DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 June 2003)

Case no. CH/02/9868

Sejad and Senad BUKVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 May 2003 with the following members present:

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

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 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicants, two brothers of Bosniak origin, are running the restaurant "KOGO", located at Dalmatinska Street no. 2, in Sarajevo. They complain of a decision of the Municipality Centar Sarajevo ordering their eviction from the restaurant. The eviction was ordered pursuant to a conclusion on enforcement terminating the applicants' temporary right to use the restaurant because the pre-war possessor R.K. has obtained a decision issued by the Commission for Real Property Claims (CRPC) entitling him to regain possession of the restaurant.

2. The applicants both disagree with the CRPC decision concerning R.K.'s rights as of April 1992 and state that they have built a completely new restaurant on the site, and invested about 200,000 DEM in its construction and in paying all the fees for approvals from the Municipality.

3. The case raises issues primarily under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was received and registered by the Chamber on 8 April 2002.

5. On 29 April 2002 the Vice-President of the Second Panel issued an order for provisional measures ordering the respondent Party *"to refrain from evicting the applicants from the "KOGO" Restaurant, located in ulica Dalmatinska no. 2 in Sarajevo"*. The order was limited in its duration until 13 May 2002. On the same day, the Chamber transmitted the case to the respondent Party for its observations.

6. On 20 May 2002, the respondent Party submitted its written observations.

7. On 13 November 2002 the Second Panel issued a second order for provisional measures ordering the respondent Party "*to prevent the taking of any steps to evict the applicants from the restaurant "KOGO" located at Dalmatinska 2 in Sarajevo",* determining that the order shall remain in force until 9 December 2002.

8. On 15 November 2002, the respondent Party submitted additional written observations.

9. On 2 December 2002, the applicants submitted their written observations in reply. On 9 December 2002 and 31 January 2003 the Chamber received additional observations from the applicant.

10. On Friday 7 February 2003 the Second Panel decided to issue a third order for provisional measures, ordering the respondent Party to take all necessary action to prevent the applicants' eviction from the business premises which they occupy until the Chamber has given its final decision in the case, unless it is withdrawn at an earlier stage.

11. The Chamber deliberated on the admissibility and merits of the case on 13 November 2002, 7 February and 8 March 2003, and on 6 and 7 May 2003. On the latter date it adopted the present decision.

III. FACTS

12. The applicants, two brothers, are running the restaurant "KOGO", located at Dalmatinska Street no. 2, in Sarajevo and built on the land registered as the cadastral lot no. 1866/1, Cadastral Municipality Sarajevo V.

13. Before the 1992-1995 war in Bosnia and Herzegovina, there used to be a restaurant on the same piece of land. R.K., a citizen of Bosnia and Herzegovina of Serb origin, built the restaurant in

1983 and was running it until May 1992 when, as a consequence of the armed conflict, he had to flee Sarajevo for Canada, where he stayed as a refugee until 1998. The exact legal situation of the restaurant at the time of the outbreak of the war is disputed by the applicants. The applicants acknowledge that R.K. built a restaurant and was running it before the war. However, they submit that the restaurant was built on the basis of a temporary building approval of the Municipality. According to the documents on file with the Chamber, R.K. built the restaurant upon issuance by the Municipality Centar Sarajevo, Municipal Commission for Urbanism and Construction, Property, Legal Affairs and Cadaster (Municipal Commission) of a building permit on 27 January 1983 (number 07/C-ČK/VB-361-218/82). A certificate of occupancy was issued on 26 April 1984. The building permit was a temporary one for a period of 3 years, which was extended until 1992 by agreement of the parties. The applicants state that R.K. was not registered as the owner of the restaurant due to the temporary character of the premises. During the war the premises were destroyed, to what extent is also subject to dispute. The applicants claim that only the foundations of the restaurant built by R.K. remained (that 80% of it was destroyed). In June 1994, the Municipal Commission carried out an "insight investigation" and established that the "business facility was 80% destroyed by war actions".

14. On 26 December 1996 the Municipality Centar Sarajevo allocated the land to the applicants (procedural decision of the Centar Municipality, number: 05/B-475-39/96) and the Municipal Secretariat for Physical Planning and Housing Affairs provided them with a building permit on 21 January 1997 (decision number: 07/A-AA-361-93/97). Subsequently the applicants constructed a restaurant at the same location. According to them, the previous business facility covered 60 m2 on only one floor, and they built a 190 m2 facility which incorporates the space covered by the previous restaurant on the ground floor but extends to the first floor of the building.

15. On 13 September 1999, R.K. submitted a request for repossession of the restaurant before the Municipality Centar. However, the Municipality did not respond to his request. R.K. then initiated an administrative dispute before the Cantonal Court in Sarajevo because of the silence of the administration. On 5 July 2000, the Cantonal Court issued a judgement accepting R.K.'s suit and ordered the Municipality Centar to issue a procedural decision on the R.K.'s request of 13 September 1999. The Municipality Centar refused to issue the requested procedural decision, and instead issued a notification that the restaurant could not be regained by R.K. because it was now the ownership of the Municipality Centar.

16. On 15 October 1999, R.K. initiated another action before the Municipal Court I in Sarajevo requesting the Court to establish his property rights over the restaurant. He also requested the Court to issue a provisional measure prohibiting the applicants to register their post-war ownership with the land registry. R.K requested the Court to address the issue of the extent to which the pre-war restaurant was destroyed. He contested the assertion that it was destroyed up to 80%.

17. On 5 February 2000, the Municipality Centar issued a conclusion suspending the administrative procedures until the court decides on the property rights concerning the restaurant. On 17 February 2001, and on 19 February 2001 R.K. appealed against the conclusion to the competent Cantonal administrative organ.

18. On 12 April 2000, the applicants registered their ownership over the restaurant with the Land Registry at the Municipal Court I Sarajevo. A land-registry certificate, dated 12 April 2000, has been submitted. The Municipal Court I in Sarajevo did not issue the requested provisional measure preventing the registration as requested by R.K. on 15 October 1999.

19. On 22 February 2001, the Municipal Court I issued a procedural decision declaring itself incompetent to decide the legal issues raised by R.K.'s suit.

20. On 23 February 2001 R.K. submitted an appeal to the Cantonal Court against the Municipal Court I procedural decision allowing the applicants to register their ownership with the land registry.

21. On 26 March 2001, R.K. submitted an appeal to the Cantonal Court against the procedural decision of 22 February 2001. The Cantonal Court on 27 June 2001, annulled the first instance

procedural decision and sent the case back to the Municipal Court. These proceedings are still pending.

22. On 24 July 2001 CRPC issued a decision establishing that, as of 1 April 1992, R.K. was the "bona fide possessor" of the restaurant built on cadastral lot no. 1866/1 of the Cadastral Municipality Sarajevo V. Paragraph 6 of the CRPC Decision reads: "With the issuance of this Decision, all legal documents of judicial and municipal bodies of B&H and entities issued after April 01st 1992, depriving or limiting property rights of persons mentioned in Article 2 and all legal acts concluded after April 01st 1992 against the will of these persons, that served as a basis for change of the legal or factual situation on the mentioned property, are declared null.".

