DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 April 2002)

Case no. CH/00/4295

Bećo OSMANAGIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 5 March 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

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

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. In 1991 he concluded a contract for the purchase of business premises in Sarajevo. However, to date the applicant has not gained possession of the premises. He introduced a lawsuit against the seller in January 1992. After 15 to 20 hearings and over 9 years of proceedings the Municipal Court I in Sarajevo ("the Municipal Court") issued a decision in February 2001, refusing the applicant's claim. The applicant filed an appeal against the Municipal Court's decision to the Cantonal Court in Sarajevo ("the Cantonal Court") which issued a decision by which it sent back the case to the Municipal Court. The case raises issues under Article 6 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was introduced to the Chamber on 10 March 2000.

3. On 5 September 2000 the Chamber deliberated on the case and decided to transmit the application to the respondent Party for its observations on the admissibility and merits of the case and to request the applicant to provide the Chamber with additional information.

4. On 28 September 2000 the Chamber received the requested additional information from the applicant.

5. On 28 November 2000 the Chamber received the respondent Party's observations which were transmitted to the applicant. The Chamber received the applicant's reply to the respondent Party's observations on 5 January 2001.

6. On 12, 19 and 23 March, 3 May and 16 October 2001 the Chamber received additional information from the applicant.

7. On 23 April 2001 and 5 September 2001 the Chamber received additional information from the respondent Party.

8. The Chamber deliberated on the admissibility and the merits of the case on 5 September 2000, 11 January, 8 February and 5 March 2002. On the latter date the Chamber adopted the present decision.

III. FACTS

9. On 8 May 1991 the applicant concluded a contract (contract number 02-3880-11) for the purchase of business premises in Business Building No. 1203 located in Dobrinja, Sarajevo, with the seller Sarajevostan.

10. In May 1991 the applicant paid the purchase price of around 20,000 US Dollars to Sarajevostan. According to the contract, Sarajevostan was obliged to hand over the business premises to the applicant before 31 August 1991. However, Sarajevostan failed to do so. According to Sarajevostan, the reason for it being late in the handing over of the premises to the applicant was that the competent municipal authority did not issue a building license in accordance with an approved urban plan. Sarajevostan had to take a series of additional actions with the aim of meeting the urban plan and other technical requirements. Because of this, the construction of the whole building was delayed. Sarajevostan has also stated that another reason for the delay was that the winter of 1991 started already in October 1991, which meant that the construction of the building had to be postponed until 1992. In 1992 the war broke out and according to Sarajevostan 98% of the building was destroyed.

11. On 19 November 1991 the applicant wrote to Sarajevostan reminding it of its obligation to hand over the premises. Another letter was sent by the applicant to Sarajevostan on 20 December

1992 in which the applicant requested compensation for the damage he had suffered from 30 August 1991 until the date of the letter. Still the premises were not handed over to the applicant.

12. On 10 January 1992 the applicant filed a lawsuit against Sarajevostan with the Municipal Court I in Sarajevo ("the Municipal Court"). The applicant claimed that Sarajevostan had breached the contract since it had not delivered the premises in a timely manner. The applicant requested the Municipal Court to order Sarajevostan to pay him 450 German Marks (*Deutsche Mark* "DM") per month from 30 August 1991 until 20 December 1991 by way of compensation for lost profit.

13. The first hearing was scheduled for 17 February 1992 but did not take place because Sarajevostan's representative did not appear. Another hearing was scheduled for 17 March 1992, but once again Sarajevostan's representative did not appear and a third hearing was scheduled for 20 April 1992. However, this hearing did not take place as the war broke out.

14. On 8 September 1997 the applicant filed a submission (additional suit) to the Municipal Court requesting it to issue a judgement in the case. The applicant requested to have the business premises handed over to him no later than 1 November 1997. The applicant also requested compensation in the amount of DM 450 per month for lost profit from 30 August 1991 until the premises were handed over to him.

15. New hearings in the case were scheduled. According to the information submitted to the Chamber, hearings were scheduled for 23 December 1997, 3 March, 13 April, 13 May, 14 September and 19 November 1998, 27 January, 6 April, 15 June and 30 November 1999, 9 February, 8 June, 2 August, 5 October and 18 November 2000 and 14 February 2001. However, hearings on other dates might have been scheduled as well.

