



**DECISION ON ADMISSIBILITY AND MERITS**  
**(delivered on 4 April 2003)**

**Case nos. CH/02/8202, CH/02/9980 and CH/02/11011**

**M.P., Dušan BRDAR and Zorka ŠTRBAC**

**against**

**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 31 March 2003 with the following members present:

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

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

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Agreement on Human Rights ("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 cases concern three applicants complaining of the fact that Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments prevents them from repossessing their pre-war apartments. The applicants are pre-war occupancy right holders over three apartments in the Federation of BiH (two apartments are in Bihać and one is in Visoko). The former Yugoslav National Army ("JNA") was the allocation right holder over the apartments (thus JNA apartments).

2. The cases differ from previous cases decided by the Chamber in the matter of JNA apartments. Namely, in previous cases and in particular in *Miholić and others* (case nos. CH/97/60 *et al*, *Miholić and others*, decision on admissibility and merits of 9 November 2001, Decisions July – December 2001), the Chamber has dealt with the situation where the applicants had purchased their JNA apartments in accordance with the Law on Securing Housing for the Yugoslav National Army. In the present cases, the applicants did not purchase the apartments in question.

3. The cases raise issues under Articles 6, 8 and 13 of the European Convention on Human Rights ("Convention"), Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

## **II. PROCEEDINGS BEFORE THE CHAMBER**

### **A. The case of M.P. (CH/02/8202)**

4. The application was introduced on 29 January 2002.

5. On 6 February 2002, the Chamber transmitted the case to the Federation of BiH for its observations on admissibility and merits under Article 8 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

6. On 7 March 2002, the Federation of BiH submitted its observations on admissibility and merits.

7. On 26 March 2002, the applicant submitted his response.

8. On 27 March 2002, the Federation of BiH submitted its additional observations.

9. On 16 April 2002, the Chamber retransmitted the case to the Federation of BiH for its observations on admissibility and merits under Article 6 paragraph 1 of the Convention.

10. On 23 May 2002, the Federation of BiH submitted its observations on admissibility and merits.

11. On 17 July 2002, 23 August 2002, 9 October 2002, 3 December 2002 and 14 February 2003, the Federation of BiH submitted additional observations.

12. On 29 October 2002, 10 December 2002, 19 December 2002, 3 February 2003, 28 February 2003 and 13 March 2003, the applicant submitted additional comments. On 13 December 2002, the applicant requested the Chamber to conceal his identity because he received threatening phone calls from unknown individuals.

13. On 29 November 2002, the Chamber invited the Organisation for Security and Co-operation in Europe ("OSCE") to participate in the proceedings in this case as *amicus curiae*. On 3 January 2003, the OSCE submitted its observations in that capacity.

14. The Chamber deliberated on the admissibility and merits of the application on 4 February 2002, 12 April 2002, 4 June 2002, 5 November 2002, 8 January 2003, 4 March 2003 and 31 March 2003 and adopted the present decision on the latter date. On 4 March 2003, the

Chamber decided to join this case to case nos. CH/02/9980 and CH/02/11011 pursuant to Rule 34 of the Chamber's Rules of Procedure.

**B. The case of Mr. Dušan Brdar (CH/02/9980)**

15. The application was introduced on 17 April 2002.

16. On 11 November 2002, the Chamber transmitted the case to the Federation of BiH for its observations on admissibility and merits under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

17. On 3 December 2002, the Federation of BiH submitted its observations on admissibility and merits.

18. On 19 December 2002, the applicant submitted his response.

19. On 20 December 2002 and 26 December 2002, the Federation of BiH submitted additional observations.

20. On 28 February 2003, the applicant submitted additional comments.

21. On 29 November 2002, the Chamber invited the OSCE to participate in the proceedings in this case as *amicus curiae*. On 3 January 2003, the OSCE submitted its observations in that capacity.

22. The Chamber deliberated on the admissibility and merits of the application on 5 November 2002, 8 January 2003, 4 March 2003 and 31 March 2003 and adopted the present decision on the latter date. On 4 March 2003, the Chamber decided to join this case to case nos. CH/02/8202 and CH/02/11011 pursuant to Rule 34 of the Chamber's Rules of Procedure.

**C. The case of Ms. Zorka Štrbac (CH/02/11011)**

23. The application was introduced on 15 May 2002.

24. On 13 June 2002, the Chamber transmitted the case to the Federation of BiH for its observations on admissibility and merits under Articles 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

25. On 15 July 2002, the Federation of BiH submitted its observations on admissibility and merits.

26. On 4 November 2002 and 3 December 2002, the Federation of BiH submitted additional observations.

27. On 11 November 2002 and 26 February 2003, the applicant submitted additional comments.

28. On 29 November 2002, the Chamber invited the OSCE to participate in the proceedings in this case as *amicus curiae*. On 3 January 2003, the OSCE submitted its observations in that capacity.

29. The Chamber deliberated on the admissibility and merits of the application on 4 June 2002, 5 November 2002, 8 January 2003, 4 March 2003 and 31 March 2003 and adopted the present decision on the latter date. On 4 March 2003, the Chamber decided to join this case to case nos. CH/02/8202 and CH/02/9980 pursuant to Rule 34 of the Chamber's Rules of Procedure.

### III. STATEMENT OF FACTS

#### A. The case of M.P. (CH/02/8202)

30. The applicant is a citizen of Croatia by birth. He acquired citizenship of Bosnia and Herzegovina in 1999. The applicant's wife was born in Croatia as well.

31. The applicant is the pre-war occupancy right holder over a JNA apartment located at Harmani H-15, entrance no. 10, first floor (apartment no. 103) in Bihać. The applicant moved into the apartment on 15 December 1986.

32. The applicant was a member of the then JNA until 19 May 1992. On 20 May 1992 he joined the Republika Srpska armed forces and has served in these forces since then. According to the applicant, he and his family occupied the apartment at issue until 14 May 1992. The applicant alleges that he left Bihać for two reasons. First, he was afraid for his own safety and the safety of his family. Wives and children of service members of the then JNA were allegedly insulted on a regular basis in order to make them leave Bihać. Secondly, his entire unit was ordered by the higher chain of command within the military structure to move from Bihać to Banja Luka.

33. On 21 December 1992, the Army of the Republic of Bosnia and Herzegovina ("RBiH Army") declared the apartment temporarily abandoned and allocated the apartment to H.M., a member of the RBiH Army. On 23 June 1996, the RBiH Army declared the apartment permanently abandoned because the applicant did not return to it before 6 January 1996 (*i.e.* 15 days after the war in Bosnia and Herzegovina officially stopped) in accordance with Article 10 of the 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 and 9/95).

34. On 21 September 1998, the applicant requested the Service of Reconstruction, Housing and Public Utilities of the Bihać Municipality ("Service in Bihać") to reinstate him into his apartment.

35. On 9 March 1999, the applicant requested the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC") to confirm his occupancy right over the apartment at issue. The case is still pending before the CRPC.

36. On 30 May 2000, the Service in Bihać issued a procedural decision refusing the applicant's request. The request was refused on the basis of Article 3a paragraph 1 of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of BiH – "OG FBiH" – nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02) ("Law on Cessation"). This provision denies the right to repossess a pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date. On 11 September 2000, the Ministry for Building, Physical Planning and Environmental Protection of the Una-Sana Canton ("Ministry in Bihać") confirmed the procedural decision of 30 May 2000.

37. On 16 October 2000, the applicant initiated an administrative dispute before the Cantonal Court in Bihać requesting the Cantonal Court to declare the procedural decision of 11 September 2000 null and void. On 19 November 2001, the Cantonal Court issued a judgment refusing the applicant's request and thus confirming the procedural decision of 11 September 2000.

38. On 10 December 2001, the applicant appealed against the judgment of 19 November 2001 to the Supreme Court of the Federation of Bosnia and Herzegovina ("Supreme Court"). On 15 May 2002, the Supreme Court issued a procedural decision quashing the judgment of 19 November 2001 and returned the case to the Cantonal Court in Bihać, in accordance with Article 43 paragraph 4 of the Law on Administrative Disputes (OG FBiH nos. 2/98 and 8/00). The Supreme Court instructed the Cantonal Court in Bihać to establish whether the applicant had purchased the apartment in accordance with the Law on Securing Housing for the Yugoslav National Army ("Law on Securing Housing for the JNA") (Official Gazette of the Socialist Federal Republic of Yugoslavia – "OG SFRY" – no. 84/90). The Supreme Court then instructed the Cantonal Court in Bihać to consider the

case not only under domestic laws but also taking into consideration the Convention and the international agreements listed in the Appendix to the Agreement on Human Rights.

39. On 9 September 2002, the Cantonal Court in Bihać issued a judgment declaring the procedural decision of 11 September 2000 null and void, in accordance with Article 35 paragraph 2 of the Law on Administrative Disputes. The Cantonal Court in Bihać instructed the Ministry in Bihać to establish whether the applicant had purchased the apartment in accordance with Law on Securing Housing for the JNA. The Cantonal Court in Bihać, as the Supreme Court, made a reference to Article II(2) of the Constitution of Bosnia and Herzegovina providing that the Convention shall have priority over domestic legislation.

40. On 3 February 2003, the Ministry in Bihać issued a procedural decision declaring the procedural decision of 30 May 2000 null and void, in accordance with Article 239 paragraph 2 of the Law on Administrative Procedure (OG FBiH no. 2/98). The Ministry in Bihać established that the applicant did not purchase the apartment at issue. The Ministry in Bihać instructed the Service in Bihać to decide the case in the light of that fact and to apply Article 3a of the Law on Cessation also taking into consideration the Convention. The case is currently pending before the Service in Bihać.

41. According to the applicant, he and his family live in military barracks in Banja Luka, the Republika Srpska, while waiting for the request for reinstatement to be decided. More than four and a half years have elapsed since the applicant requested the Federation of BiH to reinstate him.

#### **B. The case of Mr. Dušan Brdar (CH/02/9980)**

42. The applicant is a citizen of Serbia by birth and enjoys citizenship of Bosnia and Herzegovina since 1998. The applicant's wife is a citizen of Bosnia and Herzegovina by birth.

43. The applicant is the pre-war occupancy right holder over a JNA apartment located at Harmani H-15, entrance no. 6, eighth floor (apartment no. 802) in Bihać. The applicant moved into the apartment on 15 December 1986.

44. The applicant was a member of the then JNA until 26 April 1992. On 25 August 1992 he joined the RBiH Army and served in these forces until 20 October 1994. According to the applicant, he and his family occupied the apartment at issue until they left Bihać in April 1995. The applicant alleges that he left Bosnia and Herzegovina because he wished to see his father in Šabac, Serbia, who was dying.

