if the violation is occurring at the moment the Chamber issues its decision. The respondent Party further notes the inconsistency between this decision and numerous previous decisions of the Chamber in which cases were struck out of the list as resolved because the applicant had regained possession of his or her apartment.

20. Thirdly, the respondent Party notes its concern that this case will become precedent for the Chamber to award compensation to all applicants with pending applications in which the applicant seeks reinstatement to his or her apartment, regardless of whether the respondent Party responsibly takes action to reinstate the applicant. According to the respondent Party, such a practice by the Chamber will diminish its attempts to implement applicable property laws and result in an excessive number of decisions ordering the respondent Party to pay compensation to applicants.

B. The applicant

21. The applicant submitted her response to the request for review on 17 August 2001. In her response, the applicant reiterates the facts of her case, including that two years and six months passed from the date she filed her request for repossession of her apartment until her reinstatement into possession. She contacted six different domestic organs in writing attempting to repossess her apartment. During this time, the applicant and her elderly, sick mother were homeless and subjected to humiliating treatment by authorities of the domestic organs responsible for reinstating her into possession of her apartment. The applicant further notes that the temporary occupant of her apartment was not a refugee or displaced person but a person who owned both a house and an apartment in Sarajevo. Moreover, she states that the temporary occupant raised dogs in one room of the apartment and a foul smell continues to permeate today as a result of this.

22. According to the applicant, the respondent Party continues to obstruct her from fully exercising her property rights in her apartment. In particular, the respondent Party has failed to enter the "legal validity clause" into the procedural decision reinstating the applicant into possession of her apartment. The applicant has requested that the domestic authorities enter the "legal validity

clause" into her procedural decision on numerous occasions, but with no result to date. This "legal validity clause" is a prerequisite for the applicant to file a request to purchase her apartment.

23. The applicant requests that the Chamber reject the respondent Party's request for review and confirm the validity of its decision on admissibility and merits. She draws the Chamber's attention to other cases in which it found violations of property rights and awarded applicants compensation even though they had been reinstated into their apartments prior to the delivery of these decisions.

VI. THE DECISION ON REQUEST FOR REVIEW

24. In the decision on request for review of 6 July 2001, the First Panel unanimously recommended that the plenary Chamber accept the request for review because the request met the conditions set forth in Rule 64(2) of the Chamber's Rules of Procedure. More specifically, the First Panel opined that, given that the Human Rights Ombudsperson for Bosnia and Herzegovina did not initiate proceedings before the Chamber under Article V(7) of the Agreement based on her Report in the applicant's case, the applicant's prior application to the Human Rights Ombudsperson and the latter's Report raised a "serious issue affecting the interpretation or application of the Agreement" in relation to the Chamber's jurisdiction. The First Panel further opined that the case raised a "serious issue" affecting the application of Article VIII(3) of the Agreement.

25. The plenary Chamber agreed with the recommendation of the First Panel and accepted the request for review. It considered that the issues raised by the respondent Party in its request for review raised a "serious issue" affecting the interpretation and application of Articles II(2), VIII(2)(b), VIII(2)(d), VIII(3), and XI(1) of the Agreement, and that "the whole circumstances justif[ied] reviewing the decision".

VII. RELEVANT LEGAL PROVISIONS

A. The Human Rights Agreement

26. Article II of the Agreement provides for the establishment of the Commission on Human Rights. It provides as follows:

> "1. To assist in honouring their obligations under this Agreement, the Parties hereby establish a Commission on Human Rights (the "Commission"). The Commission shall consist of two parts: the Office of the Ombudsman[1] and the Human Rights Chamber.
>
> "2. The Office of the Ombudsman and the Human Rights Chamber shall consider, as subsequently described:
>
> "(a) alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or
>
> "(b) alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such 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 official or organ."

27. Article V of the Agreement sets forth the jurisdiction of the Ombudsperson. It provides as follows:

> "1. Allegations of violations of human rights received by the Commission shall generally be directed to the Office of the Ombudsman, except where an applicant specifies the Chamber.

[1] The first person who held the Office of Ombudsman, Dr. Gret Haller, took the title "Ombudsperson".

"2. The Ombudsman may investigate, either on his or her own initiative or in response to an allegation by any Party or person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, alleged or apparent violations of human rights within the scope of paragraph 2 of Article II. The Parties undertake not to hinder in any way the effective exercise of this right.

"3. The Ombudsman shall determine which allegations warrant investigation and in what priority, giving particular priority to allegations of especially severe or systemic violations and those founded on alleged discrimination on prohibited grounds.

