DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/98/804

Melika ĐUROVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 7 July 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The application concerns the applicant's attempts to enter into possession of her pre-war apartment located at Grbavička 125 in Sarajevo, which she purchased from the former Yugoslav National Army ("the JNA") Housing Fund (*Vojna Ustanova za upravljanje stambenih fondom JNA—Beograd, Odeljenje Sarajevo*), according to a purchase contract dated 11 February 1992. The applicant also seeks to be registered as the owner of the apartment.

2. The application appears to raise issues in connection with Article 8 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

3. The application was introduced and registered on 27 July 1998.

4. On 24 March 2004 the application was transmitted to the respondent Party in connection with Article 8 and Article 1 of Protocol No. 1 to the Convention.

5. On 26 April 2004 the Federation of Bosnia and Herzegovina submitted its observations on the admissibility and merits of the application, which were transmitted to the applicant on 28 April 2004. The applicant replied on 14 May 2004.

6. On 7 July 2004, the Commission deliberated on the admissibility and merits of the application, and on the same date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

7. The applicant is the pre-war occupancy right holder over an apartment located at Grbavička 125 in Sarajevo. The applicant was allocated the apartment in 1984 as a Medical Technician at the Military Hospital in Sarajevo (*Vojna Bolnica*) and a civilian member of the JNA. The applicant concluded a contract on use for the apartment on 21 January 1984.

8. On 11 February 1992 the applicant concluded a purchase contract with the JNA Housing Fund for the apartment, in accordance with the Law on Securing Housing for the JNA. The contract provided for the applicant to pay the purchase price in total amount of 161,624 Yugoslav Dinars. The signatures on the purchase contract were not verified before the competent court, but the contract contains the seal of the Tax Administration dated 13 February 1992 noting that no taxes needed to be paid.

9. On 12 February 1992 the applicant paid the purchase price of 161,624 Yugoslav Dinars.

10. On 20 June 1992 the applicant together with her family left the apartment and went to Montenegro.

11. On 24 September 1996 the apartment was declared permanently abandoned, and was allocated to M.Č., who presently uses the apartment.

12. On 23 October 1997 the applicant submitted a request for repossession of the apartment to the Commission for Real Property Claims of Displaced Persons and Refugees ("the CRPC"). It appears that the CRPC has never issued a decision upon the applicant's request.

13. On 27 May 1998 the applicant filed a repossession request to the Administration for Housing Affairs of Sarajevo Canton ("the Administration", *Uprava za stambena pitanje Kantona Sarajevo*).

14. On 12 July 2001 the Administration issued a procedural decision rejecting the applicant's request for repossession of the apartment as ill-founded, pursuant to Article 3a, paragraph 2 of the Law on Cessation of Application of the Law on Abandoned Apartments ("the Law on Cessation"). The procedural decision states that the applicant was a civilian member of the Yugoslav Army after 14 December 1995, working for Military Post 9195 in Meljine, Montenegro *(Vojna Pošta 9195 Meljine-Crna Gora*), so she cannot be considered a refugee or a displaced person for the purposes of the Law on Cessation.

15. On 28 August 2001 the applicant filed an appeal to the Ministry of Housing Affairs of Sarajevo Canton ("the Ministry", *Ministarstvo stambenih poslova*) against the 12 July 2001 procedural decision.

16. On 5 April 2002 the Ministry issued a procedural decision rejecting the applicant's appeal as ill-founded. The Ministry upheld the procedural decision issued by the Administration, stating that, in accordance with a decision issued by the Unemployment Office of Montenegro-Herceg Novi *(Zavod za zapošljavanje Crne Gore-Biro Herceg Novi)* of 21 October 1998, the applicant served in the JNA on 30 April 1991, and after 14 December 1995 she continued to serve in the Yugoslav Army, working for Military Post 9195 in Meljine, Montenegro *(Vojna Pošta 9195 Meljine-Crna Gora*) until 30 June 1996. Thus, according to Article 3a, paragraph 2 of the Law on Cessation, the applicant cannot be considered a refugee or displaced person and does consequently not have the right to repossess the apartment.

17. On 21 June 2002 the applicant initiated an administrative dispute against the 5 April 2002 procedural decision before the Cantonal Court in Sarajevo, requesting the Court to annul the procedural decision because she claims that she purchased the apartment in 1992.