45. Immediately after the applicant entered Serbia in April 1995, he was arrested and soon after that convicted of serving in the enemy's armed forces (the armed forces of the RBiH). The applicant was sentenced to three years of imprisonment and served his sentence in the Sremska Mitrovica prison in Serbia.

46. According to a document that the Federation of BiH submitted to the Chamber, on 25 December 1992, the RBiH Army declared the apartment temporarily abandoned and allocated the apartment to Đ.M., a member of the RBiH Army. On 23 June 1996, the RBiH Army declared the apartment permanently abandoned because the applicant did not return to it before 6 January 1996 (*i.e.* 15 days after the war in Bosnia and Herzegovina officially came to an end) in accordance with Article 10 of the Law on Abandoned Apartments.

47. On 30 October 1998, the applicant requested the Service in Bihać to reinstate him into his apartment.

48. On 17 August 1999, the applicant requested the CRPC to confirm his occupancy right over the apartment at issue. The case is still pending before the CRPC.

49. On 29 September 1999, the Service in Bihać issued a procedural decision confirming the applicant's occupancy right over the apartment. On 24 December 1999, upon an appeal of the temporary occupant of the apartment, the Ministry in Bihać quashed the procedural decision of 29 September 1999 and returned the case to the Service.

50. On 21 August 2000, the Service in Bihać issued a procedural decision refusing the applicant's request to reinstate him into his apartment. The request was refused on the basis of Article 3a paragraph 1 of the Law on Cessation. This provision denies the right to repossess a pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date. On 2 October 2000, the Ministry in Bihać confirmed the procedural decision of 21 August 2000.

51. On 7 November 2000, the applicant initiated an administrative dispute before the Cantonal Court in Bihać requesting the Cantonal Court to declare the procedural decision of 2 October 2000 null and void. On 26 March 2001, the Cantonal Court issued a judgment refusing the applicant's request and thus confirming the procedural decision of 2 October 2000.

52. On 13 April 2001, the applicant appealed against the judgment of 26 March 2001 to the Supreme Court. On 19 December 2002, the Supreme Court issued a procedural decision quashing the judgment of 26 March 2001 and returned the case to the Cantonal Court in Bihać, in accordance with Article 43 paragraph 4 of the Law on Administrative Disputes. The Supreme Court instructed the Cantonal Court in Bihać to establish whether the applicant had purchased the apartment in accordance with the Law on Securing Housing for the JNA. The Supreme Court then instructed the Cantonal Court in Bihać to consider the case not only under domestic laws but also taking into consideration the Convention.

53. The applicant and his family rent an apartment in Bihać while waiting for the request for reinstatement to be decided. More than four years have elapsed since the applicant requested the Federation of BiH to reinstate him.

### **C. The case of Ms. Zorka Štrbac (CH/02/11011)**

54. The applicant has citizenship of Serbia solely. The applicant's husband is a citizen of Bosnia and Herzegovina by birth.

55. In accordance with Article 19 of the Law on Housing Relations (see paragraph 90 below), the applicant is the pre-war occupancy right co-holder (together with her husband, who used to serve in the then JNA) over a JNA apartment located at Naselje Luke 4, fourth floor (apartment no. 24) in Visoko. The applicant, together with her husband, moved into the apartment in 1984.

56. The applicant left the apartment on 12 May 1992. She has never served in any armed forces. The applicant's husband was a member of the then JNA until 19 May 1992. On 20 May 1992 he joined the then Federal Republic of Yugoslavia armed forces. He has continued to serve as a member of that military force since then. The applicant alleges that she left Visoko because she was afraid for her own safety and the safety of her child. As to the applicant's husband, he was ordered by the higher chain of command within the military structure to leave Visoko.

57. On 21 October 1992, the RBiH Army declared the apartment temporarily abandoned and allocated the apartment to B.F., a member of the RBiH Army. On 5 April 1996, the RBiH Army declared the apartment permanently abandoned because the applicant did not return to it before 6 January 1996 (*i.e.* 15 days after the war in Bosnia and Herzegovina officially stopped) in accordance with Article 10 of the Law on Abandoned Apartments.

58. On 19 April 1999, the applicant requested the Service for Physical Planning, Housing and Public Utilities of the Visoko Municipality ("Service in Visoko") to reinstate her into the apartment.

59. On 10 August 1999, the applicant requested the CRPC to confirm her occupancy right over the apartment at issue. The case is still pending before the CRPC.

60. On 5 May 2000, the Service in Visoko issued a procedural decision refusing the applicant's request. The request was refused on the basis of Article 3a paragraph 2 of the Law on Cessation. This provision denies the right to repossess a pre-war apartment to a person who "remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995". On 30 August 2000, the Ministry for Building, Physical Planning and

Environmental Protection of the Zenica-Doboj Canton (“Ministry in Zenica”) confirmed the procedural decision of 5 May 2000.

61. On an uncertain date, the applicant initiated an administrative dispute before the Cantonal Court in Zenica requesting the Cantonal Court to declare the procedural decision of 30 August 2000 null and void. On 28 December 2000, the Cantonal Court issued a judgment refusing the applicant’s request and thus confirming the procedural decision of 30 August 2000.

62. On 31 January 2001, the applicant appealed against the judgment of 28 December 2000 to the Supreme Court. On 28 March 2002, the Supreme Court issued a procedural decision quashing the judgment of 28 December 2000 and returned the case to the Cantonal Court in Zenica, in accordance with Article 43 paragraph 4 of the Law on Administrative Disputes. The Supreme Court instructed the Cantonal Court in Zenica to establish whether the applicant and her husband had purchased the apartment in accordance with the Law on Securing Housing for the JNA. The Supreme Court then instructed the Cantonal Court in Zenica to consider the case not only under domestic laws but also taking into consideration the Convention.

63. On 17 June 2002, the Cantonal Court in Zenica issued a judgment declaring both procedural decisions of 5 May 2000 (the first instance procedural decision) and 30 August 2000 (the second instance procedural decision) null and void, in accordance with Article 35 paragraph 2 of the Law on Administrative Disputes. The Cantonal Court in Zenica instructed the Service in Visoko to establish whether the applicant and her husband had purchased the apartment in accordance with the Law on Securing Housing for the JNA. The Cantonal Court in Zenica, as the Supreme Court also did, made a reference to Article II(2) of the Constitution of Bosnia and Herzegovina providing that the Convention should have priority over domestic legislation.

64. On 31 July 2002, the Ministry of Defence of the Federation of BiH (“Ministry of Defence”), as an interested party, appealed against the judgment of 17 June 2002. The case is currently pending before the Supreme Court.

65. According to the applicant, she and her family rent an apartment in Bačka Palanka, Serbia, while waiting for the request for reinstatement to be decided. More than three and a half years have elapsed since the applicant requested the Federation of BiH to reinstate her.

#### **IV. RELEVANT LEGAL FRAMEWORK**

##### **A. Constitution of Bosnia and Herzegovina set out in Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina**

66. Article II(2) reads:

“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

##### **B. Agreement on Refugees and Displaced Persons set out in Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina**

67. Article I paragraph 1 reads:

“All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.”

**C. Law on Abandoned Apartments (OG RBiH nos. 6/92, 8/92, 16/92, 13/94, 36/94 and 9/95)**

68. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments. The Assembly of the Republic of Bosnia and Herzegovina adopted this Decree as a law on 1 June 1994. The Law governed the declaration of abandonment of certain categories of socially owned apartments and their re-allocation.

69. Under Article 1, an occupancy right was to be suspended if the holder of that right and the members of his or her household had abandoned the apartment after 30 April 1991. Article 3 provided for some exceptions. For example, according to Article 3, the occupancy right was not to be suspended:

(a) where the occupancy right holder and members of his or her household had been forced to leave the apartment as a result of aggressive actions intended to execute a policy of ethnic cleansing of a particular population from certain areas or in the course of a pursuit of other goals of the aggressors;

(b) if the apartment was destroyed, burnt or in direct jeopardy as a result of war actions.

70. The Decision on the Cessation of the State of War (OG RBiH no. 50/95) entered into force on 22 December 1995, the date when it was placed on the bulletin board of the Presidency Building in Sarajevo. The issue of the Official Gazette comprising this Decision was published on 5 January 1996.

71. If the pre-war occupancy right holder failed to resume using the apartment before 29 December 1995 (if he or she had been staying within the territory of the Republic of Bosnia and Herzegovina) or before 6 January 1996 (if he or she had been staying outside that territory), the pre-war occupancy right holder was to be regarded as having abandoned the apartment permanently. According to Article 10, it was to result in the deprivation of the occupancy right.

**D. Law on Cessation of the Application of the Law on Abandoned Apartments (OG FBiH nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02)**

72. This Law entered into force on 4 April 1998. Article 1 paragraph 1 expressly repealed the Law on Abandoned Apartments. According to Article 2 paragraph 1, all administrative, judicial and other decisions terminating the occupancy right on the basis of the Law on Abandoned Apartments shall be null and void.

73. Article 3 paragraphs 1 and 2, as amended, read:

“The occupancy right holder of an apartment declared abandoned or a member of his/her household defined in Article 6 of the [Law on Taking Over the Law on Housing Relations] (hereinafter the “occupancy right holder”) shall have the right to return in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

Paragraph 1 of this Article shall be applied only to those occupancy right holders who have the right to return to their homes of origin under Article I of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. Persons who have left their apartments between 30 April 1991 and 4 April 1998 shall be considered to be refugees and displaced persons under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

...”

74. Article 3a entered into force on 4 July 1999 and reads:

“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 SFRY before 14 December 1995.

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.”

75. According to Article 4 paragraph 1, the pre-war occupancy right holder over an apartment or a member of his or her household shall be entitled to claim repossession of the apartment.

76. According to Article 6 paragraph 1, as amended, the competent authority shall decide upon a claim for repossession within 30 days starting from the date when the claim was submitted. The competent authority shall decide upon the claim in the chronological order in which the claim was received, unless specified otherwise in law.

77. According to Article 10, proceedings initiated by the claims for repossession of the pre-war apartments shall be considered urgent.

78. Article 18d paragraph 6, as amended, reads:

“Exceptionally, in respect of apartments at the disposal of the Ministry of Defence, where an occupancy right to an apartment is cancelled in accordance with Article 5<sup>1</sup> or Article 12<sup>2</sup>, or where the claim is finally rejected in accordance with this Law, the competent body of the Ministry of Defence may issue a new contract on use to a temporary user of an apartment in cases where she or he is required to vacate the apartment under this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that her or his housing needs are not otherwise met.”