"4. The Ombudsman shall issue findings and conclusions promptly after concluding an investigation. A Party identified as violating human rights shall, within a specified period, explain in writing how it will comply with the conclusions.

"5. Where an allegation is received which is within the jurisdiction of the Human Rights Chamber, the Ombudsman may refer the allegation to the Chamber at any stage.

"6. The Ombudsman may also present special reports at any time to any competent government organ or official. Those receiving such reports shall reply within a time limit specified by the Ombudsman, including specific responses to any conclusions offered by the Ombudsman.

"7. The Ombudsman shall publish a report, which, in the event that a person or entity does not comply with his or her conclusions and recommendations, will be forwarded to the High Representative described in Annex 10 to the General Framework Agreement while such office exists, as well as referred for further action to the Presidency of the appropriate Party. The Ombudsman may also initiate proceedings before the Human Rights Chamber based on such Report. The Ombudsman may also intervene in any proceedings before the Chamber."

28. Article VIII of the Agreement sets forth the jurisdiction of the Chamber. It provides, in pertinent parts, as follows:

"1. The Chamber shall receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II.

"2. The Chamber shall decide which applications to accept and in what priority to address them. In so doing, the Chamber shall take into account the following criteria: …

(b) 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. …

(d) 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 decision of cases, or any other Commission established by the Annexes to the General Framework Agreement. …"

"3. The Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that (a) the applicant does not intend to pursue his application; (b) the matter has been resolved; or (c) for any other reason established by the Chamber, it is no longer justified to continue the examination of the application; provided that such result is consistent with the objective of respect for human rights."

29. Article XI of the Agreement concerns the Chamber's decisions. It provides, in pertinent part, as follows:

> "1. Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address:
> (a) Whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so
> (b) What steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures. …
>
> "3. Subject to review as provided in paragraph 2 of Article X, the decisions of the Chamber shall be final and binding. …
>
> "6. The parties shall implement fully decisions of the Chamber."

30. Article X(2) of the Agreement explains the proceedings before the Chamber, including review proceedings. It states, in relevant part:

> "When an application is decided by a panel, the full Chamber may decide, upon motion of a party to the case or the Ombudsman, to review the decision; such review may include the taking of additional evidence where the Chamber so decides."

B. The Chamber's Rules of Procedure

31. Rule 46 of the Chamber's Rules of Procedure concerns the content of applications. It provides, in relevant part, as follows:

> "2. Applicants shall furthermore: … (b) indicate whether the subject-matter of the application has already been submitted to the Chamber, the Ombudsperson, any other Commission established under the Annexes to the General Framework Agreement or any other international procedure of adjudication, investigation or settlement. …
>
> "3. Applications, other than those presented by a Party or referred to the Chamber by the Ombudsperson, should normally be made on the application form provided by the Registrar.
>
> "4. Failure to comply with the requirements set out under paragraphs 1-3 above may result in the application not being registered and examined by the Chamber. …
>
> "6. Applicants shall keep the Chamber informed of any change of their address and of all circumstances relevant to the application."

32. Rule 47 *bis* concerns applications pending before the Human Rights Ombudsperson. It states:

> "The Chamber may declare inadmissible, or suspend consideration of, any application concerning an allegation of a violation of human rights which is currently pending before the Human Rights Ombudsperson."

VIII. THE CHAMBER'S DECISION ON REVIEW

A. Scope of the case on review

33. In light of its decision on request for review of 6 July 2001, the plenary Chamber will review the Second Panel's decision on the admissibility and merits of the case, delivered on 11 May 2001, with respect to the interpretation and application of Articles II(2), VIII(2)(b), VIII(2)(d), VIII(3), and XI(1) of the Agreement.

B. Review of Decision with respect to the jurisdiction of the Chamber

34. In its request for review, the respondent Party argues that the application should have been declared inadmissible on the ground of *lis alibi pendens* because, on 28 January 1998, the applicant filed an application with the Ombudsperson for Bosnia and Herzegovina, and, on 17 December 1999, the Ombudsperson issued a Report on the applicant's case in which she found violations of Article 1 of Protocol No. 1 and Articles 6 and 8 of the Convention, recommended that the respondent Party reinstate the applicant to the apartment over which she is the occupancy right holder, but did not recommend the payment of any compensation to the applicant. According to the respondent Party, the adoption of such Report by the Ombudsperson should have prevented the Chamber from further consideration of the case under the principle of *res judicata*.