23. Upon R.K.'s request, on 21 March 2002 the Municipality Centar Sarajevo issued a conclusion allowing the execution of the CRPC decision. The applicants were ordered to vacate the property and their eviction was scheduled for 30 April 2002. In its conclusion the decision states that the property in question has never been declared abandoned or otherwise put under temporary administration of the Centar Sarajevo Municipality. It further states that the property shall be returned into the possession of the pre-war bona fide possessor R.K. and orders the applicants to vacate the property within 15 days from the date of receipt of the conclusion.

24. The applicants requested the Municipal Court I in Sarajevo to issue a provisional measure suspending the forcible execution of the Municipality Centar conclusion of 21 March 2002. On 26 April 2002 the Municipal Court I Sarajevo ordered a provisional measure postponing the applicants' eviction until the final decision is issued by the Court in the case pending before it. The decision of the Municipal Court reasons that the applicants have submitted documents to the court showing that R.K.'s rights had expired before the date indicated in the CRPC decision, that the restaurant built by R.K. was 80% destroyed, and indicating that the applicants have validly obtained legal title to the restaurant they built on the site. The Municipal Court also found that enforcement of the administrative conclusion before the conclusion of the court proceedings would result in irreparable harm to the applicants. On these grounds, relying on Article 293 of the Law on Civil Proceedings, and Article 12a paragraph 2 of the Law on Implementation of CRPC Decisions in conjunction with Articles 262-268 of the Law on Executive Procedure, the Municipal Court issued the mentioned order for provisional measures.

25. On 26 March 2002 the applicants submitted a request for reconsideration of its decision to the CRPC. However, on 9 July 2002, the CRPC decided to refuse their request as ill-founded.

26. R.K. appealed to the Cantonal Court against the procedural decision of 26 April 2002 issued by the Municipal Court. On 24 September 2002 the Cantonal Court accepted the appeal, annulled the first instance procedural decision and returned the case to the Municipal Court for renewal.

27. On 1 November 2002, pursuant to the Cantonal Court ruling, the Municipality Centar Sarajevo issued a second notification on enforcement of the CRPC decision. A second eviction of the applicants was scheduled for 15 November 2002, but it was postponed because the Municipal Court again ordered a provisional measure on 14 November 2002.

28. On 21 November 2002 the Federal Ombudsmen issued a decision finding that R.K.'s rights were violated. The Ombudsmen stated that the Municipality Centar violated R.K.'s rights (as guaranteed by the Federation Constitution and Articles 6 and 8 of the European Convention and Article 1 of Protocol No. 1 to the Convention) by failing to give execution to the CRPC decision. The Federal Ombudsman issued a recommendation requesting the Municipality to execute the CRPC decision without further delay.

29. On 14 January 2003, the Cantonal Court in Sarajevo again annulled the procedural decision of the Municipal Court on provisional measures of 14 November 2002 and again returned the case to the Municipal Court for renewal. The Cantonal Court reasoned that:

> *"Such decision of the first instance court is not correct. In the present case, the first instance court issued the disputed decision referring to provisions of Article 293 of the Law on Civil Procedure in connection with Articles 262 to 268 of the Law on Executive Procedure. Since it*

concerns the termination of enforcement of a decision of the administrative organ issued on the basis of the CRPC Decision, the enforcement cannot be terminated pursuant to the provisions of the Law on Civil Procedure or the Law on Executive Procedure.

Because the case concerns the termination of enforcement of a CRPC Decision, termination can be only allowed if the requirements set forth in Article 12 of the Law on Implementation of CRPC Decisions have been met and, thereby, this Court accepted the plaintiff's appeal and annulled the first instance procedural decision, having in mind provision of Article 362 paragraph 2 of the Law on Civil Procedure."

30. Thereupon, the Municipality Centar scheduled the eviction of the applicants for 10 February 2003. The eviction was not carried out because of the order for provisional measures issued by the Chamber on 7 February 2003 (see paragraph 10 above).

IV. Relevant legislation

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

31. 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.

32. 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. Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees (Official Gazette of FBiH nos 43/99, 51/00 and 65/01))

33. Article 2 of the Law on Implementation of CRPC Decisions states that the decisions of the CRPC "are final and binding from the day of their adoption". It further provides that the decisions of the CRPC "confirm the rights to real properties of the person(s) named in the decision, and require the responsible enforcement organs to take measures as set out in this Law" and "also carry the force of legal evidence that may be used in administrative, judicial or other legal proceedings."

34. Article 10 states that "the right holder referred to in the Commission decision and/or any other person who held a legal interest in the property or apartment at issue on the date referred to in the dispositive of the Commission decision, is entitled to submit a request for reconsideration to the Commission, in accordance with Commission regulations. A person with a legal interest in the property or apartment at issue which was acquired after the date referred to in the dispositive of the Commission decision, may lodge an appeal against the conclusion on permission of enforcement issued by the competent administrative organ, only as permitted by the provisions of this Law. The appeal procedure mentioned in this paragraph may not refute the regularity of the Commission decision. The regularity of the Commission decision may be reviewed only through the reconsideration procedures referred to in Article 11 of this Law."

35. 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, amending *inter alia* Articles 11 and 12 and inserting a new Article 12a. It entered in force eight days after the publication in the OG FBiH on 21 December 2001 (OG FBiH 56/01).

36. Relevant for the purposes of the present decision is the amended text of paragraph 2 of Article 11, which reads:

> "The competent administrative body shall not suspend the enforcement of the Commission decision, unless it has received official notification from the Commission specifically requesting suspension pending the outcome of the reconsideration."

37. The new Article 12a 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 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 transfer of rights in accordance with domestic law and irreparable damage to the enforcee if the enforcement proceedings continued."

C. The Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens (Official Gazette of the Federation BiH, Nos. 11/98, 29/98, 27/99, 43/99, 37/01, with incorporated amendments proclaimed by the High Representative Decision of the 4 December 2001 and published in the Official Gazette of the Federation BiH, No. 56/01 of the 21 December 2001)

38. According to Article 17d "a person whose right of temporary use was terminated under Article 12, Paragraph 2, Point 3 of this Law, who spent his/her personal funds on necessary expenses for the real property, shall be entitled to recover those funds under the *Law on Obligations* (Official Gazette RBiH 2/92, 13/93 and 13/94). Proceedings under the Law on Obligations may be commenced from the date when the previous owner regains possession of the real property." Where the court has awarded compensation to these persons, "the owner may recover that sum from the competent authority under the *Law on Obligations*." It further provides that "the competent authority shall be liable for all damage to the property from the time it was abandoned by the owner until the time it is returned to the owner or a member of his/her 1991 household pursuant to this law."