**E. Instruction on Application of the Law on Cessation of the Application of the Law on Abandoned Apartments (“Instruction on Application of the Law on Cessation”) (OG FBiH nos. 43/99 and 56/01)**

79. Point 23 reads:

“The rules and procedures in the Law and this Instruction concerning allocation of abandoned apartments not claimed in accordance with the applicable deadline shall also apply to apartments at the disposal of the Federation Ministry of Defence, subject to the following variations as explained in point 24 of this Instruction.”

80. Point 24, as amended, reads:

“(i) The temporary user of an apartment at the disposal of the Federation Ministry of Defence may be entitled to a new or revalidated contract on use if the requirements of Article 2 paragraph 4 of the Law and Articles 18c and 18d of the Law are met. In such cases, the body which issued the contract shall be authorised to revalidate a cancelled contract on use in

<sup>1</sup> If the pre-war occupancy right holder failed to file a request for repossession of his or her pre-war apartment before 4 July 1999.

<sup>2</sup> If the pre-war occupancy right holder over an apartment failed to file a request for eviction of the current occupant of the apartment within 30 days after the deadline for the vacation of the apartment had expired.

accordance with points 10 and 11 of this Instruction, following any procedures which are necessary to ensure that the requirements of the Law and this Instruction are met, including among others that the housing needs of the temporary user are not otherwise met under point 24(ii) of this Instruction and that the temporary user has no other accommodation available to him or her under point 9 of this Instruction.

(ii) In other cases, the responsible military housing body may issue a new contract on use of an apartment which is unclaimed or for which a claim is finally rejected to a temporary user who is currently occupying an apartment at the disposal of the Federation Ministry of Defence, who is required to vacate that apartment pursuant to the provisions of this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that his or her housing needs are not otherwise met, as explained by the Law and this Instruction.

(iii) All bodies dealing with apartments at the disposal of the Federation Ministry of Defence shall co-operate with competent international and local bodies to ensure that apartments are not used in violation of the Law by people whose housing needs are otherwise met. This co-operation shall include making available information on past and present use of apartments which are at the disposal of the Federation Ministry of Defence.”

**F. Law on Administrative Procedure (OG FBiH nos. 2/98 i 48/99)**

81. According to Article 221, the party shall be entitled to appeal against the first instance procedural decision.

82. According to Article 244, the second instance body shall decide upon the appeal and deliver the second instance decision to the party within 30 days starting from the date when the appeal was submitted.

**G. Law on Administrative Disputes (OG FBiH nos. 2/98 and 8/00)**

83. Article 1 provides that the court shall decide in an administrative dispute on the lawfulness of administrative acts. According to Article 10, an administrative dispute may be instituted against the second instance administrative act. According to Article 11, an administrative dispute may be instituted also if the second instance administrative body has failed to decide upon the appeal against the first instance administrative decision (the action against the “silence of the administration”).

84. There is no time limit in which the court must decide in administrative disputes. There is also no possibility to appeal against the “silence of the court”. The first instance court must issue a decision, in order for the party to appeal to the second instance court.

85. Article 35 reads:

“As a rule, the court shall resolve dispute against the background of facts established in the administrative procedure.

If the court finds that it is not possible to resolve the dispute on the factual background as established in the administrative procedure because of discrepancy in the case file with respect to the established facts, because the facts were incompletely established in essential points, because a wrong conclusion was drawn from established facts with respect to the factual situation, or it is found that during the administrative procedure the rules of procedure, which could affect resolving of the matter, were not taken into account, the court shall by its judgement annul the contested administrative act as well as the first instance administrative act and return the case for renewed procedure. The first instance administrative act shall be annulled if the oversights in establishing the state of facts and the violation of the rules of procedure occurred in the first instance proceedings, whereas the contested administrative act shall be annulled if those oversights occurred in the second instance administrative proceedings. In such cases the competent body is obliged to act in

compliance with the course of action specified by the judgement and issue a new administrative act.

If the annulment, in accordance with paragraph 2 of this Article, of the contested administrative act or of the first instance administrative act and the renewed proceedings before the competent body may cause the plaintiff to sustain damage, which could be difficult to repair, or if it is evident on the basis of public documents or other evidence in the case file that the state of facts is different from the one established in the administrative proceedings, or if in the same administrative dispute the administrative act has already been annulled once, particularly if the competent body has not complied on the whole with the judgement, the court shall, as a rule, establish in such cases the state of facts on its own and resolve that administrative matter against such factual background by issuing a judgement or a procedural decision.

In case referred to in paragraph 3 of this Article the court shall, as a rule, establish the state of facts at a hearing, or through a member of the court's panel, or through the body whose administrative act is the matter of the administrative dispute. The party shall also be invited to the hearing. If the court is to establish the state of facts through the body whose administrative act is the matter of the administrative dispute, that body is obliged to comply with the court's request within the time limit set by the court. If this body does not comply with the request by the court, the court shall inform the Government in order that it may take appropriate measures to have its body comply with the court's request."

86. Article 43 paragraph 4 reads:

"...

If the Supreme Court of the Federation following an appeal against the judgement finds that during the proceedings before the first instance court there occurred omissions provided for in the provision of Article 35 paragraph 2 of this law, it shall set aside the first instance judgement by issuing a procedural decision to that effect. In such cases the case is referred back to be dealt with by the court that rendered the first instance judgement. That court shall be bound by the legal opinion of the Supreme Court of the Federation and its observations pertaining to the proceedings."

87. According to Article 64, when the Cantonal Court annuls the administrative act contested in the administrative dispute, the competent administrative body shall issue a new administrative act without delay, and no later than 15 days starting from the date when the judgment has been delivered. The competent administrative body shall be bound by the legal opinion of the court and its observations pertaining to the proceedings.

88. Article 65 reads:

"If, after the annulment of the administrative act, the competent administrative body issues its administrative act in contravention of the legal opinion of the court or its observations pertaining to the proceedings, forcing the plaintiff to file another action, the court shall be obliged in such cases to quash the contested administrative act and resolve the matter on its own by issuing a judgement. Such judgements replace the competent administrative body's administrative act in all respects."

89. Article 66 reads:

"If, after the annulment of the administrative act, the competent administrative body does not issue immediately or no later than within 15 days, its new administrative act ... a party may request the issuance of such act by a separate submission. If the competent administrative body does not issue its administrative act within 7 days from the date of this submission, the party may request the issuance of such act from the court that rendered the first instance judgement.

Following a request by the party referred to in paragraph 1 of this Article, the court shall request the competent administrative body to submit the case file as well as information on the reasons for not issuing the administrative act. The competent administrative body shall be obliged to submit the case file and give such information immediately and no later than within seven days. If it does not do that or if the court assesses that the given information does not justify the non-compliance with the judgement of the court, the court shall issue a procedural decision replacing the competent administrative body's administrative act in all respects. The court shall forward such procedural decision to the enforcing body, which shall be obliged to enforce this procedural decision by the court without any delays.

The responsible person within the competent administrative body, who does not act in compliance with the provisions of Articles 64, 65 and 66 of this Law, shall be considered as having committed a flagrant breach of his/her official duty.

The proposal to initiate disciplinary proceedings shall be submitted by the court that rendered the judgement or a procedural decision on annulment of the contested administrative act, either *ex officio* or following a request by the party."

**H. Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina – "OG SRBiH" – nos. 14/84, 12/87 and 36/89; OG RBiH nos. 2/93; OG FBiH nos. 11/98, 38/98, 12/99 and 19/99)**

90. According to Article 19, only one person shall be the occupancy right holder over an apartment. Nevertheless, when the contract on use of the apartment has been concluded by one of the spouses living in the household, the other spouse shall also be considered the occupancy right holder. When one of the spouses has died or permanently ceased to use the apartment, the other spouse shall become the only occupancy right holder.

91. Article 83a, as amended, reads:

"The occupancy right holder may not be given a notice on the termination of the contract on use of apartment under this Law if the circumstances, which are the basis for the termination of the contract, occurred within the period while the occupancy right holder was absent from the apartment in the capacity of a refugee or a displaced person under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

All valid court decisions issued in the proceedings referred to in paragraph 1 of this Article, under which the occupancy right holder was given a notice on the termination of the contract on use of apartment from 30 April 1991 until the day when this law enters into force, are null and void.

Proceedings for the termination of the contract on use of apartment for the reasons determined by the Law, which were initiated prior to the entering into force of this Law and in which a valid decision was not issued until its entering into force, are terminated.

The return of an apartment into the possession of the occupancy right holder referred to in paragraph 2 of this Article shall be carried out in accordance with the [Law on Cessation]."

**I. Decision of the Constitutional Court of Bosnia and Herzegovina in the case no. U-14/00 of 4 May 2001 (Official Gazette of Bosnia and Herzegovina – "OG BiH" – no. 33/01)**

92. On 4 May 2001, the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") issued its judgment in case no U-14/00. The appellant in that case, Ž.M. had lodged an appeal before the Constitutional Court requesting the Court to annul the lower-instance decisions in his case. The contested decisions refused the appellant's claim for repossession because he had not

concluded a contract on use of the apartment and therefore did not acquire the occupancy right over the apartment, due to circumstances that were beyond his control<sup>3</sup>.

93. The Constitutional Court decided that the authorities of the Federation of BiH violated Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention in the appellant's case. The Constitutional Court reasoned that the appellant's pre-war apartment constituted his "home" in the sense of Article 8 of the Convention and that the appellant's property right over his pre-war apartment (although not the occupancy right) constituted "possessions" in the sense of Article 1 of Protocol No. 1 to the Convention. The Constitutional Court found that the interference of the Federation of BiH was not "necessary in a democratic society" and was not in the "public interest":

*"The Constitutional Court considers that the interference initially served a legitimate aim in accordance with the meaning of Article 8 paragraph 2 of the Convention. The relevant aim was the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war. Indeed, the war in Bosnia and Herzegovina caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities of, at the time, the Republic of Bosnia and Herzegovina enacted a law which temporarily solved the housing problems caused by a great number of refugees.*

*However in the present case, the appellant has still not been able to realize his rights. Therefore, the "interference", which initially could have been justified and in compliance with the principle of "necessity", can no longer, five years after the end of the war, represent a necessary "interference in a democratic society" with the appellant's right to return to his home."<sup>4</sup>*

*"The Court accepts that there may have been strong reasons in the war period justifying the use of the apartment for giving shelter to refugees. However, the conditions, which then prevailed have fundamentally changed and can no longer justify an interference with the appellant's rights. It is also true that the apartment is at present occupied by other persons and that their interests must be taken into account when determining whether the interference with the appellant's rights is proportionate. However, when weighing the various interests involved, the Court must pay particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP and the Constitution and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective."<sup>5</sup>*

The Constitutional Court also established that a situation where any temporary occupant continued to use an abandoned apartment after 4 April 1998 was unlawful, given the fact that the Law on Cessation declared null and void "all administrative, judicial and any other decisions enacted on the basis of [the Law on Abandoned Apartments] terminating occupancy right". The Constitutional Court also pointed out that an important reason behind the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement") was to enable return of refugees and displaced persons to their pre-war places of residence. Accordingly, the factual situation on 30 April 1991 had to be a starting point when deciding legal disputes pertaining to the repossession of pre-war apartments and houses.