35. Upon reviewing the case file and considering the new evidence presented in the review proceedings, the Chamber notes that the applicant filed an application with the Ombudsperson for Bosnia and Herzegovina on 28 January 1998, which was registered 18 months later on 29 July 1999. On 28 September 1999, the Ombudsperson transmitted the application to the Federation of Bosnia and Herzegovina. On 17 December 1999, the Ombudsperson adopted her Report on the application in which it recommended that the respondent Party reinstate the applicant to the apartment over which she is the occupancy right holder within six weeks of receipt of the Report. The Ombudsperson did not, and could not, however, issue a final and binding decision in the case (see paragraph 27 above).

36. Meanwhile, on 16 November 1998, the applicant filed an application with the Human Rights Chamber, which was registered on the same day. She failed to inform the Chamber that she had previously filed an application with the Ombudsperson. On 21 February 2001, over fourteen months after the issuance of the Ombudsperson's Report on the applicant's application, the Chamber transmitted the case to the Federation of Bosnia and Herzegovina. At no time prior to the request for review did the respondent Party or the applicant inform the Chamber about the prior proceedings before the Ombudsperson. On 11 May 2001, the Chamber issued its decision on admissibility and merits.

37. While surely the Chamber could have benefited from information concerning the applicant's application before the Ombudsperson, and the Report of the Ombudsperson could have been useful in the Chamber's resolution of the application, the fact of the applicant's previous application to the Ombudsperson and the Ombudsperson's subsequent Report on that application does not *ipso facto* divest the Chamber of its jurisdiction to determine Ms. Kovačević's application.

1. General discretionary powers

38. Looking to Articles V and VIII of the Agreement, which define the jurisdiction of the Ombudsperson and the Chamber, respectively (see paragraphs 27 and 28 above), the Chamber observes that it is authorized to consider any application concerning alleged or apparent violations of human rights as provided in the Convention or alleged or apparent discrimination arising in the enjoyment of the rights and freedoms protected by the international agreements listed in the Appendix to the Agreement. The Chamber may receive such applications "by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals" (Article VIII(1) of the Agreement).

39. Generally allegations of human rights violations have been first directed to the Ombudsperson, who is authorized to, among other powers, investigate the allegations, issue findings and conclusions, publish reports, and refer the allegations to the Chamber at any point (Article V of the Agreement). In recognition of this general practice, Rule 47 *bis* of the Chamber's Rules of Procedure (see paragraph 32 above), provides that the Chamber may, in its discretion, declare inadmissible or suspend consideration of any application currently pending before the Ombudsperson. Often the Chamber has exercised this discretion and declined to consider applications also pending before the Ombudsperson. However, nothing in the language of Article V or Article VIII to the Agreement or Rule 47 *bis* of the Chamber's Rules of Procedure indicates that the Chamber loses its authority to consider an application concerning violations of human rights because

such application is or was pending before the Ombudsperson. To the contrary, under each of these provisions, the Chamber retains the power to consider any application concerning violations of human rights.

2. *Res judicata* and Article VIII(2)(b) of the Agreement

40. The Chamber recalls that the principle of *res judicata* provides that a matter judicially decided in a final and binding decision is finally decided: that is, a final judgment rendered by a court of competent jurisdiction on the merits of a case is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent action involving the same claim. This principle is reflected in Article VIII(2)(b) of the Agreement, which provides that "[t]he 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."

41. The Report of the Ombudsperson, however, contained only non-binding recommendations; thus, the principle of *res judicata* could not attach to it. Under Article V of the Agreement, the Ombudsperson had no authority to issue final and binding decisions on the human rights allegations it considers. The Ombudsperson published a report, and then, in the event the conclusions and recommendations contained in that report were not complied with, the Ombudsperson forwarded the report to the High Representative and referred the report to the Presidency of the respective respondent Party for further action. The Ombudsperson could also initiate proceedings before the Chamber, but this action was discretionary.

42. In addition, Article VIII(2)(b) refers to matters "already … submitted to another procedure of international investigation or settlement". Reading this phrase in the context of the entire Article VIII, and in particular comparing it to the text of Article VIII(2)(d) which refers to matters "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", the Chamber understands Article VIII(2)(b) to relate to procedures established under an international instrument other than the General Framework Agreement. The Ombudsperson, however, was part of the Commission on Human Rights established in the Agreement, which is Annex 6 to the General Framework Agreement. Thus, the Ombudsperson could not qualify as "another procedure of international investigation or settlement" within the meaning of Article VIII(2)(b) of the Agreement.