16. On 27 January 1999 Sarajevostan submitted its reply to the lawsuit.

17. On 1 February 1999 the applicant sent a letter to the president of the Municipal Court complaining about the delay in the proceedings. On 8 February 1999 the President replied stating that a decision was expected to be issued soon. The applicant has on a number of other occasions sent submissions to the Municipal Court and the President of that court requesting it to issue a decision.

18. At the hearing on 15 June 1999 the Municipal Court issued a procedural decision instructing the permanent court expert to issue an opinion on the amount of the lost profit. On 29 August 1999 the expert submitted his findings to the Municipal Court and established the lost profit from 1 September 1991 until 31 August 1999 to be almost 12,000 Convertible Marks (*Konvertibilnih Maraka*, "KM"). At the hearing on 30 November 1999 the applicant accepted the expert's findings.

19. On 15 January 2000 the applicant filed a submission to the Municipal Court requesting further compensation for the months that had elapsed since the expert issued his findings.

20. On 14 February 2001 the Municipal Court issued a decision refusing the applicant's claim for compensation since, according to the Municipal Court, there were objective reasons why Sarajevostan did not deliver the premises on time, i.e. reasons which occurred against Sarajevostan's will. Further, the Municipal Court stated that the applicant had not submitted any evidence to substantiate his claimed lost profit.

21. On 28 April 2001 the applicant filed an appeal against the decision of the Municipal Court to the Cantonal Court in Sarajevo. On 16 January 2002 the Cantonal Court vacated the judgement of the Municipal Court and sent the case back to the Municipal Court.

IV. RELEVANT LEGAL PROVISIONS

Constitution of the Federation of Bosnia and Herzegovina

22. According to Article II(2), the Federation will ensure the application of the highest internationally recognised rights and freedoms provided in the documents listed in the Annex to the Constitution. One of the documents listed in the Annex is the European Convention on Human Rights.

The Code of Civil Procedure

23. The relevant provisions of the Code of Civil Procedure (Official Gazette of the Federation of Bosnia and Herzegovina, no. 42/98) read as follows:

Article 10
"The Court shall conduct the procedure without any unnecessary delay, causing as little as possible expenses and prevent any abuse of the rights of the parties in the proceedings."

Article 297
"During the proceedings, the court may pronounce a fine not exceeding the amount of 500 Convertible Marks to the party, its legal representative, the agent or the interferee who tend to abuse the rights recognised as theirs under this law."

V. COMPLAINTS

24. The applicant alleges that his right to a fair trial as guaranteed by Article 6 of the Convention has been violated. The applicant claims that his trial has been intentionally delayed and has not been heard in a reasonable time. Additionally, he alleges violations of his right to life under Article 2 of the Convention, his right to home under Article 8 of the Convention and his right to peaceful enjoyment of possession under Article 1 of Protocol No. 1 to the Convention. Finally, he alleges a violation of his right to work as guaranteed by Article 6 of the International Covenant on Economic and Social Rights ("ICESCR").

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

1. Admissibility

25. The respondent Party objects to the admissibility of the application on the ground that the applicant concluded the contract before the Agreement entered into force. Therefore, the respondent Party is of the opinion that the Chamber has no competence *ratione temporis* to deal with the case.

26. The respondent Party further states that the applicant's right to gain possession over the business premises in question is based upon the applicant's expectation that Sarajevostan shall hand them over to him in accordance with the contract. According to the respondent Party the applicant bears the risk of unexpected events, i.e. *force majeure,* and since the business premises have never been in the applicant's possession or ownership the application is incompatible *ratione materiae* with the Agreement.

27. Furthermore, the respondent Party is of the opinion that the application should be declared inadmissible as outside the Chamber's competence *ratione personae* since Sarajevostan is not a party to the Agreement or an official organ of the respondent Party, and therefore the respondent Party cannot be responsible for Sarajevostan's actions.

28. The respondent Party also maintains that the applicant has not exhausted the domestic remedies available to him. Further, it states that the courts schedule hearings on a regular basis and therefore cannot be said to have been inefficient.

2. Merits

29. The respondent Party is of the opinion that there has been no violation of the applicant's rights as guaranteed by Article 6 of the Convention. The respondent Party refers to Article VI(7)(4) of the Constitution of the Federation of Bosnia and Herzegovina and states that this Article guarantees fair trials before impartial and independent tribunals. Therefore, according to the respondent Party, there has been no violation of Article 6 since the applicant is guaranteed a fair trial.