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<sup>3</sup> According to the housing legislation, an individual shall acquire the occupancy right over an apartment once a contract on use of the apartment has been concluded. That contract on use shall be based on a decision of the allocation right holder. In the case at issue, the appellant had obtained a decision of the allocation right holder granting an apartment to him, but did not conclude a contract on use of the apartment. Nevertheless, the appellant lived in the apartment from 1987 to 1994, when he left Bosnia and Herzegovina.

<sup>4</sup> The above-mentioned decision of the Constitutional Court, paragraphs 24-25.

<sup>5</sup> *Ibid*, paragraph 34.

## V. COMPLAINTS

94. All applicants basically complain of not being reinstated into their respective apartments, of being deprived of the occupancy right over the apartments and of being discriminated against in that regard. The applicants also complain of the length of the proceedings before the competent authorities. Therefore, the Chamber transmitted the cases to the Federation of BiH under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

## VI. SUBMISSIONS OF THE PARTIES

### A. The respondent Party

#### 1. The case of M.P. (CH/02/8202)

95. In its observations of 7 March 2002, the Federation of BiH submits that the application is inadmissible because: (a) the applicant did not exhaust effective domestic remedies (at that time, the case was pending before the Supreme Court); (b) the application before the Chamber concerns a matter also pending before the CRPC.

96. In regard to the merits, the Federation of BiH agrees that it interfered with the applicant's rights under Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. However, the interference was lawful, "necessary in a democratic society" (in the sense of Article 8) and "in the public interest" (in the sense of Article 1 of Protocol No. 1). The Federation of BiH concludes that its interference was proportionate due to the fact that Bosnia and Herzegovina was a war torn state that faced massive destruction of its housing fund and huge migrations of its population. The Federation of BiH thus acted within its "margin of appreciation".

97. In its observations of 23 May 2002, the Federation of BiH repeats that the application is inadmissible because the case was still pending before the Supreme Court, at that time. In regard to the merits, the Federation of BiH states that it did not violate Article 6 paragraph 1 of the Convention as the authorities of the Federation of BiH were processing the present case within a "reasonable time" (20 months before the Service in Bihać, 3 months before the Ministry in Bihać and 12 months before the Cantonal Court in Bihać).

98. On 15 November 2002, the Chamber requested the Federation of BiH to answer the following questions: (a) whether the Supreme Court decided in any case that legislation in force in the Federation of BiH is contrary to the Convention and, therefore, directly applied or instructed lower courts to apply a provision of the Convention in the relevant case (in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina and Article II(A)(6) of the Constitution of the Federation of BiH); (b) whether the Federation of BiH believed that the Chamber's reasoning in *Miholić and others* (see the above-mentioned *Miholić and others* decision) should *mutatis mutandis* apply equally to persons who had not concluded a purchase contract for their apartments with the then JNA.

99. On 3 December 2002, the Federation of BiH responded that: (a) the Supreme Court directly applied provisions of the Convention in a number of cases; (b) *Miholić and others* was applicable exclusively when an applicant had concluded a contract on purchase of his or her apartment with the then JNA before 6 April 1992, when such contract had been verified by the competent court and when the purchase price of the apartment had been fully paid.

100. On 20 December 2002, the Federation of BiH submitted four procedural decisions in the Supreme Court's case nos. Už-61/01, Už-46/01, Už-455/01 and Už-449/01 of 4 April 2002, 25 April 2002, 23 May 2002 and 24 October 2002, respectively. In those four cases, the Supreme Court quashed judgments of the Cantonal Courts in Bihać and Sarajevo and returned the cases because, in the opinion of the Supreme Court, the Cantonal Courts wrongly considered the cases against domestic laws exclusively. The Supreme Court instructed the Cantonal Courts to apply directly the Convention (particularly Article 8 and Article 1 of Protocol No. 1). However, the Supreme

Court did not give any instructions or indications to the Cantonal Courts as to how the application of the Convention should affect the cases.

## **2. The case of Mr. Dušan Brdar (CH/02/9980)**

101. In its observations of 3 December 2002, the Federation of BiH submits that the application is inadmissible because: (a) the applicant did not exhaust effective domestic remedies (at that time, the case was still pending before the Supreme Court); (b) the application before the Chamber concerns a matter also pending before the CRPC.

102. In regard to the merits, the Federation of BiH submits that it did not violate Articles 6 and 13 of the Convention as the authorities of the Federation of BiH have decided already at several instances upon the applicant's request and the decisions have been issued within a "reasonable time" in the sense of Article 6. The Federation of BiH asserts that even the applicant did not complain of the proceedings in which the decisions had been issued, but rather of the decisions themselves (of the fact that they were not in his favour). The Federation of BiH states that it will refrain from commenting on possible violations of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention until the Supreme Court has decided upon the applicant's appeal. The Federation of BiH then submits that the applicant's complaint of discrimination is unsubstantiated.

103. In the same observations, the Federation of BiH claims that it has taken "necessary steps" in order to amend the Law on Sale of Apartments with Occupancy Right (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01 and 15/02) and Article 3a of the Law on Cessation. The Federation of BiH requests the Chamber to stay the deliberations of the present case in order to allow the Federation of BiH to finalise that process and thereby remedy all possible human rights violations related to the JNA apartments. The Federation of BiH also states that its authorities currently have to comply with Article 3a of the Law on Cessation as it reads because it is still in force.

104. Finally, in the same observations, the Federation of BiH responded to certain questions set by the Chamber (see paragraphs 98-99 above). On 20 December 2002, in support of its responses, the Federation of BiH provided four procedural decisions issued by the Supreme Court (see paragraph 100 above).

105. On 23 December 2002, the Chamber requested the Federation of BiH to explain whether the applicant had left his apartment on 25 December 1992 (as it was stated in a procedural decision to declare the apartment permanently abandoned issued by the RBiH Army) or at the end of 1994 (as it was submitted by the Federation of BiH on 3 December 2002).

106. On 30 December 2002, the Federation of BiH explains that the statement of the facts in its submission of 3 December 2002 is based on the allegations of the applicant. The Federation of BiH adds that it is on the Chamber to assess the evidence before it.

## **3. The case of Ms. Zorka Štrbac (CH/02/11011)**

107. In its observations of 15 July 2002, the Federation of BiH submits that the application is inadmissible because: (a) the applicant did not exhaust effective domestic remedies (at that time, the case was pending before the Cantonal Court in Zenica for the second time); (b) the application before the Chamber concerns a matter also pending before the CRPC.

108. In regard to the merits, the Federation of BiH submits that it did not violate Article 6 of the Convention as the authorities of the Federation of BiH have decided already at several instances upon the applicant's request and the decisions have been issued within a "reasonable time" in the sense of Article 6. The Federation of BiH asserts that even the applicant did not complain of the proceedings in which the decisions had been issued, but rather of the decisions themselves (of the fact that they were not in her favour). The Federation of BiH states that it will refrain from commenting on possible violations of Article 8 of the Convention until the present case has been finally decided by the domestic courts. The Federation of BiH then asserts that it did not violate Article 1 of Protocol No. 1 to the Convention as its authorities have fully complied with domestic laws

(particularly, Article 3a of the Law on Cessation and several provisions of the Law on Housing Relations). The Federation of BiH finally submits that the applicant's complaint of discrimination is unsubstantiated.

109. On 15 November 2002, the Chamber requested the Federation of BiH to answer certain questions (see paragraph 98 above).

110. On 3 December 2002, the Federation of BiH responded (see paragraph 99 above). On 20 December 2002, in support of its responses, the Federation of BiH provided four procedural decisions issued by the Supreme Court (see paragraph 100 above).

## **B. The applicants**

### **1. The case of M.P. (CH/02/8202)**

111. In his observations of 26 March 2002, the applicant submits that although he made use of all the available domestic remedies, he personally does not believe in their effectiveness. He further states that the procedure to repossess pre-war apartments has been organised so as to humiliate and pauperise returnees. The applicant informs the Chamber that he survived a heart attack that was, in his opinion, a result of the difficulties he has been facing while trying to repossess his pre-war apartment.

112. In his observations of 10 December 2002, the applicant comments on the fact that the Cantonal Court in Bihać declared the procedural decision issued by the Ministry in Bihać in the applicant's case null and void. The Cantonal Court in Bihać instructed the Ministry in Bihać to establish whether the applicant concluded a contract on purchase with the former JNA although the applicant had never asserted that he concluded such a contract. The applicant expresses his doubts as to the sincerity of the authorities of the Federation of BiH. In the applicant's opinion, the authorities of the Federation of BiH constantly intend to prolong the proceedings pertaining to repossession of the former JNA apartments. The applicant refers to Article 6 paragraph 1 of the Law on Cessation providing that the authorities have to decide upon the claim for repossession in the chronological order in which the claim has been received.

113. In his observations of 13 December 2002, the applicant informs the Chamber that his family has received intimidating phone calls from unknown individuals and requests the Chamber to conceal his identity.

114. In his observations of 19 December 2002, the applicant contests the submission of the Federation of BiH that *Miholić and others* is applicable exclusively when an applicant has concluded a contract on purchase of his or her apartment with the then JNA before 6 April 1992, when such contract has been verified by the competent court and when purchase price of the apartment has been fully paid. The applicant states that such a situation is "non-existent in practice". In the applicant's opinion, *Miholić and others* should be applied in his case because the occupancy right, as a *sui generis* right, constitutes "possessions" in the sense of Article 1 of Protocol No. 1 to the Convention. Finally, the applicant refers to the above-mentioned decision of the Constitutional Court (see paragraphs 92-93 above).

### **2. The case of Mr. Dušan Brdar (CH/02/9980)**

115. In his observations of 19 December 2002, the applicant submits that the Federation of BiH suppresses the fact that he has been living in Bihać since 1966 and served in the RBiH Army from 1992 to 1994. In the applicant's opinion, it proves that the Federation of BiH is prejudiced against him and other service members of the former JNA who happen not to be Bosniaks. The applicant also submits that some service members of the former JNA from the Sandžak region of Serbia have been granted apartments in the Federation of BiH although they were not citizens of Bosnia and Herzegovina in 1991, the only difference between them and the applicant being that they are Bosniaks from Serbia and the applicant is a Serb from Serbia. The applicant states that it proves the discriminatory intentions of the authorities of the Federation of BiH.

### 3. The case of Ms. Zorka Štrbac (CH/02/11011)

116. In her observations of 11 November 2002, the applicant submits that the Federation of BiH is obliged by Annex G to the Agreement on Succession Issues signed by the Plenipotentiaries of Bosnia and Herzegovina, Republic of Croatia, Republic of Macedonia, Republic of Slovenia and then Federal Republic of Yugoslavia on 29 June 2001<sup>6</sup> to reinstate her into her pre-war apartment.

117. In her observations of 26 February 2003, the applicant highlights that she left her apartment with her son in great fear and with only a few personal belongings. She states that her original intention was to take her son to her mother's house, and return to her job and apartment in Visoko. However, after arriving in Bačka Palanka, Serbia, she realised that it would be dangerous to return.

#### C. Submission of the Organisation for Security and Co-operation in Europe ("OSCE") acting as *amicus curiae*

118. In its submission of 3 January 2003, the OSCE holds that the conclusions reached by the Chamber in *Miholić and others* (see the above-mentioned *Miholić and others* decision) should not be distinguished from the present cases involving occupancy rights. A brief summary of the line of reasoning of the OSCE follows.

119. The OSCE first asserts that the occupancy right, as defined in domestic legislation, does amount to a "possession" under Article 1 of Protocol No. 1 to the Convention<sup>7</sup>.

120. The OSCE then states that the Federation of BiH interfered with the applicants' right to the peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, by implementing Article 3a of the Law on Cessation.

121. The OSCE proceeds to explore whether the interference is justified, that is, whether the interference pursues a legitimate aim and whether the measures employed are proportionate to the legitimate aim pursued. The OSCE raises serious objections as to the actual use of the JNA apartments, where the repossession request of the pre-war occupant was refused on the basis of Article 3a of the Law on Cessation:

*"The International Community has received numerous reports of non-compliance on the part of the Ministry of Defence, particularly regarding allocation of apartments to individuals whose housing needs are otherwise met and therefore do not meet the legal criteria for such allocation. The Ministry of Defence often neglected to provide information regarding the current status of apartments to the International Community so that such reports could be assessed accurately. Information on apartments held by Croat elements was rarely made available. In particular, many high-ranking officials of the Army of the Federation of BiH who do not meet the legal criteria have been allocated apartments. In numerous meetings staff of the Ministry of Defence informed members of the International Community that they would not apply provisions of the Law on Cessation and Instruction to high-ranking officials, despite warnings that such action clearly violated the Law on Cessation and Instruction."*<sup>8</sup>

<sup>6</sup> Article 2 of Annex G reads, in part: "The rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognised, protected and restored by that State in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons." Article 6 reads: "Domestic legislation of each successor State concerning occupancy rights (*stanarsko pravo/stanovanjska pravica/stanarsko pravo*) shall be applied equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The Agreement on Succession Issues, however, has not entered into force in Bosnia and Herzegovina yet.

<sup>7</sup> As the Chamber, in *Miholić and others*, has found a violation of Article 1 of Protocol No. 1 to the Convention only, the OSCE commented on the alleged violation of that right.

<sup>8</sup> Submission of the OSCE Acting as *Amicus Curiae* of 3 January 2003, p. 8.

The OSCE adds that the Ministry of Defence has almost 2,000 unclaimed JNA apartments at its disposal to pursue the legitimate aim of housing war veterans whose housing needs have not been otherwise met without the need to, as in the cases at hand, reject the claims of the pre-war occupancy right holders.

122. In addition, the applicants in the present cases have been treated differently from occupancy right holders over non-JNA apartments who were deprived of their possessions during the course of the 1992-1995 armed conflict. The right to return of occupancy right holders over non-JNA apartments is dependent neither on their status as a refugee or displaced person, nor on their citizenship, or whether they were allocated housing abroad, or whether they are in active military service in any foreign armed forces. The applicants in the present cases have been treated differently also from occupancy right holders over JNA apartments located in the Republika Srpska. Such occupancy right holders are entitled to return to their pre-war homes without any of the restrictions prescribed in Article 3a of the Law on Cessation of the Federation of BiH. The OSCE objects to the justification for the difference in treatment offered by the Federation of BiH (*i.e.* that the JNA apartments, which pre-war occupants were refused on the basis of Article 3a of the Law on Cessation, have been used to meet the housing needs of the war veterans) and asserts:

*“Given that there is no justification demonstrated by the FBiH Government for singling out this group of occupancy right holders and no legitimate aim is being accomplished, there appears no reasonable proportionality between the means used and the aims sought. Thus Article 3a of the Law on Cessation should be found discriminatory and contrary to Article 1 of Protocol 1 ECHR.”<sup>9</sup>*

## VII. OPINION OF THE CHAMBER

### A. Admissibility

123. Before considering the merits of these cases the Chamber must decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and, if so, whether they have been exhausted. Further, pursuant to Article VIII(2)(d), it may reject or defer consideration if the applications concern a matter currently pending before, *inter alia*, any other Commission established by the Annexes to the Dayton Peace Agreement.

#### 1. Exhaustion of domestic remedies

124. The Federation of BiH objects to the admissibility of the applications on the ground that the applicants have failed to exhaust domestic remedies. The Chamber has found that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *e.g.* case no. CH/96/17, *Blentić*, decision on admissibility and merits of 5 November 1997, paragraph 19, Decisions on Admissibility and Merits March 1996 – December 1997). It is necessary to take realistic account not only of the existence of formal remedies in the legal system, but also of the general legal and political context in which they operate, as well as of the personal circumstances of the applicants (*ibid*).

125. The Chamber notes that, according to its long established case law, it is incumbent on the respondent Party, claiming non-exhaustion, to satisfy the Chamber that there was an effective remedy available (see *e.g.* case nos. CH/96/3, *Medan*, decision on admissibility of 4 February 1997, section IV, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/8, *Bastijanović*, decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/9, *Marković*, decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997). In the present cases, an effective remedy would be one that would have a reasonable prospect of enabling

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<sup>9</sup> *Ibid*, p. 5.

the applicants to repossess their respective apartments. According to Article 3a of the Law on Cessation, the applicants are not entitled to do so.

126. The Federation of BiH submits that individuals, whose requests for repossession have been refused under Article 3a of the Law on Cessation, generally have effective domestic remedies available to them. In other words, the applicants in the present cases have prospects of being reinstated into their pre-war apartments regardless of the very clear wording of Article 3a of the Law on Cessation, which deprives the applicants of the right to be reinstated. The respondent Party points out that the Constitutions of both Bosnia and Herzegovina and the Federation of BiH oblige public bodies (including administrative bodies and courts) to give priority to the Convention over all other law. The respondent Party has provided the Chamber with several procedural decisions of the Supreme Court of the Federation of BiH, in which the Supreme Court instructed the lower courts to apply directly the Convention.

127. The Chamber observes that the Supreme Court recently annulled several judgments of Cantonal Courts and informed the Cantonal Courts of their constitutional duty to apply directly the Convention. The Chamber recognises the significance of such decisions. However, the Supreme Court left open the main question in the present cases, which is whether individuals who fall under Article 3a of the Law on Cessation have or have not the right to repossess their pre-war apartments in accordance with the Convention. The Chamber is not aware of any individual who falls under Article 3a of the Law on Cessation and who repossessed a pre-war apartment on the ground that his or her right under the Convention should prevail over the Law on Cessation. Moreover, it appears that even the respondent Party does not genuinely believe that there is any prospect of the applicants being reinstated notwithstanding Article 3a of the Law on Cessation. Namely, the Federation of BiH submits that its authorities currently have to comply with Article 3a as it reads because it is still in force (see paragraph 103 above). In these circumstances, the Chamber is satisfied that the applicants cannot be required to exhaust any further domestic remedies for the purpose of Article VIII(2)(a) of the Agreement.

## **2. *Lis alibi pendens***

128. The Federation of BiH also objects to the admissibility of the applications because the applicants have claims currently pending before the CRPC. According to Article VIII(2)(d) of the Agreement, the Chamber may reject or defer further consideration of a case, if it concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or another Commission established by the Annexes to the Dayton Peace Agreement.

129. The Chamber notes that the applicants have also claimed return of their respective apartments with the CRPC. These cases are currently pending. According to Annex 7 to the Dayton Peace Agreement, the mandate of the CRPC is confined to decisions on claims for real property in Bosnia and Herzegovina, where the property has not been sold voluntarily or otherwise transferred since 1 April 1992. The Chamber notes that in the present cases the applicants have raised several complaints essentially different from the subject matter that they have brought before the CRPC, among others the complaint that they were discriminated against. These complaints fall outside the CRPC's competence.

130. As the Chamber has already held in prior cases, in these circumstances, the applicants' pending claims before the CRPC do not preclude the Chamber from examining the whole of the present cases before the Chamber. Moreover, even if one of the matters now before the Chamber remains pending before the CRPC, the Chamber does not find it appropriate to defer further consideration of the present applications or part of them (see *e.g.*, case nos. CH/98/756, *Đ.M.*, decision on admissibility and merits of 13 April 1999, paragraphs 58-60, Decisions January – July 1999; CH/97/93, *Matić*, decision on admissibility and merits of 14 May 1999, paragraphs 52-54, Decisions January – July 1999).

### **3. Conclusion as to admissibility**

131. The Chamber acknowledges that the Federation of BiH has requested the Chamber to stay the deliberation in these cases until they have amended Article 3a of the Law on Cessation. However, the Chamber notes that the deadline for the Federation of BiH to take all necessary administrative and legislative steps to implement the *Miholić and others* decision, which might include amendments to Article 3a of the Law on Cessation, expired on 7 June 2002, *i.e.* nine months ago, without implementation having occurred. Therefore, the Chamber deems it appropriate to deliberate on the issues at this time in order to clarify its position on Article 3a and to what extent its application in the cases of the present applicants meets the requirements of the Convention.

132. The Chamber finds that none of the other grounds for declaring the applications inadmissible have been established. Accordingly, the applications are declared admissible in their entirety.

### **B. Merits**

133. Under Article XI of the Agreement, the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Article I of the Agreement provides that the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the Convention and the other international agreements listed in the Appendix to the Agreement.

134. Under Article II(2) of the Agreement, the Chamber has competence to consider: (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix (including the Convention), where such a violation is alleged or appears to have been committed by the Parties to the Agreement.

#### **1. Article II(2)(a) of the Agreement**

135. Article II(2)(a) of the Agreement that the Chamber shall consider:

“Alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto.”

##### **a. Article 8 of the Convention**

136. The applicants allege violations of their right to respect for their homes, as protected by Article 8 of the Convention. Article 8 reads 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.”

137. The Chamber must first determine whether the applicants’ pre-war apartments constitute their “home” in the sense of Article 8 of the Convention. If so, the Chamber must determine whether the Federation of BiH has interfered with the applicants’ right to respect for their homes under Article 8 of the Convention. Finally, the Chamber must determine whether the interference of the Federation of BiH is justified. The Chamber recalls that the conditions upon which a respondent Party may interfere with the right to respect for one’s home are set out in paragraph 2 of Article 8. The interference is only justified if it is: (a) “in accordance with the law”; (b) in the interest of one or more of the legitimate aims listed; and (c) “necessary in a democratic society”. Therefore, a proper

balance must be struck between the legitimate aim pursued and the means employed, taking into account the respondent Party's margin of appreciation.

**(i) Whether the apartments at issue are the applicants' "home" for the purposes of Article 8 of the Convention**

138. The applicants M.P. and Štrbac used to live in the claimed apartments and use them as their homes until the outbreak of the armed hostilities in their respective communities. The applicant Brdar alleges to have left his apartment only in April 1995. In the course of 1998 and 1999, the applicants requested the competent bodies to reinstate them into their pre-war apartments. The Chamber has previously held that links that persons in the applicants' situation retained to their apartments were sufficient for them to be considered to be their "homes" within the meaning of Article 8 of the Convention (see *e.g.*, case nos. CH/97/46, *Kevešević*, decision on the merits of 15 July 1998, paragraphs 39-42, Decisions and Reports 1998; CH/97/58, *Onić*, decision on admissibility and merits of 12 January 1999, paragraph 48, Decisions January – July 1999; CH/00/4566 *et al*, *Jusić and others*, decision on admissibility and merits of 10 May 2002, paragraph 62, to be reported).

139. The Chamber holds in the instant cases that the applicants' pre-war apartments are their "homes" for the purpose of Article 8 of the Convention.

**(ii) Interference with the applicants' rights**

140. In the course of 1996, the RBiH Army, whose legal successor are the armed forces of the Federation of BiH, declared the apartments at issue permanently abandoned and confirmed the previous allocation of the apartments to Messrs. H.M., Đ.M. and B.F., service members of the RBiH Army. The RBiH Army acted on the basis of the Law on Abandoned Apartments. The applicants did not have any remedies available to them to repossess their pre-war homes until 4 April 1998.

141. On 4 April 1998, the Law on Cessation entered into force. This Law expressly repealed the Law on Abandoned Apartments and declared all administrative, judicial and other decisions terminating the occupancy right on the basis of the Law on Abandoned Apartments null and void. It provided the pre-war occupancy right holders with the right to repossess the apartments at issue and regulated the procedure to do so. Namely, the pre-war occupancy right holders were to submit the request for repossession to the competent bodies and the competent bodies were to decide within 30 days from the date of submission of the request. The present applicants duly submitted their requests for repossession on 21 September 1998, 30 October 1998 and 19 April 1999, respectively. In all three cases, the competent bodies failed to decide on their requests before 4 July 1999.

142. On 4 July 1999, Article 3a of the Law on Cessation entered into force. This Article completely deprived the applicants of the right to repossess the apartments at issue and the authorities of the Federation of BiH accordingly refused the applicants' requests for repossession. The applicants are still not able to repossess their pre-war homes due to Article 3a of the Law on Cessation.

143. The Chamber thus concludes that the Federation of BiH interfered, and continues to interfere, with each applicant's right to respect for her or his home.

**(iii) Legality of the interference**

144. The interference of a respondent Party is only lawful if the law, which is the basis of the interference, is: (a) accessible to the citizens of the respondent Party; (b) precise so as to enable the citizens to regulate their conduct; (c) compatible with the rule of law, meaning that the legal discretion granted to the executive must not be unrestrained (*i.e.* the law must provide the citizens with adequate protection against arbitrary interference) (see *e.g.*, Eur. Court HR, *Sunday Times*, judgment of 26 April 1979, Series A no. 30, p. 31, paragraph 49; Eur. Court HR, *Malone*, judgment of 2 August 1984, Series A no. 82, pp. 32-33, paragraphs 67-68).

145. Prior to 4 April 1998, the interference of the Federation of BiH was based on the Law on Abandoned Apartments. The Chamber has previously held that the Law on Abandoned Apartments failed to meet the standards of a “law” as this expression is to be understood for the purposes of Article 8 of the Convention, in particular the requirements of accessibility and compatibility with the rule of law (see the above-mentioned *Kevešević* decision, paragraphs 55-58). In the present cases the Chamber sees no reason to differ. The interference of the Federation of BiH is accordingly not “in accordance with the law”, in so far as it has been based on the Law on Abandoned Apartments.

146. On 4 April 1998, the Federation of BiH passed the Law on Cessation expressly repealing the Law on Abandoned Apartments. The Law on Cessation provided the applicants with the right to be reinstated into their pre-war apartments. The applicants submitted relevant requests to the Services in Bihać and Visoko on 21 September 1998, 30 October 1998 and 19 April 1999, respectively. According to Article 6 paragraph 1 of the Law on Cessation, the authorities of the Federation of BiH had 30 days to issue decisions reinstating the applicants into their pre-war homes. The interference of the Federation of BiH was “in accordance with the law” from 4 April 1998, the date of the entry into force of the Law on Cessation, until 21 October 1998 in the case of M.P., until 30 November 1998 in the case of Brdar and until 19 May 1999 in the case of Štrbac, that is to say the date on which the 30-day time limit for issuance of the decision in their cases elapsed.

147. From 21 October 1998, 30 November 1998 and 19 May 1999, respectively, until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the interference of the Federation of BiH was again not “in accordance with the law”.

148. Finally, as of the entry into force of Article 3a on 4 July 1999, the interference of the Federation of BiH was again “in accordance with the law”.

149. The Chamber observes that the applicants’ complaints concern only the interference under Article 3a of the Law on Cessation and that these complaints have been submitted in 2002. The crux of the present cases is thus the introduction and application of Article 3a in the cases of the applicants. The Chamber does not consider it necessary to formally establish whether the interference prior to the entry into force of Article 3a was “in accordance with the law”. The Chamber thus proceeds to establish whether the interference that has been based on Article 3a, and which interference the Chamber has found to be “in accordance with the law”, is justified under paragraph 2 of Article 8 of the Convention.

**(iv) Whether the interference with the applicants’ rights pursues a legitimate aim under paragraph 2 of Article 8, i.e. the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others**

150. The Federation of BiH submits that the aim of Article 3a of the Law on Cessation is to free scarce housing space for former soldiers of the RBiH Army and their families. In that context, the Federation of BiH points out that the 1992-1995 armed conflict caused massive destruction of its housing fund and huge migrations of its population. The Chamber notes that according to Article 18d of the Law on Cessation and Points 23 and 24 of the Instruction on Application of the Law on Cessation, apartments that are not repossessed by their pre-war occupants due to Article 3a of the Law on Cessation should be allocated to individuals whose housing needs were not otherwise met.

151. The Chamber is aware that JNA apartments, where the repossession request of the pre-war occupant was refused on the basis of Article 3a of the Law on Cessation, are not necessarily being used for the purpose asserted by the respondent Party, as it has been explained in the submission of the OSCE acting as *amicus curiae* of 3 January 2003 (see paragraphs 118-122 above). Notwithstanding, the Chamber can accept, in principle, that the national authorities’ decision to provide with housing former soldiers of the RBiH Army and their families pursues the legitimate aim of “protection of the rights and freedoms of others” in the sense of Article 8 paragraph 2 of the Convention.

**(v) Is the interference necessary in a democratic society for the protection of the rights and freedoms of others, i.e. is there a proper balance between the legitimate aim pursued and the means employed?**

152. As to the principles relevant to the assessment of the “necessity” of a given measure “in a democratic society”, reference should be made to the case law of the European Court (see *e.g.*, the above-mentioned *Sunday Times* decision, pp. 35-36, paragraph 59; Eur. Court HR, *Lingens*, judgment of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-40; Eur. Court HR, *Gillow*, judgment of 24 November 1986, Series A no. 109, p.22, paragraph 55). The notion of necessity implies a pressing social need. In particular, the measure employed must be proportionate to the legitimate aim pursued. If the Chamber establishes that the measure employed is proportionate to the legitimate aim pursued, it will find that the Federation of BiH is acting within its margin of appreciation.

153. As to the scope of the margin of appreciation enjoyed by the respondent Party, it will depend not only on the nature of the aim pursued, but also on the nature of the right involved. In the instant cases, the common interest of the protection of the housing needs of former soldiers of the RBiH Army and their families must be balanced against the applicants’ right to respect for their home, a right which is germane to their personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Federation of BiH. The Chamber thus must look closely at each of the two paragraphs of Article 3a of the Law on Cessation individually.

- *Paragraph 1 of Article 3a of the Law on Cessation*

154. The applicants M.P. and Brdar were both born outside the territory of Bosnia and Herzegovina, in Croatia and Serbia, respectively. They were thus registered as the citizens of the respective republics of their birth. They requested and acquired citizenship of Bosnia and Herzegovina only recently, although they have lived in Bosnia and Herzegovina since 1970 and 1966, respectively. During the 1992-1995 armed conflict, the applicant M.P. served in the Republika Srpska armed forces and the applicant Brdar served in the armed forces of the then Republic of Bosnia and Herzegovina.

155. The national authorities refused their requests for repossession on the basis of Article 3a paragraph 1 of the Law on Cessation. This provision denies the right to repossess a pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date.

156. As to the active service requirement as of 30 April 1991, the Chamber has held in *Miholić and others* (see the above-mentioned *Miholić and others* decision, paragraphs 161-162) that, at that time, Bosnia and Herzegovina was still a part of the former SFRY. Persons who served in the JNA were accordingly serving in the armed forces of the then unified country. Even if one was a member of the JNA as of 30 April 1991, it does not mean that that person took part in the 1992-1995 conflict in any armed forces opposed to the Army of the Republic of Bosnia and Herzegovina. In fact, the applicant Brdar served in the Fifth Corps of the RBiH Army until late 1994.

157. As to the citizenship requirement as of 30 April 1991, the Chamber has held in *Miholić and others* (see the above-mentioned *Miholić and others* decision, paragraphs 157-160) that, prior to the dissolution of the former SFRY, there was no real need to ensure that one was actually a registered citizen of the republic in which one lived. Accordingly, many citizens who had SFRY citizenship and were residents of the Socialist Republic of Bosnia and Herzegovina were not registered in the citizenship records, although they participated fully as citizens of Bosnia and Herzegovina in all other respects. Furthermore, the Chamber has established that this requirement is discriminatory in its intent or at least in its impact. Namely, since citizenship in 1991 was predominantly based upon where a person was born, the citizenship requirement appears to be targeted at persons of Serb or Croat descent, having been born outside of Bosnia and Herzegovina.