D. Decisions of the High Representative on the Allocation of Socially Owned Land

1. Decision of 26 May 1999

39. On 26 May 1999, the High Representative issued a *Decision suspending the power of local authorities in the Federation and the Republika Srpska to dispose of socially-owned land in cases where the land was used on 6 April 1992 for residential, religious, cultural, private agricultural or private business activities* (OG FBiH no. 20/99).

40. The Decision of 26 May 1999 states, in pertinent part, as follows:

"Notwithstanding the provision of any other law, state property (including former socially-owned property, but excluding socially-owned apartments) may not be disposed of (including allotment, transfer, sale, giving for use or rent) by the authorities of the Entities or Bosnia and Herzegovina if it was used on April 6, 1992 for cultural or religious services, or if it was used by natural persons for residential purposes, business activities, or agriculture.

"Any decision referred to in the previous paragraph made by the authorities of the Entities after April 6, 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work."

41. The Decision of 26 May 1999 entered into force immediately and remained in force until 30 December 1999. On 30 December 1999, the High Representative extended the validity of the Decision of 26 May 1999 until 30 June 2000 (OG FBiH no. 54/99).

2. Decision of 27 April 2000

42. On 27 April 2000, the High Representative issued a *Decision on re-allocation of socially-owned land, suspending the 26 May 1999 and 31 December 1999 Decisions* (Official Gazette of Bosnia and Herzegovina — hereinafter "OG BiH" — no. 13/00; Official Gazette of the Federation of Bosnia and Herzegovina — hereinafter "OG FBiH" — no. 17/00; Official Gazette of the Republika Srpska — hereinafter "OG RS" — no. 12/00).

43. The Decision of 27 April 2000 states, in pertinent part, as follows:

"Notwithstanding the provision of any other law, state-owned real property, including former socially-owned property, but excluding socially owned apartments, may not be disposed of, allotted, transferred, sold, or given for use or rent, by the authorities of either Entity or Bosnia and Herzegovina.

"Any decision referred to in the previous paragraph made by the authorities of the Entities after 6 April 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work. …

"Any decision, agreement or transaction in violation of this Decision is null and void. The Office of the High Representative may, upon a clear showing by the competent authorities of an Entity or Bosnia and Herzegovina that a proposed transfer of state-owned real property is non-discriminatory and in the best interest of the public, grant a written exemption to this Decision. The burden of clearly showing that a proposed transfer of state-owned real property is non-discriminatory and in the best interests of the public rests with the competent authority requesting a written exemption to this Decision."

44. The Decision of 27 April 2000 entered into force immediately and remained in force until 31 December 2000. On 20 December 2000, the High Representative extended the validity of the Decision of 27 April 2000 until 30 March 2001 (OG BiH no. 34/00; OG FBiH no. 56/00; OG RS no. 44/00). On 30 March 2001, the High Representative again extended the validity of the Decision of 27 April 2000 until 31 July 2002 (OG BiH no. 11/01; OG FBiH no. 15/01; OG RS no. 17/01).

45. On 31 July 2002, the High Representative issued another Decision further extending the Decision of 27 April 2000 until 31 March 2003 (OG BiH no. 24/02 of 29 August 2002; OG RS no. 49/02 of 13 August 2002; and OG FBiH no. 43/02). The Decision of 31 July 2002 adds the following statement:

> "Further, by means of the adoption of harmonized legislation regulating the transfer and disposal of state-owned real property, including socially-owned property, by a date as early as possible prior to 31 March 2003, the authorities of Bosnia and Herzegovina and its entities are to assume full responsibility for ensuring the re-allocation of state-owned real property, including formerly socially-owned property, in a non-discriminatory manner and in the best interests of the citizens of Bosnia and Herzegovina."

46. On 31 March 2003, the High Representative again issued a Decision extending the 31 July 2002 ban on the allocation of state-owned land in Bosnia and Herzegovina until 15 May 2003 (OG BiH no. 13/03 of 15 May 2003 and OG FBiH no. 23/03 of 2 June 2003).

E. Law on Construction Land of the Socialist Republic of Bosnia and Herzegovina

47. The Law on Construction Land (Official Gazette of the Socialist Republic of Bosnia and Herzegovina — hereinafter "OG SRBiH" — nos. 34/86, 1/90, 29/90, 3/93, and 13/94) was applied in the former Socialist Republic of Bosnia and Herzegovina and the Republic of Bosnia and Herzegovina and is still applied in the Federation of Bosnia and Herzegovina. The Decree with force of law on the Amendments to the Law on Construction Land (Official Gazette of the Republic of Bosnia and Herzegovina — hereinafter "OG RBiH" — no. 3/93) was confirmed as law on the basis of the Law on Confirming Decrees with the Force of Law (OG RBiH no. 13/94).

V. COMPLAINTS

48. The applicants allege a violation of their right to peaceful enjoyment of possessions.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

49. In its observations of 20 May 2002 the respondent Party submits that the application is inadmissible pursuant to Article VIII(2)(a) of the Agreement for non-exhaustion of domestic remedies.

50. The respondent Party notes that the applicants were ordered to vacate the property in question pursuant to the CRPC decision of 24 July 2001. The respondent Party reminds the Chamber that under Article XII of Annex 7 to the Agreement and Article 2 of the Law on Implementation of CRPC Decisions this CRPC decision is final and binding.

51. The respondent Party further points out that under Article 10 and Article 12 of the Law on Implementation of the CRPC Decisions, the applicants filed an appeal against the conclusion allowing execution of the CRPC decision of 24 July 2001 and that on 24 April 2002 they filed a submission to the court in case number: P-1209/01, requesting the court to issue a provisional measure suspending the procedure of execution of the CRPC decision of 24 July 2001 until the court proceeding in this legal matter is validly concluded. The court of the respondent Party adopted the proposal for issuance of the provisional measure and on 26 April 2002 it issued procedural decision no. P-1209/01. Following this procedural decision, on 29 April 2002 the Municipal administrative organ issued a conclusion suspending the execution of the CRPC decision of 24 July 2001 until the court proceeding is validly concluded or until the Municipal Court I in Sarajevo issues a new decision in the proceeding upon the lawsuit of R.K. conducted under no. P-1209/01.

52. The proceedings upon the lawsuit of R.K. are thus still pending before the Municipal Court I in Sarajevo and, accordingly, the respondent Party asks the Chamber not to accept the application in accordance with Article VIII(2)(a) of the Agreement, because the applicants have not exhausted effective remedies. The respondent Party reminds the Chamber of its previous findings in cases numbers: CH/01/6911, *Radomir Vučković v. Federation of BiH*, where it stated that *"... the applicant's appeal is premature since the proceeding before the Court in Sarajevo is still pending; domestic remedies have therefore not been exhausted as required under Article VIII(2)(a) of the Agreement and, accordingly, the application has to be rejected"* (decision on admissibility of 3 April 2001, paragraph 3) and CH/01/7786 *Salih Gosić v. Federation of BiH* (decision on admissibility of 12 October 2001).

