



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 7 February 2003)

Case no. CH/01/7257

Rade BOROTA

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 4 February 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

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

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

I. INTRODUCTION

1. This case concerns the attempt of the applicant to prevent his eviction from the property he is living in and whose ownership is registered in his name in the Land Book records. In August 1995 the applicant, who is of Serb origin, concluded an exchange contract whereby he exchanged his real property situated in Croatia for a real property in Republika Srpska, Laktaši, Trn, co-owned by four brothers of the T. family, who are of Croat origin. The applicant currently lives in one part of the exchanged property, consisting of one house previously owned by two of the brothers (Z.T. and I.T.). Subsequently, the CRPC issued two decisions confirming that two of the brothers Z.T. and I.T. were "bona fide possessors" of two parts of the exchanged property located in Laktaši. In November 2000 and January 2001 the Ministry for Refugees and Displaced Persons, Department in Laktaši, issued two conclusions on enforcement for the two CRPC decisions. The applicant was given 90 days to vacate the property.

2. The applicant then initiated proceedings before the Court of First Instance in Banja Luka seeking confirmation of the validity of the contract on exchange. At the same time, he requested the Court to issue provisional measures to suspend the enforcement of the CRPC decisions. The Court has still not decided on this request.

3. The application raises issues with regard to the applicant's right to respect for his home, his right to a fair hearing and with regard to the right to an effective domestic remedy, under Article 8, 6 and 13 of the European Convention on Human Rights respectively. It also raises issues with regard to Article 1 of Protocol No. 1 of the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was received and registered on 14 August 2001. The applicant requested that the Chamber order the respondent Party, as a provisional measure, to halt his eviction from the real property he occupies.

5. On 6 September 2001 the First Panel issued an order for provisional measures, ordering the respondent Party to take all necessary steps to prevent the applicant's eviction for a period of two months.

6. On 11 September 2001 the case was transmitted to the respondent Party for its observations on admissibility and merits.

7. The respondent Party's observations were received on 5 October 2001, and were transmitted to the applicant for further observations. The applicant did not respond.

8. The First Panel deliberated on the case on 11 January 2002 and 4 November 2002. On the latter date it decided to relinquish jurisdiction over the case in favor of the plenary Chamber in accordance with Rule 24(b).

9. The plenary Chamber deliberated on the admissibility and merits of the case on 6 November and decided not to renew the order for provisional measures of 6 September 2001. It further deliberated on the admissibility and merits of the case on 7 December 2002 and 7 January and 4 February 2003. On the latter date it adopted the present decision.

III. FACTS

10. On 14 August 1995, the applicant, who is of Serb origin, concluded an exchange contract whereby he exchanged his privately owned property situated in Croatia for a private property in Republika Srpska, Laktaši, Trn, co-owned by four brothers of the T. family, who are of Croat origin. He lives in one part of the exchanged property, consisting in one house previously owned by two of the brothers (Z.T. and I.T.).

11. On 23 July 1996, the applicant registered his ownership over the exchanged real property in the public book for Cadaster Municipality Trn, and as of today his name still appears in the land books.
12. On 4 March 1999 and 13 June 2000 the Commission for Real Property Claims of Refugees and Displaced Persons (CRPC) issued two decisions confirming that the two brothers Z.T. and I.T. were “bona fide possessors” of two parts of the exchanged property located in Laktaši.
13. The applicant lodged a request for reconsideration of the CRPC decision of 4 March 1999. On 12 June 2001 the CRPC rejected the applicant’s request for reconsideration.
14. On 5 September 2000 the Ministry for Refugees and Displaced Persons issued three conclusions suspending the administrative procedure for repossession initiated by three of the brothers (Z.T., I.T. and T.T.). The Ministry referred them to initiate a procedure before the First Instance Court in Banja Luka on the ground that there was an exchange contract concluded on 14 August 1995 and that the applicant registered himself in the land books as the owner of the disputed real property in Laktaši. Apparently the brothers did not follow the Ministry’s instruction.
15. On 23 November 2000 and 23 January 2001 the Ministry for Refugees and Displaced Persons, Department in Laktaši, issued two conclusions on enforcement for the two CRPC decisions of 4 March 1999 and 13 June 2000. The applicant was given 90 days to vacate the property and his entitlement to alternative accommodation was recognised. However, no eviction was scheduled.
16. The applicant appealed against both of these conclusions on 8 December 2000 and 6 February 2001 respectively.
17. On 23 January 2001 and 7 February 2001 the Ministry issued two conclusions referring the applicant to initiate civil proceedings before the first instance court to prove that Z.T. and I.T. legally and voluntarily transmitted their rights to the applicant.
18. On 15 February 2001 the applicant initiated proceedings before the Court of First Instance in Banja Luka seeking confirmation of the validity of the contract on exchange. At the same time he requested the Court to issue provisional measures to suspend the enforcement of the CRPC decisions of 4 March 1999 and 13 June 2000. It appears that the court has still not decided on this request.
19. According to the applicant’s undisputed statement, the T. brothers are in possession of the real property in Croatia, and have acquired and duly registered the ownership of it as well.

IV. RELEVANT LEGAL PROVISIONS

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

20. Annex 7 to the General Framework Agreement, entitled Agreement on Refugees and Displaced Persons, deals with refugees and displaced persons. In accordance with Article VII of Annex 7 an Independent Commission for Displaced Persons and Refugees, later renamed Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), was established.
21. The CRPC shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of that property (Article XI). The CRPC shall determine the lawful owner of the property according to Article XII(1). The decisions of CRPC are final and any title, deed, mortgage, or other legal instrument created or awarded by the CRPC shall be recognised as lawful throughout Bosnia and Herzegovina (Article XII(7)).

B. The Law on Implementation of the Decisions of the Commission For Real Property Claims of Displaced Persons and Refugees of the Republika Srpska. (Law imposed by the High Representative on 27 October 1999 (Official Gazette of RS nos. 31/99, 2/00, 39/00 and 65/01)).

22. Article 13 reads:

“The competent court shall determine whether the transfer of rights to the appellant was conducted voluntarily and in accordance with the law.

If the transfer of rights was conducted between 1 April 1992 and 14 December 1995, and its validity is disputed by the respondent, the burden of proof shall lie on the party claiming to have acquired rights to the property under the transaction to establish that the transaction was conducted voluntarily and in accordance with the law.

If the validity of the transfer has been determined in previous proceedings that took place prior to the entry into force of this Law, the decision taken in the previous proceedings shall be null and void.

The court may make whatever orders are necessary to give effect to its decision, including orders setting aside legal transactions, orders for making or erasing entries in the appropriate public books/registers, and orders lifting any order for suspension of the administrative proceedings.

The relevant parties to the appeal shall notify the competent administrative body of the court's decision.

The responsible administrative body shall resume enforcement proceedings as required, or discontinue proceedings in accordance with the court's decisions.”

23. On 4 December 2001, the High Representative imposed the Decision on the Law on Amendments to the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, inserting *inter alia* a new Article 12a. It entered in force eight days after the publication in the OG RS on 21 December 2001 (OG RS 65/01).

24. The new Article 12 a, relevant in the present case, reads:

“The responsible administrative body shall direct the appellant to initiate proceedings before the competent court within 30 days to prove that the right holder named in the Commission's decision voluntarily and lawfully transferred his/her rights to the appellant since the date referred to in the dispositive of the Commission's decision.

The competent court may make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court's decision where the appellant can show evidence of a written contract on the transfer of rights in accordance with domestic law and irreparable damage to the enforcer if the enforcement proceedings continued.”

C. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska, Nos. 38/98, 41/98, 12/99, 31/99 and 38/99, with incorporated amendments proclaimed by the High Representative Decision of the 4 December 2001 and published in the Official Gazette of the Republika Srpska, No. 65/01 of the 21 December 2001).

25. Article 25 provides:

“The provisions of this Law shall also apply to the abandoned real property, the ownership of which has been acquired after 30 April 1991 under any title on sale of real property (contracts on exchange, purchase, gift, etc.)

In case of a dispute as to the lawfulness of the transferred real property right, the competent authority shall refer the matter to the competent court according to the provision of the Law on General Administrative Procedures regulating preliminary issues, in order to rule on the allegation.”

26. Article 2a, which was incorporated by the December 2001 amendments, provides:

“The provisions of this Law shall also apply to contracts on exchange of apartments, where the exchange took place between 1 April 1992 and 19 December 1998 in accordance with the Law on Housing Relations (RS OG 19/93, 22/93, 12/99 and 31/99) (hereinafter “ZOSO”).

In the event that each party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority shall process the claims according to this Law. Notwithstanding, the competent authority in each municipality shall deem the exchange valid, if both parties give a statement reconfirming the contract on exchange, and shall revalidate the contracts on use pursuant to Article 27 paragraph 2, point 4 of this Law.

In the event that neither party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority in each municipality shall revalidate the contracts on use pursuant to Article 27 paragraph 2, point 4 of this Law.

In the event that only one party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority shall inform in writing the corresponding competent authority in the municipality where the exchanged apartment is located of the claim. The receiving competent authority shall then deem a claim to have been filed, before the expiry of the deadline set out in Article 16, for the exchanged apartment within its jurisdiction and process the claim according to the law.

In case of a dispute as to the validity of the contract on exchange, the competent authority shall suspend proceedings and shall refer the parties to the competent court according to the provision of the Law on General Administrative Procedures (SFRJ OG 47/86; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, RS Official Gazette, No. 21/92) regulating preliminary issues, in order to rule on the allegation. Notwithstanding the provisions of the Law on Civil Procedures (SFRJ OG 4/77; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, RS Official Gazette, No. 21/92), the burden of proof shall lie upon the party claiming to have acquired rights to the apartment through the contract on exchange to establish that the transaction was conducted voluntarily and in accordance with the law. Where one of the exchanged apartments is located in the territory of another republic of the former SFRY, the burden of proof shall lie upon the party claiming that the contract on exchange was not conducted voluntarily and in accordance with the law to demonstrate that the status of the parties prior to the exchange shall be restored.”

V. COMPLAINTS

27. The applicant alleges a violation of his rights as protected by Article 6 paragraph 1 in that the Court’s failure to suspend the enforcement proceedings while the dispute is pending before it violates the principle of equality of arms. The applicant also alleges that, for the same reason, his rights as protected by Article 13 in conjunction with Article 6 paragraph 1 of the Convention have been violated. The applicant further claims violations of his rights protected by Article 8 and Article 1 of Protocol No. 1 to the Convention. Finally, the applicant complains of discrimination against him as a refugee from Croatia, in that persons displaced during the war from Bosnia and Herzegovina to Croatia enjoy a right to return and repossess property, while refugees from Croatia are not able to repossess their pre-war property.

VI. SUBMISSIONS OF THE PARTIES

A. The Republika Srpska

1. As to the exchange of properties

28. The respondent Party states that it does not challenge the allegation that the applicant is a refugee from the Republic of Croatia and that on 14 August 1995 he concluded a contract on exchange by which he exchanged his real property situated in Vrgin Most (Republic of Croatia) for the real property of the T. family situated in Trn, Municipality Laktaši. The contract was verified at the Court of First Instance in Banja Luka on 15 August 1995 and since that date the applicant has been in possession of the exchanged real property. The respondent Party further states that it recognizes both “the will of parties to conclude the contract” and the applicant’s registration of ownership in the public book for Cadaster Municipality Trn of 23 July 1996.

2. As to the requirement to exhaust domestic remedies

29. The respondent Party considers the application inadmissible, since the application does not fulfill criteria of admissibility envisaged by Article 8 paragraph 2(a) of the Agreement. It points out that before addressing the Chamber, the applicant should have exhausted domestic remedies available to him, i. e. he should have shown that domestic remedies have been exhausted and that the application has been filed within six months after the date of issuance of final decision.

30. The respondent Party recalls that the applicant has lodged an appeal against the conclusion on enforcement and that the administrative housing body in Laktaši, deciding upon the appeal, as provided for by Article 12 of the Law on Implementation of CRPC Decisions, instructed the applicant to initiate proceedings before the competent court within 30 days in order to prove that the holders of rights set out in CRPC Decision transferred their rights to him voluntarily and lawfully after the date mentioned in the dispositive of the CRPC decision. The respondent Party further points out that on 15 February 2001, the applicant also initiated proceedings before the Court of First Instance in Banja Luka, requesting to have established that the contract on exchange is legally valid. The proceedings upon the lawsuit before the Court of First Instance in Banja Luka have not been concluded. Finally, the respondent Party observes that in case that the applicant is not satisfied with the decision of the Court of First Instance, he may file an appeal as ordinary legal remedy according to Article 348 of the Law on Civil Proceedings.

31. The respondent Party submits that, instead of waiting for his claims to be decided upon before the judicial bodies of the respondent Party and thus resolving the dispute with a final decision, the applicant directly addressed the Chamber on 14 June 2001, thus showing his intention not to exhaust the domestic remedies. Therefore, the respondent Party concludes that domestic remedies have not been exhausted and the application does not meet the admissibility criteria related to obligation to exhaust the domestic remedies (Article VIII(2)(a) of the Agreement). Also, the proceedings in this case have not been concluded yet and, since the final decision has not been issued, the second condition in the same paragraph has not been met. The respondent Party therefore suggests to the Chamber to declare the application inadmissible.

3. As to the merits

32. On the merits, the respondent Party considers that the application is ill-founded. As to the alleged violation of Article 6 of the Convention, it states that the competent administrative body could not have violated Article 6 by its actions. Moreover, since proceedings have just been initiated before the courts and, considering the complexity of the case, no decision could have been issued within 5 months after the date of request and therefore, there cannot be any issue as to the length of proceedings. Further, due to the fact that the court has not issued any decision upon the applicant’s request, the applicant could not have used the right to appeal. The respondent Party thus concludes that the applicant’s allegation that his right to a fair trial has been violated is unsubstantiated and ill-founded.

33. As to the applicant's claim under Article 13 of the Convention, the respondent Party submits that he has not exhausted all available ordinary remedies and, accordingly, there is no evidence that, if exhausted, they would be ineffective.

34. The respondent Party further considers that Article 14 of the Convention could not have been violated. It submits that there is no evidence of any concrete action taken indicating a discriminatory conduct of any of the Respondent Party's bodies. The applicant has obtained the ownership and possession of the property in question on the grounds of the contract on exchange and by registering in the land books. His right has been challenged by the CRPC decisions and by the requests of I.T and Z.T. to have those decisions enforced and to be entered into possession of the property. The competent administrative body of the respondent Party has passed conclusions on enforcement of CRPC decisions in accordance with the law and its actions cannot be described as discriminatory toward the applicant.

35. The respondent Party also submits that there has been no violation of either Article 8 of the Convention or Article 1 of Protocol No. 1 to the Convention. It considers that the competent administrative body has acted within the limits of its competence as set out in the Law on Implementation of CRPC Decisions and such action cannot be qualified as violation of the right to home or to peaceful enjoyment of possessions. In fact, the Court of First Instance in Banja Luka shall decide upon the applicant's request to establish whether the contract on exchange of 14 August 1995, is legally valid and the effective and final decision of the court shall be binding on the parties in the dispute as well as on the respondent Party.

36. The respondent Party finally suggests to the Chamber, to declare the application inadmissible, and in case it goes into the merits, to reject it as ill-founded.

B. The applicant

37. The applicant claims that the brothers are in possession of the real property in Croatia, and that they have acquired and duly registered the ownership of it as well. The Chamber has requested the applicant to provide it with information and evidence regarding the land-book registration (in Croatia) of the T. brothers. However, the applicant has not provided the requested information. The applicant points out that he cannot request the cancellation of the exchange contract in Croatia because the time limit of three years has passed since the contract was signed. The applicant submits that if the CRPC decision is enforced the other contracting party will be in possession of both properties and he will be left with none.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Exhaustion of domestic remedies

38. 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.

39. The respondent Party submits that the application should be rejected since the applicant failed to exhaust available domestic remedies. The respondent Party argues that the applicant should have awaited the conclusion of the court proceedings concerning the validity of the exchange contract (see paragraphs 29 to 31 above).

40. The Chamber finds it useful to distinguish between the exhaustion of available remedies against the threat of eviction (right to respect for the applicant's home under Article 8 of the Convention) and remedies against the deprivation of ownership over the real property which the applicant obtained by the exchange contract (right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention).

a) Remedies against the alleged violation of the applicant's right to respect for his home

41. The Chamber notes that on 23 November 2000 and 23 January 2001 the Ministry for Refugees and Displaced Persons, Department in Laktaši issued two conclusions on enforcement for the two CRPC decisions of 4 March 1999 and 13 June 2000. The applicant was given 90 days to vacate the real property.

42. The Chamber further notes that on 15 February 2001 the applicant initiated proceedings before the Court of First Instance in Banja Luka seeking confirmation of the validity of the contract on exchange. At the same time he requested the Court to issue provisional measures to suspend the enforcement of the CRPC decisions of 4 March 1999 and 13 June 2000. Under Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions the relevant domestic court has the power to make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court's decision. It appears that, in the present case, the court has still not decided on the applicant's request and the conclusions on enforcement issued by the Ministry for Refugees and Displaced Persons, Department in Laktaši have not been suspended and are forcibly executable at any time since the 90 days deadline for voluntary vacation has already passed.

43. The Chamber thus is of the opinion that the applicant made use of the only remedy available to him to prevent his eviction from his home, the request provided in Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions. This remedy has proved ineffective due to the failure of the Court to decide on the applicant's request.

b) Remedies against the alleged violation of Article 1 of Protocol No. 1 to the Convention

44. As to the applicant's complaint of a violation of his rights as protected by Article 1 of Protocol No. 1, the Chamber notes that the applicant's complaint is premature as the proceedings concerning the validity of the exchange contract (and thus the applicant's rights over the real estate he obtained by that contract) are still pending before the First Instance Court in Banja Luka. The Chamber also notes that the applicant's pre-war property is located in Croatia. The Republic of Croatia does not have property legislation favoring return to the pre-war status comparable to that applying in Bosnia and Herzegovina. Therefore, if the exchange contract is finally found to have been invalid *ab initio*, there is a concrete risk that the applicant will not be able to repossess his pre-war property in Croatia. However, the Chamber observes that the domestic courts are under an obligation to take this risk into account when deciding on the validity of the exchange contract, by considering the rights of the parties also in the light of Article 1 of Protocol No. 1 to the Convention. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare the application inadmissible in this part.

2. Admissibility with regard to the alleged violations of Articles 6 and 13

45. The applicant's complaints of violations of Articles 6 and 13 appear to refer to the failure of the First Instance Court to decide on his request for an order that would suspend the administrative eviction proceedings until the court case on the validity of the exchange is decided. The applicant alleges that the harm he suffers by this inaction of the Court is compounded by the fact that he has no prospect of regaining possession of his pre-war property in Croatia. No grounds for declaring this complaint inadmissible having been argued, the Chamber decides to declare the application admissible also in this part.

3. Admissibility with regard to the complaint of discrimination

46. The applicant complains that the cancellation of the exchange contract and his eviction from the property in Laktaši discriminate against him as a refugee from Croatia, because he will not be able to repossess his pre-war property. The applicant thus argues that there is added hardship involved for the evictee in the enforcement of CRPC decisions against persons who during the armed conflict in the former Yugoslavia obtained property in Bosnia and Herzegovina by exchanging it against their property in another Republic and that this added hardship is discriminatory. The

Chamber notes that the applicant's position under Republika Srpska law is the same as that of other persons affected by the enforcement of a CRPC decision concerning property they obtained under an exchange contract. The Law on Implementation of CRPC Decisions provides for no difference in treatment between war-time exchange contracts concerning properties within Bosnia and Herzegovina and contracts where one property is outside Bosnia and Herzegovina. The difference lies between the legislation of the Republika Srpska, favoring the repossession of pre-war property, and the legislation of Croatia, that does not contain analogous provisions. The Republika Srpska as respondent Party cannot be held responsible for this "differential treatment".

47. The Chamber finds, therefore, that this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application inadmissible in this part.

4. Conclusion as to admissibility

48. The Chamber finds that no other ground for declaring the case inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to Articles 6, 8 and 13 of the Convention. The Chamber declares the remainder of the application inadmissible.

B. Merits

49. 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 recognized human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 8 of the Convention

50. Article 8 of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

51. It is undisputed that the applicant has been living on the property in Laktaši since August 1995. It has thus become the applicant's home for the purposes of Article 8 of the Convention.

(a) Whether the applicant is under an imminent threat of eviction

52. The Chamber recalls that on 23 November 2000 and 23 January 2001 the Ministry for Refugees and Displaced Persons, Department in Laktaši issued two conclusions on enforcement for the two CRPC decisions of 4 March 1999 and 13 June 2000. The applicant was given 90 days to vacate the real property and this deadline has already passed. The Chamber further notes that on 15 February 2001 the applicant requested the Court of First Instance in Banja Luka to issue provisional measures to suspend the enforcement of the CRPC decisions of 4 March 1999 and 13 June 2000. However, notwithstanding Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions, whereby the relevant domestic court has the power to make a specific order to suspend the enforcement proceedings before the responsible administrative body, the court has still not decided on the applicant's request and the conclusions on enforcement issued by the Ministry for Refugees and Displaced Persons, Department in Laktaši, have not been suspended. These conclusions on enforcement are forcibly executable at any time since the 90 days deadline for voluntary vacation has already passed.

53. The Chamber thus concludes that there is an ongoing threat of eviction resulting in a significant interference with the applicant's right to respect for his home.

54. The Chamber recalls that the conditions upon which a state may interfere with the right to respect for one's home are set out in the second paragraph of Article 8. It must accordingly be determined whether the interference in question satisfied the conditions in paragraph 2, that is to say was "in accordance with the law", in the interests of one or more of the legitimate aims listed, and "necessary in a democratic society" for achieving them. Further, a proper balance needs to be achieved between the legitimate aim pursued and the means employed.

(b) Is this threat of eviction "in accordance with the law"?

55. The Chamber observes that domestic legality is a necessary condition for the justification of an interference with a right protected under Article 8 of the Convention and that in order to be "in accordance with law" the interference complained of must have a legal basis and the law in question must contain a measure of protection against arbitrariness by public authorities. The European Court of Human Rights has considered that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law.

56. Under Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions the relevant domestic court has the power to make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court's decision. The applicant must fulfil two conditions to be eligible for such a suspension: firstly, he/she must show evidence of a written contract on transfer of rights in accordance with domestic law; secondly, there has to be irreparable damage to the enforcee. The Chamber notes that under Article 12a the Court is given discretion as to whether to order suspension. There is no provision requiring or allowing the administrative body in charge of the enforcement proceedings to suspend the enforcement in the absence of an order by the competent court.

57. The Chamber concludes that the enforcement proceedings against the applicant are in accordance with the law.

c) Is the interference 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.

58. The Chamber notes that the right of displaced persons and refugees to repossess and return to their pre-war property is one of the central objectives of the Dayton Peace Agreement. It further notes that the Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property is based on the recognition that the failure to return property to rightful owners or occupancy right holders represents a violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR). The Law acknowledges that return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else.

59. On these grounds, the Chamber finds that the recognition of the pre-war owners' right to repossess the property and the consequential order to the applicant to vacate it are supported by a legitimate aim, i.e. "the protection of the rights and freedoms of others".

d) Is there a proper balance between the legitimate aim pursued and the means employed?

60. Thus, the question before the Chamber is whether the interference with the applicant's rights is "necessary in a democratic society", in other words, whether the respondent Party strikes the right balance between the "protection of the rights and freedoms of others", in this case Z.T. and I.T., and the applicant's right to respect for his home by ordering the applicant to vacate the house, and

evicting him in case of non-compliance, before the dispute about the validity of the contract pending before the competent court is solved.

61. The Chamber notes that Article 12a of the Republika Srpska Law on Implementation of CRPC decisions, in allocating the burden of proof as to the voluntariness of the exchange contract on the applicant, contains a presumption that war-time exchanges were concluded under duress.

62. The Chamber also notes that the Constitutional Court of Bosnia and Herzegovina in its decision in case No. U 15/99 declared null and void an exchange contract because of duress, as evidenced by the general war situation. There was no evidence that the appellant had been individually targeted and forced to conclude the contract. However, the Court stated that: “in the context of the General Framework Agreement, the objective of eliminating the effects and traces of ethnic cleansing is considered to be of such primary importance as to affect in some cases the validity of legal transactions which would otherwise have satisfied the requirements under private law”. The rationale was found in Annex 7 of the Dayton Peace Agreement, and the important aim of “the return of refugees and displaced persons to their places of origin and to their previous homes”. The Constitutional Court also based its decision on the general presumption that, during the war period, exchange contracts “were concluded under the influence of the individuals’ vulnerable position as members of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina.” The Constitutional Court further considered the difference in size between the two properties and their market value as evidence to support its findings.

63. The Chamber accepts that there is a general presumption of lack of voluntariness and freedom of choice for transactions concluded during the critical period. However, this presumption is rebuttable and still requires a case by case approach in establishing duress. It is exactly because there is a presumption of duress and not a cancellation of all contracts *ex lege* that court proceedings are needed. Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina indeed suggests that exchange contract cases should be dealt with on an individual basis, assessing the particular circumstances of each case. For this task Annex 7 even provides for the establishment of a body, the CRPC, that among other tasks is mandated to decide on individual claims “where the property has not voluntarily been sold or otherwise transferred since April 1, 1992 (...)” (Article XI of Annex 7). Further, the CRPC “shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.” (Article XII Annex 7). CRPC, however, has chosen to delegate determination of the validity of post 1 April 1992 transfers to the local courts. This choice has been ratified by the Law on Implementation of CRPC Decisions.

(i) *The failure to decide on the applicant’s request for provisional measures*

64. This Law on Implementation of CRPC Decisions in Article 12a contains a mechanism that allows the court seized with the dispute about the validity of the exchange contract to decide whether, in the specific case before it, the general aim of expeditious repossession of pre-war homes should prevail over the rights asserted on the basis of the exchange contract or not. Article 12a, paragraph 2 reads: “The competent court may make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court’s decision where the appellant can show evidence of a written contract on the transfer of rights in accordance with domestic law and irreparable damage to the enforcer if the enforcement proceedings continued.”

65. The law appears to envision that the competent court, once it has been requested to issue an order provisionally halting the enforcement of the administrative repossession proceedings, will make a decision on the basis of the case file before it. The court will examine the *prima facie* strength of the arguments made and evidence presented by the two parties, the one asserting the validity of the exchange contract and the one claiming that it was concluded under duress. In this respect the court will require the side asserting the validity of the exchange to, as a minimum, “show evidence of a written contract” on the exchange. The court will then take into account whether the party seeking suspension of the eviction can make credible that the deprivation of the possession of the home until the dispute about the contract is solved will cause irreparable harm to it. The

Chamber is of the opinion that the mechanism envisaged by the law may be seen to strike a fair balance between the two parties to the dispute.

66. However, in the case before the Chamber the First Instance Court in Banja Luka has failed until today to decide on the, manifestly urgent, request for provisional measures by the applicant. As a result, the balance crafted by the legislator is overthrown and the applicant *de facto* deprived of all procedural safeguards. Under these circumstances, the interference with the applicant's right to respect for his home does not comply with the requirement that it be "necessary in a democratic society for the protection of the rights of others", in this case of the pre-war owners Z.T. and I.T..

(ii) *The differences between the rules governing suspension of enforcement under the Law on Implementation of CRPC Decisions and the Law on Cessation of the Law on Use of Abandoned Property*

67. The Chamber further notes that while the suspension of enforcement is mandatory under Article 2a of the Law on Cessation of the Law on the Use of Abandoned Property, and - through the relevant provisions on preliminary issues of the Law on Administrative Procedure - the same is true for Article 25, suspension is subject to the fulfillment of certain conditions and to the court's discretion under Article 12a of the Law on Implementation of CRPC Decisions.

68. The Chamber notes that CRPC decisions only determine in a final and binding manner who was the owner, occupancy right holder or otherwise bona fide possessor of a piece of property as of 1 April 1992, they thus do not reflect any change of title, valid or invalid, voluntary or under duress, that may have taken place after that date. CRPC decisions are limited to confirming the status as of April 1992. The Chamber further notes that in exchange contract cases (and other cases of transfer of title to a property after 1 April 1992) both parties agree as to whom is the pre-war possessor. Indeed, these contracts are characterized by the fact that there is no dispute as to who is the pre-war owner or occupancy right holder. Necessarily, the party opposing repossession recognizes the pre-war rights of the party seeking repossession, otherwise it could not claim to have validly received title to the property by exchange contract (*resoluto iure dantis, resolvitur et ius accipientis*).

69. For the reasons explained, the Chamber is of the opinion that the differences between exchange contract cases in which the person challenging the validity of the exchange contract holds a CRPC decision and those in which he/she doesn't, have no real justification. This distinction, however, has considerable impact on the procedural safeguards afforded to the party seeking not to be evicted from the exchanged property. In the case before the Chamber, the fact that the brothers Z.T. and I.T. have requested and obtained recognition of their undisputed pre-war ownership before CRPC and not before the Banja Luka authorities, has a strongly adverse impact on the rights of the applicant. Also in this respect, the interference with the applicant's right to respect for his home does not comply with the requirement that it be "necessary in a democratic society for the protection of the rights of others", in this case of the pre-war owners Z.T. and I.T..

(c) Conclusion as to Article 8

70. The Chamber finds that the continuation of the enforcement proceedings against the applicant, aiming at evicting him from the house and property in Laktaši, Trn, without any consideration of the court dispute initiated by the applicant to show the validity of the contract in his case; the failure of the First Instance Court to decide on the applicant's request for suspension of proceedings; the unjustified differential treatment between exchange contract cases in which the person challenging the validity of the exchange contract holds a CRPC decision and those in which he/she doesn't, fails to strike a fair balance between the protection of the rights of the pre-war occupant and those of the applicant.

71. The Chamber therefore decides that there has been a violation of Article 8 of the Convention.

2. Article 13 of the Convention

72. Article 13 of the Convention provides as follows:

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

73. The Chamber recalls that the European Court of Human Rights has held in the case of *Aydin v. Turkey* Eur. Ct. HR, judgment of 25 September 1997 *Reports of Judgments and Decisions* 1997, paragraph 103):

“The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.

74. In the present case, the applicant clearly has an arguable claim that his rights as guaranteed by Article 8 of the Convention were being violated and accordingly he was entitled to an effective remedy in respect of that claim.

75. One of the essential elements for the application of Article 13 is the so-called *material effectiveness* which requires that an effective remedy is not only available in the national legal system, but also that the applicant be able to take effective advantage of it. The principle that applies here, is that rights in the Convention must be effective and not theoretical. Further, remedies available and that could qualify as effective ones, will not impress the Chamber if they are not being applied properly or not at all complied with by the authorities.

76. In the present case, although the applicant has requested that the First Instance Court in Banja Luka issue an order for provisional measures to prevent his eviction pending court proceedings on the validity of the exchange contract as provided for in Article 12a of the Law on Implementation of CRPC Decisions, due to the silence of the first instance court, the applicant is left without any other remedy to seek suspension of his eviction. The Banja Luka Court of First Instance has the power under Article 12a to order suspension, but it has failed to reply to the applicant’s request for an interim measure. As of today the Court has not given any decision on the request for provisional measures. The Chamber is of the opinion that under such circumstances, the applicant was deprived of his right under Article 13 to an effective remedy against the violation of his right to respect for his home.

77. The Chamber thus finds a breach of Article 13 in conjunction with Article 8 of the Convention by the respondent Party.

3. Article 6 of the Convention

78. Article 6 of the Convention provides, in relevant part, as follows:

“In the determination of his civil rights and obligations, ... everyone is entitled to a fair and public hearing within a reasonable time ...”

79. The applicant also complains that his rights under Article 6 have been violated. The Chamber, however, in view of the conclusions it has reached in relation to Article 8 and 13 of the Convention, finds it unnecessary to examine the application in relation to Article 6 of the Convention.

VIII. REMEDIES

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

81. The Chamber notes that it has found a violation of the applicant's right to respect for his home as guaranteed by Article 8 of the Convention and the right to an effective remedy as provided for in Article 13 of the Convention. These violations result from the failure of the respondent Party to render effective in practice the remedy afforded to the applicant by Article 12a of the Law on Implementation of CRPC Decisions and the consequential failure to strike a fair balance between the protection of the rights of the pre-war owner and those of the applicant. The Chamber therefore finds it appropriate to order the respondent Party to take necessary action to ensure that this fair balance between the applicant's rights and those of the pre-war owner of the apartment is re-established through the establishment of a materially effective mechanism.

82. In these circumstances, the Chamber finds it appropriate to order the respondent Party to take the necessary legislative or administrative action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of the exchange contract.

IX. CONCLUSIONS

83. For the above reasons, the Chamber decides:

1. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 8 of the European Convention on Human Rights;

2. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 13 of the Convention;

3. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 6 of the Convention;

4. unanimously, that the application is inadmissible with respect to the complaint under Article 1 of Protocol No. 1 to the Convention;

5. unanimously, that the application is inadmissible with respect to the complaint of discrimination regarding the peaceful enjoyment of his possessions;

6. unanimously, that the Republika Srpska has violated the right of the applicant to respect for his home as guaranteed by Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

7. unanimously, that the Republika Srpska has violated the right of the applicant to an effective remedy as guaranteed by Article 13 in conjunction with Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

8. unanimously, that it is not necessary to examine whether there has been a violation of the applicant's rights protected by Article 6 of the European Convention on Human Rights;

9. by 12 votes to 1, to order the Republika Srpska to take the necessary legislative or administrative action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of the exchange contract;

10. unanimously, to order the Republika Srpska to report to it by 7 May 2003 on the steps taken to comply with this decision.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Partly dissenting opinion of Mr. Dietrich Rauschnig

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Dietrich Rauschnig.

PARTLY DISSENTING OPINION OF MR. DIETRICH RAUSCHNING

Article 12a of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, enacted for both Entities and in this case for the Republika Srpska (cited and quoted in paragraphs 22-24 of the decision), calls upon the competent court to decide in an individual case whether the procedure to enforce a decision of the CRPC should be suspended by ordering a provisional measure. Paragraph 65 of the decision states that this mechanism established by Article 12a "may be seen to strike a fair balance between the two parties to the dispute". I agree with this finding. I agree as well with the conclusion stated in paragraph 66 of the decision that the failure of the First Instance Court in Banja Luka to decide on the applicant's request for provisional measures overthrows the balance crafted by the legislator and deprives the applicant of all procedural safeguards, thereby leading to a violation of Article 8 of the Convention attributable to the respondent Party.

However, I cannot follow the reasoning laid down in paragraphs 67 to 70 of the decision that the mechanism established in Article 12a does not strike a fair balance because it differs from the mechanism established in Articles 25 and 2a of the Law on Cessation (cited in paragraphs 25 and 26 of the decision). Annex 7 to the General Framework Agreement aims at facilitating the process of early return of refugees and displaced persons to their pre-war homes and provides for a formal procedure before an international institution, the CRPC, that results in a decision confirming the right to property or home on the decisive date, *i.e.*, 1 April 1992. The Law on Implementation orders the competent administrative authorities to implement these CRPC decisions without giving them the authority to decide on a case by case basis whether such decisions should be implemented. This authority to act on a case by case basis is given only to the courts, which are entitled to decide on the validity of transfers after the decisive date and on the suspension of implementation of CRPC decisions. However, the fact that in the return process based on the Law of Cessation the administrative organs must suspend the proceedings and refer the parties to the dispute to the competent court does not render the regulation in the Law on Implementation unbalanced.

The authorities enacting laws have the competence to approach the problems to be solved with a wide margin of appreciation. Courts adjudicating on legislation to determine whether it violates legal rules of a superior rank must respect that competence. They shall not replace the decisions contained in the law by their opinion for better solutions, unless it is established that the law manifestly does not meet the requirements of the superior legal norm. For these reasons I cannot agree with conclusion no. 9 and the reasoning in paragraph 82 of the decision. The respondent Party should be ordered to ensure that its organs apply the law properly. There is no reason to request legislative action, and there is no reason to order that in a dispute on the enforcement of a CRPC decision, the administrative bodies suspend the proceedings *ex officio*, setting aside the exclusive competence of the courts to decide on the suspension according to the circumstances of the case.

For these reasons, I respectfully dissent in the specific parts of the decision mentioned herein.

(signed)
Dietrich Rauschnig