158. In the cases of the applicants M.P. and Brdar, the Federation of BiH deprived the applicants, who are internally displaced persons, of their pre-war homes in order to meet the housing needs of the former soldiers of the RBiH Army, H.M. and Đ.M., and of their families. The Chamber acknowledges that the Federation of BiH has had a difficult task in reconciling the rights of the pre-war occupants to repossess the two disputed apartments and of the current occupants to have their housing needs met. However, the Federation of BiH did not assure the Chamber that H.M. and Đ.M. fell into those particularly vulnerable categories for which housing space was to be freed by introducing Article 3a. Moreover, the Chamber is of the opinion that the Federation of BiH, when weighing the opposing interests of those individuals should give preference to the right of the applicants to return. The Constitutional Court has established (see paragraph 93 above) that the right to return of refugees and displaced persons is a primary objective of the Constitution of Bosnia and Herzegovina and of the Dayton Peace Agreement in general. Additionally, the Chamber recalls its conclusion in *Miholić and others* related to the citizenship and active service requirements where both were found to be unreasonable and therefore not proportionate. The Chamber considers that these conclusions also apply when occupancy rights are in question. The deprivation of the applicants M.P. and Brdar of their pre-war homes was thus not proportionate to the legitimate aim pursued. The applicants M.P. and Brdar were made to bear an “excessive burden”.

159. Therefore, the Chamber concludes that the Federation of BiH overstepped the margin of appreciation enjoyed by respondent Parties and accordingly violated Article 8 of the Convention, by the application of paragraph 1 of Article 3a of the Law on Cessation in the cases of the applicants M.P. and Brdar.

- *Paragraph 2 of Article 3a of the Law on Cessation*

160. The Federation of BiH refused the request of the applicant Štrbac to repossess her pre-war home on the basis of Article 3a paragraph 2 of the Law on Cessation. This provision denies the right to repossess a pre-war apartment to a person who “remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995”. The decisive fact was thus not the Serbian nationality of the applicant Štrbac as of 30 April 1991, but the active military service in the then Federal Republic of Yugoslavia armed forces of Mr. Štrbac.

161. The Chamber holds that the fact that Ms. Štrbac applied before the Chamber, and not Mr. Štrbac, does not affect the Chamber’s consideration of the case. Article 19 of the Law on Housing Relations provides that the spouse of a person who concluded a contract on use of an apartment is considered as a co-holder of the occupancy right over that apartment (see paragraph 90 above). It is the Chamber’s understanding of this provision that the other spouse participates in the sole occupancy right, but does not hold a second occupancy right over the apartment. The only logical interpretation of Article 3a of the Law on Cessation is that if the person who concluded the contract on use served at the decisive time in a foreign army, Article 3 of the Law on Cessation granting the right to return to the apartment is not applicable. The other spouse has no independent right to return to the apartment.

162. The Chamber notes that neither the applicant nor her husband took steps to purchase their pre-war apartment. Rather, the apartment has remained socially owned. The Chamber further notes that occupancy rights had an important social role in the pre-war Bosnia and Herzegovina, as anywhere else in the former SFRY. Service members of the then JNA were thus allocated apartments in Bosnia and Herzegovina because the former JNA stationed them there and had to accommodate them. The allocation right holder over such apartments was the former JNA. After the dissolution of the former SFRY, the allocation right holder over such apartments located in the Federation of BiH became the Ministry of Defence of the Federation of BiH. The purpose of those apartments remained the same – to satisfy the housing needs of the military personnel. The Federation of BiH follows that reasoning when it deprives Mr. Štrbac, a service member of the former JNA who left Bosnia and Herzegovina and continues to serve in a foreign army, of his apartment in Bosnia and Herzegovina. The Chamber thus holds that it was proportionate to deprive Mr. Štrbac and the applicant of their pre-war home in order to meet the housing needs of a war veteran and his family. The applicant Štrbac was not made to bear an “excessive burden”, considering all of her circumstances.

163. Therefore, the Chamber concludes that the Federation of BiH proceeded within the margin of appreciation enjoyed by respondent Parties and accordingly did not violate Article 8 of the Convention, by the application of paragraph 2 of Article 3a of the Law on Cessation in the case of the applicant Štrbac.

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

164. The applicants allege violations of their right to the peaceful enjoyment of their possessions. Article 1 of Protocol No. 1 to the Convention reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

165. The Chamber must first determine whether the applicants’ occupancy rights constitute “possessions” in the sense of Article 1 of Protocol No. 1 to the Convention. Then, the Chamber must determine whether the Federation of BiH has interfered with the applicants’ right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention. Finally, the Chamber must determine whether the interference of the Federation of BiH has been justified. The interference is only justified if it is: (a) “subject to the conditions provided for by law” and (b) “in the public interest”. If the said requirements have not been met, the Chamber will hold that the Federation of BiH has overstepped its margin of appreciation and accordingly violated Article 1 of Protocol No. 1 to the Convention.

**(i) Whether the occupancy right constitutes a “possession” for the purposes of Article 1 of Protocol No. 1 to the Convention**

166. According to the Chamber’s long established case law, an occupancy right is an asset that constitutes a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention (see e.g. case no. CH/96/28, *M.J.*, decision on admissibility and merits of 7 November 1997, paragraph 32, Decisions on Admissibility and Merits March 1996 – December 1997).

**(ii) Interference with the applicants’ rights**

167. In the course of 1996, the RBiH Army, whose legal successor are the armed forces of the Federation of BiH, deprived the applicants of the occupancy right over their pre-war apartments in accordance with the Law on Abandoned Apartments.

168. On 4 April 1998, the Law on Cessation entered into force and the applicants were able to initiate the procedure to repossess their pre-war apartments. The applicants duly submitted their requests for repossession on 21 September 1998, 30 October 1998 and 19 April 1999, respectively. However, the competent bodies failed to reinstate them.

169. On 4 July 1999, Article 3a of the Law on Cessation entered into force. As of that date, the applicants have been barred by law from repossessing their pre-war apartments.

170. The Chamber thus concludes that the Federation of BiH deprived the applicants of the occupancy right over their pre-war apartments in the sense of Article 1 of Protocol No. 1 to the Convention.

**(iii) Legality of the interference**

171. The European Court of Human Rights and the Chamber give all legality clauses (such as, for example, “in accordance with the law” clause in Article 8 and “subject to the conditions provided for

by law” clause in Article 1 of Protocol No. 1) an identical interpretation, as not to do so “could lead to different conclusions in respect of the same interference” (see Eur. Court HR, *Silver and others*, judgment of 25 March 1983, Series A no. 61, pp.32-33, paragraph 85). Therefore, a deprivation will be “provided for by law” for the purposes of Article 1 of Protocol No. 1 to the Convention whenever such interference is “in accordance with the law” for the purposes of Article 8 of the Convention.

172. The Chamber has established in paragraphs 145 and 147 above that the interference was unlawful prior to 4 April 1998 and again from 21 October 1998 in the case of M.P., from 30 November 1998 in the case of Brdar and from 19 May 1999 in the case of Štrbac, until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation. The interference was lawful in the short period between 4 April 1998, the date of the entry into force of the Law on Cessation and 21 October 1998 in the case of M.P., 30 November 1998 in the case of Brdar and 19 May 1999 in the case of Štrbac, and again after 4 July 1999, the date of entry into force of Article 3a of the Law on Cessation (for the discussion see paragraphs 146 and 148 above).

173. The Chamber will proceed to establish whether the interference based on Article 3a, and which interference the Chamber has found to be “provided for by law”, is justified under Article 1 of Protocol No. 1 to the Convention.

#### **(iv) Is the interference in the public interest?**

174. The European Court has previously held that governments enjoy a wide margin of appreciation with respect to the interference with the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. The European Court said in *James and others* (see Eur. Court HR, *James and others*, judgment of 21 February 1986, Series A no. 98, p.32, paragraph 46):

*“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is “in the public interest” unless that judgment be manifestly without reasonable foundation.”*

175. 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 of Human Rights: (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* decision, 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 (see Eur. Court HR, *Sporrong and Lönnroth*, judgment of 23 September 1982, Series A no. 52, p.26, paragraph 69). 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* decision, p.28, paragraph 73).

- *Paragraph 1 of Article 3a of the Law on Cessation*

176. The Chamber notes that a wide margin of appreciation is granted to respondent Parties under Article 1 of Protocol No. 1 to the Convention. Nevertheless, the Chamber finds that the interference of the Federation of BiH with the right of the applicants M.P. and Brdar to the peaceful enjoyment of their possessions placed an “excessive burden” on the applicants for the reasons stated in paragraph 158 above. The Chamber decides that the Federation of BiH has exceeded even that wide margin of appreciation.

177. Therefore, the Chamber concludes that the Federation of BiH violated Article 1 of Protocol No. 1 to the Convention in the cases of the applicants M.P. and Brdar.

- Paragraph 2 of Article 3a of the Law on Cessation

178. As to the third applicant Štrbac, the Chamber recalls that her husband serves in a foreign army (for the discussion, see paragraph 162 above). Taking into account all the circumstances of the case, the Chamber decides that the Federation of BiH proceeded within the margin of appreciation enjoyed by respondent Parties.

179. Therefore, the Chamber concludes that the Federation of BiH did not violate Article 1 of Protocol No. 1 to the Convention in the case of the applicant Štrbac.

**c. Article 6 of the Convention**

180. The applicants complain of the length of the proceedings before the competent authorities. Article 6 paragraph 1 of the Convention, so far as relevant, provides 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...”

181. In view of its decision concerning Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the Chamber considers that it is not necessary to examine the cases also under Article 6 of the Convention.

**d. Article 13 of the Convention**

182. The present cases were transmitted to the respondent Party under Article 13 of the Convention, which provides:

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

183. In view of its decision concerning Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the Chamber considers that it does not have to examine the cases also under Article 13 of the Convention.

**2. Article II(2)(b) of the Agreement**

184. The applicants complain of being discriminated against with respect to their rights to respect for their home under Article 8 of the Convention and to the peaceful enjoyment of their “possessions” under Article 1 of Protocol No. 1 to the Convention. The Chamber has already established that the Federation of BiH violated those rights of the applicants M.P. and Brdar, and that the Federation of BiH did not violate those rights of the applicant Štrbac (see paragraphs 159, 163, 177 and 179 above).

185. Article II(2)(b) of the Agreement provides that the Chamber shall consider:

“Alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex<sup>10</sup>,

<sup>10</sup> 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols II-III thereto; 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and

where such violation is alleged or appears to have been committed by the Parties, including any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority or such official or organ”.

**a. Definition of “discrimination”**

186. The Chamber has held that it must attach a particular importance to the prohibition of discrimination (see *e.g.*, case no. CH/97/45, *Hermas*, decision on admissibility and merits of 16 January 1998, paragraph 82, Decisions and Reports 1998).

187. The Chamber has previously held that, in order to establish that there has been discrimination contrary to the Agreement, it is necessary first to determine whether an applicant has been treated differently from others in the same or relevantly similar situations. Any difference in treatment is to be deemed discriminatory if it has no objective and reasonable foundation, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued (see *e.g.*, case nos. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraph 120, Decisions January – July 1999; CH/97/50, *Rajić*, decision on admissibility and merits of 3 April 2000, paragraph 53, Decisions January – June 2000; CH/98/1309 *et al*, *Kajtaz and others*, decision on admissibility and merits of 4 September 2001, paragraph 154, to be reported).

**b. Whether there is a difference in treatment**

188. Prior to 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the applicants were not treated differently than other individuals who had left their apartments during the 1992-1995 armed conflict in Bosnia and Herzegovina.

189. Article 3a of the Law on Cessation entered into force on 4 July 1999. It is an extraordinary provision in domestic legislation. It is the only provision of the legislation of the Federation of BiH that denies the right to return to a definable group of individuals. There is no such provision in the legislation of the Republika Srpska or Bosnia and Herzegovina. Article 3a applies exclusively to the apartments at the disposal of the Ministry of Defence of the Federation of BiH, that is, former JNA apartments that were declared abandoned on the basis of the then Law on Abandoned Apartments. The authorities of the Federation of BiH accordingly treat differently requests for repossession of the former JNA apartments compared with requests for repossession of all other apartments located in this Entity. When a former JNA apartment is at stake, the authorities of the Federation of BiH investigate where the returnee-to-be was born, whether he was granted refugee or other equivalent status abroad, in what armed forces he served or does he currently serve and whether he acquired another occupancy right abroad. It is not the case when any other apartment is at stake. The Chamber considers that the Federation of BiH treated the applicants differently due to their status, or the status of their spouses, as former service members of the then JNA who did not join or, in regard to the applicant Brdar, who left prior to the cessation of the 1992-1995 armed conflict the RBiH Army (Bosniak-dominated armed forces) or HVO (Croat-dominated armed forces). Given the ethnic nature of the 1992-1995 armed conflict and prevailing ethnic structure of all the armed forces that were engaged in that conflict, to treat differently individuals who did not join the RBiH Army or HVO carries also connotations of differential treatment on the ground of national origin.

**c. Whether the difference in treatment is justified**

190. The difference in treatment will only be justified if it pursued a legitimate aim and if the measure employed was proportionate to the legitimate aim pursued. When the European Court of Human Rights interprets the provision of the Convention prohibiting discrimination (*i.e.* Article 14), it

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Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities.

applies some of the same principles of interpretation applied also in relation to those Articles of the Convention with restriction clauses (such as Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention). In the present cases, the Chamber will adopt a similar approach to that of the European Court of Human Rights in this respect. Accordingly, all it has said in paragraphs 150-163 above, regarding the legitimate aim and proportionality requirements, applies also when it comes to the alleged discrimination.

- *Paragraph 1 of Article 3a of the Law on Cessation*

191. The Chamber has established in paragraph 189 above that the applicants M.P. and Brdar, have been treated differently on the ground of their status as former JNA service members who did not join or who left prior to the cessation of the 1992-1995 armed conflict the R BiH Army or HVO. This difference in treatment has pursued a legitimate aim, namely the protection of the housing needs of war veterans, H.M. and Đ.M., and of their families. However, the Chamber is of the opinion that the measures employed were not proportionate to the legitimate aim pursued (for the discussion see paragraphs 154-159 above).

192. Therefore, the Chamber concludes that the Federation of BiH discriminated against the two applicants M.P. and Brdar with respect to their rights to respect for their home under Article 8 of the Convention and to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention.

- *Paragraph 2 of Article 3a of the Law on Cessation*

193. The Chamber has also established that the third applicant, Ms. Štrbac, has been treated differently on the ground of her husband's status as a former JNA service member who has continued to serve in a foreign army after 1995 (see paragraph 189 above). The difference in treatment pursued the legitimate aim of the protection of the housing needs of a war veteran, B.F., and of his family. Due to the fact that the applicant's husband serves in a foreign army, the Chamber concludes that the measures employed were proportionate to the legitimate aim pursued (for the discussion see paragraphs 160-163 above). The difference in treatment in the case of the applicant Štrbac accordingly does not amount to discrimination.

194. Therefore, the Chamber concludes that the Federation of BiH did not discriminate against the applicant Štrbac with respect to her rights to respect for her home under Article 8 of the Convention and to peaceful enjoyment of her possessions under Article 1 of Protocol No. 1 to the Convention.

## VIII. REMEDIES

195. The Chamber has established that the Federation of BiH violated the rights of the applicants M.P. and Brdar to respect for their home under Article 8 of the Convention, to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention and not to be discriminated against in the enjoyment of those rights. According to Article XI(1)(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the Federation of BiH to remedy the established breaches. In this connection the Chamber shall consider, *inter alia*, issuing orders to cease and desist and monetary relief (including pecuniary and non-pecuniary damages).

196. Both the applicants M.P. and Brdar request repossession of their pre-war apartments.

197. The Chamber will order the Federation of BiH to take all necessary steps to ensure that the applicants M.P. and Brdar are reinstated into their pre-war apartments without further delay and at the latest within two months from the delivery of the present decision.

198. Further, the applicant M.P. seeks compensation for pecuniary damages in the amount of 80,000 Convertible Marks (*Konvertibilnih Maraka*, "KM") and for non-pecuniary damages in the amount of KM 50,000.

199. The respondent Party objects to the claim for compensation as not being substantiated. The respondent Party also argues that the request is too high.

200. In regard to the applicant's claim for pecuniary damages, the Chamber notes that the Republika Srpska armed forces have accommodated M.P. and his family in military barracks in Banja Luka. Though one could argue that such accommodation is not adequate, it is a fact that M.P. has not been paying for accommodation while waiting for his request for repossession to be decided. The Chamber thus rejects the applicant's claim for pecuniary damages.

201. In regard to the applicant's claim for non-pecuniary damages, the Chamber is of the opinion that a decision finding violations of the applicant's human rights is a sufficient remedy for the moral damages suffered. The Chamber thus rejects the applicant's claim for non-pecuniary damages as well.

202. The applicant Brdar does not seek any compensation.

203. Nonetheless, the Chamber notes that this applicant must have suffered significant emotional distress that is directly linked to repeated decisions of the Federation of BiH not to reinstate him into his pre-war home. Although the applicant Brdar spent more than two years in the RBiH Army (of which the armed forces of the Federation of BiH are the legal successor) and was even sentenced to three years of imprisonment by the Serbian authorities because of his serving in the said armed forces, the authorities of the Federation of BiH decided to refuse his request for repossession. As the Chamber has established above, the Federation of BiH, by acting so, violated Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention and discriminated against the applicant. The Chamber is of the opinion that the respondent Party has acted with particular neglect in the case of the applicant Brdar and, accordingly, that a decision finding violations of the applicant's human rights is not a sufficient remedy for the moral damages suffered. The Chamber will thus order the Federation of BiH to pay to the applicant Brdar the sum of KM 5,000 in recognition of his suffering. The sum awarded in this paragraph shall be paid to the applicant Brdar within two months from the delivery of the present decision.

204. The Chamber will further award simple interest at an annual rate of 10% on the sum awarded in paragraph 203 above or any unpaid portions thereof as of the date of expiry of the two-month period set in the same paragraph.

## **IX. CONCLUSIONS**

205. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible in their entirety;
2. by 12 votes to 1, that the right of the applicant, M.P. (CH/02/8202), to respect for his home within the meaning of Article 8 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;
3. unanimously, that the right of the applicant, Mr. Dušan Brdar (CH/02/9980), to respect for his home within the meaning of Article 8 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;
4. by 12 votes to 1, that the right of the applicant, Ms. Zorka Štrbac (CH/02/11011), to respect for her home within the meaning of Article 8 of the European Convention on Human Rights has not been violated;
5. by 12 votes to 1, that the right of the applicant, M.P. (CH/02/8202), to the peaceful enjoyment of his possessions 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 Agreement;

6. unanimously, that the right of the applicant, Mr. Dušan Brdar (CH/02/9980), to the peaceful enjoyment of his possessions 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 Agreement;
7. by 12 votes to 1, that the right of the applicant, Ms. Zorka Štrbac (CH/02/11011), to the peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights has not been violated;
8. by 12 votes to 1, that the applicant, M.P. (CH/02/8202), has been discriminated against in the enjoyment of his rights to respect for his home within the meaning of Article 8 of the European Convention on Human Rights and to the peaceful enjoyment of his possessions within the meaning of 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;
9. unanimously, that the applicant, Mr. Dušan Brdar (CH/02/9980), has been discriminated against in the enjoyment of his rights to respect for his home within the meaning of Article 8 of the European Convention on Human Rights and to the peaceful enjoyment of his possessions within the meaning of 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;
10. by 12 votes to 1, that the applicant, Ms. Zorka Štrbac (CH/02/11011), has not been discriminated against in the enjoyment of her rights to respect for her home within the meaning of Article 8 of the European Convention on Human Rights and to the peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights;
11. unanimously, that it is not necessary to examine the applications under Article 6 of the European Convention on Human Rights;
12. unanimously, that it is not necessary to examine the applications under Article 13 of the European Convention on Human Rights;
13. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to ensure that the applicant, M.P. (CH/02/8202), is reinstated into his pre-war apartment without further delay and no later than 4 June 2003;
14. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant, Mr. Dušan Brdar (CH/02/9980), is reinstated into his pre-war apartment without further delay and no later than 4 June 2003;
15. unanimously, to dismiss the claims for compensation set by the applicant, M.P. (CH/02/8202);
16. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, Mr. Dušan Brdar (CH/02/9980), KM 5,000, by way of compensation for non-pecuniary damages, no later than 4 June 2003;
17. unanimously, to order the Federation of Bosnia and Herzegovina to pay simple interest at an annual rate of 10% (ten per cent) on the sum specified in conclusion no. 16 above or any unpaid portion thereof from the date of expiry of the two-months period from the delivery of the present decision until the date of settlement;
18. unanimously, to order the Federation of Bosnia and Herzegovina to report to it on the steps taken to comply with the above orders no later than 4 June 2003.

(signed)  
Ulrich GARMS  
Registrar of the Chamber

(signed)  
Michèle PICARD  
President of the Chamber