18. On 17 April 2003 the Cantonal Court issued a judgement accepting the applicant's appeal, annulling the first and second instance decisions, and returning the case to the first instance organ for renewed proceedings. The Cantonal Court found that the first and second instance organs had not taken into consideration the provisions of the Constitution of Bosnia and Herzegovina, Article 8 of the Convention, and Article 1 of Protocol No. 1 to the Convention. The Cantonal Court instructed the first instance organ to determine if the applicant was in possession of the apartment on 30 April 1991 and whether the disputed apartment is her "home" for purposes of Article 8 of the Convention.

19. On 23 September 2003, in renewed proceedings, the Administration issued a procedural decision again rejecting the applicant's request for repossession of the apartment. The Administration repeated its reasoning from the 12 July 2001 decision (see paragraph 14 above).

20. On 23 October 2003 the applicant filed an appeal against the decision of 23 September 2003, stating that the first instance organ in renewed proceedings did not follow the instructions given by the Cantonal Court, and that it did not take the provisions of the Constitution of Bosnia and Herzegovina and the Convention into consideration in her case.

21. The Ministry rejected the applicant's appeal as manifestly ill-founded by its procedural decision of 23 March 2004. The Ministry repeats that the applicant served in a foreign army after 14 December 1995, and therefore cannot be considered a refugee in accordance with the Law on Cessation, and that she does not enjoy the right to repossess the apartment.

22. The applicant currently lives with her sister in Sarajevo.

IV. RELEVANT DOMESTIC LEGISLATION

A. Relevant legislation of the Socialist Federal Republic of Yugoslavia and of the Socialist Republic of Bosnia and Herzegovina

1. Law on Securing Housing for the Yugoslav National Army

23. The applicant purchased the apartment under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia ("OG SFRJ") no. 84/90). This Law was passed in 1990 and came into force on 6 January 1991. It essentially regulated the housing needs for military and civilian members of the JNA.

24. Article 21 set forth the general manner in which the purpose price of the apartment was to be determined, which included reductions for the revaluated construction value, the depreciation value, and the revaluated amount of procurement and communal facilities costs of the construction land, and the revaluated amount of the housing construction contribution that was paid to the JNA Housing Fund. The Federal Secretary was also authorized to prescribe the exact methodology for determining the purchase price.

2. Instructions on the methodology to determine the purchase price for JNA apartments ("the Instructions") (*Upustvo o metodoligiji za utvrđivanje otkupne cene stanova stambenog fonda jugoslovenske narodne armije*)

25. These Instructions were published in the Military Official Gazette in April 1991, and they set forth the manner of calculating the purchase price of apartments that were to be purchased from the JNA Housing Fund.

3. Guidelines for purchasing an apartment from the JNA Housing Fund ("the Guidelines") (*Pravilinik o otkupu stanova iz stambenog fonda jugoslovenske narodne armije*)

26. These Guidelines were published in the Military Official Gazette in April 1991 and set forth the procedure to be followed in order to purchase an apartment from the JNA Housing Fund.

4. Law on Taxes on the Transfer of Real Estate and Rights

27. The Law on Taxes on the Transfer of Real Estate and Rights (*Zakon o porezu na promet nepokretnosti I prava*) (Official Gazette of the Socialist Republic of Bosnia and Herzegovina ("OG SRBiH" nos. 37/71, 8/72, 37/73, 23/76, 21/77, 6/78, 13/82 and 29/91) was in force at the time the applicant concluded the purchase contract with the JNA. Article 3, paragraph 1, point 18 provided that taxes on the transfer of real estate are not incurred in the purchase of socially owned apartments.

B. Relevant legislation of the Republic of Bosnia and Herzegovina

1. Law on Abandoned Apartments

28. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina ("OG RBiH") nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95). The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 17 June 1994 and renamed the Decree the "Law on Abandoned Apartments". The Law governed the declaration of abandonment of certain categories of socially owned apartments and their re-allocation.

29. Article 2 set forth that apartments were to be considered abandoned if the pre-war occupancy right holder and his family members left the apartment, even if only temporarily. If the

pre-war occupancy right holder failed to resume using the apartment within the applicable time limit laid down in Article 3 (*i.e.* before 6 January 1996), he or she was regarded as having abandoned the apartment permanently.