30. The respondent Party further states that the case is legally very complex and that the time it has taken for the Municipal Court to issue a decision is reasonable. The respondent Party states, as an example of the complexity of the case, that the Municipal Court had to engage a financial expert. Further, the respondent Party states that the applicant by his own actions is responsible for the delayed proceedings, since the applicant's representative did not specify with which lawsuit he wished to proceed.

31. The respondent Party is of the opinion that there has been no violation of Article 8 of the Convention since the premises cannot be considered as the applicant's home.

32. The respondent Party states that there has been no violation of Article 1 of Protocol No. 1 to the Convention since the legal acts were not concluded under the influence of the respondent Party, i.e. the respondent Party has not deprived the applicant of the business premises or disturbed their use.

33. The respondent Party states that there has been no violation of Article 6 of the ICESCR since the applicant has not submitted any evidence that he would have made profit out of his business.

B. The applicant

34. The applicant maintains his complaints. He further states that the case is not legally complex since the facts are very clear. Furthermore, the applicant states that the respondent Party's allegation that the applicant's representative did not specify with which request he wished to proceed, is not true. The applicant further points out that he accepted the financial court expert's findings on 30 November 1999 with the aim to finally finish the dispute, but that the Municipal Court, without any reason, had not issued a decision when he filed his application with the Chamber.

VII. OPINION OF THE CHAMBER

A. Admissibility

35. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement.

1. *Ratione Temporis*

36. The Chamber notes that the applicant's complaints relate to a civil dispute introduced before the Municipal Court in 1992 and thus to events which occurred before 14 December 1995, when the Agreement entered into force. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively (see case no. CH/96/3, *Medan*, decision on admissibility of 4 February 1997, Decisions on Admissibility and Merits 1996-1997). The Chamber must confine its examination of the case to considering whether the human rights of the applicant have been violated or threatened with violation since that date (see case no. CH/97/30, *Damjanović*, decision on admissibility of 11 April 1997, paragraph 13, Decisions on Admissibility and Merits 1996-1997). In so far as the applicant complains that his rights have been violated after 14 December 1995, his

complaints are within the competence of the Chamber *ratione temporis* and are not incompatible with the Agreement within the meaning of Article VIII(2)(c) of the Agreement.

2. Manifestly Ill-founded

37. Regarding the applicant's complaints concerning his right to life as guaranteed under Article 2 of the Convention and his right to home as guaranteed under Article 8 of the Convention, the Chamber notes that the applicant has not substantiated his complaints. The Chamber further notes that according to Article II(2)(b) of the Agreement, the Chamber is only competent to deal with alleged violations of ICESCR if the applicant has been discriminated against. The Chamber notes that the applicant has not claimed that he has been discriminated against, nor has he submitted any documents or statements which would indicate that he has been discriminated against. Therefore, the Chamber finds that the application does not disclose any appearance of a violation of these rights. It follows that these parts of the application are manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare these parts of the application inadmissible.

3. *Ratione Materiae*

38. The Chamber recalls that, according to the case-law of the European Court of Human Rights, the "possession" protected under Article 1 of Protocol No. 1 to the Convention can only be "an existing possession" (see Eur. Court H.R., *Van der Mussele*, judgment of 23 November 1983, Series A no. 70, paragraph 48) or, at least, an asset which the applicant has a "legitimate expectation" to obtain (see Eur. Court H.R, *Pressos Compania Naviera S.A. and Others*, judgment of 20 November 1995, Series A no. 222, paragraph 31).

39. The Chamber notes that it has previously decided that in order to be a "legitimate expectation" constituting a protected possession, the applicant's prospect would have to be based on legislation in force or on a valid administrative act (see case no. CH/98/1040, *Živojnović*, decision on admissibility of 9 October 1999, paragraph 21, Decisions on admissibility and merits August - December 1999). In the present case the applicant's claim to the premises is based on his expectation that the domestic courts will issue a decision establishing that he has the right to gain possession of the premises. The Chamber is of the opinion that the question whether the applicant has a right to gain possession of the premises is a private law dispute. Having in mind the question of *force majeure,* the interpretation of the contract and the question of the other legal issues included in the dispute before the domestic courts, the Chamber is of the opinion that the outcome of the dispute is open. It is not within the competence of the Chamber to establish whether the contract gives the applicant a right to gain possession of the premises, but it is for the domestic courts to establish whether or not the applicant has this right. The Chamber recalls that it has stated on several occasions that it is not within its competence to substitute its own assessment of the facts and application of the law to that of the domestic courts (see, e.g., case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 11, Decisions August-December 1999, and case no. CH/00/4128, *DD "Trgosirovina" Sarajevo (DDT)*, decision on admissibility of 6 September 2000, paragraph 13, Decisions July-December 2000). The outcome of the applicant's civil dispute before the domestic courts is uncertain. The Chamber is therefore of the opinion that the applicant's claim does not amount to a "legitimate expectation" constituting a protected possession under Article 1 of Protocol No. 1 to the Convention. It follows that the applicants' complaints in this respect are inadmissible as incompatible *ratione materiae* within the meaning of Article VIII(2)(c) of the Agreement.

4. Failure to Exhaust Domestic Remedies

40. The respondent Party objects to the admissibility of the application on the ground that the applicant has not exhausted the domestic remedies available to him.

41. As noted above, the applicant initiated civil proceedings in 1992 before the Municipal Court, which issued a decision in February 2001. The applicant filed an appeal against this decision to the Cantonal Court, which issued a decision by which the case was sent back to the Municipal Court. The

proceedings before the Municipal Court are still pending. The respondent Party has not sought to claim that there is any remedy available to the applicant against the failure of the domestic courts to issue a final decision upon his proceedings and the Chamber for its part is not aware of any such remedy. Accordingly, the Chamber does not consider that there is any effective remedy available to the applicant which he should be required to exhaust.

5. Conclusion as to admissibility

42. The Chamber further finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber will declare the part of the application, which concerns the alleged violations of Article 6 of the Convention after 14 December 1995 admissible. The Chamber will declare inadmissible the remainder of the applicant's complaints.

B. Merits

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

44. The applicant complains of the lack of fairness in and the length of the proceedings before the Municipal Court and the Cantonal Court. The respondent Party states that the case is legally very complex and that the time it took for the Municipal Court to issue a decision is reasonable. Further, the respondent Party states that the applicant by his own action is responsible for the delayed proceedings since the applicant's representative did not specify with which lawsuit he wished to proceed.

45. Article 6 of the Convention, insofar as relevant to the present case, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

1. Fair Trial

46. The applicant alleges that the proceedings before the Municipal Court and the Cantonal Court have not been fair and that Sarajevostan has been treated in a more favourable manner than he has been treated. The respondent Party states that Article VI(7)(4) of the Constitution of the Federation of Bosnia and Herzegovina guarantees the applicant a fair trial and that the applicant's right to a fair trial has not been violated.

47. The Chamber notes that the fact that the Federation Constitution enshrines the right to a fair trial is not sufficient for the respondent Party to meet its obligation to provide the applicant with a fair trial, as required by Article 6 of the Convention. However, in the present case, the applicant has not offered the Chamber evidence indicating that the proceedings were not fair. Further, the Chamber cannot find any evidence as to a lack of fairness of the courts on its own motion.

48. The Chamber finds therefore that there has been no violation of the applicant's right to a fair trial.

2. Length of the proceedings

49. The first step in establishing the length of the proceedings is to determine the period of time to be considered. The Chamber finds that, considering its competence *ratione temporis,* it can assess the reasonableness of the length of the proceedings only with regard to the period after 14 December 1995. It may, however, take into account what stage the proceedings had reached and how long they had lasted before that date.

50. In the present case, the proceedings already had lasted almost 4 years when the Agreement entered into force. The proceedings before the Municipal Court were concluded on 14 February 2001 by the issuance of a decision refusing the applicant's claim. The proceedings before the Cantonal Court were initiated by the applicant's appeal of 9 April 2001. On 16 January 2002 the Cantonal Court issued a decision by which the case was sent back to the Municipal Court. The case is still pending before the Municipal Court. To sum up, the proceedings have lasted, after 14 December 1995, 6 years and 4 months as of the date of this decision.

51. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Chamber, namely the complexity of the case, the conduct of the applicant and of the relevant authorities and the other circumstances of the case (see e.g. case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998, with reference to the corresponding case-law of the European Court of Human Rights).

52. The respondent Party states that the case is very complex, as shown by the engaging of a financial expert and the number of hearings, which were scheduled on a regular basis. The applicant states that the case is not legally complex and that the facts of the case are very clear.

53. The Chamber notes that the issues in the underlying case are that Sarajevostan did not hand over the premises in a timely manner in accordance with the contract, that the applicant has not gained possession of the premises and whether the applicant has the right to compensation for lost profit. The case does not seem to the Chamber to be so complex as to require over six years of proceedings.

54. The respondent Party alleges that the delay in the proceedings was, in part, the fault of the applicant. The respondent Party alleges that the applicant's representative failed to specify with which request he wished to proceed with and that one of the hearings was postponed with the accord of all the parties. The applicant states that either he or his representative were present at every one of the first thirteen hearings. The applicant further alleges that eight of these hearings were postponed because Sarajevostan's representative was absent and on two other occasions the hearings were postponed because Sarajevostan's representative did not bring the disputed contract.

55. The Chamber notes that the applicant, after the cessation of the armed conflict waited until 8 September 1997 until he requested the Municipal Court to issue a judgement in the case and thereby is partly responsible for the length of the proceedings. However, even if the Chamber was to accept that the adjournment was to some extent attributable to the applicant, the Chamber notes that the main responsibility for the length of the proceedings does not belong to the applicant. The Chamber notes that the respondent Party has not objected to the applicant's allegation that the reason for postponing eight of the first thirteen hearings was because Sarajevostan's representative was absent and that two of the first thirteen hearings were postponed because Sarajevostan's representative did not bring the disputed contract.

56. Having in mind the armed conflict, the Chamber notes that it is not reasonable to expect that the domestic courts were able to issue decisions at a normal speed immediately after the cessation of the armed conflict. The Chamber is therefore of the opinion that some delay by the domestic courts in issuing decisions must be accepted. However, the Chamber notes that the present case has been pending for over 6 years after the war ended. The Chamber notes that the Municipal Court did not do anything to sanction Sarajevostan's obstructive conduct in the proceedings before it, even though they had the possibility to do so according to Article 297 of the Code of Civil Procedure (see paragraph 23). The fact that the Code of Civil Procedure may not provide any other sanctions which the relevant courts can use if the defendant delays proceedings by being repeatedly absent from hearings, does not relieve the respondent Party of its obligation to secure to persons under its jurisdiction the right to obtain a court decision within a reasonable time. Therefore, the Chamber finds that the respondent Party, by having tolerated Sarajevostan's conduct, is responsible for the length of the proceedings.

57. The Chamber therefore finds a violation of Article 6(1) of the Convention with regard to the length of the proceedings.

VIII. REMEDIES

58. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy 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.

59. The applicant requested the Chamber to order the Municipal Court to issue a decision in the case.

60. The Chamber notes that it has found a violation of the applicant's right to a fair hearing within a reasonable time as guaranteed by Article 6 paragraph 1 of the Convention. It considers it appropriate to order the respondent Party to take all necessary steps to ensure that the Municipal Court decides on the case as a matter of urgency.

61. Furthermore, the Chamber considers it appropriate to award a sum to the applicant in recognition of the sense of injustice he has suffered as a result of his inability to have his case decided before the domestic organs.

62. Accordingly, the Chamber will order the respondent Party to pay to the applicant the sum of KM 1500 in recognition of his suffering as a result of his inability to have his case decided within a reasonable time.

63. Additionally, the Chamber further awards simple interest at an annual rate of 10% as of one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the sum awarded in the preceding paragraph or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSION

64. For the above reasons, the Chamber decides,

1. unanimously, to declare admissible the part of the application relating to the fairness and the length of the domestic proceedings in the applicant's civil dispute;

2. unanimously, to declare inadmissible the remainder of the application;

3. unanimously, that there has been a violation of the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the European Convention on Human Rights, the Federation thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Federation of Bosnia and Herzegovina, through its authorities, to take all necessary steps to ensure that the Municipal Court decides on the applicant's claim as a matter of urgency;

5. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, no later than one month after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, one thousand five hundred (1500) Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for non-pecuniary damage;

6. unanimously, to order the Federation to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full; and

7. unanimously, to order the Federation to report to it no later than one month after 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 taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Ms. Michèle PICARD
President of the First Panel