43. In matters in fact submitted to an international body under other procedures, it is understandable that the Chamber should not be in a position to consider an application on the same matter and potentially render a conflicting decision. A similar rule is contained in other international instruments, for example Article 35(2)(b) of the Convention, which provides in its admissibility criteria that "[t]he Court shall not deal with any application … that … is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information".

44. In any event, it is clear that neither the principle of *res judicata* nor Article VIII(2)(b) of the Agreement apply in this case to divest the Chamber of its power to consider Ms. Kovačević's application, regardless of the similar previous application before the Ombudsperson and the Ombudsperson's Report on that application.

3. *Lis alibi pendens* and Article VIII(2)(d) of the Agreement

45. The principle of *lis alibi pendens* generally prevents an applicant who has proceedings pending against a respondent Party in one court from having additional proceedings against the same respondent Party in another court on the same subject matter. This principle is reflected in Article VIII(2)(d) of the Agreement, which provides that "[t]he 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 decision of cases, or any other Commission established by the Annexes to the General Framework Agreement" (see paragraph

28 above).

46. One primary difference between Article VIII(2)(b), discussed above, and Article VIII(2)(d) is that Article VIII(2)(b) provides that the Chamber "shall not" consider applications falling within the scope of the article, while Article VIII(2)(d) provides that the Chamber "may reject or defer" consideration of applications falling within the scope of the article. Thus, on its wording Article VIII(2)(b) is mandatory, while Article VIII(2)(d) is discretionary.

47. In addition, different from Article VIII(2)(b), discussed above, Article VIII(2)(d) applies to matters currently pending before other international human rights bodies or other Commissions established by the Annexes to the General Framework Agreement. Such Commissions exist within Bosnia and Herzegovina and were created in the context of establishing an internal structure in Bosnia and Herzegovina for lasting peace. The said provision leaves the Chamber, being among those Commissions the body primarily entrusted with the interpretation and application of the provisions guaranteeing rights and freedoms referred to by Article II(2) of the Agreement, the discretion either a) to consider an application and apply the Agreement in a case simultaneously pending before it and before another Commission, or b) to refrain from doing so if it appears for whatever reason more appropriate that the other Commission should decide the case. Such interpretation of the Chamber's discretionary powers under Article VIII(2)(d) is reflected in Rule 47 *bis* of the Chamber's Rules of Procedure which specifically concerns applications pending before the Human Rights Ombudsperson for Bosnia and Herzegovina. Rule 47 *bis* provides that "[t]he Chamber may declare inadmissible, or suspend consideration of, any application concerning an allegation of a violation of human rights which is currently pending before the Human Rights Ombudsperson" (see paragraph 32 above).

48. For several reasons, Article VIII(2)(d) cannot apply to divest the Chamber of its power to decide the application in the present case. Firstly, as explained, the Chamber's jurisdiction to consider Ms. Kovačević's application was discretionary in accordance with Article VIII(2)(d) of the Agreement and Rule 47 *bis* of the Chamber's Rules of Procedure. Secondly, Article VIII(2)(d), by its express terms, applies only to matters "currently pending". In this case, the Ombudsperson adopted her Report on 17 December 1999, and on 24 April 2000, she referred the case to the High Representative and the President of the Federation of Bosnia and Herzegovina. As of these dates, the Ombudsperson satisfied her powers articulated in Article V of the Agreement with respect to this case. The case, therefore, could no longer be considered "currently pending" before the Ombudsperson at the time the Chamber transmitted it to the respondent Party on 21 February 2001 and later delivered its decision on admissibility and merits on 11 May 2001 (see also case no. CH/98/1245, *Slavnić*, decision on admissibility and merits of 1 November 1999, paragraph 54, Decisions August— December 1999). Thirdly, Article VIII(2)(d) refers to "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". However, the Agreement, which is Annex 6 to the General Framework Agreement, has created one Commission— the Human Rights Commission. This one "Commission shall consist of two parts: the Office of the Ombudsman and the Human Rights Chamber" (Article II(1) of the Agreement). Thus, the Ombudsperson cannot be considered "any other Commission". In addition, the Ombudsperson has not been vested with the power to adjudicate applications or decide cases. The Ombudsperson has been entrusted with the powers to investigate allegations of human rights violations, issue findings and conclusions, publish reports, forward reports containing conclusions and recommendations to the High Representative and the Presidency of the respondent Party, and refer, intervene in, and initiate applications before the Chamber (Article V of the Agreement).

49. Thus, neither the principle of *lis alibi pendens* nor Article VIII(2)(d) of the Agreement prevent the Chamber from considering Ms. Kovačević's application. The Chamber may exercise its discretion to consider and decide the application even though the Ombudsperson had earlier considered the same matter.

4. Conclusion as to jurisdiction

50. None of the grounds raised by the respondent Party to challenge the Chamber's jurisdiction to decide Ms. Kovačević's application in light of the Ombudsperson's earlier Report apply in this case. Regardless of whether the Ombudsperson has considered a particular human rights matter, the Chamber retains jurisdiction to consider any application concerning allegations of violations of human rights. While it is true that often the Chamber has not exercised its discretion to decide such human rights cases that have already been considered by the Ombudsperson, this practice does not affect the Chamber's jurisdiction to do so in an appropriate case. This is such an appropriate case.

51. It follows that on review of the decision, the Chamber affirms the Second Panel's conclusion as to jurisdiction.

C. Review of Decision in light of responsibility to disclose information

52. In its request for review, the respondent Party emphasizes that the applicant failed to disclose to the Chamber her earlier application to the Ombudsperson. The respondent Party characterizes such failure as "intentional" and argues that the applicant abused her right to appeal by intentionally keeping such information from the Chamber.

53. The Chamber notes that neither the applicant nor the respondent Party notified it of the earlier application to the Ombudsperson. Both the applicant and the respondent Party were aware of this information and both had numerous opportunities to provide it to the Chamber. In addition, both were under a continuing obligation to do so—the applicant pursuant to Rule 46 of the Chamber's Rules of Procedure and the respondent Party pursuant to its undertakings contained in Articles VI and VII of the General Framework Agreement. The Chamber is prepared to accept, on the assumption that both parties were acting in good faith and in the absence of any indications to the contrary, that the failure of both parties to provide this information to it earlier was an oversight by both parties. Indubitably such information could have been helpful to the Chamber, and the Chamber encourages the full disclosure of information in all applications before it. None the less, in the circumstances of this case, the Chamber finds no abuse by the applicant and no reason to overturn its decision on admissibility and merits on this basis.

54. Furthermore, the Chamber recalls that it could have rejected the respondent Party's request for review because the primary grounds upon which it is based (the applicant's earlier application to the Ombudsperson) could have and should have been raised by the respondent Party during the previous proceedings before the Second Panel. The Chamber transmitted the application to the respondent Party for its written observations on 21 February 2001, fourteen months after the Ombudsperson adopted its Report on 17 December 1999. At no time during the proceedings before the Chamber did the respondent Party raise *lis alibi pendens* or *res judicata* or any other factual or legal argument based upon the applicant's earlier application to the Ombudsperson. This fact alone would justify the Chamber rejecting consideration of this argument on review.

D. Review of Decision on the merits

55. In the decision on admissibility and merits, the Chamber found that the respondent Party violated the applicant's rights guaranteed by Article 8 of the Convention (right to respect for home) and Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions) due to its failure to issue a decision awarding the applicant repossession of her apartment in a timely manner, delayed enforcement of that eventual decision, and non-enforcement of a CRPC decision in the applicant's favour.

56. In its request for review, the respondent Party challenges the decision because the applicant was reinstated to her apartment on 4 December 2000, five months prior to delivery of the Chamber's decision finding the respondent Party responsible for violations of the Convention. The respondent Party contends that the Chamber should have struck out the application because the applicant was finally reinstated into possession of her apartment. The respondent Party highlights other decisions

by the Chamber in which it struck out applications in accordance with Article VIII(3) of the Agreement because the applicants had been reinstated into possession of their property.

57. Article VIII(3) of the Agreement provides that "[t]he Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that (a) the applicant does not intend to pursue his application; (b) the matter has been resolved; or (c) for any other reason established by the Chamber, it is no longer justified to continue the examination of the application; provided that such result is consistent with the objective of respect for human rights." Thus, Article VIII(3) offers the Chamber an opportunity to exercise its discretion to strike out some applications when the circumstances support such an action. However, the Chamber notes that it is not required to strike out applications under Article VIII(3).