30. According to Article 10, as amended, the failure to resume using the apartment within the time limit would result in deprivation of the occupancy right. The resultant loss of the occupancy right was to be recorded in a decision by the competent authority.

2. Law on the Transfer of Real Estate

31. Article 9 of the Law on the Transfer of Real Estate (Official Gazette of the Socialist Republic of Bosnia and Herzegovina ("OG SRBiH") nos. 38/78, 4/89, 29/90 and 22/91; OG RBiH nos. 21/92, 3/93, 17/93, 13/94, 18/94 and 33/94) provided that a contract on the transfer of real estate must be made in written form and that the signatures must be verified by the competent court. Paragraph 4, among other things, provides that written contracts on the transfer of real estate that have been completely or substantially performed are valid even if the signatures of the contractual parties were not verified by the competent court.

C. Relevant legislation of the Federation of Bosnia and Herzegovina

1. The Law on Cessation of the Application of the Law on Abandoned Apartments ("Law on Cessation")

32. The Law on Cessation entered into force on 4 April 1998 and has been thereafter amended (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02, 24/03 and 29/03). The Law on Cessation repealed the former Law on Abandoned Apartments.

33. According to the Law on Cessation, the competent authorities may make no further decisions declaring apartments abandoned (Article 1, paragraph 2). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the Law on Abandoned Apartments are null and void (Article 2, paragraph 1).

34. All occupancy rights or contracts on use made between 1 April 1992 and 7 February 1998 were cancelled (Article 2, paragraph 3). A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered a temporary user (Article 2, paragraph 3).

35. The occupancy right holder of an apartment declared abandoned, or a member of his or her household, has a right to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Article 3, paragraphs 1 and 2).

36. The former Article 3a, paragraphs 1 and 2, which were in force between 4 July 1999 and 1 July 2003, provided as follows:

> "As an exception to Article 3, paragraphs 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina, at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 s/he was in active service in the SSNO (Federal Secretariat for National Defence) – JNA (i.e. not retired) and was not a citizen of Bosnia and Herzegovina according to the citizenship records, unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former Socialist Federal Republic of Yugoslavia before 14 December 1995.
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> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if s/he remained in the active military service of any armed forces outside the

territory of Bosnia and Herzegovina after 14 December 1995, or if s/he has acquired another occupancy right outside the territory of Bosnia and Herzegovina."

37. The present Article 3a, which came into force on 1 July 2003, provides as follows:

> "As an exception to Article 3, paragraph 1 and 2 of the Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee nor have the right to repossess the apartment if after 19 May 1992, she or he remained in the active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, unless she or he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former Socialist Federal Republic of Yugoslavia before 14 December 1995.
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> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee or have the right to repossess the apartment in the Federation of Bosnia and Herzegovina, if she or he has acquired another occupancy right or other equivalent right from the same housing fund of the former JNA or newly-established funds of armed forces of states created on the territory of the former Socialist Federal Republic of Yugoslavia."

2. The Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens

38. The repossession of private property is governed by the Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens (OG FBiH nos. 11/98, 29/98, 27/99, 43/99, 37/01, 56/01, 15/02, and 23/03). Article 5 provides that, for the purposes of this Law, an owner shall be understood to mean a person who, according to the legislation in force, was the owner of the real property at the moment when that property was declared abandoned.

3. The Law on Sale of Apartments with an Occupancy Right

39. Article 27 of the Law on Sale of Apartments (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01 and 15/02) provides that the ownership right to an apartment shall be acquired upon registration of that right in the Land Registry books of the competent court.

40. Article 39 reads, in relevant part:

> "The occupancy right holders who previously concluded a contract on purchase of an apartment in accordance with the Law on Securing Housing for JNA … shall have the amount they paid, expressed in German Marks ("DEM") according to the applicable exchange rate on the day of purchase, recognised when the new contract on purchase of the apartment is concluded in accordance with this Law."

41. Articles 39a, 39b, 39c, 39d, and 39e came into force on 5 July 1999, the date of their publication in the Official Gazette of the Federation of Bosnia and Herzegovina, as a result of their imposition by the High Representative of Bosnia and Herzegovina.