53. The respondent Party reminds the Chamber that the requirement for the applicants to exhaust all available domestic remedies before filing a formal application to the Chamber is meant to maintain the general principle of the international law based on the belief that the State, in the present case the respondent Party, must be afforded an opportunity to correct by domestic remedies any breach of its international obligations before it is subject to the international review or supervision. In addition, the respondent Party refers to the case-law of the Convention organs have held that a mere doubt about the success in the domestic proceedings does not release the applicant of his obligation to exhaust domestic remedies.

54. The respondent Party has not made any submissions on the merits of the case.

B. The Applicants

55. In their observation of 2 December 2002 the applicants submit that they are of the opinion that the allegations contained in their application are well founded and that their right to property has indeed been violated.

56. They point out that R.K. was the owner of a facility of temporary nature with the limited right to use the land, which expired in 1986. They submit that the right to keep the facility located on the land owned by the Municipality Centar also expired at that time. Since then, R.K. had to be considered as an illegal occupant of the land and had to remove (pull down) the facility at his own expense. Further, since the facility was 80% destroyed during the war, according to the report of the Commission of the Municipality Centar of 6 June and 23 June 1994, the ownership right of R.K. ceased in accordance with Article 53 of the Law on Ownership Relations (OG FBiH, no. 6/98) which provides that the ownership right ceases by destruction of the object.

57. They further argue that a facility of temporary nature cannot be subject to registered ownership in the land books. Such facility may be used on the basis of a provisional license by the competent administrative organ as long as it is valid. However, the use of such facility is different from ownership. With the termination of the possibility of using a facility of temporary nature, that facility has to be removed as a movable object.

58. The applicants further point out that as *bona fide* constructors in accordance with Article 25 of the Law on Ownership Relations, they are the owners of the newly-built facility, which differs from the facility previously owned by R.K. as to its architecture and function. They point out that the previous facility was of 59 m2, whereas the new one is of 160 m2. They also argue that before the construction license was granted to them and after payment of the value of the land and the town rent to the nominal owner, the Centar Municipality, they obtained the right to use the land for construction of the facility and the basis for registration in the land books. According to the principle of equality, as legal owners and possessors of the disputed facility, they argue that they have a stronger right than an illegal occupant over a facility that was of temporary nature and was totally destroyed during the war.

VII. OPINION OF THE CHAMBER

A. Admissibility

59. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies against the violations complained of exist and whether the applicant has demonstrated that they have been exhausted.

60. The respondent Party submits that the proceedings upon the lawsuit of R.K., are still pending before the Municipal Court I in Sarajevo and it accordingly suggests to the Chamber to decide not to accept the application in accordance with Article VIII(2)(a) of the Agreement because the applicants have not exhausted all effective remedies at their disposal.

61. The Chamber notes that the interference with the applicants' right to peaceful enjoyment of possessions is in fact twofold: firstly, the enforcement of the CRPC decision and the Decisions of the High Representative on Socially-Owned Real Property challenge their legal title to the KOGO restaurant building (their registered ownership); secondly, the enforcement of the CRPC decision pending resolution of the court dispute concerning their legal title or the issuance of a waiver by the OHR, would deprive them of *de facto* possession of the business facility. The Chamber shall address these two aspects in turn.

1. As to whether the applicants have a remedy to prevent their eviction from the business premises pending court determination of their legal title to the restaurant building

62. The Chamber notes that in the course of the pending court proceedings, the Municipal Court has twice issued orders for provisional measures to halt the enforcement of the administrative conclusions in R.K.'s favour. Both times these procedural decisions have been quashed by the Cantonal Court. In its decision of 14 January 2003, the Cantonal Court explains that the provisions of the Law on Civil Procedure and of the Law on Executive Procedure relied on by the Municipal Court cannot be applied in the instant case, as the enforcement of CRPC decisions is governed solely by the Law on Implementation of CRPC Decisions. The Chamber shares this opinion. The Cantonal Court

then proceeds to instruct the Municipal Court to establish whether the requirements set forth in Article 12 of the Law on Implementation of CRPC Decisions are met.

63. The Chamber notes that the relevant provision is rather Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions, governing court suspension of the administrative proceedings to enforce a CRPC decision. It 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 transfer of rights in accordance with domestic law and irreparable damage to the enforcee if the enforcement proceedings continued." Thus, one of the requirements for a procedural decision to suspend enforcement of the CRPC decision is "evidence of a written contract on transfer of rights". As the first paragraph of Article 12, which speaks of "proceedings ... to prove that the right holder named in the Commission's decision voluntarily and lawfully transferred his/her rights to the appellant" shows, the "transfer of rights" referred to in the second paragraph of Article 12 can only be a transfer from the holder of the CRPC decision to the appellant, in the instant case from R.K. to the applicants.

64. The Chamber further notes that it is the applicants' (undisputed) position that they have acquired full ownership rights over the property since 1996 not from R.K. but from the fact that they have obtained a right to use the land from the Municipality itself and then obtained rightful ownership over the building through construction in accordance with the law at that time. The Chamber accordingly concludes that the remedy in Article 12a of the Law on Implementation of CRPC Decisions is not relevant to the applicants' case. The applicants have no remedy under domestic law to obtain a suspension of the enforcement of the CRPC decision, except for the request for reconsideration to CRPC, which they have already unsuccessfully exercised.

65. Accordingly, insofar as the applicants allege that their eviction from the restaurant premises pending resolution of the court case violates their right to peaceful enjoyment of possessions, the applicants do not have any effective remedy. The application is therefore admissible in this part.

2. As to the legal title to the restaurant building

66. The Chamber notes that the interference with the applicants' legal title to the restaurant premises takes two forms: on the one hand, the CRPC decision as implemented under the Law on Implementation of CRPC Decisions; on the other, the Decisions of the High Representative on the Allocation of Socially Owned Land. The Chamber will deal with the existence of effective remedies against these two aspects of the interference in turn.

(i) The CRPC decision

67. The Chamber recalls that under Article XII(7) of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Agreement on Refugees and Displaced Persons) not only the decisions of CRPC are final but "any title, deed, mortgage, or other legal instrument created or awarded by the CRPC shall be recognised as lawful throughout Bosnia and Herzegovina". The Chamber notes also that the CRPC decision in favour of R.K. determines in a final and binding manner that he was the "bona fide possessor" of the land and restaurant as of 1 April 1992. Additionally, however, the CRPC decision establishes in its paragraph 6 that "With the issuance of this Decision, all legal documents of judicial and municipal bodies of B&H and entities issued after April 01st 1992, depriving or limiting property rights of persons mentioned in Article 2 and all legal acts concluded after April 01st 1992 against the will of these persons, that served as a basis for change of the legal or factual situation on the mentioned property, are declared null.".

68. As the Chamber has already noted, the only judicial remedy against CRPC decisions before the courts of the Federation is an action under Article 12a of the Law on Implementation of CRPC Decisions "to prove that the right holder named in the Commission's decision voluntarily and lawfully transferred his/her rights to the appellant". This remedy is not available to the applicants, as they do not allege to have received the right to use the land on which the restaurant stands from R.K., but from the Municipality (see paragraphs 62-64 above). Accordingly, it appears that the applicants cannot obtain before the courts recognition of the title they allege to have acquired since 1996, which the CRPC decision purports to annul in its paragraph 6.

(ii) The High Representative's Decisions on the Allocation of Socially Owned Land

69. The Chamber further notes that the applicants' claim to the restaurant is based on the procedural decision of the Municipality Centar Sarajevo no. 05/B-475-39/96 of 26 December 1996, by which socially owned land was allocated to them. It would thus appear that the decisions of the High Representative of 26 May 1999 and April 2000 are applicable to the present case. These decisions declare that state property, including former socially-owned property, may not be disposed of (including allotment, transfer, sale, giving for use or rent) by the authorities of the Entities or Bosnia and Herzegovina if it was used "on April 6, 1992 by natural persons for residential purposes and business activities". Moreover, these decisions purport to have retroactive effect as well, stating that "any decision referred to in the previous paragraph made by the authorities of the Entities after April 6, 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work."

70. The 1996 procedural decision falls thus within the scope of the decision of the High Representative, in particular in light of the fact that R.K., a refugee, expressed his wish to repossess his pre-war business premises. It remains unclear to the Chamber whether the allocation of the land to the applicants is null and void, or whether the exception where "a third party has undertaken lawful construction work" applies to keep the allocation of the land to the applicants in force. The Chamber observes that the applicants took possession of the land pursuant to a decision of the municipal assembly and constructed a building pursuant to building permits whose validity has not been contested in these proceedings. It could thus be argued that notwithstanding any later acts or decisions affecting the validity of the allocation of the land to the applicants, the construction of the restaurant building appears to have been lawful at the time it was undertaken, and therefore falls within the exception for "lawful construction" in the High Representative's decisions. The Chamber notes, however, that the wording of paragraph 6 of the CRPC Decision (see paragraph 67 above) in absolute terms, declaring null all the post 1992 transactions, would prevent domestic courts from issuing any decision assessing whether the exception contained in the decisions of the High Representative applies to the applicants, allowing them to be considered as "a third party (which) has undertaken lawful construction work", and thus deciding to keep the allocation of the land to the applicants in force.

71. The Chamber observes further that the High Representative's decision of April 2000 provides that the Office of the High Representative may grant a waiver of this Decision, upon a clear showing, by the competent authorities, that the proposed transfer of socially owned real property is non-discriminatory and in the best interests of the public. This makes the validity of the allocation of land to the applicants subject to an extra-judicial mechanism. Until such time as a waiver is sought from OHR and OHR exercises its discretion as to whether or not to grant a waiver, the legal situation is unclear from the perspective of a domestic court.

72. Moreover, the obligation to apply for a waiver lies with the municipality, rather than the individual, who may have obtained all the approvals required by law. Therefore the applicants are effectively not in a position to take any steps that would bring about clarity with regard to the validity of the allocation of the land to them.

73. The Federation submits that the applicants have not exhausted the domestic remedies available to them. Specifically, the Federation argues that the proceedings upon the lawsuit of R.K. are still pending before the Municipal Court I in Sarajevo. However, in the light of all the above considerations, the Chamber notes that these proceedings only refer to the enforcement of the CRPC decision as such (see Cantonal Court in Sarajevo decision of 14 January 2003) and not to the legal title. The Chamber notes however that the applicants could have approached the domestic courts in order to seek a decision on the legal title. However, the Chamber notes that even if the applicants had sought to avail themselves of further domestic remedies available to them, they would hardly have had any prospect of success as a result of the application of paragraph 6 of the CRPC decision in conjunction with the High Representative decisions. In these circumstances, the Chamber is satisfied that the applicants cannot be required to exhaust any further domestic remedies for the purposes of Article VIII(2)(a) of the Agreement (see e.g., case no. CH/98/800, *Gogić*, decision on admissibility and merits of 13 May 1999, paragraph 46, Decisions January–July 1999).

74. For the above reasons, the Chamber will declare the application admissible insofar as the applicants allege a violation of their rights protected under Article 1 of Protocol No. 1 to the Convention in respect of both the eviction from the business premises and the interference with the legal title.

B. MERITS

75. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Parties of their obligations under the Agreement.

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

76. The applicants complain that their right to the peaceful enjoyment of their possessions has been violated. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws a 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 of penalties."

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

77. The Chamber notes that the applicants claim that they have acquired full ownership rights over the property since 1996 on the basis of the fact that they have obtained a right to use the land from Municipality itself and then obtained rightful ownership over the building through construction in accordance with the law in force at that time. The Chamber recalls that on 26 December 1996 the Municipality Centar Sarajevo allocated the land to the applicants and that the Municipal Secretariat for Physical Planning and Housing Affairs provided them with a building permit on 21 January 1997. Subsequently the applicants constructed a new restaurant on the site of the previous restaurant which had been destroyed. They have been running this new restaurant since then. The Chamber further points out that, before the CRPC and the High Representative retroactive decisions came into force, the applicants were acting in accordance with the laws in force which did not prevent them from acquiring the contested rights from the municipality. There is no reason to doubt the validity of the transaction entered into by the applicants with the Municipality at the time it was entered into. The Chamber therefore finds that the applicants had rights under their contracts which were "possessions" for the purposes of Article 1 of Protocol 1.

78. The Chamber also notes, that on 12 April 2000, the applicants registered their ownership over the restaurant with the Land Registry in the Municipal Court I Sarajevo and as of today, their name still appears in the land books. Thus, as a matter of fact, the applicants are the current registered owners of the disputed property. Whether or not the allocation of the land to the applicants by the Municipality and subsequent issuance of building permits for the construction of the restaurant are valid, unless and until the land books are changed, the applicants are entitled, as a matter of domestic law, to exercise the rights of registered owners (see case no. CH/00/5408, *Salihagić*, decision on admissibility and merits of 8 May 2001, Decisions January—June 2001, paragraph 57).

79. The Chamber thus holds that the applicants' legal title to the KOGO restaurant building (their registered ownership) is a valuable asset and therefore constitutes a protected possession under Article 1 of Protocol No. 1 to the Convention.