58. The Chamber refers to its recent decision to strike out case no. CH/99/2336, *S.P. v. the Federation of Bosnia and Herzegovina*, adopted on 2 July 2001. In that decision, the Chamber interpreted the wording of Article VIII(3) of the Agreement and explained the factors it takes into consideration in deciding when it is appropriate to strike out an application. The Chamber noted that it may consider the admissibility and merits of a case, like *S.P.*, in which the applicant sought repossession of his property and was later reinstated to it, when "the question arises whether the time-limits and other procedural requirements laid down by domestic law have been complied with by the authorities" (*S.P.*, decision to strike out, paragraph 11). The Chamber stated that its "decision as to whether it should strike an application out, or in the alternative, proceed to a conclusion of the case, will depend on all the circumstances of the individual case" (*S.P.*, decision to strike out, paragraph 13). Factors to be taken into consideration in making this decision include "the length of time that has elapsed between the date on which the application was lodged and the date on which the applicant is reinstated", "the stage the proceedings have reached when the Chamber is informed of the applicant's reinstatement", "the length of time the applicant has had to wait for reinstatement" and "other exceptional suffering incurred by the applicant" (*S.P.*, decision to strike out, paragraphs 14-15). Moreover, "the effectiveness of domestic remedies may be questioned if the applicant has been reinstated through the intervention of" an international organisation (*S.P.*, decision to strike out, paragraph 15).

59. On review of the decision on admissibility and merits, the Chamber finds that the facts of Ms. Kovačević's case support the Second Panel's decision to proceed with the case and not to strike it out under Article VIII(3). The applicant lost possession of her apartment while she was caring for her elderly, sick mother, and she continued to serve as caretaker while she attempted to regain possession of her apartment. As a result of not having possession of her apartment, both the applicant and her mother were homeless and suffered significant hardship (*Kovačević*, decision on admissibility and merits, paragraphs 10 and 17).

60. In addition, the applicant waited a long time to be reinstated into possession of her apartment and sought the assistance of three separate authorities: the domestic authorities, CRPC, and the Ombudsperson. She filed her initial request with the competent domestic authority seeking repossession of her apartment on 28 May 1998 (*Kovačević*, decision on admissibility and merits, paragraph 12). After protracted procedures, delayed and complicated by several procedural errors committed by the domestic authorities, the applicant finally obtained a decision in her favour on 6 May 2000 allowing her to repossess her apartment. On 24 August 2000, the applicant requested that the domestic authorities enforce that decision (*Kovačević*, decision on admissibility and merits, paragraphs 12-16). Meanwhile, the applicant filed a claim with CRPC on 6 October 1998. On 28 January 1999, CRPC issued a decision in the applicant's favour allowing her to repossess her apartment. On 19 March 1999 and 15 December 1999, the applicant requested that the domestic authorities execute the CRPC decision (*Kovačević*, decision on admissibility and merits, paragraphs 18-19). Moreover, as explained above, on 28 January 1998, the applicant filed her application with the Ombudsperson. On 17 December 1999, the Ombudsperson issued its Report finding violations of the Convention and recommending that the applicant be reinstated into possession of her apartment within six weeks of receipt of the Report. On 24 April 2000, the Ombudsperson notified the High Representative of the failure of the respondent Party to comply with her recommendation. The Ombudsperson also referred the case to the President of the Federation of Bosnia and Herzegovina on the same day. The Chamber notes that the result of all of these procedures was that

the applicant was not reinstated into possession of her apartment until 4 December 2000. Thus, the obligation of the respondent Party to reinstate the applicant into possession of her apartment was established by its own authorities, by CRPC, and by the Ombudsperson, and yet the respondent Party still delayed, without any apparent justification, taking the necessary action to reinstate the applicant into possession of her apartment.

61. After reviewing the facts of the case, the Chamber finds an additional aggravating feature which increases the seriousness of the violations and supports the Second Panel's decision to proceed with the case: the failure of the competent organs of the respondent Party to comply with the recommendation of the Ombudsperson in a timely manner. Pursuant to Article V of the Agreement, the Ombudsperson "shall publish a report, which, in the event that a person or entity does not comply with his or her conclusions and recommendations, will be forwarded to the High Representative … as well as referred for further action to the Presidency of the appropriate Party." In this case, the respondent Party did not comply with the Ombudsperson's recommendations and reinstate the applicant into possession of her apartment until twelve months after the Ombudsperson's Report.

62. Accordingly, the Chamber affirms the Second Panel's decision on the merits, for all the reasons stated in the decision on admissibility and merits and as elaborated upon above.

E. Review of Compensation Award

63. Lastly, in its request for review the respondent Party challenges the award of compensation in light of the fact that the applicant was reinstated into possession of her apartment before delivery of the Chamber's decision and in light of the Ombudsperson's Report which contained no recommendation for the payment of compensation. The respondent Party fears that the Chamber's decision in this case will become precedent for orders for the payment of compensation in all cases in which the competent authorities of the respondent Party fail to reinstate applicants into possession of their property in a timely manner, regardless of their good faith efforts toward this result.

64. The Chamber notes that, as explained above, it has discretion to decide this case even though the Ombudsperson earlier adopted a Report containing recommendations on the same matter (see paragraphs 38-51 above). The Chamber further recalls its decision to strike out case no. CH/99/2336, *S.P. v. the Federation of Bosnia and Herzegovina*, adopted on 2 July 2001 (see paragraph 58 above). It is clear that the Chamber may exercise its discretion to proceed to decisions on the merits and award compensation in cases in which the applicant has been reinstated into possession of the property forming the basis of the application. In such cases, the Chamber proceeds to the merits on a case by case basis according to the facts of the individual case and the surrounding circumstances. In this case, the Chamber finds that the facts and circumstances of Ms. Kovačević's case support the decision and the award of compensation ordered by the Second Panel.

65. The Chamber recalls that in the course of these review proceedings, it learned that the respondent Party failed, without any apparent justification, to implement the recommendations of the Ombudsperson contained in her Report. This failure was in addition to the violations by the respondent Party found by the Second Panel in the decision on admissibility and merits: the failure of the competent organs of the respondent Party to issue a decision awarding the applicant repossession of her apartment in a timely manner, delayed enforcement of that eventual decision, and non-enforcement of a decision by CRPC in the applicant's favour. The additional failure of the respondent Party to implement the Ombudsperson's Report presents an aggravating feature which increases the seriousness of these violations and heightens the importance of the Chamber's decision finding such violations of the applicant's human rights and awarding her compensation (see *mutatis mutandis* Eur. Court HR, *Cruz Varas and others v. Sweden*, judgment of 20 March 1991, Series A no. 201, paragraph 103, stating, in relation to a failure to comply with a non-binding indication of a provisional measure, as follows: "Where the State decides not to comply with the indication it knowingly assumes the risk of being found in breach of Article 3 following adjudication of the dispute by the Convention organs. In the opinion of the Court where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 found by the Convention organs would

have to be seen as aggravated by the failure to comply with the indication."). Never the less, the Chamber decides not to award the applicant any additional compensation for the increasingly serious nature of the violations of her human rights.

66. It follows that the Chamber affirms the Second Panel's award of pecuniary and non-pecuniary compensation in the case, for all the reasons stated in the decision on admissibility and merits and as elaborated upon above.

IX. CONCLUSION

67. For the above reasons, the Chamber decides,

1. unanimously, to affirm the Second Panel's conclusion as to jurisdiction contained in the previous decision in this case on admissibility and merits adopted on 7 May 2001 and delivered on 11 May 2001;

2. unanimously, to affirm the Second Panel's decision on the merits contained in the previous decision in this case on admissibility and merits adopted on 7 May 2001 and delivered on 11 May 2001;

3. unanimously, to affirm the Second Panel's award of pecuniary and non-pecuniary compensation contained in the previous decision in this case on admissibility and merits adopted on 7 May 2001 and delivered on 11 May 2001; and

4. unanimously, that this decision on review becomes final and binding, within the meaning of Rule 66 of the Chamber's Rules of Procedures, upon its delivery on 12 October 2001, and accordingly, the time periods for compliance with conclusions nos. 6 through 9 contained in the previous decision in this case on admissibility and merits adopted on 7 May 2001 and delivered on 11 May 2001 shall run from that date.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Concurring opinion of Mr. Manfred Nowak

Annex A Decision on admissibility and merits delivered on 11 May 2001
Annex B Decision on request for review of 6 July 2001

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mr. Manfred Nowak.

CONCURRING OPINION OF MR. MANFRED NOWAK

1. I fully agree with the substance of this decision on review, although I am one of those members who would have preferred to award the applicant additional compensation in view of the additional failure of the respondent Party to implement the Ombusperson's Report (see paragraph 65 above).

2. The reason for my concurring opinion is, however, of a more principled and procedural nature. In my opinion, the Chamber should have issued a new decision on the merits of the case rather than simply affirming the Second Panel's decision on admissibility and merits (see paragraph 67 above). My reasoning is based on Article X of the Agreement, the Chamber's Rules of Procedure, and the corresponding jurisprudence of the European Court of Human Rights.

3. According to Article X(2) of the Agreement, the Chamber shall normally decide cases in Panels of seven members. Upon the motion of a party to the case or the Ombudsperson, the Plenary Chamber may, however, decide to review the decision of a Panel. In its Rules of Procedure (Rules 63 to 66), the Chamber decided to follow the model of the 11th Additional Protocol to the European Convention on Human Rights and to restrict the review proceedings only to exceptional cases. According to Rule 64(2) of the Chamber's Rules of Procedure, which corresponds to Article 43(2) of the Convention, the Plenary Chamber shall only accept a request for review if the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance, and if the whole circumstances justify reviewing the decision. As a consequence, most requests for review have, so far, been rejected by the Chamber. Such is also the case with the respective practice of the Panel of the Grand Chamber, entrusted by Article 43(2) of the Convention to accept or reject a request to refer a case to the Grand Chamber.

4. Until now, the Grand Chamber of the European Court of Human Rights has only delivered one judgment on review (Eur. Court HR, *K. and T. v. Finland*, judgment of 12 July 2001), and the Plenary Chamber only three decisions on review (case no. CH/98/1366, *V.C.*, decision on review of 8 November 2000; case no. CH/98/1062, *Islamic Community of Bosnia and Herzegovina (Zvornik Mosques case)*, decision on review of 4 September 2001; and the present decision). The practice of the two courts seems to differ considerably, however.

5. The Grand Chamber of the European Court of Human Rights in *K. and T. v. Finland* (judgment of 12 July 2001, paragraphs 140-141) deliberated on the nature and scope of its judgments on review as follows:

> "140. The Court would first note that all three paragraphs of Article 43 use the term "the case" *("l'affaire")* for describing the matter which is being brought before the Grand Chamber. In particular, paragraph 3 of Article 43 provides that the Grand Chamber is to "decide *the case*" - that is the whole case and not simply the "serious question" or "serious issue" mentioned in paragraph 2 - "by means of a judgment". The wording of Article 43 makes it clear that, whilst the existence of "a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance" (paragraph 2) is a prerequisite for acceptance of a party's request, the consequence of acceptance is that the whole "case" is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). The same term "the case" (*"l'affaire"*) is also used in Article 44 §2 which defines the conditions under which the judgments of a Chamber become final. If a request by a party for referral under Article 43 has been accepted, Article 44 can only be understood as meaning that the entire judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber envisaged by Article 43 § 3. This being so, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its

judgment, and not only the serious "question" or "issue" at the basis of the referral. In sum, there is no basis for a merely partial referral of the case to the Grand Chamber.

"141. The Court would add, for the sake of clarification, that the "case" referred to the Grand Chamber is the application in so far as it has been declared admissible (see, *mutatis mutandis*, the *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 157). This does not mean, however, that the Grand Chamber may not also examine, where appropriate, issues relating to the admissibility of the application in the same manner as this is possible in normal Chamber proceedings, for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to "reject any application which it considers inadmissible, at any stage of the proceedings"), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage."

6. The Plenary Chamber, without explicitly stating any reasons, developed a different practice. In the three decisions on review mentioned above, it confined its review to certain aspects of the cases, affirmed certain conclusions of the respective Panels, corrected others, and added its own partial conclusions. In my opinion, this practice does not seem to be in line with Rule 65(3) which is based on Article 43(3) of the Convention and states: "The Plenary Chamber shall decide any case in which it accepts requests for review. The provisions of Rules 55-61 shall apply *mutatis mutandis"*. These rules refer to the decisions on the merits. In other words: If the Plenary Chamber accepts a request for review, the decision of the respective Panel is assumed to be set aside, and the merits of the case (including the remedies) shall be decided anew by the Plenary Chamber. This interpretation is emphasised by Rule 66(2) of the Chamber's Rules of Procedure, which corresponds to Article 44(2) of the European Convention, and which specifies when decisions of the Panels become final and binding, that is, when the parties declare that they will not request review, when the time limit of one month has expired without any request for review, and when a request for review has been refused. For good reasons, there is no provision to the extent that a Panel's decision becomes final and binding when it has been "affirmed" by the Plenary Chamber. Since the Panel's decision has been set aside upon accepting the request for review, the Plenary Chamber can neither "affirm" nor correct it, but can, in my opinion, only decide itself on the merits of the case and order respective remedies. As a consequence, the formulation of the conclusions in paragraph 67 of the present decision, which suggest that the decision on admissibility and merits of the Second Panel delivered on 11 May 2001 suddenly reappear again and become final and binding on 12 October 2001 together with this decision on review, is difficult to reconcile with the Chamber's Rules of Procedure.

(signed)
Manfred Nowak