42. Article 39a provides:

> "If the occupancy right holder of an apartment at the disposal of the Federation Ministry of Defence uses the apartment legally and s/he entered into a legally binding contract on purchase of the apartment with the Federal Secretariat for National Defence (SSNO) before 6 April 1992 in accordance with the Law referred to in Article 39 of this Law, the Federation Ministry of Defence shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court."

43. Article 39b, in relevant part, provides,

> “In the event that the occupancy right holder referred to in Article 39a of this Law did not effect the payment of the total amount of the sale price of the apartment in accordance with the purchase contract, s/he shall pay the remainder of the amount specified in that contract to the Ministry of Defence of the Federation.
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> ….
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> "The provisions of Articles 39a of this Law and paragraph 1 and 2 of this Article shall also be applied to contracts on the purchase of apartments concluded before 6 April 1992, in cases where the verification of signatures has not been done before the responsible court.”

44. Article 39c provides:

> “The provisions of Articles 39a and 39b shall also be applicable to an occupancy right holder who has exercised the right to repossess the apartment pursuant to the provisions of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98 and 18/99)."

45. Article 39d provides:

> “A person who does not realise his or her rights with the Ministry of Defence, as provided for in this Law, may initiate proceedings before the competent court.”

46. Article 39e provides:

> “The occupancy right holder who is not entitled to the repossession of the apartment or does not submit a claim for the repossession of the apartment in accordance with the provisions of Article 3 and 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments and who entered into a legally binding contract on purchase of the apartment with the former Federal Secretariat for National Defence (SSNO) before 6 April 1992, shall have the right to submit a request to the Federation Ministry of Defence for compensation of the funds paid on that basis, unless it is proved that these funds were acknowledged for purchase of an apartment outside the territory of Bosnia and Herzegovina”

4. Law on Civil Procedure

47. Article 54 of the Law on Civil Procedure (OG FBiH nos. 42/98, 3/99 and 53/03) provides as follows:

> “A plaintiff may initiate a lawsuit and request that the court establish the existence or non-existence of some right or legal relationship, and the authenticity or non-authenticity of some document, respectively.
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> “Such a lawsuit may be initiated when a special regulation provides so, or when the plaintiff has a legal interest that the court establish the existence or non-existence of some right or legal relationship and the authenticity or non-authenticity of some document before the maturity date of the claim for enforcement from the same relationship.
>
> “If the decision in the dispute depends on whether some legal interest, which during the lawsuit became disputable, exists or not, the plaintiff may file, in addition to the existing claim, a complaint requesting that the court establish the existence or non-existence of such relationship, if the court before which the lawsuit is pending is competent for such a complaint.
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> “Filing the complaint under the provision in paragraph 3 of this Article shall not be deemed modification of the lawsuit.”

V. COMPLAINTS

48. The applicant complains that her right to her home in connection with Article 8 of the Convention, and her right to the peaceful enjoyment of her property, in connection with Article 1 of Protocol No. 1 to the Convention, have been violated.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

49. The respondent Party submitted its observations on the admissibility and merits of the application on 26 April 2004, in a joint submission with other applications related to JNA apartments. With regard to the facts in the present case, the respondent Party notes that there is a purchase contract in the applicant's housing file (*stambenoj dokumentaciji*), together with a contract for the maintenance of communal facilitates (*ugovor o održavanju*), and a payment slip in the amount of 161,624.00 Yugoslav Dinars. The respondent Party also states that the applicant's repossession request was rejected because the applicant continued to serve in the Yugoslav Army after 14 December 1995, and, according to Article 3a, paragraph 2 of the Law on Cessation, she cannot be considered a refugee or displaced person and does consequently not have the right to repossess the apartment.

50. As to the admissibility of the application, the respondent Party asserts that the applicant's claim is premature. Considering that the main claim is related to the applicant's ownership right, the respondent Party asserts that this matter could not be resolved through administrative proceedings, but only through the courts, and in the present case the applicant did not initiate court proceedings to determine the validity of her purchase contract. Also, the respondent Party notes that the applicant has not requested the Federation Ministry of Defence (*Federalno ministarstvo odbrane*) to issue an order to be registered as the owner of the apartment. The respondent Party argues that the application is therefore inadmissible.