80. The Chamber further notes that it is undisputed that the applicants have been running the restaurant "Kogo" since 1996. The applicants allege violations of their right to property also because they have built a completely new restaurant, which has 190 square meters (the pre-war one had 59

square meters) and invested about 200,000.00 DEM in the restaurant's construction and in obtaining all the Municipality's approvals. In this respect the Chamber recalls that, following the jurisprudence of the Strasbourg bodies, "possessions" have been understood by the Chamber in a wide sense. Consequently, apart from rights *in rem*, various economic assets and other rights *in personam* may also be considered possessions falling within the scope of protection of Article 1 of Protocol No. 1. The concept of "possessions" is autonomous and the essential characteristic is the acquired economic value of the individual interest (see, e.g., Van Marle v. Netherlands, 1986 Series A No. 101, para. 41; Pressos Compania Naviera S.A. v. Belgium, 1995 Series A No. 332, para. 31). The Chamber has itself held that the concept extends to cover contractual rights under contracts for the purchase of property, even though such contracts did not of themselves give rise to real rights of property (case nos. CH/96/3, 8 & 9, *Medan and Others*, decision on the merits delivered on 7 November 1997, Decisions on Admissibility and Merits March 1996 - December 1997, paragraph 32).

81. In the present case, the Chamber notes that, besides the applicant's claim to a legal title over the restaurant, the applicants' right to run the restaurant is a valuable asset. Therefore, the Chamber is of the opinion that the applicant's license to run the restaurant also constitutes a protected possession under Article 1 of Protocol No. 1 to the Convention.

(b) Interference with the applicants' enjoyment of their possessions

82. As already stated in the admissibility part of the decision (see paragraph 61), the Chamber is of the opinion that the interference with the applicants' right to peaceful enjoyment of possessions is in fact twofold: firstly, the enforcement of the CRPC decision and the Decisions of the High Representative on State-Owned Real Property challenge their legal title to the KOGO restaurant building (their registered ownership); secondly, the enforcement of the CRPC decision pending resolution of the court dispute concerning their legal title or the issuance of a waiver by the OHR, would deprive them of *de facto* possession of the business facility. The Chamber shall address these two aspects in turn.

(i) Interference with the applicants' legal title to the KOGO restaurant building:

83. Following its reasoning in the admissibility part (see paragraph 66), the Chamber holds that the interference with the applicants' legal title to the restaurant premises is twofold: firstly, the CRPC decision as implemented under the Law on Implementation of CRPC Decisions; secondly, the Decisions of the High Representative on the Allocation of Socially Owned Land. The Chamber will deal with these two aspects of the interference in turn.

The CRPC decision:

84. The Chamber notes that paragraph 6 of the CRPC Decision provides that: "With the issuance of this Decision, all legal documents of judicial and municipal bodies of B&H and entities issued after April 01st 1992, depriving or limiting property rights of persons mentioned in Article 2 and all legal acts concluded after April 01st 1992 against the will of these persons, that served as a basis for change of the legal or factual situation on the mentioned property, are declared null." Thus the CRPC decision itself seems to declare null and void the post-1992 transaction and as such interferes with the applicants' legal title.

The High Representative's Decisions on the Allocation of Socially Owned Land:

85. The decisions of the High Representative of 26 May 1999 and April 2000 are applicable to the present case since the applicants' claim to the restaurant is based on the procedural decision of the Municipality Centar Sarajevo no. 05/B-475-39/96 of 26 December 1996, by which socially owned land was allocated to them, and in light of the fact that R.K., a refugee, expressed his wish to repossess his pre-war business premises. These decisions declare that state property, including former socially owned property, may not be disposed of (including allotment, transfer, sale, giving for use or rent) by the authorities of the Entities or Bosnia and Herzegovina if it was used "on April 6, 1992 by natural persons for residential purposes and business activities". Moreover, these decisions purport to have retroactive effect as well, stating that "any decision referred to in the

previous paragraph made by the authorities of the Entities after April 6, 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work."

86. As to the question whether the exception where "a third party has undertaken lawful construction work" applies to keep the allocation of the land to the applicants in force, the Chamber already stated (see paragraph 70) that the wording of paragraph 6 of the CRPC Decision in absolute terms, declaring null all post 1992 transactions, would appear to prevent domestic courts from issuing any decision assessing whether the exception contained in the decision of the High Representative applies to the applicants, so as to allow them to be considered as "a third party (which) has undertaken lawful construction work", and thus deciding to keep the allocation of the land to the applicants in force.

87. The Chamber holds therefore, that the apparent effect of the CRPC decision, and/or in conjunction with the High Representative's decisions on allocation of socially owned land, was to annul those rights, thus depriving the applicants of their possessions.

(ii) Interference by the enforcement of the CRPC decision pending resolution of the court dispute concerning their legal title or a waiver by the OHR.

88. The Chamber notes that after the Cantonal Court in Sarajevo on 14 January 2003 again annulled the Municipal Court procedural decision on provisional measure of 14 November 2002, the administrative bodies are under an obligation to enforce the CRPC decision and therefore proceed with the forced eviction of the applicants if necessary. The Chamber considers that the threatened enforcement of the CRPC decision against the applicants, who are the registered owners of the property in question, constitutes an interference with the peaceful enjoyment of their possessions.

89. The Chamber will next consider whether this interference with the applicants' enjoyment of their possessions was justified under Article 1 of Protocol No. 1 as being "in the public interest" and "subject to the conditions provided for by law."

(c) Is the interference "subject to the conditions provided for by law"?

(i) The threat of eviction:

90. The Chamber notes that the applicants' threat of eviction is due to the fact that R.K., the CRPC decision holder and pre-war "bona fide possessor" of the earlier existing restaurant (CRPC decision issued on 24 July 2001), requested from the administrative body to enforce his CRPC certificate. CRPC decisions are final and binding for the administrative bodies. Furthermore the Chamber reiterates that under the Law on Implementation of CRPC Decisions, as *lex specialis*, the only remedy against the enforcement of the CRPC decision (having exhausted the reconsideration process under Article 11) is an action under Article 12a accompanied by a request to the court for an interim order to suspend enforcement of the CRPC decision. However, Article 12a does not apply in the present case.

91. Thus the Chamber concludes that the continuation of the enforcement proceedings against the applicants was in accordance with the law.

(ii) The interference with their legal title:

92. The Chamber recalls that under Annex 7 of the Dayton Peace Agreement the CRPC 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). The CRPC has determined in its decision recognising R.K. as the pre-war possessor of the restaurant, that "all legal documents of judicial and municipal bodies of B&H and entities issued after April 01st 1992, depriving or limiting property rights of persons mentioned in Article 2 and all legal acts concluded after April 01st 1992 against the will of these

persons, that served as a basis for change of the legal or factual situation on the mentioned property, are declared null". The Chamber has no competence to review decisions of the CRPC, nor do the authorities of the Federation have such competence (see case no. CH/01/7728, *V.J.*, decision on admissibility and merits delivered on 4 April 2003, paragraphs 118-123). Thus the interference with the legal title of the applicants to the KOGO restaurant flowing from the CRPC decision must be considered "subject to the provisions provided for by law".

93. As to the annulment of the allocation of the socially owned land to the applicants, the Chamber considers that as this interference is directly provided for in the Decisions of the High Representative, it also must be considered to be "subject to the provisions provided for by law".

(d) Justification for the interference

94. In order to establish whether the established interference is compatible with the applicants' rights under Article 1 of Protocol No. 1, the Chamber must next examine 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 applicants' 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 applicants have been made to bear 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).

95. The Chamber notes that, according to the jurisprudence of the European Court of Human Rights, any interference with property can only be justified if it is in the public, or general, interest. Normally, where property rights are interfered with in pursuance of legitimate social or economic policies, the community at large will enjoy a direct benefit from it. However, it is not essential that the general community enjoy a direct benefit from the interference with private property rights. In *James and Others v. the United Kingdom* (judgment of 21 February 1986, Series A no. 98, pp. 31, paragraph 41), property was transferred from a private landlord to his tenants under the leasehold enfranchisement scheme. Even though the general community as a whole enjoyed no direct benefit from the expropriated property, the transfer was nevertheless found to be in the public interest because the deprivation was made in pursuance of a government policy to enhance social justice within the community as a whole. The Court pointed out that the taking of property pursuant to a policy calculated to enhance social justice within the community could properly be described as being in the public interest.

(i) The public interest underlying the interference with the applicants' possessions

- The CRPC Decision:

96. The Chamber has previously held that the passing of the different property laws in BiH (both the Law on Implementation of CRPC Decisions and the Laws on Cessation) was dictated 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 may represent 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, paragraphs 49). Moreover, the Chamber has acknowledged that time is of the essence in the property repossession process. As stated in Article I, paragraph 1 of Annex 7, "the *early* return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina" (emphasis added). The Chamber has found that this pressing social need generally justifies the eviction of applicants from the properties they are occupying. Indeed, a significant factor that determines whether refugees and displaced persons can and will return is a sound legal framework for the repossession of housing and property. Where a legal regime exists to allow refugees and displaced persons to repossess their pre-displacement housing, durable solutions can be found through return to pre-conflict property or, alternatively, the sale and use of the proceeds to rebuild lives elsewhere.

97. The Chamber notes, however, that its previous cases involved the housing needs of displaced persons and refugees, whereas the present case does not involve the repossession by a displaced person of his/her pre-war home, but the repossession of business premises. This said, although the repossession of housing is a cornerstone for return, the Chamber notes that sustainable return also requires the possibility for returnees and displaced persons to access means of livelihood in the place of return. The Chamber recalls that in order to ensure the safe and voluntary return and to prevent activities in their territory which would hinder return, the parties have committed themselves to undertake a number of confidence building measures, namely to create in their territories the political, economic, and social conditions conducive to voluntary return (Annex 7, Article II(1)). The Parties thus acknowledged that safe and voluntary return required the establishment of conditions of a self-sustainable livelihood and of prospects of an eventual economic re-integration. Indeed, one of the main obstacles to the return and the sustainable reintegration of the returnees is the problem related to income-generating activities and employment. It is a fact that once returnees have gone home, they often face difficulties re-settling in their communities. The Chamber notes that although housing is the overriding concern of those who want to return to their homes, access to employment and to income-generating activities in general closely follows. Obstacles in this area undermine prospects for an integrated multi-ethnic BiH.

98. The Chamber recalls the UNHCR Handbook on Voluntary Repatriation (UNHCR, Handbook on Voluntary Repatriation, Geneva, UNHCR (1996)) which provides additional guidance on these issues. The Handbook stresses, for instance, that the mandate of UNHCR includes promoting "the creation of conditions that are conducive to voluntary return in safety and with dignity". "Return in safety" is understood to be return which takes place under conditions of legal safety, physical security and material security, the latter been defined as: access to land or means of livelihood (at 12). This is also underlined in the Addendum to the Report of the Representative of the United Nations Secretary-General, Mr. Francis M. Deng, submitted pursuant to United Nations Commission on Human Rights resolution 1997/39 titled: "Guiding Principles on Internal Displacement"[1]. Principle 28 states that the " Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."

- The OHR Decisions on Allocation of Socially-Owned Land:

99. The Chamber will now turn to the public interest underlying the OHR Decision on Allocation of Socially-Owned Land. According to the OHR Press Release of 27 May 1999 on the High Representative Decision on Socially-Owned Land (available at the OHR web-site, see www.ohr.int), the decision suspended "the power of authorities in both Entities to re-allocate and dispose of certain types of socially-owned land.". It further states that:

> "(...) the Decision addresses the wide-spread misuse, re-allocation and sale of socially-owned land that was previously used by people who are now refugees and displaced persons and may wish to return. In many return areas, municipalities have re-allocated former agricultural land, or have demolished war-damaged housing in order to use the land differently. They have also re-allocated land that used to accommodate cultural and religious sites and private business premises.
>
> Conducive conditions are necessary for the sustainable return of refugees and displaced people. In many cases, the current land re-allocation practice amounts to taking away their livelihood and cultural and religious heritage, which is in clear violation of Annex 7 of the Dayton Peace Agreement. The re-allocation and, in many instances unlawful sale of socially-owned land also threatens to undermine the processes of restitution and privatisation."

[1] Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 Addendum, Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2).

100. The Chamber thus accepts that also the OHR decisions on allocation of socially owned land are aimed at favouring conducive conditions for the sustainable return of refugees and internally displaced persons.

101. To sum up, the Chamber is of the opinion that the order to the applicants to vacate their property and the retroactive annulment of both the allocation of the land and the post-1992 legal transactions are supported by a pressing social need, i.e. to further full and expeditious implementation of Annex 7 of the Dayton Peace Agreement. It remains to be determined whether the right balance was struck between this public interest and the rights of the applicants.

(ii) The burden placed on the applicants

a. Retroactivity and reliance placed by the applicants on the allocation of the land

102. In this respect, the Chamber notes that the effect of the CRPC decision and of the Decisions of the High Representative is, inter alia, to annul retroactively existing contractual rights which the applicants have held since 1996 and to allow the eviction of the applicants from the restaurant they built and have been running for 6 years. In the Chamber's opinion, such retroactive decisions undermine legal certainty and frustrate the reliance placed by the applicants on rights acquired in accordance with the law in force at the time. It must therefore be regarded as a heavy-handed interference with property rights and can only be justified by cogent reasons.

b. Compensation mechanism

103. The Chamber also notes that the applicants allege violations of their right to property also because of the fact that they had built a completely new restaurant, which had 190 square meters (the pre-war one had 59 square meters) and invested about 200,000 DEM in the restaurant's construction and in obtaining all the Municipality's approvals. The Chamber is of the opinion that compensation terms are material to the assessment whether the interference respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants. Indeed, it follows from the case-law of the Convention organs that as regards deprivation of possessions there is normally an inherent right to compensation (Eur. Court HR, James and Others judgment of 21 February 1986, Series A no. 98, p. 36, para. 54, and Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 51, para. 122).

104. In the present case, the respondent Party has not made any arguments concerning the existence and adequacy of a compensation mechanism. The Chamber notes that Article 17d of the Law on Cessation of the Law on Temporarily Abandoned Real Property Owned by Citizens, which might be applicable either directly or by analogy, states that "a person whose right of temporary use was terminated [...], who spent his/her personal funds on necessary expenses for the real property, shall be entitled to recover those funds under the *Law on Obligations*" (see paragraph 38 above). Article 17d suggests that the applicants would have to initiate court proceedings against R.K. in order to recover the 200,000 KM they invested in the restaurant, and that they could not file a suit directly against the Municipality. To sum up, the applicants would have to first hand over the restaurant to R.K., thereby losing the basis of their livelihood, and then initiate court proceedings to recover a considerable sum from a party (R.K.) that may just as well not be able to pay such an amount. The Chamber considers that this compensation mechanism puts a heavy burden on the applicants' shoulders.

c. Current legal uncertainty

105. The Chamber recalls that in the present case, the exact legal situation of the previous restaurant that existed at the time of the outbreak of the war is disputed by the applicants and no final adjudication on the issue has been reached so far by any organ of the respondent Party. Indeed, on 15 October 1999, R.K. initiated court proceedings before the Municipal Court I in Sarajevo requesting the Court to establish his property rights over the present restaurant and to address the issue of the extent to which the pre-war restaurant was destroyed. Although the Municipal Court declared itself incompetent on 22 February 2001, the Cantonal Court on 27 June 2001 annulled the

first instance procedural decision and sent the case back to the Municipal Court and these proceedings are still pending.

106. The Chamber recalls that the question whether review of a CRPC decision can be sought before the ordinary courts of Bosnia and Herzegovina was addressed by the Constitutional Court of Bosnia and Herzegovina in the *Krivić* case (case no. U 21/01, decision of 22 June 2001). The Constitutional Court stated that "the Law on the Implementation of CRPC Decisions (Articles 10 to 12) makes it possible for interested persons to initiate judicial proceedings on some issues covered by that law. If the case concerns the right holder status as of 1 April 1992, the interested person may submit a request for reconsideration to the Commission. Before that, the person may be referred to the ordinary courts in order to solve legal issues that the Commission did not consider and in order to gather necessary evidence to be submitted for reconsideration." (*Krivić* judgment, paragraph 19).

107. Applied to the present case, the *Krivić* judgment of the BiH Constitutional Court suggests that if the current litigation before the domestic courts was to result in a finding that R.K. did not enjoy a priority right to re-build the restaurant (as claimed by the applicants), the applicants could seek reconsideration of the CRPC decision on the basis of such finding of the Federation courts.

108. The Chamber also notes that it is unclear whether the High Representative's decisions refer to the allocation of the socially owned land alone or whether it extends to the property located on it which is and was privately owned by the applicants before the decision came into force. Moreover, it is unclear whether a waiver could still be sought from the OHR and granted by the OHR. The High Representative's decisions appear to allow for retroactive waivers, legitimising acts of allocation of socially owned land that occurred before the first Decision on State-Owned Real Property on 27 April 2000, and do not provide for a deadline for seeking a waiver. As a consequence, domestic courts would seem to be required by the High Representative's decision to treat the allocation of land as null and void, even though a waiver from OHR might still be forthcoming in the future.

109. The Chamber notes, finally, that the High Representative's Decision envisions "a temporary suspension of the powers of municipal authorities to re-allocate socially-owned land. It freezes the situation until the legal framework governing the re-allocation of socially-owned land is reformed." In the press release, the High Representative "urges the Governments of both Entities to amend the legal framework regulating the use of land in order to bring it in accordance with Annex 7 and international human rights legal standards as well as prevent complications in the privatisation and restitution process." However, there is still no such "legal framework regulating the use of land in order to bring it in accordance with Annex 7", and the legal situation is fraught with uncertainty which exacerbates the situation of the applicants. On the other hand, the enforcement of the CRPC decision cannot be suspended while these legal problems are solved by the competent courts.

(e) Conclusion

110. The Chamber, while acknowledging the importance of the right to return, is also of the opinion that a proper balance must be struck between the public interest in creating the preconditions for sustainable return and the applicants' right to property under Article 1 of Protocol No. 1 to the Convention.

111. In the present case the retroactive effect of the decisions of the CRPC and the High Representative rendered ineffective the applicants' legitimate reliance on a transaction which was lawful at the time of its conclusion. They are now faced with an eviction from their business premises, although the case before the domestic judiciary aimed at clarifying their rights (or the absence thereof) under the highly confusing laws governing the matter has just been initiated. Furthermore, the compensation mechanism does not ensure that the applicants will recover in a reasonable time the investments they have made in reliance on the Municipality's decision allocating them the land. In the opinion of the Chamber this situation fails to strike a fair balance between the protection of the public interest and the rights of the applicants. The Chamber thus finds that the respondent Party has exceeded its margin of appreciation and that the interference is not proportional to the legitimate aim pursued.

112. In conclusion, the Chamber finds that there has been a violation of the applicants' right to peaceful enjoyment of possessions as guaranteed by Article 1 Protocol No 1 to the Convention, the Federation being responsible for this violation.

VIII. REMEDIES

113. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures. The Chamber is not necessarily bound by the claims of an applicant.

114. The Chamber notes that it has found a violation of the applicant's right to peaceful enjoyment of possessions as a result of (i) the threat of enforcement of a CRPC decision and (ii) of the retroactive annulment of legal transactions the applicants have heavily relied on. The Chamber therefore finds it appropriate to order the respondent Party to take necessary action to ensure that a fair balance between the applicant's rights and those of the pre-war user of the land is re-established through the establishment of a materially effective mechanism.

115. In these circumstances, the Chamber finds it appropriate to order the respondent Party to take the necessary steps to ensure that in the applicants' case all administrative proceedings, including enforcement proceedings, are immediately suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of R.K.'s and the applicants' claim to the property. The Chamber finds it appropriate to exercise its powers granted under Article XI(1)(b) of the Agreement to order the respondent Party to take these steps without further delay, regardless of whether either party files a motion to review the decision under Article X(2) of the Agreement.

116. The Chamber will further order the respondent Party to clarify the applicants' legal situation by putting into place the necessary legal framework governing allocation of land in accordance with the High Representative's instructions (see paragraph 109), within three months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

117. The Chamber will finally order the Federation to report to it within three months of the date of on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps it has taken to comply with this decision.

IX. CONCLUSIONS

118. 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. by 5 votes to 2, that the Federation of Bosnia and Herzegovina has violated the applicants' right to peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

3. by 5 votes to 2, to order the Federation of Bosnia and Herzegovina to take the necessary steps to ensure that in the applicants' case all administrative proceedings, including enforcement proceedings, are immediately suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of R.K.'s and the applicants' claim to the property, regardless of whether either party files a motion to review the decision under Article X(2) of the Agreement;

4. by 5 votes to 2, to order the Federation of Bosnia and Herzegovina, within three months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, to clarify the applicants' legal situation by putting into place the necessary legal framework governing allocation of land in accordance with the High Representative's instructions; and

5. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within three months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps it has taken to comply with this decision.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel