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

Case no. CH/01/7224

Milenko VUČKOVAC

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 a dispute between the applicant, the pre-war owner of real property in Zagreb, Croatia, and I.T., the pre-war owner of real property in Banja Luka, over their contract on exchange of property concluded on 12 October 1992. Neither party disputes that the contract on exchange was concluded voluntarily, but rather, they disagree on the scope of the contract. The applicant claims that the contract covers not only I.T.'s property on cadastral plot no. 1620 (as specified in the written contract on exchange) but also I.T.'s property on cadastral plot no. 1619 (a different piece of real estate not specified in the contract on exchange). I.T. claims that the contract on exchange covers only the property on cadastral plot no. 1620. The applicant has registered his ownership of both plots in the cadastral books. He uses the house located on plot no. 1620, and he rents the house located on plot no. 1619 to a third party. I.T. transferred the exchanged property in Zagreb to his son, B.T., through a donation, and B.T. subsequently registered his name in the land books. I.T. now lives in Vojnić in Croatia. The dispute between the applicant and I.T. over the validity of the contract on exchange is presently pending before the domestic courts.

2. On 2 May 2000 the Commission for Real Property Claims ("CRPC") issued two decisions confirming that as of 1 April 1992, I.T. was the "*bona fide* possessor" of both real estates. In accordance with the Law on Implementation of CRPC Decisions, I.T. asked the Ministry for Refugees and Displaced Persons, Department in Banja Luka ("Ministry"), to enforce the CRPC decision relating to the real property in dispute on cadastral plot no. 1619. On 20 June 2001, the Ministry issued a conclusion on enforcement of the CRPC decision and subsequently scheduled the applicant's eviction from the house in question. However, thereafter, the Ministry issued a conclusion postponing the administrative enforcement until the relevant court decides the dispute in question. Moreover, on 23 July 2001, deciding on a request for provisional measures filed by the applicant, the Chamber issued an order for provisional measures preventing the enforcement of the CRPC decision of 2 May 2000 against him.

3. The application raises issues under Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) to the European Convention on Human Rights (the "Convention") and Article 13 of the Convention (right to an effective remedy).

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was received and registered by the Chamber on 10 July 2001.

5. In accordance with Rule 29(1) of the Chamber's Rules of Procedure, the application was initially considered by the Second Panel of the Chamber.

6. In the application, the applicant requested the Chamber to order the respondent Party, as a provisional measure, to take all necessary steps to prevent enforcement of the CRPC decision against him. On 23 July 2001, the President of the Second Panel issued the requested order for provisional measures.

7. On 23 July 2001, the Chamber transmitted the case to the respondent Party for its observations.

8. On 20 August 2001, the respondent Party submitted its written observations. On 4 March 2002, the respondent Party submitted additional written observations.

9. On 18 September 2001, the applicant submitted his written observations in reply. On 10 October 2001, 29 October 2001 and 9 May 2002 the Chamber received additional observations from the applicant.

10. In accordance with Rule 29(2) of the Chamber's Rules of Procedure[1], the Second Panel decided to refer the case to the plenary Chamber on 4 September 2002.

11. Although the plenary Chamber did not join any of the applications, on 2 September 2002, it decided to hold a joint public hearing in this case, along with three other applications in case nos. CH/02/9130 *Stana Samardžić v. the Republika Srpska*, CH/02/9040 *Neđeljko Latinović v. the Republika Srpska*, and CH/01/8003 *Ivica Tukarić v. the Republika Srpska*.

12. On 18 September 2002, the plenary Chamber invited the applicant and the respondent Party to the public hearing on the admissibility and merits of the application scheduled for 9 October 2002. The Chamber also invited the Organisation for Security and Cooperation in Europe ("OSCE"), the Office of the High Representative ("OHR"), the United Nations High Commissioner for Refugees ("UNHCR"), and the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC") to participate in the public hearing as *amici curiae*. On 24 September 2002, the OSCE confirmed its participation as *amicus curiae* at the public hearing, and the OHR confirmed its participation as *amicus curiae* on 25 September 2002. The CRPC and the UNHCR never responded to the Chamber's invitations.

13. The respondent Party submitted additional written observations on 8 October 2002.

14. On 9 October 2002 the Chamber held a public hearing in Sarajevo. The applicant was present in person and represented by his lawyer Radmila Plavšić, the respondent Party by its Agent Mr. Dupor. The Organization for Security and Cooperation in Europe, Mission to BiH (OSCE), acting as *amicus curiae*, was represented by Ms. Lejla Mrkonja and Ms. Božana Vasković, National Legal Advisors. The Office of the High Representative, also acting as *amicus curiae*, was represented by Ms. Tanja Rakušić-Hadžić, Legal Officer, Ms. Gordana Osmančević, Property Officer.

15. On 18 October 2002 the Chamber received a written *amicus curiae* submission from OHR and OSCE, which was forwarded to the parties on 29 October 2002. The respondent Party submitted additional written observations on 29 October 2002.

16. The Chamber deliberated on the admissibility and merits of the case on 6 September, 10 October, 9 November, 6 December 2002 and on 6 January and 4 February 2003. On the latter date it adopted the present decision.

III. FACTS

17. On 12 October 1992, the applicant and Ivica Tukarić ("I.T.") concluded a contract on exchange of real property. According to the written contract, the applicant exchanged his real property located in Zagreb, Republic of Croatia – Ivanja Rijeka, Viktora Bubnja Street no. 10. I.T. exchanged his property located in Banja Luka, the Republika Srpska – Marka Lipovca Street no. 14, constructed on cadastral lot no. 1620, registered in deed of title no. 1138, Budžak Municipal Cadastre. The applicant has been using the house located on plot no. 1620 since 1992. I.T. and his wife remained in the house on plot no. 1619 until 1995, when they left for Croatia. According to the statement of I.T., which is disputed by the applicant, their departure was caused by the general hostility against Croats in Banja Luka at that time as well as by duress specifically exercised by the applicant. Since then, the applicant rents the house located on plot no. 1619 to a third person. I.T. took possession of the applicant's house in Zagreb after 12 October 1992 and then transferred the exchanged property to his son, Borislav Tukarić, by a donation. I.T.'s son subsequently registered his name in the land books. Since 1995, I.T. has lived in a house in Vojnić, Croatia. The applicant has registered his ownership of both plots (nos. 1619 and 1620) in the Banja Luka cadastral books.

18. According to the applicant, in 1992 he initiated civil proceedings before the First Instance Court in Banja Luka seeking confirmation of the scope of the contract on exchange as covering not

[1] Rule 29(2) of the Chamber's Rules of Procedure provides, in pertinent part: "Where a case pending before a Panel raises a serious question as to the interpretation of the Agreement …, the Panel may at any time before taking a final decision relinquish jurisdiction in favour of the Plenary Chamber".

only I.T.'s property on cadastral plot no. 1620 located in Banja Luka, Marka Lipovca Street no. 14 (as designated in the written contract on exchange), but also I.T.'s property on cadastral plot no. 1619 located in Banja Luka, Marka Lipovca Street no. 14 A (different real property not designated in the contract on exchange).

19. On 4 June 1996 the First Instance Court in Banja Luka issued a decision finding that the scope of the contract on exchange of real property concluded between the plaintiff (the applicant) and the defendant (I.T.) covered the defendant's property in Banja Luka at Marka Lipovca Street no. 14, including the residential building with the appended facilities and yard constructed on cadastral plot nos. 1619 and 1620 entered in the title of deed no. 1138 of the Budžak Municipal Cadastre.

20. I.T. appealed against the decision of 4 June 1996; however, on 23 April 1997, the District Court in Banja Luka refused the appeal and confirmed the decision of 4 June 1996.

21. I.T. then filed a request for review against the second instance judgment of 23 April 1997, which was refused by the Supreme Court of the Republika Srpska on 19 August 1998.

22. On 2 July 1999 I.T. submitted a proposal for renewal of proceedings. In this proposal he argued that the proceedings should be renewed because of serious flaws relating to the power of attorney of his representative during the proceedings before the Banja Luka First Instance Court, and because he had not been given equal opportunity to be heard during the proceedings. On 1 March 2000 the proposal for renewal of proceedings was refused by the First Instance Court in Banja Luka. The First Instance Court found that the procedural shortcomings complained of by I.T. did not exist or in any case did not constitute sufficient grounds to re-open the case. I.T. appealed against the decision on 20 June 2000.

23. On 2 May 2000 the CRPC issued two decisions, nos. 701 – 4325 – 1/1 and 701 – 4325 – 2/1. These decisions confirm that on 1 April 1992, I.T. was the *bona fide* possessor of the real estate registered as cadastral plots k.č. 1620 and k.č. 1619, entered in the title of deed no. 1138 of the Budžak Municipal Cadastre – Banja Luka.

24. The applicant submitted a request for review of the CRPC decisions of 2 May 2000. On 5 December 2000 the CRPC refused the request for review.

25. On 29 December 2000 the applicant again initiated proceedings before the Court of First Instance in Banja Luka to seek confirmation of the validity of the contract on exchange. The applicant asked the court to confirm the validity of the contract on exchange concerning both the real estates registered in the cadastral plots k.č. 1620 and k.č. 1619. Also, he asked the court to order a provisional measure to prevent any change concerning the ownership and possession over the disputed real estate in Banja Luka. These proceedings are still pending and the court has not decided on the request for provisional measures.

26. In accordance with the Law on Implementation of CRPC decisions, I.T. asked the Ministry for Refugees and Displaced Persons, Department Banja Luka ("Ministry") to enforce one of the CRPC decisions of 2 May 2000, the one relating to the real property in dispute on cadastral plot no. 1619. On 20 June 2001 the Ministry issued a conclusion on enforcement of the CRPC decision no. 701 – 4325 – 2/1 concerning the real estate registered as cadastral plot k.č. 1619. The Ministry scheduled the applicant's eviction from the house on cadastral plot no. 1619 for 23 July 2001.

27. On 4 July 2001 the applicant appealed against the conclusion of 20 June 2001 to the Ministry for Refugees and Displaced Persons.

28. On 16 July 2001 the Ministry of Management and Local Self–Management issued a procedural decision postponing the administrative enforcement until the relevant court decided the dispute in question.

29. On 23 August 2001 the District Court in Banja Luka refused I.T.'s appeal of 20 June 2000 against the decision of the First Instance Court rejecting the proposal for renewal of proceedings and confirmed the decision of 1 March 2000. The District Court confirmed the conclusions of the First

Instance Court. Moreover, the District Court mentioned that, under the provisions of the Law on Civil Proceedings governing requests for renewal of proceedings, it is not competent to consider the CRPC decisions submitted to it by I.T..

30. On 7 September 2001 the Ministry of Management and Local Self–Management issued a decision by which the decision of the same Ministry of 16 July 2001 was put out of force and the Ministry for Refugees and Displaced Persons was free to schedule a new date for enforcement.

31. On 24 September 2001, I.T. submitted an application to the Chamber, which was registered on the same day. I.T. requested the Chamber to order the respondent Party, as a provisional measure, to take all necessary steps to ensure that the applicant not sell the house located on cadastral plot no. 1619. On 9 November 2001, the Acting President of the Second Panel ordered the provisional measure requested, which expired on 10 December 2001.

IV. RELEVANT LEGAL PROVISIONS

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

32. Annex 7 to the General Framework Agreement, entitled the 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 the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC"), was established.

33. 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 the 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. Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees of the Republika Srpska

34. Article 13 of the Law on Implementation of CRPC Decisions of the Republika Srpska, which was imposed by the Decision of the High Representative of 27 October 1999 (OG RS nos. 31/99, 2/00 and 39/00/65/01), in its amended form, reads as follows:

> "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 which 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."

35. Article 12 of the Law on Implementation of CRPC Decisions provided (before it was amended by 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, which entered into force on 29 December 2001, amending Article 12 and substituting part of its provisions with the new Article 12a, see the next paragraph):

> "…
> 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.
> Enforcement proceedings before the responsible administrative organ shall not be suspended pending the court's decision.
> As an exception to the previous paragraph, the competent court may make a specific order to suspend the enforcement proceedings before the responsible administrative organ if a verified contract on the transfer of rights was made after 14 December 1995."

36. 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 into force eight days after publication in the Official Gazette of the Republika Srpska on 21 December 2001 (OG RS no. 65/01).

37. The new Article 12a, in relevant part, reads as follows:

> "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 enforcee if the enforcement proceedings continued."

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

38. Article 2a of the Law on Cessation of the Application of the Law on the Use of Abandoned Property of the Republika Srpska (Official Gazette of the Republika Srpska—hereinafter "OG RS"—nos. 38/98, 12/99, 31/99, with incorporated amendments proclaimed by the Decision of the High Representative of 4 December 2001 (OG RS no. 65/01 of 21 December 2001)) provides as follows:

> "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 nos. 19/93, 22/93, 12/99 and 31/99)….
>
> 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 (SFRY OG no. 47/86; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, OG RS no. 21/92) regulating preliminary issues, in order to rule on the allegation. Notwithstanding the provisions of the Law on Civil Procedures (SFRY OG no. 4/77; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, OG RS 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."

39. Article 25 provides as follows:

"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."

V. COMPLAINTS

40. The applicant alleges violations of his rights as protected by Article 6 (right to a fair hearing), Article 13 (right to an effective remedy) and Article 8 (right to respect for home) of the Convention and Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions). The applicant further complains of discrimination in conjunction with Article 1 of Protocol No. 1 and Articles 6, 8 and 13 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

41. The respondent Party considers the application inadmissible as premature and for failure to exhaust domestic remedies, within the meaning of Article VIII(2)(a) of the Agreement. The respondent Party highlights that the contract on exchange has been the subject of court proceedings in Banja Luka that have already been decided in the applicant's favour. In addition, B.T., the son of I.T., has filed a lawsuit before the Court of First Instance in Banja Luka, upon which proceedings are still pending. The respondent Party further notes that the CRPC issued decision no. 701-4325-2/1

on 2 May 2001, by which "it returned the disputed real properties to I.T". CRPC decisions are final and binding, and based on this decision, the Ministry issued the conclusion on enforcement of 20 June 2001. Because the proceedings are still pending before the Court of Second Instance in Banja Luka and because Article 13 paragraph 1 of the Law on Implementation of CRPC Decisions provides that "the competent court shall determine whether the transfer of right to the appellant was conducted voluntarily and in accordance with the law", the respondent Party concludes that the application does not meet the requirements of admissibility and suggests that the Chamber declare the application inadmissible.

42. With respect to the merits, the respondent Party submits that its competent bodies have not violated the Convention. On the contrary, the competent bodies of Republika Srpska have complied with the applicant's request, which he lodged before the Court of First Instance in Banja Luka. Namely, on 4 June 1996, the Court of First Instance in Banja Luka issued a judgment establishing that the contract on exchange concluded between the applicant and I.T. is legally valid. This judgment was confirmed by the judgment of the Court of Second Instance on 23 April 1997, and the Supreme Court of Republika Srpska rejected I.T.'s request for review on 19 August 1998. The respondent Party further notes that the contract on exchange has been fully executed because the parties have entered into possession of the real properties which were the subject of the exchange and they have registered their ownership rights over the exchanged real properties.

43. Taking these facts into account, the respondent Party contends that it has not violated Articles 6 or 8 of the Convention, nor Article 1 of Protocol No. 1. Rather, the competent bodies of Republika Srpska have recognised the applicant's right to respect for his home and to peaceful enjoyment of his possessions by establishing that the contract on exchange is legally valid. The respondent Party further states that: "If there has been a violation of the applicant's rights, then the CRPC precipitously issued its decision, based on which the Ministry for Refugees and Displaced Persons in Banja Luka was obliged to issue the conclusion on enforcement, since CRPC decisions are final and binding".

B. The applicant

44. In his written observations, the applicant submits that he offered the representative of I.T., *i.e.*, his son B.T., to terminate the contract on exchange concluded in 1992, and for both parties to return the exchange property to its pre-contract owner. However, according to the applicant, I.T. did not want to terminate the contract on exchange.

45. The applicant further submits that if the contract on exchange is cancelled by the courts in Bosnia and Herzegovina, then this would be to his detriment because the authorities in the Republic of Croatia will not recognise this cancellation. The provisions of the Law on Cessation of Application of the Law on Abandoned Property apply only in Bosnia and Herzegovina and not in the Republic of Croatia; consequently, I.T. would keep both properties. The applicant states that the Chamber should not permit I.T. to realise more rights than he had before the exchange of properties occurred, leaving the applicant without the property he had before the exchange of properties occurred.

C. The *amici curiae*

46. The OSCE and the OHR, as *amici curiae*, argue that the Law on Implementation of CRPC Decisions (see paragraphs 34 to 37 above) should apply as *lex specialis* in the present case. They stated at the public hearing that the Law on Implementation of CRPC Decisions, which was originally passed in 1999, provides for a procedure parallel to the one for claims filed with the administrative bodies. As a consequence, the rights of the parties will depend on whether they filed their claim to the CRPC or to the administrative body. In practice it often occurs that people who filed claims to the CRPC and received CRPC decisions (specially, for example, in situations concerning the exchange of properties), are in a better position than people who filed similar claims to the administrative bodies.

47. However, the *amici curiae* point out that one of the goals of the amendments of 4 December 2001 to the Law on Cessation of the Application of the Law on the Use of Abandoned Property and to the Law on Implementation of CRPC Decisions of the Republika Srpska (and to corresponding laws in

the Federation of Bosnia and Herzegovina not relevant to the present application) was to harmonise the provisions on suspension of proceedings and on the burden of proof in each law along the lines set out in Article 2a of the Law on Cessation of the Application of the Law on the Use of Abandoned Property. They submit that any current ambiguity as regards this policy in the relevant legislation is likely the result of legislative oversight, and the inconsistencies should be rectified and remedied, perhaps through new legislative amendments. Thus, with regard to the suspension of enforcement proceedings, the model set out in Article 2a of the Law on Cessation of the Application of the Law on the Use of Abandoned Property of the Republika Srpska should be applicable. Accordingly, where there is a dispute as to the validity of a contract on exchange, the housing authority must suspend its proceedings and refer the case to the competent court to determine whether the contract was signed voluntarily and in accordance with the law or under duress.

48. The *amici curiae* further argue that because of the likelihood that one of the exchanged properties cannot be restored to the pre-war right-holder due to legal barriers to repossess the property or to a subsequent transfer of the property, inter-republic exchange cases (like the present application) present the most compelling situation where the failure of the administrative body to suspend its enforcement proceedings could cause irreparable harm. They underline that suspension of the proceedings in this category of cases is indispensable (although they recommend suspension of the proceedings in all cases concerning contracts on exchange, regardless of whether the exchange was inter-republic, inter-Entity, intra-Entity, intra-municipality or any other variation). They reason that, given the assumptions built into the law, failing to suspend the proceedings will almost certainly lead to wrongful evictions.

49. Moreover, the *amici curiae* note that the allocation of the burden of proof in such cases reflects the legislator's assumption that most contracts on exchange concluded during the state of war were invalid. On the other hand, the decision to require a case-by-case analysis by the courts of all war-time contracts on exchange, rather than to annul all such contracts *ex lege*, indicates the legislator's assumption that some war-time contracts on exchange were valid. In these cases, the administrative body's failure to suspend its enforcement proceedings would cause an effectively wrongful eviction that would not be remedied until the court issues a decision upholding the contract on exchange. Cancellation of all contracts *ex lege*, and the consequent possibility of the parties to revalidate only those contracts on exchanges where an agreement of wills exists, would cause legal insecurity since such property in numerous instances was already disposed of.

50. Further, the *amici curiae* emphasise that choosing not to suspend enforcement proceedings would allow immediate repossession of the pre-contract property, but the exercise of associated property rights would be indefinitely delayed. For example, those who repossessed private property would not be entitled to transfer the property as the parties would be entitled to put notes in the respective land books blocking a transfer in light of the dispute pending before the courts. Those who repossessed socially-owned property would not be entitled to privatise their apartments until the court issues a decision on the validity of the contract on exchange. As it is not possible to predict the outcome of the court proceedings, it would be unreasonable to allow immediate repossession before the completion of the court proceedings.

51. The *amici curiae* recommend implementing a standardised procedure for the suspension of enforcement proceedings that would harmonise the different laws in accordance with the following:

> - *The Law on Cessation of the Application of the Law on the Use of Abandoned Property of the Republika Srpska*: No changes are necessary, as the policy is fully incorporated under Article 2a as regards socially-owned property. In addition, Article 25 provides for the referral of cases to the competent court "according to the provisions of the Law on General Administrative Procedure regulating preliminary issues". The lack of a clear mechanism for suspension of proceedings under Article 2a is due to an inconsistency in the Article as amended by the Decision of the High Representative on Amendments to the Law on Cessation of the Application of the Law on Abandoned Property of 4 December 2001 and Article 2a as it appears in the Official Gazette of the Republika Srpska (OG RS no. 65/01). The legislator's intention to apply the Law on General Administrative Procedure is clear from the preceding sentence, but nevertheless, the Ministry for Refugees and Displaced Persons of the

Republika Srpska sent a request to the Official Gazette of the Republika Srpska to correct the mistake.

- *The Law on Implementation of CRPC Decisions of the Republika Srpska*: Amendments are necessary to ensure uniform suspension of proceedings upon referral to the competent court under Article 12a and possibly also to address the apparent drafting inconsistency. As it stands, the relevant provisions assume that a conclusion on permission of enforcement has already been issued prior to the dispute regarding the contract on exchange being raised and referred to the competent court. In reality, such a dispute is likely to arise prior to the issuance of the conclusion on permission of enforcement and while the rights of the temporary occupant are still being determined.

52. Applying these principles to the present application, the *amici curiae* suggest that the Chamber order the respondent Party to initiate the necessary legislative changes in accordance with its recommendations (see paragraph 51 above), that is:

- to amend t*he Law on Implementation of CRPC Decisions of the Republika Srpska*, in order to ensure uniform suspension of proceedings upon referral to the competent court under Article 12a and possibly also to address the apparent drafting inconsistency.

VII. OPINION OF THE CHAMBER

A. Admissibility

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

1. With respect to Article 8 of the Convention

54. The applicant complains that his right to respect for his home has been violated. The Chamber notes that on 20 June 2001, the Ministry issued a conclusion on enforcement and subsequently scheduled the applicant's eviction from the real estate registered as cadastral plot no. 1619. This conclusion on enforcement was based upon the CRPC decision of 2 May 2000 in I.T.'s favour. However, on 23 July 2001, the Chamber issued an order for provisional measures prohibiting the CRPC decision from being applied against the applicant. Therefore, the applicant has not been evicted from the real property in dispute.

55. The Chamber further notes that the applicant does not live in the house located on plot no. 1619, but rather, he rents it to a third person. Indeed, the applicant lives in the house located on plot no. 1620. Therefore the Chamber concludes that the house on plot no. 1619 cannot be considered the applicant's "home" in the sense of Article 8 of the Convention. Consequently, the applicant has never in fact been under a threat of eviction from his home.

56. Therefore, the Chamber finds that the part of the application concerning the alleged violation of the applicant's right to respect for his home does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

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

57. The applicant alleges that his right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention has been violated. However, the respondent Party argues that this

claim is premature because the applicant has failed to exhaust domestic remedies within the meaning of Article VIII(2)(a) of the Agreement.

58. The Chamber notes that on 4 June 1996, the First Instance Court in Banja Luka issued a decision in the applicant's favour confirming that the contract on exchange concluded between the applicant and I.T. covered the disputed property in Banja Luka at Marka Lipovca Street no. 14 A. This decision was confirmed on 23 April 1997 and again on 19 August 1998 by the District Court in Banja Luka and the Supreme Court of the Republika Srpska respectively, when they refused the appeal and the request for review (revizija) of I.T. (see paragraphs 20 and 21 above).

59. I.T. requested renewal of proceedings on 2 July 1999, but his request was refused both by the First Instance Court (on 1 March 2000) and the District Court (on 23 August 2001). In the meantime, on 28 October 1999, the Law on Implementation of CRPC Decisions entered into force. Its Article 13, paragraph 3, provides that "If the validity of the transfer has been determined in previous proceedings which took place prior to the entry into force of this Law, the decision taken in the previous proceedings shall be null and void." The question whether this provision applied to vacate the judgement of the First Instance Court in Banja Luka of 4 June 1996, however, was not discussed and decided upon in the proceedings initiated by I.T. with his request for renewal.

60. Thus, a first set of court proceedings concerning the scope of the exchange contract took place between 1992 and 19 August 1998. It resulted in a final (pravosnažno) judgment resolving the civil dispute over the scope of the contract and establishing that the applicant is the owner of both plots. None the less, the question of the ownership over the property claimed by both the applicant and I.T. is the subject of new proceedings still pending before the courts in Banja Luka. In these proceedings, the courts will have to clarify whether the judgement of 4 June 1996 is still in force or whether it has been vacated by Article 13 of the Law on Implementation of CRPC Decisions.

61. The Chamber further notes that the applicant has registered his ownership over the exchanged real property in the land books, and as of today, his name still appears in the land books. Thus, as a matter of fact, the applicant is the current registered owner of the disputed property. Whether or not the contract on exchange is valid, unless and until the land books are changed, the applicant is entitled as a matter of the law of the Republika Srpska to exercise the rights of a registered owner (see case no. CH/00/5408, *Salihagić*, decision on admissibility and merits of 8 May 2001, Decisions January—June 2001, paragraph 57 (explaining the Chamber's jurisprudence with respect to the rights of registered owners under Article 1 of Protocol No. 1)).

62. However, notwithstanding the above, and pursuant to the decision of 7 September 2001 of the Ministry of Management and Local Self – Management, the applicant is under an actual threat of eviction to lose possession of his property on cadastral plot no. 1619 based on enforcement of the CRPC decision of 2 May 2000 in I.T.'s favour.

63. In light of the above and the apparent conflict between the decisions issued with respect to the disputed property by the courts in Banja Luka and the administrative bodies, the Chamber concludes that the application is not premature. The applicant was recognised as the owner of cadastral plot no. 1619 by the judgement of 4 June 1996 and registered as the owner of the disputed real property in the cadastral books, yet he is threatened with eviction. Therefore, under the circumstances of the present case, the Chamber decides to reject the objection raised by the respondent Party and to declare the application admissible under Article 1 of Protocol No. 1 to the Convention.

3. With respect to Article 6 of the Convention

64. As to the applicant's complaint under Article 6 of the Convention, the Chamber notes that he has failed to explain in what respect the proceedings before the Court of First Instance in Banja Luka violate his right to a fair hearing. There is no evidence that the court failed to act fairly as required by Article 6 of the Convention. Therefore, the Chamber finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that this part of the application is manifestly ill-founded, within the meaning of Article

VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

4. Conclusion as to admissibility

65. The Chamber finds that no other grounds for declaring the application inadmissible have been raised or appear from the application. Accordingly, the Chamber declares the application admissible in relation to Article 1 of Protocol No. 1 to the Convention and Article 13 of the Convention. The Chamber declares the remainder of the application inadmissible.

B. Merits

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

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

67. The applicant asserts that the proceedings seeking to evict him from possession of the real property on cadastral plot no. 1619 violate his right to peaceful enjoyment of his possessions.

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

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

69. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is of a general nature, enshrines the principle of peaceful enjoyment of property. It is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to the condition that the deprivation must be in the public interest and subject to conditions provided for by law and by the general principles of international law. It appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. It is contained in the second paragraph (see, *e.g.*, case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, paragraph 190, Decisions January-July 1999).

(a) Existence of a "possession" under Article 1 of Protocol No. 1

70. The Chamber notes that the applicant has been in possession of the property in question since 1992, he has obtained a final (pravosnažno) court judgement recognising his ownership, and he is registered in the Cadastral books as the owner of that property. On this basis, the Chamber concludes that, although the validity of the contract on exchange by which the applicant obtained possession of the property is currently being challenged before the courts, the property in question constitutes a "possession" of the applicant, within the meaning of Article 1 of Protocol No. 1 to the Convention (see case no. CH/00/5408, *Salihagić*, decision on admissibility and merits of 8 May 2001, Decisions January— June 2001, paragraph 53).

(b) Interference with the applicant's enjoyment of his possession

71. The Chamber notes that the enforcement of the CRPC decision of 2 May 2000 against the applicant would deprive him of possession of the property in question. The final decision as to the legal title to the property will only be taken by the competent courts of the Republika Srpska, when they decide upon the validity of the contract on exchange and that decision becomes final and binding. Nonetheless, the Chamber considers that the threatened enforcement of the CRPC decision against the applicant, who is the registered owner of the property in question, already constitutes an interference with the peaceful enjoyment of his possessions (see case no. CH/00/5408, *Salihagić*, decision on admissibility and merits of 8 May 2001, Decisions January— June 2001, paragraph 54).

(c) Justification for the interference

72. In order to establish whether the established interference is compatible with the applicant's rights under Article 1 of Protocol No. 1, the Chamber must examine whether the interference is in accordance with the law and whether it pursues a legitimate aim. If these two conditions are met, it must determine whether a "fair balance" has been struck between the demands of the general interest of the community and the requirements of the protection of the applicant's fundamental rights. Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The requisite balance will not be found if the applicant has borne an excessive individual burden (see case no. CH/97/48 *et al.*, *Poropat and Others*, decision on admissibility and merits of 10 May 2000, Decisions January–June 2000, paragraph 163).

73. In its observations, the respondent Party submits that the competent bodies of Republika Srpska have recognised, by their acts, the applicant's right to peaceful enjoyment of possessions by confirming the scope of the contract and deciding on the civil dispute over the contract on exchange. Moreover, it argues that "if there has been a violation of the applicant's rights, then the CRPC precipitously issued its decision, based on which the Ministry for Refugees and Displaced Persons in Banja Luka was obliged to issue the conclusion on enforcement, since CRPC decisions are final and binding".

74. The Chamber notes, however, that the arguments of the respondent Party omit to address the crucial element of the applicant's case, i.e. that when I.T. requested enforcement of the CRPC decision there was already a final (pravosnažno) judgment of the Court of First Instance in Banja Luka, stating that the right confirmed by the CRPC decision had been transferred to the applicant after the date referred to in the CRPC decision. On 29 December 2000 the applicant initiated proceedings before the Court of First Instance in Banja Luka seeking confirmation of the validity of the contract on exchange. In his submission to the Court of First Instance the applicant draws the Court's attention to its judgment of 4 June 1996, which had established that the exchange covered both the real estates registered in the cadastral plots k.č. 1620 and k.č. 1619. Also, he asked the court to order a provisional measure to prevent any change concerning possession of and ownership over the disputed real estate in Banja Luka. As of today, the court has not decided on the request for provisional measures.

(i) Justification for the enforcement of the CRPC decision before the entry into force of Article 12a of the Law on Implementation of CRPC Decisions

75. During a first period, from the submission of the court action on 29 December 2000 until the entry into force on 29 December 2001 of Article 12a, the Law on Implementation of CRPC Decisions did not allow courts to grant interim orders to suspend the execution of CRPC decisions on the ground that the property had been transferred after the date referred to in the CRPC decision, unless the alleged transfer of rights took place after 14 December 1995. As paragraph 3 of the old Article 12 read: "Enforcement proceedings before the responsible administrative organ shall not be suspended pending the court's decision."

76. The provision of the old Article 12 paragraph 3 was dictated on the one hand by the recognition 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 and 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 Convention (see the Chamber's decision in case no. CH/02/9130, *Samardžić*, decision on admissibility and merits delivered on 10 January 2003, paragraph 49). On the other hand it took into account 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 (*id.*, paragraph 53). It is not necessary for the Chamber to decide now whether this provision struck the right balance between the public interest in repossession of pre-war properties and the rights of the applicant, as the legislator has in the meantime amended the rules, significantly mitigating them in favor of those who wish to remain in possession of property obtained by a war-time exchange.

77. The Chamber notes, however, that the applicant's request for provisional measures should have prompted the First Instance Court in Banja Luka to decide whether the question of the existence of a valid transfer of the rights over plot 1619 was at all pending before it, or whether this question was not *res judicata*, having been decided in a final and binding way (pravosnažno) by the judgment of 4 June 1996. For this purpose, the First Instance Court would have had to examine whether Article 13, paragraph 3 of the Law on Implementation of CRPC Decisions (reading "If the validity of the transfer has been determined in previous proceedings which took place prior to the entry into force of this Law, the decision taken in the previous proceedings shall be null and void") applied to vacate the judgment of 4 June 1996.

78. The Chamber concludes that the failure of the First Instance Court to take any action upon the applicant's request for provisional measures placed an excessive individual burden on the applicant and thus was not justified under Article 1 of Protocol No. 1 to the Convention.

(ii) Justification for the enforcement of the CRPC decision after the entry into force of Article 12a of the Law on Implementation of CRPC Decisions

79. Article 12a of the Law on Implementation of CRPC Decisions, which entered into force on 29 December 2001, 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 enforcee if the enforcement proceedings continued."

80. 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 (see the Chamber's decision in case no. CH/02/9130, *Samardžić*, decision on admissibility and merits delivered on 10 January 2003, paragraphs 55-57).

81. Under the specific circumstances of the present case, moreover (as already explained above in paragraph 77), the First Instance Court is called to decide whether the question of the existence of a valid transfer of the rights over plot 1619 is at all pending before it, or whether this question is not *res judicata*, and whether Article 13, paragraph 3 of the Law on Implementation of CRPC Decisions applies to vacate the judgment of 4 June 1996.

82. The First Instance Court in Banja Luka, however, has failed also after the entry into force of Article 12a, 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 peaceful enjoyment of possessions is not justified under Article 1 of Protocol No. 1 to the Convention.

(iii) Conclusion

83. The Chamber thus concludes that the continuation of the enforcement proceedings against the applicant, without any consideration for the court decision as to the scope of the contract on exchange and notwithstanding the fact that the applicant is the current registered owner of the property, amounts to an unjustified interference with the applicant's peaceful enjoyment of his possession under Article 1 of Protocol No. 1 to the Convention.

84. The Chamber therefore decides that the respondent Party has violated the applicant's right protected by Article 1 of Protocol No. 1 to the Convention.

2. Article 13 of the Convention

85. 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."

86. In view of the conclusion it has reached above in relation to Article 1 of Protocol No. 1 to the Convention, the Chamber finds it unnecessary separately to examine the application in relation to Article 13 of the Convention.

VIII. REMEDIES

87. 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.

88. The Chamber notes that it has found a violation of the applicant's right to peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention. As a remedy, it considers it appropriate to order the respondent Party to take all necessary steps to immediately suspend the enforcement proceedings against the applicant until the civil dispute initiated by the applicant on 29 December 2000 is decided by a final and binding (pravosnažno) decision. As already observed above (see paragraph 77), in deciding this dispute the courts will have to take into account the question whether the question of the scope of the contract as determined in the judgment of 4 June 1996 is *res judicata*, or whether Article 13 paragraph 3 of the Law on Implementation of CRPC Decisions applies to vacate that judgment.

IX. CONCLUSION

89. For the above reasons, the Chamber decides:

1. unanimously, that the application is admissible with respect to the complaint under Article 1 of Protocol No. 1 to the European Convention on Human Rights;

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

3. unanimously, that the remainder of the application is inadmissible;

4. unanimously, that the Republika Srpska has violated the applicant's right to peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

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

6. unanimously, to order the Republika Srpska to take all 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 in the case initiated by the applicant on 29 December 2000;

7. unanimously, that its order for provisional measures issued on 23 July 2001 remains in force until the suspension ordered in conclusion 6 becomes effective; and

8. unanimously, to order the Republika Srpska to report to the Chamber 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