51. As regards the merits of the application in connection with Article 8 of the Convention, the respondent Party states that, because it has been determined that the applicant served in a foreign army after 14 December 1995, the denial of the applicant's right to repossess the apartment is not at odds with the Chamber's decisions in similar cases. The respondent Party concludes that it has not violated the applicant's right to her home. In connection with Article 1 of Protocol No. 1 to the Convention, the respondent Party notes that the applicant uses the term "ownership" for the apartment over which she had an occupancy right. If the applicant considered herself the owner, the Law on Cessation of the Application of the Law on Abandoned Real Property Owned by Citizens in the Federation of Bosnia and Herzegovina would be applicable. The respondent Party concludes that it has not violated Article 1 of Protocol No. 1 to the Convention.

B. The applicant

52. The applicant submitted her response to the respondent Party's written observations on 14 May 2004. She maintains her claims in full. She asserts that she is the owner of the apartment as evidenced by the contract on purchase and the payment slip, which she submitted to the Chamber. The applicant states that the apartment could not be declared permanently abandoned because it was in Grbavica, on the territory of the Republika Srpska, until 1996. She also states that she has never received a procedural decision declaring the apartment abandoned.

VII. OPINION OF THE COMMISSION

A. Admissibility

53. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

54. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …."

55. In its submission of 26 April 2004, the respondent Party asserts that the applicant has not exhausted the domestic remedies available to her with regard to the registration of ownership over the apartment because the applicant has not addressed the court in relation to her ownership claim, a remedy that the Chamber also acknowledged in case no. CH/97/60 *et al*. *Miholić and others,* decision on admissibility and merits of 9 November 2001, Decisions July-December 2001. Because the applicant's repossession claim was rejected, she must avail herself of civil court proceedings to establish her ownership to the apartment. Therefore this claim is inadmissible for non-exhaustion of domestic remedies.

56. The Commission acknowledges that the Law on Civil Procedure provides a remedy to determine whether some right exists or not, or to determine the authenticity of a document. The Commission recalls that previously the Chamber has found Article 54 of the Law on Civil Procedure (or Article 172, under the former Law on Civil Procedure) an effective domestic remedy that must be exhausted in cases where the applicants did not have a purchase contract in their possession, but rather asserted that they were the owners based on the steps taken towards the purchase of the apartment in 1991 and 1992 (see, *e.g.* case nos. CH/98/1160, CH/98/1177, and CH/98/1264, *Pajagić, Kurozović and M.P*., decision on admissibility of 9 May 2003). The Commission has also adopted the same approach (*see*, *e.g*. case no. CH/99/1921, *Blagojević,* decision of 16 January 2004). In such cases, the Commission considers it reasonable to expect that the applicant must bear the burden of initiating a lawsuit to determine the existence of a contractual relationship or of any contractual rights.

57. In the case at hand, the applicant has a purchase contract that appears, in all aspects, to be a valid contract. It has been signed by all the parties, includes the purchase price and terms of payment, and the contract also contains the seal of the Tax Administration noting that no taxes need to be paid. The Commission considers that the burden of initiating proceedings to determine the validity of the contract should fall on the party who wishes to dispute the contract, and not on the contract holder who otherwise has no reason to doubt the validity of the contract he or she possesses.

58. The Commission concludes that, because the applicant possesses a purchase contract which appears on its face to be valid, initiating a lawsuit in accordance with Article 54 of the Law on Civil Procedure is not a domestic remedy that the applicant must exhaust, within the meaning of Article VIII(2)(a) of the Agreement.

B. MERITS

59. Under Article XI of the Agreement, the Commission 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 and the other international agreements listed in the Appendix to the Agreement.

1. As to the alleged violation of Article 1 of Protocol No. 1 to the Convention

60. The applicant alleges a violation of the peaceful enjoyment of her possessions with regard to the use and enjoyment of the apartment over which she was the pre-war occupancy right holder and which she purchased in February 1992.

61. Article 1 of Protocol No. 1 to the Convention provides 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."

62. Article 1 of Protocol No. 1 to the Convention thus contains three rules. The first rule enunciates the general principle that one has the protected right to the peaceful enjoyment of one's property. The second rule covers deprivation of property and subjects it to the requirements of the public interest and conditions laid out in law. The third rule recognises that States are entitled to control the use of property and it subjects such control to the general interest and domestic law. It must then be determined in respect of these conditions 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 individual applicant's rights, bearing in mind that the last two rules should be construed in light of the general principle (*see, e.g.*, case no. CH/96/17 *Blentić,* decision on admissibility and merits of 5 November 1997, paragraphs 31-32, Decisions on Admissibility and Merits March 1996-December 1997). Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

63. The Commission must first consider whether the applicant has any rights under the contract that constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. In this regard, the Commission refers to the Chamber's decisions in case no. CH/96/3 *et al.*, *Medan and others*, decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996-December 1997; and case no. CH/97/60 *et al.*, *Miholić and others*, decision on admissibility and merits of 9 November 2001, Decisions July-December 2001. In the aforementioned cases, the Chamber consistently found that the rights under a contract to purchase an apartment concluded with the JNA, pursuant to the Law on Securing Housing for the JNA, constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. The Commission notes that in the present case the applicant concluded a contract under factual circumstances similar to those in the cases cited, and therefore, the Commission sees no reason to differ from the previous jurisprudence of the Chamber in this regard.

a. Interference with the applicant's rights

64. The Commission must next determine the nature of the interference, if any with the applicant's rights flowing from the purchase contract. The Commission is aware that the applicant has not requested the Federation Ministry of Defence (*Federalno ministarstvo odbrane*) to issue an

order to be registered as the owner of the apartment. It is apparent from Article 39c of the Law on Sale of Apartments that the applicant would have no prospect of success because this provision clearly requires the applicant to repossess the apartment in accordance with the Law on Cessation before the Federation Ministry of Defence will issue the order for her to be registered as owner. The Commission also recalls that both the first and second instance organs, in the 23 September 2003 and 23 March 2004 procedural decisions, noted that the applicant could avail herself of Articles 39 and 39a of the Law on Sale of Apartments in so far as she considers herself the owner of the apartment. The Commission therefore concludes that interference with the applicant's rights flowing from the purchase contract is caused by the Law on Sale of Apartments.

b. Public interest

65. The central issue of this case, and what the Commission must now examine, is whether the continuing interference with the applicant's property rights resulting from the application of the Law of Sale of Apartments can be justified as "in the public interest."

66. When considering whether the taking of property is "in the public interest", it must be determined 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 individuals' fundamental rights. Thus, there must be a reasonable relationship of proportionality between the means employed and the aim to be achieved. The requisite balance will not be found if the persons concerned had to bear "an excessive burden" (see *e.g.*, Eur. Court HR, *Sporrong and Lönnroth v. Sweden,* judgement of 23 September 1982, Series A no. 52, pp. 26-28, paragraphs 70-73).

67. The European Court has acknowledged that in taking decisions involving the deprivation of property rights of individuals, national authorities enjoy a wide margin of appreciation because of their direct knowledge of their society and its needs. Further, the decision to expropriate property will often involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ. Therefore, the judgement of the national authorities will be respected unless it was "manifestly without reasonable foundation" (Eur. Court HR, *James and Others v. United Kingdom*, judgement of 21 February 1986, Series A no. 98, p. 40, paragraph 46).

68. Nevertheless, respondent Parties have not been granted *carte blanche* when deciding upon appropriate measures of their social and economic policies. Those measures are still subject to the scrutiny of the European Court: (a) They must pursue a legitimate aim; and (b) there must be a "reasonable relation of proportionality between the means employed and the aim sought to be realised" (see the above-mentioned *James and others* judgement, p. 34, paragraph 50). The latter requirement was expressed also by the notion of the "fair balance" that must be struck between the demands of the communal interest and the requirements of the protection of the individual's fundamental rights. There is no "fair balance" if the person concerned has had to bear "an individual and excessive burden" (see the above-mentioned *Sporrong and Lönnroth* judgement, p. 26, paragraphs 69 and 73).

69. In its submission received on 26 April 2004, the respondent Party does not provide any specific comments on the Law on Sale of Apartments. The Commission recalls that Article 39a of the Law on Sale of Apartments specifies that only a person who concluded a legally binding contract with the JNA prior to 6 April 1992, and who is in possession of the apartment may obtain the order from the Federation Ministry of Defence to be registered as the owner of the apartment. Article 39c prevents a person who has not repossessed his or her apartment in accordance with the Law on Cessation from obtaining the order to be registered as owner of the apartment. The respondent Party has asserted no legitimate aim for either of these two provisions, or even reasons supporting such an extraordinary requirement for contract holders. The Commission, *proprio motu*, cannot find any reason for conditioning one's ownership rights upon possession of the property, as provided for in both Articles 39a and 39c of the Law on Sale of Apartments. Lacking any legitimate aim, the Commission therefore must find that the requirement that a contract holder be legally in possession of the apartment before being permitted to register his or

her ownership rights, is not "in the public interest". As such, Articles 39a and 39c of the Law on Sale of Apartments are not compatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

70. The respondent Party generally submits that the applicant should have initiated civil proceedings to determine the validity of her purchase contract. The Commission recalls that Article 39d of the Law on Sale of Apartments provides that persons who do not realize their rights to the apartment through this Law may initiate court proceedings to do so. The respondent Party, however, did not submit any reasons why contract holders who are in possession of their apartment should have their contract recognized, while contract holders who are not in possession must initiate a civil dispute to have their contract declared legally valid. As discussed above in paragraph 56, the Commission accepts that such a requirement is appropriate in cases where the purchase contract was never concluded, or is in some form incomplete or lost, etc., (*see*, *e.g*. case no. CH/99/1921 *Blagojević*, decision of 16 January 2004). When, however, as in the present case, there are no apparent flaws in the purchase contract, the Commission considers that requiring the applicant to initiate court proceedings places an excessive burden on the contract holder, and that this burden is not proportional to any legitimate aim. In coming to this conclusion, the Commission also bears in mind that the same burden is not placed on contract holders who are in possession of their apartment. Therefore, the Commission finds that the blanket requirement to initiate court proceedings as set forth in Article 39d of the Law on Sale of Apartments is not "in the public interest" and, as such it is incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

c. Conclusion

71. Having regard to the above, the Commission finds that the provisions set forth in Articles 39a, 39c, and 39d of the Law on Sale of Apartments are not in the public interest, and therefore not compatible with Article 1 of Protocol No. 1 to the Convention. The Commission therefore finds a violation of the right to the peaceful enjoyment of the applicant's possessions under Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina being responsible for this violation.

2. Alleged violation in connection with Article 8 of the Convention

72. Article 8 of the Convention provides as follows,

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

73. In light of its finding above of a violation of Article 1 of Protocol No. 1 to the Convention, the Commission considers it unnecessary to also examine the application in connection with Article 8 of the Convention.

VIII. REMEDIES

74. The Commission has established that the Federation of Bosnia and Herzegovina violated the right of the applicant to the peaceful enjoyment of her possessions flowing from the purchase contract that she concluded with the JNA in 1992 in connection with Article 1 of Protocol No. 1 to the Convention. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches

of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

75. The Commission recalls that the applicant has not submitted a compensation claim.

76. In view of the finding of a violation, the Commission considers it appropriate to order the Federation of Bosnia and Herzegovina to ensure that the applicant is allowed to repossess the apartment located at Grbavička 125 in Sarajevo within three months from the date of receipt of this decision, and to ensure that the applicant is registered as the owner over the apartment in the Land Registry books of the competent court within three months from the date of receipt of this decision. The Commission considers that this remedy is sufficient satisfaction for the violations found.

77. The Commission will order the Federation of Bosnia and Herzegovina to submit to it, or its successor institution, a report on the steps taken by it to comply with these orders within four months of the date of receipt of the present decision.

IX. CONCLUSIONS

78. For the above reasons, the Commission decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the right of the applicant to the peaceful enjoyment of her possessions flowing from the purchase contract, within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is permitted to repossess the apartment within three months of the date of receipt of this decision, and to ensure that the applicant is registered as the owner over the apartment at Grbavička 125 in Sarajevo in the Land Registry books of the competent court within three months from the date of receipt of this decision; and,

4. unanimously, that it is not necessary to examine the application in connection with Article 8 of the European Convention on Human Rights ;

5. unanimously, to order the Federation of Bosnia and Herzegovina to submit to the Commission, or its successor institution, a report on the steps taken by it to comply with these orders within four months of the date of receipt of the decision.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission